

CHANGED UTTERLY? CONTINUITY AND CHANGE IN THE REGULATION  
OF IRISH IDENTITIES

by

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LL.B., Queen's University of Belfast, 2003

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

THE UNIVERSITY OF BRITISH COLUMBIA

November 2006

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## ABSTRACT

The Supreme Court decision of *A.O. & D.L. v. Minister for Justice [Lobe]* and the Irish Citizenship Referendum of 2004 had the cumulative effect of restricting both the rights associated with Irish citizenship and the class of persons entitled to possess it. This thesis considers the dynamics underpinning those restrictions.

The history of the regulation of Irish identities is not simply a story of ever tightening border controls. The Nineteenth Amendment to the Constitution of Ireland in 1998 seemingly widened the class of person entitled to call themselves Irish. Moreover, the Republic of Ireland's membership of the European Union has reduced the state's ability to exercise control over its borders and narrowed the distinction between Irish citizens and those of other EU countries.

I argue that recent developments in the regulation of Irish identities demonstrate the Janus-like nature of modern law. Accepting the arguments advanced in *Lobe* and the Citizenship Referendum necessitates the embrace of contradiction, not rationality. They illustrate both continuity and change in the conception of what it means to be Irish. Measures to reduce perceived "abuse" of Irish citizenship seek to preserve a particular concept of Irishness and yet simultaneously serve to transform it. However, with its adherence to the creed of modernity – reason, objectivity, and the rejection of ambiguity – modern law cannot acknowledge these tensions.

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## ACKNOWLEDGMENTS

I would like to thank my supervisor Dr. Catherine Dauvergne and second reader Dr. Ljiljana Biukovic for their support and enthusiasm - despite many missed deadlines - throughout my time at the University of British Columbia. I owe a huge debt to the Faculty of Law in general, and in particular to Professors Susan Boyd, Gordon Christie, Michelle LeBaron, Wes Pue and Steve Wexler, all of whom I had the pleasure of studying under. I would like to thank Professors Margaret Hall and Doug Harris for whom I worked as a Teaching Assistant for two years and Professor Ian Townsend-Gault who provided moral (and vehicular) support on many occasions. I would also like to thank the Administrator of the Graduate Law Program, Joanne Chung for all her help during my time in Vancouver.

I must extend thanks to my friends and family for their encouragement to apply to UBC. In particular I would like to thank my mum, dad, brother Johnny, auntie Ethne, Vicky Conway, Miriam Crozier and Gareth Mulvenna. I would like to thank all my friends in Vancouver for contributing to a wonderful chapter in my life. In particular, the students of the Graduate Law Program, Cindy Baldassi, Jessica Otte, Kevin Park and Robert Russo.

I would also wish to thank Eileen Fegan, George Pavlakos and Rory O'Connell at Queen's University Belfast for providing me with the references to undertake graduate study and to Siobhan Mullally whose generous decision to allow me to read early transcripts of her work was invaluable to my own study.

## CHAPTER ONE

### 1.1 Introduction

In the last decade, the regulation of Irish citizenship has become more restrictive. In *A.O. & D.L. v. Minister for Justice [Lobe]*,<sup>1</sup> the Supreme Court upheld an appeal against a change in policy by the office of the Minister for Justice, Equality and Law Reform to assert tighter control of Irish borders. It held that refusing to let the non-national parents of a dependent child-citizen remain in the state did not violate the rights of that citizen. Following the 1990 case of *Fajjonu v. Minister for Justice*,<sup>2</sup> the Republic of Ireland had allowed non-nationals with dependent citizen children to remain in the state. *Fajjonu* ruled that child citizens had a *prima facie* right to reside in Ireland with their non-national parents, subject to the exigencies of the public good.<sup>3</sup> In *Lobe*, the Supreme Court held that the state had the right to deport the non-national parents of Irish child citizens, even if that meant that, as a consequence, the children would have to leave the state.

The second restriction was effected by the approval of the Twenty-Seventh Amendment to the Constitution of Ireland, and subsequent introduction of the *Irish Nationality and Citizenship Act 2004* [the 2004 Act].<sup>4</sup> The Twenty-Seventh Amendment was billed as a “Citizenship Referendum.” It was portrayed as a

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<sup>1</sup> *A.O. & D.L. v. Minister for Justice*, [2003] 1 IR 3 [*Lobe*].

<sup>2</sup> *Fajjonu v. Minister for Justice*, [1990] 2 IR 151 [*Fajjonu*].

<sup>3</sup> *Ibid.* at 162.

<sup>4</sup> *Irish National and Citizenship Act 2004* (I.) 2004, c.38.

necessary precursor to the introduction of legislation to restrict entitlement to Irish citizenship through birth – a right previously enjoyed by anyone born in the island of Ireland.<sup>5</sup> The Government claimed that Article 2 of the Constitution of Ireland had raised the entitlement to Irish citizenship through birth to a constitutional right.<sup>6</sup>

This study considers why the Republic of Ireland restricted both the class of persons entitled to claim Irish citizenship and the rights associated with possessing it. Others have already claimed that the decision in *Lobe* and the restrictions introduced by the *2004 Act* are indicative of social change in Ireland. I agree with them, however, I argue the restrictions do not signal a fundamental change either in the regulation of Irish citizenship or the dominant national narrative of the Republic of Ireland. I examine the continuities as well as the changes between the regulation of Irish citizenship before and after the recent developments. Moreover, *Lobe* and the Citizenship Referendum cannot be characterized as simply part of an increasingly restrictive border control campaign. The European Union [EU] has to some extent curtailed its member states' ability to exert control over their national borders, at least in the case of EU nationals, and reduced the distinctions between citizens of different member states.

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<sup>5</sup> Article 9.2.1 of the Constitution of Ireland 1937 now states "Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law. The provision is limited to those born after it was enacted by Article 9.2.2.

## 1.2 The Restriction of Citizenship: A Wider Context

The decision of the Supreme Court in *Lobe* was in many ways unremarkable. Whilst the factual scenario which led to the *Lobe* case is rare in a European context, this is indicative of how anomalous citizenship laws in the Republic of Ireland were prior to 2005. The Republic of Ireland was the only EU state to award citizenship to persons simply because they were born within a prescribed jurisdiction. The rarity of such a scenario in a European context makes a comparison with *Lobe* difficult. However, outside the EU, among states which award citizenship on the basis of a person's place of birth, the right of the state to control non-nationals within its borders is typically privileged over the right of the child citizen to remain in the state.<sup>7</sup>

Considered on an international level, the Irish Supreme Court decision in *Lobe* cannot be seen as particularly harsh either. The decision stressed that the Irish children were not being deported. Rather, their leaving the state was an indirect consequence of the deportation of their non-national parents. The Supreme Court stated that the children had the right to return to the state when they ceased to be dependent upon their parents.<sup>8</sup> The rights of the Irish child-citizen in the wake of *Lobe* compare favourably with British citizens born to non-national parents. Caroline Sawyer points

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<sup>6</sup> "Citizenship Referendum: The Government's Proposals," online: Department of Justice, Equality and Law Reform <[http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ5ZJF5C-en/\\$File/Govtproposals.pdf](http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ5ZJF5C-en/$File/Govtproposals.pdf)>.

<sup>7</sup> Siobhan Mullally, "Citizenship and Family Life in Ireland: Asking the question 'who belongs?'" (2005) 25(4) *Legal Studies* 578 at 593.

<sup>8</sup> *Lobe*, *supra* note 1 at 75, Murray J.



out that a British citizen has no right against expulsion, either in domestic or European law.<sup>9</sup>

Indeed, it is because the recent restrictions enacted by the Republic of Ireland in regard to citizenship law are common-place throughout the world that they are interesting. I argue that measured against the values modern law purports to uphold, the current Irish citizenship regime is unjust. In *Lobe*, the Supreme Court drew a distinction between the rights enjoyed by children born to non-national parents and those born of Irish citizens; as such, it is difficult to see all citizens as equal before the law. During the Citizenship Referendum, the restriction of entitlement to Irish citizenship was justified by depicting non-nationals with Irish children as lazy, workshy, selfish parents by virtue of their non-Western cultural background. The use of such rhetoric to describe an entire class of persons is again contrary to the values of equality that law claims to promote.

Many of the difficulties with the current regime were present, albeit less conspicuously so, under its predecessor, the *Irish Nationality and Citizenship Act, 1956* [the *1956 Act*].<sup>10</sup> The category of persons entitled to Irish citizenship under the *1956 Act* was very broad. It allowed anyone born in the island of Ireland to become an Irish citizen by virtue of the place of their birth.<sup>11</sup> The class of persons able to claim citizenship was widened further by allowing those of Irish ancestry to claim

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<sup>9</sup> Caroline Sawyer, "Not Every Child Matters: The UK's Expulsion of British Citizens" (2006) 14 Int'l J. Child. Rts. 157 at 160.

<sup>10</sup> *Irish Nationality and Citizenship Act 1956* (I.) 1956, c.26.

<sup>11</sup> *Ibid.* s.6(1)

citizenship regardless of where they were born.<sup>12</sup> Granting a person citizenship on the grounds of their place of birth or lineage does not, of itself, seem unjust. However, as international migration becomes more common and the defence of national borders more fierce, the shortcomings of determining the right to membership of a political community in this way are exposed.

Despite the seemingly generous definition of Irish citizenship provided by the *1956 Act*, it was unable to deal with many of the more complex claims to belong to a national community. Irish citizenship law prior to the introduction of the *2004 Act* entitled a larger class of persons to claim Irish citizenship than it does today. However, it was not demonstrably fairer. Both regimes entitled the citizen to rights denied to the non-citizen and distinguished the citizen from the non-citizen on narrow and arbitrary criteria.

### 1.3 Citizenship, Sovereignty and the Nation

Establishing criteria to determine who is a citizen poses a dilemma for modern law. Modern law purports to cherish values such as equality, objectivity and rationality, and yet for the majority of persons within a state, the criteria used to determine their status is not the strength of their claim to be part of that community, but whether they were born in the right place or to the right person. However, the difficulty in reconciling citizenship with the tenets of modernity in no way detracts from the important role that it plays in sustaining modern law. Citizenship is central to the

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<sup>12</sup> *Ibid.* s.6(2)

law's claim to legitimacy in the exercise of power.<sup>13</sup> In liberal democracies, law typically derives its authority from a claim to act in the name of its citizens. For example, the Constitution of Ireland states that it was enacted and adopted by and for the people of Ireland.<sup>14</sup> Furthermore, the concept of equality before the law demands that one be able to know what the law is. The bordered nation serves to provide the location for the law.

*Lobe* and the Citizenship Referendum serve to illustrate a paradox that challenges the premises underpinning modern law. It may not be possible to allocate and enforce the rights associated with citizenship in a manner consistent with the values modern law purports to stand. The arbitrary distinction between citizen and non-citizen appears to be both necessary for the existence of modern law and irreconcilable with the principles for which it purports to stand.

#### 1.4 Why Examine *Lobe* and the Citizenship Referendum Together?

I feel it is appropriate to consider *Lobe* and the Citizenship Referendum together because they each consider the issues of citizenship law, migration law and border control. The opinions of the Irish Supreme Court Justices and the debate surrounding the Citizenship Referendum both explore the extent to which the status of citizen bestows legitimacy upon a claim to group membership. Both illustrate the difficulty

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<sup>13</sup> For a general introduction to contract theories of the state see Richard Tuck, "Thomas Hobbes: the skeptical state" and John Dunn, "John Locke: the politics of trust" in Brian Redhead ed., *Plato to Nato: Studies in Political Thought* (Penguin Books, 1995).

<sup>14</sup> Preamble to the Constitution of Ireland 1937.

modern law has in reconciling the values it purports to espouse with its claim to exert legitimate control over the national territory. They are linked by concerns about the legitimacy and enforceability of state sovereignty.

Having argued that it is appropriate to consider *Lobe* and the Citizenship Referendum together, it is important to acknowledge that each addresses different aspects of the debate surrounding the legitimacy of state sovereignty. *Lobe* considered the rights that could be invoked on behalf of a child-citizen born to non-national parents. The Supreme Court was asked to determine whether a child-citizen had an absolute right to remain in the state and whether the rights of the family, recognized in the Constitution of Ireland as “superior to all positive law,”<sup>15</sup> included the right of a child citizen to the care and company of its parents in the state. The Citizenship Referendum addressed the issue of who should be entitled to the legal status of Irish citizen. In it, the Irish Government asked the people to approve a proposal affirming the right of the Irish Parliament [Oireachtas] to enact legislation restricting the application of the *jus soli* principle. With the approval of the proposal, the “default” position in Irish citizenship law changed from one in which citizenship was granted to anyone born in Ireland to excluding them unless certain criteria were met. In the wake of the Citizenship Referendum, the Irish Government passed the *2004 Act*. Today, save for a few statutory exceptions, Irish citizenship is now only be bestowed upon those who, at the time of their birth, had at least one parent who was, or was entitled to become, an Irish citizen.<sup>16</sup>

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<sup>15</sup> Constitution of Ireland Article 41.1.1.

<sup>16</sup> The criteria are set out in s.6 of the *1956 Act* as amended by s.3 of the *2004 Act*.

### 1.5 The Citizenship Referendum: A Party Political Issue?

The Citizenship Referendum was held on 11 June 2004, the same day as local and European elections. The Government announced that doing so would maximize voter turnout and ensure that it was not just those with strong opinions regarding immigration who participated in the referendum.<sup>17</sup> A number of opposition parties questioned the motives underpinning the Government's choice of date. On 12 March 2004, Enda Kenny, the leader of the largest opposition party, Fine Gael, warned that holding a referendum on such a sensitive issue during an election campaign risked feeding racism.<sup>18</sup> Pat Rabbitte, leader of the Labour Party was more explicit, announcing "it makes my stomach sick to see [Mary Harney, Progressive Democrat leader] lend her party as a cover to Fianna Fáil in a transparent ploy to exploit the immigration issue in an election atmosphere."<sup>19</sup> The Green Party leader, Trevor Sargent stated, "This is all about political opportunism and the forthcoming elections."<sup>20</sup>

I do not believe it is particularly accurate or illuminating to view the Citizenship Referendum as a party political issue. In a 1996 study, "Ireland: the Referendum as a Conservative Device?" Michael Gallagher examined the character of referenda in the Republic of Ireland.<sup>21</sup> Whilst Gallagher's study pre-dates the Citizenship

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> "Citizenship referendum sparks furore" Editorial, *Irish Times* (8 April 8 2004).

<sup>20</sup> Senan Molony, "Green Party attacks the 'opportunism of coalitions citizen vote,'" *Irish Independent* (17 May 2004).

<sup>21</sup> Michael Gallagher, "Ireland, the Referendum as a Conservative Device?" in Michael Gallagher and Pier Vincenzo Uleri ed., *The Referendum Experience in Europe* (Basingstoke, 1996) 86.

Referendum, it serves to contextualize it. It does not support the claim that the Citizenship Referendum was held for reasons of political opportunism or the Government parties exploiting the issue of immigration. Gallagher contends that since the implementation of the Constitution of Ireland in 1937, each referendum can be grouped into one of four issue areas: "institutional," "European," "moral" and "technical." He suggests the nature of referendum campaigns in Ireland depend upon two key factors: the extent to which the issue corresponds to the structure of the Irish party system and the salience of the issue in the eyes of the public.<sup>22</sup> He argues that only a small number of referenda have been fought along the lines drawn by traditional party divisions. He states this is due in part to the unique party structure in Ireland; there is very little policy difference between the two largest political parties, Fianna Fáil and Fine Gael. Additionally, referenda in the Republic of Ireland tend to occur on issues of constitutional significance rather than economic matters in which a left-wing or right-wing position can be taken.

Gallagher argues that Irish referendum campaigns typically take on one of four types. Firstly, quasi-elections in which the issue is fought along party lines and the electorate is interested in the issue. Secondly, referenda in which the electorate is interested but the argument is conducted along ambiguous party lines; some parties, but not all, have an official stance. Thirdly, referenda in which the issue matters to voters but either all parties endorse the proposal or the referendum is fought along "divided party" lines. Fourthly, there are referenda where the party line is indifferent;

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<sup>22</sup> *Ibid.*

party stance makes little impact upon the vote because the public is uninterested in the issue.

Examining the Citizenship Referendum through the lens provided by Gallagher, it appears to fit most comfortably into the second category of referendum. Turnout was high; indicating that the electorate was interested in the issue. The Government coalition of Fianna Fáil and the Progressive Democrats advocated a “Yes” vote. A number of parties - Labour, the Green Party and Sinn Féin – encouraged the public to vote “No.” The largest opposition party, Fine Gael, sided with the Government coalition but did not campaign on the issue itself. The parties that endorsed a Yes vote are typically perceived as centre-right parties, whilst those that encouraged voters to vote No are often considered left-wing. However, I believe it is a mistake to view the Yes and No campaigns as a left-right ideological struggle. In chapter two I draw upon literature that illustrates why the merits of open or closed border policies do not easily fit into the left-verses-right political spectrum. Furthermore, as chapter four explains, the rhetoric of voting Yes or No obscures the commonalities of the referendum campaigns. The two options presented to voters were not diametrically opposed to each other. The Yes campaign sought to restrict, rather than abolish, the right of those born to non-nationals to Irish citizenship. Conversely, none of the mainstream No campaigners advocated widening entitlement to Irish citizenship or the abolition of borders during the referendum campaign.

Another reason I believe that it is a mistake to view the Citizenship Referendum as an election ploy by the ruling coalition is that, if it was, it did not work. The results of the local and European elections suggest that the stance taken by parties in regard to the Citizenship Referendum had little correlation upon their success in local and European elections. Support for the referendum did not increase electoral support for the parties that endorsed it. Although 80% of those participating voted Yes, each of the Government coalition parties lost seats in the local elections.<sup>23</sup> Fianna Fáil lost two seats in the European Parliament while the Progressive Democrats have yet to return an MEP.<sup>24</sup> Labour, the Green Party and Sinn Féin all gained seats in the local elections despite endorsing a No vote.<sup>25</sup> The Labour Party did not make any gains in the European elections. The Greens lost two seats. Sinn Féin returned their first MEP in the Republic of Ireland.<sup>26</sup> It is therefore necessary to consider alternative explanations for the restriction of entitlement to Irish citizenship.

#### 1.6 Border Control: A Global Issue

The past decade has seen widespread concern about the ability of the Republic of Ireland to control inward - as opposed to outward - migration voiced for the first time. However, the increased prominence of the issue of border control in the political arena is not merely a local phenomenon. *Lobe* and the Citizenship Referendum are

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<sup>23</sup> Caroline O'Doherty, "Resounding Yes for citizenship change" *Irish Examiner* (14 June 2004).

<sup>24</sup> Mark Brennock, "Fianna Fáil suffers worst election results for 80 years" *Irish Times* (14 June 2004).

<sup>25</sup> See the "Election 2004," online: the *Irish Times*

<[http://www.ireland.com/focus/localelection2004/local\\_graphic.html](http://www.ireland.com/focus/localelection2004/local_graphic.html)> for a breakdown of the breakdown of the 2004 local elections in Ireland.

<sup>26</sup> Sinn Féin also secured one seat in Northern Ireland.



local manifestations of a global “moral panic” about international migration.<sup>27</sup> Chapter two considers the reasons for the rise in concern surrounding migration. It explores the concepts of citizenship, sovereignty and the nation and argues that these terms cannot be neatly defined. Drawing upon the work of scholars in each of these fields I suggest that the Republic of Ireland’s recent preoccupation with border control is a product of trends that have not merely increased the number of migrants to the Republic of Ireland, but have also prompted states to conceive of migrants and themselves differently.

Chapter three seeks to contextualize the *Lobe* case and Citizenship Referendum by examining the legislative history of Irish citizenship law and Irish case law surrounding the rights of Irish citizens born to non-nation parents. It suggests Irish citizenship laws have always been used as a form of migration law. I argue that while the increase in numbers of people traveling to the Republic of Ireland has raised concerns about the state’s ability to assert sovereignty, the Republic of Ireland has never been able to exert sovereignty as it is traditionally understood. Consequently, the regulation of Irish citizenship has always been of key importance to the state’s claim to sovereignty.

In chapter four I examine the arguments advanced for and against the proposal to restrict entitlement to Irish citizenship through birth. I argue that decision to hold the Citizenship Referendum was based upon two contradictory premises. Consequently,

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<sup>27</sup> Catherine Dauvergne, “Sovereignty, Migration and the Rule of Law in Global Times” (2004) 67(4) *Mod. L. Rev.* 588 at 588.

in a positivistic legal sense, it was unnecessary. By examining the arguments advanced during the Citizenship Referendum campaign and the legislation subsequently introduced to restrict entitlement to Irish citizenship through birth, I suggest that the Citizenship Referendum is best seen as an expression of the Republic of Ireland's sense of national identity in the early 21<sup>st</sup> century.

Chapter five reflects upon modern law's seeming inability to provide convincing answers to the issues raised by global migration. In particular, it considers the tension between law's claim to universality and its distinction in its treatment between citizens and non-citizens and, perhaps more worryingly, citizens born to non-nationals. I argue that through the lens provided by the issue of border control we see exposed the contradiction at the heart of modern law. I suggest that in order to address the issues raised by international migration it is necessary to consider the use of non-legal as well as legal strategies.

### 1.7 A Note on Terminology

I use the term "Republic of Ireland" to refer to the 26 county state, officially called "Ireland." In doing so, I attempt to avoid confusion when referring to the Irish state, as distinct from "the island of Ireland" referred to in Article 2 of the Constitution of Ireland. "The island of Ireland" includes both the Republic of Ireland and Northern Ireland. Many of the sources I have relied upon in the course of this work use the term "Ireland" to refer to the 26 county state. Unless the distinction between the Irish

state and the island of Ireland is both unclear and directly relevant to the point under discussion I have not altered the wording of other writers.

“Northern Ireland” has been a contentious term since the state was established by the Government of Ireland Act, 1920.<sup>28</sup> As I explain in more detail in chapter three, Irish Nationalists have historically denied, or at least questioned, the legitimacy of Northern Ireland. This is reflected in Nationalist terminology in which Northern Ireland is referred to as “the North” or “the Six Counties” rather than by its official title. Unionists are generally more accepting of the term Northern Ireland, although some refer to the state as “Ulster,” the name of the historic province of Ireland in which Northern Ireland is located. As three of the counties of historic Ulster are located in the Republic of Ireland, this term is not strictly accurate. The *Agreement* of 1998 was accepted by voters in both jurisdictions on the island of Ireland in separate referenda.<sup>29</sup> As the *Agreement* recognized “the legitimacy of the people of *Northern Ireland* with regard to its status”<sup>30</sup> [my emphasis] I feel it is the least contentious of the possible terms for the state. I will therefore use the term Northern Ireland in the course of this study.

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<sup>28</sup> Government of Ireland Act, 1920 (U.K.), 10 & 11 Geo. V., c.67, s.1.

<sup>29</sup> *The Agreement* of 1998 has no name. It is known variously as the Belfast Agreement, the Good Friday Agreement, the Stormont Agreement, the British-Irish Agreement, or simply the Agreement. See Brendan O’Leary, “The Nature of the Agreement,” 22 Fordham Int’l L.J. 1628 for greater discussion of the name of *the Agreement*.

<sup>30</sup> *The Agreement* (1998), Constitutional Issues, section 1(1).

## CHAPTER TWO

### 2.1 Introduction

This chapter locates the issue of the restriction of Irish Citizenship within a discussion of three inter-related concepts: citizenship, sovereignty and the nation. Each featured in *Lobe* and the Citizenship Referendum as the Irish courts and law makers sought to determine legitimate claims to Irishness, the rights bestowed by Irish citizenship and the measures the state could employ to protect its borders. I consider each concept in turn. As will become apparent, they are contested. Whilst I attempt to sketch a description of each, my focus is upon why there is a lack of certainty as to their meaning, rather than attempting to define them.

I argue that an adequate definition of each concept is impossible. Definitions assume concepts to be rational. Those who purport to define a concept attempt to reduce it to an essence. However, the definitions of citizenship, sovereignty and the nation that have been offered have proved inadequate; they do not include all the qualities associated with the concepts; nor are the qualities described exclusive to them. I suggest that rationality is unable to define these concepts because they are borne out of contradiction rather than reason. Conceptual uncertainty is integral to their existence. It cannot be overcome by simply refining definitions. Consequently, attempts to justify the restriction of entitlement to Irish citizenship or the rights associated with Irish citizenship by appeals to reason are based on the mistaken

premise that the criteria that define citizenship, sovereignty, or membership of nation are rational.

## 2.2 Defining a Citizen

In the majority of Western states, citizenship laws are based either on the principle of *jus soli* or *jus sanguinis*, or comprise some hybrid of the two. There are also naturalization processes, but that is not my focus here. Irish citizenship law is imbued with both *jus soli* and *jus sanguinis* principles.<sup>31</sup> The *jus soli* principle – literally “of the soil” – is historically a feature of common law jurisdictions. It uses the criteria of birth within a state to determine whether a person is entitled to citizenship. The *jus sanguinis* principle awards citizenship to those with a “blood relationship” to the state. The origin of *jus sanguinis* principle has been attributed to the spirit of nationalism and fraternity among the French following the 1789 revolution.<sup>32</sup>

Although awarding citizenship on the basis of a person’s place of birth or their descent is not manifestly unjust of itself, neither the *jus soli* nor the *jus sanguinis* principle have the capacity to deal with the multi-faceted and complex claim to belong to a community. Joseph H. Carens highlights the potential difficulties faced by a non-citizen, resident in a state from shortly after his or her birth, that do not

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<sup>31</sup> *Irish Nationality and Citizenship Act 1956.*

<sup>32</sup> James Brown Scott, “Nationality: Jus Soli or Jus Sanguinis” (1930) 60 A.J.I.L. 58 at 61.

trouble a citizen.<sup>33</sup> The non-citizen who commits a crime, unlike their citizen counterpart, faces the threat of deportation. A citizen guilty of the crime may be sent to jail for a long time, but he or she cannot be removed from the state. Carens argues that the longer a person resides in a state, the greater moral claim he or she has to be considered a member of the national community, even if they do not possess the legal status of citizen. Conversely, the greater the length of time a person has been resident in the state, the more the community should view that person's illegal actions as "their problem" rather than something to be dealt with by the person's country of origin.<sup>34</sup> However, the *jus soli* and *jus sanguinis* principles are not concerned with the reasons why someone may claim to belong to a community. Instead they distinguish the citizen from the non-citizen on grounds beyond that person's control.

### 2.3 Citizenship

I now turn to the concept of citizenship itself. Broadly speaking, citizenship incorporates three related components: membership, rights and duties of members and participation.<sup>35</sup> However, theorists differ in the emphasis they place upon each of these notions.<sup>36</sup>

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<sup>33</sup> Joseph H. Carens, "Cosmopolitanism, Nationalism, and Immigration: False Dichotomies and Shifting Presuppositions" in Ronald Beiner & Wayne Norman ed., *Canadian Political Philosophy* (Oxford University Press, 2001) 17 at 20-25.

<sup>34</sup> *Ibid.*

<sup>35</sup> Catherine Dauvergne, "Beyond Justice: The Consequences of Liberalism for Immigration Law" (1997) 10(2) Can. J.L. & Jur. 323 at 324.

<sup>36</sup> Marco Martiniello, "Citizenship in the European Union," in T. Alexander Aleinikoff & Douglas B. Klusmeyer eds., *From Migrants to Citizens: Membership in a Changing World*, (Carnegie Endowment for International Peace, 2000) 342.

One description of modern citizenship which is often cited is that offered by T.H. Marshall.<sup>37</sup> Marshall identifies three distinct components - political, judicial and civil citizenship - which he fuses together.<sup>38</sup> The political aspect invokes a "self rule" principle; citizenship demands the people participate in ruling as well as being ruled. That requirement can be achieved by citizens becoming involved in the law-making process directly or by electing representatives to make laws on their behalf. A second aspect of Marshall's account is the judicial conception of modern citizenship. It grants the status of legal personhood which makes persons subject to the law and gives them rights which may be enforced in court. Thirdly, the civil aspect of citizenship creates a sense of identity as a member of an exclusive group for those granted the status of citizen.

Marshall's description proceeds on a number of assumptions. Firstly, his conception of citizenship is founded upon the liberal premises of the Enlightenment. It necessitates a conceptual "flattening out" of society that is in contrast with the hierarchical structures of pre-modern societies. Marshall states, "In feudal society status was the hallmark of class and the measure of inequality. There was no uniform collection of rights and duties with which all men...were endowed by virtue of their membership of the society. There was, in this sense, no principle of the equality of citizens to set against the principle of the inequality of classes."<sup>39</sup> Secondly, Marshall

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<sup>37</sup> See, for example, Jean L. Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos" (1999) 14(3) *International Sociology* 245, Miriam Feldblum, "Reconfiguring Citizenship in Western Europe," in Christian Joppke ed., *Challenges to the Nation State* (Oxford University Press, 1998) 321, and Roel de Lange "Paradoxes of European Citizenship" in Peter Fitzpatrick ed., *Nationalism, Racism and the Rule of Law* (Dartmouth, 1995) 97.

<sup>38</sup> T.H. Marshall & Tom Bottomore, *Citizenship and Social Class* (1992, Pluto Press) at 8.

<sup>39</sup> *Ibid.*

assumes the emergence of citizenship is an evolutionary process. He presumes that each of the components of citizenship fuse together harmoniously. Finally, his account also associates citizenship with the development of the nation-state. Key aspects of Marshall's description, such as participation in the law-making process and the sense of identity drawn from group membership, infer a degree of exclusivity.

## 2.4 Challenges to Citizenship

Challenges to each of these assumptions have raised questions about the appropriateness of Marshall's description of citizenship for the 21<sup>st</sup> century. Some challenges have been theoretical. Marshall links the concept of citizenship to the modern era. As such, he invokes the creed of modernity, which Peter Fitzpatrick characterizes as the rejection of myth, the embrace of rationality and objectivity.<sup>40</sup> The late 20<sup>th</sup> century saw the emergence of postmodern critiques, which disputed the premises upon which the Enlightenment project was based. Alan Hunt states, "Postmodernism's critique of the Enlightenment is of a failed rationalist project which has run its course but which continues to encumber contemporary thought with illusions of a rational route to knowledge, a faith in science and in progress."<sup>41</sup> Postmodern thought brings into question Marshall's assumption that modern citizenship is the inevitable product of progress. Instead, it contends that modern citizenship is temporary and contingent upon the exercise of power in multiple

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<sup>40</sup> Peter Fitzpatrick, *Mythology of Modern Law*, (Routledge, 1992) at.1-3.

<sup>41</sup> Alan Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill L.J. 515 at 515.



decentralized sites.<sup>42</sup> Even before Marshall articulated his description of citizenship, the tension between the universal judicial aspect of citizenship and the exclusive political aspect was noted by Hannah Arendt.<sup>43</sup> Arendt noted the disparity between the claim to respect the rights of man – a universal principle – and its more limited application within the boundaries of the state witnessed in Revolutionary France. However, while Arendt attempted to resolve the tension by suggesting that citizenship itself was a universal right, more recent thinkers have challenged the assumption that the tension can be resolved.<sup>44</sup>

Jean L. Cohen notes that the difficulty migration poses for liberalism is not that the logic of liberalism points to open or closed borders but rather it points to both. She argues that the difficult relationship between non-citizens, or child citizens with non-national parents, and the state is born out of the contradictions of liberal citizenship. The political component of liberal citizenship is inclusive, in the sense that it emphasizes participation, but it is participation of a particular group to the exclusion of others. In contrast, the judicial conception of citizenship has the capacity for universal inclusion, but that is achieved at the expense of a collective identity of the demos. She states it was the hegemony of the liberal model that led to the component parts of citizenship being perceived as complimentary. This model is now being challenged as the impact of globalization makes apparent the state's lack of ability to control developments affecting its members' lives.<sup>45</sup>

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<sup>42</sup> Gerald Turkel, "Michel Foucault: Law, Power and Knowledge" (1990) 17(2) J.L. & Soc'y at 170.

<sup>43</sup> Hannah Arendt, *The Origins of Totalitarianism*, (Harcourt Brace and Company, 1973) at 230-31.

<sup>44</sup> Cohen, *supra* note 37 at 254.

<sup>45</sup> Cohen, *supra* note 37 at 252.

Other challenges to Marshall's description of citizenship have emerged from more practical developments. In Marshall's account, the state acts to guarantee uniform and equal rights to citizens. The *Maastricht Treaty* of 1992 [*Maastricht*] created European Union [EU] citizenship.<sup>46</sup> EU citizenship challenges both the presumption that the nation-state is the sole guarantor of rights and that rights must be applied uniformly and equally among citizens.

*Maastricht* established a series of rights common to all EU citizens: The right to free movement and residence in member states<sup>47</sup>; the right to vote in local and European elections in the member state of residence<sup>48</sup>; the right to diplomatic protection in a third country<sup>49</sup>; the right to petition the European Parliament and appeal to the European Ombudsman.<sup>50</sup> The rights of EU citizens were subsequently enhanced by the *Amsterdam Treaty* of 1997 [*Amsterdam*]<sup>51</sup>: an anti-discrimination clause and articles seeking to better protect human rights and fundamental liberties were adopted.<sup>52</sup> The rights of EU citizenship are enforceable throughout the EU. They are not contained by the boundaries of a particular nation-state.

Whilst *Maastricht* created the category of EU citizen, from its earliest incarnation, the EU has sought to maintain distinctions between member states, rather than forge a

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<sup>46</sup> *Maastricht Treaty*, O.J. C 191, 29 July 1992 [*Maastricht*].

<sup>47</sup> *Ibid.* Article 8A

<sup>48</sup> *Ibid.* Article 8B

<sup>49</sup> *Ibid.* Article 8C

<sup>50</sup> *Ibid.* Article 8D.

<sup>51</sup> *Amsterdam Treaty*, O.J. C 340 10 November 1997 [*Amsterdam*].

<sup>52</sup> *Ibid.* Articles 7 and J.1.1.

collective European identity. Hans Lindahl observes, "While the Constitution of the United States...kicks off with 'We the people,' the preamble to the *Treaty of Rome* defines European integration in terms of 'an ever closer union among the peoples of Europe.'"<sup>53</sup> *Amsterdam* affirms this conception of the EU, stating that EU citizenship supplements, rather than replaces, national citizenship. At present, the rights associated with EU citizenship remain dependent upon prior membership of a member state.<sup>54</sup>

The rights associated with EU citizenship are not necessarily applied uniformly. This is demonstrated by the restrictions that exist regarding the voting rights of EU citizens resident in another member state. The possession of EU citizenship entitles a person resident in a member state to vote in local and European elections even if they are not a citizen of that country. However, if the number of non-nationals resident in a member state amounts to 20% of those of voting age, that state may restrict voting rights for those who have lived there for less than five years. Martiniello states, "European citizens living in a member state other than their own are considered to be equal to EU citizens living in their own member state, but they are a bit less equal than them."<sup>55</sup>

EU citizenship therefore simultaneously challenges the traditional notion of citizenship and reaffirms its link with the territorial state. Whilst the state was

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<sup>53</sup> Hans Lindahl, "European Integration: Popular Sovereignty and a Politics of Boundaries" (2000) 6(3) Eur. L.J. 239 at 239.

<sup>54</sup> *Amsterdam*, *supra* note 51, Article 9

<sup>55</sup> Martiniello, *supra* note 36 at 364.

previously perceived to be the citizen's only guarantor of rights, the citizen can now also turn to the EU. Additionally, as EU citizens, non-nationals within a nation-state can claim a number of rights previously reserved for full members of the political community. However, it is not possible to see the rights associated with EU citizenship simply as national citizenship writ large. To the extent that the EU has forged a political imagining, it has done so by reference to the union of the member states. In doing so, reaffirms the legitimacy of those states.

## 2.5 Sovereignty

The issue of citizenship is closely linked to the concept of state sovereignty. Sovereignty relates to a claim to have the right to exercise power legitimately. Beyond that, the term is ambiguous and disputed. Marx and Weber suggested that in order to be sovereign a state must hold supreme and absolute power within a territory.<sup>56</sup> This definition has been widely acknowledged to be inadequate. Alan Rosas states "this state, of course, is not any state."<sup>57</sup> In response, some theorists have sought to show that sovereignty is an evolving concept rather than fixed one. Others have suggested that sovereignty is an outdated concept that is in decline. In this section I argue that the uncertainty of the concept of sovereignty poses a common problem to both these approaches: because the themes associated with sovereignty do not conform to a linear pattern there is no rational progression, nor conclusive decline, of sovereignty.

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<sup>56</sup> Jurgen Habermas, *The Inclusion of the Other* (Polity Press, 1999) at 108.

## 2.6 Models of Sovereignty

David Held suggests that since the advent of the nation-state, three models of sovereignty can be discerned: “classic,” “liberal” and “cosmopolitan.” He states that the classic model was dominant from the sixteenth century until the twentieth century. It emerged following the *Treaty of Westphalia of 1648* [*Westphalia*] as an attempt to ensure political stability following a period dominated by a series of religious wars. The classic sovereignty model positioned all alternative sites of power, such as religious or customary communities, subordinate to the power of the state. The model envisaged by theorists of classic sovereignty gave the sovereign “the undivided and untrammelled power to make and enforce the law” within a state or political community.<sup>58</sup>

## 2.7 Classic Sovereignty

Classic sovereignty has both an “internal” and an “external” dimension. Internally, the sovereign claimed absolute and final authority. Non-state actors that disputed the power of the sovereign were deemed illegitimate. The external dimension of classic sovereignty denied the legitimacy of any higher power to which a person inside the territory might appeal. It envisaged a community of states which were nominally

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<sup>57</sup> Alan Rosas, “The Decline of Sovereignty” in Jyrki Livonen ed. *The Future of the Nation State in Europe* (Edward Elgar Publishing Co, 1993) 130 at 131.

<sup>58</sup> David Held, “Law of States, Law of Peoples: Three Models of Sovereignty” (2002) 8 *Legal Theory* 1 at 3.

equal; no state had a right to interfere in the internal affairs of another. Held does not suggest that power imbalances between states did not influence international relations during this period. Rather, he argues it meant that the manner in which the ruler of a state secured power internally had no bearing on its legitimacy when dealing with other states. Whether one wielded effective power was the only measure of legitimacy.<sup>59</sup>

## 2.8 Liberal Sovereignty

Liberal sovereignty placed restrictions upon the sovereign's right to exercise absolute power within its borders. Held states that this model began to emerge as the number of democratized states increased during the nineteenth and early twentieth century. It became dominant following World War II during which the failings of the classic sovereignty model became apparent. The measure of legitimacy among the international community has become whether the sovereign can demonstrate adherence to the principles of democracy and human rights. As a consequence of the shift to the liberal sovereignty model, the actions of states are now curtailed by international agreements on a wide range of issues. Held cites examples of areas in which the legitimacy of state actions is now dependent upon an adherence to common principles. These include, but are not limited to, the development of common rules of warfare, the responsibility of individuals to adhere to certain norms during conflict, a

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<sup>59</sup> *Ibid.* at 5.

commitment to human rights and the rights of minorities and, increasingly, issues regarding the environment.<sup>60</sup>

Liberal sovereignty, Held contends, has had some success in curtailing the excesses possible under the classic sovereignty model. However, he identifies a number of difficulties with liberal sovereignty. One problem is that the values espoused by liberal sovereignty are not always harmonious. It is not difficult to imagine circumstances in which the electorate of a state endorses a policy that is advantageous to those within the state but has a detrimental effect upon the environment beyond state borders. Such a scenario places liberal sovereignty's endorsement of democracy in conflict with its support for the concept of "the common heritage of mankind," which has developed in regard to environmental issues in the last 40 years. Proponents of the hypothetical policy can appeal to the democratic mandate that endorsed that policy. However, the widespread impact of such a policy raises questions about the true accountability of state power. As Held remarks, "[P]olitical arrogance has been reinforced by the claim of the political elites to derive their support from that most virtuous source of power – the *demos*. Democratic princes can energetically pursue public policies...because they feel, and to a degree are, mandated to do so."<sup>61</sup>

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<sup>60</sup> *Ibid* at 20-23.

<sup>61</sup> *Ibid.* at 21.

## 2.9 Cosmopolitan Sovereignty

Held argues that in order for new sites of power to become truly accountable it is desirable to work towards a framework of universal law.<sup>62</sup> He calls this cosmopolitan sovereignty. In a sense the cosmopolitan model builds upon liberal sovereignty; Held characterizes cosmopolitanism as “those basic values that set down standards or boundaries that no agent, whether a representative of a government, state, or civil association, should be able to cross.”<sup>63</sup> The values themselves are also familiar: equal worth and dignity; active agency; personal responsibility and accountability; consent; collective decision making through voting procedures; inclusiveness; avoidance of serious harm and the amelioration of urgent need.

To give effect to cosmopolitanism, Held proposes four institutional requirements. “Legal cosmopolitanism” would establish fundamental legal rights at a global level. It would place all persons under a basic law that embodies fundamental values and give them rights that may be enforced by the courts. In an effort to ensure effective political participation, “political cosmopolitanism” would increase the importance of regional and global representative institutions. Conversely, the role of national parliaments would diminish. “Economic cosmopolitanism” envisages political intervention in the economy in order to ensure that the basic values outlined above are safeguarded. It does not view intervention as a goal in itself, rather as a necessity in

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<sup>62</sup> *Ibid.* at 38.

<sup>63</sup> *Ibid.* at 23.



order to bridge the gap between the aspiration of equality and the danger posed by substantive inequality and sectional interests. Finally, "cultural cosmopolitanism" acknowledges that identities are not fixed and need not be confined by national borders.

Where cosmopolitan sovereignty differs from liberal sovereignty is in loosening the link between membership of a territorial state and the right to participate in decision making. The measure of one's right to participate becomes whether one is affected by the outcome of that decision rather than whether one has been deemed a member of a fixed geo-political group. Held argues that the Social Chapter of *Maastricht* is compatible with the concept of cosmopolitan sovereignty.<sup>64</sup> However, he does not claim that the creation of EU citizenship amounts to cosmopolitan sovereignty. Rather, it offers a framework that could be built upon. At present, the rights associated with EU citizenship remain dependent upon prior membership of a member state.

The proposal to detach sovereignty from the territorial state demands a departure from the way in which sovereignty has traditionally been understood. The cosmopolitan sovereignty envisaged by Held far is much more radical than the challenge to the nation-state posed by the creation of EU citizenship. Both the classic and liberal models rely upon state borders to ensure formal equality before the law. They anticipate that the power of the sovereign, exercised through the law, will apply evenly throughout the state. Cosmopolitan sovereignty proposes that the formal

equality accorded by earlier models become subservient to substantive equality among those affected by the exercise of power.

## 2.10 A Critique of Held's Model of Sovereignty

Whilst Held's account of the evolution of sovereignty is useful, in the sense that it highlights the conceptual changes that have taken place since the *Westphalia*, it risks reducing the concept of sovereignty to a grand narrative. Doing so overlooks the shifts in power relations that occurred within the three time periods he identifies. For example, in Held's account, classic sovereignty encompasses the period from *Westphalia* to the early 20<sup>th</sup> century. There is little reference to the shifts in power that took place following the French and American Revolutions or the impact this had upon international relations.<sup>65</sup>

Moreover, Held emphasizes the differences between the models of sovereignty. In doing so he downplays their continuity. This portrays sovereignty as a linear and evolutionary concept, rather than shifting and contingent. Sovereignty should be conceived of as a loosely associated collection of themes rather than a linear progression. Those themes compete with each other, rising and falling in prominence over time. In Held's account, classic sovereignty is succeeded by liberal sovereignty because of the abuse of power under the former. However, this shift in emphasis was not simply a transition from an inferior to a superior system. It marked a resurgence

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<sup>64</sup> *Ibid.* at 38.

<sup>65</sup> Elie Kedourie, *Nationalism* (Hutchinson University Library, 1960) at 15.

of a theme that had fallen out of favour as the concept of the Rights of Man had taken hold.

From the time of *Westphalia* until the French Revolution, the dominant concept of government in Europe was one of Enlightened Absolutism. It rested upon a premise that there was a universal law of nature which could be identified through the use of reason.<sup>66</sup> The sovereign and his or her subjects were bound together in common pursuit of improvement. It was believed that by adhering to the law of nature, the welfare of all could be ensured. Between the French Revolution and the early 20<sup>th</sup> century the notion that the will of the people was subject to a higher power fell into decline. The rise of liberal sovereignty was not simply an innovation. It was also a revival of a theme present in an earlier model of sovereignty.

By endorsing cosmopolitan sovereignty, Held seeks to overcome the tensions present in liberal sovereignty. However, cosmopolitan sovereignty does not resolve the conceptual difficulties found in earlier models. In cosmopolitan sovereignty, Held envisages participation by those subject to the exercise of power rather than those with the formal status of citizen. However, it may be difficult to determine what constitutes being sufficiently affected by a power. For example, a new road built between two major cities is likely to impact upon the lives of a large number of people in some form, yet determining the appropriate level of consultation is likely to be problematic. It is debatable whether all those affected, however marginally, should be consulted. It may be fairer to consult only with those upon whom the road

will directly impact. Alternatively, it may be preferable to give greater weight to the views of those with expert knowledge on the need for the road and its potential environmental impact than to the views of the local community.

A related concern is determining the appropriate weight that should be given to the views of those affected by a decision. It seems inconsistent with the principle of substantive equality to give a person who stands to be marginally affected by a decision equal standing with those whose life will be severely disrupted. Yet Held offers no suggestions on how competing claims should be weighted against each other. Possession of citizenship in a bordered world determines the right to participate in decision making processes in a formal and arbitrary manner. Cosmopolitan sovereignty seeks to replace that arbitrary system with one in which the criteria for participation is no more rational.

## 2.11 The Decline of Sovereignty?

An alternative to Held's evolutionary theory of sovereignty is the suggestion that sovereignty should be conceived of in the manner suggested by Marx and Weber but that it is in decline. Ohmaie Kenichi emphasizes the disparity between a strict adherence to the concept of sovereignty as supreme and absolute power within a territory and present day global economic trends as evidence of the decline of the

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<sup>66</sup> *Ibid.* at 10.

nation-state.<sup>67</sup> He argues that in an era of globalization the nation-state has become an increasingly redundant “middle-man.” However, Kenichi’s focus is narrowly economic. In his account, borders are simply a hindrance to economic progress. Kenichi declares nationalism “a jingoistic celebration of nationhood that places far more value on emotion-grabbing symbols than on real, concrete improvements in the quality of life.”<sup>68</sup> However, as Richard Falk points out, the legacy of state sovereignty and nationalism is more ambivalent. Whilst resistance to globalization has highlighted the more chauvinistic aspects of nationalism, the concept of the secular, sovereign state has also been utilized as a means to reject privilege.<sup>69</sup> Moreover, Kenichi’s suggestion that we now live in “a borderless world” does not stand up to even a cursory examination. For those without the necessary skills or financial resources, the power of the state to exercise control over national borders remain very real barriers to movement.

Neil MacCormick argues that sovereignty is in decline but questions the extent to which the state ever exercised absolute power within its borders.<sup>70</sup> Instead, for MacCormick, the “decline” of sovereignty relates to the increasing dispersal of power among different bodies. He argues that sovereignty is primarily in decline in the sense that the state-centric model of legal systems proposed by theorists such as John Austin is increasingly redundant as a means of understanding the manner in which

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<sup>67</sup> Ohmae Kenichi, *The End of the Nation State: The Rise of Regional Economies* (HarperCollins, 1995).

<sup>68</sup> *Ibid.* at 13.

<sup>69</sup> Richard Falk, “The Decline of Citizenship in an Era of Globalization” 2000 4(1) *Citizenship Studies*, 5 at 11.

<sup>70</sup> Neil MacCormick, “Beyond the Sovereign State” 56(1) (1993) *MLR* 1.

law operates. Alternative sites of power, such as the EU, international law, and even forms of illegal regulation, are of increasing importance to daily life. He suggests that whilst these sites perform tasks once perceived to be the sole province of state law, they are too dispersed to be seen as “sovereign” powers in themselves. Therefore, as power becomes decentralized, the notion of sovereignty has fallen into decline.

## 2.12 Cosmopolitanism and Exclusivity

Whilst MacCormick is of the view that sovereignty is an increasingly redundant concept, his argument, that the decline of sovereignty is primarily conceptual, has the capacity to accommodate a scenario in which some themes traditionally associated with sovereignty retain importance while others fall into decline. It is therefore at least partially compatible with a theory advanced by Saskia Sassen critiquing the theory that states are in terminal decline. Sassen argues that though globalizing forces have altered the role of the state, it retains relevance by providing the framework in which those forces operate. She states “much that we describe as global, including some of the most strategic functions necessary for globalization, is grounded in national territories.”<sup>71</sup>

The reassessment of the legitimacy and effectiveness of state power on a global scale coincides with a weakening of the mono-cultural, Gaelic, Catholic identity that

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<sup>71</sup> Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, 1996) at 13.

dominated the Republic of Ireland throughout the twentieth century. John A. Harrington states, "In a series of referenda voters have abandoned irredentism, embraced secularism and liberalized the social code."<sup>72</sup> In this section I consider why arguments in favour of restricting entitlement to Irish citizenship have become potent in recent years - as the paradigm that assumed a bordered world is being challenged and Ireland has embraced multiple and shifting identities as a member of the EU.

One explanation for increased concern about the state's ability to control its borders is the growing importance of migration law in relation to state sovereignty. Catherine Dauvergne suggests that migration law has become the "last bastion" of traditional sovereignty.<sup>73</sup> Other areas traditionally considered exclusively within the domain of the sovereign state, such as economic policy and law and order, have been challenged by other sites of power. The growth of a culture of human rights has placed restrictions upon the measures that can be introduced by governments in the name of law and order; the phenomenon of globalization prevents states from "managing" economies in the manner that they once felt they could.

In contrast to this trend, states retain almost complete control of their borders. They are free to introduce immigration laws in which the selection of candidates is based upon the perceived advantage to the receiving state. There is no requirement that the state consider the wider impact of its policies, such as the removal of skilled workers

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<sup>72</sup> John A. Harrington, "Citizenship and the Biopolitics of Postnationalist Ireland" (2005) 32(3) *J. L. & Soc'y* 424 at 424.

<sup>73</sup> Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67(4) *Mod. L. Rev.* 588 at 588.

from their country of origin. Dauvergne states that even in regard to refugee law, the one area of migration law which does involve commitment to international conventions, the state retains rights associated with traditional sovereignty: states enter into the Refugee Convention as sovereign powers; they limit the number of refugees who will benefit from the protection of the Convention; the practical impact of the Refugee Convention upon the exercise of sovereignty in Western states is limited, as a disproportionate number of refugees are admitted by poorer countries; and failure to adhere to the Convention carries no penalty.<sup>74</sup>

As traditional areas in which the state excised sovereignty have eroded, the importance of migration law has increased. Ironically, the role of migration law has changed by virtue of its staying the same. Dauvergne states, "As nations have seen their powers to control the flows of money or ideas and to set economic or cultural policies slip away, they seek to assert themselves as nations through migration laws and policies which assert their nation-ness and exemplify their sovereign control and capacity."<sup>75</sup>

The Republic of Ireland's insistence upon the right to assert sovereignty was clearly demonstrated in *Lobe*, where "the need to preserve the integrity of and respect for the state's asylum and immigration laws" was emphasized.<sup>76</sup> The issue of control of state borders was, surprisingly, less obvious during the Citizenship Referendum. One of the central arguments advanced by the "Yes" campaign was that restricting

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<sup>74</sup> *Ibid.* at 597.

<sup>75</sup> *Ibid.* at 595.



entitlement to Irish citizenship was necessary because it bestowed the right to live and work anywhere in Europe. The “abuse” of Irish citizenship laws was portrayed as a threat not just to the Republic of Ireland but to the whole of Europe. In the following pages I consider how the Irish could at once embrace cultural cosmopolitanism – in the form of “Europeanness” – and at the same time restrict its migration laws. In order to reconcile the claim that the state has retained the characteristics of classic sovereignty in regard to migration law with the argument advanced by the “Yes” campaign, I employ, and attempt to build upon, a theoretical framework developed by Fitzpatrick and Harrington.

## 2.13 The Nation

The nation has been described as “the most universally legitimate value in the political life of our time.”<sup>77</sup> Yet despite its seeming omnipresence, identifying what it is has proves problematic. Peter Fitzpatrick states, “We find it difficult to challenge nation because we cannot say what it is so as to identify it explicitly and thence confront it.”<sup>78</sup> In Fitzpatrick’s analysis, the nation is intrinsically linked to criteria that fail to define it, such as history, territory and common language.<sup>79</sup> In this account, it becomes impossible to view the nation as distinct from the accounts of its origins and development.

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<sup>76</sup> *A.O. & D.L. v. Minister for Justice*, [2003] 1 IR 3 at 5 [Lobe] Keane C.J.

<sup>77</sup> Benedict. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, (Verso, 1991) at 3.

<sup>78</sup> Peter Fitzpatrick, “We Know What It Is When You Do Not Ask Us” (2004) 8 LTC 263.

Debate about the nation has traditionally sought to ascertain its origins and chart its development. It is possible to discern two broad schools of thought. One contends that nations are long established human tradition; if they are not quite “natural” phenomena they are at least long established means of organizing human society. Such theorists can be considered “organic” or “ethnic” theorists of nation. The second school contends that the nation is a recent invention, emerging only in the late 18<sup>th</sup> century. As such they may be regarded as “modernists.”

#### 2.14 The Ethnic Nation

An early example of the nation conceived of as an “ethnic” or “organic” unit is found in the work of Johann Gottfried Herder.<sup>80</sup> Herder’s work was both influenced by, and a reaction to, eighteenth century Enlightenment thinking. Theorists such as Montesquieu promoted classical republicanism as the ideal government structure.<sup>81</sup> The classical republican state demanded loyalty from its citizens whilst simultaneously emphasizing the limited sphere in which the state could exercise power over individuals. Herder wrote at a time when groups within Europe, prompted by the revival of the republican ideal, were beginning to distinguish themselves on the basis of a “national identity.” He shared with eighteenth-century theorists a sense of national identity, but disagreed with their exaltation of the individual and the cosmopolitan. Herder objected to the disparity he saw between the

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<sup>79</sup> Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge, 2002) at 112.

<sup>80</sup> Derek Heater, *Theory of Nationhood* (MacMillan Press Ltd, 1998) at 121.

<sup>81</sup> *Ibid.* at 9.

political state, as advocated by the thinkers of the classical Enlightenment period, and the cultural nation he witnessed in eighteenth century Germany.

Ergang suggests Herder's work represents a bridge between the 18th century intellectual focus upon "reason" and the 19th century emphasis upon "romance." He states, "To the individualism of the eighteenth century Herder opposed the collectivism of the nineteenth."<sup>82</sup> Many of Herder's contemporaries saw national differences as obstacles to be overcome by universalism. In contrast, Herder believed in nurturing the cultural nation. He believed the nation was the ideal group in which individuals would achieve happiness and fulfillment. To "overcome" the nation would go against what nature had decreed. Herder warned against the cosmopolitanism of the eighteenth century, stating "Where nature has separated nationalities by language, customs, and character one must not attempt to change them into one unity by artefacta and chemical operations."<sup>83</sup> The organic conception of the nation is demonstrated again in Herder's explanation of how different nations interact and co-exist. In *Ideen*, the rise and fall of nations is compared to the lifecycle of a tree: a nation grows, experiences maturity, then makes way for other nations.<sup>84</sup>

For Herder, the high-point of human existence was "humanity." Herder's definition of humanity is unclear; Ergang states, "He constantly accentuated the word humanity, but became very vague when he tried to define it."<sup>85</sup> Whatever its conceptual

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<sup>82</sup> R. R. Ergang, *Herder and the Foundations of German Nationalism* (Octagon Books, 1966) at 248.

<sup>83</sup> *Ibid.* at 97.

<sup>84</sup> *Ibid.* at 85.

<sup>85</sup> *Ibid.* at 82.

uncertainties, Herder's "humanity" was undoubtedly a communitarian, rather than an individualistic, conception of human good. Herder saw the individual as a component part of a larger group rather than the group as the sum of its parts. It was through the group that the individual achieved happiness and fulfillment. Herder stated the nation was the particular type of group necessary for humans to achieve humanity. He stressed that any other type of group was insufficient to achieve this aim. He viewed the nation as the natural unit of society, uniquely suited to bring out the best in human beings; the members of each nation were shaped by and suited to the group into which they were born. Herder believed the human race was one species separated into different nations by physical environment, education, external relations with other groups, tradition and heredity. He argued the heredity aspect of the nation ensured that an "essence" of the nation passed through successive generations. Descendants of a nation would therefore continue to display the characteristics of that nation for some time even if they resettled among another community.

A more recent example of the organic theory of nations is found in the work of Anthony D. Smith. In the *Ethnic Origins of Nations* he argues that the move towards establishment of the modern nation was gradual, allowing remnants of the pre-modern era to influence the formation of the nation-state.<sup>86</sup> Smith attempts to chart the emergence of modern nations from the groups that predated them. In doing so, he hopes to determine the similarities and differences between modern national units and the cultural units that predated them. Smith uses the term "ethnie" to abbreviate the

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<sup>86</sup> Anthony D. Smith, *Ethnic Origins of Nations* (Blackwell, 1988).

“‘form’, ‘identity’, ‘myth’, ‘symbol’ and ‘communication’ codes” of a community.<sup>87</sup>

He claims that without the foundation provided by “ethnie” attempts at nation-building are likely to be seriously hindered.<sup>88</sup>

For Smith, “form” pertains to framework in which communal symbols operate. He argues that although cultural symbols may change over time, the framework in which they operate is less prone to change. Smith’s concept of “identity” refers to a perception of “shared history.” It does not demand that the modern nation emerge from a group that previously had a sense of collective identity or adhered to a common ideology. Smith argues that over time the “shared meanings” and “common experience” of a community generates a pool of myths, symbols and ways of communicating. He contends that the “mythic” and “symbolic” character of ethnicity that ensures its durability.<sup>89</sup> He states, “The ‘core’ of ethnicity, as it has been transmitted in the historical record and as it shapes the individual experience resides in this quartet of ‘myths, memories, values and symbols’ and in the characteristic forms or styles and genres of certain historical configurations of populations.”<sup>90</sup>

## 2.15 The Nation as a Modern Phenomenon

Modernists contend that the concepts of nation and nationalism did not exist until the late 18th century. The modernist conception of the nation refers specifically to the

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<sup>87</sup> *Ibid.* at 14.

<sup>88</sup> *Ibid.* at 15.

<sup>89</sup> *Ibid.* at 16.

<sup>90</sup> *Ibid.* at 15.

nation-state which, they contend, is in stark contrast to the communities of the pre-modern era. Whilst modernists do not deny that social groups existed prior to the late eighteenth century, they maintain that such groups cannot be considered nations. Eric J. Hobsbawm states that the nation, "is a social entity only insofar as it relates to a certain kind of modern territorial state, the 'nation-state', and it is pointless to discuss nation and nationality except insofar as both relate to it."<sup>91</sup>

There are substantial differences between the theories advanced by modernists. For example, whilst Hobsbawm and Ernst Gellner agree on the time at which the concept of the nation emerged, their account of the concept of nationalism diverges. Despite differences, it is useful to acknowledge the similarity of approach of writers such as Hobsbawm, Gellner and Benedict Anderson. They share the view that the nation emerged as a consequence of a broader trend of "modernization" which included developments such as the emergence of capitalism, bureaucracy and belief that the world could be explained through reason.<sup>92</sup>

The contrast between the age of nationalism and previous structuring of societies is explored by Anderson. He contends that the ordering of the world into states with identifiable borders was not a feature of the pre-modern era. He states, "[I]n the older imagining, where states were defined by centres, borders were porous and indistinct and sovereignties faded imperceptibly into one another."<sup>93</sup> Anderson argues that

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<sup>91</sup> E.J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (Cambridge, 1990) at 9-10

<sup>92</sup> Smith, *supra* note 86 at 8.

<sup>93</sup> Anderson, *supra* note 77 at 19.

unlike earlier social models, in which legitimacy derived from a divine order, the legitimacy of the nation-state stems from the consent of those it governs. He contends the very concept of the nation challenges the hierarchical ordering of people found in the pre-modern era; despite the very real presence of internal inequality, the nation is based on the modern premise of horizontal comradeship rather than hierarchical ordering.<sup>94</sup>

Gellner argues that nations are contingent entities rather than the natural order of human societies. He contends that nations emerged towards the end of the 18th century because conditions enabled “standardized, homogenous, centrally sustained high cultures” to assert themselves as the standard of political legitimacy.<sup>95</sup> Gellner states that whilst the emergence of nations was contingent upon wider social developments, the concepts of the nation and nationalism asserted themselves so successfully that the nation came to be seen as a natural aspect of the human condition. For Gellner, nationalism is “a political principle, which holds that the political and national unit should be congruent.”<sup>96</sup> He considers the modern era to be an “age of nationalism” in the sense that the belief that the world should be comprised of nations has become so dominant that conceiving of a world ordered any other way is almost unthinkable. Gellner argues that it is the almost unquestioned legitimacy of nationalism that has prompted cultural groups to strive for the status of nationhood.

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<sup>94</sup> Anderson, *supra* note 77 at 7.

<sup>95</sup> Ernst Gellner, *Nations and Nationalism* (Oxford, 1983) at 55.

<sup>96</sup> *Ibid.* at 1.

Gellner states "nations can be defined only in terms of the age of nationalism, rather than as you might expect, the other way round."<sup>97</sup>

Hobsbawm's account of the emergence of nationalism differs somewhat from that of Gellner. He argues that the nation emerged in the late eighteenth century whilst nationalism dates from nearly a century later.<sup>98</sup> Hobsbawm states that at the time of the American and French Revolutions, "the nation" and "the state" were understood to be "indivisible." The state was considered the expression of the will of the people. He states, "The 'nation' so considered, was the body of citizens whose collective sovereignty constituted them a state which was their political expression."<sup>99</sup> Hobsbawm contends that what distinguished the nation at this time was a common rejection of a model of society based on a hierarchical structure. He states the nation was characterized by a commitment to "the common interest against particular interests, the common good against privilege."<sup>100</sup>

Between 1790 and 1880, in order to constitute a nation, a people had to be considered "viable." This was known as the "threshold principle." In order to comply with this principle, a people had to be endowed with sufficient land, resources and population.<sup>101</sup> Additionally, the group had to demonstrate a longstanding association with an existing state, the possession of a cultural elite and a capacity for conquest.<sup>102</sup>

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<sup>97</sup> *Ibid.* at 55.

<sup>98</sup> Hobsbawm, *supra* note 91 at 102.

<sup>99</sup> Hobsbawm, *supra* note 91 at 19.

<sup>100</sup> Hobsbawm, *supra* note 91 at 20.

<sup>101</sup> Hobsbawm, *supra* note 91 at 31.

<sup>102</sup> Hobsbawm, *supra* note 91 at 37.



Hobsbawm characterizes this conception of the nation as a progressive force, bringing smaller communities together to achieve "improvement."

Hobsbawm suggests that the criteria used to determine the legitimacy of a nation altered significantly after 1880. The threshold principle was abandoned and ethnicity and language became key criteria for defining nations;<sup>103</sup> consequently, the number of groups claiming to be nations significantly increased. He states in the late 19th century, nationalism - a term that reflected the belief that nations had political rights - emerged.<sup>104</sup> This changed the character of the nation. The theory that "non-viable" communities would assimilate into larger nations was abandoned as cultural groups proclaimed themselves sovereign nations with corresponding rights. Hobsbawm argues it was only in the late nineteenth century that the populist assumption of a link between language, ethnicity and the nation emerged - as a conservative reaction to social and political change. He attributes this development to the threat that traditional communities felt from the impact of modernity, the emergence of a new urban social structure and the mass migration of the nineteenth century. These created circumstances in which groups sought to distinguish those who were "like themselves" from "others."<sup>105</sup>

John Hutchinson argues that cultural nationalism has been wrongly perceived as the regressive counterpart to political nationalism. Instead, he contends is a distinct movement with different aims - many of which are progressive. For Hutchinson,

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<sup>103</sup> Hobsbawm, *supra* note 91 at 102.

<sup>104</sup> *Ibid.*

cultural nationalism is “defensive” in the sense that it was typically promoted by the elite in “folk” societies in response to the impact of modernization. However, he characterizes it as seeking to reconcile the traditions of those societies with modernity and is therefore “progressive.”<sup>106</sup>

## 2.16 The Impossibility of Nation

Fitzpatrick argues that attempts to define the nation either by reference to ethnicity or modernity have been unsuccessful. Specifically, he is critical of attempts to discover an “essence” of nation by reference to ethnic origins or historical developments. Fitzpatrick contends that having set out to define what the nation is by reference to particular ethnic origins or universal historical developments, theorists then fail to do so on their own terms: as not all ethnicities are granted the status of nationhood, distinguishing nations from cultural groups becomes reliant upon qualities in addition to ethnicity; if the modern nation is distinguished by contrast to the particularities of ethnicity, it is still dependent upon ethnicity for that point of comparison. The meaning of the term nation, Fitzpatrick contends, “seems fated to remain tied to the very criteria – of common language, territory, history and so on – which repeatedly fail to mark it definitively.”<sup>107</sup>

He suggests that the search for the origins of nation demonstrates the paradox at the heart of modernity; modernity defines itself in opposition to myth, and yet the origins

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<sup>105</sup> Hobsbawm, *supra* note 91 at 109.

<sup>106</sup> John Hutchinson, *The Dynamics of Cultural Nationalism* (Allen and Unwin, 1987).

of modern societies are explained by utilizing the mythic, to which modernity opposes itself. Fitzpatrick states, "What Enlightenment and modernity supposedly reject, in a word, is transcendence...In the uniform light of modernity, there is no room for a duality of meaning or for any ultimate ambiguity."<sup>108</sup> In the search for origins and the belief that the essence of an object can be found, the mythology of the pre-modern age is merely substituted by a belief that by looking to the past the essence of an object can be found.

## 2.17 Law and Nation

Fitzpatrick argues that the concepts of the nation and modern law are both distinct and interdependent. In coming together they form a discourse in which each concept affirms the legitimacy of the other. He describes modern law as "illimitably-self generating," that is, law insists upon its legitimacy by reference to itself, rather than any prior standard. Fitzpatrick notes that, paradoxically, the law is "contained" by the particularity of its location, and yet is "uncontained" in the sense that it serves to define the limits of the nation-state. The nation, though dependent upon law for its existence, nonetheless retains some autonomy outside that relationship; Fitzpatrick assumes that law and nation will each intersect with other concepts in a manner independent of the relationship examined above.

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<sup>107</sup> Fitzpatrick, *supra* note 79 at 112.

<sup>108</sup> Fitzpatrick, *supra* note 40 at 48.

I visualize Fitzpatrick's conception of law and nation by way of an analogy with the corresponding beams of a pitched roof. The first of the two beams represents the modern law. The beam is self-generating in the sense that it undoubtedly creates the structure of the roof; there is nothing we can point to as more central to the roof's construction. The corresponding second beam represents the nation. It provides a location for the first beam; without the second beam, the first will collapse. The two beams remain distinct. It is possible to gain some understanding of each beam without reference to the other, such as discovering the material from which it is made. Their interdependency does not tell us everything about the individual components. Each is capable of relationships beyond the one described above. However, considering the relationship between the two beams provides insight into each that we will not gain by studying them independently.

## 2.18 The Cosmopolitan Nation

Fitzpatrick argues that the concept of "Europeanness" is founded on a conception of itself as universal, ordered, dynamic and progressive.<sup>109</sup> This identity is created by opposing itself to that which is "uncivilized." The "civilization" of Europe contrasts itself with the perceived "lawlessness" of Africa. Fitzpatrick's starting point is what Derrida refers to as "the paradox of nations." Nations, of course, have borders and because of this are necessarily geographically limited. Nevertheless, nations define themselves by reference to the universal. He suggests that the universality of the nation is reconciled with the particularity of geography through the abstract. The

nation overcomes the limitations of borders by an appeal to grand narratives of its history and destiny. Fitzpatrick cites the example of Balibar's description of "French ideology" to demonstrate this point. As "the land of the 'Rights of Man,'" Balibar explains, "true 'French ideology'" entrusts the nation with a mission to educate the world.<sup>110</sup> Through this mission, the values of the French extend beyond the particular to the universal. France may be contained by borders, but the French have a duty to spread "French" values to the rest of the world. The nation may alternatively achieve a sense of universality through a claim to embody universal traits. Though a nation will not be unique in possessing those traits, it perceives itself to be an example, perhaps a necessary one, to the rest of the world. Fitzpatrick states, "The Enlightenment, or modernization, or material achievement may be world projects, but the nation will still claim to manifest them exceptionally or to endow them with particular origins or necessary supplements."<sup>111</sup>

National narratives, which appeal to the universal, act as a homogenizing force within the nation. Fitzpatrick suggests that the homogenizing effect of nationalism became one of the characteristics that defined Europe from Africa. The concept of Western or European nations was formed by a process of collectively Othering themselves from Africa. The exemplification of universal characteristics, "embodied" by Western nations, was contrasted with the particularity and heterogeneity of Africa. Fitzpatrick uses the term "the comity of nations" to describe the collectivity of Western nations. Although the criteria for membership varied over time, a constant

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<sup>109</sup> Fitzpatrick, *supra* note 79 at 125.

<sup>110</sup> Fitzpatrick, *supra* note 79 at 120.

standard has been that of "civilization."<sup>112</sup> The concept of Europeanness, later "Westernness," is formed in opposition to that perceived to be uncivilized. Fitzpatrick cites Hegel's depiction of Africa in the *Philosophy of History* to demonstrate the importance of the contrast between civilization and lawlessness found in Western philosophy. He argues the comity of nations emerged by contrasting Europeanness, and the admirable traits it claimed to embody, with a negative depiction of Africa.<sup>113</sup>

According to Hegel, "the African" lives in a state of lawlessness. He represents man "in his completely wild and untamed state."<sup>114</sup> The African has not yet achieved the standard of universality. European regimes, divided into nations and under law, are contrasted with the lawless of Africa. The status of nation becomes synonymous with civilization. The negative depiction of the African serves a number of functions. By providing contrast it affirms the European nation's perception of itself as civilized. Hegel's Africa also serves as a threat or warning to the civilized nation; the nation that has transcended savagery has merely progressed along a scale ranging from savagery to civilization. Civilization is therefore not detached from savagery but linked to it. Fitzpatrick states, "The possibility of reversion or regression to the badness within also remains."<sup>115</sup> The civilized nation faces the constant threat of reversion.

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<sup>111</sup> Fitzpatrick, *supra* note 79 at 121.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> Fitzpatrick, *supra* note 40 at 126.

Harrington argues the *Lobe* decision and the outcome Citizenship Referendum showcase the ideological shifts that have taken place in Ireland in recent years. He describes the dominant Irish identity of the 21<sup>st</sup> century as “postnationalist,” a term which he borrows from Richard Kearney.<sup>116</sup> Kearney’s work suggests the conflict between Nationalists and Unionists in Northern Ireland might be resolved by looking to a common European identity. He argues that traditional Nationalist and Unionist identities were opposed to each other; each made exclusive territorial claims to Northern Ireland. Kearney attributes the symbolic and actual violence of the Northern Ireland “troubles” to the impasse created by this ideological logjam. He suggests that the conflict in Northern Ireland could best be resolved by each side embracing “multiple and shifting identities.”<sup>117</sup> This proposal attempts to transcend the logjam by inviting each group to embrace a common European cosmopolitan identity. Kearney states, “National identity [would] appeal to an historic past, and transnational, European identity to a projected future, [while] regional identity represents a commitment to participatory democracy in the present.”<sup>118</sup>

Drawing on the work of Fitzpatrick, Harrington argues that the “escape from nationalist stalemate into the flow or European progress” necessarily involves contrasting European identity with an “Other.” Whereas the newly independent Irish state of the early-to-mid 20<sup>th</sup> century defined itself in opposition to Great Britain, the modern day European Irish state defines itself in contrast to the “backwards” nations

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<sup>115</sup> Fitzpatrick, *supra* note 79 at 128.

<sup>116</sup> Richard Kearney, *Postnationalist Ireland* (Routledge Press, 1997) at 2.

<sup>117</sup> Harrington, *supra* note 72 at 3.

<sup>118</sup> Kearney, *supra* note 116 at 59.

of Africa and Eastern Europe. Harrington states, "In a sense the border that matters is no longer the line separating North from South. It is instead the barrier between Europe and its others which runs through the ports and the airports, right into the maternity wards of the state."<sup>119</sup>

I suggest that the Republic of Ireland's embrace of Europeanness re-invents the nation rather than transcends it. Fitzpatrick's analysis challenges the narrative in which the nation-state progresses from a parochial irredentist nationalism to a shifting cosmopolitan postnationalism. Instead cosmopolitanism is incorporated as a trait of European nation-ness. Fitzpatrick suggests that membership of the EU has come to symbolize the member state's embrace of cosmopolitanism. Thus membership of the EU reaffirms the legitimacy of the nation-state rather than transcends it.<sup>120</sup>

In Fitzpatrick's analysis, cosmopolitanism becomes a characteristic of Enlightened European nationalism. Held's diagnosis offering the possibility of overcoming the contradictions of liberalism serves to perpetuate the contradictions of the nation. At present the world is divided into "civilized" Western nations and the Other by borders. In Held's cosmopolitan model, the civilized world is recast as cosmopolitan in opposition to the irredentist Other.

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<sup>119</sup> Harrington, *supra* note 72 at 19.

<sup>120</sup> Fitzpatrick, *supra* note 79 at 136.



## 2.19 Conclusion

In the preceding pages I have sought to locate the Irish Citizenship Referendum within a discussion of citizenship, sovereignty and the nation. I have argued that each of these should be seen as a collection of loosely associated inter-related themes rather than clearly defined concepts. The dynamic quality of these themes results in periodic exposure of the inadequacies of the grand narratives of modernity. However, the pervasiveness of modernism's belief in certainty leads us to develop ever more complex theories in an attempt to accommodate the dynamic nature of these themes.

In the following chapters I explore how these themes played out in *Lobe* and the Citizenship Referendum. I argue that whilst *Lobe* and the Citizenship Referendum exposed the tensions present in modern definitions of citizenship, sovereignty and nation, an examination of the history of the regulation of Irish citizenship demonstrates that those tensions were always present. As such, *Lobe* and the Citizenship Referendum mark a continuity as well as change.

## CHAPTER THREE

### 3.1 Introduction

As chapter two explained, one of the trends of the 20<sup>th</sup> century was a gradual narrowing of the distinction between the rights enjoyed by citizens and non-citizens. Personhood was increasingly held as the criteria for entitlement to rights rather than citizenship.<sup>121</sup> This has led to questions being raised about the relevance of citizenship, sovereignty and the nation-state in the 21<sup>st</sup> century. Gerard Delanty states “Especially in the countries of the European Union, residence is increasingly coming to be the over-riding factor in citizenship rights...although still based on the priority of national citizenship, a legally codified European citizenship now exists as a post-nationalist citizenship.”<sup>122</sup>

In contrast, Saskia Sassen argues that though it has relinquished much of its traditional sovereign power, in regard to immigration, the nation state continues to assert the right to control its borders.<sup>123</sup> You will recall, Catherine Dauvergne contends that as other areas traditionally considered exclusively within the domain of the sovereign state, such as economic policy and law and order, have been challenged by other sites of power, migration law has become the “last bastion” of traditional

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<sup>121</sup> Joseph H. Carens, “Cosmopolitanism, Nationalism, and Immigration: False Dichotomies and Shifting Presuppositions” Ronald Beiner & Wayne Norman ed., *Canadian Political Philosophy* (Oxford University Press, 2001) 17 at 20.

<sup>122</sup> Gerard Delanty, “Irish Political Community in Transition” (2005) 33 *Irish Review* 13 at 15.

<sup>123</sup> Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, 1996) at 59.

sovereignty.<sup>124</sup> In this chapter I seek to build upon the framework established by Sassen and Dauvergne. I suggest that citizenship laws should be understood as a type of migration law. Possession of citizenship entitles persons to exercise certain rights within a state that non-citizens cannot. By increasing the number of people eligible to receive citizenship – for example by including descendents of citizens born outside the state - a country increases the number of people who can migrate to the state without the need to satisfy the requirements of formal migration laws.

By restricting entitlement to Irish citizenship, the Republic of Ireland sought to exercise control over its borders. However, I suggest this manner of exercising sovereignty was not new to the Irish state. The practical and symbolic use of citizenship laws has always been of particular importance to the Republic of Ireland. For much of the history of the state, however, the use of citizenship law as a form of migration law was obscured by the relatively small number of people immigrating to Ireland and the seemingly generous provisions of Irish citizenship law.

### 3.2 Ireland and Sovereignty

Whilst I agree with Dauvergne that the control of borders is of increasing significance to states in their efforts to assert sovereignty, I suggest that use of citizenship laws has long been of particular importance to the Republic of Ireland. Though it became formally independent in 1937, the extent to which the Republic of Ireland could

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<sup>124</sup> Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67(4) Mod. L. Rev. 588

exercise sovereignty in the “traditional” sense during the ensuing decades was limited. In the wake of independence, the Republic of Ireland remained tied economically to the United Kingdom. The majority of Irish exports went to the UK; though the Republic of Ireland established its own currency, it was a derivative of Stirling and Irish interest rates matched those set in London. Brendan Halligan states, “Ireland was part of an economic and monetary union, with some minor modifications because of political independence.”<sup>125</sup>

The extent to which the Republic of Ireland could claim to exercise sovereignty in regards to law and order was also limited. The *Government of Ireland Act, 1920* [the *1920 Act*]<sup>126</sup> partitioned Ireland into the Irish Free State and Northern Ireland. Northern Ireland remained part of the UK. Though Article 2 of the Constitution of Ireland 1937 declared that the national territory comprised “the whole Ireland of Ireland,” the Oireachtas did not exercise power over the six counties in the north-east corner, a fact acknowledged in Article 3.

The Republic of Ireland’s relationship with the UK has gradually altered. In 1972 both states joined the European Union [EU].<sup>127</sup> Through membership of the EU, the Republic of Ireland’s relationship with the UK changed from one in which it was economically dependent upon the UK to one in which the states are partners in a

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<sup>125</sup> Brendan Halligan, “What Difference did It Make?” in Rory O’Donnell ed., *Europe: the Irish Experience*, (Institute of European Affairs, 2000) 18 at 18.

<sup>126</sup> *Government of Ireland Act 1920* (U.K.) 1920, c.67, s.1.

<sup>127</sup> Then the European Economic Community [EEC].

broader union. Fintan O'Toole states that 1996 was the year in which "it became possible to understand the Republic of Ireland without reference to Britain."<sup>128</sup>

Politically, the relationship between the Republic of Ireland and the UK has also changed. The British Government acknowledged Ireland's right to self determination in the *Agreement* of 1998.<sup>129</sup> In the event that voters in the Republic of Ireland and Northern Ireland were to endorse proposals for a united Ireland the British Government has stated it would accept that result.<sup>130</sup> In a reciprocal gesture, the Republic of Ireland removed its territorial claim to Northern Ireland in Articles 2 and 3 of its Constitution. Consequently there ceased to be a disparity between the area that the Republic of Ireland claims as its national territory and that over which it exercises effective sovereignty.

Whilst these developments enabled the Republic of Ireland to achieve economic prosperity and normalized its relations with the UK, they have not resulted in the Republic of Ireland exercising sovereignty in a traditional manner. It has ceased to be economically dependent upon the UK, but has achieved that status through European integration and the embrace globalization rather than through self-sufficiency. It has utilized processes that have seen many facets of state sovereignty transferred from states to supra-national bodies. Furthermore, whilst the *Agreement* resulted in the removal of the Republic of Ireland's territorial claim to Northern Ireland, it also

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<sup>128</sup> Fintan O'Toole, quoted in Michael Mays, "Irish Identity in an Age of Globalisation" (2005) 13(1) Irish Studies Review at 7.

<sup>129</sup> *Northern Ireland Act 1998* (U.K.) 1998 c.47, s.1.

<sup>130</sup> *Ibid.*

committed the state to establishing a Human Rights Commission to ensure that the state conforms to international human rights standards.<sup>131</sup> Therefore, at the point in which the state's claim to sovereignty coincided most strongly with its ability to exercise authority over its proclaimed territory, the Republic of Ireland announced that its authority was subject to a standard set beyond the borders of the nation-state. Consequently, the Republic of Ireland has never exercised many of the powers traditionally associated with state sovereignty. In the following sections I demonstrate that regulation of migration laws is one of the tools that it has consistently used as a means to assert sovereignty.

### 3.3 Irish Citizenship 1922 – 1937

The Irish Free State was established in 1922. The Constitution of the Free State of Ireland [the 1922 Constitution] was based upon the terms of the *Anglo-Irish Treaty* of 1921 [the *1921 Treaty*]. It granted the Irish Free State some political autonomy as a dominion of the British Commonwealth. Article 3 dealt with Irish citizenship. It stated,

“Every person, without distinction of sex domiciled in the area of the Irish Free State (Saorstát Eireann) at the time of the coming into operation of this Constitution, who was born in Ireland or who has been ordinarily resident in the area of the Irish Free State (Saorstát Eireann) for not less than seven years,

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<sup>131</sup> *The Agreement*, 1998, Rights, Safeguards and Equality of Opportunity, s.9. Northern Ireland Office, online < <http://www.nio.gov.uk/agreement.pdf> >.

is a citizen of the Irish Free State (Saorstát Ereann) and shall within the limits of the jurisdiction of the Irish Free State (Saorstát Ereann) 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 Ereann) shall be determined by law.”<sup>132</sup>

Under the 1922 Constitution, anyone born in the 26 counties that comprised the Irish Free State prior to the date upon which it came into effect became an Irish citizen. Anyone born in the island of Ireland and resident in the Irish Free State at the time the 1922 Constitution came into effect was also a citizen of the Irish Free State. So too was anyone born elsewhere who had lived in the jurisdiction of the Irish Free State for the preceding three years.

From 1922 until the passing of the *Irish Nationality and Citizenship Act 1935* [the *1935 Act*] there was no statute governing Irish nationality or citizenship. This led to the anomaly that those born in the Irish Free State after 6 December 1922 were not Irish citizens until the *1935 Act* conferred citizenship upon them retrospectively. Mary Daly suggests that the delay in introducing an Act was because the Irish Free State was reluctant to introduce legislation acknowledging its citizenship was

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<sup>132</sup> Constitution of the Free State of Ireland 1922, Article 3 (Stationary Office, 1922).

subservient to British nationality.<sup>133</sup> She suggests that the Irish Free State resisted legislating on citizenship in the hope that negotiations at the Imperial Conference of 1926 would lead to a declaration that Commonwealth citizenship and British nationality were of equal status. Instead, The Balfour Declaration of 1926 adopted an “umbrella” theory of British nationality. It stated that whilst Commonwealth states were equal, the status of Commonwealth citizen was secondary to the allegiance subjects owed to the British Crown.

The *1935 Act* attempted to assert, as far as possible, Ireland’s claim to be a sovereign nation whilst minimizing the detrimental effect upon its relationship with Britain. It was primarily concerned with the assertion of sovereignty in the territory of the Irish Free State. Section 33 purported to repeal the British legislation, so those born in the Irish Free State would not longer be both Irish citizens and British nationals. Daly suggests that the criteria for Irish citizenship in the *1935 Act* were modeled on the corresponding British Act in an attempt to placate Britain.<sup>134</sup>

The *1935 Act* also marks the beginning of a process by the Irish state to use its citizenship laws to assert sovereignty, in a limited form, over the whole island of Ireland. The *Constitutional (Amendment No. 26) Act, 1935*<sup>135</sup> removed the phrase “within the limits of the jurisdiction of the Irish Free State (Saorstát Eireann)” from Article 3 of the *1922 Constitution*. This enabled the Oireachtas to pass legislation

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<sup>133</sup> Mary Daly, “Irish Nationality and Citizenship since 1922” (2001) 32 *Irish Historical Studies* 377 at 382.

<sup>134</sup> Daly, *ibid.* at 385.

<sup>135</sup> *Constitutional (Amendment No. 26) Act 1935* (I.), 1935 c. 12.



which bestowed Irish citizenship upon those born outside the borders of the Irish Free State. Section 2 of the *1935 Act* enabled the children of male Irish citizens born outside the state to be awarded Irish citizenship.<sup>136</sup> The *1935 Act* also bestowed a discretionary power to award citizenship to those born outside the Irish Free State upon the Minister for Justice.<sup>137</sup> It therefore became possible for residents of Northern Ireland to become Irish citizens.

The measures introduced by the *1935 Act* were criticized by some members of the Dáil as not going far enough in asserting Irish sovereignty. Deputy John A. Costello stated that the *1935 Act* was a “nationality” Act in name only. He complained that the *1935 Act* did nothing to assert the sovereignty of the Irish nation “which springs from our sentiments as an independent race, from the full knowledge of our past history as a nation.”<sup>138</sup> In a sense he was correct. Despite the wording of the *1935 Act*, Britain continued to view Ireland as a Commonwealth member and did not recognize Irish citizenship as distinct from British nationality until 1948. As such, Irish citizens continued to be British subjects.

Others raised criticisms of the *1935 Act's* treatment of the residents of Northern Ireland. During the debate surrounding the *Irish Nationality and Citizenship Bill, 1934*, Deputy John Esmonde complained that the measures were inappropriate as they treated members of the “Irish nation” resident in Northern Ireland in the same manner as “foreigners.” He stated,

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<sup>136</sup> *Irish Nationality and Citizenship Act 1935*, (I.), 1936 s.2(2)(a).

<sup>137</sup> *Ibid.* s.4.

“under this Bill, in future the Irish people of the North are to be put in the same position as Turks...according to the Bill in future the young Turks of Tyrone and the dancing Dervishes of Derry will have to go on a pilgrimage to that Mecca of Irish nationality, Piccadilly Circus, and, at the High Commissioner’s office there, will have to have their names inscribed in order to obtain the benefits of Irish citizenship.”<sup>139</sup>

### 3.4 Irish Citizenship: 1937 – 1998

In 1937, the 26 counties that today comprise the Republic of Ireland adopted its present constitution. Article 9 of the Constitution decreed that all citizens of the Irish Free State became citizens of the Ireland upon the Constitution coming into effect.<sup>140</sup> Future acquisition and loss of citizenship continued to be determined by the *1935 Act* until 1956. At that point, the *1935 Act* was replaced with the *Irish Nationality and Citizenship Act, 1956* [the *1956 Act*] which, although amended since its introduction, was never repealed and remains in effect today.<sup>141</sup>

The citizenship regime implemented by the *1956 Act* sought to achieve two goals. It sought to further overcome the difficulty posed by partition to the Irish nationalist vision, in which the whole island of Ireland was recognized as a nation-state; it also

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<sup>138</sup> Deputy John A. Costello, Ireland, *Dáil Debates*, vol.55 (4 April 1935).

<sup>139</sup> Deputy John Esmonde, Ireland, *Dáil Debates*, vol.55 (4 April 1935).

<sup>140</sup> Constitution of Ireland 1937, Article 9.1.1.

<sup>141</sup> *Irish Nationality and Citizenship Act 1956* (I.) 1956, c.26 [the *1956 Act*].

attempted to counteract the problem of depopulation. The framers of the *1956 Act* hoped to achieve these goals by extending the categories of person entitled to claim Irish citizenship.

The influence of the *jus soli* principle is apparent in Part II of the *1956 Act*. Part II of the *1956 Act* defines who is an Irish citizen. Until recent changes in the legislation, Section 6(1) stated anyone born in Ireland was an Irish citizen. No further qualification was required in order to acquire Irish citizenship.<sup>142</sup> The *jus soli* principle remains within the *1956 Act* today; albeit in a form tempered by a residency requirement. Part II of the *1956 Act* is also extensively influenced by the *jus sanguinis* principle. Section 6(2) states that a child born to a parent who is an Irish citizen is an Irish citizen. The rule applies regardless of whether the child was born in the state, the citizen parent was resident in Ireland at the time of the child's birth, or if the citizen parent was alive at the time of the child's birth. By bestowing Irish citizenship upon the children of Irish citizens, regardless of whether the child was born or will be raised in Ireland, Section 6(2) demonstrates a conception of Irish citizenship in which Irishness is defined by lineage rather than birth into, or contribution to, Irish society.

The influence of the *jus sanguinis* principle is also evident in Part III of the *1956 Act*. Part III determines who can become an Irish citizen. Ordinarily, an alien must comply with conditions set out in Section 15 of the Act in order to receive a

certificate of naturalization. Section 15 is qualified by Section 16 which lists circumstances in which the Minister for Justice may grant a certificate of naturalization regardless of whether the conditions are met. Among the circumstances expressly stated by Section 16 is "where the applicant is of Irish decent"<sup>143</sup> and "where the applicant is a parent or guardian acting on behalf of a minor of Irish decent."<sup>144</sup>

By the early 1950s, an increasing number of people born in Northern Ireland were not entitled to Irish citizenship under the *1935 Act* because their fathers had been born outside the state. However, Mary Daly argues that extending the benefits of Irish citizenship to their fellow countrymen was not the primary goal of the framers of the *1956 Act*. Her research indicates that the Irish Government was more concerned with securing the Republic of Ireland's claim to be a sovereign state than ensuring the wellbeing of those in Northern Ireland. She points out that whilst the Irish Government had protested strongly about the *British Nationality Act 1948*<sup>145</sup> it had hitherto shown little concern for anomalies in its own legislation which prevented Northerners from exercising rights within the Republic of Ireland.<sup>146</sup>

The extension of entitlement to citizenship was therefore primarily a symbolic measure. By entitling anyone born in the island of Ireland to Irish citizenship, the

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<sup>142</sup> The exception to this rule was the case of those born in Northern Ireland who were required under Section 7 of the 1956 Act to "declare" that they were Irish in order to acquire Irish citizenship. Consequently, it is not correct to state they were Irish citizens *solely* from birth.

<sup>143</sup> *Supra* note 141 s.16(a).

<sup>144</sup> *Supra* note 141 s.16(b).

<sup>145</sup> *British Nationality Act 1948* (UK) 1948, c.56.

<sup>146</sup> Daly, *supra* note 133 at 392

*1956 Act* served to further a national narrative about the indivisibility of the Irish nation in the face of challenge posed by partition. Though the power of the Irish state only extended to 26 of the 32 counties, the *1956 Act* entitled those born in Northern Ireland to claim Irish citizenship. It sought to reduce, as far as possible, the distinction between those born in the Republic of Ireland and those born in Northern Ireland. Remarks by then Minister for Justice, James Everett, during the Dáil debate on what was to become the *1956 Act* indicate the prevailing mood of the time. He stated, "A result of this new provision is that birth in the national territory of the Six Counties is recognized, just as in the Twenty-Six Counties, as enabling Irish citizenship to be transmitted from either the father or mother to the children in a never ending chain, without any formality of registration."<sup>147</sup>

By entitling a large class of persons to claim Irish citizenship, the *1956 Act* also sought to counter depopulation, one of the practical difficulties facing the state at that time. Approximately half a million people – one seventh of the population – left Ireland in the 1950s.<sup>148</sup> In 1956 the threat depopulation posed to Irish society was perceived to be greater than that posed by inward migration. John A. Harrington describes the national climate of the time as "one of defeat and despair."<sup>149</sup> The *1956 Act* entitled both those born in the state and those descendent of Irish citizens to claim citizenship in the hope that it would decrease the threat posed by depopulation.<sup>150</sup> It

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<sup>147</sup> Deputy James Everett, Ireland, *Dáil Debates*, vol. 154 (29 February 1956).

<sup>148</sup> Tim Pat Coogan, *De Valera: Long Fellow, Long Shadow* (London, Hutchinson 1993) at 661-667.

<sup>149</sup> John A. Harrington, "Citizenship and Biopolitics of Postnationalist Ireland" (2005) 32(3) *J.L. & Soc'y* 424 at 431.

<sup>150</sup> Siobhán Mullally, "Citizenship and Family Life in Ireland: Asking the Question 'Who Belongs?'" (2005) 25(3) *Legal Studies* 578.

was a strategy linked to the concept of Irish sovereignty in the sense that it attempted to secure the state through economic well-being.

### 3.5 The Nineteenth Amendment to the Constitution of Ireland

On 10 April 1998, agreement was reached between negotiators charged with securing a settlement for governing Northern Ireland.<sup>151</sup> The *Agreement* was accepted by voters in Northern Ireland and the Republic of Ireland in separate referenda. It effected significant change in the relationships between the Republic of Ireland, Northern Ireland, and Great Britain. The undertakings of the parties envisaged a re-conceptualization of “Irishness” and “Britishness.” In the Republic of Ireland, voters approved the Nineteenth Amendment to the Constitution of Ireland. This replaced the traditional claim to Northern Ireland with an inclusive definition of Irishness. However, whilst the Nineteenth Amendment signaled a re-conceptualization of “Irishness” and the aspirations of the state, the Republic of Ireland continued to use its citizenship laws as an expression of state sovereignty.

From the time of Ireland’s partition by the *Government of Ireland Act, 1920* [the 1920 Act], Northern Ireland was the subject competing claims to sovereignty between the Irish Free State (which became the Republic of Ireland) and the United Kingdom. Broadly speaking, those who identified themselves as Irish Nationalists perceived the partition of Ireland and the establishment of Northern Ireland to be an illegitimate act,

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<sup>151</sup> *Ibid.*

whilst those who saw themselves as British Unionists held that Northern Ireland was a legitimate state.

Nationalists reasoned that the General Election of 1918, in which a majority in Ireland had endorsed independence, gave legitimacy to the concept of Ireland as an independent, unitary island nation. That a majority of voters in the north-east of Ireland had rejected independence did not justify partition. J.J. Lee succinctly captures the dominant Nationalist critique of partition, stating "The Ulster unionist mind saw no incongruity in denying any nationalist right to rule the nine counties of 'Protestant' Ulster on the basis of a 3:1 nationalist majority in Ireland as a whole, whilst simultaneously insisting on a right to rule Ulster with a 55 per cent Protestant majority."<sup>152</sup> The rejection of the legitimacy of Northern Ireland was reflected in Articles 2 and 3 of the Constitution of Ireland 1937:

"Article 2.

The national territory consists of the whole Island of Ireland, its islands and the territorial seas.

Article 3.

Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to

exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstat Eireann and the like extra-territorial effect.”

By laying claim to “the whole island of Ireland,” Article 2 denied the legitimacy of Northern Ireland. Reference to “the re-integration of the national territory” in Article 3 reflected a unitary conception of the Irish nation-state. It perceived a time in which “the North” (never Northern Ireland) would assimilate into the Irish Free State. The concept of assimilation is central to the traditional Nationalist concept of reunification; the re-integration of the national territory would be a unilateral action in which the illegitimate northern state assimilated into the legitimate southern state.

Unionists argued that the *1920 Act* created two legitimate states, Northern Ireland and the Irish Free State, when it partitioned the island of Ireland. Unionists reasoned that at the time of partition the whole of Ireland was part of the United Kingdom and therefore subject to the Westminster doctrine of Parliamentary Supremacy. Consequently, the Westminster Parliament had the authority to partition Ireland if it wished. Furthermore, the doctrine of Parliamentary Supremacy ensured that, until the event of a repeal of the *1920 Act*, Northern Ireland was a legitimate political entity. In contrast to the claims of Nationalists, Unionists maintained the Constitution of Ireland made an illegitimate territorial claim upon part of the sovereign United Kingdom.

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<sup>152</sup> J.J. Lee, *Ireland 1912-1925: Politics and Society* (Cambridge University Press, 1989) at 4.



The *Agreement* sought to move away from what Kearney dubs “the nationalist-unionist logjam” of competing irredentist claims to sovereignty.<sup>153</sup> It envisaged a re-conceptualization, not only of northern Nationalism and Unionism, but also wider Irish and British identities. Irish and British identities were reconceived as intimately inter-related rather than mutually exclusive and necessarily incompatible. The *Agreement* envisaged that whilst people would retain their sense of Irishness or Britishness these would be seen as an historic aspect of a broader community. Meanwhile, it would be possible to transcend longstanding difficulties by each group looking to the future through the lens of a common European identity. In the Republic of Ireland, the original Article 2 of the Constitution of Ireland which laid claim to the whole island of Ireland was replaced with an inclusive concept of Irishness:

“Article 2.

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.”

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<sup>153</sup> Richard Kearney, *Postnationalist Ireland* (Routledge Press, 1997) at 2.

The new Article 3 acknowledged a plurality of Irish identities. Whilst it retained the Nationalist aspiration of a united Ireland, it acknowledged the northern state. The concept of unification through assimilation was abandoned.

#### Article 3.

1. It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the islands of Ireland, in all the diversity of their shared identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of the majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.
2. Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island.”

The revised Articles 2 and 3 acknowledge the legitimacy of the Irish identity of northern Nationalists and the British identity of northern Unionists. Article 2 entitles any person born on the island of Ireland “to be part of the Irish nation.” Article 3 acknowledges the legitimacy of Northern Ireland. It recognizes that a united Ireland

can only be achieved with the consent of the majority of people within the Republic of Ireland and Northern Ireland. Furthermore, the *Agreement* commits the Government of the Republic of Ireland to participating in cross-border bodies in Northern Ireland [“the north-south dimension”] and inter-governmental bodies with the British Government in London [“the east-west dimension.”]

The amending of Articles 2 and 3 indicated that the narrative in which the whole island of Ireland was rightfully a mono-cultural nation-state had ceased to dominate Irish political thought in the way that it had throughout most of the 20<sup>th</sup> century. However, whilst the Constitution of Ireland adopted a new inclusive definition of Irishness, and the area over which the Republic of Ireland claimed as its rightful territory altered, the state continued to use citizenship laws to exert sovereignty over that territory. In the Dàil, TDs raised concerns as to whether the Article 2 would reduce the ability of citizens resident in the state to hold their government to account. Former Taoiseach John Bruton sought reassurance that Irish citizens resident outside the state would not be entitled to vote in elections within the Republic of Ireland.<sup>154</sup> The Taoiseach, Bertie Ahern assured the Dàil that the new Article 2 would not extend voting rights to Irish citizens outside the state. He pointed out that under Article 16.2 of the Constitution residence in the state was a prerequisite for citizens to exercise voting rights.<sup>155</sup>

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<sup>154</sup> John Bruton, Ireland, *Dàil Debates*, vol.489 (22 April 1998).

<sup>155</sup> Bertie Ahern, Ireland, *Dàil Debates*, vol.489 (22 April 1998).

Therefore, while one consequence of the *Agreement* was that the Republic of Ireland formally acknowledged northern Nationalists and those of Irish descent as part of the Irish nation, it simultaneously ensured that the operation of citizenship rights remained tied to the territorial state. In doing so, the Republic of Ireland continued to exercise sovereignty over the national territory through its citizenship laws.

### 3.6 Irish Sovereignty and the Rights of the Family

A year before the Citizenship Referendum, the Irish Supreme Court released the decision of *A.O. & D.L. v. Minister for Justice [Lobe]*.<sup>156</sup> It seemingly restricted the rights of Irish citizens born to non-nationals from residing in the state. Since the case of *Fajujonu v. Minister for Justice [Fajujonu]*,<sup>157</sup> Government policy had proceeded on the misapprehension that non-national parents of child-citizens could not be deported.<sup>158</sup> However, as I will show, the Irish courts have always held that the rights of child citizens to the care and company of their parents in the state were “subject to the exigencies of the common good.” Furthermore, courts defined “the common good,” against which the children’s right to remain in the state was measured, as the state’s ability to exercise sovereignty over the national territory. The Supreme Court decision in *Lobe* indicated that the Republic of Ireland considered the common good to be best served by rejecting applications from non-nationals to remain in the state

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<sup>156</sup> *A.O. & D.L. v. Minister for Justice*, [2003] 1 IR 3, 2003 [*Lobe*].

<sup>157</sup> *Fajujonu v. Minister for Justice* [1990] 2 IR 151 [*Fajujonu*]

<sup>158</sup> Donncha O’Connell & Ciara Smyth, “Citizenship and the Irish Constitution” in Ursula Fraser & Colin Harvey ed., *Sanctuary in Ireland: Perspectives on Asylum Law and Policy* (Institute of Public Administration, 2003) 229 at 235.

for the benefit of their citizen children. However, this decision expressed a change in priorities of the state, rather than a fundamental change of policy.

The claim that the state's ability to assert control of its borders could be outweighed by the right to family life found in Article 41 of the Constitution was considered in *Pok Sun Shum v. Ireland* [*Pok Sun Shum*].<sup>159</sup> The plaintiff was a Chinese national who arrived in the Republic of Ireland in 1978. He married an Irish citizen and had four Irish children. At some point, the plaintiff was involved in "a serious incident" and told that he must leave the Republic of Ireland. However, he did not do so. Instead, he remained in the state and in 1981 applied for a certificate of naturalization. His application was denied and he was once again told that he would have to leave the state. The plaintiff sought a declaration from the High Court that his removal from the state would violate his wife's right to family life, protected under Article 41 of the Constitution of Ireland.

The High Court rejected his claim. Costello J. stated that the right to family life, guaranteed under Article 41 could be restricted in the interests of the public good. He stated "I do not think that the rights of the 'family' are absolute, in the sense that they are not subject to some restrictions by the state."<sup>160</sup> Costello J. continued by emphasizing the need for the state to be able to assert sovereignty through control of its borders. "It seems to me that the State...must have very wide powers in the

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<sup>159</sup> *Pok Sun Shum v. Ireland*, [1986] 6 I.L.R.M. 593

<sup>160</sup> *Ibid.* at 597.

interest of the common good to control aliens, their entry into the state, their departure and their activities when in the state.”<sup>161</sup>

The Irish Courts adopted a similar approach in *Osheku v. Ireland* [*Oskeku*].<sup>162</sup> The plaintiff was a Nigerian citizen who had lived in the Republic of Ireland since 1979. Upon arrival, he agreed to leave the state within a month. Instead he married an Irish citizen and had a child who was also an Irish citizen. The plaintiff sought an order to restrain the Minister for Justice from deporting him. The power to deport aliens was bestowed upon the Minister by section 4 of the *Alien Act 1935*. The plaintiff argued that in cases where a non-national was part of an Irish family, the *Alien Act 1935* was in conflict with the right to family life guaranteed by Articles 40, 41 and 42 of the Constitution.

Gannon J. rejected the plaintiff's claim. He quoted, apparently with approval, the remarks of Costello J. in *Pok Sun Shum* which stated that the rights of the family guaranteed by the Constitution were not absolute. Gannon J. held that there were circumstances in which it was necessary to restrict the rights of individuals in pursuit of the common good. He stated, “There are fundamental rights of the state as well as fundamental rights of citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter.”<sup>163</sup> He went on to emphasize that the control of borders was of key importance to the integrity of the state. He ruled that the integrity of the state, “constituted as it is of the collective body of its

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<sup>161</sup> *Ibid.* at 599.

<sup>162</sup> *Osheku v. Ireland* [1986] IR 735 [*Osheku*].

citizens within the national territory must be defended and vindicated by the organs of State and by the citizens so there may be true social order within the territory and concorde maintained with other nations in accordance with the objectives declared in the preamble to the Constitution.”<sup>164</sup>

The main authority upon which the families in *Lobe* relied was a previous Irish Supreme Court case, *Fajujonu v. Minister for Justice*.<sup>165</sup> Mr. and Mrs. Fajujonu were Nigerian and Moroccan citizens respectively. They had lived in Ireland illegally from 1981. Between 1983 and 1987 they had three children who, by virtue of the place of their birth, were Irish citizens. At some point in 1981 a deportation order was issued against Mr. Fajujonu, although it was never enforced. In 1983 the Fajujonu family asked the court to recognize that their children had a right to the care and company of their parents in the state under Article 41 of the Constitution, and guarantee that the parents would not be deported.

The High Court ruled that whilst child citizens had a constitutional right to be in the state, and to the care and company of their non-national parents, they did not have a right to the society of their parents in the state. On appeal, the Supreme Court held the children involved had a constitutional right to the care and company of their parents and had a *prima facie* entitlement to exercise that right in the state. It held that the parents could indicate a choice of residence on the child citizen's behalf if it

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<sup>163</sup> *Ibid.* at 746.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Fajujonu*, *supra* note 157.

was “in the interests of those infant children.”<sup>166</sup> *Fajujonu*, established that the child’s right to the care and company of his or her parents in the state could only be restricted “subject to the exigencies of the common good.”<sup>167</sup> The Supreme Court did not overrule the High Court decision and did not find for the appellants. Rather, it invited the Minister for Justice to reconsider his opinion to deport Mr. Fajujonu. As it happened, the original deportation order had become invalid and a new order was not issued.

During the 1990s the Republic of Ireland changed from a country of net emigration to one of net immigration. Among those entering the country was an increased number of asylum seekers. The number of people seeking asylum in Ireland rose from 39 in 1992 to approximately 12,000 in 2002.<sup>168</sup> In response to this, the Government introduced the lengthy *Refugee Act, 1996*.<sup>169</sup> However, Government policy in regard to the non-national parents of Irish children proceeded on the misapprehension that they could not be deported.<sup>170</sup> The perception that, as a consequence of *Fajujonu*, the non-national parents of child citizens could effectively bypass the asylum and immigration system and remain in the state by asserting a choice of residence on behalf of the child was seen as a threat to the integrity of that system. Consequently, a decision was made to begin refusing applications to remain in the state in the hope

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<sup>166</sup> *Ibid* at 162.

<sup>167</sup> *Ibid*.

<sup>168</sup> Maurice Manning, “Introduction” in Ursula Fraser & Colin Harvey ed., *Sanctuary in Ireland: Perspectives on Asylum Law and Policy* (Institute of Public Administration, 2003) xi at xii

<sup>169</sup> *Refugee Act 1996* (I.), 1996, c.17.

<sup>170</sup> O’Connell & Smyth, *supra* note 158 at 235.



that it would provoke a legal challenge that would result in *Fajujonu* being “overturned.”<sup>171</sup>

The challenge to the Minister for Justice’s decision to refuse residence rights to non-national parents was raised in *Lobe*. The *Lobe* case concerned the Lobe family from the Czech Republic and the Osayande family from Nigeria. The Lobe family came to Ireland in March 2001; the Osayandes arrived in May of the same year. In each instance, the parents claimed asylum upon arrival in the state but their applications were unsuccessful. An order to deport both the Lobe and Osayande families was issued but, before it could be enforced, each family gave birth to a child. At the time of the children’s birth, anyone born in Ireland automatically received Irish citizenship. The families contended that in light of the birth of a child citizen, the state could no longer deport the parents. The *Lobe* case considered whether a child citizen had the right to reside with his or her non-national parents in the Republic of Ireland.

The families submitted three arguments on behalf of the children. Firstly, they contended that as the children were Irish citizens, in accordance with Articles 2 and 9 of the Constitution of Ireland, they had an unqualified right to reside in the state. As the children were dependent upon the care of their parents, and the deportation of the parents would lead to the removal of the children from the state, the deportation of the parents amounted to a violation of the children’s right to reside in the state. Secondly, it was submitted that the deportation order was a violation of Articles 40.1

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<sup>171</sup> O’Connell & Smyth, *supra* note 158 at 231.

and 40.3 of the Constitution. Article 40.1 holds that all persons must be treated equally before the law; Article 40.3 commits the state to upholding the rights of the individual. The families argued that as the deportation order would lead to the removal of the children, as well as their parents from the state, it distinguished the quality of citizenship enjoyed by citizens born of non-nationals from those born of Irish citizens. This, they claimed, amounted to a form of discrimination, forbidden by Articles 40.1 and 40.3, against child citizens born of non-national parents. Finally, the families argued that the Constitution entitled the children to the care and company of their parents in the state. Article 41 recognizes "the Family" as possessing "inalienable and imprescriptible rights, antecedent to and superior to all positive law." It commits the state to protecting the family, "in its constitution and authority." It was submitted that, as the children were dependent upon their parents, deporting the parents would remove the children from the state and deprive them of their right to the state's protection of the family.

The families were unsuccessful in their bid to remain in the state. A majority of the Supreme Court held that whilst, in general, a citizen has the right not to be expelled from the state, the right is not absolute. Keane C.J. cited the extradition process as an example of a circumstance in which a citizen may legitimately be compelled to leave the state.<sup>172</sup> The court stressed that the deportation of the parents did not affect the right of the children, as citizens, to return to the state when they were capable of asserting a choice of residence independent of their parents. Rather, the children

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<sup>172</sup> *Lobe, supra* note 156 at 27.

were leaving the state merely as a practical consequence of their parents' deportation.<sup>173</sup>

The Supreme Court also rejected the argument that the Constitution of Ireland's commitment to the protection of the family guaranteed the children the right to the care and company of their parents in the state. Keane C.J. pointed to imprisonment as an instance in which the integrity of the family may be restricted legitimately, indicating that whilst the family may possess rights that are superior to all positive law, the Court did not recognize the integrity of the family as an absolute right.<sup>174</sup>

The majority of the Supreme Court held that the right of the child citizen to reside in the state had to be balanced against the right of the Oireachtas to exercise power over the entry of non-nationals into the state. In that balancing act, they considered the control of borders of greater importance than the rights of the child citizen. Each of the Justices in the majority endorsed the view expressed by Gannon J. in *Osheku v. Ireland*<sup>175</sup> that "the national territory must be defended by the organs of the State and by the citizens."<sup>176</sup> Exercising control over non-nationals within the national territory was considered so essential to the integrity of the state that it outweighed the rights of child citizens to reside in the state. This was expressed most forcefully by Keane J. who stated "it would seem to me that it cannot be said, as a matter of law, that, in a case such as the present, the parents of the minor applicants can assert a choice to

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<sup>173</sup> *Lobe, supra* note 156 at 75.

<sup>174</sup> *Lobe, supra* note 156 at 27.

<sup>175</sup> *Osheku, supra* note 162 at 746.

reside in the State on behalf of the minor applicants, even if that could be said to be in the interests of the minor applicants.”<sup>177</sup>

The increase in the numbers of people entering the country clearly influenced the decision of the Supreme Court in *Lobe*. Comparing the circumstances in which *Fajujonu* was decided with those of *Lobe*, Murray J. stated “There is manifestly a distinction to be drawn between a situation where the number of persons seeking to enter the State in any one year is very low, for example 30 or 40, and the situation where many thousands seek to do so.”<sup>178</sup> His comments indicate that it was the change in material circumstances, rather than a change in the rights associated with Irish citizenship, that prompted the court to rule that the families in *Lobe* could not remain in the state. Keane C.J. made similar remarks in his judgment.<sup>179</sup> The *Lobe* case held that, providing the immigration services gave appropriate consideration to the claim of a child citizen when making its decision, the Republic of Ireland could remove the non-national parents of child citizens from the state, even if that was to the detriment of the children. In doing so, the courts affirmed that the rights associated with possessing Irish citizenship were subservient to the state’s right to assert sovereignty over the national territory.

Claire Breen suggests that the decision to deny residency rights to the non-national parents of Irish children at best ignores the rights of the child and at worst

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<sup>176</sup> *Lobe*, *supra* note 156 at 24, 45, 85, and 134, Keane C.J., Denham, Murray and Hardiman JJ. Geoghegan J. endorses the decisions of Keane C.J. and Hardiman J. at 166.

<sup>177</sup> *Lobe*, *supra* note 156 at 20, Keane C.J.

<sup>178</sup> *Lobe*, *supra* note 156 at 45, Murray J.

discriminates against citizens on the grounds of their parents' nationality. She argues that the *Lobe* decision disregarded Irish jurisprudence that emphasized the need to prioritize the best interest of the child.<sup>180</sup> The Constitution of Ireland places particular importance upon the (nuclear) family. It permits state interference in family life only when parents fail in their "physical or moral" duty to their children.<sup>181</sup> The well-being of children has often been cited as justification for intervention in family life. They typically involve social services removing children from the custody of their parents.

Breen contends that the best interests of the child were disregarded in *Lobe* in favour of ensuring the state retained the power to control its borders. She argues that the Supreme Court could have drawn upon the Convention on the Rights of the Child [CRC] to defend the rights of the child citizen. The Republic of Ireland assumes a dualistic approach to international law. In theory, dualism holds that international law can only be enforced if it has been incorporated into domestic law. However, Breen points out that the Irish experience of the relationship between domestic and international law is more complex than the formal definition of dualism suggests. Irish courts have repeatedly stated that international law is not enforceable unless incorporated into domestic law. Nevertheless, they have invoked international law as guidance for interpreting the meaning of constitutional provisions and domestic legislation. At the time of *Kelly v. O'Neill* the European Convention on Human

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<sup>179</sup> *Lobe*, *supra* note 156 at 25, Keane C.J.

<sup>180</sup> Claire Breen, "Refugee Law in Ireland: Disregarding the Rights of the Child-Citizen, Discriminating against the Rights of the Child" (2004) 15(4) Int'l J. Refugee L. 750.

<sup>181</sup> Constitution of Ireland Article 41.1.

Rights [ECHR] did not form part of the Republic of Ireland's domestic law. However, the court deemed the state's ratification of the ECHR sufficient authority to take the jurisprudence of the European Court of Human Rights into account. Therefore, whilst domestic law provides the only source of enforceable rights in the Republic of Ireland, the character of those rights has been influenced by international law.

The *Lobe* case stands in marked contrast to such decisions. It saw rights repeatedly emphasized in international law marginalized by the Supreme Court. For example, Article 2 of the CRC, of which the Republic of Ireland is a signatory, requires states ensure their practices are non-discriminatory, "irrespective of child's, or his or her parent's...status."<sup>182</sup> The universal nature of rights emphasized in Article 2 of the CRC was not used to interpret the rights of the Irish citizen born to non-national parents. Instead, the Supreme Court emphasized the need for the state to be able to exercise control over its borders.

Siobhán Mullally agrees that the Supreme Court's willingness to permit the Executive to intervene in the private sphere of family life in *Lobe* was in marked contrast to previous decisions regarding the rights of the family. She notes that only a year before the Supreme Court ruled that constitutional provisions regarding the family permitted the state to intervene only in the most exceptional of circumstances.<sup>183</sup> She argues that acting in the best interest of the child has repeatedly been used to justify

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<sup>182</sup> Breen, *supra* note 180 at 753.

<sup>183</sup> Mullally, *supra* note 150 at 579.

state intervention in the Republic of Ireland. Therefore, despite the state's ostensibly "pro-family" constitution and extensive jurisprudence emphasizing the importance of acting in the best interest of the child, the *Lobe* case mirrored the approach of courts in other Western countries with *jus soli* citizenship regimes.

Breen and Mullally demonstrate that there was sufficient judicial precedent to make a case against deporting the families in *Lobe*. However, I suggest that the problem is not that the Supreme Court made the wrong decision but that making a decision compromised the principles that law purports to stand for. It will be recalled that in chapter two I employed the work of Jean L. Cohen, who argues that the component parts of citizenship – political, judicial and identity – do not always fit together harmoniously. In *Lobe* the judicial component of citizenship, in the form of the right of the child citizens to equal treatment before the law, came into conflict with the political aspect, which asserted that the state had a right to control non-nationals within its territory.

The response of the Supreme Court was not to acknowledge the tension between the component parts of citizenship, but rather to deny it. A majority held that the law demanded the deportation of the parents, ignoring that the law also required the children be accorded the same rights as citizens born to Irish parents. In doing so, the Supreme Court downplayed the precedents which placed the rights of the family and the best interests of the child at the forefront of judicial decision making. Breen and Mullally's criticisms of the *Lobe* decision are not without merit, but placing the

emphasis upon the rights of the child does not resolve the tension posed to legal systems by citizens born to non-national parents. It simply places the emphasis on difference principles.

### 3.7 Challenges to State Sovereignty

During the Citizenship Referendum campaign, the opinion of the Advocate General in the case of *Chen v. Secretary of State for the Home Department* [*Chen*] was released.<sup>184</sup> *Chen* considered whether a child citizen of an EU member state, who is effectively in the care of a national of a non-member country, had the right to reside in another member state. Although the case directly concerned the Government of the United Kingdom, the outcome was of general significance throughout the EU.

The child in question, Catherine Chen, was born in Belfast to a Chinese national, Man Lavette Chen [Mrs. Chen] in September 2000. Mrs. Chen traveled from Great Britain, where she lived at the time, to Northern Ireland so that her child would be entitled to Irish citizenship. Though historically the United Kingdom awarded citizenship on the basis of the *jus soli* principle, a residency requirement was inserted into UK citizenship law by the *British Nationality Act 1981*.<sup>185</sup> Northern Ireland is part of the United Kingdom. However, under Section 7(1) of the Irish Nationality and Citizenship Act, 1956, Mrs Chen was entitled to “declare” Catherine an Irish citizen, at which point she retrospectively became an Irish citizen “at birth.” After

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<sup>184</sup> *Chen v. Secretary of State for the Home Department*, Case C-200/02 [2004] E.C.J. at para. 47 [*Chen*].



Catherine was born, she and Mrs. Chen returned to Britain where they applied for a long-term residency permit. The application was refused.

Mrs. Chen appealed to the European Court of Justice [ECJ] to have the decision to refuse her long-term residency application overturned. She argued that the UK Home Department's refusal was a breach of Catherine's right of free movement within EU Member States, as guaranteed to EU citizens by Article 18 EC and Directive 90/364. The ECJ was asked to determine whether Catherine's dependency upon her mother conferred a right upon Mrs. Chen to reside with her daughter in a member state of which Catherine was not a citizen.

The Advocate General, and later the ECJ itself, held that a child whose parents were not EU nationals could reside in another member state in the company of its parents.<sup>186</sup> It held that provided Catherine was covered by "appropriate sickness insurance" and the parents had sufficient financial resources to ensure the child did not become "an unreasonable burden upon the state," the UK Government could not restrict Catherine's right to free movement.<sup>187</sup> In the Republic of Ireland, advocates of the restriction of Irish citizenship argued that the opinion of the Advocate General in *Chen* demonstrated the threat that Ireland's existing citizenship law posed, both to its own sovereignty and to the sovereignty of its EU partners.<sup>188</sup> I suggest that the implications of the *Chen* case are more complex than the reaction of "Yes" campaign

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<sup>185</sup> *British Nationality Act 1981* (U.K.) 1981, c. 61, s.1.

<sup>186</sup> *Chen*, *supra* note 184 at para. 47.

<sup>187</sup> *Chen*, *supra* note 184 at para. 47.

suggested. It demonstrates the continuing potency of the sovereignty of EU member states as much as it challenges it.

By declaring that free movement provisions entitle EU citizens to reside in any member state, provided that they do not become an unreasonable burden upon their state of residence, the ECJ appeared to detach the ability to control admission of non-nationals from the nation-state. To the extent that *Chen* represents a challenge to the sovereignty of EU member states, the challenge comes not from non-nationals but from the EU itself. Peter Fitzpatrick argues that despite the particularity of its location, the nation posits itself as embodying universal characteristics.<sup>189</sup> This universality is among the positive characteristics attributed to the nation and is placed in contrast to the particular and parochial. Fitzpatrick suggests that rather than transcending the nation, the EU promotes itself as embodying those attributes.<sup>190</sup>

As chapter two explained, rights enjoyed by EU citizens resident in other member states do not correspond fully to those enjoyed by citizens residing in their own state. Typically, the EU citizen residing in their own state is privileged over those from another member state.<sup>191</sup> The *Chen* case highlights that certain rights associated with EU citizenship are restricted to those outside their home state. Siobhán Mullally notes that the rights invoked in *Chen* were dependent upon the child residing in

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<sup>188</sup> See Carol Coulter, "European finding bolsters case for referendum made by Government" *Irish Times* (19 May 2004) and "Citizen Chen" Editorial, *Irish Independent* (19 May 2004).

<sup>189</sup> Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge, 2002) at 132.

<sup>190</sup> *Ibid.* at 136.

<sup>191</sup> Marco Martiniello, "Citizenship in the European Union" in T. Alexander Alienikoff & Douglas B. Klusmeyer ed., *From Migrants to Citizens: Membership in a Changing World* (Carnegie Endowment for International Peace, 2000) 324 at 366.

another member state. She suggests that as the Directives relied upon in the *Chen* case depend upon the citizen crossing a national border, the decision in *Chen* was no indication that an appeal to the ECJ would result in the decision in *Lobe* being overturned.<sup>192</sup>

However, it should be noted that the rights bestowed by EU citizenship and affirmed by the ECJ remain dependent upon the prior possession of citizenship of a member state. As the Citizenship Referendum demonstrates, this is an area in which the member states retain full control. Furthermore, the restrictions placed upon the member states' right to control the movement of non-nationals within its borders apply only to citizens of other EU states and certain members of their families. Member states fully retain the right to control the movement of non-EU nationals. Therefore, whilst the transfer of authority to exert control of its borders indicates a loss of the sovereignty by the member states, paradoxically, the process simultaneously reaffirms the sovereignty of those states.

### 3.8 Conclusion

I have sought to demonstrate that the issue of the regulation of citizenship has long been linked to the Republic of Ireland's assertion of national sovereignty. The right of the state to control its borders is considered so central to national identity that even when the non-national invokes values that the Republic of Ireland has declared superior to national law, he or she is unlikely to be successful in their application. As

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<sup>192</sup> Mullally, *supra* note 150 at 590.

we have seen, membership of the EU has, to some extent, restricted the ability of its member states to exercise full control over their national borders. In the following chapter I examine the themes of the Citizenship Referendum and consider why the EU was not perceived as a threat to Irish sovereignty.

## CHAPTER FOUR

### 4.1 Introduction

This chapter explores the themes of continuity, change and contradiction in the Irish Citizenship Referendum. I examine the Government's justification for seeking the approval of a constitutional amendment prior to introducing legislation. I suggest that the two claims upon which the Government's relied were contradictory. The first assumed that the terms "the nation" and "the citizenry" were interchangeable while the second placed them in opposition to each other.

My focus then turns to the underlying motivation for seeking to restrict entitlement to Irish citizenship. This, I suggest, was also ambiguous. It sought both to preserve an existing concept of Irishness and advance a new Irish European identity. The restriction of entitlement to Irish citizenship was therefore simultaneously defensive and transformative. In the latter part of this chapter I examine the arguments advanced by proponents and opponents of the Citizenship Referendum. I argue that it is not possible to see the arguments advanced by the two "sides" in terms of a progressive/conservative dichotomy. Instead, both sides advanced a vision of the "good" Irish society by drawing upon the notion of tradition whilst advancing a narrative of national progress.

#### 4.2 Was a Citizenship Referendum Necessary?

The Citizenship Referendum was justified on the grounds that a constitutional change was necessary in order to alter Irish citizenship law. The assumption that there was a need to change Ireland's citizenship law of course prefigures this. In support of the claim that a referendum was necessary, the Government advanced two arguments.

The first concerned the substantive need to restrict Irish citizenship. In the early 1990s the Republic of Ireland changed from a country of net emigration to one of net immigration.<sup>193</sup> Children born to those non-nationals became Irish citizens because of the *jus soli* principle in Section 6(1) of the *Irish Nationality and Citizenship Act 1956* [1956 Act].<sup>194</sup> The Government claimed that people with no previous connection to Ireland were choosing to give birth there in order to secure Irish passports for their children. It dubbed the scenario in which non-national women arrived in the State in the late stages of pregnancy "passport tourism" and claimed that, in effect, Irish citizenship laws were being "abused."<sup>195</sup>

The Government's second argument addressed why it believed a referendum on the issue of citizenship was necessary. The Minister for Justice stated that although

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<sup>193</sup> "Statistical Yearbook of Ireland 2004," online, Central Statistics Office  
<<http://www.cso.ie/releasespublications/documents/statisticalyearbook/2004/statisticalyearbook2004.pdf>>

<sup>194</sup> *Irish Nationality and Citizenship Act 1956* (I.) 1956 c.26.

<sup>195</sup> "Citizenship Referendum: The Government's Proposals," online: Department of Justice, Equality and Law Reform <[http://www.justice.ie/80256E010039C5AF/vWeb/fIJUSQ5ZJF5C-en/\\$File/Govtproposals.pdf](http://www.justice.ie/80256E010039C5AF/vWeb/fIJUSQ5ZJF5C-en/$File/Govtproposals.pdf)>.

Section 6(1) of the *1956 Act* was still in force at that time, the Irish Parliament [Oireachtas] no longer had the power to legislate on the issue of citizenship.<sup>196</sup> It will be recalled that a redrafted version of Article 2 stating “it is the entitlement and birthright of every person born in the island of Ireland...to be part of the Irish nation” was inserted into the Constitution in 1998. The Government stated that simply amending the *1956 Act* would be ineffective because any legislative restriction on entitlement to Irish citizenship would be in conflict with the Article 2.<sup>197</sup> Writing in the *Sunday Independent*, the Minister for Justice explained, “I have consulted with the Attorney General to see if we could solve this by bringing forward a suitable Act of Parliament, but his firm advice strongly concurred with my own view: that any Act would be inconsistent with the Constitution as it now stands.”<sup>198</sup>

In considering the claims advanced by the Government in order to justify restriction of Irish citizenship I employ an analytical approach developed by Jacques Derrida. Doing so provides insights into perceptions of “legitimate” and “abusive” uses of Irish citizenship law. I suggest that the two claims upon which the Government’s justification for holding the Citizenship Referendum relied were contradictory. The first explanation relied upon the assumption that terms “the nation” and “the citizenry” were interchangeable while the second placed them in opposition to each other.

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<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

#### 4.3 The Contradiction of the Citizenship Referendum

The Government stated that Article 2 elevated entitlement to Irish citizenship to a right. This was based on the assumption that the terms “part of the Irish nation” and “Irish citizen” were interchangeable. However, the arguments advanced by the Government in support of restricting citizenship presented them as distinct and in opposition to each other. Writing in the *Irish Examiner* in May 2004, Prime Minister [Taoiseach] Bertie Ahern argued that existing Irish citizenship law resulted in variance between the national group and those entitled to Irish citizenship. He stated, “I believe that Irish citizenship should be available to children born in Ireland if their parents have a real connection to this island.” Mr. Ahern continued, “What a YES vote will do is close a loophole in our law that has been open to abuse. It will ensure that Irish citizenship remains open to those who have a genuine connection to this country.”<sup>199</sup> The very use of language that suggests citizenship is being abused indicates that something prior to citizenship is the measure by which the legitimacy of a claim to Irishness is measured.

In *Of Grammatology*,<sup>200</sup> Derrida argues that the metaphysical tradition that dominates Western thought conceives of a hierarchy of signifiers in which those perceived to be closest in proximity to a signified “Truth” are privileged, while “lesser” signifiers are

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<sup>198</sup> Michael McDowell, “Proposed Citizenship Referendum” *Sunday Independent* (14 March 2004).

<sup>199</sup> Bertie Ahern, “Conception of Citizenship” *Irish Examiner* (31 May 2004).



presented as opposing that Truth.<sup>201</sup> Derrida cites Saussure's privileging of the spoken word over written language as an example of this hierarchy. Saussure states, "Language and writing are two distinct systems of signs; the second exists for the sole purpose of representing the first."<sup>202</sup> In this example, the spoken word is conceived of as signifying the Truth of the speaker's experience. The written word is not considered an alternative signifier of the Truth but the signifier of the spoken word. It is relegated to the status of the signifier of a signifier. However, not only is the written word beneath the spoken word in the hierarchy because of its perceived proximity to the Truth of the speaker's experience, it is also conceived of as a negative to the Truth. This is because its status as "not the signifier" constructs the written word as opposed to the Truth. The word "not" in the above statement is central to understanding Derrida's claim that as a signifier's proximity from the signified Truth increases it becomes opposed to that Truth. In the example of the spoken and written word, because the written word does not signify the Truth, signifying instead the spoken word, it is opposed to the Truth.

In Mr. Ahern's view, the fact that a child was an Irish citizen was insufficient to render it part of "the Irish nation." Rather, the child's status as an Irish citizen poses a threat to the nation. Not only was the child citizen not part of the Irish nation, it was opposed to it. The distinction between members of the nation and Irish citizens was made more explicitly by Mr. Ahern in a Dàil debate. Pressed by a member of the opposition as to why the "abuse" of Irish citizenship law had not been anticipated

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<sup>200</sup> Jacques Derrida, *Of Grammatology* (John Hopkins University Press, 1997).

<sup>201</sup> *Ibid.* at 11.

when Article 2 was drafted in 1998, Mr. Ahern responded, "I did not visualise... Russians, Moldovans (sic) and Ukrainians coming to this country...for two or three weeks to have children, simply for the benefit of Irish citizenship."<sup>203</sup> Throughout the Citizenship Referendum, the Government argued that possession of Irish citizenship did not, of itself, indicate that a person had a "real connection" to Ireland. In approving the Twenty Seventh Amendment to the Constitution, Irish voters endorsed the view that children of non-nationals were not members of the national group and therefore should not be given the legal rights accorded citizens. However, in doing so, they negated the procedural reason for holding the referendum. In accepting that the Irish nation and the Irish citizenry were distinct, Irish voters apparently endorsed the view that a legislative change to Irish citizenship laws was possible and a referendum was unnecessary.

By the Government's own positivistic logic, the Citizenship Referendum was unnecessary. The assertion that the referendum was held simply to overcome a legal loophole is contradictory. A literal reading of Article 2 reveals nothing to suggest a right to Irish citizenship. Conversely, a purposive interpretation invokes concepts of an essential Irishness that is prior to the legal status of citizen which in turn negates the Government's assertion that the referendum was held purely to overcome a legal technicality.

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<sup>202</sup> *Ibid.* at 11.

<sup>203</sup> Bertie Ahern, Ireland, *Dáil Debates* vol.582 (30 March 2004).

#### 4.4 Judicial Interpretation of Article 2

None of the Republic of Ireland's political parties disputed the Government's claim that a referendum was necessary to restrict entitlement to Irish citizenship. Both advocates and opponents of the restriction of entitlement to Irish citizenship focused upon whether that restriction was desirable rather than whether a referendum was necessary to enact change. However, the Government's interpretation of Article 2 differs substantially from the majority of the Supreme Court in *Lobe* a year before the Citizenship Referendum was held.

Keane C.J. rejected the suggestion that Article 2 created a right to Irish citizenship for all those born in Ireland.<sup>204</sup> He held the children in *Lobe* had become Irish citizens because of Section 6(1) of the *1956 Act*, which at the time stated "Every person born in Ireland is an Irish citizen from birth."<sup>205</sup> Hardiman J. declared that Article 2 acknowledged, rather than conferred, rights.<sup>206</sup> Like the Chief Justice, he held that entitlement to Irish citizenship was still governed by Section 6(1) of the *1956 Act*.<sup>207</sup> Geoghegan J. agreed with Keane C.J. and Hardiman J.<sup>208</sup>

Denham J. declared that Article 2 created a constitutional right to Irish citizenship. However, having announced that the terms "part of the nation" and "citizen" should be considered interchangeable, she drew a distinction between the two concepts

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<sup>204</sup> *A.O. & D.L. v. Minister for Justice*, [2003] 1 IR 3 at 18 [*Lobe*].

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.* at 130.

<sup>207</sup> *Ibid.* at 131.

<sup>208</sup> *Ibid.* at 166.

which contradicts that statement. Denham J. attempted to balance “the rights of the Nation, of individuals and of the family unit.”<sup>209</sup> The concept of “balancing” necessarily involves separating that which you wish to balance; it is impossible to balance something against itself. This makes a conceptual distinction between the children as “citizens” and members of “the Irish nation.” The inference of Denham J’s statement is that she did not view the child citizens are part of the Irish nation. Rather, they were non-nationals who, through their status as citizens, acquired some rights against the state. Denham J. did not consider the children’s well-being as contributing to the well-being of the nation. Instead, their status as citizens was conceived of as a threat to the nation.

Murray and McGuinness JJ. stated that Article 2 created a birthright to Irish citizenship. Whilst neither held that Article 2 bestowed Irish citizenship itself, they suggest that it gave constitutional protection to the right found in Section 6(1) of the *1956 Act*. Murray J. suggested that Article 2 did effect some change to entitlement to Irish citizenship, declaring “Prior to the adoption of the amendment, citizenship was acquired by law.”<sup>210</sup> He considered the impact of Article 2 to be “declaratory of the existing right to citizenship of a person born in Ireland as provided for by law.” In her dissenting judgment, McGuinness states, “Given the changes in the pattern of immigration to this country, it is not impossible that, in the absence of constitutional

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<sup>209</sup> *Ibid.* at 60.

<sup>210</sup> *Ibid.* at 81.

protection, the statutory provision in this jurisdiction might...have been changed...In light of Article 2 such a statutory change cannot now occur.”<sup>211</sup>

Fennelly J. interpreted Article 2 as “a qualitative statement of the nature of citizenship.”<sup>212</sup> He states that Article 2 should have “real content.” However, this does not necessarily mean that it must create a right to Irish citizenship. At no point does Fennelly J. state that Article 2 creates a right to Irish citizenship. Whilst Fennelly J. suggests that Article 2 extends a right to be part of the Irish nation to citizens and people of Irish ancestry living abroad he does not state that the right to be part of the Irish nation includes the right to be an Irish citizen – either for those born in Ireland or those of Irish ancestry.

Therefore, in *Lobe*, only two of the seven Supreme Court Justices expressly stated that Article 2 granted Irish citizenship or gave constitutional protection to the right to Irish citizenship through birth. Of those, one made remarks later in her decision which contradict her previous declaration on the meaning of Article 2. Another Justice, Murray J., inferred the right existed. Three of the Supreme Court Justices endorsed the view that Article 2 did not create a right to Irish citizenship whilst the remarks of Fennelly J. were inconclusive. Consequently, the assumption that Article 2 raised the statutory entitlement to Irish citizenship to a constitutional right was far from a certainty.

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<sup>211</sup> *Ibid.* at 99.

<sup>212</sup> *Ibid.* at 181.

#### 4.5 Conceptions of Irishness

As an amendment to the Constitution of Ireland was not necessary in order to change Irish citizenship laws, it prompts consideration of the function the Citizenship Referendum. I suggest it exercised a purpose of the Constitution recognized in *Finn v. Att. Gen.*<sup>213</sup>

In *Finn*, the plaintiff sought a declaration that the *Eighth Amendment to the Constitution Bill, 1982* [the *Eighth Amendment Bill*] was unconstitutional. The proposed Eighth Amendment sought to insert a “pro life” clause into the Constitution. In an attempt to ensure that abortion was deemed unconstitutional, the plaintiff argued that the Constitution of Ireland already protected the unborn child’s right to life and therefore the *Eighth Amendment Bill* was superfluous. Barrington J. held that whilst the plaintiff was correct to state that unborn child’s right to life was already protected by the Constitution, that did not make the *Eighth Amendment Bill* unconstitutional. He held that Article 46.1 allows for unlimited amendment to the Constitution of Ireland. He stated “I am satisfied that by Article 46 s.1, the people intended to give themselves the full power to amend any provision of the Constitution and that this power includes a power to clarify or make more explicit anything in the Constitution.”<sup>214</sup>

The Citizenship Referendum should be seen as a statement about the values officially endorsed by the Irish State in the early 21st century. It was a campaign in which

conceptions of the good society competed. It was not a two sided argument in which one side advocated a racist policy and the other objected to it. Neither advocates nor opponents of the proposed constitutional amendment comprised a single group. To view the Citizenship Referendum in this way ignores the differing viewpoints within the "Yes" and "No" camps. It also overlooks the continuity between the two "sides." Both mainstream Yes and No campaigns assumed a world divided into nations and therefore made claims about inclusion and exclusion. They each presented a vision of the "good" Irish society. Each version relied upon myths about the national character of the Irish. This in turn meant that both advocates and opponents of the proposed amendment to the Constitution relied upon criteria that distinguished the Irish from other nations.

According to Hegel, our conception of who we are is reliant on a sense of "the Other." To affirm who or what we are we must distance ourselves from that which we are not. Hegel's starting point is Descartes' assertion "I think therefore I am." Self consciousness is proof for Descartes that there is Truth. Hegel considers the problem of distinguishing that which we are from that which we are not. He suggests that in order to discover the "self" we need to distinguish it from that which it is not. He states,

"Consciousness...has a double object: one is the immediate object, that of sense-certainty and perception, which however *for self consciousness* has the

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<sup>213</sup> *Finn v. Att. Gen* [1983] I.R. 154 [*Finn*].

<sup>214</sup> *Ibid.* at 163.

character of a *negative*; and the second, viz. *itself*, which is the true *essence*, and is present only in the first instance as opposed to the first object. In this sphere, self consciousness exhibits itself as the movement in which this antithesis is removed, and the identity with itself becomes explicit for it.”<sup>215</sup>

For Hegel, the self is the essence that is left when that which it is not is removed. In the following section I outline the justifications given by advocates and opponents of the amendment to the Constitution. By exploring the assumptions underlying justifications given for and against restricting entitlement to Irish citizenship I argue that both “sides” relied upon a conception of Irishness that was placed in contrast to an Other. Whilst the mainstream Yes and No campaigns did not use overtly racist language, the assumptions underpinning their arguments relied upon a cultural essentialism also found in racist discourses.

#### 4.6 The Yes Campaign

The mainstream Yes campaign comprised of the ruling Fianna Fáil and Progressive Democrat parties. The largest opposition party, Fine Gael did not actively campaign during the referendum, although it did endorse the referendum and the Government’s plans to restrict entitlement to Irish citizenship.

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<sup>215</sup> Georg Hegel, *Phenomenology of Spirit*, trans. by A.V. Miller, (Oxford University Press, 1977) at 105 (emphasis his own.)



The Government coalition advanced three reasons for restricting entitlement to Irish citizenship. Firstly, it claimed that non-nationals from outside the EU were traveling to Ireland to give birth to children for selfish reasons: to gain social, political and economic rights within Irish society and to a right of residence within the EU for themselves.<sup>216</sup> Secondly, the Government stated that the number of non-national women arriving in Ireland in order to give birth to children was placing a strain on maternity services in Dublin. The final argument presented by the Government was that removing entitlement to Irish citizenship by birth would remove the incentive for women to travel to Ireland during the late stages of pregnancy. This argument was couched in the language of humanitarianism. The Government stressed the danger of the journey to both the mother and her child. It speculated that the prospect of securing Irish, and therefore European, citizenship for their child was placing vulnerable women at risk. Under pressure from their partners, who wished to secure a right to residency themselves through their link to an Irish citizen, pregnant women were traveling to Ireland. The Government therefore presented the restriction of entitlement to Irish citizenship as a humane measure.<sup>217</sup>

Harrington suggests that the outcome of the Citizenship Referendum reflected changes in the dominant conception of Irishness.<sup>218</sup> He contends that the dominant national narrative has changed since the founding of the Irish state in the early 20<sup>th</sup> century. During the period following Irish independence from Britain, Ireland

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<sup>216</sup> "Citizenship Referendum: The Government's Proposals," *supra* note 195 at 5.

<sup>217</sup> McDowell, *supra* note 198.

<sup>218</sup> John A Harrington, "Citizenship and the Biopolitics of Postnationalist Ireland" (2005) 32(3) J. L. & Soc'y 424 at 425.

defined itself in opposition to "Britishness." Indeed, a belief in a fundamental distinction between Irishness and Britishness was used to justify Ireland's independence and to forge a sense of national identity for the new Irish state. Harrington suggests that from the mid-1950s, but especially since the Republic of Ireland's entry into what was then the European Economic Community, the Republic of Ireland has moved away from defining itself in opposition to Britain and has embraced a cosmopolitan European identity. It has rejected a fixed mono-cultural identity, liberalized and embraced the "multiple and shifting identities" of cosmopolitan Europe.<sup>219</sup> However, as Harrington acknowledges, embracing a European identity does not transcend the need to define oneself in opposition to an Other. Drawing on the work Peter Fitzpatrick, Harrington indicates that in embracing a European identity, Ireland embraces a Eurocentric world view to the exclusion of non-European Others.

Harrington's analysis appears to be confirmed by the rhetoric of the Yes campaign during the Citizenship Referendum. Throughout the campaign, the Government emphasized that the restriction of Irish citizenship was necessary in order for Ireland to fulfill its responsibilities as a European nation. Rather than defining Ireland in opposition to Britain, the Yes campaign presented the Republic of Ireland as a European nation dealing with a European problem.

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<sup>219</sup> *Ibid.* at 422.

The restriction of entitlement to Irish citizenship was presented as a means of eliminating a danger to pregnant women and unborn children.<sup>220</sup> This constructed Ireland as a compassionate nation. The non-European male was characterized as willing to risk the well-being of his child or pregnant partner in order to increase his claim to reside in Europe. His reasons for seeking entry to Europe, in order to claim social security benefits from a society he had not contributed to, were equally contemptible. European Ireland was portrayed as both good and under threat from the non-European. Ireland contrasted itself favorably against the non-European countries of Africa and the former Eastern Bloc. Non-European nations were constructed in an extremely negative light. The non-European embodied the negative, threatening traits that a civilized European Ireland had transcended. Ireland was portrayed as protecting the health of non-national women and their unborn children who would otherwise be coerced into traveling during the late stages of pregnancy. Ireland was also portrayed as a victim of the non-European; the fragile European civilization faced threats in the form of maternity wards at bursting point, social security abuse and uncontrolled borders.

Despite the strength of much of Harrington's argument, I have difficulties with some of the inferences he draws. On a theoretical level I am concerned that the term "postnationalism" is misleading. Harrington uses postnationalism, a term he borrows from Richard Kearney,<sup>221</sup> to signify a political identity that has transcended the physical and ideological boundaries of traditional Irish nationalism to embrace a

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<sup>220</sup> McDowell, *supra* note 198.

<sup>221</sup> Richard Kearney, *Postnationalist Ireland* (Routledge, 1997).

cosmopolitan European identity. He exposes the racialized underpinnings of the postnationalist project by the application of Peter Fitzpatrick's critique of Hegel. However, in identifying the European identity as postnationalist, Harrington overlooks a key point in Fitzpatrick's theory; European identity recreates rather than transcends nationalism. Fitzpatrick states, "the EU achieves this seeming transcendence, not by becoming different to its member-nations but, rather, by containing them in a replication of the dimensions and dynamic of the nation."<sup>222</sup> As such, it is perhaps more accurate to talk of "Irish European nationalism."

The second concern I have is the assumption that those who voted Yes did so because they embraced a cosmopolitan identity. Although an overwhelming majority of voters endorsed the proposed amendment, there is a shortage of strong data to indicate why they chose to support it. Opinion polls taken before the referendum suggested there was much voter confusion regarding the purpose of the referendum.<sup>223</sup> The only exit poll taken on the day of the referendum suggested that many supported the referendum because of anti-immigrant sentiment.<sup>224</sup> The Yes/No nature of the referendum gives a false impression of homogeneity among the sides. The mainstream Yes campaign argued that the Republic of Ireland's status as a cosmopolitan state justified changing its citizenship laws. As such it accords with Harrington's analysis. However, there were also voices who advocated a Yes vote in order to reject cosmopolitanism in favour of a conservative, inward-looking identity.

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<sup>222</sup> *Ibid.* at 133.

<sup>223</sup> Carol Coulter, "Confusion over what Yes or No vote means" *Irish Times*, 2 June 2004.

<sup>224</sup> By the Irish Broadcaster RTÉ, cited in Priya Rajsekar "Can I Look You Confidently in the Eye Again" *Irish Times* (6 June 2004).

With a lack of information on why Irish voters endorsed the proposal, the extent to which the Citizenship Referendum reflected a reconceptualization of Irish identity by the general public, and how much it remains an aspiration of a cosmopolitan elite, is unclear.

The extent to which the traditional preoccupations of Irish nationalism continue to play a role in the 21<sup>st</sup> century has been explored by Patrick Hanafin.<sup>225</sup> Harrington's account suggests an almost linear transition from irredentism to cosmopolitanism. Hanafin's work considers the complexity of social change in the Republic of Ireland. He argues that with the establishment of the Irish State, citizenship was founded upon Roman Catholic construction of the individual. It conceived of the citizen as "living for death. The "ideal" Irish citizen was one who was prepared to sacrifice their own life, either literally or figuratively, for the life of the nation. Hanafin contends that though Irish society has liberalized significantly, the concept of Irishness as a form of self-sacrifice continues to assert itself.<sup>226</sup>

Hanafin's study considers the role of unborn children and Irish martyrs as virtual, ideal Irish citizens. He employs a Derridian analysis to argue that the change from irredentist Irish nationalism to liberal cosmopolitanism is not simply a matter of social progress. Cosmopolitanism does not simply replace traditional Irish identities. Rather, the engagement of cosmopolitanism with Irishness has a mutually

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<sup>225</sup> Patrick Hanafin, "Valourising the Virtual Citizen: The Sacrificial Grounds of Postcolonial Citizenship in Ireland" 2003 (1) Law, Social Justice and Global Development Journal <http://elj.warwick.ac.uk/global/03-1/hanafin.html>.

<sup>226</sup> *Ibid.* at 3.

transformative effect upon each concept. For example, in regards to the issue of abortion, Hanafin suggests that liberalization in other areas of Irish life provoked a response from conservative sections of society that might otherwise not have occurred. Though the Irish State has never permitted abortion, concerns that a more general process of liberalization would lead to its legalization prompted the formation of anti-abortion groups who successfully lobbied for the insertion of a “pro-life” clause into the Constitution of Ireland in 1983. Liberalization should therefore be seen as a catalyst for change; however, its impact is influenced by the circumstances of the existing society. It simultaneously challenges the dominant social order and reasserts traditional values of that society.

Continuing the theme of continuity and change, I suggest that in *Lobe* and the Citizenship Referendum we witness the evocation of a new identity through themes familiar to Irish society. Siobhán Mullally points out that the Citizenship Referendum centred on the migrant woman’s reproductive role, recalling the longstanding debate in Irish society surrounding abortion.<sup>227</sup> *Lobe* invoked the rights of the family, which are considered so central to Irish identity that Article 41 of the Constitution declares the “superior to all positive law.” Yet, following the embrace of a broader European identity, the traditional “Irish” approach towards these themes was seemingly abandoned. The life of the child and role of the mother was not celebrated. Nor were the rights of the family considered superior to the state’s right to control its borders. Mullally states, “Where migrant women have invoked the

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<sup>227</sup> Siobhán Mullally, “Gendered borders: reproduction, family unity and immigration law in Ireland” in Walsum S (ed., *Women and Immigration Law* (Cavendish: London, 2005) 4 (forthcoming).

constitutional protections afforded to the family or the State's duty to 'defend and vindicate' the right to life of the 'unborn,' the State has been quick to appeal to the requirements of comity with other nations and its inherent and universal right to control immigration."<sup>228</sup>

Interestingly, the perceived power relationship within immigrant families indicates that the patriarchal nuclear family continued to dominate the Irish imagination. As we have seen, the expectant mothers were depicted as victims, lacking autonomy. They were conceived of as subservient to their male partners – traveling to Ireland at his behest and for his benefit. Therefore, even though the Citizenship Referendum serves as an indicator of social change in the Republic of Ireland, it also revisited and affirmed themes associated with more traditional Irish identities.

#### 4.7 Other Voices

As stated earlier, the choice of voting Yes or No in the Citizenship Referendum implied a dichotomy between the views of advocates and opponents that did not really exist. In this section I outline some of the views expressed by advocates of the constitutional amendment. These voices often endorsed views that were either overtly racist or based upon cultural stereotypes common to racist discourses. I believe that though they were not endorsed by the Government coalition, without evidence of what prompted Irish voters to endorse the Twenty-Seventh Amendment the views expressed by those voices cannot be discounted.

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<sup>228</sup> *Ibid.* at 5.

There is a growing body of work suggesting that racism is a much misunderstood concept in Ireland. Though the UN has recognized that racism is not about skin colour but prejudice based upon hierarchy, inferiority and superiority drawn along ethnic or racial lines, in Ireland racism tends to be defined narrowly. Bryan Fanning states, "Popular understandings of racism tend to define it...in terms of beliefs about biological inferiority, physical attacks and verbal abuse."<sup>229</sup> Among the myths that continue to have currency is the view that the Irish are not racist and that the phenomenon of racism is something that Ireland has only experienced in the last fifteen or twenty years.<sup>230</sup> These views have been exposed as based upon a myth about the homogeneity of Irishness. Fanning describes that myth as "an ideological construct. It was born, in part, out of nineteenth-century claims that there was such a thing as the Irish race."<sup>231</sup>

A Yes vote was endorsed by the unashamedly anti-immigration "Immigration Control Platform" [ICP].<sup>232</sup> The ICP is a small Euro-skeptic group opposed to almost any immigration to Ireland, including from EU states. It endorsed a Yes vote in the Citizenship Referendum, stating that it was a step towards reasserting Ireland's sovereignty as a state, which "forced multiculturalism" was eroding.<sup>233</sup> The ICP believed the Government proposals to restrict entitlement to Irish citizenship should

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<sup>229</sup> Bryan Fanning, *Racism and Social Change in the Republic of Ireland* (Manchester University Press, 2003) at 19.

<sup>230</sup> Louise Beirne & Vinodh Jaichand, "Breaking Down Barriers: Tackling Racism in Ireland at the Level of the State and its Institutions," (Amnesty International, 2006) at 33.

<sup>231</sup> *Ibid.* at 8.

<sup>232</sup> Immigration Control Platform, online: <[www.immigrationcontrol.org](http://www.immigrationcontrol.org)>.

<sup>233</sup> Seán McCárthaigh, "Putting Irish people first" *Irish Examiner* (27 May 2004).



have gone further. It argued for the restrictions on Irish citizenship should be applied retrospectively and employed the familiar complaint that tax-payer's money was being used to support "bogus" asylum seekers.<sup>234</sup>

There might be a tendency to dismiss the ICP as a small, insignificant group. However, mainstream commentators advanced arguments that shared that group's belief that the Irish were a culturally homogenous group unused to immigrants in national newspapers during the referendum campaign. Writing in the *Irish Times*, columnist John Waters dismissed the suggestion that the Citizenship Referendum would encourage racist tendencies, claiming "There is very little racism in Ireland, and astonishingly little considering that we learned very much of what we know about life at the knee of the most racist power on the planet."<sup>235</sup> In making this claim, Mr. Waters reiterated a view still widely held in Ireland; the Irish are not racist.<sup>236</sup>

Arguing that the referendum would be heavily defeated, he confidently recalled the generous nature of the Irish. He stated, "It is less than a generation since Irish people lined up at their teachers' desks to give their pennies to the black babies. To ask them now...to snatch passports from the grasp of the babies of the black babies is a little too much for this breed of white man."<sup>237</sup> The aid campaigns referred to have since been described as "well meaning but patronizing" and identified as contributing "to the

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<sup>234</sup> See remarks by Pat Talbot in Seán McCàthaigh "Putting Irish People First," *Irish Examiner*, May 27<sup>th</sup> 2004.

<sup>235</sup> John Waters, "Citizenship Stroke an Act of Folly" *Irish Times* (19 April 2004).

<sup>236</sup> Bill Rolston & Michael Shannon, *Encounters: How Racism came to Ireland* (Beyond the Pale, 2002) at 2.

<sup>237</sup> Waters, *supra* note 235.

deep-seated attitudes of racial superiority in the psyche of the majority ethnic group” by an Amnesty International report.<sup>238</sup> The rhetoric of “black babies” was undoubtedly intended to be ironic. However, there is nothing to indicate that Mr. Waters viewed the African missionary campaigns as anything but proof that racism was not an issue in Ireland. His argument relied upon stereotypes of the Irish, portrayed as welcoming and generous, which were contrasted with a portrayal of the British as “the most racist power on the planet.” Rather than dispel claims that racism exists in Ireland, Mr. Waters used racialized assumptions to (wrongly) predict the outcome of the Citizenship Referendum.

The widespread belief that Ireland was until recently a society free from racism itself was promoted by Irish nationalism, which defined itself as “good” in opposition to “bad” Britain and Britishness. In his history of twentieth century Ireland, J.J. Lee contrasts the character of Irish nationalism with that of Ulster Unionism. Of Unionists he states, “Race and religion were inextricably intertwined in Ulster unionist consciousness. Unionists could not rely on the criterion of colour, for the Catholics lacked the imagination to go off-white, nor on the criterion of language, for the Catholics had unsportingly abandoned their own. It was therefore imperative to sustain Protestantism as the symbol of racial superiority.”<sup>239</sup> In contrast, Lee states “racism was far less central to the ideology of Irish nationalism than to that of Ulster unionism.”<sup>240</sup>

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<sup>238</sup> Beirne & Jaichand, *supra* note 230 at 33.

<sup>239</sup> J.J. Lee, *Ireland 1912-1985: Politics and Society* (Cambridge University Press, 1989) at 4.

A variation on the claim that Ireland is not racist is the argument that racism is a new phenomenon in Ireland.<sup>241</sup> Rolston and Shannon identify two versions of this narrative. The first they term an “immigrant blaming” narrative, in which the emergence of racism is attributed to the arrival of the immigrant rather than the actions of the host society. The second is a slightly more liberal account in which the actions of the host society are attributed to the “natural teething problems” of a homogenous society encountering different cultures for the first time.

The second of these two narratives was endorsed in an editorial entitled “It’s Right to Vote Yes,” by the Irish Independent.<sup>242</sup> Among the reasons it gave for taking this view was that the *jus soli* principle was unsuited to a country such as Ireland. The paper stated that most countries that retained birthright citizenship laws were “immigrant countries.” In doing so it shared the view taken by the ICP that Ireland was not a land of immigrants. Aside from the misleading nature of the account of the development of Irish citizenship law<sup>243</sup> the *Irish Examiner*’s editorial served to re-enforce a commonly held myth about the homogeneity of the Irish.

Bryan Fanning describes the myth as thus, “Ireland has always been a homogenous society and that the Irish identity is something that remains fixed and unchanged.”<sup>244</sup> The concept of Irish identity as fixed and unchanging is perhaps best illustrated by the

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<sup>240</sup> *Ibid.* at 10.

<sup>241</sup> Rolston & Shannon, *supra* note 236 at 2.

<sup>242</sup> “It’s right to vote Yes,” Editorial, *Irish Independent* (19 May 2004).

<sup>243</sup> The division of citizenship regimes into *jus soli* and *jus sanguinis* regimes is largely dependent upon whether they derive from a common law or civil law tradition, not their status as “old world” or “new world” nations.

<sup>244</sup> Fanning, *supra* note 229 at 3.

many references found to Gaelic Ireland found in Irish nationalist literature. In Padraic Pearse's "Mise Éire" ["I am Ireland"], for example, the island of Ireland is portrayed as the common mother of Gaelic and modern day Ireland.<sup>245</sup> Closely related to this view is an assumption that it is both natural and inevitable that the island of Ireland should be a single autonomous political unit. Lee criticizes Ulster Unionists for seeking to establish the partition of Ireland, stating "The nine county province of Ulster was neither an administrative nor a political unity."<sup>246</sup> In contrast, for Lee, the logic of Irish Nationalism seeking to establish a sovereign independent Ireland where one had not existed before is so self evident as to go unquestioned.

The conception of the Irish as a homogenous group is beginning to be questioned. D.G. Boyce points out in his history of Irish nationalism, that it is "bad history" to regard the Gaels as "the Irish in the infancy of their race."<sup>247</sup> He argues that the importance of the Gaels to modern Irish identity comes from their symbolic status given to them in the more recent past. Boyce states, "It may well be that the tacit assumption by many nationalist historians that this last Celtic invasion was 'good,' and all post-Celtic incursions and invasions 'bad' was because the later invaders were unfortunate enough to have their misdeeds chronicled, while the Gaels were able to compose their own, more flattering version of their history."<sup>248</sup> Accounts of the origin of the Irish nation, provided in poems such as "Mise Éire," served to mark the Irish as a distinct group with national characteristics. Such narratives give a narrow

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<sup>245</sup> Padraic Pearse, *The Collected Works of Padraic Pearse: Plays, Stories, Poems* (Manunsel and Co. Ltd, 1917) at 40.

<sup>246</sup> Lee, *supra* note 247 at 9.

<sup>247</sup> D.George Boyce, *Nationalism in Ireland* (Routledge, 1995) at 25.

and exclusionary account of Irishness. They played a key role in justifying Ireland's independence at what is considered by Hobsbawm the high-point of nationalism by framing Ireland's population as distinct, and necessarily homogenous.<sup>249</sup> The *Irish Examiner's* editorial endorsed a conception of Irishness which has little scope to allow for the contributions of the Normans, Anglo-Irish, Irish-Italians, or Irish Travellers, to name a few groups.

The argument that the Irish nation is a construct and not a given now finds itself "in tune with the wider intellectual currents of the age."<sup>250</sup> John Harrington argues that Ireland has recently moved away from irredentist nationalism and embraced a cosmopolitan European identity. As such, essentialist nationalism is now being questioned. This is borne out by the reasons given by the mainstream Yes campaign during the Citizenship Referendum. There are many problems with the Eurocentric vision for Ireland set out by the current Government, but it did not advocate a restriction of entitlement to Irish citizenship on the grounds that only those of Gaelic descent should be entitled to it. However, that mainstream Irish newspapers published articles such as the *Examiner's* editorial or John Waters' article without comment being passed indicates that the view that there is a "true" Irishness which is White, Celtic, Catholic and dates back to mythical times still gains wide acceptance throughout the country.

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<sup>248</sup> *Ibid*

<sup>249</sup> E.J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (Cambridge, 1989).

<sup>250</sup> R.V. Comerford, *Ireland: Inventing the Nation*, (Arnold, 2003) at 1.

#### 4.8 The No Campaign

A No vote was endorsed by Labour, Ireland's third largest political party, and two smaller parties: Sinn Fein and the Greens. It also attracted support from approximately 45 groups<sup>251</sup> which included groups such as the Irish Council for Civil Liberties,<sup>252</sup> the Methodist Church in Ireland,<sup>253</sup> as well as a number of a number of organizations formed specifically to oppose the referendum, such as "Lawyers against the Amendment."<sup>254</sup> Because of the large number of small groups opposing the referendum it is not possible to outline in detail the reasons given by each. Instead I will limit my analysis to the claim that the Government's proposals were racist.

A number of opponents of the proposed amendment raised concerns that the plan to restrict entitlement to Irish citizenship was racist or could encourage those with racist tendencies. In doing so they focused upon the Government's plans to restrict entitlement to Irish citizenship, should the proposed amendment be passed, rather than the effect of the referendum itself. Green Party leader, Trevor Sargent, stated "This plays into the hands of those who are trying to heighten tension and play the race card in the run-up to European and local elections."<sup>255</sup> Sinn Fein claimed that the Government was seeking a citizenship regime based on "blood ties" (seemingly overlooking that Irish citizenship law was already, in part, based upon such a

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<sup>251</sup> Grainne Cunningham & Helen Bruce, "Alliance of Voices United in Calling for No Vote" *Irish Independent* (9 June 2004).

<sup>252</sup> Aisling Reidy, "Conception of Citizenship" *Irish Examiner* (31 May 2004).

<sup>253</sup> Patsy McGarry, "Methodists Say Vote is Ill-Judged" *Irish Times*, (26 May 2004).

<sup>254</sup> Michael O'Farrell, "Citizenship Referendum will Target Innocent Children if Passed, warn Lawyers" *Irish Examiner* (20 May 2004).

<sup>255</sup> Senan Molony, "Green Party Attacks the 'Opportunism' of Coalition's Citizenship Vote" *Irish Independent*, (17 May 2004).

concept.)<sup>256</sup> For the most part, the Labour Party restricted its criticism to the manner in which the referendum was held, stating that the Government had failed to follow the protocol for constitutional amendments by properly consulting all parties elected to the Dáil and had failed to provide any compelling evidence for a constitutional change.<sup>257</sup> However, Pat Rabbitte, leader of the Labour Party also suggested at one point that holding the Citizenship Referendum was a cynical attempt by the ruling coalition to make gains in elections, held on the same day, by exploiting public concerns about immigration.<sup>258</sup>

The argument that the proposed Twenty-Seventh Amendment was racist overlooked the racialized character of Irish citizenship prior to the Citizenship Referendum. A racialized conception of Irishness already played in defining the national group. In the wake of independence, national identity in the Irish Free State was dominated by an association with Catholicism<sup>259</sup> and the myth of a Gaelic mono-cultural nation.<sup>260</sup> As a consequence, alternative narratives of the Irish experience were suppressed; the legitimacy of Travellers' culture was denied; the role of Protestantism in shaping Irish cultural identity was downplayed; women were relegated to the private sphere.<sup>261</sup> During this period, the construction of a national identity in opposition to Britain

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<sup>256</sup> Aengus O Snodaigh, in Brian Dowling, "Tánaiste Rejects Racist Charge over Poll" *Irish Independent* (22 May 2004).

<sup>257</sup> Pat Rabbitte, Ireland, *Dáil Debates*, vol. 582 (7 April 2004).

<sup>258</sup> *Ibid.*

<sup>259</sup> Beirne & Jaichand, *supra* note 230 at 33

<sup>260</sup> Fanning, *supra* note 229 at 10.

<sup>261</sup> Breda Gray & Louise Ryan, "The Politics of Irish Identity and the Interconnections between Feminism, Nationhood, and Colonialism" in Ruth Roach Pierson ed., *Nation, Empire and Colony: Historicizing Gender and Race* (Indian University Press, 1998) 121 at 126-28.

posited Ireland and the Irish as good against negative depictions of Britain and Britishness.

Those advocating a No vote were as reliant on a conception of the good society, with borders, as proponents of a Yes vote. As such, they also required a bad society from which to Other themselves. In some cases Britain, the Other historically used by Irish nationalism, was used. One No campaign slogan compared the proposal to restrict entitlement to Irish citizenship with the racism experienced by Irish immigrants in Britain in the 1950s and 1960s. It read, "Remember 'No Blacks, No Dogs, No Irish?'"<sup>262</sup> In this conception of the good society, Irishness – the victim of colonialism rather than its perpetrator - was contrasted favourably with Britain.

In his study of Ireland's interaction with colonialism, Stephen Howe suggests that the rhetoric of Irish anti-imperialism is of recent pedigree.<sup>263</sup> Howe argues that though some prominent advocates of Irish independence, such as Daniel O'Connell, made common cause with oppressed peoples in the British Colonies, Irish nationalism's relationship the colonial era is, on the whole, ambivalent. He states that most early Irish nationalists simply did not identify their cause with non-European struggles. Some, though not a majority, of Irish nationalists went further, arguing for Irish independence on grounds of Ireland's dissimilarity to Britain's other colonies rather than making common cause with them. For John Mitchel, it was the supposed biological superiority of the white Irish that made Ireland's status as a colony

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<sup>262</sup> Socialist Workers Party, online: <http://www.swp.ie/html/home.htm>.

<sup>263</sup> Stephen Howe, *Ireland and Empire*, (Oxford University Press, 2000) at 43.



unbearable because it relegated a “White” nation to the status of “the Negro.”<sup>264</sup> Howe’s is one of a number of recent studies that suggest that the denial of racism in Ireland was itself based upon an inherently racist depiction of the English Other.<sup>265</sup> Irish nationalist accounts of Ireland’s relationship with Britain overlooked the biological and cultural essentialism upon which the distinction between the Irish and British was based.

Through an examination of Dáil debates of the time, Mullally demonstrates that despite the inclusive definition of Irish citizenship set out in the *1956 Act* it pursued a racialized conception both of the Irish and the Other.<sup>266</sup> She draws attention to the remarks of Deputy Anthony Esmonde, who raised concerns that the *1956 Act* would entitle people “who might not be exactly satisfactory, from the standpoint of Irish culture and Irish thought, or to the overwhelming majority of the Irish people” to Irish citizenship. Moreover, despite the seemingly inclusive nature of the *1956 Act*, it was introduced in pursuit of a state-building project that was highly racialized. The *1956 Act* reflects a conception of the Irish as a homogenous, culturally distinct nation linked by blood and their relationship with the island of Ireland. It aimed to reduce, as much as possible, the distinction between those born in the Republic of Ireland and those born in Northern Ireland in furtherance of the belief that the Irish are a distinct cultural unit. The views of James Everett, Minister for Justice at the time, illustrate how the aim of the *1956 Act* was to give legal recognition to those perceived to be

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<sup>264</sup> *Ibid.* at 44.

<sup>265</sup> See generally Beirne & Jaichand, *supra* note 230 and Fanning, *supra* note 229.

<sup>266</sup> Siobhán Mullally, “Citizenship and Family Life in Ireland: Asking the question ‘Who Belongs?’” (2005) 25(3) *Legal Studies* 578 at 581.

culturally Irish. The Minister is careful to note in the course of explaining the impact of the legislation that since the legislation would require a person resident in Northern Ireland to “declare” their Irish citizenship, the *1956 Act* would not bestow citizenship upon those “of entirely alien parentage without any racial ties.”<sup>267</sup>

The use of an inclusive *jus soli* principle in the *1956 Act* was justified by reference to a national narrative that was not opposed to a racialized conception of the world, but rather dependent upon it. By entitling those born in Northern Ireland to retrospectively claim Irish citizenship from birth the *1956 Act* affirmed the nationalist narrative that Ireland was culturally homogenous, regardless of partition.

#### 4.9 Legislative Changes Following the Referendum

Having considered the assumptions underpinning earlier citizenship legislation and the Irish Citizenship Referendum, I now consider the changes enacted by the *Irish Nationality and Citizenship Act 2004* [the *2004 Act*]. Section 4 of the *2004 Act* amended Section 6 of the *1956 Act*.<sup>268</sup> Section 6A now reads, “A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person’s birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years.”<sup>269</sup> Whilst section 6A restricts the entitlement of both Europeans and non-Europeans to Irish citizenship, it ensures that

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<sup>267</sup> James Everett, Ireland, *Dáil Debates*, vol. 154 (29 February 1956.)

<sup>268</sup> *Irish Nationality and Citizenship Act 2004* (I.) 2004, s.4 [the *2004 Act*].

the children of non-Europeans are less likely to acquire Irish citizenship. The right to free movement of persons is guaranteed to EU citizens by Article 18 EC and Directive 90/364. The case of *Chen v Secretary of State for the Home Department*<sup>270</sup> affirmed that the right to reside in another Member State is dependent upon EU citizens having adequate resources to support themselves. Therefore, while Europeans have a *prima facie* right to enter and remain in Ireland, non-Europeans face the prospect of being denied the necessary documentation to stay in the state long enough for their children to be born Irish citizens.

The opportunity for a child born to non-European parents to become an Irish citizen is further diminished by subsections 6A(4) and (5). These draw an explicit distinction between the criteria that European and non-European citizens must fulfill in order for their children to be entitled to Irish citizenship, should they be born in Ireland. For the child of a non-European to receive Irish citizenship, its parents must have been legally resident in either the Republic of Ireland or Northern Ireland for three out of the preceding four years. Furthermore, time spent in Ireland under a study permit does not count towards that requirement.<sup>271</sup> There is no corresponding requirement of legality of residence for the European citizen parents of a child born in Ireland. Whilst it could be argued that such a requirement is unnecessary in the case of a European parent because Article 18 EC and Directive 90/364 give European citizens the right to live and work in any member state, it must be remembered that that right

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<sup>269</sup> *Irish Nationality and Citizenship Act 1956* (I.) 1956, s.6A [the 1956 Act]

<sup>270</sup> *Chen v Secretary of State for the Home Department*, Case C-200/02 [E.C.J.].

<sup>271</sup> *Irish Nationality and Citizenship Act, 1956*, s. 6A(4)(b) as amended by the *Irish Nationality and Citizenship Act, 2004*.

is not absolute. The *Chen* case held that the right to reside in another member state is dependent upon European citizens having adequate resources to support themselves. They may be required to leave another Member State if they become an unreasonable burden upon the social services of that country. Under the new Irish citizenship regime, it is conceivable that a child born to a European citizen who has failed to comply with an order to leave Ireland would receive Irish citizenship while a child born to a non-European, legally resident for the purposes of education, would not.

“Europeanness,” as prescribed by the *2004 Act*, is not confined to citizens of countries that are members of the European Union. It also includes citizens of countries that are members of the European Economic Area (EEA) and Switzerland.<sup>272</sup> Furthermore, the *jus sanguinis* principle found in the original version of the *1956 Act* was not substantially altered by the *2004 Act*. Collectively, the amendments to the *1956 Act* made by the *2004 Act* amount to a privileging of citizens of the historic “comity of nations” to the exclusion of those who fall outside that collective of nations.

#### 4.10 Conclusion

In this chapter I have sought to explore the themes of continuity, change and contradiction in the Irish Citizenship Referendum. I argued that the justifications for given for holding a referendum on the issue of citizenship were contradictory.

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<sup>272</sup> The *2004 Act*, *supra* note 268, s. 2.

Therefore the referendum was not necessary in a positivistic sense. I therefore considered the purpose served. I argued it is best seen as a forum in which conceptions of the good society competed. However, there are similarities as well as differences in the conceptions of the good society. Whilst those supporting the Citizenship Referendum advocated restricting entitlement to Irish citizenship and those opposed to it advocated keeping the law as it was, both agreed that there should be a border. Moreover, the motivation behind restricting entitlement to Irish citizenship also served a dual purpose. It sought both to preserve a traditional concept of Irishness and advance a vision of the Republic of Ireland as a European nation. The subsequent legislation introduced by the 2004 Act was geared towards restricting non-Europeans rather than simply those perceived to be non-Irish. This indicates that the Republic of Ireland increasingly sees itself as a European nation. However, this does not imply that it has or will abandon "Irishness" in favour of "Europeanness." Rather, the values perceived to be embodied by Europeanness are incorporated as part of the Irish national identity.

## CHAPTER FIVE

In this thesis I have sought to locate the recent changes to the regulation of Irish Citizenship in a global and historical context. I have argued that whilst the changes enacted by *A.O. & D.L. v. Minister for Justice [Lobe]*<sup>273</sup> and the *Irish Nationality and Citizenship Act 2004* [the *2004 Act*]<sup>274</sup> have made the regulation of Irish citizenship more restrictive, the story of the regulation of Irish identities is, on the whole, a more dynamic affair.

Chapter two provided a theoretical framework for examining the perceived need to restrict entitlement to Irish citizenship and introduce tighter border controls. I argued that citizenship is a conceptually uncertain term that overlaps with other, equally ambiguous concepts such as sovereignty and nation. Each is best seen as a descriptive term for a series of loosely related themes that fall and rise in prominence over time. Though the concepts of citizenship, sovereignty and nation are demonstrably uncertain, a prevailing belief in the tenets of modernity – rationality, objectivity and the rejection of ambiguity – demands that they can and must be neatly defined. The dynamic nature of the themes encompassed by these concepts periodically exposes the tensions that are always present in their definition.

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<sup>273</sup> *A.O. & D.L. v. Minister for Justice*, [2003] 1 IR 3 [*Lobe*].

<sup>274</sup> *Irish Nationality and Citizenship Act 2004* (I.) 2004 [the *2004 Act*].

In chapter three I argued that the regulation of Irish citizenship has always been closely linked both to the Irish state's assertion of sovereignty and a sense of Irish national identity. By reference to Dáil debates on earlier legislation, I showed that concerns about the state's ability to assert sovereignty, and the perceived disparity between the Irish nation and those entitled to claim Irish citizenship, are not merely a recent phenomenon. The Republic of Ireland has long used its citizenship laws as an expression of its sovereignty. My examination of case law also reveals the overriding importance ascribed to the right of the state to assert itself as sovereign by the Irish courts. I suggested that the creation of European Union [EU] citizenship has to some extent challenged the Republic of Ireland's ability to exercise control over its borders. However, by making EU citizenship dependent upon national citizenship, the EU simultaneously reaffirms the sovereignty of its member states.

Chapter four considers the contradictions in the justification for holding the Citizenship Referendum. I suggest it was not strictly necessary in a positivistic legal sense. Instead, I argue that the Citizenship Referendum is best seen as an expression of the dominant Irish national identity in the 21<sup>st</sup> century. I therefore explore the assumptions underpinning arguments advanced during the campaign. Whilst I agree with others who have suggested Republic of Ireland is forging a new European identity, I argue that it is not an indication that it is now a postnationalist society. Rather, Irish nationalism has adopted "Europeanness" as a national trait.

In *Lobe* and the Citizenship Referendum the tools of modernity – claims to reason, objectivity, fairness and the language of rights – were used to justify a judicial decision and constitutional amendment contrary to the principles modernity purports to stand for. There are two interesting points to be drawn from this: Firstly, the belief in modernity is so pervasive that even as the values it purports to stand for are neglected, that neglect is justified by reference to modernity. Secondly, substantive equality is waived in order ensure the survival of structures that preserve the myths of modern law.

If a majority of the Irish Supreme Court had come to a different conclusion in *Lobe*, the outcome would have been advantageous for the families concerned. Similarly, if those eligible to vote in the Citizenship Referendum had rejected the proposal, children born to non-nationals living in the state might have continued to receive the benefit of entitlement to Irish citizenship through birth.<sup>275</sup> Nevertheless, my purpose is not to argue that *Lobe* was wrongly decided. Nor is it to argue that a rejection of the Citizenship Referendum would have been a victory for the oppressed. Rather, it is to suggest that the contradictions that are apparent in the reasoning of the Supreme Court Justices in *Lobe* and the justification for holding the Citizenship Referendum illustrate the extent to which modern law is based upon myth and also the fragility of the seemingly incontrovertible truths of modern law.

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<sup>275</sup> Although, as I have argued, a constitutional amendment was not strictly necessary in order for the Oireachtas to restrict entitlement to Irish citizenship.



*Lobe* illustrates that because the principles underpinning the modern concept of citizenship conflict in many ways, the Supreme Court could not have reconciled them. However, because the concept of modern law is premised on the assumption that there is a rational answer to a problem, the courts do not address that tension. It is therefore necessary for the courts to promote one element of the dilemma presented to it as over-riding in its importance. By emphasizing either the rights of the state or those of the child the court attempts to affirm the premise underlying modern law that it has an answer to the problem posed by child citizens born to non-nationals. I suggest that a majority of the Supreme Court chose to emphasize the state's right to control non-citizens within the national territory because such a decision better affirms the law's conception of itself; if non-nationals can assert a right to reside in the state, by virtue of the rights of their citizen children, the law's claim to authority over the national territory is diminished. The implication of this is that when the courts are faced with a dilemma that challenges the claims of modernity law will seek to affirm its ability to resolve the problem. Had the court ruled in favour of the child citizen, it would have substantively upheld a value espoused by modernity. However, it would have been at the expense of the right of the state to control its borders. When the law upholds the right of the state to control its borders, it continues to assert that it can strike a balance between the rights of the child and those of the state. Accepting the argument that the rights of the child outweigh the rights of the state concedes that the law does not have absolute control over the national territory. In *Lobe*, the Supreme Court's preoccupation became defending the myth of modernity rather than enforcing the values for which modernity purports to stand.

A similar paradox emerged during the referendum campaign. Explaining why he believed the Citizenship Referendum was necessary, the Minister for Justice employed the tools of modernity – specifically claims to rationality and fairness. The proposal to hold a referendum was launched by pitching it between the two equally irrational and unfair straw-men of the right-wing racist and the left-wing utopian dreamer; the Minister stated, “I simply won’t allow the proposal to be hi-jacked by those who wish to further a racist agenda; but equally I will be harsh in my criticism of those on the other end of the political spectrum who claim to detect racism in any action, however rational, fair-minded or soundly based, that affects immigration or citizenship policy.”<sup>276</sup> However, as I have shown, accepting the Government’s justification for holding the Citizenship Referendum requires the embrace of contradiction rather than rationality.

Whilst I believe that while law has an important role to play in the issue of international migration, its capacity to address the issues raised is limited. As we have seen, law is intimately linked to the bordered nation. It is therefore not an independent adjudicator but an interested party. The capacity of modern law to engage with the matter of international migration is also restricted by its belief that it can find a rational and correct answer to the problem. I suggest that we must therefore look to non-legal as well as legal strategies to engage with the matter of international migration. Unfortunately, time and space constraints prevent me from exploring those strategies in the course of this thesis. The conception of law as a

myth is compatible with a belief that law is influenced by less dominant discourses, although law itself cannot fully acknowledge the debt that it owes to those sources. Whilst it is not possible to overcome the problems generated by a bordered world, my hope is that by acknowledging the limitations of modern law a step is taken towards engaging with the issue of international migration in a more holistic manner.

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<sup>276</sup> Michael McDowell, "Proposed Citizenship Referendum" *Sunday Independent* (14 March 2004).

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