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**HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS:
THE RELATIONSHIP OF INTERNATIONAL, SUPRANATIONAL AND NATIONAL
CATALOGUES IN THE 21ST CENTURY**

Response of the Supreme Court of Ireland



Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

I.

GENERAL PART: CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I.I

International catalogues of human rights (ECHR, UDHR and ICCPR)

☐ In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?.

Ireland has a dualist system under which international agreements to which Ireland becomes a party do not automatically become part of Irish domestic law. Article 29 of the Constitution provides, among other things:-

"3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States...

5 1° Every international agreement to which the State becomes a party shall be laid before Dáil Éireann.

2° The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann.

3° This section shall not apply to agreements or conventions of a technical and administrative character.

6. No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

Thus, treaties that are signed and ratified by Ireland do not automatically become part of the domestic law of the State. In order to be enforceable and binding at domestic level, such treaties must be domestically incorporated, either by an Act of the Oireachtas (Parliament, Dáil Éireann referred to above being the lower House or principal chamber of Parliament), or an amendment to the Constitution.

Where a treaty has not been domestically incorporated, rights under the treaty will not be enforceable in domestic courts.

However, international law has persuasive effect and may provide assistance to a court in interpreting rights under domestic law. Domestic law may be interpreted by the Courts in light of Ireland's international obligations.

Article 20 of the Constitution was summarised by the Supreme Court (Griffin J) in *Crotty v An Taoiseach*¹ as follows:

“The constitutional scheme in respect of international agreements would appear, therefore, to be that Government, exercising the executive power, may enter into international agreements but such agreements must be laid before Dáil Eireann, and if the agreement involves a charge on public funds, the State is not bound by the agreement unless the terms of the agreement have been approved by Dáil Eireann”².

What mechanism is used to invoke the international treaties in national court decision-making?

International treaties are often cited by parties before Irish courts and referred to by courts in their decisions but as outlined below largely have persuasive value. The only international human rights treaty to which national law gives effect is the European Convention of Human Rights ('ECHR'). Irish law gives effect to the ECHR within via the European Convention of Human Rights Act 2003 ('The 2003 Act').

Interpretive obligation

The 2003 Act provides for “further effect” to be given to the Convention in Ireland, “subject to the Constitution”.³ Thus Ireland has given effect to the Convention in a sub-constitutional and interpretative way. The 2003 Act provides that “[i]n interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.”⁴

However, when parties bring cases alleging a breach of human rights they usually rely on the Constitution of Ireland which, as outlined below, protects a range of fundamental rights. Article 34.3.2 of the Constitution confers on the High Court, Court of Appeal and Supreme Court the power to review the constitutionality of legislation. The Courts may declare a law invalid if it breaches the Constitution.

¹ [1987] IR 713

² Ibid at 792

³ European Convention on Human Rights Act, 2003, long title.

⁴ Ibid., s. 2(1).

Declaration of Incompatibility

Under s. 5 of the 2003 Act, the High Court, Court of Appeal and Supreme Court may, where no other remedy is adequate or available, make a declaration of incompatibility if the Court finds that a statutory provision or a rule of law is incompatible with the State's obligations under the Convention provisions.⁵ A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the statutory provision or rule of law.⁶ A party to such proceeding may apply to the Attorney General for compensation for an injury or loss or damage suffered as a result of the incompatibility.⁷

Obligation to perform State functions in a manner compliant with the Convention

Section 3 of the 2003 Act requires public bodies to carry out their role complying with the necessary state obligations. Damages may be claimed if it is found that the obligations has not been complied with as long as no other remedy is available.

3

Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.

While Ireland is bound by the obligations set out in treaties that it has ratified, such international treaties are not directly applicable in Irish law. As indicated in question 1 above, in order to be enforceable domestically, a treaty must be domestically incorporated, either through an Act of the Oireachtas (Parliament) or an amendment to the Constitution.

The Supreme Court decision of *Re O'Laighleis*⁸ provided guidance regarding the position of the ECHR and international law in the Irish legal system. *O' Laighleis* concerned a challenge by an individual to sections of *the Offences Against the State Act 1940* under which he was detained which enabled arrest and detention without charge. He argued that this was contrary to the European Convention of Human Rights which Ireland had ratified in 1953, in particular Article 5 regarding personal liberty and Article 6 regarding a fair hearing in criminal proceedings. Stating the position in relation to international agreements, the Supreme Court noted:

“The insuperable obstacle to importing the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms into the domestic law of Ireland— if they be at variance with that law—is, however, the terms of the Constitution of Ireland. By Article 15, 2, 1, of the Constitution it is provided that "the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws

⁵ S. 5(1) of the European Convention on Human Rights Act 2003, as amended by s. 63 of the Court of Appeal Act 2014.

⁶ Ibid, s. 5(2)(a).

⁷ Ibid, s. 5(4)(b).

⁸ [1960] IR 93

for the State." Moreover, Article 29, the Article dealing with international relations, provides at section 6 that "no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas. The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law."⁹

No argument can prevail against the express command of subsection 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws."

The Supreme Court examined the position of the Universal Declaration of Human Rights (UDHR) within Irish Law in the case of *Re Application of Woods*¹⁰. The applicant relied on Article 4(1) of the UDHR which was ratified by the Irish Government on the 25th February 1953. He was seeking Habeus Corpus and argued that a period of penal servitude violated the Article as it amounted to a violation of the prohibition against servitude and slavery. The Court rejected that penal servitude came under Article 4(1) and examined the Article and its effect within Irish Law. O'Dálaigh C.J. stated that "...the United Nations' Universal Declaration of Human Rights is not a part of domestic law in Ireland"¹¹.

This position that the only source of International Law which has direct effect is that which has been approved by Parliament was reaffirmed recently by Clarke C.J. in the Supreme Court decision of *Conway v Ireland*. In referring to The Aarhus Convention, he stated that:

"[T]here can be no doubt that, as a matter of Irish Constitutional Law, the Aarhus Convention cannot, save to the extent it might be 'determined' by the Oireachtas', become part of Irish domestic law. While the constitutional architecture in other jurisdictions may differ, that aspect of the position in Irish constitutional law is at least clear"¹².

I.II

Supranational catalogues of human rights (the Charter)

Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by "radiating" through the national catalogues (a substantive point of reference in other states)?

Article 29.4.10 of the Constitution of Ireland provides that no provision of the Constitution invalidates "laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of

⁹ Re O'Laighleis [1960] IR 93 at 124-125

¹⁰ Application of Woods [1970] IR 154

¹¹ Ibid at 161

¹² Conway v Ireland [2017] 1 IR 53 at para. 2.3

the Communities”, thus enabling EU law to have force in the State. The Charter of Fundamental Rights of the European Union (‘The Charter’), like other EU treaties was implemented into Irish law under Article 29 of the Constitution and the 1972 European Communities Act. As it is a Treaty and not a Directive or other secondary piece of EU legislation, it does not have to be transposed into Irish Law and has direct effect in areas of EU competence.

In research carried out by an EU law academic, De Burca, regarding the use of the Charter before the Irish courts¹³ it was found that the Charter was most commonly invoked in asylum and criminal law cases¹⁴. The most frequently cited articles of the Charter were Article 47¹⁵ with regard to the right to fair trial and Article 24 on the rights of the child¹⁶. The Charter is also increasingly relied upon in European Arrest Warrant proceedings.

☒ Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?

Yes, human rights case law of the Court of Justice serves as a source of application and interpretation for Irish courts. For example, in *Okunade v Minister for Justice, Equality and Law Reform*,¹⁷ Clarke J¹⁸ noted that while the Supreme Court’s earlier decision of *A.O. & D.L. v Minister for Justice, Equality and Law Reform*,¹⁹ which held that the right of an Irish born child to the company, care and parentage of its parents within the State was not an unqualified right remained correct, the law had been affected by ECJ decisions delivered since then.²⁰

Further examples are referred to in question I.V below.

☒ Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is conditioned by making a request for preliminary ruling with the Court of Justice of the EU?

Ireland has a robust catalogue of fundamental rights, which have been enshrined in the Irish Constitution since 1937 and a well-developed jurisprudence of the Superior Courts (which include the Supreme Court, Court of Appeal and High Court) protecting such rights. Many of the rights protected by the Charter are already guaranteed by the Constitution. For example, the most commonly cited right, the right to a fair hearing

¹³ De Burca, “The Domestic Impact of the EU Charter of Fundamental Rights” (2013) 49(1) *The Irish Jurist* 49-64

¹⁴ *Ibid* at 62

¹⁵ *Ibid*

¹⁶ *Ibid*

¹⁷ [2012] IESC 49.

¹⁸ As he then was he is currently Chief Justice of Ireland

¹⁹ [2003] 1 IR 1.

²⁰ (n 27) pp. 57,58.

in Article 47 of the Charter is similar to the right protected by Article 38 of the Irish Constitution, which states that “No person shall be tried on any criminal charge save in due course of law.” The impact of the Charter can be said to have been primarily been achieved via the preliminary reference procedure.

I.III

National human rights catalogues

☐ Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?

Yes, the catalogue of human rights is part of the Constitution of Ireland. It is found primarily in Articles 40-44 of the Irish Constitution which explicitly refers to a number of fundamental rights. These include the right to life, liberty, freedom of expression, freedom of religion and education.

Article 40.3 states:

3 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

In 1965, the Supreme Court in *Ryan v Attorney General* [1965] IESC 1; [1965] IR 294, upheld a decision of the High Court which found that, in addition to the rights expressly referred to in the Constitution, Article 40.3 guarantees a range of unenumerated rights. The Superior Courts have since identified a range of such unenumerated rights, including the right to marital and individual privacy, to right of access to justice, to have access to legal aid, the right to bodily integrity, the right to travel, the right to freedom from torture and inhuman and degrading treatment and the right to earn a livelihood.

☐ What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?

The national catalogue of human rights within the Constitution is largely based on the previous 1922 Constitution of the Irish Free State, Papal Encyclicals, Brehon Law (a type of early collection of statutes which governed everyday life in Early Medieval Ireland), post-war Constitutions of other European countries as well as more established Constitutions such as the Swiss and American Constitutions.

☐ What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?

The only way in which the Irish Constitution can be amended is by special legislation which must be passed by both Houses of Parliament and which must then be put to the People of Ireland in a referendum. A referendum to amend the Constitution is passed if a simple majority of the electorate validly votes in support of the amendment. The referendum procedure is outlined in Articles 46 and 47 of the Constitution.

Given that the Irish Constitution is over 80 years old, as might be expected, the referendum process has brought about many amendments to the Constitution. Many of these have strengthened fundamental rights within the Constitution. For example, amendments have lowered the voting age limit from 21 to 18²¹, removed the special position of the Catholic Church within the Constitution²², granted the right to divorce,²³ abolished the Death Penalty,²⁴ enshrined marriage equality allowing same sex marriage,²⁵ created a clear general statement on Children's Rights for the first time within the Constitution,²⁶ liberalised divorce laws²⁷ and removed the equal right to life of an unborn with the mother.²⁸

Moreover, the Supreme Court has generally interpreted the Constitution as a 'living document' which flexibly reflects the changing mores and values of society.²⁹ For example, *McGee v AG* [1974] IR 284, a case in which the Supreme Court identified an unenumerated right to marital privacy in the Constitution, Walsh J noted:

“According to the preamble the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured.The judges must therefore as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues must be conditioned by the passage of time.”

In *The State (Healy) v Donoghue* [1976] IR 32, a case in which the Supreme Court recognised a constitutional right to access to legal aid in criminal law cases, O'Higgins C.J. found:

“The rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity which may gradually change or develop as society changes or develops, and which fall to be interpreted from time to time in accordance with prevailing ideas... The Constitution did not

²¹ The Fourth Amendment to the Constitution of Ireland

²² The Fifth Amendment to the Constitution of Ireland

²³ The Tenth Amendment to the Constitution of Ireland

²⁴ The Twenty First Amendment to the Constitution of Ireland

²⁵ The Thirty Fourth Amendment to the Constitution of Ireland

²⁶ The Thirty First Amendment to the Constitution of Ireland

²⁷ The Thirty Eight Amendment to the Constitution of Ireland

²⁸ The Thirty Sixth Amendment to the Constitution of Ireland

²⁹ For example, *McGee v AG* [1974] IR 284 and *The State (Healy) v Donoghue* [1976] IR 325.

seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment.”

I.IV

The mutual relationship between different catalogues of human rights

☐ Can you give examples from the case law of your court related to the use of any of the international catalogues?

Examples of decisions of case law of the Supreme Court in relation to the use of the ECHR include:

- *Society of Protection of the Unborn Children (Ireland) v Grogan* Society of Protection of the Unborn Children (Ireland) v Grogan [1998] 4 IR 343, in which the Supreme Court cited the ECHR case *Open Door Counselling Ltd v Ireland* ECHR case 29/10/1992 in support of the view that an injunction granted restraining the dissemination of information about abortion services abroad could not be reconciled with the right to communicate.
- *Foy v An t-Ard Chláraitheoir*, in which the High Court made the first declaration of incompatibility issued under the ECHR Act 2003 to the effect that Irish laws failure to provide a system of gender recognition for transsexual individuals was incompatible with Article 8 of the ECHR.
- *DPP v. Gormley; DPP v White*, [2014] IESC 17, [2014] 2 IR 591. in which the Supreme Court referred to jurisprudence of the European Court of Human Rights in finding that the need for basic fairness, which was inherent in the requirement of trial in due course of law under Article 38.1 of the Constitution, carried with it, at least in general terms and potentially subject to exceptions, an entitlement not to be interrogated after a request for a lawyer had been made and before that lawyer had become available to tender the requested advice.
- *Luximon v Minister for Justice & Equality; Balchand v Minister for Justice & Equality* [2018] IESC 24, [2018] 2 IR 542, in which the Supreme Court held that in arriving at a decision under s. 4(7) of the Immigration Act 2004 refusing to grant a renewal or variation of permissions to remain in the State, the appellant, the Minister for Justice, Equality and Law Reform, had erred in failing to consider the Article 8 ECHR privacy and family rights of the respondents.
- *Walsh v Minister for Justice and Equality* [2019] IESC 15. The Supreme Court considered the issue of whether the proceedings in the Circuit were in accordance with fair and appropriate procedures before the appellant was found to be in contempt in the face of the court. The Supreme Court, in concluding that fair procedures had been followed, referred to case law of the ECtHR which it considered to be “clear and reasonably consistent, and provide[d] a useful perspective when viewing the requirement for fair procedures under the Constitution.”

Examples of decisions of the Supreme Court in which the Charter of Fundamental Rights of the European Union was relied upon include:

- *DPC v Facebook Ireland and Schrems* [2019] IESC 46 - in which the Supreme Court upheld the judgment of Costello J to the effect that the data protection laws of the United States did not offer adequate protection to EU citizens under Articles 47 and 52 of the Charter.
- *Minister for Justice and Equality v O'Connor* [2018] IESC 47; [2018] IESC 18; in which the Supreme Court made a request for a preliminary ruling to the CJEU on the issue of whether, having regard to Brexit, the uncertainty which an individual whose surrender was sought by the United Kingdom would face as to the extent to which he would be able to enjoy rights under the EU Treaties, the Charter or relevant legislation, should prevent his surrender. As the question was answered by the CJEU on an urgent basis in a separate but similar case in the High Court in relation to an individual who was in custody, the reference by the Supreme Court was withdrawn.

☐ Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?

The overlap in the rights protected by the various catalogues has been considered in the context of the order in which claims should be considered by the courts in cases where rights are invoked both under the Irish Constitution and the ECHR. In *Carmody v Minister for Justice, Equality and Law Reform*³⁰, the Supreme Court held that in any action that challenges the constitutionality of a legislative provision (and this would equally apply to any rule of law), as well as the compatibility of that provision with the ECHR Act 2003, the constitutional claim must be considered first.

In *N.V.H. v Minister of Justice and Equality*³¹ the Supreme Court considered the right to work in the context of three human rights catalogues: the Charter of Fundamental Rights (Article 15), The International Covenant on Economic and Social Rights and the Irish Constitution (Article 40.1). The issue which arose was whether asylum seekers should have the right to work akin to Irish citizens. The Supreme Court stated:

“This involves a consideration of whether the right in essence is social, and tied to civil society in which citizens live, in the way that voting is limited by belonging to a relevant society, or whether the right protects something which goes to the essence of human personality so that to deny it to persons would be to fail to recognise their essential quality as human persons mandated by Article 40.1”³².

The Supreme Court applied the Constitution finding that the absolute ban on asylum seekers seeking work was unconstitutional. In interpreting the United Nations Convention on Economic, Social and Political Rights the Court noted that “..the

³⁰ [2010] 1 IR 635

³¹ [2017] IESC 35

³² Ibid para. 13

thinking is broadly consistent with that with that which was the background to the Constitution.”³³

☐ Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary?)

As indicated in the response to the previous question, the Irish Courts have stated that, where parties rely on both the Constitution and the ECHR, claims under the Constitution should be considered first.

In addition, litigants must exhaust all other options prior to bringing a claim under the ECHR Act.

II.

SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS

II.1

Right to life

☐ What is the original wording of the provision protecting this right in your national catalogue?

The right to life in Ireland is enshrined in Article 40.3.2 of the Irish Constitution, which states:

“The State shall, in particular, by its laws protect as best it may from unjust attack, and in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

☐ Is it possible to restrict the right? If so, how and under what conditions?

☐ Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Although the Irish courts have placed a high value on the right to life in a number of decisions,³⁴ they have found that it is not absolute. A variety of cases have become the courts regarding the following situations: (i) before birth in relation to the right of life of the unborn; (ii) in post-birth situations pertaining to life of the gravely ill very young child;³⁵ (iii) in relation to the protection of one’s life during and at any stage of life and (iv) in relation to the gravely ill and/or near death situation.

³³ Ibid para. 16

³⁴ DPP v Shaw [1982] IR 1; Re A Ward of Court (withholding medical treatment((No. 2) [1995] 2 ILRM 401;

³⁵ The malformed neonate

The right to life of the unborn

In May 2018, the People of Ireland voted in favour of the Thirty-Sixth Amendment to the Constitution which resulted in repeal of the previous Eighth Amendment which put the right to life of a foetus on equal footing with that of the carrying mother. In *Attorney General v X* [1992] 2 IR 1, the Supreme Court held that that an abortion was lawful in circumstances where there was a threat to the life of the woman. The Supreme Court had held under the previous constitutional and legislative framework that the mother's right to travel³⁶ and the freedom to disseminate information³⁷ were not affected by a foetal right to life.

The Thirty-Sixth Amendment to the Constitution resulted in the repeal of the Eighth Amendment and the insertion of a constitutional provision permitting the Legislature to enact law providing for the regulation of pregnancy.

The Supreme Court has held that fertilised embryos do not have a right to life.³⁸

The right to life and the gravely ill

The Irish courts have considered a wide range of medico-legal and constitutional issues concerning seriously ill persons. For example, in *In Re a Ward of Court (No.2)* [1996] 2 IR 79, a ward of court was in a 'near-Persistent Vegetative State'³⁹ and the family of the ward sought to discontinue her artificial nutrition and hydration. The High Court granted these orders, which were upheld by the Supreme Court. In doing so, the Court noted that "[t]he requirement to defend and vindicate the life is a requirement "as far as practicable," it is not an absolute." In certain circumstances, an individual's right to bodily integrity might rank higher in value than his or her right to life.

It is only in exceptional circumstances that a Courts would not override a parental decision to refuse medical care to save life. Such a circumstance was noted in *North Western Health Board v H.W. and C.W*⁴⁰ where the Court noted that "Even if acute medical care is advised by some medical experts and the parents consider that the responsible decision may be to refuse such care it may be within the range of responsible decisions. This may occur where a child is suffering a terminal illness and parents may decide responsibly that he or she has suffered enough medical intervention and should receive only palliative care."⁴¹

³⁶ *Attorney General v X* [1992] 1 IR 1

³⁷ *Open Door Counselling Ltd and Dublin Well Woman v Ireland* [1993] 15 EHRR 244

³⁸ *Roche v Roche* [2009] IESC 82

³⁹ i.e a near persistent vegetative state, a condition where the individual has a minimal state of cognitive capacity and minimal awareness. The condition is distinguished from 'brain death' where the patient is legally dead

⁴⁰ [2001] 3 IR 62

⁴¹ *Ibid* at p. 723

The right to die

There is no right to die in the Irish Constitution and, as such, a person cannot compel another person or the State to assist him or her in committing suicide. In *Fleming v Ireland*⁴² the appellant wished to be in a position to end her own life but because of her disability, but could only do so with assistance. Irish law provides that any person who assists another person to commit suicide could be imprisoned for up to 14 years.⁴³ The Applicant challenged the constitutionality of this provision, arguing that implicit in the right to life was the right to die. The High Court found that this was not the case and that Parliament was fully entitled to enact an absolute ban on assisted suicide. The Supreme Court dismissed an appeal, finding that no person has the right to terminate or have terminated his or her life.

☒ Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Ireland's previous regime of holding the right to life of the mother on an equal footing to the right to life of the unborn was at odds with European and international norms with the result that the Supreme Court of Ireland had to interpret the law regarding the right to life of the unborn in accordance with the provisions of the Constitution of Ireland.

II.II

Freedom of expression

☒ What is the original wording of the provision protecting this right in your national catalogue?

Article 40.6.1. of the Constitution provides:

The State guarantees liberty for the exercise of the following rights, subject to public order and morality: -

- I. The right of the citizens to express freely their convictions and opinions.*

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of seditious, or indecent matter is an offence which shall be punishable in accordance with the law.

⁴² [2013] IESC 19

⁴³ Criminal Law (Suicide) Act 1993 s2(2)

Is it possible to restrict the right? If so, how and under what conditions?

As per Article 40.6.1 the right of citizens to express freely their opinions and convictions is subject to public order and morality.

There are a number of other instances where the free expression of one's opinions may be limited or curtailed by Acts of the Oireachtas. For example, section 5 of the Misuse of Drugs Act 1984 makes it an offence to print, publish, sell or distribute any publication advocating or encouraging the use of a controlled drug, or advertising things used in connection with the taking of a drug." This is an example of where considerations of public order and morality can be said to have curtailed the right of freedom of expression.⁴⁴

Another example of the use of the public order exemption by the Oireachtas is the Official Secrets Act 1963 which prohibits the unauthorised disclosure of secret or confidential information by holders of public office. As the authors of Kelly note: "the thrust of this legislation was to prohibit the communication of official information except where such communication was duly authorised."⁴⁵

However, the courts can intervene if necessary, in particular where there is a risk of prejudicing the right of a fair trial. "Those who publish prejudicial material before or during a trial risk being punished for contempt.."⁴⁶

Finally, the right to freedom of expression may be curtailed by defamation laws. Article 10(2) of the ECHR recognises "the protection of the reputation of others" as a ground that can justify the restriction of the freedom of expression.⁴⁷ This is particularly the case in Ireland as Article 40.3.2 pledges the State to protect, by its laws as best it can, and in the case of injustice done, vindicate the good name of every citizen.⁴⁸ The tort of defamation is governed by the Defamation Act 2009. As a result, one's right to a good name is protected under the Constitution.

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Yes, the Supreme Court has considered the limits of the right to freedom of expression and its qualifications. For example, in *Murphy v Independent Radio & Television Commission*⁴⁹ a private media company had agreed to broadcast an hour long video with religious Christian themes at 'the Irish Faith Centre'. The advert was not

⁴⁴ Michael Forde and David Leonard, *Constitutional Law of Ireland*, (3rd Ed., Bloomsbury: Dublin) at [19.04].

⁴⁵ Hogan et al, *Kelly: The Irish Constitution*, para 7.6.39.

⁴⁶ Michael Forde and David Leonard, *Constitutional Law of Ireland*, at [19-12].

⁴⁷ Article 10(2) of the ECHR

⁴⁸ Article 40.3.2 which reads: "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

⁴⁹ [1999] 1 IR 12.

broadcast as it was contrary to section 10(3) of the Radio and Television Act 1988 which stated that “no advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute”. The State offered no substantive argument as to why the restriction was justifiable. It relied on the fact that the provision in section 10(3) which applies to private broadcasters was almost identical to the rules regulating the public broadcaster under section 20 of the Broadcasting Act 1963.

The Supreme Court held:

“All three kinds of banned advertisement relate to matters which have proved extremely divisive in Irish society in the past. The Oireachtas was entitled to take the view that the citizens would resent having advertisements touching on these topics broadcast into their homes and that such advertisements, if permitted, might lead to unrest. Moreover the Oireachtas may well have thought that in relation to matters of such sensitivity, rich men should not be able to buy access to the airwaves to the detriment of their poorer rivals.”⁵⁰

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Article 40.6. of the Constitution is broadly comparable to Article 10 of the ECHR in that both protect the right to freedom of expression but contain significant exemptions in the interest of public order and morality.

An example is the aforementioned case of *Murphy v. Independent Radio & Television Commission*⁵¹ in which the Supreme Court held:

“The Court does not think his statement that an Irish statutory provision which offended article 10 of the European Convention would be unconstitutional in most if not all circumstances was intended to raise the suggestion that one could by examining the European Convention decide on whether a statute violated the Irish Constitution or not. Whatever methodology may be adopted by the European Court of Human Rights in deciding its cases we are bound to presume that a statute passed since the enactment of the Constitution does not violate the Constitution and we can only rule such an Act unconstitutional if that presumption has been rebutted.”⁵²

⁵⁰ *Ibid* at 22.

⁵¹ *Supra* note 33

⁵² *Ibid* at 27

II.III

Right to privacy/right to respect for private life/right to private life

☐ What is the original wording of the provision protecting this right in your national catalogue?

The right to privacy is not explicitly referred to in the Irish Constitution. However, the courts have recognised that the right to privacy is an unenumerated right protected by Article 40.3.1 of the Irish Constitution:⁵³

For example, private written communications and telephone conversations cannot be deliberately, consciously and unjustifiably interfered with.

Article 40.5 which protects the inviolability of the dwelling has also been construed as protecting a right of privacy, engaged by accessing of private communication.⁵⁴

☐ Is it possible to restrict the right? If so, how and under what conditions?

As recognised by the Irish High Court in the case of *Kennedy v Ireland*, the right to privacy is not absolute and it may be restricted by the constitutional rights of others, or by the requirements of the common good, and it is subject to the requirements of public order and morality.⁵⁵

The Irish courts have recognised specific situations where the right to privacy must be balanced with other rights or interests. For example, in *O'T v B*, it was recognised that the right to privacy of a natural parent must be balanced against the right of a child to know the identity of their natural mother.⁵⁶ In *BF v Clinical Director of Our Lady's Hospital Navan*, the plaintiff's right to privacy was limited to the extent that it might be consistent with the patient's best interests, thus his right to privacy was not violated by a decision to reclassify him as an involuntary patient.⁵⁷

In addition, the right to privacy does not extend to privacy as to income,⁵⁸ it can be overlooked when private information has a direct bearing on the welfare of a child,⁵⁹ and it cannot be invoked to prevent an inquiry into validity of marriage.⁶⁰

The right to privacy in business affairs has very rarely been recognised, and has been found to exist only at the 'outer reaches of and the furthest remove from the core personal right of privacy.'⁶¹ The right to privacy is not breached when police

⁵³ *McGee v. Attorney General* [1974] IR 284

⁵⁴ *Maximillian Schrems v Data Protection Commissioner* [2014] IEHC 310

⁵⁵ *Kennedy v Ireland* [1987] IR 587

⁵⁶ *O'T. v B* [1998] 2 IR 321

⁵⁷ *BF v Clinical Director of Our Lady's Hospital Navan* [2010] IEHC 243

⁵⁸ *Murphy v Attorney General* [1982] IR 241

⁵⁹ *P. v Q* [2012] IEHC 593

⁶⁰ *J.S. v C.S. (Orse. C.T.)* [1997] 2 IR 506

⁶¹ *Caldwell v Mahon and Others* [2006] IEHC 86

observation of an individual is justified,⁶² and there is no right to privacy with regard to criminal activity.⁶³

☐ Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The right to privacy was first recognised in the context of marital privacy in *McGee v Attorney General*. The case concerned a statutory provision banning the use of contraception which was needed by the plaintiff for medical reasons, and the Irish Supreme Court held that the right to privacy was universally recognised.⁶⁴

In the case of *Norris v Attorney General*, the right to privacy was invoked unsuccessfully in the context of a challenge to the constitutionality of a law in force at the time which criminalised homosexuality.⁶⁵ The law has evolved since the *Norris* decision and the right of couples to marry regardless of their sex is recognised by the Irish Constitution.

A general constitutional right to privacy was first successfully invoked before the High Court in *Kennedy v Ireland* where the plaintiffs' telephones were tapped by the State.⁶⁶

Subsequent cases have seen the courts develop the right to privacy in the context of publication; such as granting an interlocutory injunction restraining the publication of material relating to the private and family life of a rape victim.⁶⁷ In *M v Drury*, freedom of the press was prioritised and an interlocutory injunction restraining the publication of material pertaining to the break-up of the plaintiff's marriage could not be granted.⁶⁸

Additionally, in *Cogley v RTÉ* the right to privacy could not restrain the broadcast of information about a nursing home where there was significant legitimate public interest in its disclosure.⁶⁹ However, in general the Irish courts are not reluctant to award damages where privacy rights have been breached.⁷⁰

The courts have also found that the right to privacy can be diminished by poor living conditions and lack of sanitation,⁷¹ similarly finding that the confinement of a prisoner

⁶² *Kane v Governor of Mountjoy Prison* [1988] IR 757

⁶³ *EMI Records (Ireland) Ltd and Others v UPC Communications Ireland Ltd* [2010] IEHC 377

⁶⁴ *McGee v. Attorney General* [1974] IR 284

⁶⁵ *Norris v Attorney General* [1984] IR 36

⁶⁶ *Kennedy v Ireland* [1987] IR 587

⁶⁷ *X v Flynn* Unreported, May 19, 1994

⁶⁸ *M.M. v Drury* [1994] 2 IR 8

⁶⁹ *Cogley v Radio Telefís Éireann* [2005] IEHC 180

⁷⁰ *K (L) (A Minor) v Independent Star Ltd and Others* [2010] IEHC 500, *Herrity v Associated Newspapers (Ireland) Ltd* [2008] IEHC 249

⁷¹ *O'Donnell v South Dublin County Council* [2007] IEHC 204

in doubled up cell 23 hours a day, without in-cell sanitation and being forced to slop out breached their privacy rights.⁷²

The right to privacy has also successfully been invoked where the inviolability of the dwelling has been breached; in *Sullivan v Boylan*⁷³ where the plaintiff was stalked by a debt collector, and in *Schrems v Data Protection Commissioner* in relation to the transfer of personal data to the United States under the Safe Harbour regime.⁷⁴

☐ Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Case law of the Supreme Court is in line with case law of international courts but the rights specifically protecting personal data under the Charter of Fundamental Rights personal data has given rise to the need for Irish courts to refer questions to the CJEU in this area. For example, *Data Protection Commissioner v Facebook Ireland*⁷⁵ concerned the issue of the validity of standard contractual clauses allowing the export of personal data could be exported outside the EU.. The Supreme Court upheld the High Court request for a preliminary reference from the CJEU, which is expected in early 2020.

The right to privacy as set out under Article 8 EtCHR has been incorporated into domestic law. In respect of the right to privacy of homosexual couples, following the Supreme Court decision in *Norris v Attorney General*, the ECHR found in *Norris v Ireland* [1988] 10581/83, that a law criminalising homosexual activity breached Article 8 of the ECHR. However, as noted above, the law has since evolved and the Supreme Court would now interpret and apply the law as it has changed.

II.IV

Freedom of religion

☐ What is the original wording of the provision protecting this right in your national catalogue?

There are many references to religion in the Constitution of Ireland. The preamble to the Constitution states the following:

*“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”*⁷⁶

Further respect to the idea of religion is espoused within Article 44 of the Constitution which states, in Article 44.1, that:

⁷² *Simpson v Governor of Mountjoy Prison* [2017] IEHC 561

⁷³ *Sullivan v Boylan and Others (No 2)* [2013] IEHC 104

⁷⁴ *Maximillian Schrems v Data Protection Commissioner* [2014] IEHC 310

⁷⁵ *Data Protection Commissioner v Facebook Ireland* [2018] IEHC 545

⁷⁶ The Preamble, Bunreacht na hEireann

“ *The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.*”⁷⁷

Article 44.2.5^o state:

*“Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.”*⁷⁸

With regard to the free practice of one’s religious beliefs, regardless of denomination Article 44.2.1^o states that:

*“Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.”*⁷⁹

☐ Is it possible to restrict the right? If so, how and under what conditions?

As noted previously, the right to free practice and profession of one’s religion is, according to Article 44.2.1 subject to “public order and morality”.⁸⁰

☐ Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The Supreme Court considered the free profession and practice of religion in *Quinn’s Supermarket Ltd v Attorney General*⁸¹. The case involved an issue surrounding the opening hours of certain shops within the state. This area was governed by the *Victuallers’ Shops (Hours of Trading on Weekdays) (Dublin, Dun Laoghaire and Bray) Order, 1948 (S.I. No. 175 of 1948)*⁸², which the Supreme Court found to be repugnant to the Constitution as it prevented practitioners of the Jewish faith from observing Sabbath.

☐ Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The Irish Courts have taken a broadly similar view as to International Courts (particularly The European Court of Human Rights) in relation to freedom of religion. An example of such similarities can be seen in both courts’ decisions where consent to medical procedures is revoked on grounds of freedom of religion.

⁷⁷ Article 44.1, Bunreacht na hEireann

⁷⁸ Article 44.2.5^o, Bunreacht na hEireann

⁷⁹ Article 44.2.1^o, Bunreacht na hEireann

⁸⁰ Ibid n.4

⁸¹ [1972] IR 1 at 24

⁸² *Victuallers’ Shops (Hours of Trading on Weekdays) (Dublin, Dun Laoghaire and Bray) Order, 1948*

The case of *Baby AB Children's University Hospital, Temple Street v CD and EF*⁸³ demonstrates how the Irish courts view the issue of parents refusing life-saving medical treatment on behalf of their children on grounds of religious freedom. Hogan J. granted an order overriding the religious objection of Jehovah's Witness parents to a life-saving blood transfusion for their child.

The decision in the case of *Baby AB* is akin to that of the decision of the European Court of Human Rights in the *Case of Jehovah's Witnesses of Moscow and Others v Russia*⁸⁴. It was noted in this case that Articles 8 and 9 of the European Convention on Human Rights provided "sufficient protection for both the freedom of choice of adult patients and the objective interests of minors (by empowering the courts to overrule the parents' opposition to medical treatment likely to save the child's life)."⁸⁵

II.V

Prohibition of discrimination

☐ What is the original wording of the provision protecting this right in your national catalogue?

Article 40.1 of the Irish Constitution provides that "*All citizens shall, as human persons, be held equal before the law.*"

There are other constitutional articles which prevent the state from discriminatory action in certain contexts: Art 9.1.3 provides that "no person may be excluded from Irish nationality and citizenship by reason of the sex of such person." A range of rights contained within Arts 16.1.1-3 prohibit discrimination on the basis of gender in relation to the membership of Parliament and voting in Parliamentary elections. Art 44.2.3 prohibits the State from discriminating on the grounds of religious belief, profession or status; moreover, Art 44.2.4 provides that the state shall not discriminate between schools under the management of different religious denominations, as regards funding allocation. Also, Art 54.2 refers to the right of men and women equally, to an adequate means of livelihood.⁸⁶

☐ Is it possible to restrict the right? If so, how and under what conditions?

The constitutional right to equality is qualified by a proviso in Art 40.1 noting, the right "*shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.*"

The right may be restricted if the interference is proportionate to the objective.

⁸³ [2011] IEHC 1

⁸⁴ ECHR case 302/02 10/06/2010

⁸⁵ European Court of Human Rights, Guide on Article 9 of the European Convention on Human Rights. (31st August, 2019) p29

⁸⁶ *ibid* 1565.

☐ Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

As noted above, the courts have considered this right. However, the equality guarantee is interpreted in the context of other constitutional rights. In *Quinn's Supermarkets v Attorney General*,⁸⁷ the Supreme Court noted that the:

“provision is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community.”⁸⁸

Art 40.1 cannot be read as a guarantee that all persons should be treated identically.⁸⁹ This is justified by the second sentence of Art 40.1, quoted above, known as the proviso, which allows certain differences to be taken into consideration.

☐ Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

ECtHR jurisprudence is similar to domestic Irish jurisprudence concerning equality, insofar as: there is no standalone right which may be enforced and in order to rely on the right one must use it in conjunction with another right. Further, any infringement of the right must be proportionate.

II.VI

Right to liberty

☐ What is the original wording of the provision protecting this right in your national catalogue?

Article 40.4. of the Constitution provides:

“1° No citizen shall be deprived of his personal liberty save in accordance with law.

2° Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person

⁸⁷ [1972] IR 1.

⁸⁸ *ibid*, pp. 13,14.

⁸⁹ *State (Nicolaou) v An Bord Uchtála* [1966] IR 567, 639.

before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law.

3° Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this Constitution, the High Court shall refer the question of the validity of such law to the Court of Appeal by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court shall fix until the Court of Appeal has determined the question so referred to it.

4° The High Court before which the body of a person alleged to be unlawfully detained is to be produced in pursuance of an order in that behalf made under this section shall, if the President of the High Court or, if he is not available, the senior judge of that Court who is available so directs in respect of any particular case, consist of three judges and shall, in every other case, consist of one judge only.

5° Nothing in this section, however, shall be invoked to prohibit, control, or interfere with any act of the Defence Forces during the existence of a state of war or armed rebellion.

6° Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.”

Is it possible to restrict the right? If so, how and under what conditions?

Yes, it is possible to restrict the right to liberty. A person is subject to the deprivation of his or her liberty upon arrest for any arrestable offence. In order for an arrest to be effective, it must be duly authorised, either by statute, a lawful arrest warrant or derivative of the common law. However, a valid arrest is dependent on whether a warrant exists with the appropriate authorisation, including the extent of its purpose. Where a person has been arrested but not informed of the reasons for the arrest, that detention may be unlawful.

A person may be deprived of his or her liberty when refused bail. The criteria which the courts take into account when deciding whether or not to grant bail can be found in the judgment of the Supreme Court in *People v O’Callaghan*.⁹⁰

⁹⁰ [1966] IR 501

The Constitution provides for “the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.”⁹¹

A person may also be deprived of his or her liberty when convicted of an offence and sentenced to a term of imprisonment provided for in the law.

☐ Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The Supreme Court in *Re The Emergency Powers Bill, 1976* was asked, pursuant to Article 26 of the Constitution which empowers the President of Ireland to refer a legislative Bill to the Supreme Court before signing it into law for the Supreme Court to examine the Bill’s constitutionality. The Bill in question provided for the arrest and detention of a suspect for a maximum of seven days. Supreme Court upheld the constitutionality of the bill but per O’Higgins CJ “statutory provision of this nature which makes such inroads upon the liberty of the person must be strictly construed. Any arrest sought to be justified by the section must be in strict conformity with it.”⁹²

Similarly, in *McMahon v. Leahy* [1984] I.R. 525 the Supreme Court emphasised the fact that the courts will insist on strict compliance with legal requirements when the personal liberty of an individual is at stake.

☐ Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Article 40 of the Irish Constitution is broadly comparable to Article 5 of the ECHR which provides, “[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...”⁹³ The article goes on to provide for a remedy for cases of unlawful detention as follows:

“2. Everyone who is arrested shall be informed promptly, in a language which he or she understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be

⁹¹ Article 40.4.6

⁹² [1977] IR 159]

⁹³ Article 5 of the European Convention on Human Rights.

decided speedily by a court and his release ordered if the detention is not lawful.”

In terms of case law, the approach of the Irish Courts appears to be broadly similar to that taken by the European Court of Human Rights. For instance in *Assanidze v. Georgia*⁹⁴ the European Court found that the applicant was being illegally detained and ordered his immediate release.⁹⁵

Article 5 ECHR, like Article 40 of the Irish Constitution permits the deprivation of liberty only “in accordance with a procedure prescribed by law. Much like the Irish courts however, the ECtHR has taken the view, for example in *Mooren v Germany* that while non-compliance with such a national law can constitute a breach of Article 5 ECHR, such a breach must be a serious irregularity as opposed to a procedural difficulty.⁹⁶

Similarly, in *State (Comerford) v Governor of Mountjoy Prison* where the High Court held that while the applicant’s detention was irregular, “the *habeas corpus* procedure is designed to vindicate individual liberty and... it should not be debased by being used as a vehicle to obtain other forms of relief”

END

⁹⁴ ECHR case 08/04/2004

⁹⁵ *Ibid* at 203.

⁹⁶ *Mooren v Germany* 50 EHRR 23 at [72].