COMPARATIVE CONSTITUTIONAL TRADITIONS PROJECT-REPORT ON IRELAND

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1. Foundations. Common constitutional traditions. General questions

Does your legal system have a specific term for 'constitutional tradition'? If yes, does the term used in the national version of the TEU differ from the English term 'tradition'? If no, do legal traditions exist in other areas of your system (private, criminal or administrative law)?

The English language is one of the official languages in the Republic of Ireland. Thus, the terminology is the same.[1]Does your system attach a specific legal significance/concept to constitutional traditions?

In a common law jurisdiction like Ireland, the principles and the doctrines which develop from the traditions can be considered to form a body of precedent which is 'traditionally' followed. Therefore, such traditions are legally significant due to their binding nature upon lower courts.

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[1] Article 8.2 Irish Constitution

Does your system draw distinctions between values, principles and traditions?

Values can be perceived as more general visions found within the Constitution when it is read and analysed as a whole instrument and not analysed piece by piece and divided into individual principles. Values can be, per example, specifically discerned from the preamble.

The Preamble of the Irish Constitution reads as follows:

"In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution."

The Preamble is written from the perspective of those in a divided country…the Preamble is sectarian: it speaks of "centuries of trial" endured by our fathers, and their "heroic and unremitting struggle to regain the rightful independence of our Nation" As Doyle has pointed out, this version of "We, the People of Eire" is exclusionary,[2]and would be more so in the context of a united Ireland. Thirdly, the Preamble is very religious and—though arguably Christian—is understood to be settling out the ambitions and aspirations of a Catholic state.[3]

Traditional approaches to certain provisions can be discerned from the principles that develop from the provisions. In that sense principles and traditions are similar conceptually. The decision of the Irish Supreme Court in *State (Burke) v Lennon [1940] IR 136* provided a clear indication of the potential of the new

[2] O. Doyle, *The Irish Constitution: A Contextual Analysis* (2018) 14.

[3] "For example, the cardinal virtues of Prudence, Justice and Charity are arguably more related to Catholic theology than other Christian traditions." See D. Kenny, *The Irish Constitution, a united Ireland, and the Ship of Theseus: Radical constitutional change as constitutional replacement* (2019), 10-11.

Constitution in the sphere of judicial review. The decision established the power of the judiciary to declare legislation unconstitutional. As Eoin Daly has pointed out, "…this simply describes the institutional status quo in Ireland since the enactment of the 1937 Constitution, which explicitly grants the superior courts the power to invalidate unconstitutional legislation…"[4]

What can constitute a constitutional tradition in your legal system – parts of a constitutional text, case law, legal theory, conventions, collective constitutional experience and/or long-standing public perception?

Paul Gallagher noted that the Irish Constitution is treated "as a living document falling to be interpreted in accordance with contemporary circumstances…" and there is "recognition of the Constitution as an organic set of rules which can, in certain circumstances, be interpreted differently at different times…". Paul Gallagher made these comments in reference to declarations of unconstitutionality by the courts and noted "that at a point in time a constitutional challenge might be rejected which 20 or so years later will succeed (although not, of course, where a reference under Article 26 has been upheld)." [5]

Long-standing public perception will necessarily allow the evolution of the tradition which will be interpreted by applying the derived principles in a different manner. In that sense the tradition of judicial supremacy enshrined explicitly in the Constitution, is acted upon through the doctrine of unconstitutionality. The principle brings the tradition to life. But the principle itself depends upon the societal dynamics of the time in which it is used for the ultimate outcome.

"It is perhaps this in-built capacity to evolve through judicial interpretation that gives the Constitution its lasting strength and its capacity to achieve justice and to protect the dignity and freedom of the individual-ideals specifically mentioned in its Preamble."[6]

Judicial interpretation of the Constitutional text will necessarily build upon legal theories when looking to develop per

[4] E. Daly, *Reappraising judicial supremacy in the Irish constitutional tradition* in L. Cahillane, J. Gallen and T. Hickey (eds), *Judges, Politics and The Irish Constitution* (2017) 29.

[5] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, 45 Irish Jurist (N.S.) (2010) 22, 49.

[6] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 32.

example the values outlined in the Preamble and apply these to specific cases. Denham J. in *A v Governor of Arbour Hill Prison* expresses the following view:

"Many of the principles set out in the Constitution of 1937 were ahead of their time. It was a prescient Constitution. Thus, the Constitution protected fundamental rights, fair procedures, and gave to the superior courts the role of guarding the Constitution to the extent of expressly enabling the courts to determine the validity of a law having regard to the provisions of the Constitution. Over the succeeding decades international instruments, such as the United Nations Charter and the Universal Declaration of Human Rights, proclaimed fundamental rights and fair procedures…"[7] The ideals represented in the majority of international human rights conventions would, taking into account the timing of the writing of the Constitution, necessarily be already reflected within its provisions to some extent.

What is the relationship between constitutional traditions and customary constitutional law?

There is no clear distinction between the two.

Can institutional arrangements, for example a bicameral legislature or a federal infrastructure, be an expression of constitutional tradition in your system?

Ireland has a bicameral legislature but does not know federalism. Moreover, the bicameral structure of the Oireachtas is not part of Ireland's constitutional tradition, as the matter was put to a referendum to amend the constitution in 2015, with the aim of transforming the parliament into a unicameral legislature. The referendum ultimately failed, but bicameralism, is not a constitutional tradition as much as a concept holding symbolic value. [8]

Can legal techniques such as constitutional and statutory interpretation or – within the principle of proportionality – a balancing of clashing interests qualify as a constitutional tradition in your system?

The term "unique" is perhaps most appositely applied to the 1937 Constitution not with reference to its individual provisions as such, but with reference to the vision and balance it demonstrated in the legal, political and social context which prevailed

[7] *A v Governor of Arbour Hill Prison* [2006] 1 4 1.R. 88,145-146.
[8] J. Kelly, *The Irish Constitution* (1980) 120.

internationally at the time of its adoption, and with reference to the remarkable fact that it enshrined, as early as 1937, many principles which did not take root internationally until later. The Constitution's provision for judicial review of the constitutionality of legislation can be considered an example of this.[9]

How does time factor into constitutional traditions in your system? The phrase (and especially the term used in the German text of the Treaty on European Union (*Überlieferung*) suggests that constitutional traditions are of some vintage – but how old must they be?

A common law jurisdiction like Ireland relies on the passage of time for the emergence of a legal or constitutional tradition: Time is necessarily an important factor due to the need for a repetitive approach to develop surrounding a reading or application of a certain Article or the consolidation of a certain precedent.

Kearns P. has made reference to the notion that repetition over time of an approach gives an act necessary legal force.[10] Hogan J has expressly qualified the attributions one should make to an act before it is considered a tradition and such necessarily here implies the passage of time in which the tradition may be repeated.[11] However, the position is less clear with regard to constitutional law. For example, while some elements of the 'crown prerogative', such as 'treasure trove' have been argued to have endured from English law, others have clearly been extinguished.[12]

A comparison between the English and German texts of the TEU raises the question whether traditions can develop (and possibly end) within a single constitutional regime**.** The English response is very likely to be positive, given the absence of clear breaks in English constitutional history over the past several centuries, while the German notion of *Überlieferungen* indicates that something may have to pass on from one regime to the next (or survive some other form of regime change or transition) in order to be an *Überlieferung*. What is the response to this question in your legal system?

Having due regard to the 81 year lifespan of the Irish Constitution, although certain traditions may be seen to have been

[9] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 29.
[10] *Director of Public Prosecutions v Fitzsimons* [2015] IEHC 403
[11] *Kennedy v Judge Gibbons* [2014] IEHC 67 [26]
[12] *Webb v Ireland* [1987] IESC 2, [1988] IR 353

carried over time from British colonial times and the 1922 Constitution, the originality of the 1937 Constitution means that most of what is now considered traditional practice has been in fact developed within its own lifespan using its own provisions.

Must constitutional traditions be rooted both in history and in contemporary law?

The extent to which a link with history is necessary is a complicated question. As an example, the Irish Constitution provision for judicial review of the constitutionality of legislation was building on existing foundations in this regard. The 1922 Constitution expressly provided, in Art.65, for constitutional judicial review. "However, provision for amendment of that Constitution by the legislature significantly diminished that protection.".[13] Sutherland has noted in relation to judicial review and the 1922 Constitution: "The judges of the time, trained in a positivist tradition, were not yet ready to fully entertain, let alone develop, the concept of judicial review ... The Constitution the Irish people now enjoy ... has proved to be a far more formidable protector of basic rights and freedoms than its predecessor".[14] Further, the courts have noted: "The power to review the constitutionality of legislation expressly given by the Constitution to the superior courts was a novel aspect of the Constitution in 1937. No such power existed expressly elsewhere in Common Law jurisdictions, such as the United Kingdom, Australia, or Canada."[15]

In conclusion, it could be asserted that the futuristic visions in the 1937 Irish Constitution means that in its relatively short history, the Articles and governing principles which may be deemed traditional to the system were later expanded upon and developed through the judiciary and common law: as such, the traditions must be understood both in terms of their historical roots but also their development through contemporary practice.

In this regard, it is germane to refer to Murray C.J's statement in *A v Governor of Arbour Hill*, namely that the Constitution must be viewed as a living document.[16] The same judge, in *Sinnott v Minister for Education*, expressed the view that the Constitution: " ... [F]alls

[13] Cited in P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 29.
[14] Sutherland, *The Influence of United States Constitutional Law on the Interpretation of the Irish Constitution*, 28 St. Louis University Law Journal (1984) 41, 41-42.
[15] *A v Governor of Arbour Hill* Prison [2006] 1 4 1.R. 88, 146.
[16] *A v Governor of Arbour Hill* [2006] 4 I.R. 88, 129.

to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores".[17]

How detailed are constitutional traditions in your system (broad concepts and ideas, particular norms and precise rules, or both)? Broad concepts such as Judicial Supremacy and Popular Sovereignty exist, but the rules or traditional approaches developed under each are relatively detailed. Judicial review of legislation, and wide interpretations of the Articles in the Constitution allow for the reading of unenumerated rights into the text.

Are constitutional traditions considered typical, distinctive or unique to your system?

Irish courts have never really identified a set of distinctive constitutional traditions that are unique to the Irish legal system, and thus absent in other constitutional regimes. Even when Ireland stood as an outlier in protecting the life of the unborn within the constitution (Article 40.3.3. as introduced by the Eighth Amendment to the Constitution in 1983) to the point of banning abortion *tout court*, the Irish judiciary never explicitly articulated the point that this represented a unique constitutional tradition. The point however was made by the European Court of Human Rights in *A., B., and C. v Ireland*, where it upheld the Irish abortion ban as compatible with Article 8 ECHR, despite a contrary European consensus, arguing that this was based:

"on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have relevantly changed since then."[18]

With the repeal of the Eighth Amendment of the Constitution in May 2018, and the ensuing legalization of abortion, however, the alleged uniqueness of the Irish legal system in protecting the right to life of the unborn has been removed, so the matter above is moot. Of passing interest is the fact that the Supreme Court of the Irish Free State did identify unique constitutional traditions deriving from provisions of the 1922 Constitution. However, such provisions do not form part of the 1937 Constitution's text, so this point too, is now moot.[19]

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[17] *Sinnott v Minister for Education* [2001] 2 I.R. 545, 680.

[18] *A., B. and C.* par 226

[19] *The State (at the prosecution of Jeremiah Ryan and Others) v Captain Michael Lennon, Governor of the Military Detention Barracks, Arbour Hill, Dublin, Colonel Frank Bennett and Others, The Members of the Constitution (Special Powers) Tribunal ; and*

2. Subject/content of constitutional traditions

What is the subject/content_of constitutional traditions in your system? Are they limited to the area of human rights protection or can they include institutional arrangements? Can you list the principles that are considered to be part of the constitutional traditions, and provide a short description of them?

Judicial Supremacy in the Irish constitutional tradition.[20]

The role of the Irish Supreme Court in the decision in *State (Burke) v Lennon [1940] IR 136* provided a clear indication of the potential of the new Constitution in the sphere of judicial review. The decision established the power of the judiciary to declare legislation unconstitutional.

It was held that the provision allowing "internment without trial" under the Offences against the State Act 1939 was repugnant to Article 40.4 of the Irish Constitution providing for the right "not to be deprived of personal liberty save in accordance with the law". This landmark decision was given in the Hugh Court by Duffy J and upheld on appeal by the Supreme Court. As noted by O'Dell, "…this simply describes the institutional status quo in Ireland since the enactment of the 1937 Constitution, which explicitly grants the superior courts the power to invalidate unconstitutional legislation…"[21] The widespread support for judicial supremacy is also rooted in historical experience. In fact, the 1922 Irish Free State Constitution turned out to be a dead letter since in the politically unstable climate of 1920s/1930s it was abusively amended through its flexible amendment procedure, and thus the Constitution proved quite ineffective in safeguarding civil liberties. In contrast 1937 Constitution precluded possibility of extended flexible amendment procedure paving way for period of judicial rights based judicial activism in 1960s/1970s.

2.1 Popular Sovereignty (and Natural Law)

Another constitutional tradition is the tension between popular sovereignty and natural law. As Doyle has noted: "Some

in the Matter of the Courts of Justice Act 1924 and in the Matter of the Constitution of Saorstát na hÉireann [1935] 1 IR 170

[20] E. Daly, *Reappraising judicial supremacy in the Irish constitutional tradition*, cit. at 4, 29.

[21] E. Daly, *Reappraising judicial supremacy in the Irish constitutional tradition*, cit. at 4, 29.

people say that the Irish constitutional order derives its authority from the fact that it embodies the will of the people. Accordingly, all enactments endorsed by the people are valid. Others say that the constitutional order derives its authority from the natural law and that enactments of the people must comply with the precepts of the natural law in order to be valid."[22]

This has been the subject of discussion by the courts. In *McGee v Attorney-General*[23], Walsh J noted: "Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection."[24] In *Byrne v. Ireland,* the same judge observed: "[The State is the creation of the people and is to be governed in accordance with the provisions of the Constitution which was enacted by the people and which can be amended by the people only, and ...the sovereign authority is the people."[25]

Article 1 of the Constitution provides: "The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of government, to determine its relations with other nations and to develop its life, political, economic, and cultural, in accordance with its own genius and traditions." This has been described as referring to "popular sovereignty in its undiluted form."[26] Ireland is described in Articles 5 and 6 as "a sovereign, independent democratic", state in which "all powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good."

In the case law, the principle has been invoked almost exclusively in relation to the people's role in the constitutional-amendment process. The constitutional referendum a hallmark of popular sovereignty. Further, popular sovereignty has been

[22] O. Doyle, *Legal Validity: Reflections on the Irish Constitution*, 25 Dublin University Law Journal 56 (2003), 58.
[23] *McGee v Attorney-General* [1974] I.R. 284.
[24] *McGee v Attorney-General* [1974] I.R. 310.
[25] *Byrne v Ireland* [1972] I.R. 241, 263.
[26] V.T.H. Delany, *The Constitution of Ireland: Its Origins and Development*, The University of Toronto Law Journal, Vol. 12, No. 1 (1957), 1-26.

interpreted, in practical terms, as meaning that the people's right of constitutional amendment is substantively unfettered. Unusually in European terms, this means that no constitutional principle is unamendable or immutable[27]. As such, Ireland does not know the concept of unconstitutional constitutional amendments. The Supreme Court has conflated popular sovereignty with constitutional amendment" "the Constitution … was enacted by the people and … can be amended by the people only [as] the sovereign authority"[28]. Popular sovereignty has consistently been invoked to reject various challenges to constitutional amendments that were alleged to have violated supposedly immutable or essential constitutional principles, particularly the principles of natural law[29]". Thus, the Supreme Court has rejected the argument that even "natural" human rights in the Constitution are immutable or unamendable, reasoning that "the people intended to give themselves full power to amend any provision of the Constitution[30]". Thus "a proposal to amend the Constitution cannot per se be unconstitutional[31]". Similarly it has been said "there can be no question of a constitutional amendment properly before the people and approved by them being itself unconstitutional[32]".

Does your system draw a clear distinction between administrative and constitutional law given that concepts such as proportionality, distinct techniques of statutory interpretation or principles of judicial review developed in administrative law but have crept into and strongly affected constitutional thinking over time?

Ireland in this respect is in a peculiar position. On the one hand, being a common law country, it doesn't really know a body of administrative law which is treated separately (including by a separate order of jurisdiction) like it happens in continental jurisdictions. Indeed, as it was stated:

"In UK and Ireland the distinction between individual and general administrative acts is almost irrelevant because the law of administrative acts is mostly a law on the procedure, not on

[27] J Casey, *Constitutional Law in Ireland*, (2000) 709.
[28] *Byrne v Ireland* [1972] IR 241, 262,
[29] *Finn v Attorney General* [1983] IR 154; *Riordan v An Taoiseach* (No.1), [1999] 4 IR 321.
[30] *Finn v Attorney General* [1983] IR 154, 163
[31] *Slattery v An Taoiseach* [1993] 1 IR 286.
[32] *Riordan v An Taoiseach* (No.1), [1999] 4 IR 321, 330

substance or in the generality or singularity of those affected by the act. In UK and Ireland the courts have only recently started to look into substantive aspects of administrative decisions. Previously their focus of interest was almost exclusively whether or not the public authorities had followed a due procedure (i.e. based on well-established court case law principles) to shape their decisions[33]".”[34]

On the other hand, however, contrary to the UK, Ireland has a written constitution, so it has a body of constitutional norms which have higher status than simple administrative law principles and practice.

3. Constitutional traditions and society

What is the relationship between constitutional traditions and societal values in your system? Can the two fall apart over time if a constitutional text (and, possibly, case law) continues to uphold and enforce a particular idea or approach whereas contemporary society is moving away from it? Conversely, can a constitutional tradition survive formal constitutional amendment and a changing jurisprudence if a large part or even a majority of society continues to believe in it?

Gallagher notes that the Irish Constitution is treated "as a living document falling to be interpreted in accordance with contemporary circumstances…" and there is "recognition of the Constitution as an organic set of rules which can, in certain circumstances, be interpreted differently at different times…". Gallagher made these comments in reference to declarations of unconstitutionality by the courts and noted "that at a point in time a constitutional challenge might be rejected which 20 or so years later will succeed (although not, of course, where a reference under Art.26 has been upheld)." [35]

The dynamic interaction of constitutional principles and societal values is itself a feature of the accepted nature of the Irish Constitution, in that the evolution of its principles are welcomed and expected within its provisions. There exists a factual symbiosis of constitutional interpretation and changes in societal values

[33] W. Rusch, *Administrative Procedures in EU Member States* (2009) 13.
[34] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 22-24.
[35] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 49.

through which evolution in society beliefs can be exported into the reading of the Constitution.

At the same time, as mentioned before, a core principle of the Irish Constitutional system is popular sovereignty, which manifests itself through referenda amending the Constitution. In this respect, Ireland has a long track record of frequent popular ballots to amend the constitution, to reflect changing social norms and perceptions. In the last decade, in particular, the Constitution has been amended several time inter alia to allow gay marriages, legalize abortion, and decriminalize blasphemy – a reflection of the profound social transformation in the fabric of society which have resulted directly into a popular change of the constitutional text.

What is the relationship between traditions and national identity?

The Constitution does not seem to draw its inspiration from distinctively republican thought. Instead, it refers to "natural" rights –partly of religious origin – as well as national identity that is defined in Gaelic and Christian traditions, as is notable from the preamble.[36]

4. Practical application of national constitutional traditions and European influence

Do courts your system utilize constitutional traditions when dealing with purely national disputes? If so, in what types of cases/disputes? Why? Yes. This is evident in the judicial Interpretation of unenumerated rights, in order to recognise rights which were not deemed readily ascertainable in the Constitution (see below).

Are the constitutional traditions recognized in your system purely national concepts or (also) the result of European influence (Council of Europe/ECHR or EU)? Is it possible to keep these two levels apart after decades of interaction and cross-pollination between systems?

In Ireland, foreign law and foreign cases can have persuasive authority on the national courts. Moreover, English law continues to be highly influential, foreign law still serves as precedent in sectors of the Irish legal system (e.g. contracts, property and tort) and it would be customary for national courts to consider

[36] E. Daly, "*Republican themes in the Irish constitutional tradition*", Études irlandaises, 41-2 (2016) 163-184 [12].

judgments delivered by courts in the UK as well as in other jurisdictions around the world which originate out of the English common law. Finally, judgments of the ECJ have binding authority on the national courts, if they are relevant to the case, and Irish courts have a solid tradition of referring preliminary references to the ECJ and duly following its decisions, as well as duly implementing the rulings of the ECtHR.

The case of *A v Governor of the Harbour Hill Prison*[37] followed on from the Supreme Court's striking down of a section of the Criminal Law (Amendment) Act 1935 in the CC case. Here, the Chief Justice placed great emphasis on foreign law in resolving the extremely difficult question of the effect of a declaration of unconstitutionality on convictions pursuant to a particular piece of legislation.[38] It is perhaps noteworthy that the first non-common law system to which the Chief Justice had regard was the European Court of Justice. Thereafter, the Chief Justice cited a decision of the European Court of Human Rights. (and the Supreme Court of India's judgment in *Orissa Cement Ltd v State of Orissa.* Gallagher notes: "He noted "a substantial correspondence" between the pertinent articles of the Indian Constitution and Arts 15.4 and 50.1 of the Irish Constitution. Only then were United States authorities discussed, followed by Canadian authorities.)"[39] However, the effect in such cases is that foreign law can be persuasive, rather than prescriptive.

As previously noted, many of the constitution's directive principles reflect more modern concepts of justice. Although expressed in language which seems old-fashioned today, they incorporate some of the ideals subsequently enshrined in the provisions of the Charter of Fundamental Rights of the European Union. Article 45.4.20 provides: "The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength." This mirrors Article 31(1) of the Charter, which provides that, "every worker has a right to working conditions which respect his or her health, safety and

[37] *A v Governor of the Harbour Hill Prison* [2006] 4 I.R. 88

[38] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 42-43.

[39] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 43.

dignity", resonates with this provision, and Article 32, which prohibits the employment of children. Article 34(1) of the Charter, which provides that the Union recognises and respects the entitlement to social security benefits and social services, resonates with the State's pledge in Article 45 to: "safeguard with especial care the economic interests of the weaker sections of the community and, where necessary, to contribute to the support of the infirm, the widow, the orphan and the aged". There are numerous other examples, reflecting a strong degree of cross-pollination.

The above has been reinforced by judicial interpretation. Gallagher notes that: "*Ryan*[40] resulted in a conclusion that the general guarantee in that section was not confined to the personal rights specified in Art.40 but extended to other unspecified personal rights. This in turn led Denham J. 30 years later in *Re a Ward of Court (No.2)* to hold that one of the unspecified rights of the person under the Constitution was the right to be treated with dignity-a right which by then had a distinct international flavour…It is worth noting that art. 1 of the EU's Charter of the Fundamental Rights specifically refers to the need to respect and protect human dignity. Article 3 of the same Charter recognises everybody's right to "physical and mental integrity". The right to bodily integrity was, of course, explicitly recognised in the Ryan case. The right to life in art.2 of the Charter is explicitly protected in Art.40.3.2. The Charter in fact resounds with rights… All these rights, or a variation of them, are recognised expressly or implicitly in the Irish Constitution."[41]

Have courts referred to Art. 6 (3) TEU or the jurisprudence of the CJEU on constitutional traditions? This does not appear to have occurred. However, Fennelly J. in *MJELR v. Stapleton*[42] and cited by Denham CJ in *Minister for Justice and Equality -v- Busby*[43] may a reference *en passant* to Article 6, and by inference, Article 4(2) TEU: "It follows, in my view, that the courts of the executing member state, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, 'respect … human rights and fundamental

[40] *Ryan v Attorney General* [1965] I.R. 294, 314, 333-334.
[41] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 32-33.
[42] *Minister for Justice, Equality and Law Reform v Stapleton* [2008] 1 IR 669
[43] *Minister for Justice, Equality and Law Reform v Busby* [2014] IESC 70

freedom'. Article 6.2 provides that the Union is itself to 'respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms … and as they result from the constitutional traditions common to the Member States, as general principles of community law."[44]

Have national constitutional traditions been used by courts as an argument to protect the system from European influence or referred to as a driver of integration, or both? The European influence has been broadly accepted in the development of Ireland's constitutional tradition. It has certainly been seen as a driver of integration.

However, it has been stressed that constitutional and contextual distinctions between Ireland and other countries may militate against the application of foreign constitutional law to any particular case. As noted by MacMenamin J. in *McNally v Minister of State for Community, Rural and Gaeltacht Affairs:* " ... observations as to foreign law should be approached with an appropriate level of diffidence and care ... Reference to foreign case law (no matter how eminent the provenance) must have due regard to the institutional and contextual distinctions which exist between all states".[45] In this regard, Gallagher notes that "…authorities would … appear to suggest that the more unique the national constitutional context, the less important the role that foreign law can play in the interpretation of the same."[46]

Is free speech subject to a proportionality analysis? What are the constitutional standards of scrutiny for free speech?

Any restrictions upon the constitutionally guaranteed freedom of speech must pass either one of the two standards of review as developed by the Irish Courts.

Article 40.6.1(i) of the Irish Constitution of 1937 prescribes that the right of free expression may be exercised "subject to public order and morality". The middle sentence of the Article allows restrictions on the "rightful liberty of expression" of the "organs of public opinion" to ensure that they are not "used to undermine public order or morality or the authority of the State". The last sentence regulates "utterances of seditious, or and indecent matter,

[44] *Minister for Justice, Equality and Law Reform v Busby* [2014] IESC 70 [18]
[45] *McNally v Minister of State for Community, Rural and Gaeltacht Affairs* , High Court, December 17, 2009, at paras 105-106.
[46] P. Gallagher, *The Irish Constitution - Its Unique Nature and the Relevance of International Jurisprudence*, cit. at 5, 41.

in that both shall be offences "punishable in accordance with law". It is further accepted that the exercise of Constitutional rights "may be regulated by the Oireachtas when the common good requires this" and Article 40.6.1.(i) "can, in certain circumstances, be limited in the interests of the common good"[47]. The freedom of autonomous communication, as derived from Article 40.3.1, is explicitly guaranteed "as far as practicable". This right may also be limited in the interest of the common good.

The tension between a prescribed constitutional right that may be limited by ordinary legislation is noted by Hall: "Freedom of speech is one of the Irish Constitution's most majestic guarantees. The guarantee, however, is not one of absolute majesty. This is so because Article 40.6.1.i of the Irish Constitution provides that the State guarantees liberty for the rights of the citizens to express freely their convictions and opinions, subject to public order and morality. Specifically, that provision in the Constitution provides that organs of public opinion such as the radio and the press must not be used to undermine public order or morality or the authority of the State. In effect, prior restraint receives constitutional sanction."[48]

Since the mid-1990s, the Irish Courts have developed two categorical standards of review concerning restrictions of rights. The first entails a proportionality test; the second is a rationality test.

The doctrine of proportionality was first elaborated by Costello J in *Heaney v Ireland*[49], providing that the objective of a provision that challenged a constitutionally protected right must be "of sufficient importance to warrant over-riding" it and the objective must be viewed as "pressing and substantial in a free and democratic society." The Irish proportionality test is then set out as follows: the said objectives must: "be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; impair the right as little as possible, and be such that their effects on rights are proportional to the objective..."[50]

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[47] *Murphy v Irish Radio and Television Commission* [1999] 1 IR 12, 25, [1998] 2 ILRM 360, 373.

[48] E.G., *The Majestic Guarantee: Freedom of Speech, The Non-Renewal of the "Section 31" Order*, The Western Law Gazette (University College, Galway) Issue No. 9 (1995).

[49] *Heaney v Ireland* [1994] 3 IR 593.

[50] *Heaney v Ireland* [1994] 3 IR 607.

The first requirement of a rational connection means that the pressing and substantial issue put forward by the State cannot be arbitrary, unfair, or based on considerations that are considered irrational. Restrictions deemed "unreasonable", "unnecessary" or "impermissibly wide" are adjudged as disproportionate. The requirement interprets the weakness or strength of the reason for which the State imposes a restriction. The less pressing the reason, the less likely it is that it will be found to be proportional. Conversely a more substantial issue will be more likely to be found proportionate.[51]

The second requirement of minimal impairment means that the interference must not stray beyond what is necessary to answer the pressing and substantial issue in question, with the burden placed on the right being as small as possible. As such, minimal intrusions upon rights have been held to be proportionate.[52]

The final requirement asks for a proportional effect, so that the pressing and substantial reason is proportional to the effect it will have on the right it burdens. It has been described as assessing the strength or weakness of the burdened right for which there exists a pressing and substantial reason for restriction. If the restricted activity is far from the core of the right, then it is more likely to be found proportionate.[53]

This articulation of the doctrine has been explicitly endorsed in the Irish Supreme Court and applied in the context of freedom of political expression in Article 40.6.1 (i) and of the freedom of autonomous communications in Article 40.3.1 of the 1937 Constitution.[54]

A substantial amount of deference is generally afforded to the Irish Parliament (known as the Oireachtas) when applying the three steps of the proportionality test. Such judicial restraint was commented on by O'Sullivan J in the case of *Colgan v Independent Radio and Television Commission* to the extent that it "may be an application of the presumption of constitutionality". This is a rule

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[51] E. O'Dell, *Property and Proportionality: Evaluating Ireland's Tobacco Packaging Legislation* 17 (2) QUT Law Review (2017) 46, 58.

[52] E. O'Dell, *Property and Proportionality: Evaluating Ireland's Tobacco Packaging Legislation* cit. at 51, 46-58.

[53] E. O'Dell, *Property and Proportionality: Evaluating Ireland's Tobacco Packaging Legislation* cit. at 51, 58.

[54] *Murphy v IRTC* [1999] 1 IR 321; *Colgan v IRTC* [2000] 2 IR 490; *Mahon v Post Publications* [2007] 3 IR 338.

which the courts have developed over time when testing statutes for constitutionality. In *Pigs Marketing Board v Donnelly*[55], Hanna J stated: "When the Court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representative of the people, is presumed to be constitutional unless and until the contrary is clearly established."[56]

The second standard of review has been developed in cases where the Supreme Court chooses not "to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."[57]

The second standard is the rationality test, and it has been used almost interchangeably with the proportionality test[58], without "any real judicial explanation as to why these choices…are justified"[59]. Commentators have interpreted the courts' statements on the matter to amount to a possible invocation of this standard in the absence of a personal right being vindicated by the Statute in which case State interest or constitutional duty alone may suffice to invoke the rationality test standard.[60] It was suggested that the rationality and proportionality tests were two complimentary standards and both should be used in each instance,[61] however it has been argued that no law could fail rationality and pass proportionality and therefore such an endeavor is ineffectual[62]. The relationship between the tests remains unresolved and requires renewed attention from the Irish Courts.

Does free speech prevail over minority rights?

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[55] *Pigs Marketing Board v Donnelly* [1939] IR 413.
[56] *Pigs Marketing Board v Donnelly* [1939] IR 417.
[57] *Touhy v. Courtney* [1994] 3 I.R. 1 at 47
[58] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* (5th ed, 2018) 1505
[59] B. Foley, *Deference and the Presumption of Constitutionality* (Institute of Public Administration, 2008) 130.
[60] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 1501,1502.
[61] *King v Minister for the Environment* [2007] 1 IR 296 at 309, [25]
[62] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 1506.

Free speech in the context of the right to communicate under Article 40.3.1., as one of the unspecified rights of the citizen, or the freedom of political expression in the right "to express freely… convictions and opinions" contained in Article 40.6.1 (i), is placed under only one significant statutory limitation that may be viewed as vindicating the rights of minorities in Ireland, namely the Prohibition of Incitement to Hatred Act 1989 ("the 1989 Act").

The Act is limited in terms of its protection of groups. By only naming race, colour, nationality, religion, ethnic or national origins, membership of the Travelling community (a gypsy group, since defined as a distinct ethnicity in Irish law) and sexual orientation, the Act may be criticized as ignoring incitement to hatred against other groups, most obviously disabled people, intersex and transgender people, asylum seekers and refugees, and, arguably, the Roma community.

Further criticism relates to the vagueness of terms used in the Act and the lack of definition of key terms, making it difficult to discern the meaning of 'stir up' or 'threatening, abusive or insulting'. The statute lacks measures to address general denigration of minority groups, such as the lack of explicit mention of face-to-face abuse or "drive by shoutings". The inadequacy of the legislation is further evident from the low number of prosecutions and convictions under the Act since its enactment. [63]

Aside from the 1989 Act, the Criminal Justice (Victims of Crime) Act 2017 is the only other piece of legislation addressing so-called hate crime, and only in a limited manner, addressing the needs of victims specifically. The absence of further hate crime legislation has been criticized.[64] However, it may be noted that other legislation such as the Video Recordings Act 1989, the Criminal Justice (Public Order) Act 1994, the Offences Against the State Act 1939, the Equal Status Act 2000 and the Employment Equality Act 1998 deal with hate speech in a broad sense. The fact that the present legislative base does not deal with abusive employment of freedom of speech against minorities means that in practice, constitutionally protected free speech (subject to certain limitations) prevails over minority rights in Ireland.

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[63] A. Haynes & J. Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland*, Irish Council for Civil Liberties, (2017)

[64] A. Haynes & J. Schweppe, '*LGB and T? The Specificity of Anti-Transgender Hate Crime*' in A. Haynes, J. Schweppe and S. Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (2016) 126.

Is hate speech excluded from the area of constitutionally protected speech, or is it included? As noted above, so-called hate speech is not explicitly included in the area of constitutionally protected speech.

If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc.)?

To the extent that hate speech does not fall within the 1989 Act, it may still be actionable as defamation. However, the relevant legislation may be seen as protecting individuals rather than groups, and as such is clearly not designed to deal with hate speech. The Defamation Act 2009 sets out the "tort of defamation", which consists of "the publication, by any means, of a defamatory statement concerning a person to one or more than one person". A "defamatory statement" is defined as one "that tends to injure a person's reputation in the eyes of reasonable members of society". An actionable defamatory statement is comprised of three elements, all of which must be proven by the plaintiff, namely: (1) It must be published; (2) It must be defamatory;[65] and (3) The plaintiff must be identifiable.[66]

How is the interplay fleshed out between free speech and anti-discrimination law?

Article 40.1 of the Irish Constitution guarantees that "All citizens shall, as human persons, be held equal before the law". The Employment Equality Acts (EEA) 1998-2004 and the Equal Status Acts (ESA) 2000-2018 are the principal pieces of anti-discrimination law in Ireland. They cover the nine grounds of gender, marital status, family status, age, disability, sexual orientation, race, religion, and membership of the Traveller Community, and a final ground relating to housing assistance (that is only applicable in cases concerning accommodation).

There is currently no legislation in Ireland requiring a court to take a bias motivation, or a demonstration of bias, into account when determining the appropriate sanction to impose in a given case. However, An Garda Síochána (the police force) have adopted the practice of recording what they refer to as "discriminatory motives" in relation to standard offences. Garda HQ Directive No 04/2007 states that any incident which is perceived by "the victim or another person" – for example the police officer, a witness, or a

[65] That is to say it undermines the reputation of the plaintiff.
[66] N. Cox & E. McCullough, *Defamation Law and Practice*, (2014) 4-01.

person acting on behalf of the victim – as having a racist motivation should be recorded as such.[67] The Court of Appeal has indicated that it may be appropriate for a racist hate motivation to be considered an aggravating factor at sentencing, but there is no requirement on the sentencing courts to treat it as such. The same circumstances seem to apply to discrimination against persons with disabilities. Overall, it may be stated that the interplay between free speech and anti-discrimination law is underdeveloped, with most cross-fertilization occurring at the sentencing stage in individual cases.

Do crimes of opinion exist in your country? In particular, how about blasphemy? Contempt of the authorities or of a religion?

The expression of opinion is a constitutionally protected right subject to constitutional and legislative limitations. Article 40.6.1. (i) is held to protect the dissemination of information and the expression of convictions and opinions.[68] In *The Irish Times v Ireland*, Barrington J stated that "the right of the citizen to "express freely their convictions and opinions" guaranteed by Article 40 of the Constitution is a right to communicate facts as well as to comment on them."[69]

Until comparatively recently, blasphemy had been proscribed by the Constitution. However, in 2018, the Thirty-seventh Amendment removed the offence of publishing or uttering blasphemous matter from Article 40.6.1. The offence is still criminalised by the Defamation Act 2009, passed to enforce the requirement of the 1937 Constitution, though there is presently legislative action to repeal the relevant sections, and to remove the offence from Irish law.

Section 36.2 of the Defamation Act 2009 clarified that a person publishes or utters blasphemous matter if such is "grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion." Contempt of a religion, as it was previously dealt with through criminalisation of blasphemy, will cease to be a criminalised offence when the new legislation is passed, along with the removal of all related legislation noted in the General Scheme of the Repeal of Offence of Publication or Utterance

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[68] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 2604.

[69] *The Irish Times v Ireland* [1998] 1 IR 359 at 405, [1998] 2 ILRM 161 at 192-193.

of Blasphemous Matter Bill 2018.[70] However, an attack on religion could still constitute an offence under section 2 of the 1989 Act. This section criminalises actions likely to stir up hatred towards a group of people, inter alia, on the basis of their religion.

Freedom of expression, guaranteed by Article 40.6.1, is subject to restrictions on the basis of public order, and the authority of the State is further repeated in the specific context of the media. Article 40.6.1 (i), expressly grants unto the "organs of public opinion, such as the radio, the press, the cinema" the right of expression which includes "criticism of Government policy" insofar as this is not "used to undermine public order or morality or the authority of the State."

The right to criticize the Government is adequately protected in Ireland and a provision allowing for such criticism is viewed as central to the right of free speech[71]. It follows that statements insulting the Government cannot be regarded as an attack on the authority of the State[72] and in that context the contempt of the authorities is not a crime.

Is apology of a crime in itself a crime? Apology of a crime is not a crime in itself in Ireland. How is holocaust denial handled? There are no enacted laws criminalizing the denial of the holocaust in Ireland.

Is commercial speech an autonomous category? Commercial speech is not an autonomous category. There are no Irish decisions on whether the guarantee under Article 40.6.1 protects commercial speech. An inference can be drawn that some forms of commercial speech may receive protection, from the decision of Barrington J in *The Irish Times v Ireland* where a reference was made to advertisements; however the issue was not directly addressed. It has been noted that, despite the central focus of the right being on the human personality, the courts have held that the right can be engaged with commercial communication restrictions of varying kinds and therefore this type of communication is less likely to fall outside of the ambit of the Article. Are there any particular types of

[70] Repeal of Offence of Publication or Utterance of Blasphemous Matter Act (2018).
[71] D. Barrington, *The Irish Constitution – VIII: Freedom of Speech and Free Association*, Irish Jesuit Province 80 (1952) 951.
[72] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 2073.

speech that enjoy special protection? Or on the other hand, are there any types of speech that are ruled out by the law or by the constitution? The second paragraph of Article 40.6.1 makes a direct reference to State Power in relation to organs of public opinion. Academic opinion in the area leans towards the interpretation that the specific reference must mean that appropriate and balanced legal protections which recognize the unique features of media speech activities are mandated by the Constitution. The Irish Courts have shown themselves to be very reluctant to inhibit the freedom of expression of the media. It is accepted at common law that the courts will not impose prior restraint on the media publications, save for exceptional circumstances, with many cases taken for this end failing on the basis of being adjudged a disproportionate interference with press freedom.[73] However, in the recent decision of *O'Brien v RTE*[74] an interlocutory injunction was granted, as this freedom was balanced against the plaintiff's right to privacy and reputation.

Several areas of speech are made unlawful by legislation in Ireland. The Offences Against the State Act 1939 has active provisions in place that relate to unlawful organisations and documents. Section 10 (1) provides that it is unlawful to "set up in type, print, publish, send through the post, distribute, sell, or offer for sale any document: which is or contains or includes an incriminating document…a treasonable document…a seditious document." Section 10 (2) makes it unlawful to publish any communication on behalf of an unlawful organisation. Section 11 makes it unlawful to import newspapers containing seditious material. The repeal of these sections was recommended in the Report of the Committee to Review the Offences Against the State Acts 1939-1998[75] on the grounds of being outdated in the modern era and effectively unenforceable. Further, it is questionable whether, having regard to the breadth of these provisions, they are constitutional or compatible with the European Convention on Human Rights, though they have yet to be challenged on such grounds.

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[73] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 2068.

[74] *O'Brien v RTE* [2015] IEHC 397

[75] Committee to Review the Offences Against the State Acts, 1939-1998 and Related Matters, Ireland, *Report of the Committee to Review the Offences Against the State Acts, 1939-1998 and Related Matters* (Stationery Office, 2002) 298.

Section 4 (1) of the Offences Against the State (Amendment) Act 1972 expressly states "any public statement made orally, in writing or otherwise…that constitutes an interference with the course of justice shall be unlawful." This section has also been recommended for repeal.

Section 41 (4) of the Broadcasting Act 2009 makes it unlawful to broadcast an advertisement which addresses the merits or otherwise of adhering to any religious faith or belief or of becoming a member of any religion or religious organisation. Broadcasting of political advertising i.e. of an advertisement with a political end, is banned in section 41 (3) of the Broadcasting Act 2009. The definition for an advertisement with a "political end" was given by O'Sullivan J in *Colgan v Independent Radio and Television Commission*[76], to the degree that it is interpreted as such "if it is directed towards furthering the interests of a particular political party or towards procuring changes in the laws of this country or… countering suggested changes in those laws, or towards procuring changes in the laws of a foreign country or countering suggested changes in those laws or procuring a reversal of government policy or of particular decisions of governmental authorities in this country or… countering suggested reversals thereof or procuring a reversal of government policy or of particular decisions of governmental authorities in a foreign country or countering suggested reversals thereof."[77] How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc.? How is conscientious objection handled? The display of religious symbols has recently come to prominence in public discussion in the context of banning the Islamic face veil in Ireland. However, no legislation has been enacted in this area. With regards to educational institutions, an official guideline was sent to 450 Roman Catholic secondary schools in Ireland, in 2010, to prohibit Muslims from wearing a face veil at school. An exemption was made for religious symbols or garments which do not cover the face, such as headscarves.[78] This guideline is not a legal ban; it did however

[76] *Colgan v Independent Radio and Television Commission* [2002] 2 IR 490, [1999] 1 ILRM 22.
[77] *Colgan v Independent Radio and Television Commission* [1999] 1 ILRM 22 at 37.
[78] S Caldwell, *Ireland's Catholic Schools Ban Full Muslim Veil*, The Telegraph (24 September 2017)

reportedly cause a large number of Catholic schools to ban the face veil with numbers and names remaining unclear.[79]

The Education (Admission to Schools) Bill 2016 and the Equal Status (Admission to Schools) Bill 2016 offer legal protection providing remedies for restrictions on access on religious grounds which are of a discriminatory nature. It is as yet unclear as to whether the measures will be successful in preventing schools from restricting access for children from non-Catholic backgrounds.[80]

With regards to employment, Article 44.3 of the Constitution provides that the "State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status", and the Employment Equality Acts 1998-2015 make it illegal to discriminate against employees on religious grounds, including "religious belief, background, outlook or none."[81] The Irish Prime Minister (Taoiseach), Leo Varadkar has stated that the government has no plans to force hospitals owned by religious orders to remove religious symbols.[82]

In terms of conscientious objection, the only mention made of this concept in Irish law is in the recent Health Act 2018, dealing with termination of pregnancies, adopted after the May 2018 referendum which legalized abortion in Ireland. It provides that medical practicioners, nurses and midwives are not obliged to carry out a termination in circumstances in which they have a conscientious objection thereto. What is the interplay between free speech and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?

Free speech and freedom of association are regulated as separate constitutional rights. The "right of the citizen to form associations and unions" is a constitutionally separate right under Article 46.6.1 (iii) of the Irish Constitution. It is one of the State guaranteed rights, grouped together under Article 46.6.1, together with freedom of expression and freedom of assembly. It is subject

[79] Claire Hogan, *Accommodating Islam in the Denominational Irish Education System: Religious Freedom and Education in the Republic of Ireland*, 3 Journal of Muslim Minority Affairs 31(4) (2011) 554–73.
[80] Open Society Justice Initiative, '*Restrictions on Muslim Women's Dress in the 28 EU Member States: Current law, recent legal developments, and the state of play.*' (2018)
[81] Citizens Information, "Equality in the Workplace".
[82] Paul Cullen, *No plans to force hospitals to remove crucifixes, says Taoiseach Varadkar: publicly-funded hospitals need to recognise not everyone is Catholic.* The Irish Times (February 28 2019)

to the same constitutional restrictions, set out in Article 46.6.1. with limitations in the interest of public order and public morality.

One limitation for this provision is specifically noted in sub-paragraph (iii), which states that "Laws…may be enacted for the regulation and control in the public interest of the exercise of the foregoing right". The right is further protected in that discrimination in regulatory laws is expressly unconstitutional under Article 40.6.2: "Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination."

Is burning the national flag allowed? and about foreign flags? or a political party's flag?

No provision of Irish law directly deals with flag burning. A report published by the Department of the Taoiseach, presents non-statutory guidelines for dealing with the Irish flag. It is expressly stated that there are no statutory requirements dealing with handling of the flag and observance of the guidelines is a matter for each individual person to observe and the department's role in the matter is merely advisory. Section 14 of the guide refers to the "proper disposal of a worn or frayed National Flag". Here it states that when the flag is "no longer fit for display" it should "not be used in any manner implying disrespect. It should be destroyed or disposed of in a dignified way."[83] If the burning of the flag were carried out in a respectful manner in order to dispose of a flag considered unusable, then such burning would be seen to follow the aforementioned guidelines. No references have been made to the burning of foreign flags nor to flags representing political parties in Irish law.

How have the new technologies shaped the evolution of the free speech law?

The general consensus is that the law regarding online communication regulation remains outdated and largely unregulated in Ireland. Member of Parliament (Deputy) Aindrias Moynihan, commented in 2018: "Ireland is completely behind the curve in enacting regulatory legislation for the online and social media spheres."[84] There has been no update in this area since 1951.

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[83] Department of the Taoiseach, "*The National Flag*" (2018)

[84] Dáil Éireann debate - Wednesday, 31 Jan 2018 https://www.oireachtas.ie/en/debates/debate/dail/2018-01-31/28/ accessed 14 May 2022

Despite efforts to catch up, advances in technology continue to outpace the law.

Online platforms, once notified, are required to remove content when it is a criminal offence to spread such material. Examples may include material containing incitement to violence or hatred, or to commit a terrorist offence, or offences concerning child sexual abuse material.

To what extent is anonymous speech protected?

As defined by both the General Data Protection Regulation (GDPR) and the Irish Data Protection Act 2018, personal data that has been anonymised does not require compliance with data protection law. In theory, that means such data can be kept indefinitely and used for other purposes than that for which it was originally obtained.

Anonymous speech rights are limited in Ireland by the possibility of receiving a court order that will enforce the discovery of the identity of the anonymous wrongdoer by requiring a third party to disclose the information. These types of orders are called Norwich Pharmacal orders (NPOs). The Irish Supreme Court recognized NPOs in *Megaleasing U.K. Ltd v. Barrett*[85]. The court, in a bid to recognize the balance of rights to privacy stated that such orders should be "used sparingly" and the courts should be aware of and prevent that such orders are abused. Moreover, it was noted that their application "requires a balancing of the requirements of justice and the requirements of privacy." NPOs may only be granted in the High Court in Ireland. The order will be granted at the courts' discretion in circumstances in which "the plaintiff applying has established 'very clear proof' of wrongdoing; the defendant is 'mixed up' in the wrongdoing, though may not itself be liable; the plaintiff seeks the identity of the wrongdoers; the defendant is in a position to provide the information sought; and the plaintiff has no other means of ascertaining the information sought."[86] The order is usually made against Internet platforms, which will be required to disclose the IP address from which abusive comments were made and against Internet Service Providers (ISPs) to identify the subscriber who is linked to that IP address. Notably, Irish law fails to ensure that Internet users are notified of attempts to identify them and given an opportunity to

[85] *Megaleasing U.K. Ltd v. Barrett* [1993] I.L.R.M. 497.

[86] Gráinne Murphy, *Norwich Pharmacal Orders in Ireland: Case Law So Far,* LK Shields (2016).

oppose the application. In most Irish cases, the users are dependent on the ISP or Internet platform to make a case on their behalf.[87]

At a broader level, it should be noted that it is generally the case in Irish law that the right to have justice administered in public outranks the right to one's good name and to privacy in the hierarchy of rights.[88]

Are there limitations of free speech due on ethical grounds?

Limitations are placed upon the freedom of expression in the interest of the right to life. Section 2(2) of the Criminal Law (Suicide) Act 1993 provides that a person who counsels another to commit suicide or to attempt to commit suicide will be guilty of an offence and liable on conviction on indictment for a term of imprisonment of up to 14 years.

Kelly J commented on the issue in *Foley v Sunday Newspapers Ltd,* where a plaintiff sought an interlocutory injunction on the basis that the material the defendant sought to publish endangered his life, health and privacy: "[The defendant's freedom of expression] is an important right … however, it cannot equal or be more important than the right to life. If therefore the evidence established a real likelihood that repetition of the material in question would infringe the plaintiff's right to life, the court would have to give effect to such a right." [89]

Have there been any particular "hard cases" that have helped define the scope of this right?

A number of prominent cases have helped to shape the scope of the right to free speech in Irish law. The scope has been held to include not only protecting the dissemination of information but also the expression of convictions and opinions.

In the *Irish Times v Ireland,* Barrington J acknowledged that Article 40.6.1 confers rights onto organs of public opinion and said: "These rights must include the right to report the news as well as the right to comment on it…[90] ." In the same case, the Supreme Court held that judges have an inherent power to restrict press reporting of criminal cases in order to vindicate the right to a fair trial under Article 38.1. However, according to Morris J, such a

[87] F. Crehan, *Making threats over the internet is a crime, but sometimes anonymity is needed'* The Journal (2013)
[88] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 1678.
[89] *Foley v Sunday Newspapers Ltd* [2005] 1 IR 88 [42].
[90] *The Irish Times v Ireland* [1998] 1 IR 359, [1998] 2 ILRM 161.

restriction could only be imposed when a judge is satisfied: " (a) that there is a "real risk of an unfair trial" if contemporaneous reporting is permitted, and (b) that the damage which such improper reporting would cause could not be remedied by the trial Judge either by appropriate directions to the Jury or otherwise."[91]

In *Attorney General for England and Wales v Brandon Book Publishers Ltd*[92], Carroll J held that the restriction in the second paragraph of Article 40.6.1. (i) on freedom of expression in the interests of public order or morality or State security could only apply in reflection of the interests of this State, and in any other case the onus rests on persons seeking to restrict this freedom to establish the case.

In *Marine Terminals Ltd v Loughman and ors*[93], Feeney J noted: "The use of the term "scab" and the use of terms such as "crimes against Irish workers" are strong and forceful language but they were used in circumstances where it must be recognised that they represented the entitlement of the persons expressing such views to express their view in relation to the matters in issue."[94]

Are there other areas covered by free speech?

The courts have inferred a right to silence from the guarantee of the freedom of expression, with any abridgment of this right having to pass the proportionality test.

Keane J in *D.P.P. v. Finnerty* referred to: "the more general constitutional and legal dimensions of what has come to be called "the right of silence"…"[95] Barrington J in *Re National Irish Bank Ltd* noted: " …the right to silence [is] not absolute but might in certain circumstances have to give way to the exigencies of the common good provided the means used to curtail the right of silence were proportionate to the public object to be achieved."[96]

Can you say on which of these questions in your country there is an established legal tradition?

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[91] *The Irish Times v Ireland* [1998] 1 IR 359, [1998] 2 ILRM 161, [31].

[92] *Attorney General for England and Wales v Brandon Book Publishers Ltd* [1986] IR 597, [1987] ILRM 135.

[93] *Marine Terminals Ltd v Loughman and others* [2009] IEHC 620.

[94] *Marine Terminals Ltd v Loughman and others* [2009] IEHC 620.

[95] *D.P.P. v. Finnerty [*1999] IESC 130 (17th June, 1999) [16].

[96] *Re National Irish Bank Ltd. (under investigation),* [1999] IESC 18; [1999] 1 ILRM 321 (21st January, 1999) [26].

The proportionality analysis and rationality test apply in the context of standards of review upon restrictions placed on constitutionally protected rights.

In terms of balancing of constitutional rights, against each other, in *People (Director of Public Prosecutions) -v- Shaw*[97], Kenny J stated: "There is a hierarchy of constitutional rights and, when a conflict arises between them, that which ranks higher must prevail....." This expresses the view that there is not an immutable loss of precedence of rights that can be formulated.

CJ Finlay in *X* expressed view that an attempt was being made to reconcile the right to life and the right to travel but where such reconciliation is not possible, the court will establish a priority of rights. "There are instances, however, I am satisfied, where such harmonisation may not be possible and in those instances I am satisfied, as the authorities appear to establish, that there is a necessity to apply a priority of rights."[98] However, these areas have been developed by case law, and the notion of an established constitutional tradition may be something of a stretch.

How would you state in normative terms the legal traditions in this area?

The right to free speech took some time to attract the support of the courts. Daly notes that "…the right lay dormant for the first 45 years of its existence and, despite a promising beginning to its analysis by the High Court in The State (Lynch) v Cooney[99] in 1982, subsequent case law left the right marginalised, misunderstood, synthetically partitioned, and frequently trumped." Daly further posits that "received wisdom holds that the traditional failure by the domestic courts to develop a strong free speech right is primarily due to the "weak and heavily circumscribed"[100] text of Article 40.6.1 °(i), "which does not compare favourably with its counterparts in other constitutions and international human rights instruments."[101] However, the fact is that the temporal provenance of the 1937 Constitution makes it somewhat misleading to compare its wording with much later human rights treaties, and in more

[97] *People (Director of Public Prosecutions) -v- Shaw* , 1982 IR
[98] *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992) [52]
[99] *The State (Lynch) v Cooney* [1982] 1 IR 337 (HC, SC)
[100] *Report of the Constitution Review Group* (Pn 2632, 1996) at 291.
[101] T. Daly, *Strengthening Irish Democracy: A Proposal to Restore Free Speech to Article 40.6.1 (I) of the Constitution*, 31 Dublin University Law Journal 228 (2009), 228.

recent years, the courts have treated the Constitution as a living instrument.

Ó Caoimh J in *Hunter v Duckworth and Co Ltd* (31 July 2003) HC at p45 expressed view that there was no essential difference between the provisions of Article 40.6.1 (i) and art 10 of the Convention and that the courts could have regard to the latter in interpretation of the former.[102]

"…the Irish courts' frosty attitude to free speech [has been seen to] thaw considerably, greater protection of the right has been achieved, not by interpreting Article 40.6.1 °(i) more generously, but by sidelining it altogether. Rather than directly addressing the difficulties posed by the constitutional text and case law, the courts appear to have begun circumventing them in free speech cases by reference to Article 10 ECHR, on the basis of the European Convention on Human Rights Act 2003 which incorporated the Convention into Irish law."[103]

In *Paperlink*[104] Costello J identified "the very general and basic human right to communicate", as one of the personal unspecified rights of the citizen protected by Article 40.3.1, and stated that this right must also be regarded as a basic function of free speech. He stated that the right to communicate must inhere in the citizen by virtue of his human personality, illustrating the human and social dimension of the right to communicate. However, he differentiated the right to communicate from the right to express freely convictions and opinions guaranteed by Article 40.6.1.i, a rather confusing conclusion, though the two are undoubtedly closely related.[105]

4. Freedom of movement

Is freedom of movement subject to a proportionality analysis? What are the constitutional standards of scrutiny for this right?

[102] G. Hogan, G. Whyte, D. Kenny & R. Walsh, *Kelly: The Irish Constitution* cit. at 58, 2121.
[103] T. Daly, *Strengthening Irish Democracy: A Proposal to Restore Free Speech to Article 40.6.1 (I) of the Constitution*, cit. at 102, 228
[104] *AG v. Paperlink,* [1984] ILRM 373.
[105] E.G., *The Majestic Guarantee: Freedom of Speech, The Non-Renewal of the "Section 31" Order*, cit. at 48.

The right to personal liberty, granted through Article 40.4, includes the right to move inside the country as well as outside of it. Having been upheld both as a tenet of the right to liberty, and as an unenumerated right in itself, it is subject to the constitutional restrictions placed on rights in those articles. In Article 40.3 the rights guaranteed will be respected, defended and vindicated "as far as practicable" and Article 40.4 expressly allows for restrictions of the right to personal liberty "in accordance with the law." The proportionality analysis applies to the right to travel in Ireland and to another state, insofar as any restriction thereupon is concerned.

As was outlined in the context of freedom of speech, the Supreme Court in Ireland has adopted the proportionality approach in the vindication and restriction of the majority of constitutional rights, stating that there must be "a proper proportionality in between any infringement of the citizen's rights with the entitlement of the State to protect itself…"[106]

In terms of balancing the right to travel against the right to life, the Supreme Court was confronted with such analysis in the seminal case of *A.G. v. X*[107]: the case centred around the right to life of the unborn (inserted into the Irish Constitution by the 8th Amendment, since repealed by the 37th Amendment), and was triggered by the effort by the public prosecutor to prevent an underage girl who had become pregnant as a result of rape and showed suicidal tendencies from traveling to England to obtain an abortion. In this case, the High Court held: "Notwithstanding the very fundamental nature of the right to travel and its particular importance in relation to the characteristics of a free society… if there were a stark conflict between the right of a mother of an unborn child to travel and the right to life of the unborn child, the right to life would necessarily have to take precedence over the right to travel..."[108]

The High Court injunction was appealed to the Supreme Court, which overturned it by a majority of four to one in March 1992. The majority opinion (Finlay C.J., McCarthy, Egan and O'Flaherty J.J.) held that a woman had a right to an abortion under Article 40.3.3 if there was "a real and substantial risk" to her life. However, the Supreme Court's judgment did not take issue with the balancing exercise carried out by the High Court. Although the

[106] *Heaney v Ireland* [1996] 1 IR 580, 590.
[107] *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992)
[108] *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992) [53]

constitutional prohibition of abortion has since been repealed, it would appear as though freedom of movement – as part of the right to travel – will be subject to a proportionality analysis vis-à-vis other constitutional rights.

What scope is left for the national regulation of this right, considering EU's competence on the subject?

Section 2 of the ECHR Act 2003 obliges the courts to interpret "any statutory provision or rule of law" in a manner compatible with the Convention. However, the courts retain significant control in this regard, and the Act has not had a very significant impact on domestic rights-related jurisprudence, with the courts instead relying on the Constitution's fundamental rights protections. Incompatibility with such rights is fatal to legislation, with superior courts being empowered to strike down such laws.[109]

Each of the three branches of government can be seen to have taken an active approach to defining the scope of this right in Ireland. The courts have interpreted the scope of the right to travel by reading it into two Articles in the Constitution. The right to travel outside of the state was explicitly considered in *The State (M) v Attorney General*, as "commonly accepted as dividing States which are categorized as authoritarian from those which are categorized as free and democratic…I have no doubt that a right to travel outside the State in the limited form …is a personal right of each citizen…subject to the guarantees provided by Article 40 although not enumerated."[110]

Are there any forms of resistance to the supranational push towards a EU-wide guarantee of freedom of movement? On what grounds? What other constitutional provisions are invoked to resist the widespread protection of this right?

Ireland is not party to the EU border-less Schengen free movement zone, mostly because the UK decided not to participate, and Ireland wished to allow borderless movement between Ireland and the UK within the so called Common Travel Area.

In a study concluded in 2019, Ireland was one of the six countries where the portion of people who expressed positive attitudes towards EU immigration was above 50%. Euro-scepticism in the context of immigration and social conservatism has virtually

[109] F. de Londras, *Declarations of Incompatibility Under the ECHR Act 2003: A Workable Transplant*?"=, Statute Law Review, Volume 35, Issue 1, February (2014), 50–65.

[110] *The State (M) v Attorney General* [1979] IR 73, 81.

no presence within parties elected to sit in the Oireachtas, though some small fringe groups exist.[111] Eurosceptic arguments of the minority centre around the EU undermining Irish sovereignty, lacking democratic legitimacy and in its neoliberalism working to benefit elite business and threatening Irish neutrality.[112].

How are social and environmental considerations factored in the freedom of movement jurisprudence? Are there rules in place against the so called social dumping or eco- dumping?

When two rights come into conflict as in *A.G. v. X*[113] and cannot be reconciled, a priority of rights as will be considered, although per Egan J no "immutable list of precedent of rights" can be formulated. Indeed, in *A.G. v. X* itself, the justices diverged on whether and in what circumstances the right to life of the unborn could be trumped in favour of the right to travel. Generally, it may be stated that the hierarchy of rights is weighed up in the sphere of social values and a balance is struck.

The period of the "Celtic Tiger", together with the influx of large scale immigration to Ireland with the expansion of the EU in the 2000s, forced Ireland to develop the country's labour market regulations.[114] Employers in Ireland engaged in social dumping practices during this period.[115] In 2005 Irish Ferries attempted to replace 500 Irish nationals with Latvian immigrants who were proposed half the ordinary wage; this was unsuccessful due to Trade Union protests, but a fear of social dumping set in.[116] This case gave Ireland the momentum needed to address weaknesses in Irish employment law. The ICTU, the umbrella organisation for trade unions, moved to issue guidelines which would protect migrant workers from exploitation. SIPTU, the largest trade union in Ireland, cooperated with the Migrant Rights Centre of Ireland and other migrant support groups to successfully implement Registered Employment Agreements (REAs) to protect rates of pay.

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111 The National Party, '*Overview of Mass-Immigration in Ireland: Part III – Citizenship Ceremonies'*, (2018) https://nationalparty.ie/overview-of-mass-immigration-in-ireland-part-iii-citizenship-ceremonies/ accessed 16 May 2022.

112 B Laffan & J O'Mahony, '*Ireland and the European Union*' (2008) 87–88.

113 *A.G. v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992)

114 G. Hughes, *Free Movement in the EU The Case of Ireland* (2011) 5

115 T. Krings, *Varieties of social dumping in an open labour market: the Irish experience of large-scale immigration and the regulation of employment standards.* ETUI Policy Brief European Economic, Employment and Social Policy N° 6 (2014) 4.

116 T. Krings, *Varieties of social dumping in an open labour market: the Irish experience of large-scale immigration and the regulation of employment standards,* cit. at 116, 4.

These were challenged in the case of *McGowan v Labour Court Ireland*[117], in 2013 and the Supreme Court struck out Part III of the Industrial Relations Act in which they were contained, and deemed the REAs unconstitutional and incompatible with Article 15.2.1. of the Constitution. The reasoning was based upon the arrangements' infringement upon the separation of powers doctrine. This is a continual issue in low wage regulation as similarly Employment Regulation Orders (EROs), set by the Joint Labour Committee (JLC) which also provided employment conditions, under part IV of the 1946 Act were declared unconstitutional in 2011 in the case of *John Grace Fried Chicken Ltd v Catering Joint Labour Committee*[118]. The Government stepped in to prevent complete abolition of the JLC and reforms ensued instead.

A decline in union density in the hospitability sector between 1994-2004, meant that immigrants were arriving to a union free workplace, though the widespread knowledge of the Minimum Wage Act 2000 amongst immigrants prevented the "race to the bottom". On March 4th 2019, the Employment (Miscellaneous Provisions) Act 2018 was commenced. The Bill had been described by the Minister for Employment Affairs and Social Protection as containing "the most significant changes for working conditions in a generation".[119] The measures imposed will directly affect all those working in the hospitality areas, improving security and predictability of working hours with the possibility of criminal sanctions.[120]

In relation to eco-dumping, customs duty is applied per the TARIC rules. The Irish Revenue department outline excise duty rates.[121] VAT charges are imposed in same manner as on goods sold in country and may be increased by "the amount of any Customs Duty, Anti-Dumping Duty, Excise Duty (excluding VAT) payable in relation to their importation, any transport, handling and

[117] *McGowan v Labour Court Ireland* [2013] IESC 21.
[118] *Chicken Ltd v Catering Joint Labour Committee* [2011] IEHC 277.
[119] Department of Employment Affairs and Social Protection, *Employment Bill: One of the Most Significant Pieces of Workforce Legislation in a Generation – Minister Doherty.* (2018).
[120] A. Dennehy, *The Employment (Miscellaneous Provisions) Act 2018 - what employers need to know* (2019) https://www.lexology.com/library/detail.aspx?g=4aac6671-f29b-40e1-9d50-24b33d18dba6 accessed 17 May 2022.
[121] Revenue, Irish Tax and Customs, *A Guide to Customs Import Procedures December* (2018) 11.

insurance costs between the place of introduction into the EU and the State and onward transportation costs to the place of final destination, if known, at the time of importation."[122] Ireland enforces the anti-dumping duty as imposed by the European Commission.

Are there different standards between goods / services / capital / people? Beyond the standard EU distinctions in this regard, there do not appear to be any *sui generis* Irish differences between goods, services, capital and people. However, it should be noted that Ireland is not a member of the Schengen area, and it may be argued that the recent large influx of immigration has given rise to a higher standard of regulation where people are concerned.

How is the subject handled towards non-EU countries? Entry into the State by non-nationals is principally regulated by the 'permission to land' regime in the Immigration Act 2004.[123] For this purpose, non-nationals from many prescribed states are required to hold a valid Irish visa.[124] Generally, persons who are in the State without such permission are 'unlawfully present', but this is not in itself an offence.[125] Provision is made for registering most categories of non-EU nationals who are lawfully in the State, with particulars of their place of residence, if they wish to stay beyond 3 months. Failure to duly register is an offence.[126]

Non EEA nationals who visit the State can be granted a maximum of 90 days Visitor Permission at the port of entry. This applies to both non visa required nationals and visa required nationals. Generally, this period will not be extended. For nationals requiring a visa, this must be sought in advance. A (unilateral) visa waiver programme for non-nationals from many prescribed states who hold a valid UK visa has been in place for a number of years, and this looks set to continue.

Are there rules in place against industrial relocation abroad? Are these rules compatible with the constitution? For a long time under Irish law, the writ of *ne expat regno* enabled a court to prohibit a person from leaving the country. However, it is somewhat

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[122] Revenue, Irish Tax and Customs, *A Guide to Customs Import Procedures December* (2018) 12

[123] Immigration Act 2004 s4.

[124] Immigration Act 2004, s 17, Immigration Act 2003, so 1(1) and 2 (1)(c) and Immigration Act 2004 (Visas) Order, S.I. 417/ 2012.

[125] Immigration Act 2004 s5

[126] M. Forde and D. Leonard, *Constitutional Law of Ireland* (3rd edn, 2013), 15.47.

uncertain whether it remains part of Irish law; there is no reference to it in the Rules of the Superior Courts. In 2002, what is described as an ex parte 'Bayer' order was made restraining persons from leaving the State. Such orders were discussed by the English courts in *Byankov v Ministerstvo na vatreshnite raboti,* with a significant rider, namely that persons entitled to EU law free movement rights cannot readily be prohibited from leaving one Member State to go to another such state[127]." A similar position appears likely in Ireland.

Preventing industrial relocation of a company if not for fraudulent purposes as expressed above is impermissible in Irish law. Such an order would be considered an unconstitutional restriction on the freedom of movement, and would also interfere with the right to property, which is also the subject of direct constitutional protection.

Are there any sectors where the freedom of movement is not applied? Are there rules in place protecting the so called national champions in certain economic areas? Are there rules in place preventing foreign capitals to take control of so called strategic businesses? Are these rules constitutional (or would they be)?

The freedom of movement is seen as one of the most fundamental rights of the person and no arbitrary restriction on that freedom will be held constitutional. The Irish courts have adopted a strict approach to when the freedom of movement may be lawfully restricted: In *Lennon v Ganly and Fitzgerald*, it was held that that constitutional rights should not be restricted without clear and proper cause.[128] However, the *Campus Oil* case demonstrates that past Irish governments have attempted to exercise and maintain control of key industries, though this practice has diminished significantly in the face of rulings by the ECJ.[129]

In the past, a policy of economic nationalism was pursued by Irish governments until the late 1960s (when the state applied for EEC membership). This was largely due to its vulnerability to British tariff barriers and the idea of self-sufficiency was seen as attractive in this context. However, this policy was a failure, resulting in severe poverty and a lack of development. This became apparent in the 1960s. As Neary notes, "The special circumstances

[127] *Byankov v Ministerstvo na vatreshnite raboti* (Case 241/11) [2013] QB 423.
[128] Irish Human Rights Commission, *Observations on the Passports Bill* (2006) 2.
[129] *Campus Oil Limited and Others v. Minister for Industry and Energy and Others* ECLI:EU:C:1984:256

of the preceding decades - world depression and world war - no longer applied, and the rest of Europe began to grow at extremely rapid rates. But Ireland failed to share in this prosperity."[130] The legacy of this era weighs heavily on Irish political consciousness, and has led to an highly globalised and open economy.

Have there been any particular "hard cases" that have helped define the scope of this right?

In recognition of the importance of a passport to the exercise of fundamental rights, in the case of *State (M) v. Attorney General* the Irish High Court recognised that the right to travel outside the State is an unenumerated right under Article 40.3 of the Constitution. In that case, Finlay J held that "A citizen has, subject to the obvious conditions which may be required by public order and the common good of the State, the right to a passport permitting him or her to avail of such facilities as international agreements, existing at any given time, afford to the holder of such a passport."[131] However, it is clear that such a right is subject to restrictions by law, and Section 12 of Passports Act 2008 now outlines instances in which issue of passport may be refused.

As noted earlier, one basis for restricting the right to travel abroad is where a person is restrained from leaving the jurisdiction in the interests of the proper administration for justice.[132]

Attorney General v X[133] raised issues regarding rights derived from EU law concerning freedom of movement and on foot of this case, the Government committed to propose constitutional amendments, which were put before the people in November of 1992. These amended the Constitution to ensure that Article 40.3.3 would neither "limit freedom to travel between the State and another State" nor "limit freedom to obtain or make available, in the State information relating to services lawfully available in another State."[134] This gave specific protection to both free movement of persons and free movement of services.

Are there other areas covered by freedom of movement?

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[130] Peter Neary, *The Failure of Economic Nationalism*, The Crane Bag, Vol.8 No.1 , *Ireland: Dependence & Independence* (1984) 68-77, 69.
[131] *State (M) v. Attorney General* [1979] IR 73.
[132] Irish Human Rights Commission, *Observations on the Passports Bill* (2006) 2.
[133] *Attorney General v X* [1992] 1 IR 1, [1992] ILRM 401.
[134] Constitution of Ireland 1937, art. 40.3.3.

Freedom of movement may also include the right to move within the state. Kenny J referred specifically to the "right to free movement within the State", albeit *obiter*, in *Ryan v Attorney General* , as one of those rights to be read from Article 40.3 according to the "Christian and democratic nature of the State". However, it should be noted that this case was decided in 1979, in the context of the Cold War, and that Kenny's pronouncement was not part of the *dispositif*.

Can you say on which of these questions in your country there is an established legal tradition?

In terms of established legal traditions, beyond the cases already discussed on free movement and the balancing with other constitutional rights, it is worth mentioning that Ireland now has an explicit constitutional provision protecting free movement overseas. One principle that has firm roots is that constitutional rights should not be restricted without clear and proper cause.[135].

How would you state in normative terms the legal traditions in this area?

Assessing the normative impact of the legal traditions in this area represents a complex question. Upon independence, Ireland chose to preserve the applicability of the English common law, albeit subject to a normatively superior Irish constitution. The current (1937) constitution is Ireland's second, and although judges have gotten to grips with a standard of judicial review wholly alien to the UK, it is nonetheless the case that the traditions in the areas discussed have roots that are perhaps less well developed than other European jurisdictions, as they result from the relatively novel phenomenon of common law clashing with a written constitution of a higher order.

5. Judicial independence

How are judges selected, at the various levels? Is there room for political interference in the process?

From a formal point of view, political interference in judicial appointments in Ireland is not a mere aspect of selection. Rather, the process has always been political. The process is provided for by the Constitution via articles Article 35.1, Article 13.9 and Article 13.11. Judges are appointed by the President upon recommendation of the Government, and it is the Government of the day that

135 *Lennon v Ganly* [1981] ILRM 84.

effectively chooses the candidate to be appointed. It has been recorded that in practice the Taoiseach, together with the Minister for Justice and Attorney General would have a final decision prepared and present this nomination to the Cabinet.[136] In this manner the appointment processes were viewed as "partly a facet of party political patronage exercised by the government".[137]

The discretion of the Government in the selection process, however, has been constrained to a limited degree by the Judicial Appointments Advisory Board (hereafter "the Board"), established pursuant to the Courts and the Courts Officers Act 1995. The Board is composed of eleven members: Judges hold five positions on the Board, with the Chief Justice as chair and the President of each of the courts (Court of Appeals, High Court, Circuit Court and District Court) sitting ex officio. Moreover, the Board also includes the Attorney General and representatives of the Bar Council and Law Society bringing the total of independent members to eight persons[138]. As a result, the Ministerial nominees are only three in number. However, given the fact that the board's members were themselves the beneficiaries of political patronage, doubts as to whether a more meritocratic model might emerge from this model are clear.

The Board is required to submit names of persons applying for the vacancies and recommend at least seven candidates to the Minister for Justice.[139] This is however a strictly 'advisory' role and the Government is not required to appoint persons submitted by the JAAB, as it disposes of a constitutional right to appointment. However, generally the Government is unlikely to appoint a person whom the Board has not recommended. In 1998 the majority on the Board threatened resignation upon hearing the Government's proposal to appoint a person declined by the Board.[140] When making a judicial appointment, the government may select from the

[136] J.C. MacNeill, *The Politics of Judicial Selection in Ireland* (2016) 105-6, P Bartholomew, '*The Irish Judiciary*' (1971) 31-3.
[137] P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland*, German Law Journal Vol 19 No.7 (2019) 1879.
[138] § 13(2) of the 1995 Act, as amended by § 12(b) of the 2014 Act.
[139] § 16(5) of the 1995 Act.
[140]D. Gwynn Morgan, *Selection of Superior Judges*, Irish Law Times 22 (2004), 42.

list of seven or more names but it is not required to do so.[141] The government is not required to provide reasons for its decision.[142]

It should be borne in mind, however, that in Ireland, like in most common law jurisdictions, judges are mostly drawn from senior members of the bar. Contrary to continental jurisdictions, there are no judicial training schools or curricula. Hence it would be common practice to appoint as judges senior barrister who have distinguished themselves in their career.

In terms of difference between higher and lower court appointments, at least at District Court level, political interference and use of political connections has been prevalent, with commentators noting candidates would even lobby for positions. These connections are, however, deemed less significant as one moves up the court hierarchy to more senior appointments.[143] The Government retains full discretion in appointments of judges to the Supreme Court, as such appointments are generally chosen from serving judges and the JAAB does not play a role in this regard.

In an interviews in 2012, Mr Justice Peter Kelly, President of the Association of Judges in Ireland stated that the JAAB does not work: 'We all know cases of people who would be excellent judicial appointments and are passed over in favour of people who are not so well qualified.'[144] Thus it would appear that political favouritism is still a problem and the current system does nothing to prevent this. A study of the Irish judiciary carried out in 2004 which involved interviewing superior court judges, concluded that the general view among members of the judiciary was that the JAAB was good in theory but in practice it had made little difference to the political patronage system of appointments in Ireland[145].

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[141] Regarding an incident in 1998 where the board threatened to resign when the government attempted to appoint a person deemed unsuitable. See D Gwynn Morgan, *Selection of Superior Judges,* Irish Law Times 22 (2004), 42.

[142] L. Cahillane, *Judicial appointments in Ireland: the potential for reform* in L. Cahillane, J. Gallen and T. Hickey (eds), *Judges, Politics and the Irish Constitution* (2017) 125

[143] J, Carroll MacNeill, *The Politics of Judicial Selection in Ireland* (2016), 107 and 137-8.

[144] S. Gilhooly, *The Peter Principles,* The Parchment (2012) 30.

[145] J. Carroll, *You Be the Judge Part II – The politics and Processes of Judicial Appointments in Ireland,* Bar Review 11 (2005) 186.

Efforts to reform this area are ongoing[146], with calls on the government to declare that, in future, political allegiance 'would play no part in the selection for appointment of the judiciary'[147]. In fact, the former Chief Justice of the Supreme Court of Ireland repeatedly made the case in favour of establishing a Judicial Council, to strengthen the independence of the judiciary including on matters of judicial appointments.[148] However, a bill on judicial appointments, proposed by an independent minister in the current minority government, has been delayed for over a year in the upper house of parliament by a coalition led by senior members of the legal profession, presumably keen to protect the current system of patronage.[149]

The modalities for the appointment of national judges have been replicated also in the field of appointment of judges for international courts and tribunals, although, in recent years, Ireland has published open competitions for judicial positions e.g. at the European Court of Human Rights, though these have not always resulted in transparent procedures.

What remedies are in place against attempt of the political bodies to interfere with the selection and with the day-to-day activity of the courts?

With regard to the day-to-day activities of the courts, despite deep partisan divisions, there are only slight ideological differences in the reasoning of the major parties in Ireland. As such, partisanship could only ever have a restricted effect on the judicial decisions.[150]

The Irish judiciary has historically defended its own independence through its judgments. A prime example is the *Abbeylara* case[151] where the courts found that the function of finding

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[146] D. Kenny, *Market, diversity and interpretative communities: the (non-party) politics of judicial appointments and constitutional adjudication* in L. Cahillane, J.Gallen and T, Hickey (eds), *Judges, Politics and the Irish Constitution* (2017) 137.

[147] P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1877.

[148] K. Holland, *Chief Justice calls again for judicial council to be set up*, Irish Times, 25 May 2012

[149] Judicial Appointments Commission Bill (2017) s25, s64.

[150] P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1879.

[151] *Maquire v Ardagh* [2001] 1 IR 385. A referendum to reverse this decision was held at the same time as the referendum on judges' pay but was rejected by the people.

of facts was strictly judicial, and the Oireachtas was not permitted to infringe in any way upon this right. In *Crotty*, the courts defended the people's role in a democratic state by holding that when EU treaty amendments bring about major changes to national laws, a referendum is required.[152]

Patrick O'Brien has commented that Ireland has a robust culture of de-facto judicial independence despite having no internal structure for self-governance. However, the system has historically relied on good relations between politics and the judiciary.[153] The only action that the Oireachtas may officially take to discipline the judiciary or interfere in any manner is impeachment under Article 35.4.1 of the Constitution. This process requires a vote in both houses of the Oireachtas. No judge has ever been impeached under the present constitutional regime.[154]

Beyond this right there are no formal paths to "interfere" with judicial function or even discipline judges for behaviour that wouldn't warrant impeachment. The Minister, Chief Justice or District Court President may investigate the behaviour of District Court judges but this power cannot be qualified as disciplinary, is rarely instigated,[155] and is restricted only to cases concerning the District Court judiciary.[156]

The often fraught relationship between the judiciary and the executive over the last few years in Ireland has placed in the spotlight the issue of how far the "great restraint" to be exercised by judges in public pronouncements about matters of policy laid down in the Bangalone Principles,[157] and historically considered

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[152] *Crotty v An Taoiseach [*1987] IESC 4; [1987] IR 713.

[153] "The Committee was formerly known as the Judicial Studies Institute and was established to fulfil a very limited mandate to train judges provided for in the Courts and Court Officers Act 1995 (§§ 21 and 48 of the Act)", P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1877.

[154] "Information from interviews. The advisory power is contained in § 6(f) of the 1998 Act. For an example of innovation on the part of the Service see http://www.irishsentencing.ie [last accessed 15 September 2017]", P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1877.

[155] R. Byrne et al, *'The Irish Legal System',* (2014), 189; L. Cahillane, *Ireland's System for Disciplining and Removing Judges* 38 Dublin University Law Journal (2015) 55.

[156] Courts of Justice (District Court) Act 1946, § 21, Courts (Supplemental Provisions) Act 1961, §§ 10(4) & 36(2).

[157] United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (2007), 96, at

part of the common law via the Kilmuir Rules, should extend. However, there has been an increasing – and worrying – tendency of present and former Irish judges to speak out on matters of direct concern to them, such as judges' pay and judicial appointments in recent years.

Are some judges selected through an election process? If so, how is the campaign regulated? How about, in particular, the issue of campaign finance for judicial elections? There is no quasi-democratic election process for the judiciary. What instruments can outside groups legitimately employ to exert pressure on courts?

People who wish to voice their disapproval at judicial conduct may enforce rights provided in the Constitution to stage a peaceful public protest. The right derives chiefly from the right to freedom of assembly in Article 40.6.1.ii and the right to freedom of expression found in Article 40.6.1.i. It involves the exercise of a range of other rights including the right to take part in the conduct of public affairs, the right to freedom of thought, conscience and religion and the right to participation in cultural life.

Protestors considered to be breaching the public peace without lawful authority or reasonable excuse or to be causing harassment, alarm or distress may be restricted. The Criminal Justice (Public Order) Act 1994 gives police a broad power to 'move on' individuals when there is reasonable concern for the maintenance of the public peace. The fact that the Act applies to behaviour "likely to" cause alarm etc. means that there need not be an actual victim.[158]

Courts may impose reporting restrictions on certain proceedings, with violations thereof punishable on the basis of contempt of court. One more modern question concerns the use of social media and contemporaneous reporting of proceedings. This has been discussed in media outlets and in the relevant court in the trial of a number of people for false imprisonment. In that case, members of the public and the accused were seen to be tweeting about the case from inside the courtroom.[159] Subsequently the Courts Service of Ireland published a discussion paper on

www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf

[158] S. Nolan, *ICCL calls for immediate legislation for safe zones around abortion clinics* (2019) https://www.iccl.ie/tag/right-to-protest/ accessed 21 May 2022

[159] C. Keena, *Jobstown trial struck a modern, and very disturbing, tone,* The Irish Times, 30 June 2017.

guidelines for the use of social media in the courts, while the Law Reform Commission will also shortly address this issue.

Is a guarantee of judicial independence explicitly provided for in the constitution or can it be derived from other provisions?

Judicial independence may be derived from the separation of powers doctrine. The 1937 Constitution does not expressly prescribe a separation of powers; it does however enumerate three distinct powers of government; legislative, executive and judicial. In *Calley v Moylan,* in a joint judgment, Clarke and O'Donnell JJ noted that the "principle of separation of powers while fundamental must itself be deduced from the language and structure of the Constitution. Article 6 merely describes, rather than prescribes, the principle. The nature of the separation of powers required under the Irish Constitution, therefore, must be deduced from the terms of the constitutional text, the constitutional structure, and the functions of government envisaged by it." [160] In *O'Byrne v Minister for Finance*[161], Lavery J stated that the separation of powers doctrine is "imperfect" regarding legislative and executive powers but was described as "definite" in respect of judicial power. However, the Supreme Court in *Abbey Films Ltd v Attorney General*[162] said that "the farmers of the Constitution did not adopt a rigid separation between the legislative, executive and judicial powers."[163] There exists therefore a certain degree of independence between the powers which facilitates the operation of a system of checks and balances.

At times the doctrine has been enforced to promote Article 34 and reinforce the extent of judicial power. For example, in *Deaton v Attorney General*[164], it was held that a law allowing the Revenue Commissioners to choose the penalty tax offenders would face was declared unconstitutional on the grounds that only judges may make such a decision.

Judicial independence is not absolute and the judiciary is not immune from the control of the Oireachtas. Both court structure and procedure are prescribed by statute, which the Oireachtas may modify. No mechanism could prevent the Oireachtas from effectively nullifying a court's decision in a case by retrospectively

[160] *Calley v Moylan [2014]* IESC 26 at [41]
[161] *O'Byrne v Minister for Finance* [1959] IR 1, (1960) 94 ILTR 11.
[162] *Abbey Films Ltd v Attorney General* [1981] IR 158.
[163] *Abbey Films Ltd v Attorney General* [1981] IR 171.
[164] *Deaton v Attorney General* [1963] IR 170

changing the law. As a counterbalance, the 1937 Constitution expressly established a Supreme Court which holds a power of judicial review over legislation.

Are there any significant differences between low- and high-level courts, or between ordinary courts and the court exercising judicial review / constitutional justice?

Ireland has a unitary judicial system, with decentralized judicial review of legislation – every court being entitled to strike down a Statute which is incompatible with the Constitution. Articles 34 to 37 of the Irish Constitution explain the administration of justice and outline the structure of the courts system. Article 34.1 states that: "Justice shall be administered in courts established by law...". The four primary courts i.e. the District Court, the Circuit Court, the High Court and the Supreme Court, as well as the additional Special Criminal Court and the Court of Appeal are established by the Courts (Establishment and Constitution) Act 1961. The 1961 Act also enables the creation of special courts in the interest of justice, per example, the Children's Court.

The Supreme Court, the Court of Appeal, and the High Court are considered higher-level courts and are the only courts expressly provided for in the Constitution (with other courts established on the basis of ordinary legislation, some of which predates the foundation of the state, being remnants of the inherited common law). The Supreme Court generally hears appeals only on points of law, and its interpretation is final. All three of the higher courts have authority to interpret the Constitution. Both civil and criminal cases regarded as very serious will be heard in the High Court. This court also hears appeals from lower courts. The Court of Appeal was established in 2014 and may be regarded as the newest of the higher level courts, hearing civil appeals from the High Court and taking over the appellant jurisdiction of the Supreme Court and hearing criminal appeals from the High Court and Circuit Court, taking over from the former Court of Criminal Appeal.[165]

Cases which require a jury are heard before the Circuit Court and matters to be tried summarily are brought before the District Court. A military tribunal and special court are established by law. Here, serious crimes may be heard without a jury. It should be

[165] G. Butler, *The Road to a Court of Appeal – Part I: History and Constitutional Amendment*, Irish Law Times, Vol. 33, No. 14 (2015)

noted that the inherent powers of superior courts are significantly more extensive than those of lower courts established by law.

Are there special rules in place when the constitutional court (or equivalent body, for that matter) adjudicates disputes involving the highest authorities of the state? do such authorities enjoy special constitutional guarantees?

Since Ireland does not have an *ad hoc* court specializing on constitutional matters, disputes involving other branches of government are regularly adjudicated in the ordinary courts' system. The highest authorities if the state enjoy special constitutional guarantees at the outset of a case. The presumption of constitutionality has been developed by the courts over time and is now steadily grounded in case law though it is not to be found in the Constitution itself.

Hanna J in *Pigs Marketing Board v Donnelly*[166], stated that it is an axiom that "a law of the Oireachtas…is presumed to be constitutional unless and until the contrary is clearly established".[167] The legislature is further afforded the rule of avoidance, also articulated by the courts as the principle of "self-restraint". This rule is developed primarily concerning judicial review of legislation and it limits such action to instances where it is necessary having regard to the specific issue before the court. It was asserted in *Gilligan v Special Criminal Court*[168], that addressing this issue last in any given case is now a "well settled"[169] practice. This is considered an aspect of the presumption of constitutionality that the constitutionality issue should only be assessed where such an assessment is unavoidable. It was described by Henchy J in *The State (P Woods) v Attorney General*[170] as an "inherent limitation of the judicial process" without which the judiciary would be creating gaps in the law that it was incapable of plugging without infringing upon the power of the legislature.

Is the subject particularly topical, or the matter is relatively settled, with no relevant developments in recent years?

There are two recent reform movements in the area to create a new independent mechanism for appointing judges and to create

166 *Pigs Marketing Board v Donnelly* [1939] IR 413.
167 *Pigs Marketing Board v Donnelly* [1939] IR 417.
168 *Gilligan v Special Criminal Court* [2005] IESC 86, [2006] 2 IR 389.
169 *Gilligan v Special Criminal Court* [2005] IESC 86, [2006] 2 IR 407.
170 *The State (P Woods) v Attorney General* [1969] IR 385.

a Judicial Council with a significant role in disciplining the judiciary.

The Judicial Appointments Commission Bill 2017 is currently (as of June 2019) being debated at Committee Stage. This Bill proposes to create a Judicial Appointments Commission (JAC) which would recommend only three names to the Government. The bill places an emphasis on principles of merit and diversity in the appointment process. The Committee also proposes a smaller fraction of legal representation with only three ex officio members of the judiciary; the Chief Justice and the Presidents of the Court of Appeal and High Court with six lay members and a lay chair. Further, there would only be two judicial members on the decision panels.[171] The JAC will be held accountable to the Oireachtas through the lay chair. Judges will be protected from being held accountable for court proceedings and other exercises of their judicial function.[172] The Government is required only to "first consider" the JAC recommendations (as was the case with the 1995 Act) and therefore commentators have eluded that at least formally the Government "will retain an almost unconstrained discretion to appoint a candidate of their choice."[173]

The second legislation currently (May 2019) in its fourth stage before the Seanad Eireann, the Judicial Council Bill 2017 aims to create a Judicial Council which would grant control to judges over training, organization, representation and discipline. The council would be made up of every judge automatically and chaired by the Chief Justice. The Bill proposes to create the Judicial Conduct Committee which will be capable of hearing disciplinary complaints and refer such to a panel of lay persons as well as judges, issue reprimands or direct judges towards extra training. Mirroring the set-up of the Courts Service, this Council would be held accountable to the Oireachtas but through a secretary who will not be required to speak for the judges' exercise of their judicial functions.[174]

Have there been any particular 'hard cases' that have helped define the scope of this guarantee?

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171 Judicial Appointments Commission Bill (2017) s12, s13.
172 Judicial Appointments Commission Bill (2017) s12, s13.
173 P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1881.
174 Judicial Council Bill (2017) s20.

The Irish road to judicial reform of any kind, including that of the appointment of judges has historically been heavily dependent on the political climate. Patrick O'Brien has commented that Ireland does have a robust de facto culture of judicial independence despite the lack of de jure self-governing structures. However all and any reforms to the system can be directly linked and attributed to controversies or personal projects of senior judges and politicians thriving off of their good will and investment. The lack of regulation of discipline has lead Ireland into near constitutional crisis twice in the past two decades and as such these cases are landmarks for attempted albeit unsuccessful reform movement in the area. The first involved the intervention by a Supreme Court judge with the County Registrar for Dublin, seeking that a case be relisted for modification of sentence. A sequence of highly unusual and procedurally improper actions followed. The Registrar first invited Sheedy's solicitor to apply for the case to be relisted for modification of sentence. In November 1998, the case then came not before the original trial judge but before Judge Cyril Kelly. Kelly had no power to alter a sentence handed down by another judge, and made multiple procedural errors in the hearing itself. In particular, Kelly asked Sheedy's solicitor to have a medical report prepared on Sheedy so that it placed on file after the hearing, apparently to justify his decision to suspend the rest of the sentence. This would in effect falsify the record.[175] An investigation was launched, resulting in scathing criticism. Following a brief negotiation with the Government, both judges and the registrar resigned. The Government, grateful that a constitutional crisis had been avoided and cautious about judicial independence, secured the passage of special legislation to provide for pensions for all three.[176] The Sheedy Affair led directly to proposals for reform. The Department of Justice proposed the creation of a Judicial Council to manage judicial discipline. This proposal had been foreshadowed several years earlier in a report by the Constitutional Review Group, which recommended that the Constitution should be

[175] It is not clear if this second report was ever in fact put on the record. On the Sheedy affair, see J. O'Dowd, *The Sheedy Affair*, Contemporary Issues in Irish Law and Politics 3 (2000), 103. See also F. O'Toole, *Unanswered questions about the Sheedy affair cannot be buried a second time*, The Irish Times, 24 June 2000.

[176] Shortly afterwards the Oireachtas (legislature) enacted special legislation to provide for pensions for O'Flaherty, Kelly and the registrar: Courts (Supplemental Provisions) (Amendment) Act 1999.

amended to create a judge led Judicial Council that would be responsible for judicial discipline.[177] This has not yet come to pass, but legislation has been recently proposed on the subject, though the Council's powers would be severely restrained absent constitutional amendment.

A second case arose a few years later. A Circuit Court Judge, Brian Curtin, was charged with possession of child pornography in 2002 but acquitted when it transpired that the key evidence against him – his personal computer – had been seized pursuant to an invalid search warrant. The fact that his acquittal was on the basis of a technicality made it look as though he was guilty. The Oireachtas began to go about impeaching him, the first time something like this had been attempted, requiring the crafting of a fresh procedure. Special legislation was enacted in order to give Oireachtas staff immunity from prosecution concerning the handling of criminal material, and to compel Curtin to testify.[178] Curtin delayed the process wherever possible, challenging the request to produce his computer in the courts. The Supreme Court ultimately rejected his arguments, holding that power to impeach a judge in Article 35 of the Constitution included a power to assess his fitness for office.[179] Curtin then sought further delays on grounds of ill health. When this was refused, he resigned, having just served just long enough in his post to qualify for his pension. The Curtin case was the closest Ireland had come to judicial impeachment, and revealed significant problems concerning judicial discipline. O'Brien notes: "A process involving the Government and the interim Judicial Council began in 2013 but produced a Bill only in 2017. This coincided with an unflattering report from the GRECO organization of the Council of Europe criticizing the delay in legislating for a Judicial Council, which appears to have provided some impetus for finalizing the proposals."[180]

Are there other areas covered by judicial independence?

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[177] Report of the Constitutional Review Group, April 1995.

[178] Amendment to § 3 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997.

[179] *Curtin v. Clerk of Dáil Éireann* [2006] IESC 14, [2006] 2 IR 556.

[180] P. O'Brien, *Never let a Crisis go to Waste: Politics, Personality and Judicial Self-Government in Ireland,* cit. at 139, 1891-1892.

There are no other significant legislative provisions covering judicial independence. Can you say on which of these questions in your country there is an established legal tradition?

In terms of judicial independence, it has been noted elsewhere that "Political interference with the judiciary by the Stuart Monarchs in England is the historical source of the Constitutional concern for judicial independence in the Anglo-American tradition. It spread throughout the common law world, and into Ireland, though the Act of Settlement in 1701. In Alexander Hamilton's Federalist Papers one finds the modern formulation of the separation of powers that has been influential in the subsequent establishment of modem democratic orders, including the Irish regime."[181] As such, the roots of this tradition are very deep indeed.

[181] For example, according to Lavery J, "[i]t is demonstrable that the founders of the State and the framers of the Constitution were inspired by the same ideas which actuated the founders of the United States of America which are enshrined in the Declaration of Independence and in the Constitution of the United States." Statement of Lavery J in *O'Byrne v Minister for Finance* [1959] IR 1, at 39. See C.E. Kelly, *Ireland and Judicial (In)dependence in Light of the Twenty-Ninth Amendment to the Constitution*, 18 Trinity College Law Rev. 15 (2015) 20.