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THE RIGHTS OF WOMEN UNDER THE CONSTITUTION OF THE IRISH FREE STATE

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INTRODUCTION

The Constitution of the Irish Free State does not always get the attention that it deserves from feminist scholars. Its neglect becomes apparent when compared with the wealth of comment and controversy that has surrounded the Constitution of 1937. What little attention is given to the Constitution of the Irish Free State is usually relatively benign. Historians tend to offer the 1922 Constitution hurried praise for guaranteeing equal suffrage to women before skipping over the remainder of its provisions to get at its meatier successor. Most feminist scholars focus on the 1937 Constitution by noting the lack of significant participation by women in the drafting process together with the inclusion of a number of provisions that are often considered offensive. These include Art.45.4.2° which provides that "citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength". Few accounts of the 1937 Constitution in women's history fail to note the notorious Art.41.2.:

1. In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
2. The State shall, therefore, 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.

The origin and contents of the 1922 Constitution do not receive anything like the same attention as those of de Valera's Constitution in analyses of the position of women in the independent Irish State. It is true that the position of women between the foundation of the State and the enactment of the 1937 Constitution has been the subject of a number of historical analyses.[1] Yet, few of these accounts have examined the constitutional aspect of the position of women in the Irish Free State. This is a great pity because important decisions were made at the foundation of the State that survived the lifespan of the 1922 Constitution and set fateful precedents that would be reflected in its successor. Indeed, it could be argued that the events of 1922 marked a key

1. For example see Mary Clancy, "Aspects of Women's Contribution to the Oireachtas Debate in the Irish Free State, 1922-1937" in Maria Luddy and Cliona Murphy (eds), *Women Surviving* (Dublin: Poolbeg, 1990), pp.206–232; and Maryann Valiulis, "Gender, Power and Identity in the Irish Free State", *Journal of Women's History,* Vol. 6, No. 4/Vol. 7, No. 1, Winter/Spring, 1994/1995.

juncture in determining the rights of women in independent Ireland for the next half century and beyond.

This article will analyse the efficacy of the 1922 Constitution in promoting and protecting the rights of women. It will do this by examining the drafting of Art.3 of the Constitution, which was often perceived as an equality guarantee for women. It will attempt to show that the early drafts showed considerable promise in advancing the rights of women. This promise was never fully realised for reasons that will be outlined in some detail. This article will also analyse the use that was made of the provisions of Art.3 in opposing legislation passed between 1922 and 1937 that openly discriminated against women. It will conclude by examining the long-term reputation of the 1922 Constitution, and of Art.3 in particular, with respect to the rights of women. The overall record of the 1922 Constitution in protecting women's rights was far from impressive. Yet, these repeated failures never seemed to damage the reputation of the 1922 Constitution in the particular context of the rights of women. This article will examine why this was the case.

As mentioned earlier, the 1922 Constitution granted equal suffrage to women. This important achievement is reflected in Art.14 of the Constitution.[2] This is the provision of the 1922 Constitution that usually receives the most attention from scholars who focus on women's history. Yet, it is important to recognise that the 1922 Constitution's commitment to equal suffrage reflected a pre-existing commitment. Partial suffrage had, of course, already been granted by the Representation of the People Act 1918. More importantly, the 1916 proclamation had promised that when a permanent national government was established it would be "elected by the suffrages of all her men and women". The promise of equal suffrage in this hallowed document ensured that the extension of the franchise was widely anticipated by the press.[3] As events transpired, Art.14 was enacted without any real contest in 1922.[4] Consequently, the granting of equal suffrage cannot be wholly attributed to the enlightened attitude of the drafters of the 1922 Constitution. The attitude of the drafters towards the rights of women that went beyond the single issue of equal suffrage is a matter of far greater interest and significance.

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2. "All citizens of the Irish Free State (Saorstát Eireann) without distinction of sex, who have reached the age of twenty-one years and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of Dáil Eireann, and to take part in the Referendum and Initiative. All citizens of the Irish Free State (Saorstát Eireann) without distinction of sex who have reached the age of thirty years and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of Seanad Eireann. No voter may exercise more than one vote at an election to either House, and the voting shall be by secret ballot. The mode and place of exercising this right shall be determined by law."
3. For example, see *Freeman's Journal*, January 31, 1922.
4. The constitution committee did, however, go to the trouble of examining the extent to which women were granted the right to vote in various Constitutions from around the world. NAI, Constitution Committee, T2, undated memorandum on "Exercise of the Franchise" by P.A. O'Toole.

DRAFTING THE 1922 CONSTITUTION

In a historical context, it is quite appropriate that this article be written by a man as this reflects the manner in which the rights of women were considered in drafting the 1922 Constitution. It is, overwhelmingly, a story of men discussing the rights of women. There were no women on the committee appointed by Michael Collins to draft a Constitution for the embryonic Irish State in January 1922. Michael Collins appointed himself as chairman of the constitution committee although the demands of his other duties meant that he was seldom in attendance and he played little role in the initial drafting stage. The effective chairman was Darrell Figgis. Figgis was a prominent literary figure in 1920s Ireland and was the only paid member of the constitution committee.[5] The rest of the committee included four lawyers: Hugh Kennedy,[6] John O'Byrne,[7] Kevin O'Shiel[8] and Clement J. France[9]; a businessman: James Douglas[10]; a former civil servant: James McNeill[11] and two academics: Professor Alfred O'Rahilly[12] and Professor James Murnaghan.[13] Why did Michael Collins fail to appoint a single woman to sit on this committee? It is true that there were very few women in 1920s Ireland with a significant amount of legal experience. Nevertheless, the membership of the constitution committee shows that legal experience was not a vital pre-requisite. The sad truth is that it probably never occurred to Michael Collins to appoint a woman. Yet, even if he had been so inclined, there were very few women candidates in the political sphere who would have been considered suitable. Cumann na mBan was dominated by opponents of the Treaty and the entire female representation in the Dáil was firmly behind de Valera's banner. This led Hugh Kennedy to condemn Cumann na mBan as "women whose extacies [sic] … can find no outlet so satisfying as destruction".[14] Indeed, Cumann

5. Figgis would go on to be elected as a TD in the constituent assembly of 1922.
6. Kennedy would later become the first person to hold the offices of Legal Adviser to the provisional government, Attorney General and Chief Justice of the Supreme Court.
7. Later Attorney General, judge of the High Court and judge of the Supreme Court.
8. O'Shiel was a former judge of the "Dáil Courts". He was appointed as Assistant Legal Adviser to the provisional government on September 6, 1922 and subsequently served as a Land Commissioner.
9. France was an American lawyer who had come to Ireland on behalf of the American Committee for Relief in Ireland.
10. Later vice-chairman of the Seanad of the Irish Free State.
11. Later High Commissioner in London and second Governor-General of the Irish Free State.
12. Professor of Mathematical Physics at University College Cork. A cousin of Michael Joseph O'Rahilly, better known as "The O'Rahilly", of the 1916 Rising. He was a late addition to the Constitution Committee, joining it on January 30, 1922. NAI, Department of the Taoiseach, S8952 and S8953.
13. Professor of Jurisprudence and Roman Law at University College Dublin and later judge of the Supreme Court.
14. UCD Archives, Kennedy Papers, P4/548, note on opposition to the Treaty,

na mBan voted by the crushing majority of 419 to 63 to reject the Treaty.[15] This gender imbalance was so pronounced that the Anti-Treaty Party was dubbed the "Women and Childers Party".[16]

Although no woman sat on the constitution committee, Hannah Sheehy-Skeffington, in her capacity as chairman of the Irish Women's Franchise League, did meet with a representative of the committee and received assurances that the Constitution would guarantee "equal rights of citizenship" to women.[17] Although Skeffington wrote that she had met with "the Chairman in charge of drawing up the Constitution" it is unlikely that this was a reference to Michael Collins who would probably have been mentioned by name or as chairman of the provisional government.[18] As mentioned earlier, Collins seldom attended meetings and was not directly involved in the work of the committee. Darrell Figgis presided over the constitution committee as acting chairman in his absence. It seems likely that Figgis was the person who gave these assurances to Skeffington. Figgis was known to be a supporter of granting enhanced rights to women. This is confirmed by his contributions to the public debates on the position of women under the 1922 Constitution.[19] During the drafting process Figgis examined a number of existing Constitutions from around the world and seems to have paid particular attention to provisions concerning the position of women.[20]

One of the earliest drafts of the proposed Constitution contained a general provision that was designed to promote the equal rights of men and women in the new State. This provision appeared under the heading "Chapter 1 – Fundamental rights of the people" in a draft called "Document No. 3". Article 1 of this draft provided as follows:

> All Irishmen and women have as citizens of Saorstat Eireann fundamentally the same civil rights and duties. All Irishmen and women are members of one common society. For the better ordering of their common affairs, to adjustment of their mutual interests, for the care and nurture of their physical and moral well-being and development, and for the binding together of them all in life and liberty, certain powers of Government are devised by them.[21]

It should be noted that this equality provision appeared in conjunction with a strong declaration of popular sovereignty. Irish feminists might

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undated.

15. Dorothy Macardle, *The Irish Republic* (Dublin: Wolfhound Press, 1937), p.658.
16. Tom Garvin, *1922: The Birth of Irish Democracy* (Dublin: Gill & Macmillan, 1996), p.98.
17. *The Freeman's Journal* October 2, 1922.
18. *The Freeman's Journal* October 2, 1922.
19. For example, see *Dáil Debates*, Vol. 1, Col. 670–73, September 25, 1922.
20. For example see NAI, Constitution Committee, S1, correspondence concerning the Belgian Constitution.
21. UCD Archives, Kennedy Papers, P4/320, Document No. 3.

have preferred an equality provision that appeared in an article of its own. Nevertheless, the association with popular sovereignty ensured that the proposed equality provision appeared in the very first article of the draft, a prominence that it would not otherwise have enjoyed. In fact, there was another equality guarantee that did appear in a distinct article in Document No. 3. Article 7 of this draft provided that:

> All Irishmen and women are equal before the law, and no law can be of effect that in any way impairs that equality.[22]

This provision was crossed out in Hugh Kennedy's copy of Document No. 3 and it is absent from later drafts. The reason for its removal is impossible to trace in the absence of additional evidence. The fact that Hugh Kennedy crossed it out does not necessarily mean that he was responsible for its removal. It seems likely that this provision was seen as superfluous given that there was already a gender equality guarantee within the text of Art.1.[23]

Slight alterations were made to the wording of Art.1 in a draft called "Document No. 6"[24] and in a subsequent draft called "Document No. 28". Article 1 of Document No. 28 provided as follows:

> All Irish men and women have as citizens of Saorstat Eireann fundamentally the same rights and duties. For the better ordering of their common affairs, for the adjustment of their mutual interests, for the care of their physical and moral well-being and development, and for binding all citizens together in unity and liberty, certain powers of government are devised by them.[25]

The text of Art.1 was crossed out in Hugh Kennedy's copy of Document No.28 and is not present in the next draft which was called "Document No. 39". This removal seems to reflect a desire for consolidation rather than a rejection of principles of gender equality. It should be remembered that the equality guarantee in Art.1 appeared in conjunction with provisions that emphasised that the legal order of the new State would be founded on principles of popular sovereignty. Articles 2 and 3 of this draft also contained provisions that emphasised the importance of popular sovereignty. The constitution committee could not have been satisfied with this needless repetition. When the constitution committee removed Art.1 they also deleted most of Art.2 and united the remainder to the text of Art.3. This led to the creation of a single article dealing with the principle of popular sovereignty.[26]

The gender equality guarantee had not been forgotten; it just needed a new home. The constitution committee believed that they had found one in

22. UCD Archives, Kennedy Papers, P4/320, Document No. 3.
23. UCD Archives, Kennedy Papers, P4/320, Document No. 3.
24. UCD Archives, Kennedy Papers, P4/320, Document No. 6.
25. UCD Archives, Kennedy Papers, P4/323, Document No. 28.
26. UCD Archives, Kennedy Papers, P4/323, Document No. 28.

the wording of a new opening provision in the draft Constitution. The new Art.1 was derived from a pamphlet called "The Sovereign People" written by Pádraig Pearse.[27] It provided that:

> The nation's sovereignty extends not only to all the men and women of the nation, but to all the material possessions of the nation; the nation's soil and all its resources; all the wealth and wealth-producing processes within the nation; and all right to private property is subordinated to the public right and welfare of the nation.
>
> It is the duty of every man and woman to give allegiance and service to the commonwealth, and it is the duty of the nation to ensure that every citizen shall have opportunity to spend his or her strength and faculties in the service of the people. In return for willing service it is the right of every citizen to an adequate share of the produce of the nation's labour.[28]

At some point it was decided to add a sentence at the end of Art.1 providing that "All Irish men and women have as citizens the same rights".[29] The constitution committee had restored the equality guarantee but still seemed dissatisfied with its location. It was finally decided to move the equality guarantee out of the new Art.1. The sentence declaring that "All Irish men and women have as citizens the same rights" was moved to the end of Art.3 which dealt with matters of citizenship.[30] It is clear from the context in which this sentence was inserted together with subsequent remarks made by members of the constitution committee that this sentence was intended to serve as a general equality guarantee and was not limited to the acquisition and termination of Irish citizenship.[31] It is not clear why the constitution committee decided to move the equality provision. Nevertheless, it proved to be a fortuitous move as the British government would later demand the removal of all the provisions contained in Art.1 of Document 39.[32]

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27. NAI, Department of the Taoiseach, S8955, memorandum by Hugh Kennedy, June 11, 1922. This pamphlet is reproduced in *Collected Works of Pádraig H. Pearse - Political writings and speeches* (Dublin: The Phoenix Publishing Col Ltd, 1922), pp.335–72.
28. UCD Archives, Kennedy Papers, P4/325, Document No. 49.
29. This sentence is handwritten in UCD Archives, Kennedy Papers, P4/325, Document No. 49 and is typed in UCD Archives, Kennedy Papers, P4/326, Document No. 49.
30. The alteration is handwritten in UCD Archives, Kennedy Papers, P4/326, Document No. 39 and typed at UCD Archives, Kennedy Papers, P4/327, Document No. 39.
31. For example, see *Dáil Debates*, Vol. 1, Cols 672–3, September 25, 1922.
32. By this stage the provisions of Art.1 of Document 39 had been partitioned into the new Arts 1 and 2 of the draft Constitution. NAI Department of the Taoiseach, S8955. The British do not seem to have been aware that these provisions were derived from the works of Pádraig Pearse. Nevertheless, they objected to them in light of their perceived "Soviet" and "Bolshevik" character. TNA-PRO, CAB 43/1 22/N/148(3), meeting of British signatories, May 27, 1922 and TNA-PRO CAB

Article 3 had been relatively short and simple when the equality guarantee was first attached.[33] The position of the equality guarantee became increasingly anomalous as the provisions on the acquisition and termination of Irish citizenship became longer and more technical in nature. This did not go unnoticed within the provisional government. George Gavan Duffy, a signatory of the 1921 Treaty and Minister for Foreign Affairs in the provisional government, examined the equality guarantee contained in the final sentence of Art.3. He concluded that "This [provision] is important and should be a separate Article."[34] His colleagues do not seem to have placed the same priority on the equality guarantee and were content to make cosmetic changes to its wording while leaving it attached to the provisions on citizenship. The provisional government did no more than change the phrase "All men and women have as citizens the same rights" to "Men and women have equal rights as citizens". It could be argued that, in making this change, the provisional government may have wished to distinguish the concepts of equal rights and identical rights. This seems improbable and it is more likely that the wording was simply changed in the interests of textual elegance.

The constitution committee presented the provisional government with three draft Constitutions known as Drafts A, B and C on March 7, 1922. Drafts A and B were largely identical and contained provisions that reflected the pre-existing commitment to equal suffrage together with the equality guarantee at the end of Art.3. The provisions relating to women in the third draft, the very different and ultimately unsuccessful Draft C, are also worthy of some consideration.

Draft C was created by Alfred O'Rahilly, a physics professor from University College Cork. He produced it without any input from the rest of the committee apart from a certain amount of support from his fellow academic Professor James Murnaghan. Draft C also granted equal suffrage and defined those persons who, irrespective of sex, would be entitled to claim Irish citizenship. It also contained a general equality guarantee in Art.46 declaring that "All citizens are equal before the law, independently of birth, sex, status or rank". This sentence was attached to a number of provisions dealing with the position of hereditary titles in the new State. Once again, it was not thought worthwhile to devote an entire article to emphasising the equal rights of men and women.

Draft C was heavily imbued with its author's religious and social ideals and contained a number of provisions that made direct reference to the position of women in the new State. Article 55 declared that "Maternity shall be under the special protection of the law" and further provided that

21/257. The British secured the removal of these provisions in June 1922. NAI, Department of the Taoiseach, S8955, memorandum by Hugh Kennedy, June 11, 1922.

33. UCD Archives, Kennedy Papers, P4/326, Document No. 39
34. NAI, Constitution Committee, V13, memorandum by George Gavan Duffy, April 11, 1922.

"industrial night work of women shall be forbidden by law". These provisions seem to reflect a similar spirit to that contained in Arts 41.2 and 45.4 of de Valera's Constitution. Another provision of Draft C that is echoed in the 1937 Constitution is the declaration that:

> Marriage, as the basis of family life and national well-being, is under the special protection of the State; and all attacks on the purity, health and sacredness of family life shall be forbidden.[35]

The draft produced by O'Rahilly also committed the State to recognising the "inviolable sanctity of the marital bond".[36] Many aspects of Draft C would resonate far into the future. There is evidence suggesting that Eamon de Valera examined Draft C while creating his own Constitution in 1937.[37] There is, however, no evidence that Michael Collins ever seriously considered adopting Draft C in 1922.[38]

Draft B was chosen to form the basis of the future Constitution of the Irish Free State. The provisional government spent April and May carefully scrutinising its text and making a number of alterations. De Valera received a lot criticism in 1937 for omitting the words "without distinction of sex" from a number of key articles.[39] The drafters of the 1922 Constitution were far more astute in this respect. They were not always convinced that the words "without distinction of sex" were of any real necessity in all the contexts in which they appeared. Nevertheless, they adhered to advice that stressed that these words should be retained on the basis that they were "politically wise".[40]

Collins and Griffith took the draft Constitution to London for inspection by the British government in May 1922. The British were not convinced that the draft Constitution complied with the terms of the 1921 Treaty. As a result, an extensive redrafting of the Constitution took place in London. The British did not, however, interfere with the equality provision placed

35. Article 53 of Draft C. NAI, Department of the Taoiseach, S8953. See Art.41.3.1° of the 1937 Constitution.
36. Article 53 of Draft C. NAI, Department of the Taoiseach, S8953.
37. Brian Farrell, "The Drafting of the Irish Free State Constitution: III" (1971) 5 *Ir. Jur.* 111 at 111–12.
38. O'Rahilly later complained that the draft was 'unanimously rejected without even a personal discussion with me such as they had with the other signatories of the other draft'. UCD Archives, Kennedy Papers, P4/315, letter from O'Rahilly, September 2, 1922.
39. For example, the phrase "without distinction of sex" was only placed in Art.16.1.2° after substantial criticism in the Dáil. A similar amendment was made in Art.16.1.3° following pressure from the opposition. *Dáil Debates*, Vol. 68, Cols 153–54, June 9, 1937. The importance of these changes was easily outweighed by de Valera's removal of these words from the new equality guarantee in Art.40.1. *Dáil Debates*, Vol. 67, Cols 64–65, May 11, 1937.
40. NAI, Department of the Taoiseach, S8953, memorandum by P. Hogan, May 1, 1922.

at the end of Art.3. Their principal concern was with issues of sovereignty and, apart from issues of religious freedom, had little interest in the social provisions of the Irish Constitution.

THE CONSTITUTION OF THE IRISH FREE STATE AT WESTMINSTER

The position of Irish women was emphasised in an unexpected manner when the draft Irish Constitution was considered at Westminster. Those who opposed the creation of the Irish Free State often stressed the alleged outrages against women during the turmoil of the civil war. Ireland was portrayed as a country in which elderly women stood exposed to the elements in their nightdresses as they watched their homes and possessions go up in flames.[41] Lurid details were given of the savage rapes that were alleged to be everyday occurrences in the current climate of terror. Edward Carson described how the wife of an acquaintance had left a Dublin hospital with a broken heart because it was filled with "ravished ladies". Carson concluded that, "Even that basest of crimes has become a commonplace in Ireland".[42] Those who were hostile to the 1921 Treaty, and by extension the Constitution of the Irish Free State, often highlighted the plight of the southern unionists left behind under the jurisdiction of the provisional government. The vulnerability of southern protestant women carried considerable emotional force and was considered an effective means of attacking the results of the Treaty settlement.

Some figures at Westminster praised the democratic ideals that the drafters had attempted to enshrine in the text of the new Irish Constitution. Such praise was forthcoming from Ramsay MacDonald who would soon become Prime Minister in the first Labour government.[43] It was curious that nobody made reference to the obvious irony of the British parliament passing a statute granting the vote to all Irishwomen over 21 while this position was still denied to women in the United Kingdom. This contrast between the position of Irishwomen and their British counterparts was sometimes the cause of a certain amount of hubris on the western side of the Irish Sea in the early 1920s. A woman correspondent writing for the Irish Times struck a definite note of superiority when she concluded that:

> … [I]f only all Englishwomen would take a keener interest in politics, in the deeper and more intelligent way that my own countrywomen

41. For example see *Hansard*, House of Lords, Vol. 52, Col. 227, December 4, 1922. On this general subject see the letter of protest from the Honorary Secretary of Cumann na mBan to Liam Lynch at the policy of burning houses in which Cumann na mBan members were occasionally asked to assist. UCD Archives, FitzGerald Papers, P80/784.
42. *Hansard*, House of Lords, Vol. 52, Col. 223, December 4, 1922.
43. *Hansard*, House of Commons, Vol. 159, Cols 332–3, November 27, 1922.

do, then their country would be in a sure way to a safer and wiser government.[44]

THE POSITION OF WOMEN IN THE DEBATES OF THE CONSTITUENT ASSEMBLY

The purpose of the Irish election of June 1922 was to elect a special assembly that would consider and enact the draft Constitution. This was the last Irish election in which women still had unequal rights of franchise as men. Under the Representation of the People Act 1918 only women over 30 who fulfilled certain property requirements were given the vote. Although all the major parties had committed themselves to creating a fully equal franchise the provisional government announced that there was not sufficient time to prepare a new register of voters before the election. This claim was challenged by Kathleen O'Callaghan TD who presented a schedule that suggested that a revision could be carried out in three months.[45] The provisional government was working to a tight deadline and refused to accept this assessment. Despite this setback several Irish newspapers commented on the large number of women voting in the election for the constituent assembly. Their enthusiasm for the elections was contrasted to the relative apathy displayed by many of their male counterparts.[46]

The relative enthusiasm of women voters for the 1922 election did not translate into an increase in female representation in the Dáil. In fact, the general election of 1922 was a significant setback in this regard. There had been six women TDs in the second Dáil Éireann. These were Countess Markievicz, Margaret Pearse, Kathleen Clarke, Mary MacSwiney, Kathleen O'Callaghan and Dr Ada English. All six women were opponents of the 1921 Treaty. When the dust settled after the 1922 election only two of these women, Mary MacSwiney and Kathleen O'Callaghan, had retained their seats. Their opposition to the Treaty ensured that neither would sit in the special Dáil that would sit as a constituent assembly or "Dáil Bhunaidh" whose sole legislative agenda was to enact the draft Constitution. Their abstention from the constituent assembly guaranteed that the draft Constitution, including the provisions that most affected the rights of women in the new State, was debated by an all-male assembly. This would not be the last occasion on which the general emphasis on the "national question" would overshadow concerns relating to the position of women in the new State.

The complete absence of female representation in the constituent assembly was hardly a good omen for the rights of women in the embryonic Irish State. Yet this did not mean that there were no representatives in the constituent assembly who took an interest in the position of women in the new State. Thomas Johnson and Cathal O'Shannon of the Labour Party and

44. *Irish Times*, November 17, 1922.
45. Dorothy Macardle, *The Irish Republic* (Dublin: Wolfhound Press, 1937), p.669.
46. *Irish Independent*, June 17, 1922 and *Irish Times*, June 17, 1922.

prominent independents such as Professor William Magennis and Darrell Figgis proved to be sympathetic voices. Their contributions ensured that the rights of women were not entirely ignored by the constituent assembly.

The outbreak of a bitter civil war on June 28, 1922 delayed the summoning of the constituent assembly until the following September. During this time the provisional government became increasingly uncomfortable with the broad guarantee of gender equality tacked on at the end of the provision dealing with Irish citizenship. It seems that the seeds of discomfiture were planted by a deputation of women who called to government offices to discuss the equality provision with members of the provisional government. The identity of these women remains unknown. Nevertheless, their intervention proved to be a decisive incident with respect to the history of women in twentieth-century Ireland. Kevin O'Higgins told the constituent assembly that these women had put forward an interpretation of Art.3 that demanded absolute equality and would render unconstitutional all legislation that was in any way discriminatory on the basis of sex.[47] The provisional government was horrified. Hugh Kennedy, a future Attorney General and Chief Justice of the Supreme Court, queried whether the current practice of requiring female civil servants to retire on marriage could be retained if Art.3 were interpreted in such a manner.[48] W.T. Cosgrave raised the possibility that a broad equality provision of this nature could be used to compel the government to allow husbands and wives to submit separate tax statements.[49] Such a position would, he predicted, lead to "endless bother".[50]

It should be noted in defence of these unidentified women who met with the provisional government that only O'Higgins' account of this meeting appears to have survived. It seems unlikely that these women set out to "count their chickens" and give advance warning to the provisional government of the consequences that they believed would flow from the equality provision. It is far more likely that a few unfortunate remarks were made inadvertently at a meeting that was intended to be a general discussion of the position of women in the new State. The accuracy of O'Higgins' uncorroborated account of the meeting might be open to challenge. Nevertheless, it must be conceded that something important occurred at this time that provoked a sudden and radical change of policy on the part of the provisional government. Whoever made the remarks and in whatever context, it is impossible to deny that this incident was a seminal event that would have serious long-term consequences.

When the constituent assembly was finally summoned the provisional government immediately sought to limit the effect of the equality provisions in the draft Constitution. It was proposed to alter the sentence at the end of Art.3 from "Men and women have equal rights as citizens" to "Men and women have equal political rights".[51] Ernest Blythe, the Minister for Local

47. *Dáil Debates*, Vol. 1, Cols 1677–79, October 18, 1922.
48. P4/341 Kennedy Papers UCD Archives.
49. This was also raised by Hugh Kennedy. UCD Archives, Kennedy Papers P4/341.
50. *Dáil Debates*, Vol. 1, Col. 674, September 25, 1922.
51. *Dáil Debates*, Vol. 1, Cols 662–63, September 25, 1922 and NAI, Department of

Government, justified this move by explaining that the amendment was not intended to deprive women of any rights but to prevent lawyers from construing Art.3 in a manner that might cause difficulties in the future. He gave the example of the commission of criminal offences as an area in which it was desirable to distinguish the treatment of men and women.[52] Gerald FitzGibbon, who would later become a judge of the Supreme Court, openly expressed his support for the amendment. He noted that many separated women would be shocked to learn that under a position of strict equality they might be obliged to provide alimony for their husbands.[53]

The most significant speech in support of the amendment came from the Minister for Home Affairs, Kevin O'Higgins. O'Higgins insisted that that the real purpose of the amendment was not designed to deprive women of any rights. Rather, it was designed to deprive men of certain rights that they might claim under the original provision. O'Higgins illustrated his point by giving the example of marital coercion. Marital coercion was a rebuttable presumption at common law. It held that a married woman who committed a felony, apart from murder, in the presence of her husband had committed it under his coercion and, therefore, was not guilty of an offence. O'Higgins claimed that he wanted to prevent a situation from arising where men, under a position of strict equality, could make use of such a presumption in relation to crimes committed in the presence of their wives. Sadly, no voice was raised in the constituent assembly suggesting that the demands of gender equality might demand the removal of the presumption of marital coercion in relation to women rather than its extension in relation to men. This was the approach that was taken in the 1980s in the case of the *State (DPP) v Walsh and Conneely*.[54] This decision confirmed that the presumption of marital coercion had not survived the enactment of the 1937 Constitution because it offended the concept of equality before the law under Art.40.1. However, it must be stressed that the decision in *State (DPP) v Walsh and Conneely* occurred over half a century after the debates of the third Dáil Éireann sitting as a constituent assembly. Subsequent remarks suggest that Kevin O'Higgins would not have accepted such a line of reasoning in 1922.

O'Higgins was convinced that it was necessary to retain certain legal "privileges" for women under the conditions that existed in the 1920s. O'Higgins claimed that there were two types of women living in 1920s Ireland. He recognised that there was a new type of woman coming into existence. This new Irish woman was "an extremely able woman, an extremely strong-minded woman, a woman of highly developed public spirit and civic sense".[55] However, he added there remained in existence an older form of Irish womanhood that had grown up under very different circumstances. The ordinary woman of the nineteenth century was "a less

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the Taoiseach, S8956.

52. *Dáil Debates*, Vol. 1, Cols 670–71, September 25, 1922.
53. *Dáil Debates*, Vol. 1, Col. 673, September 25, 1922.
54. [1981] I.R. 412.
55. *Dáil Debates*, Vol. 1, Col. 1678, October 18, 1922.

independent woman whose civic outlook or, as some would say, lack of outlook, is excused as having its origin in early Victorian education".[56] O'Higgins insisted that this type of woman would suffer under a position of strict equality and, therefore, should not be deprived of the protection that was currently provided by the law.[57]

There were women in 1922 who objected to the arguments put forward by O'Higgins. They protested that many of the so-called "privileges" granted to women by contemporary law, such as marital coercion, were unnecessary and also deeply insulting. Mary Hayden wrote that severely limiting the equality provisions of the draft Constitution in order to protect such archaic devices was akin to using "a machine gun to kill a fly".[58] She concluded that the argument put forward by the government was nothing more than "camouflage".[59] O'Higgins would go on to make extensive use of the supposed contrast between the "new woman" and the "Victorian woman" throughout the 1920s. In later years O'Higgins would champion discriminatory measures that could be seen as impeding the emergence of the "new woman" while offering little in terms of protection to the "Victorian woman". A good example was his advocacy of a total removal of women from juries in 1927. O'Higgins only accepted an amendment that would allow women to "opt in" to serving on a jury with the greatest of reluctance.[60] O'Higgins' otherwise sympathetic biographer has noted that "where women were concerned he was almost mediaeval in his attitude".[61]

The significance of the proposed amendment was not lost on the members of the opposition who chose to take their seats in the constituent assembly. They were well aware that the alteration of "rights" to "political rights" seemed to invoke the principle of *expressio unius exclusio alterius*. George Gavan Duffy, who had resigned from the provisional government some months earlier, warned his former colleagues that they were laying themselves open to serious misapprehension by making this change.[62] Professor Eoin MacNeill, then Minister for Education in the provisional government, argued that all rights could be considered to political in nature.[63] Few seemed impressed with this line of reasoning. The context in which the amendment was introduced clearly illustrated that the provisional government intended a serious narrowing of the scope of rights protected. Professor William Magennis of University College Dublin noted that the term "political rights"

56. *Dáil Debates*, Vol. 1, Col. 1679, October 18, 1922.
57. *Dáil Debates*, Vol. 1, Col. 1679, October 18, 1922.
58. *The Freeman's Journal*, September 29, 1922.
59. *The Freeman's Journal*, September 29, 1922.
60. See "Women on Juries".
61. Terence de Vere White, *Kevin O'Higgins* (Tralee: Anvil Books, 1966), p.170.
62. Although he opposed the provisional government's amendment George Gavan Duffy did feel that the draft article was flawed in its wording. He felt that it should speak of men and women having "equal rights of citizenship" rather than "equal rights as citizens". This wording was also favoured by Darrell Figgis. *Dáil Debates*, Vol. 1, Col. 677, September 25, 1922.
63 *Dáil Debates*, Vol. 1, Col. 1684, October 18, 1922.

seemed to guarantee the right to vote and the right to stand for election, commitments that the provisional government had inherited, but very little else.[64] Darrell Figgis claimed that it had been intended by the drafters of the original provision to guarantee equality with respect to economic and social rights in addition to political rights.[65] Figgis' words carried considerable weight since he had been the effective chairman of the committee that had actually created the equality guarantee in Art.3 of the draft Constitution.[66]

One of the main arguments used by the provisional government in support of their amendment was that the original provision would have required a major overhaul of existing law. W.T. Cosgrave claimed that the present wording of the equality guarantee would force the government to undertake an exhaustive archival inquiry through every effective Act of Parliament in order to discover and strike out existing inequalities. It was argued that a herculean task of this nature was an unreasonable burden to place on the new State. The provisional government declared its preference for removing legislative inequalities on an ad hoc basis. As Cosgrave put it: "if you leave the women to talk over their grievances you will not be long in learning what they are".[67] Having identified an area that was considered problematic the government could take steps to remedy it.

The large government majority within the constituent assembly guaranteed the acceptance of the amendment in spite of the protests of the Labour Party and many influential independents. The opposition did score a minor victory in persuading the government to remove the truncated equality provision from its anomalous position at the end of a long article dealing with the acquisition and termination of Irish citizenship. They were persuaded by George Gavan Duffy to place the declaration that "Men and women have equal political rights" in a new and entirely separate Art.4 of the draft Constitution.[68] Yet even this belated measure could hardly compensate for the dilution of the equality guarantee. The draft Constitution was supposed to represent a new legal order and even a new Ireland that was moving boldly into the future. Now it had been altered to avoid conflict with laws that had been inherited from the past. It proved to be a fateful precedent.

There were protests from women at the amendment of the equality provision. In many ways the amendment served as an early warning of the conservatism that characterised the first governments of the Irish Free State. However, female discontent was excluded from the confines of the constituent assembly and was limited to external agitation. The only direct contribution made by women to the proceedings of the constituent assembly was a series of disruptions from the visitors gallery made by Maud Gonne MacBride,

64. *Dáil Debates*, Vol. 1, Col. 670, September 25, 1922.
65. *Dáil Debates*, Vol. 1, Cols 672–73, September 25, 1922.
66. Although Figgis was a proponent of Draft A and not Draft B which was chosen to form the basis of the 1922 Constitution their draft articles with respect to citizenship and equality were identical.
67. *Dáil Debates*, Vol. 1, Col. 674, September 25, 1922.
68. *Dáil Debates*, Vol. 1, Cols 677–78, September 25, 1922.

Hanna Sheehy-Skeffington, Charlotte Despard and another unidentified woman over the issue of anti-Treaty prisoners.[69] These women were forcibly removed and Cosgrave growled that "no three or four mad women coming in here to talk to us are going to make me release those prisoners".[70]

Hannah Sheehy-Skeffington had never been particularly happy with the original equality provision at the end of the article on citizenship. She had dismissed it as a "meagre sentence". Nevertheless, she was far from happy with the dilution of this provision by the constituent assembly. The atmosphere of the times were reflected when she speculated as to whether British interference was in some way responsible for this state of affairs. In fact, the dilution of the original provision by the Irish constituent assembly had nothing to do with the British who had never paid significant attention to the equality guarantee. Nevertheless, Skeffington roundly condemned the procrastination of the provisional government in removing discriminatory laws that had been inherited from the United Kingdom. These "cobwebs", she declared, had been swept away by the 1916 proclamation which represented "the Irishwoman's charter of liberty". She concluded with the following appeal:

> "It is time for all women, whatever their political views may be, to make their will in this matter felt, so that it may be made clear to our male legislators that they received no mandate from women voters to restrain women's rights of equal citizenship and equal opportunity with men."[71]

A number of pro-Treaty women sent a circular to every sitting TD in the hope of prompting the men of the constituent assembly into adopting an effective equality provision.[72] This document set out the equality provisions that other countries had felt able to place in the texts of their Constitutions. These included Art.109 of the German Constitution:

> All Germans are equal before the law. Men and women have fundamentally the same civic rights and duties.

It also detailed Art.7 of the Austrian Constitution:

> All Citizens of the Federation shall be equal before the law. Privileges of birth, sex, position, class and religion are abolished.

The circular also included Art.96 of the Polish Constitution:

69. *The Freeman's Journal,* September 21, 1922.
70. *Dáil Debates*, Vol. 1, Col. 546, September 21, 1922.
71. *The Freeman's Journal,* October 2, 1922.
72. *Dáil Debates*, Vol. 1, Col. 1671, October 18, 1922.

> All Citizens are equal before the law. Public employment is open in the same degree to all under conditions prescribed by law.[73]

This practical and constructive intervention did not bear fruit. The opposition struggled in vain to come up with a wording that was acceptable to the provisional government. Professor Magennis moved an equality guarantee that contained a loophole for discrimination in certain limited areas:

> "Men and women are guaranteed equal rights of citizenship, and unless otherwise debarred by law, shall be eligible without distinction, for public office and employment according to their abilities and attainments."[74]

This proposal never received serious consideration and Thomas Johnson declared himself ashamed that Irish legal minds could not draft an acceptable provision.[75]

The debate over women's rights was overshadowed by the issues touching the ever-present "national question". Much of the debates of the constituent assembly were spent in lengthy and acrimonious debate over the clauses dealing with such matters as the position of the Crown, the role of the Governor-General and deeply divisive Oath. Thomas Johnson concluded that if the flawed wording of the new Art.4 could not be improved it was better that it be removed in its entirety from the draft Constitution.[76] The provisional government proved only too happy to comply. Ernest Blythe concluded that many women would prefer that the intention to pursue egalitarian values be taken for granted rather than spelling it out in a constitutional provision.[77]

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73. The circular also included Art.106 of the Constitution of Czecho-Slovakia: "Privileges of sex, birth or occupation shall not be recognised."; Article 128 of the German Constitution: "All Citizens of the State without distinction are eligible for public offices as provided by law in accordance with their qualifications and abilities. All exceptional provisions against women officials are annulled."; and an article from the Bavarian Constitution which stated that "Every Member of the Bavarian State who has completed 20 years is a Citizen of the State without distinction of birth, sex, creed, or occupation". *Dáil Debates*, Vol. 1, Cols 1671–72, October 18, 1922.
74. *Dáil Debates*, Vol. 1, Col. 1671, October 18, 1922. Magennis later agreed to drop the words after "citizenship" *Dáil Debates*, Vol. 1, Col. 1681, October 18, 1922. He had earlier suggested "men and women shall enjoy the privileges, and be subject to the obligations of such citizenship under conditions to be discerned by law". *Dáil Debates*, Vol. 1, Col. 672, September 25, 1922.
75. *Dáil Debates*, Vol. 1, Col. 1679, October 18, 1922. Johnson drafted his own wording for Art.4 which read "All citizens are equal before the law. Men and women have fundamentally the same civic rights and duties". This amendment was not discussed in the constituent assembly. NAI, Deparmtent of the Taoiseach, S8956A.
76. *Dáil Debates*, Vol. 1, Col. 1680, October 18, 1922.
77. *Dáil Debates*, Vol. 1, Col. 1682, October 18, 1922.

THE RESIDUAL EQUALITY GUARANTEE

There were, however, other provisions in the draft Constitution that could be seen as protecting the principle of equal rights for women. The original equality clause had been tacked on to the end of a provision dealing with the definition of Irish citizenship. When that clause was removed there remained a residual equality guarantee contained within the definition of citizenship itself. The final wording of Art.3 of the 1922 Constitution read:

> Every person, without distinction of sex, domiciled in the area of the jurisdiction of the Irish Free State (Saorstát Éireann) at the time of the coming into operation of this Constitution, who was born in Ireland or either of whose parents was born in Ireland or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstát Éireann) for not less than seven years, is a citizen of the Irish Free State (Saorstát Éireann) and shall within the limits of the jurisdiction of the Irish Free State (Saorstát Éireann) enjoy the privileges and be subject to the obligations of such citizenship: Provided that any such person being a citizen of another State may elect not to accept the citizenship hereby conferred; and the conditions governing the future acquisition and termination of citizenship in the Irish Free State (Saorstát Éireann) shall be determined by law.

The words "without distinction of sex" had been added to this Article by the constituent assembly because, strange as it may sound in a modern context, it could not be taken for granted that the word "person" included women in the 1920s.[78] These words were later used to argue that Irish citizens "without distinction of sex" would "enjoy the privileges and be subject to the obligations of such citizenship". The weakness of these words as a guarantee of gender equality is readily apparent. They were buried within a technical provision that defined the persons entitled to claim the status of Irish citizenship. Another weakness is apparent in the use of the word "privileges" in place of "rights". Although these shortcomings were noted in 1922, many members of the constituent assembly did not seem to fully appreciate their significance.[79]

As time progressed, the dilution of the equality provisions of the 1922 Constitution seemed to fade from memory. The 1922 Constitution was remembered as the document that had given equal suffrage to women some years before this was conceded in the United Kingdom. This was a matter of considerable pride to many Irish people in the decades that followed. Yet, this pride was accompanied by a strange sense of amnesia as to the manner

78. See *Edwards v Attorney General* [1930] A.C. 124. The relevant amendment was first advocated by Thomas Johnson and was later proposed by Professor William Magennis. *Dáil Debates,* Vol. 1, Col. 672, September 25, 1922 and Vol. 1, Col. 1666, October 18, 1922.
79. *Dáil Debates*, Vol. 1, Col. 1683, October 18, 1922.

in which the provisional government had stifled the prospect of placing an effective equality provision within the Constitution. This collective sense of amnesia included many of those who had actually been present in the constituent assembly. As with the proposed abolition of the death penalty, the original equality provision proved to be one of the ideals that did not live to survive the birth of the State and was cruelly parodied by later events.[80] The remaining part of this article will attempt to show how the pitiful remains of the original equality guarantee, submerged within the convoluted language of Art.3, failed to advance the position of women in any way during the life of the 1922 Constitution. The vagaries of memory ensured that many people in the 1920s and 1930s seemed genuinely surprised when confronted by this failure. Although disillusion was slow, the fundamental weakness of Art.3, as a guarantee of gender equality, was soon exposed.

CIVIL SERVICE EXAMINATIONS

In the autumn of 1925 the Civil Service Commissioners advertised an examination for entry into the civil service with the rank of first junior administrative officer. This was one of the highest positions in the civil service that could be entered by means of examination. In 1925 this method of entering the civil service remained an all-male preserve. All advertisements for the relevant examination made it clear that only men could be accepted as candidates. The government of the day had no desire to change this practice and was convinced that it was sanctioned by law. Section 4(3) of the Civil Service Regulation Act 1924 allowed the civil service commissioners, with the consent of the Minister for Finance, to limit competitive examinations to persons belonging to a specified class. The government and the civil service commissioners believed that this included the power to specify that only men need apply.[81] This belief was supported by s.1(a) of the Sex Disqualification (Removal) Act 1919 which had given the power to reserve any branch or post for men in "the Civil Service of His Majesty … in any of His Majesty's possessions overseas or in any foreign country".

In 1925 a legal challenge was initiated by the Irish Women Citizens' and Local Government Association against the discriminatory aspects of these civil service examinations.[82] Their legal challenge focused on the argument that s.1(a) of the 1919 Act was inapplicable to the Irish Free State. On this occasion the Irish pre-occupation with the 'national question' actually proved beneficial to the position of women. It was argued that the Irish civil service could not be considered a "Civil Service of His Majesty". Although the Treaty and the 1922 Constitution made clear that the Irish Free State was a Dominion

80. See Gerard O'Brien, "Capital Punishment in Ireland, 1922-1964" in N.M. Dawson (ed), *Reflections on Law and History* (Dublin: Four Courts Press, 2006), pp.223–58.
81. *Dáil Debates*, Vol. 13, Col. 505, November 18, 1925.
82. *Dáil Debates*, Vol. 13, Col. 521, November 18, 1925.

of the British Empire and a constitutional monarchy these were provisions that many Irish people found impossible to accept. Even supporters of the Treaty found themselves unable to accept these constitutional provisions. The provisional government had deliberately strayed from Dominion precedent during the drafting of the 1922 Constitution in denying any role for the Crown with respect to the civil service of the embryonic State. The British acquiescence to this position during the Anglo Irish negotiations on the Constitution represented a minor Irish victory. Three years later, the Irish government could not cast any element of doubt on this position. Consequently, the Attorney General was unable to contradict the contention that the civil service commissioners were acting ultra vires. The success of the legal argument put forward by Irish Women Citizens' and Local Government Association ensured the cancellation of the examination that had initiated the controversy. It also had the potential to prevent any further discrimination on grounds of sex in recruitment for the civil service.[83]

Ironically, the main beneficiaries of this short-lived revolution in the civil service were men and not women. The civil service commissioners advertised an examination for the recruitment of clerical officers soon after the successful initiative by the Irish Women Citizens' and Local Government Association. The main duties of this position included typing and taking short-hand notes. The government was horrified at being unable to prevent a number of men from applying for these examinations and was appalled when some of them were successful.[84]

The Irish government believed that the need to exclude women from certain civil service positions was a matter of urgent concern in 1925. At this time the government was expecting the report of the boundary commission that would establish the final border between the Irish Free State and Northern Ireland. Notwithstanding the final positioning of the border, it was clear that the Irish Free State would need more customs and excise officers to patrol its length. The government wished to reserve these positions for men. Yet, it was unable to do so because the use of s.1(a) of the Sex Disqualification (Removal) Act 1919 was unacceptable in political terms. The undesirability of women being employed as customs officers was raised on a number of occasions in the Oireachtas.[85] Swift action was deemed to be required to restore the previous status quo.

In November 1925 Ernest Blythe, the Minister for Finance, introduced the Civil Service Regulation Bill in the Dáil. This measure provided a mechanism whereby the civil service commissioners could declare that membership of a particular sex was considered a necessary qualification for positions within the civil service. It also gave the civil service commissioners the power to confine entrance examinations to persons of one particular sex. The relevant

83. *Dáil Debates*, Vol. 13, Cols 516 and 535, November 18, 1925 and *Seanad Debates*, Vol. 6, Cols 257–58 and 262–64, December 17, 1925.
84. *Dáil Debates*, Vol. 13, Col. 243, November 12, 1925.
85. For example see *Dáil Debates*, Vol. 13, Cols 503–04, November 18, 1925 and *Seanad Debates*, Vol. 6, Col. 261, December 17, 1925.

provision was to be retrospective in effect in order to ensure that previous intakes of personnel that had been conducted on the basis of sex-specific recruitment policies would be immune from legal challenges.[86]

Both Dáil and Seanad rang with assertions from the opposition that the controversial Bill violated Art.3 of the 1922 Constitution.[87] Some argued that the Bill attempted to amend the Constitution by stealth given that the 1922 Constitution was subject to amendment by ordinary legislation.[88] Others bemoaned the fact that one of the world's earliest constitutional provisions granting equal rights of citizenship between men and women should now be set at nought.[89] Nevertheless, none of those who asserted that the Civil Service Regulation Bill was unconstitutional could provide even the rudiments of a legal argument as to why this should be so. Professor Magennis could only argue that the enactment of this Bill would be contrary to the spirit in which the Constitution had been adopted.[90] Ernest Blythe denied that the Bill he was piloting through the Oireachtas was unconstitutional. He chose not to make use of a legal argument in taking this stance. Instead, he argued that if the Constitution could be used to prevent discrimination with respect to entry into the civil service it could also be used to prevent discrimination on entering the Free State army.[91] Although this was hardly a sophisticated argument, it was one that even the most ardent advocates of the rights of women in the Oireachtas seemed reluctant to challenge.

The passage of the Civil Service Regulation (Amendment) Bill represents another example of matters connected with the "national question" overshadowing matters concerning the rights of women. The introduction of the controversial Bill had to compete with the events which followed the sensational collapse of the boundary commission in the press. W.B. Yeats complained in the Seanad that he was not adequately prepared to properly consider the Civil Service Regulation Bill as a result of the time taken up with the consideration of the new realities posed by a consolidated state of partition.[92] The strength and solidarity of the governing party, was sufficient to allow the safe passage of the Bill despite significant opposition from the Labour Party and the representatives of the universities in the Dáil. Party solidarity ensured that Margaret Collins-O'Driscoll, a woman TD belonging to Cumann na nGaedheal, voted in favour of the measure. However, the government lacked resources of comparable strength in the Seanad where the level of resistance was much stronger. Here the most vocal opponent of the Bill was Jenny Wyse-Power, a veteran of the Ladies Land League.

86. Civil Service Regulation (Amendment) Act 1926, s.2(1). See also *Dáil Debates*, Vol. 13, Col. 535, November 18, 1925.
87. For example see *Dáil Debates*, Vol. 13, Col. 510, November 18, 1925 and *Seanad Debates*, Vol. 6, Col. 245, December 17, 1925.
88. See Art.50 of the Constitution of the Irish Free State.
89. *Dáil Debates*, Vol. 13, Col. 524, November 18, 1925.
90. *Dáil Debates*, Vol. 13, Col. 1097 December 2, 1925.
91. *Dáil Debates*, Vol. 13, Col. 878, November 25, 1925.
92. *Seanad Debates*, Vol. 6, Col. 260, December 17, 1925.

Republican legend maintained that the 1916 proclamation had been signed in her house.[93] Wyse-Power questioned the constitutionality of the Civil Service Regulation (Amendment) Bill. Yet, even she failed to produce the rudiments of a legal argument. Instead, she opposed the Bill on the grounds that it represented a betrayal of the contribution made by women to the struggle that had resulted in the establishment of the State.[94] This oratory might not have impressed lawyers but it had considerable emotional appeal. It may have contributed to the rejection of the Bill in the Seanad by 20 votes to 9. Although this defeat embarrassed the government it was little more than a short-lived moral victory for the position of women in the Irish Free State. Rejection by the Seanad did not mean the defeat of a Bill under the 1922 Constitution. It merely resulted in a delay of 270 days before the Governor-General indicated the King's assent and the Bill came into force.

The weakness of Art.3 of the Constitution as the sentinel of women's rights is apparent throughout the passage of the Civil Service Regulation (Amendment) Act 1926. It is significant that the original legal challenge that had provoked the Cosgrave administration into passing the Bill had not succeeded on the basis of possible repugnancy to the Constitution. Instead, it succeeded on the basis that the wording of the Sex Disqualification (Removal) Act 1919 implied an unacceptable challenge to Irish sovereignty. The weakness of Art.3 was also reflected in the absence of any substantive legal argument in the Oireachtas challenging the constitutionality of the Civil Service Regulation (Amendment) Act 1926. Ernest Blythe noted that the constitutionality of this legislation could always be tested in the courts.[95] This was a challenge that failed to elicit any response.

LOCAL AUTHORITY POSITIONS

The unsuccessful protests against the Civil Service Regulation (Amendment) Act 1926 seemed to sap the strength of opponents of legislation that facilitated discrimination against women. In 1926 the Oireachtas passed the Local Authorities (Officers and Employees) Act. This allowed advertisements for local authority positions to specify that only persons of a particular sex would be deemed suitable for the post.[96] Sir John Keane expressed his surprise that his women colleagues in the Seanad had not noticed this provision.[97]

93. Máire Comerford, *The First Dáil* (Dublin: J. Clarke, 1969) p.44.
94. *Seanad Debates*, Vol. 6, Cols 258–59, December 17, 1925.
95. *Seanad Debates*, Vol. 6, Col. 246, December 17, 1925.
96. s.7(1) of the Act provided that "Whenever a local authority or the Minister requests the Commissioners to recommend a person for appointment to an office to which this Act applies the Commissioners shall with the consent of the Minister prescribe the qualifications as to age, health, character, education, training, experience and (where in the opinion of the Commissioners the duties of the office so require) sex for such office."
97. *Seanad Debates*, Vol. 7, Col. 652, July 2, 1926.

Nevertheless, the measure passed through the Oireachtas with barely a murmur of protest. Consequently, the perceived equality provision in Art.3 of the 1922 Constitution was not raised in this context.

WOMEN ON JURIES

The Sex Disqualification (Removal) Act 1919 was not confined to dealing with the entrance of women into the civil service. It also provided that sex and marital status would no longer provide exemption from jury service. Yet even this emancipatory piece of legislation failed to secure complete equality between men and women in the jury box. It gave judges and other persons the power to order that a jury in a particular case be composed solely of men or solely of women. It was obvious that the former option was far more likely to be chosen than the latter. In addition, the 1919 Act also contained special provisions aimed at preserving "feminine delicacy". It permitted women to apply to be exempted from service on a jury in respect of any case by reason of the nature of the evidence to be given or the nature of the issues to be tried. The 1919 Act also provided certain medical exemptions to women. These were widely believed to be exploited by women desirous of escaping this civic duty.[98]

In the early 1920s the Cosgrave administration sought to amend this state of affairs that had been inherited from the United Kingdom. Ministers complained to the Oireachtas of the inconvenience caused by the frequency with which women sought to evade jury service. The response of the government was to introduce the Juries (Amendment) Bill 1924 that allowed most categories of women who were qualified to sit on a jury to opt for a permanent exemption from jury service.[99] The ability to opt out of jury service was influenced by a woman's marital status. Unmarried women and widows could always claim the exemption. Married women could only claim the exemption if their husbands were qualified and liable to serve as jurors in the same administrative county or county borough.[100]

The government justified this measure by claiming that the frequency with which women sought to evade jury service was placing a significant strain on the new courts system.[101] Thomas Johnson, leader of the Labour Party, predicted that the Bill would be the cause of "vigorous agitation" throughout

98. s.1(b) Sex Disqualification (Removal) Act 1919.
99. s.3(1) Juries (Amendment) Act 1924. The Juries (Amendment) Bill was first proposed as an economy measure that would alter the method by which the list of jurors would be prepared. The provisions with respect to women were one of a number that were suggested by Lorcan Sherlock, former Lord Mayor of Dublin. NAI, Office of the Attorney General, 2000/22/0071, S.A. Roche to Attorney General, January 17, 1924.
100. s.3(2), Juries (Amendment) Act 1924.
101. *Dáil Debates*, Vol. 6, Cols 1664–65, March 5, 1924.

the Irish Free State.[102] This prediction was never fully realised. The women who sat in both houses of the Oireachtas failed to cause a single ripple of protest during the passage of the Bill. In fact, the Attorney General Hugh Kennedy, soon to be appointed the first Chief Justice of the Supreme Court, was visited by a delegation of women who argued that the 1924 Bill did not go far enough. These women rejected the position of placing women on the register of jurors and providing them with an "opt out". They argued that women should be automatically excluded from the register while providing those women who wished to be included with an "opt in". This scheme was rejected by Kennedy who felt that it would mean that the "average woman" would not be represented in the jury box.[103]

The "opt out" for women jurors was duly enshrined in the Juries (Amendment) Act 1924. Women who appeared on the jury books and who satisfied the criteria of the Act were sent a letter informing them of their right to an exemption together with a form that would allow them to have their names removed from the list.[104] During the summer of 1924 the Department of Justice decided to investigate how many women had taken up the offer. It discovered that 17,303 women whose name appeared on the jury books had applied to be exempted. Of these applications 16,707 were granted. This left a total of 5,360 women on the jury books of the administrative counties and county boroughs of the Irish Free State. This figure included 4,691 women who were entitled to an exemption but had declined to apply for one and 666 women who had their application for an exemption refused. It should be noted that the figures for the number of women who had declined to exercise their right to an exemption were sometimes based upon approximations.[105] This consideration together with gaps in the information collected from County Kildare might go some way to explaining certain anomalies within the figures.[106]

The proportion of women who applied for an exemption as compared to the number who declined to do so differed between the administrative areas of the State. Women in Dublin city were most inclined to voluntarily serve on a jury with 1685 applying for exemptions while 750 women who were entitled to an exemption declined to apply for one. In Galway 994 women applied for exemptions while 371 who could have been exempted declined to apply for one. By contrast, in County Wexford, 604 women applied for exemptions while just 17 who were entitled to an exemption declined to apply for one. In Leitrim 53 women applied for exemptions while just a single woman declined to do so and had her name entered on the jury book for the county. According to the figures in the memorandum, no woman who was entitled to an exemption chose to have her name placed on the jury book in

102. *Dáil Debates*, Vol. 6, Cols 1667–69, March 5, 1924.
103. *Dáil Debates,* Vol. 6, Cols 2096–97, March 13, 1924.
104. NAI, Department of Justice, H89/33 and H284/13.
105. NAI, Department of Justice, H284/2, circular of June 11, 1924.
106. NAI, Department of Justice, H284/2, Juries Amendment Act 1924: women jurors, statistics.

counties Carlow and Waterford. While certain aspects of these figures are open to challenge the overall conclusion seems clear. The great majority of women who were entitled to the exemption under the Juries (Amendment) Act 1924 elected to make use of it.[107]

The only real opposition to the Juries (Amendment) Act 1924 in the Oireachtas came from the leader of the Labour Party. Thomas Johnson declared that he was opposed to gender-specific exemptions on principle. Johnson relied heavily on Art.3 of the Constitution in making his case against this measure. Article 3 made reference to the privileges and obligations of Irish citizens. Johnson felt that the former could not be claimed while the latter was evaded. He felt that:

> "There is a distinct bond [in Article 3] that [there] should be equal obligations, equal rights and responsibilities, and so far as citizenship goes I do not think we should make a distinction between woman as woman and man as man."[108]

Johnson never went so far as to challenge the constitutionality of the Juries (Amendment) Bill 1924. However, he did seek to amend it in order to make its terms gender neutral in order to conform to what he perceived to be the spirit of Art.3.[109] Even in this very limited capacity he was accused of carrying the constitutional principle too far.[110] None of the women in either house of the Oireachtas moved to support Johnson, a position that many of them would later regret. The absence of significant protest set a dangerous precedent that was soon exploited.

Just three years after the enactment of the Juries (Amendment) Act 1924 the Cosgrave administration sought to expand its terms. A government memorandum admitted that one of the principal features of the Juries Bill 1927 was the "abolition of women jurors".[111] The provisions of the Bill excluded all women from the jury box irrespective of whether they wished it or not. The Juries Bill 1927 was championed by Kevin O'Higgins. O'Higgins had already excluded women stenographers from the Circuit Court and from the Central Criminal Court on the basis that these courts often dealt with matters "which one would not like to discuss with the feminine members of one's own family".[112]

O'Higgins attacked the Sex Disqualification (Removal) Act 1919 which had granted theoretic, if not practical, equality between men and women with respect to jury service. He made full use of the fact that the majority of the

107. NAI, Department of Justice, H284/2, Juries Amendment Act 1924: women jurors, statisitics.
108. *Dáil Debates,* Vol. 6, Col. 2095, March 13, 1924.
109. *Dáil Debates,* Vol. 6, Col. 2094, March 13, 1924.
110. *Dáil Debates,* Vol. 6, Col. 1671, March 5, 1924.
111. NAI, Department of the Taoiseach, S5317, memorandum on Juries Bill 1927, undated.
112. *Dáil Debates*, Vol. 18, Col. 469, February 15, 1927.

Irish electorate had not been represented at Westminster during the enactment of this statute.[113] This stance allowed the 1919 Act to be presented as the act of an alien legislature that had been foisted on the Irish people against their will. As for the Juries (Amendment) Act 1924, O'Higgins maintained that it had introduced an impractical scheme that was unduly expensive in terms of time and money.[114] He estimated that only 10 per cent of women citizens who were qualified to serve on a jury chose to remain on the register under the 1924 system.[115] This claim is open to challenge and certainly does not conform to the figures provided by the Department of Justice memorandum quoted above.[116] O'Higgins also claimed that of those who were eligible only forty to fifty women a year had actually served.[117] It is difficult to verify these figures. It should be noted that O'Higgins revised the figure down to as low as thirty at a later stage of the debate on the Bill.[118] O'Higgins never mentioned the number of women who had actually turned up at the courtroom in order to serve on a jury. Opponents of the 1927 Bill claimed that it was common practice for women who turned up at the courthouse to be asked to stand aside during the selection of jurors.[119] The Department of Justice itself did little to facilitate women who were willing to serve on juries. A private enquiry as to whether some means might be found to insert the names of qualified women into the jury books who had been omitted by oversight did not attract an encouraging response.[120] In 1925 a Department of Justice official wrote that the women who remained eligible for jury service were "not worth catering for and are not in fact useful jurors."[121]

The Juries (Amendment) Act 1924 had enjoyed an almost untroubled passage through the Oireachtas. By contrast, the government faced considerable opposition from women's organisations in 1927. This did not faze O'Higgins who considered his opponents to be the "self appointed spokeswomen" of a small minority of Irishwomen. He claimed that they were the women of the "Terenure tram" or the "Dalkey train" who had very different interests to their rural and less prosperous sisters.[122] O'Higgins compared their position to that of a vegetarian purporting to speak for the entire human race in a question as to whether or not the consumption of meat should be prohibited.[123] He believed that the majority of Irishwomen

113. *Seanad Debates*, Vol. 8, Col. 662, March 30, 1927.
114. *Seanad Debates*, Vol. 8, Col. 662, March 30, 1927.
115. *Dáil Debates*, Vol. 18, Col. 754, February 23, 1927.
116. NAI, Department of Justice, H284/2, Juries Amendment Act 1924: women jurors, statisitics.
117. *Dáil Debates*, Vol. 18, Col. 467, February 15, 1927.
118. *Dáil Debates*, Vol. 18, Col. 489, February 15, 1927.
119. *Irish Times*, February 18, 1927.
120. NAI, Department of Justice, H284/2, S.A. Roche to Miss Harrison, September 19, 1927.
121. NAI, Department of Justice, H284/3, memorandum to accompany departmental rough draft of the Juries Bill 1925, undated.
122. *Seanad Debates*, Vol. 8, Col. 795–96, April 8, 1927.
123. *Dáil Debates*, Vol. 18, Col. 468, February 15, 1927.

would welcome the complete removal of a burden that seriously interfered with their domestic duties and which many found irksome and unpleasant.[124] Many members of the Oireachtas agreed with these sentiments and with O'Higgins' assessment of the women's organisations. Some argued that, far from incurring a negative image, the passage of this Bill would considerably enhance the popularity of the Minister for Justice amongst women.[125] There were others who went considerably further than O'Higgins in arguing that women were inherently unsuited for jury duty. One Senator even contended that women jurors tended to come to their verdict before the trial had even begun. He concluded that, in any case, young women wearing short skirts would only serve as a source of distraction for male jurors.[126]

The opposition to this Bill within the Oireachtas made no effort to deny that jury duty was unpopular among the great majority of women. It simply pointed out that the same could be said with respect to men.[127] Professor Magennis moved an unsuccessful amendment that sought to make jury duty optional for men in order to highlight that many of same arguments raised in relation to women could be used with equal strength with respect to men.[128] Senator Wyse-Power and others argued that the progress that had been achieved in inculcating a civic spirit among women, however small, would be completely destroyed by this Bill.[129] Some questioned the merit of O'Higgins' chivalrous motives in not wishing to impose indecent or disturbing matters on women in the courtroom. It was pointed out that the women who found themselves in the witness box or even in the dock were not spared such exposure.[130]

The 1922 Constitution proved to be a major rallying point for opponents of the 1927 Bill. Pamplets issued by women's organisations and letters that sought to lobby members of the Oireachtas made full use of principle of equality that was supposed to have been established by the Constitution.[131] Thomas Johnson revived his argument based on the complementary nature of the equal "privileges" and "obligations" of citizenship within Art.3. He felt that jury service was a vital obligation of citizenship and was the corollary of the right to vote.[132] If the government were to interfere with one

124. *Dáil Debates*, Vol. 18, Col. 489, February 15, 1927.
125. *Seanad Debates*, Vol. 8, Col. 786, April 8, 1927.
126. *Seanad Debates*, Vol. 8, Col. 790, April 8, 1927. See also *Seanad Debates*, Vol. 8, Cols 677–78, March 30, 1927.
127. For example see *Dáil Debates*, Vol. 18, Col. 478, February 15, 1927.
128. *Dáil Debates*, Vol. 19, Cols 19–22, March 22, 1927.
129. *Seanad Debates*, Vol. 8, Cols 682–3, March 30, 1927.
130. *Seanad Debates*, Vol. 8, Col. 682, March 30, 1927. See also NAI, Department of the Taoiseach, S5317, letter from A. Spring Rice and M. Cosgrove of the Irish Women Citizens' and Local Government Association, February 18, 1927.
131. NAI, Department of the Taoiseach, S5317, letter from A. Spring Rice and M. Cosgrove of the Irish Women Citizens' and Local Government Association, February 18, 1927 and undated pamphlet issued by the Joint Conference of Women Societies.
132. *Dáil Debates*, Vol. 18, Col. 477, February 15, 1927.

for the sake of administrative convenience could it not do the same with respect to the other? Professor Magennis brought up the drafting of Art.3 in 1922 and claimed that that those who had secured the reference to equal citizenship, which had included himself, had done so in full knowledge that the Sex Disqualification (Removal) Act 1919 would come within the scope of their amended article. He concluded that Art.3 of the Constitution was being dangerously marginalised by restricting jury service to an obligation of male citizenship.[133]

O'Higgins was dismissive of constitutional arguments against the Bill. As far as he was concerned "a few words in a Constitution do not wipe out the difference between the sexes, either physical or mental or temperamental or emotional".[134] He denied that the Constitution placed any duty on the government to weigh out the obligations of citizenship in grammes and impose them with precise equality among all the citizens of the State. O'Higgins relied on advice from the Attorney General and argued that the real meaning of Art.3 of the Constitution was to allow the obligations of citizenship created by law to be imposed on every citizen. In this way, every citizen was equally liable to have the obligations of citizenship imposed upon them. However, when it came to actually imposing these duties the State was not constitutionally bound to impose meticulously equal obligations on all its citizens. O'Higgins argued that if Art.3 was to be interpreted as demanding the imposition of exactly equal obligations on all citizens the State could not confine military conscription to men in the event of a national emergency. O'Higgins believed that the Constitution gave the State the discretion to confine obligations to a particular group of citizens. He refused to concede that an expression of equality of status necessarily demanded identical status among Irish citizens. O'Higgins defended the need to discriminate between the sexes with respect to jury service and added that it was preferable that this be done in the open rather than by subterfuge in a back office.[135]

Once again, Kevin O'Higgins raised his distinction between the "new woman" and the "Victorian woman". Nevertheless, his emphasis fell entirely upon the latter category. He claimed that some 3 per cent of Irishwomen, mostly from middle class Dublin, wished to compel the remaining 97 per cent "who shrink from this duty of jury service and all the strain, - physical, mental and nervous, - that it involves to serve, in order, forsooth, to vindicate this great principle of equality of status".[136] In this way O' Higgins condemned the position taken by opponents of the Bill as being flagrantly undemocratic. O'Higgins took umbrage at accusations that he was acting in an unconstitutional manner. He retaliated by declaring that the position

133. *Dáil Debates*, Vol. 18, Cols 778–79, February 23, 1927.
134. *Dáil Debates*, Vol. 18, Col. 489, February 15, 1927.
135. *Seanad Debates*, Vol. 8, Cols 686–91, March 30, 1927 and Vol. 8, Cols 792–93, April 8, 1927.
136. *Dáil Debates*, Vol. 18, Col. 757, February 23, 1927.

of his opponents breached Art.2 of the Constitution which expressed the paramouncy of popular sovereignty over all the institutions of the State.[137]

O'Higgins undermined his claim that the 1927 Bill was designed to protect "Victorian women" rather than impeding the progress of "new women" when he made clear his lack of enthusiasm for any form of "opt in" scheme for women willing to serve on juries.[138] This scheme was proposed by James Craig, a representative of Trinity College Dublin in the Dáil, in the hope of ameliorating a Bill that he opposed on principle.[139] It may be recalled that an "opt in" scheme had been rejected by the then Attorney General, Hugh Kennedy, in 1924 on the basis that it would not ensure representation of the "average woman".[140] It was opposed by some members of the Oireachtas on the same basis in 1927. Thomas Johnson feared that an undue proportion of morbid women, presumably attracted to the grisly details of criminal cases, would apply.[141] Women's organisations and most of the women in the Oireachtas strongly opposed this compromise scheme. Like O'Higgins, although coming from a different perspective, they felt that if discrimination was to take place it was better that it be done in the open rather than covered by an elaborate subterfuge.[142] When this was pointed out to Craig he withdrew his support from his own amendment.[143] Nevertheless, the "opt in" scheme was eventually incorporated into the Juries Bill 1927. The government seem to have calculated that a sugar coating of this nature would ease the passage of this controversial measure.

One factor that considerably assisted the government in getting this Bill through the Oireachtas was the lack of consensus amongst the opposition as to whether to stick to the "opt out" scheme enshrined in the Juries (Amendment) Act 1924 or to return to the more egalitarian position established in 1919. A significant portion of the opposition favoured the latter approach. This included many representatives who deeply regretted having voted in favour of the 1924 Act that had worked as a Trojan horse in eroding the rights of women in the Irish Free State.[144] However, there were also many who wished to retain the status quo of women enjoying an "opt out" from jury service under the 1924 Act.[145] These persons came under fire from O'Higgins who pointed out that any arguments as to the unconstitutionality of the 1927 Bill would apply with equal force to the provisions of the 1924 Act.[146]

The weakness of the objections to the 1927 Bill on the basis of the 1922 Constitution can be gauged from the fact that many of the arguments were

137. *Seanad Debates*, Vol. 8, Col. 691, March 30, 1927
138. *Dáil Debates*, Vol. 18, Col. 784, February 23, 1927.
139. *Dáil Debates*, Vol. 18, Col. 783, February 23, 1927.
140. *Dáil Debates,* Vol. 6, Cols 2096–97, March 13, 1924.
141. *Dáil Debates*, Vol. 18, Col. 788, February 23, 1927.
142. *Dáil Debates*, Vol. 18, Col. 784, February 23, 1927.
143. *Dáil Debates*, Vol. 19, Cols 26–27, March 22, 1927.
144. For example *Seanad Debates*, Vol. 8, Col. 808, April 8, 1927.
145. For example *Seanad Debates*, Vol. 8, Col. 784, April 8, 1927.
146. *Seanad Debates*, Vol. 8, Cols 791–92, April 8, 1927.

based on the spirit of the Constitution rather than on its wording. Only a few voices in the Oireachtas raised the argument that women in the dock would be denied a trial by a jury that was truly representative of their peers under the scheme envisaged by the 1927 Bill.[147] No person raised the potential argument that Art.72 of the Constitution provided that: "No person shall be tried on any criminal trial without a jury" and that at the time of the Constitution's enactment the word "jury" had meant a body composed of both men and women.

It was widely asserted by opponents of the Juries Act 1927 that its provisions would be found to be unconstitutional on the basis of its discriminatory provisions.[148] These predictions proved to be accurate and the Act was duly found to be unconstitutional in *De Búrca and Anderson v Attorney General*.[149] However, by the time this judgment was given almost half a century had passed and the Constitution of 1922 had given way to another.

CITIZENSHIP

The fundamental weakness of the supposed equality guarantee in the 1922 Constitution is illustrated by its failure to ensure that men and women enjoyed equal treatment in the very context in which it appeared in Art.3. The supposed equality guarantee was contained within a provision that dealt with Irish citizenship. Article 3 did not mention the effect of marriage on the acquisition or termination of Irish citizenship. Nevertheless, it soon became clear that members of the Cumann na nGaedheal administration were opposed to tolerating a position whereby a husband and wife could retain different nationalities. If this "national frontier" between husband and wife were to be avoided it was clear that one of the parties to a marriage would have to surrender their original nationality. It was seen as only natural that this burden should fall upon the wife.

The Cosgrave government never produced a statute that expanded on the provisions of the 1922 Constitution dealing with the acquisition and termination of citizenship. Nevertheless, the position held by Irish ministers had serious consequences that extended far beyond the Irish Free State. It should be recalled that the Irish Free State came into existence as a Dominion of the British Empire. This ensured that Irish citizens were also considered to be British subjects. British subject status was not necessarily incompatible with Irish citizenship. It was seen as an overarching status that was enjoyed in common by citizens of Canada, Australia, the United Kingdom and all the other constituent parts of the British Empire. This common status was regulated by the British Nationality and Status of Aliens Act 1914. Section

147. *Seanad Debates*, Vol. 8, Col. 684, March 30, 1927.
148. For example, see *Seanad Debates*, Vol. 8, Cols 667–71, March 30, 1927.
149. [1976] I.R. 38; (1977) 111 I.L.T.R. 37.

10 of this "Imperial statute" provided that "The wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien".[150] Irish ministers were uneasy at the relationship between Irish citizenship and British subject status and often disputed the applicability of the 1914 Act to the Irish Free State.[151] Nevertheless, the Irish government supported the principle contained within s.10 of the 1914 Act and blocked all efforts to amend it.

By the mid-1920s most of the governments of the self-governing parts of the British Empire recognised the hardships caused by the existing law in relation to the nationality of married women. A woman who married an alien lost her British subject status irrespective of whether or not she was entitled to receive the nationality of her husband. A woman who was separated, divorced or widowed had no automatic entitlement to resume her former status as a British subject. The existing law had caused particular hardship during the First World War when many women of British origin had found themselves treated as "enemy aliens" as a result of their marriage to a citizen of an enemy power.

In 1926 the representatives of all the self-governing parts of the British Empire met in London at an Imperial Conference. One of the items on the agenda was the reform of law relating to the nationality of married women. It was proposed that women should have the right to choose whether or not to keep their status as British subjects on marriage to an alien. This proposal was supported by the governments of the United Kingdom, Canada, Australia and New Zealand. The National Council of Women of Ireland lobbied the Irish delegation to the Imperial Conference on this point. Its representatives noted the support for reform among the other countries represented and expressed the hope that the Irish government "which has already made a name for enlightened legislation, will not be numbered among the reactionaries in this instance".[152] These women were soon to be disappointed.

The Irish delegation made it clear that it could not accept the proposed reforms on the basis that they were inconsistent with the concept of "Christian marriage". Kevin O'Higgins told the Imperial Conference that the Irish were a conservative people and that there was not the same pressure from "Feminist movements" within the Irish Free State.[153] The failure to achieve unanimity ensured that the proposal to reform the law relating to the citizenship of

150. This was a continuation of a position reflected in s.10 of the Naturalisation Act 1870.

151. For example, see NAI, Department of the Taoiseach, S5340, Annex 7, memorandum on nationality and citizenship, undated and UCD Archives, Costello Papers, P190/107, Imperial Conference, Committee on Nationality, November 17, 1926.

152. UCD Archives, McGilligan Papers, P35/132, Story (Honorary Secretary) to Irish Free State delegates to the Imperial Conference, September 9, 1926. These sentiments were echoed by the Irish Women Citizens' and Local Government Association, NAI, Department of the Taoiseach, S2072, Edel MacNaghten to W.T. Cosgrave, August 12, 1926.

153. NAI, Department of Foreign Affairs, 1/20, Imperial Conference 1926, committee on nationality. See also UCD Archives, Blythe Papers, P35/217, Department of

married women came to nothing. It should be noted that the Irish delegation were not alone in opposing change. The Irish received some support in this matter from the Union of South Africa.[154] Kevin O'Higgins also claimed that there were divisions within the British government on this issue, with the Home Office supporting reform and the Foreign Office opposing it.[155] The British made additional efforts to resolve the difficulties associated with the nationality of married women in 1929 and in 1930 but without success. The Irish government remained unenthusiastic about the British proposals. One government memorandum concluded that they were "of very little practical interest".[156] It must be admitted that the Irish were always distracted from these matters by their desire to separate the concepts of Irish citizenship and British subject status. Nevertheless, the actions of the Irish government contributed to a delay in reform that had serious implications for women across the globe.[157]

In 1935 the de Valera administration finally passed legislation that made it clear that Irishwomen would not be deprived of Irish citizenship on the basis of their marriage to an alien.[158] The Irish Nationality and Citizenship Act 1935 also provided a mechanism whereby widows, but not divorcees, who had relinquished their status as Irish citizens upon marriage might have it restored to them.[159] Eamon de Valera must be given credit for recognising the hardships that had previously been endured by women who had lost their original nationality on marriage.[160] He must also be given credit for resisting the arguments of certain members of the former administration who asserted that his reforms were inconsistent with Christian marriage and amounted to a form of "national divorce".[161] This was one issue on which de Valera won the gratitude and admiration of a number of women's organisations.[162] In fact, the new position on the nationality of married women was the culmination of a gradual shift of opinion that slowly became apparent within the Cosgrave

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Justice memorandum, undated and *Dáil Debates*, Vol. 54, Cols 1462–64, December 15, 1934 and Vol. 54, Col. 398, November 28, 1934.

154. NAI, Department of Foreign Affairs, 1/20, Imperial Conference 1926, committee on nationality.
155. NAI, Department of Foreign Affairs, 1/20, Imperial Conference 1926, committee on nationality.
156. NAI, Department of the Taoiseach, S5340, Annex 7, Department of Justice memorandum on nationality and citizenship for the Conference on the Operation of Dominion Legislation undated, 1929.
157. The British finally moved to remedy the difficulties associated with the nationality of married women with the enactment of the British Nationality and Status of Aliens Act 1933.
158. Irish Nationality and Citizenship Act 1935, s.15.
159. Irish Nationality and Citizenship Act 1935, s.14. De Valera declined to extend this provision to divorcees. *Dáil Debates*, Vol. 54, Col. 1460, December 15, 1934.
160. *Dáil Debates*, Vol. 54, Cols 1467–71, December 15, 1934.
161. *Dáil Debates*, Vol. 54, Cols 1445 and 1461–66, November 28, 1934.
162. NAI, Department of Foreign Affairs, 1/20 Alice Paul to John J. Hearne, October 31, 1932.

and de Valera governments in the early 1930s. I have found no evidence that this shift of opinion was in any way influenced by the supposed equality guarantee in Art.3 of the Free State Constitution.

The new position with respect to married women did not mean that Irish citizenship law recognised complete equality between the sexes. For example, the Irish Nationality and Citizenship Act 1935 provided that the citizenship of children born outside the State could only be transmitted through the father.[163] In 1935 De Valera believed that equal treatment in this area would lead to "confusion".[164] De Valera would alter his stance on this issue in the 1950s and sought to amend Irish law in order to allow citizenship to be transmitted by either parent.[165] This principle was eventually enshrined in law by the Costello administration in s.6 of the Irish Nationality and Citizenship Act 1956. Nevertheless, these events occurred long after the demise of the 1922 Constitution. Although Art.3 of the 1922 Constitution made reference to persons enjoying the privileges of citizenship without distinction of sex it proved ineffective in translating this aspiration into reality.

THE CONDITIONS OF EMPLOYMENT ACT 1936

In 1932 the Cumann na nGaedheal government that had been responsible for the creation of the 1922 Constitution lost power and was replaced by a new Fianna Fáil administration led by Eamon de Valera. The new government differed from its predecessor in that it was willing to subordinate free trade principles to the need to tackle the State's chronic unemployment figures. It also proved more willing to regulate the small sector of industrial production that existed within the Irish Free State in order to maximise forms of employment that were considered to be socially desirable and minimise those that were not. This goal was reflected in an ambitious piece of legislation known as the Conditions of Employment Act 1936.

Although many provisions of 1936 Act caused unrest in the Oireachtas none caused more controversy than s.16. This provision gave the Minister for Industry and Commerce the power, after consulting various interested parties, to totally prohibit the employment of female workers in a particular type of industrial work or to fix the proportion of female workers who could be employed in a specific industry. According to Seán Lemass, then Minister for Industry and Commerce, the purpose of this section was twofold. First, it sought to exclude women from areas of work considered to be unsuitable for them. In this respect the government claimed to be following in the benign tradition of the Factories Acts of the nineteenth century and such measures as the Employment of Women, Young Persons and Children Act 1920. It also claimed that the principles behind s.16 were entirely consistent with

163. Irish Nationality and Citizenship Act 1935 s.2.
164. *Dáil Debates*, Vol. 54, Col. 1474, December 15, 1934.
165. NAI, Department of the Taoiseach, S15579A, handwritten notes of September 26 and 28, 1953.

those espoused around the world by the International Labour Organisation based in Geneva.[166] These aspirations were applauded by one Senator who described a trip to Sweden where he had seen, to his great dismay, women carrying deals, stoking ships, acting as dock labourers and even working as miners. He concluded his description of this vision of horror by asking "do the feminists want that to come about in holy Ireland?"[167] Another Senator expressed his support for this aspect of s.16 on the grounds that physically demanding forms of industrial work made women coarse and reduced their level of physical attractiveness.[168]

The second purpose of s.16 was to combat the trend of replacing male industrial workers with cheaper female workers. It is clear from government memoranda that this was the primary reason for introducing the provision. Seán Lemass privately raised concern as to the high proportion of women, sometimes as high as 90 per cent, employed in the manufacturing of clothing, confectionary and tobacco products. He noted that traditionally male dominated industries such as heavy engineering, mining and steel manufacturing were largely absent from the Irish Free State. Lemass believed that the trend that favoured female workers would increase over time. This convinced him that certain industries would have to be reserved for men if employment was to be balanced in the Irish Free State.[169] The government openly expressed concern at the effects that long term unemployment was having on large numbers of men. Lemass claimed that s.16 was necessary to avoid the Irish Free State from following the example of Derry where the men reputedly looked after the children while the women earned the daily bread.[170]

The government was forced to respond to protests from women's organisations, in particular the Irish Women's Workers Union. Seán Lemass gave assurances that s.16 of the Bill was not aimed at removing women who were currently working in industry. Instead, it was intended to retain as many men as possible within the industrial sector. The government noted that men entered industry with the expectation of a long-term career on which they would ultimately have to support a family. It was argued that most female industrial workers were single and were "birds of passage" who usually retired on marriage.[171] In addition, many in the Oireachtas condemned female industrial labour on the grounds that it was largely exploitative. Oliver St. John Gogarty went so far as to speak of women falling into the hands of Jewish moneylenders or even prostitution because the expense of keeping up their appearance was more than their meagre wages could

166. *Dáil Debates*, Vol. 57, Cols 1076–77, June 26, 1935.
167. *Seanad Debates*, Vol. 20, Col. 1261, November 27, 1935.
168. *Seanad Debates*, Vol. 20, Col. 1413, December 12, 1935.
169. NAI, Department of the Taoiseach, S6462, Amendment of Factories and Workshop Acts 1901-1920, undated.
170. *Dáil Debates*, Vol. 56, Cols 1282–83, May 17, 1935.
171. *Dáil Debates*, Vol. 57, Col. 1207, June 27, 1935.

support.[172] Lemass denied that s.16 of the Bill involved a gender issue at all. He argued that it sought to restrain ruthless employers from replacing higher paid workers with lower paid workers. Once again it was argued that the women's organisations who opposed s.16 were not truly representative of Irishwomen.[173] Supporters of the Bill argued that a majority of women in the trade unions had no objection to it.[174] It is impossible to verify this claim. In any case, it was scarcely considered that many women involved in industrial work were not members of trade unions.

The significant level of support for the Conditions of Employment Bill among the trade unions ensured that the opposition lacked vocal support from the Labour Party on this occasion. Fine Gael did, however, oppose s.16 on the ground that it gave the government excessive powers to interfere with the industrial sector. Fine Gael also argued, as a secondary consideration, that this provision gave the government excessive powers to interfere with the rights of women. As on previous occasions Senator Wyse-Power was at the forefront of the opposition to this challenge to the position of women in the Irish Free State. She condemned the Bill as a blatantly discriminatory measure that was aimed at the daughters of the poorest class.[175] She was joined by Kathleen Clarke who feared that the precedent set by this Bill with respect to women in the industrial sector could one day be expanded into the middle class commercial and professional fields.[176] The opposition to this aspect of the Bill both within and outside of the Oireachtas questioned the necessity of sacrificing female labour in order to avoid the erosion of wages. It was argued that this could be avoided by ensuring that women received equal pay for equal work in industry as their male counterparts.[177] This argument was rejected by Seán Lemass who seemed to assume that such a policy would only result in the reduction of men's wages rather than any improvement with respect to women.[178]

Opponents of s.16 also claimed that it drove a coach and four through the terms of the Constitution.[179] Robert Rowlette TD told that Dáil that,

> "It is inherent in our Constitution that women should have the same freedom of action in this country as the male citizens, and that they should be free to undertake any form of activity such as the male citizens are free to undertake".[180]

Others based their argument on the references to "privileges" and

172. *Seanad Debates*, Vol. 20, Col. 1411, December 12, 1935.
173. For example, see *Seanad Debates*, Vol. 20, Col. 1418, December 12, 1935.
174. *Seanad Debates*, Vol. 20, Col. 1424, December 12, 1935.
175. *Seanad Debates*, Vol. 20, Col. 1399, December 11, 1935.
176. *Seanad Debates*, Vol. 20, Col. 1258, November 27, 1935.
177. *Seanad Debates*, Vol. 20, Cols 1416–17 and 1422, December 12, 1935.
178. *Seanad Debates*, Vol. 20, Cols 1422–23, December 12, 1935.
179. *Seanad Debates*, Vol. 20, Col. 1417, December 12, 1935.
180. *Dáil Debates*, Vol. 57, Col. 1212, June 27, 1935.

"obligations" within the wording of Art.3. They claimed that on this occasion women were being held to the same obligations but were being deprived of the same privileges enjoyed by men. Once again the weakness of their position was betrayed by the ease with which their arguments were rejected. Seán Lemass argued that s.16 of the Conditions of Employment Bill reflected matters of economic necessity and did not involve matters of constitutional principle. He expressed the opinion that there was no more a denial of equal rights under s.16 than in a local authority specifying that only local labour was to be employed in giving out a construction contract.[181] Once again the "national question" hampered the efforts of those who opposed a measure seen as threatening the position of women in the Irish Free State. Those who had opposed the Treaty, and by extension the Constitution, during the civil war preferred to base their objections on the wording of the 1916 proclamation rather than on that of the 1922 Constitution.[182] As on previous occasions, Senator Wyse-Power objected to the Conditions of Employment Bill on the grounds that it was a betrayal of the contribution of women to the Anglo-Irish conflict of 1919 to 1921. She claimed that during that time many young women workers who had lost their jobs as a result of that conflict. She added that:

> "… [T]hese young girls kept constantly assuring me: 'When our own men are in power, we shall have equal rights'. They believed that. It may have been due to their lack of experience, but it was part of their faith. I do not know how they feel now."[183]

The Bill, including s.16, was enacted as the Conditions of Employment Act 1936. It was enacted a year before the publication of the text of de Valera's own Constitution. The frequency with which the Conditions of Employment Act was mentioned in public debates on the draft suggests that it had a significant impact on the poor reception given to the 1937 Constitution by many women's organisations. Many seemed to fear that the 1936 Act presaged an era of widespread discrimination against women that would not be restrained by the new Constitution. Few seemed to notice that the 1922 Constitution had also proved to be impotent in this respect.

CONCLUSIONS

Some months after the passage of the Conditions of Employment Act 1936 Eamon de Valera began to frame the draft that would eventually replace the Constitution of 1922. Unlike the position in 1922, there were women in the Oireachtas who could contribute to the debate on the new Constitution.

181. *Seanad Debates*, Vol. 20, Col. 1423, December 12, 1935.
182. For example, see *Seanad Debates*, Vol. 20, Col. 1398, December 12, 1935.
183. *Seanad Debates*, Vol. 20, Col. 1248, November 27, 1935.

Yvonne Scannell has labelled these women as the "Silent Sisters".[184] They had little impact on the debates on the 1937 Constitution and did not make any significant intervention with respect to those provisions that made direct reference to women. These included the provisions of Art.41.2.1° relating to life in the home that were the cause of so much controversy in 1937 and beyond. The Conditions of Employment Act 1936 provided a direct precedent for the declaration in Art.45.4.2° that "citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength". The original draft of this clause had actually referred to the "inadequate strength of women" before it was amended in the face of negative reaction in the Dáil.[185]

On December 29, 1937 the new Constitution came into force and the Constitution of the Irish Free State of 1922 passed into the realm of legal history. Given the benefit of hindsight, what conclusions can be drawn as to the impact of the 1922 Constitution on the position of women? It should be noted for the sake of balance that some legislation that was beneficial to the rights of women was passed between 1922 and 1937. This included the Local Government (Extension of Franchise) Act 1935 and some aspects of the Irish Nationality and Citizenship Act 1935. The greatest impact of the 1922 Constitution on the position of women was, without a doubt, the granting of equal suffrage and equal rights to sit in the Oireachtas. Yet it should be re-iterated that by enshrining these rights in the text of the Constitution the provisional government was doing little more than fulfilling commitments that had been made at the outset of the struggle for independence. The constitution committee subsequently attempted to insert a provision that could have been used to achieve equal rights beyond these limited spheres. As seen earlier, this attempt was circumscribed by drastic amendments to Art.3 by a group of men who described themselves as "the most conservative-minded revolutionaries that ever put through a successful revolution".[186] Such was the extent of the dilution of the original equality provision that none of the textbooks written on the 1922 Constitution, including the celebrated volume written by Leo Kohn, make any reference to the desiccated remains that were left in the final wording of Art.3.

Successive Irish governments were well aware of the limitations of Art.3 but made no effort to enlighten the public on this matter. A committee charged with reviewing the Constitution in 1926 examined the question as to whether Art.3 could prevent women from being expressly excluded from civil service examinations. The committee concluded that "This contention would give an extraordinarily wide meaning to the expression 'privileges of citizenship'".[187] When the Attorney General reviewed this same question in

184. Yvonne Scannell, "The Constitution and the Role of Women" in Brian Farrell (ed.) *De Valera's Constitution and ours* (Dublin: Goldenbridge, 1988), pp.123–36.
185. *Dáil Debates*, Vol. 68, Col. 242, June 9, 1937.
186. Per Kevin O'Higgins at *Dáil Debates*, Vol. 2, Col. 1909, March 1, 1923.
187. NAI, Department of the Taoiseach, S5973/3, extract from memo furnished to the constitution committee by the President's Department, March 13, 1926.

1924 he was unable to see how Art.3 had any relevance to this question at all.[188] One civil servant noted how Art.3 had been misconstrued by advocates of the rights of women. He proposed that there should be some form of clarification of the meaning of the phrase "enjoy the privileges and be subject to the obligations of such citizenship".[189] The government wisely declined to disillusion the citizens of the new State.

There can be little doubt that the 1922 Constitution, and Art.3 in particular, proved weak and ineffectual in protecting the vision of equal rights reflected in the drafts produced by the constitution committee. Yet a strange sense of amnesia emerged soon after the enactment of the 1922 Constitution as to these obvious failings. This was apparent throughout the lifetime of the 1922 Constitution but became more pronounced as its demise approached in 1937. In that year women's organisations made an unfavourable comparison between the provisions of Eamon de Valera's draft Constitution and Art.3 of the 1922 Constitution. The National University Women Graduates' Association passed a resolution that presented the 1922 Constitution as a document reflecting principles of "equal rights and opportunities". This was contrasted to the draft Constitution of 1937 which was presented as a "sinister and retrogressive" measure.[190]

The debates on the new Constitution allowed a number of individuals to point out the failings of Art.3 of its predecessor. Frank MacDermott drew the attention of the Dáil to the limited context in which the supposed equality guarantee appeared within the text of Art.3.[191] He challenged Patrick McGilligan, who had served as Minister for Industry and Commerce and Minister for External Affairs in the previous administration, to provide a single example of a discriminatory law that would be tolerated under the new Constitution that would not have been tolerated under its predecessor.[192] McGilligan was unable to provide any convincing examples. Frank Aiken, the Minister for Defence, reminded members of Fine Gael that Art.3 had not prevented the enactment of the discriminatory provisions within the Civil Service Regulation (Amendment) Act 1926.[193]

The remarks made by MacDermott and Aiken had little impact on the praise being heaped on Art.3 during the debates on the 1937 Constitution. Professor John Marcus O'Sullivan, a Professor of Modern History at University College Dublin and Minister for Education between 1927 and 1932, praised Art.3 as the "constitutional bulwark of women's rights" and

188. UCD Archives, Blythe Papers, P24/211, John O'Byrne, Attorney General to Mr Boland, Department of Finance, December 15, 1924.
189. UCD Archives, Blythe Papers, P24/211, W. Doolin to Minister for Finance, January 20, 1926.
190. *Irish Times*, May 11, 1937.
191. *Dáil Debates*, Vol. 68, Cols 172–73, June 9, 1937.
192. *Dáil Debates*, Vol. 68, Cols 180–81, June 9, 1937.
193. *Dáil Debates*, Vol. 67, Col.333, May 12, 1937. See also the remarks of Helena Concannon at *Dáil Debates*, Vol. 67, Cols 246–47, May 12, 1937.

the "guardian of their rights and privileges".[194] Mary S. Kettle, chairman of the Joint Committee of Women's Societies, wrote that "women have been accustomed to regard Art.3 of the Constitution as the charter of their liberties".[195] This praise was not limited to the frontiers of the Irish Free State. A British women's association known as the "Open Door Council" contrasted certain undesirable aspects of the draft Constitution with the "excellent status for women" laid down in the 1916 proclamation and in the Constitution of the Irish Free State.[196] Another British association called the "Six Point Group" noted that,

> "When the I.F.S. adopted her 1923 Constitution [sic] women felt elated at the recognition of the equality of men and women in Art.3".[197]

Even persons who had once criticized Art.3 seemed to have changed their minds. In 1922 Hannah Sheehy-Skeffington dismissed the original, and far more extensive, equality guarantee in the draft version of Art.3 as a "meagre sentence".[198] In 1937 she was prepared to offer qualified praise to the much diluted version of Art.3. She stated that,

> "As far as women were concerned it carried out, if more formally and not quite so wholeheartedly, the intention of the 1916 proclamation".[199]

When a deputation of women representing a broad swathe of women's organisations met with de Valera in early 1937 they based their representations on Art.3 of the Constitution which, in their view, "guaranteed to women equality of status with men in regard to all the privileges of citizenship".[200] In the months that followed numerous women's organisations followed this trend and placed a great deal of emphasis on Art.3. Many of them, including the National Council of Women of Ireland, the Irish Women Citizens' and Local Government Association and the National University Women Graduates Association, demanded that Art.3 be retained in the new Constitution.[201]

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194. *Dáil Debates,* Vol. 67, Cols 221–22, May 12, 1937.
195. *Irish Press*, May 11, 1937.
196. NAI, Department of the Taoiseach, S9880, Winifred Lesueur, Secretary of the Open Door Council to President, May 26, 1937.
197. NAI, Department of the Taoiseach, S9880, B. Archdale, Chairman of the Six Point Group to President, June 14, 1937.
198. *The Freeman's Journal,* October 2, 1922.
199. Margaret Ward (ed.), *In Their Own Voice, Women and Irish Nationalism* (Cork: Attic Press, 2001), p.184.
200. NAI, Department of the Taoiseach, S9278, memorandum on meeting with deputation from the Joint Committee of Women's Societies and Social Workers, January 30, 1937.
201. NAI, Department of the Taoiseach, S9880, Honorary Secretary of the National

A number of reasons might be submitted to explain this general sense of amnesia with respect to the record of the 1922 Constitution in relation to the rights of women. The most obvious of these seems to lie in the perceived value in making use of the 1922 Constitution as a foil to be used against its more controversial successor. It might be argued that much of the eulogy for the 1922 Constitution was based on what it did not say rather than on what it did. The 1922 Constitution did not attempt to stereotype the place of women in society. It did not speak of life or duties within the home. It did not speak of preventing people from entering avocations unsuited to their sex, age and strength. These considerations, together with a general failure of memory with respect to the drafting of Art.3, seem to have had a considerable impact on the general perception of the 1922 Constitution with respect to women.

Notwithstanding the apparent distortion of memory with respect to the 1922 Constitution, it is difficult to deny that its creation represented an important juncture with respect to the rights of women in Ireland. The merits or otherwise of historians meditating upon lost opportunities or "what might have been" are open to dispute. Nevertheless, it should be remembered that in 1922 the limbs of the embryonic State were still supple. Given the strength of feminist sympathy in the years building up to the creation of the State it represented a unique opportunity for change. The granting of full adult suffrage in advance of many European neighbours was a source of considerable national pride in 1922. Such sentiments might have provided the bedrock for more substantial legislative change. It is worth noting that in 1922 the administration that brought the State into existence admitted that the body of law inherited from the British was in need of reform with respect to its treatment of women. Yet in spite of such idealism it expressed a preference to leave such reforms to a more propitious yet indefinite time in the future. Such procrastination ensured that substantial legislative change did not occur for many decades and allowed numerous pieces of retrogressive legislation to appear on the statute books during the intervening period.

Had the provision drafted by the constitution committee entered the final text of the 1922 Constitution intact, it would have represented one of the most advanced expressions of gender equality in any Constitution of the time. The Irish Free State would have come into existence at the vanguard of progress towards gender equality. How effectively the application of such a constitutional guarantee would have operated when confronted with a largely conservative legislature and judiciary is open to speculation. What is more certain is that if such a provision had formed part of the 1922 Constitution it would have been extremely difficult for Eamon de Valera to have refused to replicate it in his own Constitution. An effective gender equality provision in the 1937 Constitution would have formed an important counterweight to

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Women Graduates Association to President, May 11, 1937; Honorary Secretary of the Irish Women Citizens' and Local Government Association to President, May 20, 1937 and *Irish Press*, May 11, 1937.

any expressions of social policy that might have caused offence. As events transpired, the 1937 Constitution came into force with an equality provision in Art.40.1 whose performance to date has proved to be less than impressive. However, as this paper has attempted to illustrate, any examination of the position of women under Irish law should look beyond the provisions of the current Constitution. If many Irish women were disappointed with the fruits of independence it must be conceded that the roots of failure extend to the very foundations of the State.

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