

DEFERENCE UNDER THE SEPARATION OF POWERS: AN INCREASINGLY ACCEPTABLE TRAIT AMONGST THE IRISH JUDICIARY?



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Authors Declaration:

I hereby acknowledge that this thesis which I now submit for examination, for the award of Master's in Law, is entirely my own work and has not been taken from the work of others, save to the extent that such work has been cited and accurately referenced within the text of my work.

This paper has not been published or submitted in fulfilment or part-fulfilment of the requirements of another academic programme.

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PART I

1) ABSTRACT

Deference refers to a certain respect or esteem which is due to a superior or an elder or a tendency of inferiors to acknowledge the legitimacy of superiors' powers. It is a concept which is becoming increasingly popular in the works of legal commentators as of late. This is a direct result of the growing perception that it is a trait which is becoming synonymous with the Irish Judiciary.

The object of this research is to examine whether this accusation is true *i.e.* have our Superior Courts changed their mindset and adopted a more deferential stance than they used to exhibit. More importantly, it is my objective to determine whether this alleged deference on behalf of the Judiciary is an acceptable trait based on the impact it will have on those seeking justice from our courts and the wider implications on society as a whole. This will be achieved by completing an in-depth analysis of the relevant caselaw, first of all to determine the base line which is important, as it will establish whether the judiciary has deviated from this recently, and secondly, I will examine specific areas; namely deference in general, delegated legislation, distributive justice, and mandatory orders in order to assess the impact this deference will have on certain aspects of our society.

This research paper ultimately concludes that the Irish Judiciary have moved away from a position of strength and power to undoubtedly become more deferential in the last decade and a half, but as a result of the broad scope of the concept of deference it is impossible to draw an all-encompassing conclusion as to its merits, or lack thereof. Rather I will base my conclusions on the more specific areas of examination undertaken with the aim of highlighting that deference has both advantages and disadvantages which depend on the circumstances in which it is exhibited.

2) METHODOLOGY

2.1) Introduction:

The overall purpose of the research undertaken is, first of all, to prove that the Irish Judiciary has become more deferential and, secondly, to assess whether this deference is acceptable or not. This section will serve to highlight the research methods, utilised in completing my dissertation, the link between these methods and the resulting conclusions. *i.e.* it will show how I went about conducting my research. In carrying out a study on judicial deference under the Irish separation of powers, the primary sources of information were the Irish Constitution, the caselaw, the numerous textbooks on the area and the relevant articles. The topic I have chosen can be described as quite policy orientated and as such I will rely heavily on both primary and secondary sources to formulate my conclusions. The majority of research shall come from a critical analysis of the literature on the topic area, namely the separation of powers in Constitutional law with an emphasis on the Judiciary. I will now proceed to explain exactly what methods I have chosen and the procedure involved in more details. I will also include reasons why I have rejected using certain research methods where appropriate.

2.2) Literature Review:

As previously mentioned, an extensive review of the subject matter literature will provide the bulk of the research material used to formulate my conclusions. This is due to the analytical nature of my chosen research topic *i.e.* one based on black-letter theorising rather than empirical research. These can be broken up into two distinct sections, namely primary sources and secondary sources.

(i) Primary sources:

These include up-to-date, relevant materials and are extremely important when undertaking a law-orientated dissertation. This is evident from the fact that sources such as treaties and international agreements, both primary and secondary legislation, opinions and resolutions, relevant caselaw and constitutions fall under this heading. Seen as though my research question is heavily based on the tripartite separation of powers which exists within our constitution, Bunreacht na hÉireann can be seen as the cornerstone of my research. Whilst interpreting the constitution on this area I will predominantly use a teleological or purposive approach as in my view it is the approach which results in the fairest outcome. However, I do submit, that at times, where the teleological approach results in an absurdity I may revert to a harmonious approach.

Similarly, many of the recent seminal decisions on the topic and the decisions of the presiding judges have shaped the current law on the area and in fact inspired

me to choose this topic in the first place. Logically it follows that detailed examinations of cases such as *O'Reilly v Limerick Corporation*¹, *Sinnott v Minister for Education*,² *Buckley v Attorney General*,³ *Crotty v An Taoiseach*⁴ and *TD v Minister for Education*,⁵ to name but a few, are extremely pertinent to my analysis. Whilst examining these landmark cases and the respective judiciary's comments on them I will be mindful of the distinction between *obiter dicta* and *ratio decidendi* and the varying weight to be attributed to different statements and observations. The inclusion of a small amount of caselaw foreign common law jurisdictions (predominantly the US but other jurisdictions such as India, amongst others, are relevant in various areas throughout the paper) has been deemed necessary for comparative purposes in some areas. Similarly to the above, treaties and international agreements as well as both primary and secondary legislation have all had a role to play in creating this perceived deference on the behalf of the judiciary and so they too must be examined.

(ii) Secondary Sources:

These can be seen to be much more varied and include sources such as newspaper articles, journals, textbooks, official reports as well as reports by non-governmental organizations and international bodies. Textbooks such as *Constitutional Law in Ireland*⁶, *Casebook on Irish Law*⁷ and *The Irish Constitution*⁸ will provide the core of my research and can be seen as a starting point from which I will gradually progress as they will set out the law as it is in its most basic form and suggest other materials to read and pose certain questions for thought.

I will also search and keep an eye on certain law-based journals which are accessible through the D.I.T library such as the Law Society Gazette, The Dublin University Law Journal and The Irish Law Times, to name but a few, in order to gain an up to date insight into the issues at hand. Newspaper articles and Law Reform Commission Reports will also serve a similar purpose. Various internet

¹ *O'Reilly v Limerick Corporation* [1989] ILRM 181.

² *Sinnott v Minister for Education* (2001) unreported, Supreme Court, July 12, 2001.

³ [1950] IR 67.

⁴ [1987] IR 713.

⁵ *T.D. v Minister for Education* [2001] 2 IR 545.

⁶ Casey, *Constitutional Law in Ireland*, Sweet & Maxwell, 2000, 3rd ed.

⁷ Doyle, *Casebook on Irish Law*, Clarus Press, 2008.

⁸ Kelly, Hogan and Whyte, *The Irish Constitution*, Lexis Nexis Butterworths, 2003, 4th ed.

sources will be invaluable to me in accessing journals, newspaper articles and various caselaw and I will rely heavily on websites like Bailli, Justis Irish Reports, Lexis Nexis, Westlaw and Firstlaw throughout my dissertation.

2.3) Miscellaneous:

I expressly reject carrying out a survey in order to help me with my research. I believe that I will have accumulated enough data from various sources to draw unbiased conclusions to my research question without the need to carry out a survey for the sake of it. Also, I believe small surveys are fraught with dangers such as the chosen medium, timing and resulting in an unrepresentative sample due to self-selection of subjects. Similarly, I have decided to not carry out any interviews based on the fact that I do not feel that they would add any significant value to my paper.

The drawing of conclusions will be one of the most difficult tasks involved in completing this thesis as the separation of powers in the Irish Constitution is already an extremely well-documented area. However, I believe that by focusing specifically on judicial deference I will be able to draw unbiased and well-informed conclusions relevant to the subject matter based on the wealth of both primary and secondary resources on the area.

2.4) Ethical Issues:

I believe that when choosing to undertake a research project such as this, that you become bound by a certain code of ethics which also determines the methods of research used and how you transcribe your ideas and conclusions. Perhaps the most obvious is the duty to reference any work that is not your own and not to plagiarise. Similarly, you are under an obligation not to use other people's work out of context to support an idea of your own which is not in line with the original author's intention. I feel that you must also be wary of how your work is going to be used by others to support their theories in the future.

2.5) Conclusion:

Throughout this methodology chapter I have attempted to highlight the various methods I have chosen in order to complete my dissertation. I have also provided an insight into the methods I have utilized and any other considerations I possessed throughout researching and writing my dissertation. I hope it was clear that the bulwark of my research data came from a

critical analysis of both primary and secondary literature on the area as I believe it to be the most useful way to draw conclusions to my policy orientated research question.

3) INTRODUCTION

“The dominance of [traditional separation of powers] theory has occasionally inculcated a tendency on the part of the courts towards undue deference to the other organs of government.”⁹

The purpose of this paper is, first of all, to assess whether the Judiciary is deviating from its traditionally strong position by becoming increasingly deferential to other organs of State established under the constitutionally enshrined doctrine of the separation of powers and, secondly, to determine whether this alleged deference is acceptable in the Ireland of today. As such, this paper can be seen as a critical analysis of judicial deference and not a discussion of the separation of powers as a whole. However, in order to critically analyse judicial deference, it is necessary for me to briefly summarise certain concepts such as deference and the separation of powers as well as provide a background to constitutions themselves and the organs of government which comprise our State.

In light of this, “Part I” of this paper will be devoted to defining and providing background information on areas which are vital to understanding the more-detailed discussions later on. Once these key tenets have been properly explained I will move on to establish that the Irish Judiciary was a traditionally strong and dominant organ of State in “Part II.” I will then proceed to provide examples of how this established power has been constantly eroding on account of a newly acquired judicial trait, namely deference, by examining the relevant caselaw. In order to do this I will examine deference from four separate and unique viewpoints, namely; deference in general, deference as it pertains to delegated legislation, distributive justice and mandatory orders. From this analysis of our Judiciary’s behaviour I hope to determine whether the alleged deference is appropriate or not. Finally, I will draw my conclusions from the critical analysis I have undertaken to show that our judiciary has indubitably become more deferential when compared with the Judiciary of the 1970’s. Furthermore, I hope to prove that deference is such a broad concept which relates to too many issues for me to give a conclusive, “umbrella-like” answer as to whether it is an acceptable trait or not. What I do wish to achieve however, is to conclude whether this newly found deference is acceptable under each of the specific areas that I have examined.

4) BACKGROUND INFORMATION

⁹ Carolan, *Separation of Powers and Administrative Government*, in Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008, at 225.

4.1) Deference:

Generally speaking, deference implies a submission to the judgment of a recognised superior out of respect or reverence. It has been argued by some that deference is a disingenuous idea, as by conscientiously making the decision not to interfere, the Judiciary is formulating policy in a manner of speaking, or paradoxically, lack of intervention is intervention in its own right. Or as Langwallner puts it; “any judicial deference to the executive or legislature on principle or policy matters is itself a policy, or... an ideological choice.”¹⁰ For the purposes of this paper however, deference will, unless otherwise stated, refer to the conservative doctrine by which judges seek to avoid frustrating the will of other constitutionally established organs of government when promulgating their decisions of judicial review. They achieve this by displaying the correct amount of respect to these other institutions and by not transgressing the constitutionally mandated lines of demarcation which establish the power attributed to each institution.

4.2) Constitutions in General:

A constitution sets out the basic rules for running a state and it is not uncommon for it to be codified as a written document that enumerates and limits the powers and functions of a political entity, thus ensuring that the affairs of the state are carried out in a specific manner. In summation, it is a basic legal framework which sets out the rules which govern a state. Typically, a constitution attempts to do three things, and Bunreacht na hÉireann is no exception:

1. Define the State’s jurisdiction (Articles 2, 3 and 19.8 of The Constitution of Ireland 1937).¹¹
2. To establish the institutions of the State and the framework governing how the power’s of the State will be distributed between those institutions (Articles 5, 6, 15.2, 28.2, and 34.1 of the Irish Constitution).
3. To regulate the relationship between the State and its inhabitants (*e.g.* the fundamental rights provisions contained in Articles 38 and 40-44 of the Irish Constitution).

4.3) Bunreacht na hÉireann:

¹⁰ Langwallner, *Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual*, in Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008, at 261.

¹¹ Hereinafter referred to as “the Irish Constitution” or “Bunreacht na hÉireann.”

The Irish Constitution can be seen as an organic document¹² whose roots are steeped in Irish history, which attempts to protect the ideals, customs, beliefs and culture of our State by creating an infrastructure which both governs and regulates society at its most fundamental levels. Some of the more integral characteristics of Bunreacht na hÉireann include: its ability to change through referendum *i.e.* to date there have been 28 amendments to the document, which is relatively young when compared to the American Constitution, which has only been amended 27 times in a 219 year life-span. Bunreacht na hÉireann also provides for express powers of judicial review, quite unlike the US where they are merely implied and the UK where they are non-existent, a power which has provided for a traditionally strong judiciary. Another aspect of the Irish Constitution which differs with the US is the titular position of our president who wears but a “hollow crown” as opposed to the all-powerful American President who wears numerous hats¹³ and can be seen as the head of the executive there. Other core features include: the dualist approach to international law and the non-retroactivity of criminal liability guaranteed under Article 15.5.1. Perhaps the key tenet, and arguably the most defining of both ours, and constitutions the world over,¹⁴ is the operation of a tripartite system of checks and balances known as the Separation of Powers.

5) A HISTORY OF “TRIAS POLITICA”:¹⁵

¹² I use the term “organic” as it is a living document which is subject to constant change by public plebiscite, should it be desired. For example, there have been 28 amendments to the constitution so far. Another reason for referring to the constitution as organic is the nature of constitutional jurisprudence *i.e.* the way in which societal morals and values change over time resulting in different interpretations of the Constitution *e.g.* cases like *McGee v A.G.* [1974] IR 284 & *State (Healy) v Donoghue* [1976] I.R. 325. As Miller put it in

¹³ I refer to the words of *Amaury de Riencourt* here who described the US President as “[wearing] ten hats – as Head of State, Chief Executive, Minister of Foreign Affairs, Chief Legislator, Head of the Party, Tribune of the People, Ultimate Arbiter of Social Justice, Guardian of Economic Prosperity and World Leader of Western Civilization.” I do not purport to agree with this description fully, but merely to use it to represent the chasm which exists between the power of the US and Irish presidencies.

¹⁴ Various forms of the doctrine of separation can be found in the constitutions of countries such as America, Australia, the U.K. and France (three branches), Costa Rica & Taiwan (five branches), Germany (three branches and six bodies) and Hungary (four branches and six bodies) to name but a few.

¹⁵ Greek translation for “Separation of Powers.”

“A ‘central concept of modern constitutionalism,’ the theory of the separation of powers enjoys a position of almost unparalleled global repute as a foundational tenet of liberal democracy. A doctrine of long-standing historical and political significance, it exerts considerable influence over the attitudes, opinions and public pronouncements of academics, officials, and citizens in many states, Ireland included.”¹⁶

5.1) Introduction:

The separation of powers is one of the most significant features of the Irish Constitution which is unavoidable whilst dealing with judicial deference. As Ó’Dálaigh CJ. put it; “The Constitution of Ireland is founded on the doctrine of the tripartite division of the powers of government - legislative, executive and judicial.”¹⁷ Articles 6, 15.2, 28.2, and 34.1 of the Irish Constitution are the main articles which provide the basis for the separation of powers, and the Irish Judiciary attempt to interpret them in a harmonious manner in order to adhere to the doctrine whenever possible. Article 6 of the Irish Constitution reads:¹⁸

1. “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.
2. These powers of Government are exercisable only by or on the authority of the organs of State established by this Constitution.”

In order to gain a better understanding of how our institutions of State interact, thereby ascertaining a better grasp on judicial deference, I believe it is necessary to examine the history regarding this key feature of our Constitution.

5.2) A History of Separation:

Perhaps the first form of the idea of separating powers can be traced back to the ancient Greeks who called it the “mixed constitution.” This idea is prominent in the work of *Plato’s Laws* and *Aristotle’s Politics* and it presupposes the division of state powers. Although a more accurate, to modern standards,¹⁹ notion of the doctrine did not appear in writing until

¹⁶ Carolan, *Separation of Powers and Administrative Government*, in Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008, at 213.

¹⁷ *Re Haughey* [1971] IR 217, at 250.

¹⁸ In *Attorney General v Hamilton (No.2)* [1993] 2 IR 250 both Finlay CJ. and O’Flaherty J. indicated that the separation of powers doctrine was clearly implied by and was “inherent in” Article 6 of the Constitution.

¹⁹ “New constitution-makers” such as Baron de Montesquieu espoused a tripartite separation of powers between legislature, executive and judiciary emphasising the seminal importance of an independent judiciary. Despite

the middle ages, the fact that this idea can be traced back so far in history only serves to highlight the importance behind the doctrine. To James Madison, one of the founding fathers of the American constitution, the separation of powers was the “sacred maxim of free government, designed to guard against concentration of power in the same hands – ‘the very definition of tyranny’.”²⁰ The rationale for the doctrine of separation of powers is based on a belief in man’s inherent tendency to corrupt. This is obvious from a brief look at the comments of many notable political theorists throughout history. As Madison put it;

“Ambition must be made to counteract ambition... But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself... experience has thought mankind the necessity of auxiliary precautions.”²¹

Miller also commented on this inherent corruption in a similar vein when he said;

“If man was depraved and anti-social, he then required control, but those who controlled, themselves being human beings, would mercilessly exploit their subjects unless there was some way to limit their power.”²²

Perhaps Acton encapsulated all these ideas most succinctly in his dictum when he argued “power tends to corrupt and absolute power corrupts absolutely.” Despite the obviously negative connotations of man’s inherent tendency to corrupt highlighting the danger of absolute government, the modern form of the doctrine of the separation of powers appeared which is now in place in various countries throughout the world, like Australia, America and Ireland.²³

often being credited with being the inventor of the tripartite system of separated powers, he himself shows more modesty by saying: “Whoever shall read the admirable treatise of Tacitus on the manners of the Germans, will find that it is from them the English have borrowed the idea of their political government. This beautiful system was invented first in the woods.” (Montesquieu, *The Spirit of Laws*, book 11, chap. 6 at 213, in Kurland, *Michigan Law Review*, Vol. 85, No. 3 (Dec., 1986), at 595.

²⁰ Miller, *Arkansas Law Review and Bar Association Journal*, Vol. 27, No. 4, winter 1973, at 586.

²¹ Madison, *The Federalist*, No. 51, at 347-48.

²² Miller, *Arkansas Law Review and Bar Association Journal*, Vol. 27, No. 4, winter 1973 at, 588.

²³ Political theorists also formulated an efficiency argument for the widespread application of the separation of powers which lacked the negative overtones. Cf. Carl Becker’s most famous work “*The Heavenly City of the Eighteenth-Century Philosophers*, (1932) where man is described as being “capable of, guided solely by the light of reason and experience, of perfecting the good life on earth.”

The core concept behind the doctrine is to compartmentalise State power and distribute it amongst different institutions so as that no one institution can wield absolute command based on the perceived danger of residing all State power in one person or body alone *i.e.* “concentration of power means tyranny.”²⁴ Therefore, the institutions are prearranged to be independent of each other so as to act as counterweights, or as a system of “checks and balances,” supervising and overseeing the activities of the others in order to restrain an abuse of power. To Madison “the danger is action and the safeguard is stalemate.”²⁵ So he designed a system whereby the separate organs of government would constantly be in a stalemate with each other, thus preventing tyranny. “To be legitimate under the Constitution, power must be accountable, that is those who make decisions affecting the values of others must answer in another place for their actions.”²⁶ This reference implies that the institutions of State are constantly at war with one another, on the contrary; “checks and balances [suggest] the joinder, not separation, of two or more governmental agencies before action [can] be validated – or the oversight of one by another.”²⁷ Accordingly, each organ of State is said to have exclusive powers that only it can exercise and any attempt by one institution of State, or a body which is not an institution of State, to invoke the powers constitutionally mandated to another would constitute an invasion of that body’s powers. These powers are so exclusive that they cannot even be given away; “It is ordinarily impermissible for one organ of government to cede its governmental power either to another organ of government or to an outside agency. The constitutionally authorised recipient of power cannot give it away.”²⁸ In Ireland a tripartite separation exists whereby the power to rule our state is divided up between the legislative, the executive and the judiciary. However, it becomes obvious that in practice, it is difficult to keep these institutions separate and that a “blurring of the lines” often occurs.

5.3) An Imperfect Doctrine?

²⁴ Miller, *Arkansas Law Review and Bar Association Journal*, Vol. 27, No. 4, Winter 1973, at 588.

²⁵ Pitkin, *The Concept of Representation*, University of California Press, 1972, at 195.

²⁶ Miller, *Arkansas Law Review and Bar Association Journal*, Vol. 27, No. 4, Winter 1973, at 599.

²⁷ Kurland, *Michigan Law Review*, Vol. 85, No. 3 (Dec., 1986), at 592.

²⁸ Doyle, *Casebook on Irish Constitutional Law*, 2008, at [12-22].

“In no system of which I have any knowledge has it been found to be possible to confine the legislative, the executive and the judicial power in what I may call its own water-tight compartment; and, if such a thing were to be attempted, the result, I fear, would be so much the worse for the compartment.”²⁹

One of the most common criticisms of the separation of powers doctrine is that it is by no means rigid or perfect, but rather there are numerous overlapping, gray areas. Madison also noticed this “blurring of the lines” when he said; “If we look into the constitutions of the several states we find that... there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.”³⁰ The same can be said of the Irish doctrine which is not as strict as it may appear at first glance; “The framers of the constitution did not adopt a rigid separation between the legislative, executive and judicial powers.”³¹ One of the main reasons for this is that Ireland has chosen to adopt a parliamentary system as opposed to a presidential one such as in the US. This means that members of the Executive are drawn from, sit and are answerable to the lower house of parliament. This inevitably results in overlap between the institutions with the Executive being a ‘subset’ of the Legislature. The Government moreover is not fully independent of the other institutions of State as it is effectively “hired and fired” by the Dáil.³² Equally, the Government is answerable to the Dáil for its decisions.³³ In this way, it is dependant on the Dáil not only for its initial creation but also for its continued survival. The relationship between the various organs of government is labyrinthine in its complexity involving a delicate system of checks and balances. One of the best examples of these checks and balances is judicial review which is bestowed upon the Courts by the Constitution³⁴ and provides them with the power to supervise the activities of both the Government and the Oireachtas and to strike down any measure implemented by the Legislature or Executive that it deems unconstitutional. Despite the fact that the Judiciary exercise reluctance to intervene in the functions of other organs of State, the Constitution itself clearly confers the duty on the Courts to uphold the Constitution when they deem it appropriate.³⁵ Other examples of these checks and balances include:

²⁹ As per Johnston J. in *Lynham v Butler (No. 2)* [1933] IR 74, at 121.

³⁰ Madison, *The Federalist*, No. 47, 1961, at 327.

³¹ *Abbey Films v Attorney General* [1981] IR 158, at 171.

³² See Articles 13.1.1° - 2° and Articles 28.10 – 11 of the Irish Constitution.

³³ See Article 28.4 of the Irish Constitution.

³⁴ See Articles 26, 34 and 50 of the Irish Constitution.

³⁵ See Articles 15.4, 16 and 34.4 of the Irish Constitution.

1. The Taoiseach has a role in the appointment of Members of Parliament *i.e.* appoints eleven members to the Seanad, a number which usually guarantees him a majority in that house.
2. The power of the Oireachtas to impeach a judge or President for stated incapacity or misbehaviour under Article 35.
3. Despite being constitutionally mandated to be independent in the performance of their duties under Article 35.2, judges are appointed by the President effectively on the advice of the Government.³⁶
4. The system of Presidential pardons, commutation and remission of sentences³⁷ can be seen as interference in the judicial sentencing function, but are permitted under Article 13.6.
5. The delegation of legislative power to the Executive and other institutions.

5.4) Conclusion:

Thus it becomes evident that the separation of powers doctrine in Ireland is not strict.

“The Irish [constitutional] structure is not a simple or clear-cut separation of powers. There is overlapping and impingement of powers, however, in a general sense there is a functional division of power.”³⁸

It is this interaction between institutions resulting from such obscure lines of demarcation that has helped create the notion of deference. There are numerous examples of areas mentioned above where the organs of state overlap and are forced to involve themselves in each other's affairs. Accordingly, the Judiciary are often faced with the question of whether they should interfere in the activities of the Legislative or Executive or whether they should respectfully back down and leave them to make their own decisions. Questions such as these shall be answered in *Part II* of this paper, but in order to deal with deference in detail I must first briefly examine the individual organs of State.

³⁶ See Article 13.9 and Article 35.2 of the Irish Constitution.

³⁷ The second and third of these have been delegated to the Executive.

³⁸ As *per* Denham J. in *Laurentiu v Minister for Justice* [1999] 4 IR 26, at 60.

6) THE ORGANS OF STATE:

6.1) The Legislature:

Article 15.2.1 of the Irish Constitution provides 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 for the State.”

The Legislature, or Oireachtas, is the national parliament in Ireland, (which is comprised of two houses: Dáil Éireann and Seanad Éireann) and is the organ responsible for promulgating legislation, thus formulating the principles and policies by which the State is to be run.

“Legislation is the stipulation of generally applicable rules and standards that are, in the first instance, used by persons to guide and regulate their own behaviour and, in the second instance, used by official bodies (such as courts) to determine whether persons have behaved lawfully. The legislative power is thus the power to lay down these generally applicable standards.”³⁹

The legislative power enjoyed by the Oireachtas today is broad but not absolute.⁴⁰ According to Article 15.3 of the Irish Constitution, every piece of legislation they promulgate must be in accordance with the Constitution and if it is not the Judiciary will step in to strike it down or declare it invalid, as it is not the role of the judiciary to “repair” legislation as this would be a breach of their constitutionally enshrined powers. Judicial review refers to the ability of the Judiciary to test the constitutionality of legislation produced by the Oireachtas and can be initiated in the High Court only. This power is non-existent in the UK and, unlike the US;⁴¹ it is an express power here under Article 26 of the Irish Constitution.⁴² The doctrine of proportionality is the method utilised by the Judiciary to test the fairness of an act, and was formulated in the case of *Heaney v Ireland*.⁴³ Here, the Supreme Court ruled that the right to silence is protected by the Constitution as a corollary to the right to freedom of expression. In light of the public interest, this right is not absolute as the Judiciary must balance the individual’s right against self-incrimination with the public’s right to be protected against crime. Thus, an Act of Parliament which made it an offence to refuse, to answer questions concerning the suspect’s whereabouts at a particular time once arrested, was constitutional as

³⁹ Doyle, *Casebook on Irish Constitutional Law*, 2008, at [11-01].

⁴⁰ Unlike its predecessor, the Westminster Parliament, which was sovereign.

⁴¹ *Cf. Marbury v Madison* 5 US 137 (1803).

⁴² It is acknowledged that Article 26 comprises only one aspect of the concept of judicial review and that the concept as a whole is based on Articles 34.3 & 50 of the Irish Constitution also.

⁴³ [1994] 3 IR 593. See later *Rock v Ireland* [1997] 3 IR 484 for a more recent application of the test.

it struck an “appropriate and proportionate balance” between respecting the rights of the prisoner and protecting the public interest. It is a three-pronged test which examines the aims of the act, the means used under the act and whether, on the whole, the act is fair or proportional. In light of this, all acts passed post 1937 are presumed to be constitutional and the onus is on the challenger to rebut this presumption.

Unlike other jurisdictions,⁴⁴ the Executive or ministers cannot claim any inherent power to make, suspend or alter laws. Despite this constitutionally enshrined right however, the Irish Supreme Court has recognised the need to balance constitutional democracy and the rule of law with the needs of a modern day government. They have achieved this by setting out the pragmatic “principles and policies” test in *Cityview Press v An Comhairle Oiliúna*,⁴⁵ whereby it is deemed acceptable if the Oireachtas delegates the power to make rules to a subordinate body so long as that body is “[merely] giving effect to ‘principles and policies’ which are contained in the [parent] statute itself.” This has given rise to much debate both in the Irish Judiciary and amongst many notable scholars as to whether this exclusive constitutional privilege can be delegated at all? I will rejoin the debate as to whether the Judiciary is being deferential to the Oireachtas in fear of stepping on their toes, or whether they have merely adopted a pragmatic response by realising that they must exercise deference in this instance in order to alleviate the administrative backlog associated with our modern legislature lacking the necessary resources, later on in this paper.⁴⁶

6.2) The Executive:

Article 28.2 of The Irish Constitution states:

“The executive power of the state shall, subject to the provisions of this constitution, be exercised by or on the authority of the Government.”

This means that the Executive, or Government, has the power to implement and administer the laws and policy of the State as set out by the Oireachtas. The exact powers attributed to the Executive are less clearly defined than other organs of Government, and the fact that the Legislature and the Executive are “nested” in Ireland results in much academic debate as to the Executive’s actual powers and responsibilities *i.e.* a formal separation exists between the Legislature and the Executive, but the two organs are linked, or “nested” together, as

⁴⁴ Such as the United Kingdom or France where long before Article 37 of the 1958 Constitution the executive was recognised as having an autonomous *pouvoir réglementaire*.

⁴⁵ [1980] IR 381.

⁴⁶ This discussion resumes in Chapter 9: “*Legislative Amenability and Delegated Legislation.*”

members of the latter are drawn from the former. The fact that these two organs are “nested” or overlap means that the Executive is rarely troubled about its power as it can equip itself with any new abilities by virtue of this majority in the Legislature, and it is primarily from statute that the Executive gains its power. However, it is also acknowledged that the Executive power of the State is distinct from any power the State may possess under statute. This is evident from cases such as *State (C) v Minister for Justice*⁴⁷ and *Murphy v Dublin Corporation*.⁴⁸ One attempt to define Executive power is that proposed by Halsbury *i.e.* that the executive’s functions are “merely the residue of functions of government after legislative and judicial functions have been taken away.”⁴⁹

Regarding domestic affairs, the Government can act without statutory authority as a result of the constitutional grant of executive power.⁵⁰ This power does not apply however if it takes action imposing obligations or burdens on any citizen. “The absence of any Irish judicial authority on this point doubtless reflects consistent legal advice to Governments that statutory authority is essential for such action.”⁵¹ A foreign example of this occurs in *Youngstown Sheet and Tube Co. v. Sawyer* (1953).⁵² Here the U.S. Supreme Court held that a seizure on the country’s steel mills by President Truman unlawful, despite the defendant claiming the grant of executive power. A similar approach was adopted in the Indian case of *Madhya Pradesh v Singh*.⁵³ Here, the State Government ordered the defendant to reside only in a specified place. The statute this order was based on was previously ruled unconstitutional but the State Government argued that the order was supportable by the constitutional grant of Executive power. The Indian Supreme Court rejected this contention on the basis that where a citizen’s rights were prejudicially affected, executive action must be supported by legislation. Doyle adopts a similar viewpoint to Halsbury when he mentions that despite the courts’ power to review government acts which are in disregard of the constitution it seems that “the implicit governmental powers of the State that are not explicitly vested in any other organ of government (such as the immigration control power) vest, at least presumptively, in the Government.”⁵⁴

⁴⁷ [1967] IR 106.

⁴⁸ [1972] IR 215.

⁴⁹ *Halsbury’s Laws of England*, 4th ed., 1988, at 814.

⁵⁰ The case of *Haughey v Moriarty* [1999] provides an example of where the Supreme Court recognised the existence of implicit executive powers.

⁵¹ Casey, *Constitutional Law in Ireland*, 2000, at 235.

⁵² 343 US 579 (1953).

⁵³ [1967] (SC) 1170.

⁵⁴ Doyle, *Casebook on Irish Constitutional Law*, 2008, at 333.

Article 29.4.1 of the Irish Constitution highlights another of the government's constitutionally enshrined powers, which are independent from statute, by informing us that the government is the sole body responsible for determining the State's foreign policy:

“The executive power of the state in or in accordance with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.”

It is clear that the government can exercise this power without statutory authority as few statutory provisions deal with this area. Despite having to lay any foreign policy related decisions before the Dáil they are binding without Dáil approval, unless, of course, they involve a charge on public funds.⁵⁵ Fitzgerald CJ's comments in the case of *Boland v An Taoiseach*⁵⁶ enforced the idea that the Government can decide the State's foreign policy despite what the courts say:

“In my opinion, the courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution.”⁵⁷

In this case the Supreme Court considered a challenge to the Sunningdale Agreement, under which the Irish Government declared that there could be no change to the status of Northern Ireland, until the majority of the Northern Irish people desired a change in that status. Mr. Boland claimed this was in breach of Articles 2 & 3 of the Irish Constitution which at the time made a territorial claim to the whole island of Ireland. Budd J. rejected this argument:

“... it would appear to me that what is stated on behalf of the Irish Government [under clause 5 of the Sunningdale Agreement] is a statement of a matter of policy. It is for the Executive to formulate matters of policy. The judiciary has its own particular ambit of functions under the Constitution.”⁵⁸

Thus, we can see how the court demonstrated its unwillingness to interfere in a foreign policy related issue, “notwithstanding the apparent inconsistency between the agreement and the Constitution.”⁵⁹

⁵⁵ Article 29.5 of the Irish Constitution mandates that an international agreement which involves a charge on public funds must be approved by Dáil Éireann.

⁵⁶ [1974] IR 338.

⁵⁷ [1974] IR 338, at 361.

⁵⁸ [1974] IR 338, at 366.

⁵⁹ Doyle, *Casebook on Irish Constitutional Law*, 2008, at [12-19].

Despite certain exceptions,⁶⁰ the above comments in the *Boland* case represent the current position of a modern day deferential judiciary. Similarly, Doyle has commented that in all aspects, apart from cases dealing with “governmental [fettering of] its power to conduct foreign affairs by legally committing itself in advance to reach agreements with other States; the courts have shown notable deference to the Government in the exercise of its foreign affairs power.”⁶¹

6.3) The Judiciary:

Article 34.1 of the Irish Constitution proclaims the powers of the Irish Judiciary:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

Article 37.1 of the Irish Constitution adds a qualification to the above:

“Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under the Constitution.”

This typically involves the power to adjudicate in a final manner in disputes between parties, however, from the above two provisions, four main principles regarding the Judiciary may be gleaned which provides us with quite a practical summary:

1. The main function of the Judiciary is to administer justice or, in other words, to determine legal disputes.
2. The administration of justice in criminal matters is an exclusive function of the courts erected, and judges appointed, under the Constitution (subject to the provisions of Article 38 on Special Criminal Courts).
3. In civil matters, limited judicial functions and powers may be conferred on persons who are not judges or bodies which are not courts.
4. Subject to ‘2.’ the administration of justice in civil matters is a function reserved to the courts.⁶²

⁶⁰ Mainly the case of *Crotty v An Taoiseach* [1987] IR 713.

⁶¹ Doyle, *Casebook on Irish Constitutional Law*, 2008, at 333, referring to *Crotty v An Taoiseach*.

⁶² Casey, *Constitutional Law in Ireland*, 2000, at 240.

The question arises however, as to what exactly is meant by the “administration of justice” or the judicial role? The Courts themselves have made numerous intermittent attempts to develop an authoritative definition of the power they wield but as of yet, “a comprehensive statement as to what may constitute “the administration of justice” [has] proved elusive.”⁶³ This ambiguity over the concept led Kenny J. in the case of *McDonald v Bord na gCon (No.2)*⁶⁴ to propose a checklist of the ubiquitous features:

1. It involves a dispute or controversy as to the existence of legal rights or as to a violation of the law.
2. It results in the determination of legal rights or obligations, the imposition of a legal liability, or the infliction of a legal penalty.
3. The determination of the court is final (though in some cases subject to appeal) as regards the existence of legal rights or liabilities or as regards the imposition of a penalty.
4. The State is obliged to enforce those rights, liabilities and penalties.
5. The function is one that has traditionally been performed by courts in this country.

It can be said to involve the power to resolve a legal dispute with definitiveness which concerns the existence of legal rights and liabilities, as well as the power to impose legal penalties as a result of that resolution. Thus, the determination of the guilt or innocence of a person in a criminal trial and the imposition of a sentence upon conviction provide two examples which have been determined to be judicial functions. The former was decided in the case of *Re Haughey*⁶⁵ where the Supreme Court determined that an Oireachtas Committee could not “try and convict” a person who refused to give evidence before the Committee, as it lacked the power to determine the guilt of the accused. *Deaton v Attorney General*⁶⁶ established that where a person has been convicted of a crime, only a court can decide that person’s punishment. Here, the Supreme Court ruled that the legislation which gave the Revenue Commissioners the power to decide the penalties imposed on people convicted of customs offences was unconstitutional as only a court could decide such a penalty.⁶⁷ As *per* Ó’Dálaigh CJ.; “the selection of punishment is an integral part of the administration of justice

⁶³ *Brady v Houghton* [2006] 1 IR 1, at 24.

⁶⁴ [1965] IR 217. The case dealt with an exclusion order by the defendant against a greyhound trainer under section 47 of the Greyhound Industry Act 1956. Kenny J. found that the legislation infringed Article 34 of the Constitution. This decision was appealed to the Supreme Court who reversed the decision but endorsed the test.

⁶⁵ [1971] IR 217.

⁶⁶ [1963] IR 170.

⁶⁷ *Cf. State (Sheerin) v Kennedy* [1966] IR 379 and *State (O) v O’Brien* [1973] IR 50 for similar decisions on this area which will be discussed in greater detail later on in this paper under the heading of “Mandatory Orders”.

and, as such, cannot be committed to the hands of the Executive as Parliament purported to do in s. 186 of the Customs Consolidation Act, 1876.”⁶⁸

Judicial review refers to the system whereby the courts can make a declaration of invalidity against legislation which they deem to be unconstitutional. This means that the provisions in the legislation are declared unlawful and have no legal effect. There are different procedures involved concerning different types of law which are set out under Articles 26, 34 and 50 of the Irish Constitution. Under Article 26, a special provision of the Constitution, the constitutionality of a Bill is assessed prior to the President signing it into law. If the President is dubious regarding the Bill s/he has the power to refer the Bill to the Supreme Court in order to test its constitutionality. This is known as the Article 26 reference procedure and can only be made by the President to the Supreme Court. Under Article 34, any Government measure or legislation passed after the Constitution was enacted is susceptible to assessment by the High Court (and on appeal to the Supreme Court) of its constitutional validity. Where such a law, or part thereof, is found unconstitutional, it is declared null and void and has no legal effect. If only part of the law is found to be unconstitutional then it is only that part that will be deemed to lack legal effect. This can be seen as a “catch all” provision which is the true strength of the Judiciary due to its wide-ranging influence.⁶⁹ Similarly, it is this awesome judicial power that provides the basis for most of the caselaw throughout this paper. Article 50 deals with legislation and other measures which were brought into force before the 1937 Constitution was enacted. Here the Judiciary must decide on the legality of legislation which has been “carried over” into the laws of our State. This legislation must have been in force on December 29, 1937 and it must not be inconsistent with the 1937 Constitution.

It is now both widely acknowledged and accepted that the Judiciary has an important role to play in making law and in some cases even a duty. According to Casey;

“...the judicial exposition of Bunreacht na hÉireann is testimony to the way this role has been discharged. By identifying unenumerated rights, re-examining common law doctrines in the light of the Constitution and ‘unmaking’ laws by striking down

⁶⁸ [1963] IR 170, at 183.

⁶⁹ The one judgment rule (*i.e.* only one judgment may be handed down by the Court, the fact that no dissents are allowed to be published reinforces the decision) only serve to make this judicial power even more formidable.

statutory provisions as unconstitutional, the courts have transformed our understanding of the basic law.”⁷⁰

What is also evident is that the power to make the law of the state is constitutionally granted to the Oireachtas, and thus the judicial law-making process has its limits. This is evident from *McGrath v McDermott*⁷¹ which dealt with the Capital Gains Tax Act 1975. What is important to note from this case is the *ratio decidendi* of Finlay CJ;

“The function of the courts in interpreting a statute... is strictly confined to ascertaining the true meaning of each statutory provision... The courts have not got a function to add or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable... for this Court to avoid the application of the provisions of the Act of 1975 to these transactions could only constitute the invasion by the judiciary of the powers and functions of the legislature in plain breach of the constitutional separation of powers.”⁷²

Despite this viewpoint, I would agree with Casey’s comments above *i.e.* that in some instances the courts are under an obligation to step in and “make” law by tackling the tough decisions that the democratically accountable Legislature fail to tackle in fear of a public backlash, and in others it is their responsibility to strike down offending laws in order to protect individuals. This argument regarding the appropriate amount of deference (or activism) to be shown on behalf of the Judiciary will be discussed in the relevant chapters contained in Part II below.

⁷⁰ Casey, *Constitutional Law in Ireland*, 3rd ed., 2000.

⁷¹ [1988] IR 258. For a similar decision see *Maher v Attorney General* [1973] IR 140 where the Supreme Court neglected to apply the Doctrine of Severance and opted not to strike down the word “conclusive”, which would have rendered the provision constitutional, on the grounds that it was beyond their constitutional remit.

⁷² [1988] IR 258, at 276.

PART II

7) A TRADITIONALLY STRONG JUDICIARY:

“In the middle of the nineteenth century, the Supreme Court described itself as ‘equal in origin and equal in title to the legislative and executive branches of government.’ That might have been a bit of braggadocio at the time. It is a claim easily defended today.”⁷³

7.1) Judicial Theory in the Age of Enlightenment:

As a matter of contrast, it is intriguing to note the theoretical constructs of Age of Enlightenment political thinkers regarding the judiciary under the separation of powers. John Locke foresaw a tripartite division of functions, that is, he asserted three classes of power: legislative, executive and federative. James Harrington’s controversial ‘*Oceana*’ also contained a tripartite functional division: a Senate to propose laws, an Assembly to enact them and an Executive to enforce them. What is noteworthy to mention here is that a judiciary fails to feature in either man’s work as all power is divided between an executive and a legislature. This was due to the fact that debates regarding the virtues and possible flaws of the separation doctrine at the time, centred on a legislative or executive usurpation of power, there was virtually no fear of judicial hegemony.

“The Framers⁷⁴ were generally of a mind that the executive and the legislature ought to keep their hands off the courts. No concern was displayed that the courts themselves represented a threat to the other two national branches or to the people.”⁷⁵

In the words of Hamilton, the judiciary was the;

“least dangerous branch. It may truly be said to have neither force nor will, but merely judgment... The judiciary is beyond comparison the weakest of the three departments of power... it can never attack with success either of the other two.”⁷⁶

If only they could see what kind of an entity the judiciary has become today. Utilising the comments made above as a baseline it is obvious that the Judiciary has long since surpassed the limits of its own authority as contemplated by Locke, Harrington and Montesquieu. The

⁷³ Kurland, *Michigan Law Review*, Vol. 85, No. 3 (Dec., 1986), at 610 referring to comments made in the American case of *Gordon v United States* 117 US 697, 701 (1864). Despite the comments referring to the American Judiciary, I believe they are equally, if not more, applicable to our own Courts.

⁷⁴ Referring to the Founding Fathers of the American Constitution.

⁷⁵ Kurland, *Michigan Law Review*, Vol. 85, No. 3 (Dec., 1986), at 599.

⁷⁶ Hamilton, *The Federalist*, No. 78, J. Cooke ed., 1961, at 523.

most obvious reason for this is the growth of judicial review. I use the term “growth” as despite being specifically provided for in Bunreacht na hÉireann since its conception, it did not always exist in traditional separation of powers theory. In constitutions much older than our own, such as the American one, judicial review is a power that was implied after its birth. This is evident from Kurland’s observation;

“Where the alleged overreaching of one branch or another impinges on the rights of a person, association, or corporation, the judicial branch has more and more often been called on to determine whether the challenged authority is legitimate...the judiciary has developed from that ‘98-lb weakling’ into [a] muscular giant.”⁷⁷

Consequently, the implied power of judicial review has contributed to making the judiciary the powerhouse that it is today. This part of my dissertation is entitled “*A Traditionally Strong Judiciary*” as I am referring to the Irish Judiciary which can be seen as traditionally strong due to the formal adaption of judicial review in the Irish Constitution at its birth, a time when judicial review had found a firm foothold in American constitutional separation theory evidenced from the following observation:

“[The Courts have] consistently wielded a wider and wider power of judicial review. After a hesitant start in *Marbury v Madison*,⁷⁸ and a disastrous effort in *Dred Scott v Sandford*,⁷⁹ the Court has been more and more willing to fashion new constitutional rules limiting both national and state action, with less and less reliance on the terms of the Constitution, its origins, or even the Court’s own precedents.”⁸⁰

In the next section I am going to switch focus from political theory to hard fact and caselaw in order to prove the long-established strength and independence of the Irish Judiciary.

7.2) Independence of the Judiciary:

Buckley v Attorney General,⁸¹ also known as the “*Sinn Féin Funds case*,” is a decisive case which highlights the independence of the Judiciary against the Legislature. It concerned the ownership of the significant “war chest” (around £200,000) held in the name of the old Sinn Féin party before it became fragmented by political dissention. The remnants of the Sinn Féin party sought to seize these funds, along with other groups, and proceedings were initiated in the High Court to determine ownership. However, whilst the case was ongoing, the

⁷⁷ Kurland, *Michigan Law Review*, Vol. 85, No. 3 (Dec., 1986), at 606-7.

⁷⁸ 5 US 137 (1803).

⁷⁹ 60 US (19 How. 393 (1857).

⁸⁰ Kurland, *The Rise and Fall of the ‘Doctrine’ of the Separation of Powers*, *Michigan Law Review*, Vol. 85, No. 3 (Dec., 1986), at 610.

⁸¹ [1950] IR 67.

Oireachtas enacted the Sinn Féin Funds Act 1947, which purported to distribute the money evenly between survivors of the War of Independence, thus effectively ending the case. Gavan Duffy J. of the High Court was of the opinion that;

“I am not today concerned with the merits of the plaintiff’s claim, but with their right to have it tried by a judge of the High Court... I assume the Sinn Féin Funds Act, 1947... to have been passed by the Legislature for excellent reasons... but I cannot lose sight of the constitutional separation of powers. This court cannot, in deference to an Act of the Oireachtas, abdicate its proper jurisdiction to administer justice in a cause whereof it is duly seized... Under the Constitution no other organ of State is competent to determine how the High Court of Justice shall dispose of the issues raised by the pleadings in this action.”⁸²

The essence of the legislation was to remove judicial determination from the dispute, thus allowing the Oireachtas to determine the outcome of the proceedings. Unsurprisingly, the Supreme Court affirmed this decision on appeal by ruling the act to be in breach of the Separation of Powers, as once a case has been initiated in the Courts, only said Courts can determine its outcome.⁸³ It “was an unwarranted interference by the Oireachtas in a purely judicial domain.” This judgment sends a message to the Oireachtas that the courts cannot be told how to perform their duties and that the actual judicial process is inviolable.

7.3) Crotty v An Taoiseach:⁸⁴

Apart from Articles 28.2 & 29.4.1, the Irish Constitution is silent as regards the Executive, which means that its powers are ill-defined as opposed to those of the Judiciary. This has contributed to creating a traditionally “judicial-o-centric” doctrine of separation in Ireland whereby the Judiciary is very powerful. The *Boland* case formulated the “clear disregard” test and it received its first major application during the seminal case of *Crotty v An Taoiseach*,⁸⁵ which can be seen as the apex of judicial activism in Ireland. The test mandates that judges can only interfere in the affairs of the Executive when they think there has been a “clear and flagrant disregard” of its executive powers under the Constitution. Despite, the apparent limiting nature of the manner in which the test is phrased, it has been utilised on numerous

⁸² [1950] IR 67, at 69.

⁸³ However, in the case of *National Provincial Building Society v UK* [1997] 25 EHRR 127, the ECtHR cast a shadow of doubt over the *Buckley* decision by stating that the right of access to the court, guaranteed by Art, 6(1) of the European Convention “cannot be interpreted to prevent any interference by the authorities with pending legal proceedings to which they are a party, at 181 . They found no breach of Article 6 here however.

⁸⁴ [1987] IR 713.

⁸⁵ [1987] IR 713.

occasions to demonstrate the power of the Judiciary. In 1986, the move towards a Single European Market was accelerated by the signing of the Single European Act,⁸⁶ Title III of which provided for co-operation between EU states in the realm of foreign policy. The plaintiff sought to restrain the Government from ratifying the SEA on the grounds that it was an unconstitutional abdication of state sovereignty. In light of this application Barrington J. granted an interlocutory injunction in his home on Christmas Eve 1986 to prevent ratification. Despite a divisional High Court upholding the validity of the SEA the Supreme Court held that ratification of Title III was unconstitutional as the State was abdicating its constitutionally defined power to conduct foreign affairs under Article 29.4. They held that a referendum was necessary to authorise the State to sign the SEA as otherwise the State ceded sovereignty to foreign nations without the public's consent. Walsh J. described the position of the majority of the Supreme Court;

“[The Government and the Oireachtas are] both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution... In the last analysis it is the people themselves who are the guardians of the Constitution. In my view, the assent of the people is a necessary prerequisite to the ratification of so much of the Single European Act as consists of Title III thereof.”⁸⁷

Henchy J. also gives us an insight into the mind of the deciding majority when he says;

“... in the conduct of the State's external relations, as in the exercise of the executive power in other aspects, the Government is not immune from judicial control if it acts in a manner, or for a purpose which is inconsistent with the Constitution. Such control is necessary to give effect to the limiting words ‘subject to the provisions of this Constitution.’”⁸⁸

Thus, we can see that the Judiciary is not afraid to step in to interfere in the affairs of the Government when it deems the Government to have perpetrated an egregious or “clear disregard” of the Constitution.

⁸⁶ Hereinafter referred to as the SEA.

⁸⁷ [1987] IR 713, at 782-784.

⁸⁸ [1987] IR 713, at 786.

7.4) Judicial-o-centric:

*Re Haughey*⁸⁹ dealt with the judicial power in criminal⁹⁰ matters *i.e.* Article 34.1 and not Article 37.1 of the Irish Constitution. Here the Oireachtas passed the relevant Public Accounts Committee legislation which provided that if a person refused to answer a question the Committee would certify the person as having committed an offence, and send them to the High Court, thus treating them “in like manner” as the High Court. Mr. Haughey refused to answer questions and was certified and forwarded to the High Court. On appeal to the Supreme Court they found that it was not possible to be in contempt of the Public Accounts Committee as it was not a court and that the State’s national courts would not be used as appendages to enforce purported decisions of tribunals. Ó’Dálaigh CJ. summarised the position as follows; “The Constitution... reserves exclusively to the Courts the power to try persons on criminal charges... Trial, conviction and sentence are indivisible parts of the exercise of this power...”⁹¹ *State (Sheerin) v Kennedy*⁹² was similar to *Re Haughey* above, but it dealt with the imposition of further punishment once convicted. The issue was whether section 7 of the Prevention of Crime Act 1908, as adapted, authorised the Minister for Justice to transfer irredeemable juvenile offenders from a Borstal institution to prison, “with or without hard labour.” Here, the power given to the Minister for Justice to add “hard labour” to the sentence of a juvenile convict amounted to a breach of the Judiciary’s exclusive powers to determine punishment for offenders. Similarly, in *State (O) v O’Brien*⁹³ the High Court ruled that a provision allowing the Minister for Justice to detain a juvenile offender “...until the pleasure of the Government be made known concerning him,” breached the constitutionally mandated separation of powers, as the Minister was not entitled to determine a convicted person’s sentence and that the sentence of a prisoner must have a definite duration.⁹⁴

⁸⁹ [1971] IR 217.

⁹⁰ A “criminal” matter is not defined in the Irish Constitution but the definition utilised is that espoused by the Supreme Court in *Goodman International (No.1)* [1992] IR 542 *i.e.* it attracts a punitive sanction which is not merely fiscal, it attracts criminal procedures and it is associated with determination of crime against the State or Public.

⁹¹ [1971] IR 217, at 250.

⁹² [1966] IR 379.

⁹³ [1973] IR 50.

⁹⁴ *Cf. Re Gallagher* [1991] IR 31 where the Supreme Court ruled that an accused person could be detained at the pleasure of the Government, provided he had been found guilty but insane as such a verdict technically amounts to an acquittal, hence, there is no “punishment”.

*Re Solicitor's Act 1954*⁹⁵ dealt with the power of the Judiciary in civil matters under Article 37.1 of the Constitution. Here, two solicitors who were found guilty of professional misconduct had their names struck off the roll of solicitors by order of the Law Society acting under the Act of 1954, which purported to transfer this power from the Chief Justice to the Society. The two solicitors in question argued that the Act unconstitutionally conferred a non-limited judicial function on the Law Society. The Supreme Court held that the powers granted upon the Disciplinary Committee of the Law Society were punitive, thus judicial in nature. The power to strike a solicitor off a roll was a sanction whose consequences could be more severe than a term of imprisonment. The court was of the opinion that historically the practice of striking off solicitors had always been reserved to judges and that the powers involved were far-reaching, not limited. Thus they were seen as an administration of justice. In the words of Kingsmill Moore J.;

“if the exercise of the assigned powers and functions is calculated to affect in the most profound and far-reaching way, the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot be properly described as limited.”⁹⁶

The cases listed above provide us with seven concrete examples, from 1950 and culminating in 1987, of the Irish Judiciary deciding to take an activist approach and involving themselves in the affairs of other organs of government where they deem it appropriate to do so. Thus, it is established that the Irish Judiciary was once seen as a traditionally strong entity. Now I will move on to prove how the judiciary has moved away from this activist role and mutated into an increasingly deferential entity.

⁹⁵ [1960] IR 239.

⁹⁶[1960] IR 239, at 264.

8) DEFERENCE, AN INCREASING IRISH TREND:

8.1) Introduction:

The cases listed above represent instances where the Irish Judiciary decided to involve themselves in the affairs of the Executive. However, I am of the opinion that recently there has been an increasing trend towards a dilution of the judicial branch or a clear reluctance or reticence on behalf of the Courts to intervene in the functions of other State institutions and in order to prove this I am going to highlight a number of examples from Irish caselaw. There exists a strong tendency on behalf of our Judiciary to defer on politically sensitive matters within the remit of the Executive, such as international relations. The first example is *Horgan v An Taoiseach*.⁹⁷ In this case, the plaintiff, who was retired military personnel, contended that the use of Shannon Airport by US planes, which was allowed by the Dáil, amounted to participation in war and as such was in breach of Articles 29.1 - 3 and Article 28.3 of the Constitution. The defendants responded by arguing that Article 29 was not justiciable as participating in a war has no legal definition, and thus, is a political question.⁹⁸ Kearns J. was of the opinion that Articles 29.1 – 3 were statements of principle that were not binding and that Articles 5, 6, 28 & 29 should be interpreted harmoniously. The court concluded that neutrality was simply a policy which was not constitutionally mandated and, as such, it would have been beyond their powers to interfere. Perhaps the *ratio decidendi* of the case can be found in Kearns J.'s comments:

“In even an extreme case, the court would be still obliged to extend a considerable margin of appreciation to those organs of State when exercising their functions and responsibilities under Article 28. The plaintiff is effectively asking that the Dáil be told by this court to resolve afresh on a matter on which it has already resolved on the presumed basis that the court is better suited than the Dáil for deciding what constitutes ‘participation’ in a war. The court cannot without proof of quite exceptional circumstances, accept this contention and accordingly, the plaintiff’s claim under Article 28 of the Constitution also fails.”⁹⁹

⁹⁷ [2003] 2 IR 468.

⁹⁸ The “political question doctrine” is a US theory derived from the case of *Baker v Carr* 369 US 186 (1962) which mandates that some acts are so political in nature that it would be inappropriate for the Judiciary to intervene. It is submitted that this train of thought is not universally accepted. Brian Foley makes numerous valid points in “*Diceyan Ghosts: Deference, Rights Policy and Spatial Distinctions*,” (2006) DULJ 77, but the lasting impression he conveys is that he objects to what he terms “spatial defence” *i.e.* the idea that policy matters are for the legislature and not part of the court’s provenance.

⁹⁹ [2003] 2 IR 468, at 516.

In short, the Court did not want to interfere as there was an absence of “exceptional circumstances” and no evidence of an egregious disregard of the Constitution.

8.2) A Conservative Judiciary:

*Dubsky v Government of Ireland*¹⁰⁰ was a case similar to *Horgan* in that it claimed that the Government’s decision to allow US military aircraft involved with the Afghanistan war to land and refuel in the state without the assent of the Dáil, was unconstitutional and in breach of Articles 28 & 29 of the Constitution. The court followed the deferential precedent of *Horgan* by arguing the political question doctrine, (*i.e.* neutrality was a question of policy on which the Constitution is silent) thereby adopting a restrained approach to the actions of the Executive in respect of war.¹⁰¹ As Doyle notes; “This judgment again marks out a high level of judicial deference to the Government’s role in foreign affairs. In light of this decision, the Supreme Court’s conclusion in *Crotty* appears exceptional.”¹⁰²

*Brennan v Minister for Justice*¹⁰³ is another example of the Judiciary failing to intrude upon the dealings of the Executive. The case questioned whether the Minister for Justice has the “judicial” power to commute criminal sentences? Article 13.6 of the Irish Constitution could confer the right to commute or remit sentences on the Government whilst section 23 of the Criminal Justice Act 1951 provides that the Government can delegate the power to commute or remit a sentence to the Minister for Justice.¹⁰⁴ This led Mr. Brennan, a District Court Judge, to allege that the Minister was operating a “parallel system of justice” by pardoning criminals he had previously convicted. Geoghegan J. defined the court’s reasoning by commenting;

“...the power of remission of fines was not properly exercised by the Minister in any of the four instant cases and that there is clear evidence to indicate that the system is *ultra vires* both the Act of 1951 and the Constitution... I am quite satisfied that

¹⁰⁰ [2005] IEHC 442.

¹⁰¹ Perhaps the most recent case dealing with the political question doctrine can be found in *Roche v Roche* [2009] IESC 82 15th December, which deals with the justiciability of determining when life begins. This case is discussed in greater detail later on in this paper.

¹⁰² Doyle, *Casebook on Irish Constitutional Law*, 2008 at [12-26].

¹⁰³ [1995] 1 IR 612.

¹⁰⁴ The president solely retains the formal right of pardon.

Article 13.6 of the Constitution was never intended to create a parallel or alternative system of justice to that provided for by Article 34.”¹⁰⁵

Despite the court finding that this was exactly what was happening (*i.e.* the Minister was acting under “a parallel system of justice”) a declaration of unconstitutionality was never made so, bizarrely, the legislation still exists but is never used. Remarkably, it is evident that even in some cases where the Judiciary find fault with the powers attributed to members of the executive, they are so deferential that they fail to make an official declaration of unconstitutionality. For this reason, I believe that this case provides one of the strongest insights into the modern day, reverent mind of our Judiciary.

*Kavanagh v Government of Ireland*¹⁰⁶ dealt with the judicial review of maintenance of the Special Criminal Court pursuant to Part V of the Offences against the State (Amendment) Act 1939. The issue in question was whether the trial of an applicant in the Special Criminal Court was constitutional. Under Article 38 of the Constitution, the Government is permitted to establish special courts when it deems ordinary courts to be inadequate. The court adopted a deferential approach by deeming Part V essentially a political question pursuant to Article 35 and, as such, was beyond the remit of the Supreme Court to alter. Keane J. did however add a *caveat* to the judgment when he proclaimed;

“A decision of this nature taken by the Government cannot be regarded as forever beyond the reach of judicial control... Save in the exceptional circumstances of war and national emergency ... the courts at all times retain their jurisdiction to intervene so as to ensure that the exercise of these drastic powers to abridge the citizen’s rights is not abused by the arm of government to which they have been entrusted.”¹⁰⁷

These are strong words and are reminiscent of the traditional “judicial-o-centric” Irish doctrine, alas strong words become hollow and empty unless action is taken on them, and it seems that little action has been taken since Judicial activism peaked with the *Crotty* decision. A point reinforced by the case of *McMenamin v Ireland*,¹⁰⁸ where a District Court Judge challenged pension arrangements as being unfair and inequitable as they were being treated considerably different to other types of judges. In holding that the inequality in question was unjust, but more importantly, not unconstitutional, Hamilton CJ. enunciated an admonitory decision;

¹⁰⁵ [1995] 1 IR 612, at 627

¹⁰⁶ [1996] 1 IR 321.

¹⁰⁷ [1996] 1 IR 321, at 365-366.

¹⁰⁸ [1996] 3 IR 100.

“I do not propose to make a declaration giving effect to my views because, having regard to the respect which the separate organs of government, the legislature, the Government and the judiciary have traditionally shown to each other, I am satisfied that once the Government is made aware of the situation with regard to this constitutional injustice, it will take the necessary steps to have the matter remedied in accordance with law and in accordance with its constitutional obligations.”¹⁰⁹

Yet another example of the deference associated with the Irish Judiciary of today, whereby rather than taking any official action, the court “is satisfied” that the Executive will amend itself and will “take the necessary steps to have the matter remedied.”

*Roche v Roche*¹¹⁰ concerned whether determining when life began was a justiciable issue or not. The facts of the case are as follows: the appellant and her husband underwent fertility treatment, throughout which the defendant signed a document entitled, a "Husband's Consent." The effect of this document was that he acknowledged that he was the husband of the plaintiff and consented to the fertilisation of the plaintiff's eggs and the implantation of three embryos. Eventually, marital difficulties arose and the plaintiff sought to have three frozen embryos implanted in her uterus, which her husband objected to. Thus, the issue arose as to whether the constitutional protection afforded to the life of the unborn, as provided in Article 40.3.3 of the Constitution, extended to three fertilised embryos which had been frozen and stored in a clinic. The problem here was that if the Court found in favour of the husband, then the “unborn” embryos would never be used, which could possibly be regarded as murder. The Supreme Court dismissed the appeal on constitutional law grounds. Murray CJ. delivered the opinion of the court stating that a linguistic and caselaw based approach lead harmoniously to the same conclusion that the meaning of "unborn" under Article 40.3.3 was “the foetus *en ventre sa mere*,” *i.e.* the embryo had to be implanted in the womb of the mother. As the embryo undergoing cryogenic preservation was not so implanted it was incapable of impinging on the right to life of the mother. Murray CJ.'s *ratio* is intriguing as it appears that he is almost adopting a political question approach.¹¹¹ He formed the opinion that the courts lacked the objective criteria to decide the question of when life begun, as a justiciable issue *i.e.* it was not a justiciable issue for the Court to decide that the frozen

¹⁰⁹ [1996] 3 IR 100, at 136.

¹¹⁰ [2009] IESC 82 15th December. This case affirmed the decision in *R(M) v R(T) & Others* [2006] IEHC 359 (15 November 2006), which also dealt with the protection of embryos.

¹¹¹ Despite concerning very different facts, the case provides a very recent follow up to *Horgan* and *Dubsky* as it deals with the Political Question Doctrine.

embryos constituted the life of the unborn within the meaning of Article 40.3.3. Fennelly J. makes an interesting *obiter* in this case when he mentions that it was disturbing, that four years after the publication of the Report of the Commission on Assisted Human Reproduction, no legislative proposal was ever formulated. These comments become even more intriguing when compared to Hamilton CJ.'s aforementioned comments, in *McMenamin* above, where he expressed an unquestioning belief in the Government to remedy injustices when they are brought to their attention (“...I am satisfied that once the Government is made aware of the situation with regard to this constitutional injustice, it will take the necessary steps to have the matter remedied...”). Perhaps this belief stems from the presumption of constitutionality *i.e.* it is the presumption itself which contains the deference as they assume the Oireachtas will alter the offending legislation once they have been made aware of it. Regardless of where it stems from, on the basis of Fennelly J.'s *obiter* in *Roche*, it would appear that this trust and respect may have been misplaced.

8.3) The Right to Privacy:

McGee v Attorney General,¹¹² can be seen as a high water mark of judicial activism as it provides an excellent example of our Judiciary adopting an activist role as a majority¹¹³ of the Supreme Court identified the unenumerated right of marital privacy. Mrs. McGee was a woman who was married with four children and was advised against further pregnancy by her doctor. Contrary to this, she attempted to import spermicidal jelly which was seized by customs acting under the authority section 42 of the Customs Consolidation Act 1876.¹¹⁴ The plaintiff then challenged s. 17 of the Act of 1935 as being unconstitutional. The claim failed in the High Court but the Supreme Court held that section 17(3) did not survive the enactment of the constitution. Furthermore, Article 40.3.1° guaranteed a right of privacy in marital relations, which enveloped the decision to use contraceptives, a right which was violated by section 17(3). *Norris v Attorney General*¹¹⁵ can be seen as a follow up to *McGee*, where the plaintiff sought judicial acknowledgment that certain 19th century statutes which penalised homosexual conduct between consenting male adults were unconstitutional. This was based on the argument that the right of privacy inherent in the Constitution, established

¹¹² [1974] IR 284.

¹¹³ 4 – 1 majority, Walsh, Budd, Henchy and Griffin JJ.; FitzGerald CJ dissenting.

¹¹⁴ As amended by section 17(3) of the Criminal Law Amendment Act 1935, which provides that contraceptives be included in the table of prohibited goods in s.42 of the Act of 1876..

¹¹⁵ [1984] IR 36.

by *McGee*,¹¹⁶ meant there was a limit on the State's power to interfere with personal conduct which had no impact on the protection of public order or the common good. The Supreme Court appears to have accepted that the right to privacy is guaranteed, and the majority judgment here does not deny its existence. However, that does not mean that it can always be applied, it must be weighed against the ill-effects on society as a whole which is the approach the court adopted here. Based on this argument, the Supreme Court disallowed the appeal holding;

“That, having regard to the Christian nature of the State, the immorality of the deliberate practice of homosexuality, the damage that such practice causes to the health of citizens and the potential harm to the institution of marriage, there was no inconsistency between the terms of any of the impugned sections and the provisions of the Constitution and that, therefore, the right to privacy claimed by the plaintiff could not prevail against the sanctions imposed by those sections.”¹¹⁷

In coming to this conclusion the Court stated that the preamble indicated an acceptance of Christian values. This was in conflict with the conclusion that in adopting the Constitution “the people rendered inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful.”¹¹⁸ They continued to mention that the State was entitled to discourage conduct which it deemed to be “morally wrong and harmful to a way of life and to values which the State wishes to protect.”¹¹⁹ Moreover, the Court referenced the fact that male homosexuality increased the occurrence of venereal disease and was injurious to the institution of marriage which the State pledged to protect under Article 41.3.1° of the Constitution. Finally O’Higgins CJ., whilst referring specifically to the privacy issue, made the valid point that a right to privacy could never be absolute and that many acts done in private are condemned by law *e.g.* incest, suicide and mercy killing. Thus, *Norris* can be seen as a case of its time exemplifying excessive deference to a Victorian Parliament which established these out-of-date, by modern day standards, notions towards homosexuality. It constricted the right to privacy which was

¹¹⁶ *Griswold v Connecticut* (1965) 381 US 479 is the first example of the right to privacy being recognised in the US. Here, the Supreme Court held that a statute denying married person access to contraceptives invalid, a decision similar to *McGee*, only nine years earlier. This decision was then significantly expanded in *Roe v Wade* (1973) 410 US where numerous statutory restrictions on abortion were eliminated.

¹¹⁷ [1984] IR 36, at 37. Henchy and McCarthy JJ. dissenting. The sanctions being referred to were ss. 61 & 62 of the Offences against the Person Act 1861 and s. 11 of the Criminal Law Amendment Act 1885 which provide the relevant sentences for committing or attempting to commit the act of buggery, indecent assault or an act of gross indecency with another male person.

¹¹⁸ [1984] IR 36, at 64.

¹¹⁹ *Ibid.*

established in the activist case of *McGee* and marked a return to its conservative, deferential approach to such issues.¹²⁰

8.4) Conclusion:

The cases listed above supply eight examples of the judiciary acting more deferentially than previously as, excluding *Norris*, the cases span a time period of 1995 to 2009. When compared with the caselaw in the preceding chapter it becomes readily apparent that the Irish Judiciary is exemplifying greater levels of deference than they used to. In the majority of the cases above, the courts have utilised the political question doctrine as a means of vilifying this newly acquired deferential stance as it is a perfect tool for avoiding issues involving tough decisions, which will have major implications for public policy. Deference tends to rear its ugly head most often when the courts are faced with these potentially, public policy changing issues as they attempt to shirk their responsibility to decide such matters. I am of the opinion that, *in general*, the Irish Judiciary should curtail this new found deference and revert back to the traditionally stringent watchdog that they used to be in order to preserve the intentions of Bunreacht na hÉireann's drafters. They believed that the tripartite separation of powers was the best form of government for our country and I am of the opinion that our country has not mutated enough to validate this deference. Not only this, but if they continue down this reverent road, numerous minorities and less popular social groups who lack efficient democratic representation due to small numbers, will once again be overlooked when socio-economic policy is being formulated. Granted, that in most instances, the fault lies with the Oireachtas for failing to promulgate legislation to protect these groups in the first place. Permit me to pose quite a cynical question here in an attempt to understand their inaction; can we really expect more from our democratically accountable lawmakers? This is by no means acceptable, but nonetheless rational, albeit in a warped sense. However, our judiciary have no such excuse, however weak, to legitimise their lack of action. Simply put, I believe it is their constitutionally mandated duty to regain their activist approach in order to protect these groups, who in many cases are incapable of protecting themselves.

However, I did say *in general* and I concede that circumstances exist where the judiciary are correct to exemplify deference. Thus, the appropriate level of reverence to be shown depends

¹²⁰ It is submitted that the Irish Judiciary have made some headway regarding homosexuality by recognising the legitimacy of same-sex marriages in the very recent case of *Zappone and Gilligan v Revenue Commissioners* [2006] IEHC 404.

on numerous factors and I will now move on to examine specific areas and assess whether the Judiciary are demonstrating the correct levels of deference to other organs of government.¹²¹

¹²¹ Some readers of this paper may point out that this chapter is substantially shorter than the one preceding it for an advocate of the theory that the judiciary are becoming increasingly deferential. I will say to them, that the remainder of this paper is devoted to highlighting specific areas where deference abounds and they will be discussed in greater detail there, than is permissible by this chapter.

9) LEGISLATIVE AMENABILITY & DELEGATED LEGISLATION

9.1) Amenability to the Courts - Justiciability:

There is much debate regarding the ability of the Judiciary to interfere in the affairs of the Legislature, and presuming they are able to, to what extent is the Legislature answerable, or amenable, to them. Throughout the remainder of this chapter I will critically assess the case law in order to find out when the courts will interfere and what lengths they will go to protect the separation of powers. The case of *AG v Hamilton (No. 2)*¹²² dealt with cabinet confidentiality and the non-amenable clause set out under Articles 15.12 & 15.13 of the Irish Constitution;

15.12: “All official reports and publications of the Oireachtas or of either house thereof and utterances made in either house wherever published shall be privileged.”

15.13: “The members of each House of the Oireachtas shall, except in the case of treason as defined in this Constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of either house, and shall not, in respect of any utterance in either house, be amenable to any court or any authority other than the house itself.”

The Attorney General sought to review a ruling of the Beef Tribunal which led to the question: whether the court had the power to compel a member of the Oireachtas to reveal their sources in light of Article 15.13? Geoghegan J. in the High Court was of the opinion that they could claim privilege through Article 15.13, but that privilege would only extend to utterances made during the legislative process. The case was appealed to the Supreme Court who showed deference to the Legislature by deciding that TD's¹²³ could not be compelled to reveal their sources.¹²⁴ The case of *O'Malley v An Ceann Comhairle*¹²⁵ was similar and dealt with whether judicial review for the internal affairs of the Houses of Oireachtas existed. The applicant, a former TD, wanted to ask a minister a question but was refused by the Ceann Comhairle. He later appealed against the decision of the High Court which refused him permission to seek judicial review of the Ceann Comhairle's decision. The Supreme Court dismissed his appeal holding that such decisions could not be amenable to judicial review based upon an interpretation of Article 15.10 of the Irish Constitution. According to

¹²² [1993] 3 IR 227.

¹²³ Or Teachta Dála which is the Irish translation for “Deputy to the Dáil” or “Assembly Delegate.”

¹²⁴ It is worth mentioning that the Supreme Court added a *caveat* to its decision here by mentioning that this non-amenable privilege could be waived outside the house, in, say a, libellous statement.

¹²⁵ [1997] 1 IR 427.

O’Flaherty J.;

“It would seem to be inappropriate for the court to intervene except in some very extreme circumstances which are impossible to envisage at the moment. But further, it involves to such a degree the operation of the internal machinery of debate in the house as to remain within the competence of Dáil Éireann to deal with exclusively, having regard to Article 15.10 of the Constitution.”¹²⁶

In the more recent case of *Ahern v Judge Mahon*,¹²⁷ the courts once again adopted a deferential approach. The issue was whether the Mahon Tribunal could investigate the former Taoiseach regarding inconsistencies in his finances. Mr Ahern argued that he was not “amenable” under Art 15.13 *i.e.* he was exercising a function under parliamentary privilege. Kelly J. agreed with this contention and instead he let a court of public opinion decide. The comments made by O’Flaherty J. in *O’Malley* above are steeped in deference toward the Legislature which emphasizes the respect the Judiciary attaches to comments made in Parliament and after reading them in conjunction with the more recent decision in *Ahern* one would wonder if the courts ever interfere in their internal workings.

However, the *Maguire v Ardagh* case¹²⁸ represents such an instance where the Judiciary suspended the respect it normally shows toward the Oireachtas and interfered in its affairs, by holding that they enjoy no inherent power to conduct inquiries. The case involved an inquiry into the shooting of John Carthy in Abbeylara, which compelled Gardai to attend. The question arose as to whether an Oireachtas sub-committee enjoyed the inherent power to conduct an inquiry that could lead to a finding of unlawful killing against people who were not members of either house *i.e.* did the parliamentary inquiry structure reflect the pre-1922 Westminster model? Perhaps the more accurate question is whether this system was intended to confer like powers on the Oireachtas? The Supreme Court rejected the Westminster argument holding that the Irish parliament was a different entity whose powers did not extend to making findings of fact concerning individuals who were not members of the Oireachtas. Thus, the decision to hold the inquiry was *ultra vires* as once they began dealing with non-members, the doctrine of justiciability kicks in.¹²⁹ This point was reinforced by the *dicta* of the judges involved. For example, McGuinness J. commented that the Oireachtas had the

¹²⁶ [1997] 1 IR 427, at 431.

¹²⁷ [2008] IEHC 119.

¹²⁸ [2002] 1 IR 385.

¹²⁹ *Cf. Re Haughey* [1971] IR 217, which can be seen as the precedent for the rule that the courts can subject the Oireachtas to review as to non members, such as the result in *Maguire v Ardagh*.

power to enquire, not to make adverse findings against non-members, whilst all actions impinging on non-members were justiciable, whilst Geoghan J. stated that non-justiciability stopped at a point when dealing with non-members.¹³⁰

*Howlin v Morris*¹³¹ represents another example of judicial intervention where they have deemed that the Oireachtas is amenable to them. Here, a TD received confidential info by phone as to alleged malfeasance of a Garda which was relevant to the Morris Tribunal. The tribunal wanted to discover the identity of the informant, and to this end the applicant TD's papers were sought for discovery by the Tribunal, including his telephone bills. In response the Dáil sought to invoke the privilege pursuant to Article 15.10, 15.12 & 15.13 of the Irish Constitution.¹³² The High Court held that documentary records of telephone conversations between members of the Oireachtas and the public constituted private papers of members pursuant to Art 15.10, thus the privilege was held to be absolute and the discovery order was quashed. On appeal to SC however, the order for discovery was restored¹³³ based on the fact that they could not plead the privilege as neither House had made rules as to these types of papers and they needed to formally enact such rules.

9.2) Deference & Delegated Legislation:

The non-delegation doctrine, the idea that the legislature of a state should not be permitted to dilute its exclusive, constitutionally enshrined right to determine the laws of that state, can be traced back to Madison's separation of powers idea which I have explained above.¹³⁴ In light of this idea, if the Legislature was allowed to delegate some of its powers to another organ, or an institution operating outside the balanced system, then this could upset the equilibrium and undermine the separation of powers doctrine completely. Proponents of a more meddlesome judiciary put forward reasons such as these in an attempt to persuade the Judiciary to refrain from being deferential and, instead, to become more active and prevent the Legislature diluting its power. Despite this however, it has been recognised both in Ireland, and in many

¹³⁰ [2002] 1 IR 385.

¹³¹ [2006] 2 IR 321.

¹³² These are the main "cabinet confidentiality" provisions in the Irish Constitution which mandate that "[e]ach House... shall have power to ensure freedom of debate [and to] protect its official documents and private papers of its members... against any person... interfering with [them]." (Article 15.10). Article 15.12 goes on to state that "All official reports and publications of the Oireachtas or of either house thereof and utterances made in either house wherever published shall be privileged."

¹³³ Murray CJ. Geoghan, Denham, Hardiman and McGuinness JJ all allowed appeal for restoration of order of discovery.

¹³⁴ Cf. Chapter 5: "*A History of Trias Politica.*"

common law jurisdictions, that there is a real need to delegate rule-making power to the executive, and other subordinate institutions, as the Oireachtas is finding it increasingly difficult to cope with promulgating legislation which is becoming “progressively more complex over the last two centuries”¹³⁵. It simply does not have the man-power. As Carolan notes:

“The Irish courts, like their common law counterparts have noted how ‘the giving of powers to... a subordinate body... has been a feature of legislation for many years’ accepting that this ‘practice has obvious attractions in view of the complex, intricate and ever changing situations which confront both the Legislature and Executive in a modern State’... Delegated legislation... is thus grudgingly regarded as a ‘necessary evil’.”¹³⁶

An example which highlights how protective the judiciary are over the Oireachtas’ constitutionally enshrined right to legislate occurs in *Maher v. Attorney General*.¹³⁷ Here, the Supreme Court had to consider the constitutionality of a provision which stated that the results of a blood test taken from a person alleged to be driving above the permitted level of alcohol intake would be “conclusive” evidence of the driver’s guilt. The inclusion of the word “conclusive” meant that such evidence could not be challenged in a court of law and as such was unconstitutional. The Court refused to interfere by reading the legislation as if the offending word was not present, which would have cured the unconstitutionality, as it felt that this would be creating legislation, which was beyond their power. They can only interpret law, not write it. The comments of O’Higgins CJ. in *Norris v Attorney General*¹³⁸ provide a fine example of the Judiciary’s stance on this area;

“It may be regarded as emphasising the obvious but, nevertheless, I think it proper to remind the plaintiff and others interested in these proceedings that the sole and exclusive power of altering the laws of Ireland is, by the Constitution, vested in the Oireachtas. The Courts declare what the law is – it is for the Oireachtas to make changes if it so thinks proper.”¹³⁹

¹³⁵ Ryan, *Constitutional Law*, 2nd ed., 2001.

¹³⁶ Carolan, Democratic control or “High-Sounding Hocus Pocus”? A Public-Choice Analysis of the Non-Delegation Doctrine, (2007) 14(1) DULJ 111, at 2.

¹³⁷ [1973] IR 140.

¹³⁸ [1984] IR 36.

¹³⁹ [1984] IR 36, at 53.

This point was reinforced in *L v L*¹⁴⁰ where the court refused to develop the law relating to matrimonial property; as such developments were a matter for the Legislature and not the courts. Similarly, in *State (Murphy) v. Johnson*,¹⁴¹ it was established that a court does not have the requisite power to alter legislation even to correct an obvious clerical error as it was beyond their ambit. In this case, the court refused to amend legislation to correct a simple cross-referencing error based on the fact that only the Oireachtas had the power to alter legislation. The question is whether the Judiciary should apply the strict rules regarding delegation which they apply to themselves, to the Government?

Every year the Irish Government passes hundreds of laws in the form of statutory instruments, ministerial orders *etc.* with the intention of giving effect to broader laws previously passed by the Oireachtas. These statutory instruments are usually very detailed and technical in nature and as such the Oireachtas lacks both the time and the necessary expertise to enact them themselves, thus it adopts a pragmatic approach by delegating the responsibility to sections of the Executive which are more capable of implementing them accurately. The courts must now decide whether the Government is acting beyond its constitutional powers and “making law?”

9.3) Judicial Reverence: Permitting Legislative Dilution:

In the seminal *Cityview Press* case,¹⁴² the courts were forced to decide whether the Oireachtas could delegate certain powers to the defendant body AnCO, which determined the amount of funds to be collected off employers in order to train employees in a particular sector. The legislation in question was the Industrial Training Act 1967 and the plaintiff claimed that only the Oireachtas could set and impose such levies. O’Higgins C.J. in the Supreme Court outlined the following test:

“In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to “principles and policies” which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in statute and details are only

¹⁴⁰ [1992] IR 116.

¹⁴¹ [1983] IR 235.

¹⁴² *Cityview Press v An Comhairle Oiliúna* [1980] IR 381.

filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power. In this instance... there is no unauthorised delegation of legislative power.”¹⁴³

Thus, we can see that the Government can continue to make statutory instruments so long as two conditions are met:

1. The statutory instrument must adhere to the “principles and policies” test. i.e. Follow the law, rather than make new law.
2. The statutory instrument must not attempt to “change, amend or repeal” the law as set out by Parliament.¹⁴⁴

In the *Re Article 26 and the Health (Amendment)(No. 2) Bill 2004* case¹⁴⁵ the Supreme Court also upheld the delegation of power to the Minister for Health, which enabled the Minister to make regulations for the future imposition of charges relating to nursing home care, on the basis that this constituted “no more than the implementation of the principles and policies contained in the Act.”¹⁴⁶ The above cases provide us with even more instances of the Courts exemplifying deference towards another organ of government. Here, they are basing their decision on the fact that the Government is merely filling in the blanks for the Legislature and not making new law. Despite it seeming like a breach of the separation of powers the Judiciary has deemed that it is not. They do not always come to this conclusion however and it appears that a case can swing either way depending on its individual merits...

9.4) Judicial Interference: Protection of the Doctrine of Separation:

...The *Laurentiu* case¹⁴⁷ provides us with such an example. Here, the Supreme Court decided that the Minister for Justice was making new policy as opposed to merely giving effect to “principles and policies” contained in the Aliens Act 1935 when deciding upon criteria which determined whether EU nationals could be deported from the State. There were no “principles and policies” contained in the Act of 1935 and the Minister was given wide-ranging powers to create these policies himself which the court believed to be unconstitutional.¹⁴⁸ In *Mc Daid v Sheehy*,¹⁴⁹ the High Court found that legislation which

¹⁴³ *Cityview Press v. An Comhairle Oiliúna* [1980] IR 381 at 399.

¹⁴⁴ A relatively straightforward application of these principles can be found in *Healy v. Minister for Social Welfare* [1999] 1 ILRM 72.

¹⁴⁵ *Re Article 26 and the Health (Amendment)(No. 2) Bill 2004* Case [2005] I.E.S.C. 7.

¹⁴⁶ It is worth mentioning that the Bill was struck down for reasons other than those relating to delegation of legislative power.

¹⁴⁷ *Laurentiu v. Minister for Justice, Equality and Law Reform* [1999] 4 IR 26.

¹⁴⁸ The case of *Leontjava and Chang v. DPP* [2004] 1 IR 591 also dealt with the Aliens Act 1935. Here, the Supreme Court found that a statutory instrument could enjoy the same legal effect as that of an act of the

permitted the Government to exercise a “bare” power to impose taxes with no regard for any “principles or policies” contained in the parent Act was an unconstitutional delegation of power. Blayney J. felt that the power to legislate had been given to the Government when he commented that; “It is far from the case of the Government filling in only the details...”¹⁵⁰ The *East Donegal Co-op* case¹⁵¹ dealt with the Livestock Marts Act 1967 which set up a licensing scheme for Marts at the time. Section 4 of the Act gave the Minister the power to exempt from the Act’s provisions “any particular business or business of any particular class or kind.” Walsh J. of the Supreme Court held that the power conferred upon the Minister was far-reaching stating “...the provision purporting to grant power to the Minister to exempt ‘any particular business’ is invalid...”¹⁵² At this stage it is evident that the Irish Judiciary has espoused a strict view to delegated legislation. After a detailed examination of the caselaw in the forthcoming paragraph, it will also become evident that the courts tend to rule that the minister, or subordinate body in question, was acting *ultra vires* as opposed to making a judgment of unconstitutionality based on an unlawful delegation of legislative power, in contradiction with the separation of powers doctrine. So, even when the Judiciary decide to adopt a more activist role they still demonstrate deferential traits, as instead of making a declaration that the legislature was acting in breach of the separation of powers they choose, instead, to find against the minister or subordinate body on the grounds that they were acting outside their powers.

The Executive is also forbidden from changing, amending or repealing legislation which is evident from *Cooke v Walsh*.¹⁵³ Here, the Supreme Court held that the Minister for Health was acting *ultra vires* when the Minister attempted to alter legislation by issuing a statutory instrument, thereby depriving the plaintiff of free medical care to which he was entitled to under the Health Act 1970. Similarly, in *Harvey v Minister for Social Welfare*,¹⁵⁴ the Supreme Court held that the Minister for Social Welfare was also acting *ultra vires* when he attempted to reverse the plaintiff’s entitlement to certain social welfare payments by means of

Oireachtas on the grounds that the Oireachtas was entitled to incorporate legislation by reference. i.e. If the Oireachtas unequivocally states that a statutory instrument should enjoy the full force of law in the state, it is entitled to so as there is no constitutional provision forbidding it.

¹⁴⁹ [1991] 1 IR 1.

¹⁵⁰ [1991] 1 IR 1, at 9. See also *Casey v Minister for Arts* [2004] 1 IR 402 and *Bupa Ireland Ltd. v Health Insurance Authority* [2008] IESC 431 for other decisions where Ministers were found to be acting *ultra vires*.

¹⁵¹ *East Donegal Co-op Ltd. v Attorney General* [1970] IR 317.

¹⁵² *East Donegal Co-op Ltd. v Attorney General* [1970] IR 317, at 350.

¹⁵³ [1984] IR 710.

¹⁵⁴ [1990] 2 IR 232.

a statutory instrument, as that right was guaranteed by a law created by the Oireachtas.¹⁵⁵ In light of the above caselaw, it appears that on the whole, when the Government seeks to rely on delegated legislation which has the effect of making a right previously enjoyed under legislation obsolete, the Judiciary will strike it down as an unconstitutional breach. *Laurentiu v Minister for Justice, McDaid v Sheehy, The East Donegal Co-op case, Cooke v Walsh and Harvey v Minister for Social Welfare* all involved the reversal of pre-existing, or previously enjoyed, legislative rights respectively which resulted in the Judiciary finding unconstitutional delegations of legislative power.¹⁵⁶

9.5) EU Law: A Dualist Approach?

Article 29.6 of the Irish Constitution provides that “no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.” This means that Ireland has adopted a traditionally dualist approach to international law *i.e.* in order for it to take effect, it must be ratified by the Oireachtas first.¹⁵⁷ But what about the case of implementing European Union regulations and directives? EC directives require individual member states¹⁵⁸ to take steps to implement them into the MS’s national law and some EC regulations stipulate that the MS has to take certain steps for the regulation to be implemented. Thus, the question arises; can implementation by statutory instrument be justified or must the measure be passed by an Act of the Oireachtas?

“Ireland has chosen to allow the State to implement directives by means of a ministerial order or statutory instrument. Section 3 of the European Communities Act 1972 allows a Minister to implement an EU measure by means of statutory instruments... This means that measures of EU law may be transposed into national law without having been approved by Parliament.”¹⁵⁹

Similarly, Ministers are permitted to vary, alter or repeal any inconsistent piece of legislation as they see fit.¹⁶⁰ The case of *Meagher v Minister for Agriculture*¹⁶¹ dealt with these issues. Here, the Supreme Court overruled a High Court decision which found that the Minister was acting *ultra vires* when he attempted to alter part of the Petty Sessions Act 1851 when

¹⁵⁵ See also *Mulcreavy v Minister for the Environment* [2004] 1 IR 72 regarding similar issues.

¹⁵⁶ Not to mention the similar findings in cases such as *Mulcreavy v Minister for the Environment* [2004] 1 IR 72, *Casey v Minister for Arts* [2004] 1 IR 402 and *Bupa Ireland Ltd. v Health Insurance Authority* [2008] IESC 431.

¹⁵⁷ For example European Convention on Human Rights Act 2003.

¹⁵⁸ Hereinafter referred to as MS.

¹⁵⁹ Ryan, *Constitutional Law*, 2nd ed., 2008, at 67.

¹⁶⁰ See c. 3.2 of the Act of 1972.

¹⁶¹ [1994] 1 IR 329.

implementing an EC directive. The Supreme Court held that while Ireland was not obliged to implement directives by means of a statutory instrument;

“the practical reality was that statutory instruments were the only feasible way of doing so. There are so many directives that have to be implemented every year... that the prospect of implementing them all by Act of Parliament would be unthinkable. The Oireachtas would not feasibly be able to keep up with the pace of change in EU law and Ireland would quickly default in its obligation to implement directives”¹⁶²

Thus, it is evident that in most cases EU law can be implemented by means of a statutory instrument, except where the EC regulation/directive leaves open a principle or policy. Then the said policy could only be enacted in the State by way of an act of Parliament. As Keane C.J. put it in the authoritative case on the issue *Maher v Attorney General*;¹⁶³ “[unless] the choices as to policy... have... been reduced to vanishing point,” then an act of the Oireachtas will be necessary for implementation.”

9.6) Judicial Meddling – The Non-Delegation Doctrine:

As we have seen from the majority of cases mentioned in the previous section;

“The Irish Courts have, in the last twenty years, taken to espousing a particularly strict view of the powers of the Oireachtas to delegate legislation pursuant to Article 15.2.1.”¹⁶⁴

Despite the non-delegation doctrine being rejected all over the common law world,¹⁶⁵ the Irish Courts have enunciated a strict adherence to it since the 1980s. As it stands, the situation in Ireland appears to be that the Oireachtas can delegate legislative power to subordinate bodies “provided it has set out some overarching policies or principles that the delegate has to follow” and that “where an Act contains minimal or no principles or policies... the measure will more than likely be unconstitutional.”¹⁶⁶ Fennelly J.’s *obiter* in *Kennedy v. Law Society of Ireland*;¹⁶⁷ is also of relevance;

“The Oireachtas may, by law, while respecting the constitutional limits, delegate powers to be exercised for stated purposes. Any excessive exercise of the delegated

¹⁶² Ryan, *Constitutional Law*, 2nd ed., 2008, at 67.

¹⁶³ [1973] IR 140.

¹⁶⁴ Fahey, Reconsidering the Merits of the “Principles and Policies” Test – A Step Towards the Reform of Article 29.4.10 of the Irish Constitution, (2006) Vol. 24, no. 5, *Irish Law Times*, at 65.

¹⁶⁵ Examples include both Australia and America.

¹⁶⁶ Ryan, *Constitutional Law*, 2nd ed., 2008, at 65.

¹⁶⁷ [2002] 2 IR 458.

discretion will defeat the legislative intent and may tend to undermine the democratic principle and, ultimately, the rule of law itself.”¹⁶⁸

This unequivocally meddlesome approach adopted by the Irish Judiciary is somewhat undermined if you look at its application elsewhere, primarily its birthplace; the United States. There it has only been utilised twice in the last century to invalidate statutory delegations of power.¹⁶⁹ Since then, no statute has been struck down on this ground, the courts continually finding the terms of the challenged provision valid.¹⁷⁰

“Many American Commentators, therefore, view the non-delegation doctrine as a dead-letter, and it seems curious that a doctrine which now lacks practical significance in the land of its origin should be imported into Ireland in the 1980s.”¹⁷¹

Similarly, the Australian High Court has rejected the non-delegation doctrine as far back as the 1930s.¹⁷² Fahey also makes an interesting comment; “in modern times, in a system of government wherein a legislative majority is enjoyed by the government in the houses of the Oireachtas it seems an unusual act indeed on the part of the Supreme Court to adopt such a rigorous position as to Article 15.2.1 as in *Cityview Press*.”¹⁷³ So, in comparison with other common law jurisdictions such as the US and Australia, it is evident that Ireland has adopted quite a meddlesome and active role in protecting the Separation of Powers by allowing legislative delegation only in circumstances where there is no “more than a mere giving effect to the ‘principles and policies’ which are contained in the statute itself.”¹⁷⁴

9.7) Conclusion - A Necessary Evil?

Admittedly, there are some very obvious problems associated with the “principles and policies” test *i.e.* Questions arise as to what exactly a “principle” or “policy” is and at what stage does a minister stop “merely giving effect”? Casey drably commented on the issues of obscurity regarding the test when he said; “If provisions of such vagueness can pass muster it is not easy to imagine what would not.”¹⁷⁵ Despite these issues of obscurity in the *Cityview* decision, it is a very relevant and pragmatic system in helping to alleviate the administrative

¹⁶⁸ [2002] 2 IR 458, at 486.

¹⁶⁹ *Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495 and *Panama Refining Co. v. Ryan* 293 (1935) U.S. 288.

¹⁷⁰ *Cf. Amalgamated Meat Cutters v Conally* 337 (1971) F. Supp. 737, where the Judiciary utilises great ingenuity to validate delegated legislation.

¹⁷¹ Casey, *Constitutional Law in Ireland*, 3rd ed., 2000, at 227.

¹⁷² *Cf. Victorian Stevedoring and General Contracting Co. Pty Limited v. Dignan* (1931) 46 CLR 73.

¹⁷³ Fahey, Reconsidering the Merits of the “Principles and Policies” Test – A Step Towards the Reform of Article 29.4.10 of the Irish Constitution, (2006) Vol. 24, no. 5, Irish Law Times, at 65.

¹⁷⁴ *Cityview Press v An Comhairle Oiliúna* [1980] IR 381.

¹⁷⁵ Casey, *Constitutional Law in Ireland*, 3rd ed., 2000, at 223.

backlog faced by the Oireachtas, whilst used in conjunction with the ever-present judiciary acting as a watchdog. Under this supervisory role, the Judiciary realised that they must ensure that certain constitutional parameters are not transgressed and, as such, upheld the validity of the provision whilst setting out a particularly rigid test for delegated legislation.

As Denham J. pointed out;

“The power of the legislature must be protected. The power is for that body for the benefit of democratic government and may not be surrendered.”¹⁷⁶

The Supreme Court had this in mind when they adopted the “principles and policies” test in *Cityview*. Whilst acknowledging this fact, the Supreme Court also recognised that delegation of legislative power to subordinate institutions is a long standing phenomenon and is also inevitable in modern society. They conceded that certain legislation needs to be delegated in order to ensure the smooth running of the Oireachtas and to avail of expertise on more detailed provisions that they themselves were incapable of providing. The Judiciary deem this to be largely unobjectionable from an administrative efficiency viewpoint as the Oireachtas lacks the time, resources and expertise to critically examine every technical detail of modern legislation. Thus, the decision in *Cityview* can be seen as a compromise between the two viewpoints and it is for this reason that it has enduring relevance in a modern regulatory society. Carolan also recognises this necessary compromise;

“rule of law theorists have relied on the non-delegation doctrine as their response to problems posed by delegated legislation... This doctrine accepts the reality of delegation but seeks to restrain it by insisting that political discretion is exercised at a normatively legitimate level of the legislature. Administrators are bound by the specific rules set out in the parent statute, thus satisfying the rule of law requirement that public power be carried out in accordance with valid legal commands.”¹⁷⁷

Perhaps Casey sums up the principles set out in *Cityview* best when he says;

“The cases surveyed above show that this facet of the separation of powers has teeth, the Oireachtas... may delegate a power to put flesh on the bones of an Act, but anything going beyond this will be constitutionally suspect.”¹⁷⁸

In light of the above analysis I am of the opinion that this is one area where the Judiciary are right to demonstrate increased levels of deference to the Legislature by allowing them to

¹⁷⁶ *Laurentiu v. Minister for Justice, Equality and Law Reform* [1999] 4 IR 26 at 63.

¹⁷⁷ Carolan, Democratic control or “High-Sounding Hocus Pocus”? A Public-Choice Analysis of the Non-Delegation Doctrine, (2007) 14(1) *DULJ* 111.

¹⁷⁸ Casey, *Constitutional Law in Ireland*, 3rd ed., 2000, at 225.

dilute their power. In fact, I believe that the “principles and policies” test set out in *Cityview Press* is too onerous, a point emphasised by the number of cases I have outlined above where the attempted delegation was shot down. They would do well to follow the examples of the US and Australian higher courts¹⁷⁹ by curtailing the activist stance they portray when it comes to delegated legislation. By relaxing the *Cityview Press* test they would be seen to be facing up to the reality of the situation and preventing an administrative backlog, which without this deference, would almost certainly result in a much more inefficient Oireachtas, than what we have today.¹⁸⁰ Even by exemplifying the deference they show at the moment by allowing *some* delegation, and the approach they adopted to the implementation of EU law, our Judiciary are espousing a rational approach to the intricacies of current law-making and are availing of a much wider pool of experts with highly advanced subject knowledge on specific areas which the future law will refer to. This is unquestionably beneficial to, and more preferable for, society as a whole. Thus, it is my estimation that deference shown by the Judiciary toward the Oireachtas concerning delegated legislation must be regarded as a necessary evil. As the old adage reminds us; “two heads are better than one.”

¹⁷⁹ *Amalgamated Meat Cutters v Conally* 337 (1971) F. Supp. 737.

¹⁸⁰ Cf. Hanna, J. in *Pigs Marketing Board v. Donnelly* [1939] IR 413, at 421 when he said “[t]he functions of every government are now so numerous and complex that of necessity a wider sphere has been recognised for subordinate agencies...”

10) DEFERENCE AND DISTRIBUTIVE JUSTICE:

10.1) Introduction:

With Articles 40.3.1 & 2 of Bunreacht na hÉireann as their basis, the Judiciary has recognised that certain unenumerated, civil and political rights exist, such as the right to bodily integrity, privacy, travel, freedom of expression and silence¹⁸¹ and the “State has guaranteed in its laws to respect..., defend and vindicate the personal rights of the citizen from unjust attack.”¹⁸² The case of *Ryan v Attorney General*¹⁸³ acknowledged the right to bodily integrity as an unenumerated right by deciding that the water fluoridation scheme did not breach the right. This case and the European Convention on Human Rights Act 2003 provide proof of the court’s recognition and adoption of the existence of certain unenumerated rights in the Constitution. Unlike these unenumerated civil and political rights, the courts have held that there are no implied socio-economic rights except for the right to free primary education, which is the only express socio-economic right under the Irish Constitution, guaranteed by Article 42.4. The case of *O’Donoghue v Minister for Health*¹⁸⁴ provides us with a working example of this. Here, O’Hanlon J. held that the right to free education applied to all children, even to the applicant, an eleven-year-old boy who was suffering from severe physical and mental disabilities. Until he was eight, the applicant was educated and cared for at home by his mother at her own expense. After having initially been denied a place at a local special needs school for children, the applicant finally secured such a place, but it was inadequate for his needs and damages were awarded. O’Hanlon J. described the situation as follows;

“In a case like the present one it should normally be sufficient to grant declaratory relief in the expectation that the institutions of the State would respond by taking whatever action was appropriate to vindicate the constitutional rights of the successful applicant.”

While it is possible for the courts to restore a party’s legal entitlements (*i.e.* commutative justice), decisions involving the redistribution of existing wealth patterns (*i.e.* distributive justice) are not so easily dealt with by the courts and are generally left to the Dáil. This is

¹⁸¹ Which has an alternative constitutional basis under Article 38.

¹⁸² Article 40.3 of the Irish Constitution.

¹⁸³ [1965] IR 294.

¹⁸⁴ [1996] 2 IR 120.

sometimes termed a “deferential approach” based on the reverence the Courts accord to the Oireachtas in fear of invading their constitutionally enshrined domain.

10.2) Socio-economic Rights:

In certain contexts the separation of powers is observed particularly strictly. Judges are especially reluctant to rule on matters that affect the way in which the State’s financial resources are distributed. Socio-economic rights (as distinct from civil and political rights) pose a unique problem for the Irish Judiciary as the judgment of the court has the potential repercussion of pre-allocating funds for the budget created by both the Executive and the Legislature,¹⁸⁵ which would be a breach of the tripartite separation of powers. As a result, the courts adopt a deferential approach and are usually unwilling to intervene to enforce what are referred to as socio-economic rights *e.g.* the right to adequate housing, food or sustenance as opposed to civil and political rights mentioned above. “Recent attempts to imply socio-economic rights into the Constitution via Article 40.3 have been firmly rebuffed by the Supreme Court”¹⁸⁶ and it appears that the court will only enforce such a right where the actions of the Oireachtas or Government result in a “conscious and deliberate breach”¹⁸⁷ of a constitutional right. Hardiman J. is a proponent of this deferential approach regarding socio-economic rights who argues that for the courts to involve themselves in questions of policy and principle is to misapprehend the judicial function and to undermine the democratic process.¹⁸⁸ Not only this but he is also of the opinion that judicial activism results in the transfer of power from democratically accountable, elected politicians to an unelected judiciary, thus proponents of judicial activism in this area are anti-democratic and authoritarian.

The case of *O’Reilly v Limerick Corporation* provides a perfect insight into the mind of the Judiciary regarding socio-economic rights.¹⁸⁹ The case dealt with a claim by members of the travelling community who lived on unofficial sites in Limerick, to be provided with halting sites *i.e.* they sought a mandatory injunction directing the local authority to provide them with

¹⁸⁵ The State’s annual budget can be seen as a result of co-operation between both the Legislature and the Executive as the Department of Finance creates the budget which it then presents to the Dáil for examination, who will then create the relevant legislation to bring it into force.

¹⁸⁶ Kelly, Hogan and Whyte, *Constitutional Law in Ireland*, 2003, at [7.3.219].

¹⁸⁷ A term frequently referred to in *TD v Minister for Education* [2001] 4 IR 259.

¹⁸⁸ See his comments in *Sinnott v Minister for Education* [2001] 2 IR 545, at 711 and Hardiman, A., *The Role of the Supreme Court in our Democracy*, in Joe Holland ed., *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers*, (MacGill Summer School, 2004).

¹⁸⁹ [1989] ILRM 181.

sites based on a special statutory duty alleged to exist under the Housing Act 1966, and they also claimed damages for conditions in breach of their constitutional rights to be provided with a minimum standard of basic material conditions. If the court were to rule that money be spent in a particular way, how would it decide from where that money would come and who would in turn be deprived of their resources? Costello J. whilst invoking the distinction between commutative and distributive justice, encapsulates the decision of the court that the latter is exclusively the concern of the Executive, quite succinctly when he says;

“I am sure that the concept of justice found in the Constitution is that the nation's wealth should be justly distributed, but I am equally sure that a claim that this has not occurred should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts.”¹⁹⁰

It is obvious from this excerpt that if the court found in favour of the plaintiff then they would have to provide a form of housing for them as well as damages.¹⁹¹ The problem with this is that they would be deciding how to allocate State funds and essentially deciding on budgetary issues, which is a power beyond their remit.¹⁹² The question is whether this deferential inaction on behalf of the Supreme Court by allowing the Legislature to decide is appropriate or not?

*DB v Minister for Justice*¹⁹³ involved a youth who required a secure detention facility for their own welfare. The applicant sought a mandatory order from the High Court to make the respondents build a secure 24 bed, high support unit at Portrane in Dublin. The court came to the decision that it had the jurisdiction to make such orders, a decision they did not make lightly, based on the traditional respect between branches which is evident from cases such as *McMenamin v Ireland*.¹⁹⁴ The court reached this conclusion as they believed they were not deciding policy here as the Minister had previously agreed to build the unit and had reneged on his obligation until now, the Minister was not immune from such orders, and there were lives at risk. At one stage during the proceedings Kelly J. had threatened to jail the Minister for failure to co-operate with the court. The fact that the Minister had already agreed to build the unit and made ineffective attempts to fulfil these obligations can be seen as the lynchpin

¹⁹⁰ [1989] ILRM 181, at 195.

¹⁹¹ This decision was endorsed by the Supreme Court in cases such as *MhicMhathúna v Attorney General* [1995] 1 IR 484, *Sinnott v Minister for Education* [2001] 2 IR 545 and *TD v Minister for Education* [2001] 4 IR 259.

¹⁹² See also *O'Brien v Wicklow UDC ex tempore* (10 June 1994) HC where Costello J. resiled from this position later on in his career.

¹⁹³ [1999] 1 IR 29.

¹⁹⁴ [1996] 3 IR 100.

upon which the Court hung their decision to interfere. This becomes even more evident when we look at a similar case which results in the Supreme Court overturning this decision. *TD v Minister for Education*¹⁹⁵ was the second ever seven-judge sitting of the Supreme Court and can be seen as a “sequel” to the *DB* case in which the State contested the remedy sought, and not the right, in the previous case of *DB v Minister for Justice*¹⁹⁶ i.e. Kelly J. granting an injunction against the Minister which required the State to build special care units for children. On appeal to the Supreme Court, the majority held that the orders granted breached the separation of powers doctrine. Keane CJ. could see no conceivable benefit of granting orders to children who he deemed to lack the required *locus standi* as they were no longer kids, and he was of the opinion that Kelly J. had infringed the separation of powers doctrine as the courts could not dictate how the wealth of the State be distributed, stating; “a Rubicon has been crossed to undertake a role which is conferred by the Constitution on the other organs of State.”¹⁹⁷ Murphy J. in the majority was of the opinion that all personal rights under the Constitution, except for education, were civil and political and the fact that no referendum had changed this position meant there was no role for implied socio-economic rights. Murray J. explained the situation by explaining that;

“A judicial imperative is substituted for executive policy. The Judge becomes the final decision-maker. In short, he is administrator of that discrete policy. That is not a judicial function within the ambit of the Constitution.”¹⁹⁸

Despite the deferential stance outlined above, Murray J. was reminiscent of cases like *Crotty*¹⁹⁹ by hinting that the Court could intervene in rare and exceptional circumstances where there exists a “clear [or egregious] disregard” or a conscious and deliberate breach of the separation with bad faith or recklessness. Denham J., in the dissenting minority, was of the opinion that the separation of powers was not absolute and that this was one of the exceptional circumstances where the court should intervene as children’s rights had been breached. Despite opinions such as these, this represents another decision which reinforced the idea of a deferential judiciary and cast a shadow of doubt over the validity of the unenumerated rights doctrine and socio-economic rights. Nonetheless, this deference is not necessarily a bad thing as it prevents the inclusion of numerous other socio-economic rights

¹⁹⁵ [2001] 4 IR 259.

¹⁹⁶ [1999] 1 IR 29.

¹⁹⁷ [2001] 4 IR 259, at 288.

¹⁹⁸ [2001] 4 IR 259, at 335.

¹⁹⁹ *Crotty v An Taoiseach* [1987] IR 713.

(like secure detention facilities for example) in the Constitution which, if they were introduced, may be too much of a burden for the State to deal with.

10.3) Education:

Despite the court acknowledging free education as a constitutionally enshrined right they will not always get so actively involved and there are instances where they even exemplify deference when it comes to the only express socio-economic right. *Sinnott v Minister for Education*²⁰⁰ is such an instance. The importance of the case is underscored by the fact that it was the first ever seven-judge sitting of the Supreme Court, which involved a 23 year-old plaintiff who was autistic, but received no more than two years of primary education. The applicant claimed that the State had failed in its constitutional duty to provide primary education for the child and sought a mandatory injunction directing the defendants to provide free education, appropriate to his needs, for as long as he was capable of benefiting. Barr J, in the High Court deemed the constitutional provision to be an open-ended obligation and granted the mandatory injunction sought. The State appealed to the Supreme Court on a point of law, who held that the plaintiff was an adult with profound disabilities, but who was not entitled to state-funded primary education beyond the age of eighteen. The majority held that it was not appropriate to grant the mandatory orders sought, as the Constitutional right to a free primary education ended when a person ceases to be a “child.” Whilst giving his decision, Hardiman J’s *obiter dicta* provides us with some of the purest description of the respect the Judiciary has for the separation of powers which helps us to understand their deference in such cases;

“...the constitutionally mandated separation of powers is a vital constituent of the sovereign independent republican and democratic State envisaged by the Constitution... It is not a mere administrative arrangement: it is itself a high constitutional value... highly specialised services... seem quite different from the ordinary content of “primary education” either in 1937 or today... if judges were to become involved in such an enterprise, designing the details of policy in individual cases or in general, and ranking some areas of policy in priority to others, they would step beyond their appointed role... The views of aspirants to judicial office on such

²⁰⁰ [2001] 2 IR 545.

social and economic questions are not canvassed for the good reason that they are thought to be irrelevant.”²⁰¹

Also of note is Geoghegan J’s *obiter dicta* as once again he is expressing a potential power of the Judiciary to involve itself where a citizen’s constitutionally enshrined right has been flouted;

“As this matter does not have to be decided by me having regard to my judgment, I would reserve my position, but I do think that in very exceptional circumstances it may be open to a court to order allocation of funds where a constitutional right has been flouted without justification.”²⁰²

The decisions in *Sinnott v Minister for Education*²⁰³ and *TD v Minister for Education*²⁰⁴ are examples of successful State appeals against the protection of socio-economic rights. However, they cannot be regarded as unqualified rejections as in both cases “the State made important concessions, accepting the plaintiff’s claim to free primary education until the age of eighteen in *Sinnott* and accepting the plaintiffs’ rights in the *TD* case.”²⁰⁵ Thus, the current position of the Irish Judiciary appears to be that they believe they have the power to interfere by granting mandatory orders in “rare and exceptional circumstances” where there is a “clear [or egregious] disregard” of the constitutional provisions, but in practice this power is utilised rarely.

10.4) Distributive Justice – Foreign Examples:

The case of *Soobramoney v Minister for Health*²⁰⁶ is a South African Supreme Court case which replicates the Irish position perfectly, *i.e.* it represents a high level of deference. Here, the Court was very unequivocal about the large margin of discretion it would afford to the State to set budgetary priorities by saying that the court “will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities.”²⁰⁷ Like our own judiciary, they continued to add a caveat to the preceding statement by stating that if the decision taken was ‘unreasonable’ then they would interfere, a statement which is extremely reminiscent of a dissent by Denham J. in *TD*;

²⁰¹ [2001] 2 IR 545, at 702.

²⁰² [2001] 2 IR 545, at 724.

²⁰³ [2001] 2 IR 545.

²⁰⁴ [2001] 4 IR 259.

²⁰⁵ O’Connell, *From Equality before the Law to the Equal Benefit of the Law: Social and Economic Rights in the Irish Constitution*, in Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008, at 333.

²⁰⁶ 1997 (12) BCLR (CC).

²⁰⁷ 1997 (12) BCLR (CC), at 29.

“In exceptional circumstances it may be open to the court to make a mandatory order where a constitutional right has not been protected by the defendants and where there are no reasonable grounds to balance such a decision against the protection of constitutional rights.”²⁰⁸

However, if one were to examine modern caselaw from other common law jurisdictions around the world they would find numerous examples of decisions where the respective courts have found socio-economic rights to be justiciable, unlike the position of the Irish Judiciary. In the majority of these examples, the socio-economic right tends to stem from an existing constitutional provision which acts as its basis. *Olga Tellis v Bombay Municipal Corporation*²⁰⁹ is one such example. The case concerned public interest litigation by thousands of pavement dwellers from the city of Bombay who contested that they could not be evicted from their pavement dwellings without first being offered alternative lodgings. They also contended that the reason they had chosen these pavement dwellings was because of the proximity to their place of work and to evict them would result in them being deprived of their livelihood. The judgment of the Indian Supreme Court extended the right to life, guaranteed by Article 21 of the Indian Constitution, to embrace the right to livelihood, which in this context, translated into the right to be permitted to stay in the street-dwellings. The final orders in *Olga Tellis* upheld the Bombay Municipal Corporation Act, which was the legislative instrument which purported to evict the dwellers; however, this could only be done provided that alternative accommodation had been arranged. By including the condition of providing alternate accommodation, the Indian Supreme Court was essentially upholding the socio-economic right to shelter. Similarly, in *People’s Union for Civil Liberties v Union of India & Ors*,²¹⁰ the court established the right to food as a derivative of the right to life and implemented a number of procedures aimed at eliminating hunger from the country. For example, the Court permitted the release of grain stocks during times of famine, they ordered that ration shop licensees stay open and provide grain to families below the poverty line at a set price and that all persons with means of support *e.g.* the elderly, disabled, widows *etc.*, be granted an *Antodaya Anna Yozana* ration card for free grain. These are but a few of the

²⁰⁸ *TD v Minister for Education* [2001] 4 IR 259, at 306.

²⁰⁹ (1985) 3 SCC 545.

²¹⁰ Supreme Court of India, 2 May 2003.

measures implemented but “is there not a distant echo in a transmuted constitutional and intellectual context of the right to care and maintenance by the state?”²¹¹

*Pascham Banag Khet Samity v State of West Bengal*²¹² can be seen as a return to *Olga Tellis* where the Indian Supreme Court established the right to emergency medical care as a derivative of the right to life. They were of the opinion that an essential obligation can not be avoided on the basis of financial constraints. The plaintiff involved had been taken to numerous public medical institutions without successful admission due to overcrowding and a lack of technical capacity. Eventually he was admitted to a private hospital resulting in expensive treatment. The Court awarded compensation on the grounds that there had been a violation of the right to life under Article 21 of the Indian Constitution and awarded compensation. This decision was based on the fact that the right to emergency medical assistance represents a key constituent of the right to health, which is itself a central aspect of the right to life. Thus, the Indian Supreme Court sent out that message that the right to life imposed a positive burden on the state to safeguard the right to life of every person. In *Mendoza & Ors v Ministry of Public Health*,²¹³ an Ecuadorian case, the Constitutional Court found that the Ministry of Health failed in its obligation under Article 42 of the their Constitution *i.e.* they suspended a HIV treatment programme, thus failing to protect the right to health. In a decision which almost reiterates those of the Indian Supreme Court above, the Court found that despite the right to health being an autonomous right, it also forms part of the right to life.

A dissenting opinion in the Canadian case of *Gosselin v AG of Quebec*²¹⁴ results in a similar conclusion to the examples expressed above *i.e.* that social and economic rights inform the content of the right to life. Here, the right to life was the foundation upon which a right to minimum social assistance was established. Also, a distinction was drawn between different types of economic rights *i.e.* “corporate-commercial economic rights” and “economic rights fundamental to health and human survival”;²¹⁵

²¹¹ Langwallner, *Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual*, in Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008, at 264.

²¹² (1996) 4 SCC 37.

²¹³ Resn No 0749-2003-RA (28 Jan 2004).

²¹⁴ (2002) SCC 84.

²¹⁵ I have borrowed the italicised terms from Langwallner, *Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual*, in Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008.

“The instant appeal, in contrast, makes obvious why ‘those economic rights fundamental to human life or survival’ should not in fact be treated as of the same ilk as corporate-commercial economic rights. Simply put, the rights at issue here are so intimately intertwined with considerations related to one’s basic health (and hence ‘security of the persons’) – and, at the limit, even of one’s survival (and hence ‘life’) – that they can readily be accommodated under the s.7 rights of ‘life, liberty and security of the person’ without the need to constitutionalize ‘property’ rights or interests.”²¹⁶

The distinction drawn here is quite a useful one in determining when the Judiciary should be deferential as opposed to activist and *vice versa*. In my opinion the Irish Judiciary would do well to continue exemplifying deference whilst dealing with corporate-commercial economic rights as they would merely place too great a burden on the budget of the State by making them actionable. However, when dealing with economic rights fundamental to human health and survival, situations which I believe would fall within the justiciable extreme circumstances enunciated by Geoghegan J.,²¹⁷ Denham J.,²¹⁸ Kelly J.,²¹⁹ and Sachs J.²²⁰ from South Africa on different occasions, I am of the opinion that they should adopt a much more activist role as a result of the seriousness of the issues at stake. The health and survival of human beings in situations such as these far outweigh concerns regarding placing too much of a burden on State finances as opposed to corporate-commercial economic rights. An essential obligation to another person can not be avoided on the basis of financial constraints. *Ò Beoláin v Fahy*²²¹ perhaps represents a change of opinion in the Irish Judiciary as one of the staunchest members of the opposition to recognising a form of exceptionalism as it pertains to socio-economic rights, does just that. In this relatively recent case, Hardiman J. decided that the State had to provide Irish translations of documents necessary to conduct a criminal defence through Irish and that the State had to pay for it.

²¹⁶ *Gosselin v AG of Quebec* (2002) SCC 84 at 310.

²¹⁷ *FN v Minister for Education* [2001] 4 IR 259.

²¹⁸ *TD v Minister for Education* [2001] 4 IR 259.

²¹⁹ Several decisions culminating in *TD v Minister for Education* [2001] 4 IR 259.

²²⁰ Sachs, A. *The Judicial Enforcement of Socio-Economic Rights*, (2003) 56 Current Legal Problems.

²²¹ [2001] 2 IR 279.

10.5) Conclusion:

Deference in this area refers to the belief of the courts that questions of policy regarding matters of social and economic justice are matters for the Legislature or the Executive and are outside the domain of the courts. As I have previously mentioned, deference is not always a negative thing and in the case of the Irish Judiciary's failure to grant socio-economic rights in the majority of the cases mentioned above I believe it is a positive, as it means that not every socio-economic right shall be included in the Constitution of Ireland. I believe this is a positive thing because, if every socio-economic right were included expressly in the Constitution then they would result in too great a financial burden on State and greater taxes for the average citizen, which would do more harm than good, especially in an economic climate such as the one we are currently experiencing. Similarly, the court process should focus on individual issues; I do not think it is appropriate for them to determine wider policy matters as they are not democratically responsible for their decisions. The majority of the Constitution Review Group²²² was also of the opinion that socio-economic rights should not be explicitly included in Bunreacht na hÉireann based on the fact that it would distort democracy, thus;

“requiring judges to rely on their own subjective appraisal of what constituted poverty and depriving the Legislature and Executive of any power to determine the cost of implementing such rights.”

Reverence for other organs of government is tolerable in this area for reasons such as those outlined above, but I believe that the deference displayed by the Judiciary in the aforementioned caselaw is *slightly* excessive. The Supreme Court noted that there were limits to the reticence of the Courts. While the Courts generally lean against asserting socio-economic rights, they have reserved their entitlement to intervene where there has been a “conscious and deliberate” breach of a constitutional right. I would like to take this opportunity to hark back to the *obiter dictae* of Murray and Denham JJ. in *TD v Minister for Education*²²³ and that of Geoghegan J. in *Sinnott v Minister of Education*.²²⁴ All three mentioned “rare and exceptional circumstances” where they argue that socio-economic rights are justiciable and that they should be allowed to grant mandatory orders against other organs of State. Of particular note was Denham J.'s comments in *TD*;

²²² *Report of the Constitution Review Group* (Pn 2632, 1996) pp 234-6.

²²³ [2001] 4 IR 259.

²²⁴ [2001] 2 IR 545.

“It is clear from the caselaw that in rare and exceptional circumstances, to protect constitutional rights, a court may have a jurisdiction and even a duty to make a mandatory order against another branch of government. The separation of powers in the Constitution of Ireland is not absolute... the powers and duties of each organ of State extend across theoretical lines of separation and checks and balances established in the Constitution breach a rigid concept of the separation of powers...”²²⁵

Undoubtedly, this requires something in the nature of bad faith or recklessness, but nonetheless, it underlines that the Courts could, in appropriately extreme cases, uphold a socio-economic right, even if it involved trampling on the Oireachtas’ sole right to determine the distribution of state resources.

This view reflects the decisions of higher courts from countries like Canada, India and South Africa where it is evident from the caselaw that they are finding more and more that it is their duty to protect the economic rights of the individual which are fundamental to human health and survival, as opposed to corporate-commercial economic rights. It is my opinion that the socio-economic rights which are fundamental to human health and survival, as espoused in *Gosselin v AG of Quebec*²²⁶ should constitute the “rare and exceptional circumstances” Denham J. was referring to in *TD*, thus the Irish Judiciary should adopt a more activist role when dealing with these. This would be desirable as socio-economic rights are arguably more valuable and fundamental than civil and political rights; for example, why should freedom of speech be more studiously protected than the right to food or water? Also, without certain minimal socio-economic rights, it may not be possible to articulate civil and political rights, education providing a perfect example here. As Langwallner puts it;

“... the notion that we should defer as a matter of course to the legislature or executive on issues of policy or principle simpliciter and without examining the rights driven claim involved undermines our system of judicial review and constitutes a failure by the court to engage in the protection of rights of the individual.”²²⁷

Moreover, deference to the Legislature or Executive based on principle or policy matters can be seen as a strategy in its own right, or an ideological choice made by a majority of the Judiciary concerning the enforceability of socio-economic rights. Thus, I believe that while

²²⁵ [2001] 4 IR 259, at 306.

²²⁶ (2002) SCC 84.

²²⁷ Langwallner, *Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual*, in Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008, at 261.

the current level of deference in this area is tolerable, the Judiciary should involve themselves a little more in order to protect the rights of the individual provided they have been sufficiently flouted. However, I must stress that socio-economic rights should only be justiciable where there exists exceptional circumstances or where a right fundamental to human health and survival is concerned.

11) MANDATORY ORDERS:²²⁸

11.1) Introduction:

This is an area which has caused much controversy as it begs the question as to whether it is acceptable for the Oireachtas, through promulgation of legislation, to compel the Judiciary to decide a case in a particular manner. In *State (O'Rourke) v Kelly*²²⁹ the Supreme Court examined section 62(3) of the Housing Act 1966 on the basis that it was an unconstitutional invasion of the judicial power. Section 62 established that a housing authority, Dublin Corporation in this case, may recover an abode provided by it, with sub-section (3) continuing to state that "... the justice shall, in such case he is satisfied that the demand mentioned in the said subsection (1) has been duly made, issue the warrant." Thus, it was argued that the judge had been deprived of his discretion over the matter and accordingly was an intrusion by the Legislature into the affairs of the Judiciary. The Supreme Court rejected this contention as they believed it was clear that section 62(3) "did not attempt to convert the District Court Judge into a mere rubber stamp."²³⁰ O'Higgins CJ. Delivered the judgment of the court;

"... it is only when the provisions of sub-s. 1 of s. 62 have been complied with and the demand duly made to the satisfaction of the District Judge that he must issue the warrant. In other words, it is only following the establishment of specified matters that the sub-section operates. This is no different to many of the statutory provisions, which on proof of certain matters; make it mandatory on a court to make a specified order. Such legislative provisions are within the competence of the Oireachtas."²³¹

As a result of this decision, the fact that a district court judge is required by legislation to make a mandatory order is not *per se* unconstitutional. The case of *State (McEldowney) v Kelleher*²³² distinguished *O'Rourke*. The contention here was centred on the Street and House to House Collections Act 1962 which regulates public collections of money, which are illegal without a permit. Such permits are obtained by application to a local Garda Chief Superintendent, who is entitled to refuse an application if he is of the opinion that the money raised from the collections will be used for unlawful purposes. Subsection 13(4) of the Act of

²²⁸ For the purposes of this paper I only wish to highlight a number of cases relevant to judicial deference under the separation of powers. The debate regarding the utility of mandatory sentencing in our society is a complex one worthy of a paper in its own right.

²²⁹ [1983] IR 38.

²³⁰ Casey, *Constitutional Law in Ireland*, 2000, at 266.

²³¹ [1983] IR 38, at 61.

²³² [1983] IR 289.

1962 states that where an appeal is brought to the District Court against refusal by a Garda to grant a permit, then the District Court Judge must disallow the appeal if a member of the Garda Síochána, not below the rank of Inspector, stated on oath that s/he had reasonable grounds for believing that the proceeds would be used for an unlawful purpose. McEldowney had been refused a permit and his appeal to the District Court had been disallowed with the Judge stating that he had no alternative under s. 13(4). On appeal, the Supreme Court reversed the decision of the High Court holding that s. 13(4) was unconstitutional based on the fact that if evidence of a certain type was given, then the District Court Judge was obliged to disallow the appeal as all discretion to do otherwise was eliminated. Walsh J. held that the Act “[created] justiciable controversy and then purports to compel the court to decide it in a particular way upon a particular statement of opinion.”²³³ As such, the Oireachtas may not grant an appeal to the courts and then attempt to dictate that appeals outcome, thus it was in breach of the separation of powers.

11.2) O’Reilly & Judge v DPP:²³⁴

However, in *O’Reilly & Judge v DPP* it appears the courts reverted back to their original deferential stance in *O’Rourke*. The case concerned s. 46 of The Offences against the State Act 1939, which provides that where a person’s trial is pending before the Circuit Court or Central Criminal Court, the DPP may make an application to the High Court for a transfer of the trial to a special criminal court where s/he is of the opinion that the ordinary courts are, in his opinion, insufficient to guarantee the effective administration of justice. On hearing this application, “the High Court shall make the order applied for...” It was this provision that was alleged to be an unconstitutional invasion of the judicial power. Carroll J. rejected the argument on the basis that the constitutional jurisdiction of the High Court was already limited by Article 38.3 of the Irish Constitution which authorises the establishment of special criminal courts. Thus, a mandatory order which had the effect of transferring the trial did not constitute an unwarranted invasion of the High Court’s power. What is controversial here is that the conclusion that Article 38.3 operates to limit the High Court’s jurisdiction seems dubious, particularly when compared to the effect of section 48 of the Offences against The State Act, which clearly requires the High Court to “rubber stamp” the conclusions of the DPP. Article 38.3 evidently does not indicate an intention to deprive the High Court of its normal judicial function. Also, unlike *O’Rourke*, it does not mandate that the High Court be

²³³ [1983] IR 289, at 306.

²³⁴ [1984] IRLM 224.

satisfied as to the matters in the certificate, with the result that the Court is completely deprived of its discretion in the matter. It is for this reason that I believe the Court was almost inventing reasons to uphold s. 46 of the Act of 1939 as they were beginning to demonstrate the deferential stance that they would become synonymous with in the next two decades and more. As Casey mentions;

“In matters involving security, a pattern (similar to that in other countries) of judicial deference to legislative/executive judgment is plain: see in particular the Supreme Court’s judgment in *Kavanagh Government of Ireland*.”²³⁵

11.3) Recent Developments:

In the more recent case of *Osmanovic v DPP*,²³⁶ there was a challenge to the constitutionality of an alleged fixed penalty in section 89(b) of the Finance Act 1997. It was argued that this fixed penalty infringed upon the separation of powers on the grounds that it removed the discretion of a judge from the criminal process. In holding that the penalty in question was not unconstitutional, Murray CJ. had regard to the fact that it was a revenue offence which traditionally attracted different types of penalties, and that it did not fix the penalty completely, emphasising the “discretion of the court.” He was of the opinion that the Oireachtas was performing a “fairly normal function” in relation to a revenue offence and that it would have been different if all offences were subject to mandatory sentences which would remove the Judiciary’s discretion completely. The case of *Whelan v Minister for Justice*²³⁷ dealt with similar issues but on a more serious scale. Here, the court had to decide whether the mandatory life sentence for murder provided by section 2 of the Criminal Justice Act 1990 was constitutional or not. It was argued that the imposition of this legislation would impugn the role of the parole board in varying sentences, the Minister’s discretion to commute or remit sentences and that it was in breach of the separation of powers as it eliminated the role of the judge from the process. Despite compelling arguments such as these, the Judiciary, in the most recent caselaw on the topic, have decided to dilute their power even further with the decision of Irvine J. judging that mandatory sentences were not unconstitutional *per se*. In this case, she was under the impression that the Minister was merely exercising his function under Article 13.6 of the Constitution which states;

²³⁵ Casey, *Constitutional Law in Ireland*, 3rd ed., 2000, at 269. This case is discussed under the heading “*Deference in General*” above.

²³⁶ [2006] IESC 50.

²³⁷ [2007] IEHC 374.

“The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities.”

In her judgment, which relied heavily on the presumption of constitutionality, she stated that there was nothing unconstitutional about the Oireachtas prescribing rules reflecting general views of the public as they did so in a vast array of cases. This decision is accorded even more credibility as it was upheld in the extremely recent case of *Lynch v Minister for Justice*.²³⁸

11.4 Conclusion:

Consequently, despite a hiccup in *State (McEldowney) v Kelleher*,²³⁹ the topic of mandatory orders has provided yet another strong example of the deference shown by the Irish Judiciary of late. From the caselaw it appears that they are more than willing to gift more of their constitutionally enshrined power to other organs of government. This is one area where I believe deference is not acceptable. Granted, admirable reasoning has been forwarded on the basis that mandatory sentences reduce crime and that repeat offenders are deterred as they can be sure of the sentences they will receive as well as the fact that it provides consistency and uniformity of sentencing. However as an avid believer in the separation of powers I do not believe that arguments such as these should violate our chosen system of government. Mandatory sentences have the effect of removing a sizable portion of judicial control from the justice system and in particular their ability to apply discretion given the facts of the case is considerably limited, *e.g.* adjudicating over a charge of possession for the leader of a drug empire or merely a small time street dealer. In my opinion judges should regain their activist approach in order to vindicate the constitutionally mandated separation of powers as a form of mandatory sentencing could just as easily exist without the need for legislative intervention by a decision of the judicial brethren to establish uniform precedent of strict sentencing relating to different charges based on public perception.

²³⁸ [2010] IESC 34 (14 May 2010). See also *Whelan v Minister for Justice* [2010] IESC 34 (14 May 2010).

²³⁹ [1983] IR 289.

12) CONCLUSIONS:

Throughout the course of this paper I have attempted to chart the movements of our Judiciary from that of the strongest organ of government, to one that has, and is continuing to become progressively weaker, through its self-adopted deferential stance. Cases such as *Buckley v Attorney General*,²⁴⁰ *Crotty v An Taoiseach*,²⁴¹ *Re Haughey*²⁴² and *Re Solicitor's Act 1954*²⁴³ can be seen as the equivalent to a boxer's highlight reel, capturing his strongest and most memorable moments. However, judicial activism peaked around the 1970s with cases such as *McGee v A.G.*²⁴⁴ and *Ryan v A G.*²⁴⁵ and ever since then it has become increasingly obvious that the Irish Judiciary has made the decision to exemplify greater levels of deference to other institutions of government. This has resulted in the emergence of an executive dominated doctrine of separation in Ireland, thus fulfilling the worst fears of John Locke and James Harrington in the Age of Enlightenment all those years ago. The aforementioned cases of *Horgan v An Taoiseach & Ors.*²⁴⁶ and *Roche v Roche* [2009]²⁴⁷ are but two examples of this. The task before me at this stage of my paper is to conclude, whether in my opinion, this new found deferential trait is acceptable or not. In order to do so I will examine deference under separate issues, as I have done in the paper itself.

12.1) Delegated Legislation:

In my opinion, the judiciary are correct to exemplify deference in this area, and in fact I believe they would do well to adopt a stance more akin to other common law jurisdictions such as the US and Australia, who have much more relaxed tests than our own *i.e.* the onerous test espoused in *Cityview Press v An Comhairle Oiliúna*.²⁴⁸ To do so would have the effect of increasing the pragmatic approach the Judiciary has already adopted to the issue of delegated legislation. I use the word pragmatic on the basis that to delegate more powers to promulgate legislation reduces the administrative backlog on the Oireachtas. Similarly, the legislation, once promulgated will have the benefit of being created by people with much

²⁴⁰ [1950] IR 67.

²⁴¹ [1987] IR 713.

²⁴² [1971] IR 217.

²⁴³ [1960] IR 239.

²⁴⁴ [1974] IR 284.

²⁴⁵ [1965] IR 294.

²⁴⁶ [2003] 2 IR 468.

²⁴⁷ IESC 82 15th December.

²⁴⁸ [1980] IR 381.

greater subject knowledge on the issues at hand. A point emphasised by our current stance on EU legislation and the following observation made by Carolan;

“There are, of course strong arguments in support of judicial deference in many of these matters. Issues of political theory, policy, expertise and institutional competence all arise when a court is asked to examine the actions of administrative bodies.”²⁴⁹

However I do submit, that in order to conserve our separation of powers doctrine, the Judiciary must not allow the Oireachtas to completely delegate its constitutionally enshrined power, in essence, they must act as a “deferential watchdog” on this issue.

12.2) Distributive Justice:

The Irish Constitution adopts an intermediate position on the question of socio-economic rights.²⁵⁰ Despite the Judiciary showing a reluctance to acknowledge socio-economic rights which is highlighted by the preceding caselaw, our Constitution explicitly protects some of these. For example, education under Article 42, family rights under Article 41 and property rights under Article 4. The failure on behalf of the Judiciary to grant every socio-economic right is not necessarily a bad thing. If they were to acknowledge every socio-economic, this would undoubtedly create far too great a financial burden for the state to cope with and may even have the effect of backlogging the court system even further with numerous spurious claims. Furthermore, the court process should focus on individual issues and not determine wider policy. Based on arguments such as these, I agree with the Constitutional Review Group’s recommendations²⁵¹ that socio-economic rights not be included expressly in the Constitution and, as such, agree with the Judiciary’s deferential approach to the issue. I would like to add to this that, despite being in favour of this deference, I believe that it may be *slightly* excessive and that the courts should take a little more action on the *caveats* they have taken to time to enunciate throughout the relevant caselaw. For example, Denham J. speaks of “rare and exceptional circumstances” in *TD v Minister for Education*²⁵² where it would not be beyond the court’s remit to involve itself to protect the rights of the individual. Such an approach would be akin to foreign jurisdictions such as Canada and South Africa and in my opinion would be more desirable here as the socio-economic rights fundamental to human health and survival (or the “rare and exceptional circumstances” as espoused by

²⁴⁹ Carolan, *Separation of Powers and Administrative Government*, in Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008, at 228.

²⁵⁰ As opposed to the South African Constitution which proclaims socio-economic rights alongside civil and political ones.

²⁵¹ *Report of the Constitution Review Group* (Pn 2632, 1996) pp 234-6.

²⁵² [2001] 4 IR 259.

Denham J.) would be protected, provided it has been sufficiently flouted in the first place. In summation, deference, as it pertains to socio-economic rights, is acceptable but *slightly* excessive.

12.3) Mandatory Orders:

Of late there has been a sharp increase in the number of fixed penalty laws generally, for example, RTA legislation, increased Garda powers with limited judicial control regarding detention, while the Supreme Court's appellate jurisdiction has been increasingly diminished. Mandatory orders can be seen as one of the greatest corrosives of judicial power as the Oireachtas assumes direct control over certain areas of the judicial process. Deference here is unacceptable from my point of view based purely on a separation of powers argument. Mandatory orders remove a sizable portion of judicial control from the process, and in particular, they remove a judge's discretion over certain mitigating circumstances and other specific facts which may only be relevant to the case in question and the mandatory order failed to foresee. Furthermore, there are alternative methods to achieving consistency in sentencing other than imposing mandatory sentences to reflect public opinion. One such method is for judges to make a pact to adopt a non-lenient stance regarding certain areas of concern and to apply mitigating factors only where they deem them absolutely necessary. Thereby creating a kind of "judicial cartel" where the set price is replaced by unanimity of sentencing. Mandatory orders are merely a means for democratically elected officials to appear that they are making changes and are actually doing something so as to appear to be effective in the public eye. On the basis of reasons such as these I believe that deference here is unacceptable and that the Judiciary must act to prevent further corrosion of their power and regain some of that which has already been lost.

12.4) Overall Conclusions:

When I initially starting working on this paper I had an iron-cast belief that our all-powerful Judiciary should show respect to no institution that attempts to usurp its power and that deference was a despicable trait. However, as I peeled back the layers and analysed the issues in greater detail, I found myself realising that deference is not the sum of all evils that I once seen it as. I had to remind myself, that the higher courts in this jurisdiction are not fools, but a collection of incredibly intellectual minds. If they exercise deference in a given area, then more than likely they have a very good reason to justify it, such as the adoption of a pragmatic approach to the area of delegated legislation by availing of greater subject

knowledge and preventing too great a financial burden on the State when it comes to socio-economic rights. This has led me too wonder whether the judiciary have adopted a disingenuous idea approach to deference, whereby not deciding on an issue is forming a policy in its own right. This is a notion which is impossible to prove so I have come to the conclusion that when they exercise deference, they do so with the best interest of the State and the common good as a whole in mind.

Despite having its advantages regarding specific issues, deference is not always positive either and at times it is difficult to apply the optimistic approach that the Judiciary always has society's best interests at heart when exercising this reverence. It is obvious that there are weaker sections of society (such as travellers, homosexuals, African Americans and any group which is outnumbered in our society) which have less influence on the Oireachtas than larger, more mainstream sections and that this generally corresponds to voter turnout. Thus, the Oireachtas may be unwilling to act in the best interests of these weaker sections as it is not politically expedient to do so *i.e.* they do not worry too much about failing to protect the interests of minorities because, as the name suggests, they have very little political clout based on their small numbers, and as democratically accountable members of the government interested in self-preservation, it is in their nature to put more effort into protecting the rights of majoritarian groups. This is undoubtedly unacceptable but nonetheless a fact of life. In my opinion, this is where the judiciary must step in to protect the interests of these minorities who are being ignored by the "least worst" solution of majoritarian democracy as they lack the political clout to effectively articulate their own interests and influence the democratic process. Undoubtedly the problem here originates in the Oireachtas, as they do not want to risk their political careers by legislating on a very controversial issue, but our independent Judiciary should not have similar concerns when faced with such a tough decision. And it is when faced with tough decisions based on religion or morality, for example that will have a great impact on public policy that deference occurs most. Very often the Judiciary shies away from its job, claiming the political question doctrine and that the issue is not justiciable in the hope that the Government will rectify the problem for the in the near future. Similarly, in some cases it appears that the courts are even inventing reasons to legitimise bad legislation so as to avoid having to make hard decisions. An approach which I believe is based heavily on the presumption of constitutionality. This is not acceptable as if they do not stand up for

the rights of minorities who will? We have seen from *Roche v Roche*²⁵³ and *McMenamin v Ireland*²⁵⁴ that the Oireachtas is not so efficient when it comes to rectifying these problems once brought to their attention. Thus, it appears that when it comes to tricky situations, our organs of State pass the ball back and forth to one another in the hope that one of them will step up to the plate and take the shot. In these pressured situations, it is the democratically unaccountable and independent judiciary who needs to grab the bull by the horns and exercise the kind of leadership we expect of them based on its traditionally strong and activist role in the 1970s.

At last we come to the question; “deference under the separation of powers: an increasingly acceptable trait amongst the Irish Judiciary?” Unfortunately, I cannot provide a clear-cut answer. The notion of deference encapsulates too many issues to provide one. This, broad concept means that it is not appropriate for me to conclusively judge whether the recently increased level of deference on the part of the Judiciary is appropriate or not as it depends on the circumstances surrounding the deference and the nature of the judicial controversy. I can say this however, that the level of deference shown by the judiciary regarding specific issues such as socio-economic rights and distributive justice is acceptable. From a more general perspective however, it is my opinion that our superior courts would do well to restrain their cries of “political question doctrine” and “lack of justiciable issues” and revert back to the powerful, interfering, fearless, strong, activist and publically respected stance they personified in the 1970’s.

²⁵³ [2009] IESC 82.

²⁵⁴ [1996] 3 IR 100.

BIBLIOGRAPHY

BOOKS

1. Bunreacht na hÉireann - The Constitution of Ireland, 1937.
2. Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008.
3. Casey, *Constitutional Law in Ireland*, 3rd ed., Dublin: Round Hall Sweet and Maxwell, 2000.
4. Doyle, *Casebook on Irish Constitutional Law*, Dublin: Clarus Press, 2008.
5. Foley, *Deference and the Presumption of Constitutionality*, Dublin: Institute of Public Administration, 2008.
6. Gwynn Morgan, *The Separation of Powers in the Irish Constitution*, Dublin: Round Hall Sweet & Maxwell, 1997.
7. *Halsbury's Laws of England*, 4th ed., 1988, Vol 8.
8. Kelly, Hogan and Whyte, *Constitutional Law in Ireland*, 4th ed., Dublin: Lexis Nexis Butterworths, 2003.
9. Lane, *Constitutions and Political Theory*, Manchester: Manchester University Press, 1996.
10. Pitkin, *The Concept of Representation*, University of California Press, 1972.
11. *Report of the Constitution Review Group* (Pn 2632, 1996) pp 234-6.
12. Ryan, *Constitutional Law*, 2nd ed., Dublin: Thompson Round Hall, 2008.
13. Ryan, *Constitutional Law*, Dublin: Round Hall Sweet & Maxwell, 2002.

JOURNALS

1. Arthur S. Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, with Special Emphasis Upon the Doctrine of Separation of Powers*, *Arkansas Law Review and Bar Association Journal*, Vol. 27, No. 4, Winter 1973.
2. Carolan, *Democratic Control or "High-Sounding Hocus Pocus"? A Public-Choice Analysis of the Non-Delegation Doctrine*, (2007) 14(1) DULJ 111.

3. Carolan, *Separation of Powers and Administrative Government*, in Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008.
4. Fahey, *Reconsidering the Merits of the “Principles and Policies” Test – A Step Towards the Reform of Article 29.4.10 of the Irish Constitution*, (2006) Vol. 24, no. 5, Irish Law Times.
5. Foley, *Diceyan Ghosts: Deference, Rights Policy and Spatial Distinctions*, (2006) DULJ 77.
6. Hamilton, *The Federalist*, No. 78, J. Cooke ed., 1961.
7. Hardiman, A., *The Role of the Supreme Court in our Democracy*, in Joe Holland ed, *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers*, (MacGill Summer School, 2004).
8. Langwallner, *Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual*, in Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008.
9. Madison, *The Federalist*, No. 47, J. Cooke ed., 1961.
10. Madison, *The Federalist*, No. 51, J. Cooke ed., 1961.
11. O’Connell, *From Equality before the Law to the Equal Benefit of the Law: Social and Economic Rights in the Irish Constitution*, in Carolan & Doyle (Editors), *The Irish Constitution: Governance and Values*, Dublin: Thomson Round Hall, 2008.
12. Philip B. Kurland, *The Rise and Fall of the ‘Doctrine’ of the Separation of Powers*, *Michigan Law Review*, Vol. 85, No. 3 (Dec., 1986), pp. 592-613.
13. Sachs, A. *The Judicial Enforcement of Socio-Economic Rights*, (2003) 56 Current Legal Problems.

ELECTRONIC SOURCES

1. http://wikisum.com/w/Lipset_and_Rokkan:_Party_systems_and_voter_alignments.
2. <http://www.bailii.org/>
3. <http://www.courts.ie/>
4. <http://www.firstlaw.ie/>
5. <http://www.jstor.org/>
6. <http://www.justis.com/data-coverage/irish-reports-and-digests.aspx>

7. <http://www.lexisnexis.com/>
8. <http://www.oireachtas.ie/parliament/>
9. <http://www.westlaw.co.uk/>
10. <http://www.westlaw.ie/>
11. <http://www.wikipedia.org/>

TABLE OF CASES (IRISH)

1. *Abbey Films v Attorney General* [1981] IR 158.
2. *AG v Hamilton (No. 2)* [1993] 3 IR 227.
3. *Ahern v Judge Mahon* [2008] IEHC 119.
4. *Attorney General v Hamilton (No.2)* [1993] 2 IR 250.
5. *Attorney General v X* [1992] 1 IR 1.
6. *Boland v An Taoiseach* [1974] IR 338.
7. *Brady v Houghton* [2006] 1 IR 1.
8. *Brennan v Minister for Justice* [1995] 1 IR 612.
9. *Buckley v Attorney General* [1950] IR 67.
10. *Bupa Ireland Ltd. v Health Insurance Authority* [2008] IESC 431.
11. *Byrne v Ireland* [1972] IR 241.
12. *Casey v Minister for Arts* [2004] 1 IR 402.
13. *Cityview Press v An Comhairle Oiliúna* [1980] IR 381.
14. *Cooke v Walsh* [1984] IR 710.
15. *Cronin (A Minor) v Minister for Education, Science & Ors.* [2004] 3 IR 205.
16. *Crotty v An Taoiseach* [1987] IR 713.
17. *DB v Minister for Justice* [1999] 1 IR 29.
18. *Deaton v Attorney General* [1963] IR 170.
19. *Dubsky v Government of Ireland* [2005] IEHC 442.
20. *East Donegal Co-op Ltd. v Attorney General* [1970] IR 317.
21. *FN v Minister for Education* [2001] 4 IR 259.
22. *Goodman International (No.1)* [1992] IR 542.
23. *Harvey v Minister for Social Welfare* [1990] 2 IR 232.
24. *Haughey v Moriarty* [1999] IR 3.
25. *Healy v Minister for Social Welfare* [1999] 1 ILRM 72.

26. *Heaney v Ireland* [1994] 3 IR 593.
27. *Horgan v An Taoiseach & Ors* [2003] 2 IR 468.
28. *Howlin v Morris* [2006] 2 IR 321.
29. *Kavanagh v Government of Ireland* [1996] 1 IR 321.
30. *Kennedy v Law Society of Ireland* [2002] 2 IR 458.
31. *L v L* [1992] IR 116.
32. *Laurentiu v Minister for Justice, Equality and Law Reform* [1999] 4 IR 26.
33. *Leontjava and Chang v DPP* [2004] 1 IR 591.
34. *Lowth v Minister for Social Welfare* [1998] 3 IR 321.
35. *Lynch v Minister for Justice* [2010] IESC 34 (14 May 2010).
36. *Lynham v Butler (No. 2)* [1933] IR 74.
37. *Maguire v Ardagh* [2002] 1 IR 385.
38. *Maher v Attorney General* [1973] IR 140.
39. *Mc Daid v Sheehy* [1991] 1 IR 1.
40. *McDonald v Bord na gCon (No.2)* [1965] IR 217.
41. *McGee v Attorney General* [1974] IR 284.
42. *McGrath v McDermott* [1988] IR 258.
43. *McMenamin v Ireland* [1996] 3 IR 100.
44. *Meagher v Minister for Agriculture* [1994] 1 IR 329.
45. *Mulcreavy v Minister for the Environment* [2004] 1 IR 72.
46. *Murphy v Dublin Corporation* [1972] IR 215.
47. *Norris v Attorney General* [1984] IR 36.
48. *Ò Beoláin v Fahy* [2001] 2 IR 279.
49. *O'Brien v Wicklow UDC ex tempore* (10 June 1994).
50. *O'Carolan (A Minor) v Minister for Education* [2005] IEHC 296.
51. *O'Donoghue v Minister for Health* [1996] 2 IR 120.
52. *O'Malley v An Ceann Comhairle* [1997] 1 IR 427.
53. *O'Reilly & Judge v DPP* [1984] ILRM 224.
54. *O'Reilly v Limerick Corporation* [1989] ILRM 181.
55. *Osmanovic v DPP* [2006] IESC 50.
56. *Pigs Marketing Board v Donnelly* [1939] IR 413.
57. *R(M) v R(T) & Others* [2006] IEHC 359 (15 November 2006).
58. *Re Article 26 and the Health (Amendment)(No. 2) Bill 2004 Case* [2005] IESC 7.
59. *Re Gallagher* [1991] IR 31.

60. *Re Haughey* [1971] IR 217.
61. *Re Solicitor's Act 1954* [1960] IR 239.
62. *Roche v Roche* [2009] IESC 82 15th December.
63. *Roche v Roche* [2009] IESC 82 15th December.
64. *Rock v Ireland* [1997] 3 IR 484.
65. *Ryan v Attorney General* [1965] IR 294.
66. *Sinnott v Minister for Education* [2001] 2 IR 545.
67. *State (C) v Minister for Justice* [1967] IR106.
68. *State (Healy) v Donoghue* [1976] I.R. 325.
69. *State (McEldowney) v Kelleher* [1983] IR 289.
70. *State (Murphy) v Johnson* [1983] IR 235.
71. *State (O) v O'Brien* [1973] IR 50.
72. *State (O'Rourke) v Kelly* [1983] IR 38.
73. *State (Sheerin) v Kennedy* [1966] IR 379.
74. *TD v Minister for Education* [2001] 4 IR 259.
75. *Whelan v Minister for Justice* [2007] IEHC 374.
76. *Whelan v Minister for Justice* [2010] IESC 34 (14 May 2010).
77. *Zappone and Gilligan v Revenue Commissioners* [2006] IEHC 404.

TABLE OF CASES (OTHER)

1. *Amalgamated Meat Cutters v Conally* 337 (1971) F. Supp. 737.
2. *Baker v Carr* 369 US 186 (1962).
3. *Dred Scott v Sandford* 60 US (19 How. 393 (1857).
4. *Gordon v United States* 117 US 697, 701 (1864).
5. *Gosselin v AG of Quebec* [2002] 4 SCR 429.
6. *Griswold v Connecticut* (1965) 381 US 479.
7. *Madhya Pradesh v Singh* [1967] (SC) 1170.
8. *Marbury v Madison* 5 US 137 (1803).
9. *Mendoza & Ors v Ministry of Public Health* Resn No 0749-2003-RA (28 Jan 2004).
10. *National Provincial Building Society v UK* [1997] 25 EHRR 127.
11. *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.
12. *Panama Refining Co. v Ryan* 293 (1935) U.S. 288.

13. *Pascham Banag Khet Samity v State of West Bengal* (1996) 4 SCC 37.
14. *People's Union for Civil Liberties v Union of India & Ors*, Supreme Court of India, 2 May 2003.
15. *Roe v Wade* (1973) 410 US.
16. *Schechter Poultry Corp. v United States* (1935) 295 U.S. 495.
17. *Soobramoney v Minister for Health* 1997 (12) BCLR (CC).
18. *Victorian Stevedoring and General Contracting Co. Pty Limited v Dignan* (1931) 46 CLR 73.
19. *Youngstown Sheet and Tube Co. v. Sawyer* 343 US 579 (1953).