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INTEGRATION AND THE LAW: THE IRISH EXPERIENCE IN ITS INTERNATIONAL AND EUROPEAN CONTEXT

A dissertation submitted to the University of Dublin
for the Degree of Doctor of Philosophy

Clíodhna Siobhán Murphy

Trinity College Dublin, 2012
School of Law
Trinity College Dublin

DECLARATION

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Summary

This thesis examines the interaction between integration and law, from an Irish perspective. It explores the legal dimensions of the concept of integration and its coherence in a European and international context. It examines the legal and policy framework for the integration of migrants that is being constructed in Ireland and critically discusses the multiple paradigms of integration that are influencing the development of this framework. In particular, by analysing the approaches of the United Nations (human rights), Council of Europe and European Union systems, the thesis considers the actual and potential impact of these systems on Irish law and policy on integration.

The thesis is structured in three parts. The first part addresses the meaning of "integration" and the nature of its relationship with law. It presents an in-depth analysis of the policy framework for integration in Ireland, in light of the definitions of integration developed by the Council of Europe, the EU and UNHCR. This part of the thesis also considers in detail the various dimensions of the relationship between integration and law, and the factors which may shape this engagement. The second part of the thesis analyses the legal foundations of integration at the international, EU and national levels. In the sphere of international law, a nascent integration paradigm as the progressive realisation of equality is identified in the work of the UN human rights treaty monitoring bodies. The role of the concept of integration in the jurisprudence of the European Court of Human Rights is also outlined. So too the conflicting concepts of integration evident in EU law and policy are discussed. In the sphere of Irish law, the Irish constitutional framework for integration is analysed by looking at both the values underlying the text of the Constitution and the interpretation of the fundamental rights provisions by the Irish courts in cases involving immigration. The third part of the thesis examines a number of discrete areas of Irish law with strong links to integration, including citizenship, family reunification and the state's relationship with religion, as a means to consider the relationship between integration and law in the Irish setting.

The thesis demonstrates that the legal dimensions of integration, while disparate and fragmented, are nonetheless significant. Legal rules and frameworks, particularly in domains such as religious freedom, immigration and citizenship, are inevitably part of the integration

process whether or not they are recognized as such by lawmakers, and whether or not they form part of a broader integration policy framework. The thesis argues for a more developed conception of "integration and law", which emphasises the extent of law's influence on the integration process whilst recognising the limits of this influence. In doing so, it acknowledges the importance not only of the internal legal foundations of national integration policy but also the pervasive influence of EU and international law on national integration frameworks.

A number of thematic conclusions emerge from this thesis. The first of these highlights the indeterminacy of the concept of integration and the contribution which law can make in delineating the meaning of integration. The incoherency and contradictions at the heart of each of the international, EU and Irish frameworks for integration are the second main conclusion. Finally, the complex intersection between the frameworks of international, EU and Irish law and the impact which this has on the shape of integration at the national level is a key finding of the thesis. Taken together, these conclusions help to broaden our understanding of the nexus between integration and law. Building on these conclusions, the thesis suggests two main ways in which a human rights-based approach to integration can be promoted. First, it emphasises the importance of the use of a broad-based definition of integration which takes into account both its functional and wider dimensions. Secondly, the thesis advocates the development of a conceptual framework which recognises and utilises the extent of the interaction between integration and law, moving beyond the conceptualisation of integration as a mandatory element of immigration law. On this basis, a number of basic recommendations for the development of a holistic and human-rights based integration policy in Ireland are outlined.

The thesis thus offers a number of original contributions to the emerging scholarship on the relationship between integration and law. It sets out a detailed analysis of the legal and policy framework for integration in Ireland, in the light of international and EU law and practice. A number of concrete suggestions are made as to the future development of Irish law and policy relating to integration. A broad conceptual framework for the study of integration and law is proposed, which takes into account states' international and European law obligations. The study traces the construction of a new paradigm of integration as the progressive realisation of equality, emerging from the universal treaty regime, which provides a real alternative to the way in which integration is being conceptualised at the national level as a mandatory process and a tool of immigration control.

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BIBLIOGRAPHY

1. Introduction

1.1 Immigration, Integration and Law in Ireland

> Over thousands of years waves of people have come ashore on the island of Ireland. However, the island found by those early migrants was very different from the Ireland of today. The differences included those of the landscape, society and governance. Tales of early refugees to Ireland are told in myth and legend. ... Today Ireland is not covered by great oak forests. Raths have been replaced by housing estates and apartment blocks. The Brehon law has been displaced by modern Irish law. The principles and law governing Irish society today come from the people and are to be found in the Constitution of Ireland, 1937, and the legislation of the Oireachtas. It is to that Constitution and law we must look to determine the issues of our times.[1]

It has become trite to observe that Ireland has gone through intense migratory change since the late 1990s. From 1996 until 2008 Ireland experienced unprecedented inward migration for the first time in the history of the State, which had been marked by waves of mass emigration. Immigration flows have now reversed once more, with the financial crisis and dramatic rise in unemployment resulting in a return to net emigration in 2008.[2] Ireland

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[1] Denham J, *AO &LO v Minister for Justice, Equality and Law Reform* [2003] 1 IR 1, at 42.

[2] The late 1990s and early 2000s were characterised by a sharp increase in asylum applications, and in 2004 the enlargement of the EU opened the Irish labour market to nationals of the twelve new EU Member States. Immigration hit a peak in the year up to April 2006, with net immigration reaching 71, 800 - the bulk of this comprising EU12 nationals. With the onset of the economic crisis, in the years up to April 2009 and 2010 net emigration resumed, with the year up to April 2010 witnessing the highest rate of emigration from the State since 1989. Emigration from Ireland in the twelve months to April 2010 was estimated to have remained

will, however, continue to experience a certain level of immigration, and immigration will form a feature of Irish society into the future. In any event, the wave of immigration between 1996 and 2008 has already changed Irish society permanently.[3] The pattern of intense immigration experienced over a short period of time has brought societal change and rendered it necessary to rework and reconsider notions of identity and belonging in a State which had previously been largely homogenous in terms of race and religion. In a broad sense, it has become necessary to examine how traditional long-standing social structures deal with increased pluralism and the new types of diversity brought about by immigration.[4]

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broadly constant at 65,300 while the number of immigrants into Ireland fell sharply over the same period. These combined changes have resulted in an increase in net outward migration from 7,800 in April 2009 to 34,500 in April 2010. This is the highest level of net outward migration since 1989. These emigration figures include both non-Irish and Irish emigrants. While the level of overall emigration remained constant, emigration among Irish nationals increased significantly in the year, while the emigration of non-Irish nationals fell (with nationals of the EU12 States accounting for the bulk of this decline). Many of the EU12 nationals who had migrated into Ireland left Ireland between 2008 and 2010. Immigration from EU 12 countries dropped to 5,800 in 2010 from a peak of 52,700 in the year ending April 2007. Asylum statistics also reflect the general trend with the level of asylum applications reaching their lowest point since the mid-1990s. Asylum application numbers are now just one sixth of the peak figure of 11,634 reached in 2002. See "Minister Dermot Ahern announces end of year asylum statistics", *Press Release, Department of Justice*, 7 January 2011; Central Statistics Office, *Population and Migration Estimates, April 2009* (CSO, September 2009); and Central Statistics Office, *Population and Migration Estimates, April 2010* (CSO, 21 September 2010).

[3] A simple illustration of this is the number of newly naturalised citizens who were entitled to vote in the 2011 general election. The Irish Independent reported that up to 15,500 "new Irish" were entitled to vote in the 2011 general election after securing citizenship since the previous general election in 2007. "'New Irish' boost voter numbers by 15,500", *Irish Independent*, 8 February 2011.

[4] The following news articles provide a flavour of the type of changes which have taken place and the types of issues which have arisen in recent years: "Orthodox Christians of all shades now have a significant presence in Ireland", *Irish Times*, 14 May 2008; "Mosque on Talbot Street gets go-ahead despite objections", *Irish Times*, 17 July 2008; "Muslim community in plea for more burial grounds", *Irish Times*, 31 August 2008; Survey finds 360 migrant-led churches and chaplaincies, *Irish Times*, 8 December 2008; "Encouragement for immigrants to become Irish urged", *Irish Times*, 24 April 2009; "Gardai object to 57 suspected 'sham' marriages", *Irish Times*, 18 August 2010; "Call for Government action on racism", *Irish Times*, 22 March 2011.

Despite these demographic and societal changes, Irish integration policy continues to be developed on a more or less *ad hoc* basis, despite the establishment of the Office of the Minister for Integration in 2007. This piecemeal evolution of Irish integration policy seems likely to continue, especially given the abolition of the Office of the Minister for Integration in 2011.

In terms of law, the legal regulation of the arrival and status of non-nationals in the State has to date focussed on admission policies and the legal determination of asylum claims. Assessing the role of the concept of integration in immigration law is hampered by the absence of specific legislative reference and scant judicial reference to the concept. The courts appear to view integration for the most part as a non-justiciable social concept, falling outside the remit of the role of the courts. This perspective was clear in *AO and DL v Minister for Justice, Equality and Law Reform*,[5] in which Keane CJ considered the desirability of a tolerant and pluralist society in the shadow of the respective roles of the Oireachtas, executive and judiciary in immigration matters, stating that:

> Many would wish to see the development in Ireland of a tolerant and pluralist society capable of accommodating immigrants from diverse ethnic and cultural backgrounds, because that is a desirable objective in itself, recognises the openness and generosity with which Irish emigrants in times past were received in other countries and, on a purely economic level, remedies serious shortages in the skilled and unskilled labour markets. At the same time, the legislature and executive cannot be expected to disregard the problems which an increased volume of immigration inevitably creates, because of the strains it places on the infrastructure of social services and, human nature being what it is, the difficulty of integrating people from very different ethnic and cultural backgrounds into the fabric of Irish society. The resolution of these complex political, social and economic issues which, it

[5] [2003] 1 IR 1.

> need hardly be said, are not in any sense unique to Ireland, is entirely a matter for the Oireachtas and the executive. The function of the courts is to ensure that the constitutional and legal rights of all the persons affected by the legislation in question are protected and vindicated.[6]

This thesis argues for a broader understanding of the relationship between integration and law. While the theme of integration fuses emotive social issues such as identity, belonging and social cohesion, as the above quote of Denham J in the Supreme Court illustrates, it also raises essential legal issues which must be dealt with within the confines of the Constitution and the law. These include family unity, access to the education system, the place of religion in the public sphere and the citizenship regime.

The changes brought about by immigration have sparked research in the subject, and in the related field of integration. Immigration and asylum law have been the subject of increased academic focus in the Irish context.[7] Similarly, integration has become a key policy area in Ireland and its neighbouring European Union ("EU") countries, as well as at the level of the EU and of the Council of Europe and in the work of the United Nations ("UN") human rights treaty monitoring bodies. Integration is a contested concept, with some commentators seeing its premise as representing a rejection of diversity by migrant receiving societies.[8] Integration is often associated with assimilation and discrimination,[9]

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[6] *Ibid*, at 26.

[7] See, for example, Ursula Fraser and Colin Harvey, *Sanctuary in Ireland? Perspectives on Asylum Law and Policy* (IPA, 2003); Dug Cubie and Fergus Ryan, *Immigration, Refugee and Citizenship Law in Ireland: Cases and Materials* (Round Hall Sweet & Maxwell, 2004); Siobhán Mullally and Liam Thornton, "The Rights of the Child, Immigration and Article 8 in the Irish Courts", in Ursula Kilkelly (ed) *The ECHR and Irish Law* (2nd ed, Jordans, 2009); Siobhán Mullally, "The Irish Supreme Court and the Illegal Immigrants (Trafficking) Bill, 1999" [2002] 13 *IJRL* 354; Siobhán Mullally, "Citizenship and Family Life in Ireland: Asking the Question 'Who Belongs?" (2005) 25 *Legal Studies* 578; Patricia Brazil, "Recent Issues in Refugee Family Reunification under Irish Law" (2009) 16(1) *DULJ* 412.

[8] Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International, 2004), at 234.

and this frame of analysis has become increasingly relevant in the context of the use of integration tests by many European states as a mandatory condition for entry to the state or access to social welfare and residency rights.[10] At the same time, however, competing narratives of integration centred on holistic, two-way paradigms continue to emerge from NGOs, international organisations and academics.[11] The meaning, scope and implications of integration thus remain controversial.

Despite these developments, relatively little attention has been paid to the interpretation and development of integration through law. In the Irish context in particular (as pointed out above), integration has been considered almost solely as a matter of social policy,[12] despite the nexus between integration and crucial legal issues. There is a small but growing body of literature addressing the development of a framework for integration at the EU level and the use of integration measures, conditions and programmes by countries across Europe, which is discussed in Chapters 3, 4 and 7.[13] However, the Irish example is not discussed in this body of work on integration and law. Furthermore, much of the existing literature analyses the interaction of integration and law solely in terms of the use of integration as a

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[10] Anja Wiesbrock, "Discrimination Instead of Integration? Integration Requirements for Immigrants in Denmark and Germany", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009).

[11] Rosa Da Costa, "Rights of Refugees in the Context of Integration: Legal Standards and Recommendations", UNHCR Legal and Protection Policy Research Series (UNHCR, June 2006); Alistair Ager and Alison Strang, "Understanding Integration: A Conceptual Framework" (2008) 21(2) *JRS* 166.

[12] Bryan Fanning, "Integration and Social Policy" in Bryan Fanning, *Immigration and Social Change in the Republic of Ireland* (Manchester University Press, 2007).

[13] See, for example, Saskia Bonjour, "Between Integration Provision and Selection Mechanism. Party Politics, Judicial Constraints, and the Making of French and Dutch Policies of Civic Integration Abroad" (2010) 12 (3) *EJML* 299; Ricky Van Oers, Eva Ersboll and Dora Kostakopoulou (eds), *A Re-Definition of Belonging? Language and Integration Tests in Europe* (Martinus Nijhoff Publishers, 2010) ; Sergio Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU* (Martinus Nijhoff, 2009); Elspeth Guild, Sergio Carrera and Kees Groenendijk eds, *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009); Kerstin Rosenow, "The Europeanisation of Integration Policies" (2009) 47(1) *International Migration* 133.

mandatory element of immigration law, rather than looking at the wider connections between integration and law. This thesis aims to fill these gaps in the literature by providing a study of the interaction between law and integration, using Ireland as a case study.

1.2 Core Questions

The central questions which are addressed by the thesis are as follows:

- How is the concept of integration developed through the adoption and interpretation of legal norms impacting on migrants?
- How is a legal framework for the integration of migrants being constructed in Ireland?
- What paradigms of integration are influencing the development of this legal framework, and what factors influence the implementation of these paradigms?
- How have the universal treaty regimes, the Council of Europe and the EU approached integration, and what is the actual and potential impact of the EU and international legal frameworks on integration in Irish law and policy?
- Is there coherence within and between the international, EU and Irish frameworks, and how do these frameworks inter-relate?

The thesis is structured in three parts. The first part addresses the meaning of integration and the nature of its relationship with law. The second part of the thesis analyses the legal foundations of integration at the international, EU and national levels. The third part of the thesis examines a number of discrete areas of Irish law with strong links to integration as a means to consider the relationship between integration and law in the Irish setting. This structure is intended to ensure that the analysis captures the interaction of the three legal spheres relevant to this thesis: international, EU and Irish law. In this way, the significance of the international and EU law dimensions of the interaction between integration and law is highlighted. Finally, the conclusions draw together the central themes permeating the chapters, and underline the contribution of the thesis to a broad understanding of integration

and law. The conclusions also set out a number of recommendations for the development of a holistic, human-rights based approach to integration in Ireland.

1.3 Outline of the thesis

1.3.1 Part I – Conceptual Foundations of Integration

Part I considers the conceptual basis of integration and is thus concerned with setting out some of the background relevant to the remainder of the thesis. Chapter 2 outlines a working definition of integration, based on an analysis of the Irish, Council of Europe, EU and UNHCR definitions of integration and a consideration of various integration 'models'. The chapter discusses some of the difficulties with 'integration' as a concept, but concludes that, despite these difficulties, integration is a significant and useful topic of study. A number of models of integration which are commonly used to describe the basis of integration policy in different states are identified and explained, and the limitations of these models noted. A central part of this thesis involves questioning the usefulness of such models, and determining whether Irish integration law and policy can be said to be based on a coherent 'model'. Another issue which is introduced in this chapter is whether the ideal of integration as a two-way participatory process is achieved by states in practice or whether measures taken in the sphere of integration in fact place a greater emphasis on the migrants' responsibility to integrate rather than the responsibilities of existing members of society, or of the state itself. Some "wider perspectives" on integration are also identified which will be used to frame the analysis in Part III. These include the links between integration and national identity; social inclusion and equality; and the management of diverse societies generally. Finally, a working definition of integration for the purposes of the rest of the thesis is outlined. This working definition is broad-based and emphasises the functional and wider elements of the integration process.

Chapter 3 outlines the interactions that take place between integration and law in a number of practical settings such as citizenship, family reunification and the legal regulation

of the expression of cultural and religious identity in the public sphere. It also examines the specific way in which immigration law and integration have been linked in many European countries in the form of integration requirements for entry, residence and family reunification. A key idea underlying the chapter is that this frame of analysis is not sufficiently broad to capture the complex interaction between integration and law. This chapter also suggests that legal approaches to integration are shaped by a number of factors, including a number of interacting legal frameworks (international, EU and national law), and are also inextricably linked to national identity and the "public philosophy" of the state in question. This idea will be referred to throughout the thesis in order to ascertain if there is a coherent conception of integration enshrined in Irish law. Finally, Chapter 3 outlines some of Ireland's distinguishing features which make it a useful case study contributing to the emerging international scholarship on integration.

1.3.2 Part II – Legal Foundations of Integration

Part II is concerned with identifying the legal structures within which integration fits. The discussion of integration is posited within a framework of multiple legal orders: international, EU and national norms are all relevant. Chapter 4 examines the approach to integration taken in international refugee and human rights law, including under the European Convention on Human Rights ("ECHR"). First, the connections between international refugee law and integration are analysed. The role and value of international human rights law in addressing integration issues is then explored. The chapter examines the concluding observations on state reports of the monitoring committees for the core UN human rights treaties, as well as the jurisprudence of the European Court of Human Rights, to determine whether there has been any normative development of the concept of integration by these international bodies. The analysis illustrates that, while international norms do not provide a comprehensive framework for integration, they impact on national integration frameworks in a number of concrete ways (which are set out in the chapter). In addition, it is argued that the normative development of integration by the UN treaty monitoring committees provides a valuable resource for the interpretation of the concept of

integration in a way which avoids the problems of national public philosophy-influenced integration policy and practice, and could help to re-orientate national integration policy and practice towards a more human rights-based approach.

Chapter 5 explores the concept of integration contained in EU law and policy by looking at specific integration policy, concepts of integration contained in EU immigration and asylum law and the approach taken to the integration of EU citizen migrants. It highlights the importance of the EU approach to integration from an Irish perspective, but also points out the limits of EU action in the context of integration. The chapter illustrates that EU law encompasses numerous conceptions of integration, depending principally on the status of the individual as a citizen of the EU or a third-country national ("TCN"). It concludes that the EU soft law framework for the integration of TCNs is not strong enough to counterbalance the deficiencies and the problems encountered in national integration policy and practice. Moreover, the inclusive concept of integration contained in the policy documentation is in any event usurped in the legally binding immigration measures, in which the use of integration as a mandatory norm in immigration law is endorsed. In contrast, in relation to EU migrants, EU law has altered the relationship between EU citizens living and working in EU Member States other than their own, such that the idea of integration has become almost superfluous in the context of EU migrant citizens. EU law and policy on integration thus lacks coherence and enshrines multiple concepts of integration.

In Chapter 6, the Irish constitutional framework for integration is analysed by looking at both the values underlying the text of the Constitution and the interpretation of the fundamental rights provisions by the Irish courts in cases involving immigration. The overall aim of this chapter is to gain an understanding of the 'public philosophy' underpinning Irish constitutional law, from an integration perspective. The first section concentrates on a textual analysis of the 1937 Constitution. Some of the distinctive features of the Constitution which have a bearing on integration are identified, including the influence of nationalism and the role of religion in the constitutional order. The second section outlines the rights of non-citizens in Irish constitutional law and examines the interpretation of the Constitution in the body of jurisprudence which has evolved around the

residence and deportation of non-citizen parents of Irish citizen children. The role of the concept of the 'common good' in constitutional decisions at the intersection of rights, immigration and sovereignty is highlighted, as is the influence of the European Convention on Human Rights on this area of Irish constitutional law.

1.3.3 Part III – Functional and Wider Perspectives on Integration and Law: The Irish Perspective

Part III examines a number of areas of Irish law of particular importance to integration, comparing it to the law in other jurisdictions and in light of international law. These include first of all what are described as 'functional' aspects of integration: providing a legal status and core services such as education, welfare and health services linked to that status; and secondly, aspects of integration with 'wider' connections to the broader themes of national identity, responses to diversity in society and social policy. While the themes to be examined are broken into a series of chapters, these themes and chapters naturally overlap and intersect, as will be clear from the analysis. For the most part, the Irish political and judicial organs have not explicitly referred to or considered the notion of integration. The task therefore is to determine the implications for integration of the way in which the Irish legislature and courts have addressed issues relating to citizenship, religious freedom, family reunification, and social inclusion and policy.

Chapter 7 considers access to Irish citizenship in terms of both the rules relating to birthright citizenship and the law of naturalisation. Citizenship is a fundamental integration issue which draws together some of the themes referred to in Part I. First, the chapter looks at some of the recent experiences and debates in Ireland in the area of citizenship, most notably the discourse surrounding the 2004 referendum which removed the automatic right to Irish citizenship of children born in Ireland. The next part of the chapter concentrates on black-letter law and access to nationality. Access to citizenship in Ireland is compared with other jurisdictions, and is contrasted with those which impose integration and/or language conditions in the naturalisation process. Overall, it will be seen that the restrictive discourse

on citizenship and integration which was evident in the context of the 2004 citizenship referendum has not yet translated into legal measures in the form of integration conditions for access to citizenship in Ireland.

Chapter 8 examines the place of religion in Irish public life though an analysis of the law relating to religion and the education system, in addition to the legal regulation of the use of religious symbols in public spaces (particularly focussing on schools). First, the chapter considers some of the legal issues raised by the denominational nature of the education system at primary and secondary level. It seeks to apply the existing legal framework relating to religion and education to the new issues raised by increased religious and cultural diversity in Ireland. This is an area which has spawned significant jurisprudence in other jurisdictions and under the rubric of the ECHR. This case law will be used to inform the analysis. Secondly, the issue of religious symbols in state education and other public space will be looked at. This has emerged as a divisive and controversial integration issue in many countries with a long tradition of immigration, particularly in Britain and in France, where the wearing of Islamic dress in public schools has been the subject of extensive legal debate. A key part of this chapter will an analysis of how Irish constitutional principles of freedom of religion, developed in the context of almost unanimous adherence to the Catholic faith, may evolve in the context of the issues arising in the context of increased religious diversity.

Chapter 9 analyses the approach to family reunification in Irish law across a number of categories of migration status, underlining the disparities in treatment across these categories. This illustrates the implications of migration status and administrative categorisation for integration in Ireland. It considers the law of family reunification in Ireland in the light of international law. Overall, the findings of the chapter highlight the impact of EU and international law on immigration and asylum law at the national level.

The concluding chapter describes the Irish legal and policy framework which emerges from the preceding analysis and draws out a number of conclusions from the common threads running through the chapters. The first of these is that integration is largely indeterminate, with a significant role for law in determining the meaning of integration. The

incoherency and contradictions contained in each of the international, Irish and EU legal frameworks for integration are the second main conclusion. Finally, the complex intersection between the frameworks of international, EU and Irish law and the impact which this has on the shape of integration at the national level is a key finding of the thesis. Building on these conclusions, the thesis suggests two main ways in which a human rights-based approach to integration can be promoted. First, the importance of the use of a broad-based definition of integration which takes into account both its functional and wider dimensions is emphasised. Secondly, the thesis advocates the development of a conceptual framework which recognises and utilises the extent of the interaction between integration and law, moving beyond the conceptualisation of integration as a mandatory element of immigration law. On this basis, a number of basic recommendations for the development of a holistic and human-rights based integration policy in Ireland are outlined.

1.4 Methodology

Standard legal methodology is employed in this thesis. In the case of Irish law, the traditional primary sources of Irish law - the Constitution, legislation and case law – are the main focus of the research. In the EU law context, EU Treaties, legislation and case law are the primary sources. In the international law sphere, the UN Convention Relating to the Status of Refugees (together with its Protocol)[14] and a number of the UN human rights treaties are analysed, in particular the International Covenant on Civil and Political Rights,[15] the International Covenant on Social, Economic and Cultural Rights[16] and the International

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[14] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137; and UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

[15] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

[16] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

Convention for the Elimination of All Forms of Racial Discrimination.[17] As regards regional human rights instruments, the European Convention on Human Rights, as interpreted by the European Court and Commission of Human Rights, is examined.[18] I have also referred to the decisions, general comments and concluding observations on state reports of the relevant UN treaty monitoring bodies. In the absence of a formal treaty monitoring body in case of the 1951 Refugee Convention, the instruments of the Office of the UN High Commissioner for Refugees and the Executive Committee of the High Commissioner are used.

A wide array of secondary sources has also been utilised. Academic commentary contained in books, articles, conference papers and case comments have been consulted. Irish parliamentary debates are referred to in Chapter 7 in order to determine the rationale for the changes in citizenship law in 2004. The theme of the thesis - integration - is not in itself a legal concept; consequently, the legal analysis draws from interdisciplinary and sociological scholarship in certain parts, particularly when looking at the concept of integration in the opening chapters. The traditional legal sources are complemented by policy documents, which are used throughout the thesis but particuarly in Chapter 2 in order to devise a working definition of integration for the purposes of the thesis. Policy documents produced by state agencies (such as the Health Service Executive and An Garda Síochána), by Government and by the Oireachtas are used as secondary sources. Reports of domestic non-governmental organisations such as the Immigrant Council of Ireland and the Migrant Rights Centre of Ireland are examined, as are research papers by independent think-tanks such as the Economic and Social Research Institute. Press coverage of integration-related themes is referred to where relevant. In addition, Chapter 5 is partly based on an in-depth analysis of the significant body of EU policy documents in the field of integration.

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[17] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

[18] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5.

Two of the chapters have been published in journals in adapted form. The ECHR section of Chapter 4 formed the basis of an article published in the European Journal of Migration and Law, "The Concept of Integration in the Jurisprudence of the European Court of Human Rights."[19] Similarly, an article in the Hibernian Law Journal entitled "Immigration, Integration and Citizenship in the European Union: The Position of Third Country Nationals" has its origins in Chapter 5.[20]

1.5 Terminology

While the terminology used in this thesis is generally defined in the body of the text itself, a small number of terms require some clarification. The terms "migrants" and "immigrants" will be used interchangeably to describe persons who enter or reside on the territory of a state which is not that of their nationality. This encompasses - *inter alia* - voluntary migrants in search of better opportunities, family migrants, refugees and beneficiaries of other forms of international protection. The term "third-country national" as applied in EU law means any person who is not a citizen of a Member State. The terms "EU migrant" and "EU citizen migrant" are both used to refer to EU citizens who exercise their right to free movement to enter or reside in another EU Member State. In Chapters 6 and 7, the terms "non-national" and "non-citizen" are also used interchangeably.

My working definition of "integration", the identification of which is one of the core strands of this dissertation, is set out in Chapter 2. The definition is as follows:

> Integration is an ongoing, multidimensional, two-way process between, on the one hand, migrants and, on the other hand, existing members of the

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[19] Clíodhna Murphy, "The Concept of Integration in the Jurisprudence of the European Court of Human Rights" (2010) 12(1) *European Journal of Migration and Law* 23.

[20] Clíodhna Murphy, "Immigration, Integration and Citizenship in the European Union: The Position of Third Country Nationals" (2008 - 2009) 8 *Hibernian Law Journal* 155.

receiving society along with the receiving state itself. This process involves a series of interlinked spheres, which, for the purposes of this thesis, will be characterised as forming part of 'functional' or 'wider' perspectives on integration. 'Functional' aspects of integration include first of all protecting fundamental rights and secondly providing a legal status which acts as a gateway to the core policy areas of housing, health, education, social welfare and family reunification. 'Wider' aspects of integration connect to these functional themes but place integration in its broader thematic context. These are aspects of integration with 'wider' connections to the broader themes of national identity, responses to diversity in society, social policy and equality - most importantly, approaches to citizenship and the place of culture and religion in public space.

Finally, abbreviations used in the footnotes are contained at the back of the Bibliography.

2 The Concept of Integration

2.1 Introduction

> Integration is a chaotic concept: a word used by many but understood differently by most.[1]

The difficulty in defining integration is a pervasive problem encountered by lawyers and sociologists attempting to explore the phenomenon, "hindering coherent policy development and productive public debate".[2] This chapter will investigate different understandings of the concept of integration in order to develop a conceptual framework for the analysis of the relationship between integration and law. First, a number of mainstream approaches to defining integration will be compared in order to gain a sense of the scope of the meaning of integration. This is followed by a detailed analysis of the definition and conceptualisation of integration in the Irish context. It is argued that the definitions examined broadly converge around the idea of integration as a two-way, multi-faceted and gradual process. A number of integration models which are often used to describe the responses of states to difference and diversity will then be identified – multiculturalism and assimilation being the two classical opposing models - and the continued usefulness of these models questioned. Finally, the value of situating integration in its broader context (in particular given the circularity and incoherence which often pervades debates on the meaning of integration) will be underlined by looking at some of the wider debates and social themes of which integration forms part. This analysis of the variety of possible conceptualisations of

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[1] Vaughan Robinson, "Defining and measuring successful refugee integration", in ECRE, *Proceedings of ECRE International conference on Integration of Refugees in Europe* (ECRE, 1998)

[2] Alistair Ager and Alison Strang, "Understanding Integration: A Conceptual Framework" (2008) 21(2) *JRS* 166, at166.

integration and its broader dimensions is synthesised to develop a working definition of integration, which will be used to frame the rest of the thesis.

2.2 Defining Integration: The Council of Europe, UNHCR and European Union Approaches

Integration is an elusive concept. A cursory review of literature discussing integration reveals the complexity and uncertainty surrounding the meaning and use of the term. Overall, there is a "lack of a clear and generally agreed conceptual framework for integration research".[3] The following are some of issues which become problematic when assessing the meaning of integration. Is integration a condition or a process? If it is a process, is it a one-way process whereby immigrants are expected to adapt to fit in with a dominant culture and way of life, or a two-way process of adaptation, involving change in values, norms and behaviour for both newcomers and members of the existing society? What are the defining criteria for integration, and how do we know if it has been successfully achieved? The multi-dimensional nature of the integration process makes it difficult to define in any precise way. Integration is related to a wide range of policy areas (for example, education, housing and health) and involves a wide variety of social actors: political decision-makers, public officials, employers, trade unions, co-workers, neighbours and so on. The process is shaped by many factors, including the characteristics of the migrants (for example their skills, language abilities, education and religion) and the characteristics – economic, social, cultural and political – of the milieu which they are attempting to enter.[4]

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[3] See Stephen Castles, Maja Korac, Ellie Vasta, Steven Vertovec, *Indicators of Integration: Mapping the Field* (Report of a Project carried out by the University of Oxford Centre for Migration and Policy Research and Refugee Studies Centre contracted by the Home Office Immigration Research and Statistics Service, December 2002), at 139.

[4] See International Organisation for Migration and the National Economic and Social Council, *Managing Migration in Ireland: A Social and Economic Analysis* (IOM, September 2006).

Approaches to the definition of integration can revolve around identifying the underlying issues and fundamental theoretical questions raised by the concept,[5] or take a more functional approach by identifying expected outcomes.[6] An "inclusive" approach can also be taken, whereby integration is simply seen as the inclusion of new populations into the structures of the host country.[7] On balance, it is accurate to conclude that "(T)here is no single, generally accepted definition, theory or model of immigrant and refugee integration. The concept continues to be controversial and hotly debated".[8]

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[5] For example, Favell defines the 'problem' of integration as follows: How can a political system achieve stability and legitimacy by rebuilding communal bonds of civility and tolerance – a moral social order – across the conflicts and divisions caused by the plurality of values and individual interests? He identifies the theoretical origins of the concept as dating to the American functionalist solution to the Hobbesian problem of value pluralism, worked out in the sociology of Talcott Parsons. He argues that the application of the idea of integration to the study of race and ethnicity and its use as a conceptual framework for public policies was popularised by the Chicago school of urban sociology, although in their use it has a mainly assimilatory sense. Adrian Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain* (2nd ed, Palgrave, 2001), at 3.

[6] For example, Home Office, *Indicators of Integration: Final Report* (Home Office Practice and Development Report, 2004) uses the following working definition of integration, having reviewed more than forty definitions of the term (at 9): "An individual or group is integrated within a society when they achieve public outcomes within employment, housing, health, education etc. which are equivalent to those achieved within the wider host communities, and are inactive relationship with members of their ethnic or racial community, wider host communities and relevant services and functions of the state, in a manner consistent with shared notions of nationhood and citizenship in that society."

[7] Heckmann and Schnapper (ed.s) define integration as the inclusion of new populations into the social structures of the host society (Friedrich Heckmann and Dominique Schnapper eds, *The Integration of Immigrants in European Societies – National Differences and Trends of Convergence* (Lucius and Lucius, 2003), at 14). Similarly, in *Managing Migration in Ireland A Social and Economic Analysis*, the International Organisation for Migration uses the term "integration" to refer to "the adjustments that result from interactions (or their lack) between immigrants and mainstream Irish society" (note 4, at 151). Anja Wiesbrock uses a broad definition of "integration", as "the process of inclusion of immigrants in the institutions and relationships of the host society. Anja Wiesbrock, *Legal Migration to the European Union* (Martinus Nijhoff Publishers, 2010), at 16.

[8] Stephen Castles, Maja Korac, Ellie Vasta, Steven Vertovec, note 3, at 114.

2.2.1 Early definitions of integration: the Council of Europe approach

The Council of Europe was one of the first organisations that included integration on its agenda[9] and, within the Council of Europe, the European Committee on Migration has produced a significant body of work on immigration and integration, particularly throughout the 1990s.[10] The Committee has noted that there is no uniform concept of migrants' integration in the European receiving societies. Concepts of integration may differ greatly with regard to their position on the inclusion-exclusion continuum of legal-political rights (eg possibilities of naturalisation, active and passive voting rights), and in offering access in differing degrees to language training, housing, education, the labour market and the social security system.[11] The Council of Europe advocates a broad understanding of the concept of integration. Integration is understood as "a two-sided process and as the capacity of people to live together with full respect for the dignity of each individual, the common good, pluralism and diversity, non-violence and solidarity, as well as their ability to participate in social, cultural, economic and political life."[12] According to the Council of Europe approach, the rationale for integration policies is to allow immigrants to participate fully in the life of the host society, and strategies for integration must include social, political and cultural aspects. While states should respect immigrants' dignity and distinct identity,

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[9] Rinus Penninx, Dimitrina Spencer and Nicholas Van Hear, *Migration and Integration in Europe: The State of Research* (ESRC Centre on Migration, Policy and Society (COMPAS), University of Oxford, 2008), available at http://www.norface.org/files/migration-COMPAS-report.pdf, at 7. Rosenow notes that the diverse integration initiatives of the Council of Europe dominated the activities at the European level until the EU established a legal basis for supranational activities with the Treaty of Amsterdam. Kerstin Rosenow, "The Europeanisation of Integration Policies" (2009) 47(1) *International Migration* 133, at 139.

[10] See for example, Rainier Baubock, *The Integration Of Immigrants*, (Council of Europe Consultation); Christoph Hofinger, *Measurements and Indicators of Integration* (Council of Europe, 1998); Council of Europe, *Religion and the integration of immigrants* (Community Relations, 1999); Jan Niessen, *Diversity and cohesion: new challenges for the integration of immigrants and minorities* (Council of Europe, 2000). See also Council of Europe, *Framework for Integration* (2000).

[11] Christoph Hofinger, *ibid.*, at 32.

[12] See Council of Europe, *White Paper on Intercultural Dialogue: Living Together as Equals in Dignity* (Strasbourg, 7 May 2008).

immigrants also have a responsibility to abide by the laws and respect the basic values of European societies and their cultural heritage. In this way, integration is perceived as a process of mutual responsibility of the receiving state and the immigrant.

On a practical level, integration and the creation of an environment conducive to integration are viewed by the Council of Europe as key elements of a successful migration management strategy.[13] The most important practical elements of integration policies are identified as being secure residence and related rights, promotion of equal socio-economic and civil and political rights, easy and fair naturalisation and the adoption of legal and other measures to combat racial and ethnic discrimination.[14]

2.2.2 UNHCR's definition of integration

The Office of the United Nations High Commissioner for Refugees ("UNHCR") uses a similar formulation in the context of refugee integration, which is defined as a "dynamic and multifaceted two-way process which requires efforts by all parties concerned, including a preparedness on the part of refugees to adapt to the host society without having to forego their own cultural identity, and a corresponding readiness on the part of host communities and public institutions to welcome refugees and meet the needs of a diverse population".[15]

UNHCR emphasises the complex and multi-dimensional nature of the integration process, noting that "the process of integration is complex and gradual, comprising distinct but interrelated legal, economic, social and cultural dimensions, all of which are important for refugees' ability to integrate successfully as fully-included members of society."[16] Integration is divided into a three-pronged process of legal, economic and social and cultural

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[13] See Council of Europe, *Towards a Migration Management Strategy* (July 2003).

[14] *Ibid.*

[15] UNHCR Executive Committee, *Conclusion on Local Integration* 7 October 2005, No. 104 (LVI) – 2005, preamble and (k). See also UNHCR, *Note on the Integration of Refugees in the European Union* (May 2007).

[16] UNHCR, *Note on the Integration of Refugees in the European Union*, *ibid.*, at 2.

integration.[17] Specific rights relating to integration are seen as encompassing the following: legal residency status; employment; housing rights; education; public relief and health care; social security and labour legislation; family unity; right of access to courts; property rights; freedom of residence and movement and naturalization.[18] UNHCR has also emphasised the practical importance of the means chosen to promote integration: these can be, on the one hand, targeted support for those who are expected to integrate along with clearly identified obligations or expectations and, on the other hand, ensuring integration through mainstream services from the beginning with little or no initial direct support to integrate.[19] UNHCR's concept of integration will be examined in detail in Chapter 4.

2.2.3 The definition of integration in the European Union Framework on Integration

The European Commission has noted that, in the context of the European Union ("EU"), "No Member State has a uniform definition of integration, however they do to a certain extent agree that integration is composed of different elements and that it must be a two-way process involving both immigrants and their local community".[20] The Commission has summarised the common elements of Member States' integration policies as including respect for fundamental values in a democratic society; the right to maintain his or her own cultural identity; rights comparable to those of EU citizens and corresponding obligations and active participation in all aspects of life on an equal footing.[21]

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[17] See Alexandra Fielden, "New Issues in Refugee Research: Local integration: an under-reported solution to protracted refugee situations", Research Paper No. 158 (UNHCR, June 2008)..

[18] Rosa da Costa, "Rights of Refugees in the Context of Integration: Legal Standards and Recommendations", UNHCR Legal and Protection Policy Research Series (UNHCR, June 2006).

[19] UNHCR, *Mapping Integration: UNHCR's Age, Gender and Diversity Mainstreaming Project on Refugee Integration in Ireland – 2008/2009* (April 2009), at 9.

[20] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Immigration, Integration and Employment* (COM (2003) 336 final), Annex 1, at 44. This Communication was one of the first EU documents dealing with integration.

[21] *Ibid.*

The EU Framework for the Integration of Third Country Nationals in the EU (EU "Framework on Integration") envisages integration as "a process of mutual accommodation by both the host societies and immigrants and an essential factor in realising the full benefits of migration."[22] The approach taken in the EU Framework on Integration has been to identify "Common Basic Principles for Immigrant Integration Policy in the EU" ("CBPs"),[23] which are primarily to assist Member States in formulating integration policies by offering a non-binding guide of basic principles against which they can judge and assess their own efforts and to serve as a basis for Member States to explore how EU, national, regional, and local authorities can interact in the development and implementation of integration policies. Integration is defined in the CBPs as "Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States".[24] The CBPs are wide-ranging and emphasise the importance of employment,[25] education,[26] access to institutions of the host society on an equal basis to EU citizens,[27] participation in the democratic process,[28] and free practice of religion and culture.[29] Reflecting the two-way approach taken in the definition of integration, both migrants' and the host society's responsibilities in the integration process are acknowledged: for example, CBP 4 states that "basic knowledge of the host society's language, history, and institutions is indispensable to integration; enabling

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[22] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Third Annual Report on Migration and Integration* (COM (2007) 512 final), at 3.

[23] Justice and Home Affairs Council Conclusions, *Common Basic Principles on Immigrant Integration*, Council Document 14615/04, Brussels, 19 November 2004. In 2009, the European Parliament reminded Member States, local authorities and immigrants that all points of the CBPs must be applied equally (European Parliament resolution of 2 April 2009 on problems and prospects concerning European citizenship (2010/C 137 E/03), at para. 20.

[24] CBP 1.

[25] CBP 3.

[26] CBP 5.

[27] CBP 6.

[28] CBP 8.

[29] CBP 9.

immigrants to acquire this basic knowledge is essential to successful integration." Similarly, CBP 2 provides that "(I)ntegration implies respect for the basic values of the European Union." Frequent interaction between immigrants and Member States citizens is stated to be a "fundamental mechanism for integration."[30]

The CBPs have been further developed in subsequent policy documents, including in the Commission's Communication on A Common Agenda for Integration,[31] which makes proposals for concrete measures to put the CBPs into practice. A Common Agenda for Integration provides suggestions for action both at EU and national level. It encourages Member States to strengthen their efforts in developing comprehensive national integration strategies, while new ways of ensuring consistency between actions taken at EU and national level are being considered. The CBPs are also elaborated upon in the Handbooks on Integration, which consider in detail various practical issues linked to different CBPs.[32] While the importance of the CBPs as the basis for EU integration policy has been consistently emphasised[33] and the CBPs contain the official EU definition of integration, they constitute only one small part of the multi-faceted EU Framework on Integration. The EU approach to integration will be further discussed in Chapter 5.

2.3 Defining Integration in the Irish Context: the Conceptual Basis for Irish Integration Policy

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[30] CBP 7.

[31] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 1 September 2005 – A Common Agenda for Integration – Framework for the Integration of Third-Country Nationals in the European Union (COM(2005) 389 final – Not published in the Official Journal).

[32] The most recent (and third) edition of the handbook is European Commission, *Handbook on Integration for policymakers and practitioners* (Brussels,3rd ed., April 2010).

[33] See for example, Council of the EU, *Strengthening of Integration Policies in the EU*, Council Document 10267/07 Luxembourg, 12-13 June 2007, at para. 6.

The concept of integration is relatively new to Irish policymakers and consequently has not yet generated a significant body of specific policy documentation. In addition, formal integration programmes in the form of language courses, civic orientation courses, integration contracts or tests do not as yet form part of the Irish integration landscape (other than the basic civic orientation course provided for resettled refugees).[34] To date, official discourse appears to embrace the two-way approach discussed above in the context of the Council of Europe, UNHCR and EU definitions. One of the first policy documents in the area of integration (dating from 2000) adopted a wide-ranging and inclusive working definition of the concept of (refugee) integration, stating that: "Integration means the ability to participate in Irish society to the extent that a person needs and wishes in all of the major components of society, without having to relinquish his or her own cultural identity".[35] It was also acknowledged that integration is not a static concept but a process which undergoes constant change as society evolves, and that integration is a two-way process that places an obligation on refugees and on society.[36] As regards specific integration issues, the report identified the following key practical issues: language skills, employment, training, recognition of skills and qualifications, education, accessing mainstream health services, health issues, accommodation, naturalisation and citizenship and family reunification.[37] Integration policy, insofar as it existed at all, was based on this report for eight years.

The rapid rise in immigration in the years following the publication of this policy document resulted in an increased focus on integration. In 2007, the Houses of the Oireachtas Joint Committee on European Affairs produced a "Report on Migration and Integration Policy in Ireland", which considered the integration practices of other European

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[34] This contrasts with practice in most EU Member States, which usually combine a number of mandatory and/or voluntary integration measures of this type. See Anja Wiesbrock, *Legal Migration to the European Union*, note 7, at 606-700.

[35] *Integration: A Two-Way Process*, Report to the Minister for Justice, Equality and Law Reform by the Interdepartmental Working Group on the Integration of Refugees in Ireland (Department of Justice Equality and Law Reform, 2000).

[36] *Ibid.*

[37] *Ibid.*

countries. The fairly sparse conclusions of the Committee related primarily to the importance of language teaching and the necessity for a single government department with responsibility for integration.[38] This recommendation was acted upon in 2007 with the creation of a new position of Minister of State with special responsibility for Integration (referred to generally as the "Minister for Integration"). Upon his appointment as Ireland's first Minister for Integration in 2007, Conor Lenihan described his task as twofold: "making sure that there are no barriers to migrants succeeding in Irish society; and bringing the Irish population to the point of maturity and understanding what the issues are."[39] This two-way approach reflects Ireland's acceptance of the EU common framework for the integration of third-country nationals. The EU Common Basic Principles are used as a benchmark for Irish integration policy,[40] as part of a general trend whereby "(p)olicy to combat racism and foster a more inclusive and intercultural society in Ireland are increasingly influenced by policy at EU level, including policy relating to integration."[41]

This trend is continued in the Statement on Integration Strategy and Diversity Management ("Migration Nation") published by the Office of the Minister for Integration ("OMI") in 2008.[42] This key document, which reiterates the major influence which the EU Common Basic Principles have had and continue to have on Irish integration developments, outlines the principles intended to underpin Irish integration policy. The statement sets out these principles as follows:

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[38] Houses of the Oireachtas Joint Committee on European Affairs, *Report on Migration and Integration Policy in Ireland* (March 2007).

[39] "Vigorous economy key to integration of migrants, says Minister", *Irish Times*, 4 January 2008.

[40] Houses of the Oireachtas Joint Committee on European Affairs, note 38, at 11, "In Ireland, the CBPs continue to inform the policy making process and all projects submitted for funding from a recently announced Immigration Integration Fund are required to reflect the CBPs."

[41] Editorial, NCCRI Journal: *Spectrum*, Issue 15, September 2007.

[42] Office of the Minister for Integration, *Migration Nation: Statement on Integration Strategy and Diversity Management* (May 2008).

- A partnership approach between the Government and non-governmental organisations, as well as civil society bodies, to deepen and enhance the opportunities for integration;
- A strong link between integration policy and wider state social inclusion measures, strategies and initiatives;
- A clear public policy focus that avoids the creation of parallel societies, communities and urban ghettoes, i.e. a mainstream approach to service delivery to migrants; and
- A commitment to effective local delivery mechanisms that align services to migrants with those for indigenous communities.[43]

The central features of the policy statement are its mainstreaming approach to the provision of services for new communities;[44] its situation of integration policy in the context of the general social inclusion and equality framework;[45] and its insistence on a two-way model of integration.[46] Other notable features include the emphasis placed on respect for cultural differences and the lack of emphasis on identity or "values" issues. The practical areas of language education; interpretation and translation; information provision; and funding arrangements information are identified as the key areas crucial to integration success, rather than areas relating to culture or values.[47] The statement has been characterised as enshrining an intercultural approach for this reason.[48] Migration Nation constitutes a skeletal conceptual framework for future development of integration policy in Ireland. One of the aims of Part III of this thesis will be to explore whether the legal framework for integration reflects the principles underlying this policy setting.

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[43] *Ibid.*, at 9 and 10.

[44] *Ibid.*, at 16.

[45] *Ibid.*.

[46] *Ibid.*, at 18.

[47] *Ibid.*,, at 34 and 35. Although it also states that "serious social upheaval can be anticipated" as a result of immigration (at. 35) and that "we cannot focus on 'rights' to the exclusion of 'responsibilities' [of migrants]" (at. 36).

[48] For example, in An Garda Siochana, *Diversity Strategy and Implementation Plan 2009-2012: Beyond Legal Compliance* (May 2009), at i.

2.3.1 The fragmented nature of integration policy in Ireland

In addition to the body of policy documentation specifically based on integration, integration-related concerns have emerged in other major policy areas. The National Action Plan Against Racism 2005-2008 ("NPAR") and the National Action Plan for Social Inclusion 2007-2016 ("NPSI") lay down integration policies and goals. NPSI provides that one of the high level goals to be achieved in the context of social inclusion is the integration of migrants and specifically the development of a "strategy aimed at achieving the integration of newcomers in our society".[49] NPAR is the bedrock of Irish integration policy and provided the guiding principles for Migration Nation,[50] and has importance as "a blueprint for an overall integration agenda"[51] even though the life span of the plan is now officially over (and no anti-racism strategy has been put in place to replace it).[52] In parts, it reads more like an integration plan than an anti-racism plan, providing an "intercultural framework" with the objectives of protection, inclusion, provision, recognition and participation.[53] In the sphere of education, Guidelines for Intercultural Education in Primary Schools and an Intercultural Education Strategy 2010 – 2015 have been published[54] and in

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[49] See *National Action Plan for Social Inclusion 2007-2016* (February 2007), at 15, Goal 12. The Plan provides that as an initial action, resources for the provision of 550 teachers for language supports in the education sector will be provided by 2009 and access to other public services through translation of information and supports will be improved. The IOM has observed that "Social inclusion initiatives have been introduced as a response to the potential for the marginalization, isolation and exclusion of migrants. These measures have not only been important to promote inclusion and integration, but they have been a crucial element of a broad approach to preventing racism." See International Organisation for Migration and the National Economic and Social Council, note 4, Chapter 8: "Implications for Social Policy: Health, Social Welfare and Migrants".

[50] See *The National Action Plan Against Racism 2005-2008: Not an End, Just a Beginning* (2009), at 7.

[51] *Ibid.*.

[52] The final report in relation to NPAR is contained in *The National Action Plan Against Racism 2005-2008: Not an End, Just a Beginning* (2009).

[53] See *Planning For Diversity: The National Action Plan Against Racism 2005 - 2008*, at 27.

[54] Department of Education and Skills and Office of the Minister for Integration, *Intercultural Education Strategy 2010 – 2015* (2010). Also in the field of child care and education, see Office of the Minister for Children, "Diversity and Equality Guidelines for Childcare Providers" (Office of the Minister for Children,

health, an Intercultural Strategy for Healthcare has been devised.[55] In a similar vein, An Garda Síochana, the national police force, has published a Diversity Strategy which draws on the NPAR and Migration Nation to promote an intercultural approach to diversity management, stating:

> Interculturalism recognises that integration is at the very minimum, a 'two way street' and places demands on both the majority and minority communities to create proper conditions for harmonious integration.[56]

There is an acknowledged need to go beyond these piecemeal policy documents towards a more comprehensive integration framework.[57] In its Integration Framework, Dublin City Council states:

> Public sector organisations are responding, in different ways and with different objectives to growing diversity and the need to ensure that services are accessible, good quality and efficient for all.[58]

December 2006) and FAS, "Guidelines for Interculturalism" (FAS, January 2009). These publications are not immigration-specific. See also Oireachtas Library and Research Service, "Understanding the Challenges of Immigration for Education Provision" (Spotlight No. 1, 2008).

[55] Launched by the HSE on 21 February 2008. Furthermore, on 21 February 2008, the Arts Council, the Irish Government Agency for developing the arts, and the National Action Plan against Racism announced that they have entered into a partnership to carry out research designed to develop a cultural diversity policy for the arts. An action plan, informed by this research, will be developed in order to support cultural diversity practice into the future. See "The Arts Council and the National Action Plan Against Racism", *Arts Council Press Release*, 21 February 2008.

[56] An Garda Síochána, note 48, at i.

[57] See speech of An Tánaiste Michael McDowell, where he expressed the view that "The challenge now, of course, is to extend our horizons; to go beyond anti-racism measures as we begin to understand the totality of initiatives needed to work towards societal cohesion." "The Arts Council and the National Action Plan Against Racism", note 55.

This comment is telling: while the emerging policy documents reference the NPAR and Migration Nation as their conceptual foundation, the only thing that links these initiatives is a theoretical commitment to making public services more accessible. The International Organisation for Migration observed in 2006 that integration policy would need to be built on a widely shared vision of how integration might contribute to a dynamic, secure and socially cohesive Irish future.[59] While it has been seen that broadly speaking a mainstreaming, intercultural approach drawing on EU integration policy is endorsed in the policy documentation, a more developed specific vision of integration still seems to be lacking. Aside from Migration Nation, the only integration-specific document to emanate from the former Office of the Minister for Integration related to the specific group of resettled refugees.[60] These refugees are a highly selected group of migrants and it is difficult to extrapolate general principles from the policy approach to the integration of this group. Since its establishment, the OMI appeared to perceive its role as facilitating integration at grassroots level through the funding of sporting groups, non-governmental organisations ("NGOs") and faith-based community groups rather than developing an overarching integration framework which could be used to inform the action of other state

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[58] Dublin City Council, *Towards Integration: A City Framework* (Dublin City Council, 2008).

[59] See International Organisation for Migration and the National Economic and Social Council, note 4. See also National Economic and Social Council, *Migration Policy*, NESC Report No. 115 (2006). This was reiterated in the OECD Economic Survey of Ireland 2008, which emphasised that better integration of immigrants is necessary to ensure that immigration is a continued success in Ireland. OECD, *Economic Survey of Ireland* (April 2008).

[60] Louise Kinlen, "The Reception, Orientation and Integration of Resettled Refugees in the Irish Context" (Office of Minister for Integration, February 2008). Even this report states at the outset that "The views expressed in this report are those of the author and do not necessarily represent those of the Office of the Minister for Integration." While this documentation espouses a holistic vision of integration encompassing the phases of pre-departure orientation, post-departure orientation and integration, resettled refugees represent a tiny proportion of the migrant population as a whole and also represent a highly selected group. Conclusions relating to this group thus contribute little to a broad understanding of integration in Ireland.

bodies.[61] The decentralised approach taken to date to integration is also reflected in the focus on the development of integration strategies by local authorities rather than by the OMI.[62] This is a narrow approach to integration which suggests a reluctance to tackle the deeper issues attaching to integration. This trend would also suggest that the current fragmented approach to integration will probably continue into the future.

2.3.2 The impact of the financial crisis on integration strategy in Ireland

One of the major reasons for the lack of progress in the field of integration since the establishment of the OMI has been the impact of the financial difficulties which Ireland has been experiencing since late 2007. The financial crisis and dramatic rise in unemployment resulted in April 2009 in a return to net emigration for the first time since 1995.[63] These developments have meant that integration is no longer as immediate an issue as it was between 2000 and 2007 and it has slipped down the political agenda. The harsh budgetary measures necessitated by the financial crisis have impacted on the equality and integration

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[61] This view is reinforced by the following statement of the Office in the *United Nations International Convention on the Elimination of All Forms of Racial Discrimination Combined Third and Fourth Reports by Ireland as Required under article 9 of the Convention on the legislative judicial, administrative or other measures adopted to give effect to the provisions of the Convention* (Office of the Minister for Integration, 21 December 2009): "The new integration policy focuses on the role of local authorities, sporting bodies, faith-based groups and political parties in building integrated communities and targets funding in these areas." (para. 35 p.12). Also see the contribution of the Minister for Integration, Mary White, at the EU Ministerial Conference on Integration, where she emphasised the role of sport in integration ("Minister White T.D., attends the European Ministerial Conference on Integration in Zaragoza, Spain", *Press Release of the Office of the Minister of Integration* (19 April 2010)).

[62] See, for example, Dublin City Council, "Towards Integration: A City Framework" (2009); Cork City Council, "Integration Strategy - Connecting Communities" (2008); Limerick City and County Councils, "Integrating Limerick - Integration Plan 2010 – 2012" (2010).

[63] Central Statistics Office, *Population and Migration Estimates, April 2009* (CSO, September 2009). The statistics showed that immigration from all non-Irish groups showed a decline, with those from the EU 12 countries showing the greatest fall. See also Chapter 1 (Introduction) and the analysis contained in Central Statistics Office, *Population and Migration Estimates April 2010* (CSO, 21 September 2010).

infrastructure through, for example, the closing of the National Consultative Committee on Racism and Interculturalism and the cuts in funding for the Human Rights Commission and Equality Authority.[64] The plans set out in Migration Nation to establish new integration structures, including a standing Commission on Integration and a Task Force to establish future policy needs – have been shelved (although a Ministerial Council on Integration was established in 2010).[65] The NPAR has not been replaced by a new strategy and so the State currently has no formal anti-racism strategy in place. This state of affairs resulted in 2011 in the following findings of the Migration Integration Policy Index:

> The boom transformed Ireland into a country of immigration but, with the crisis, net emigration has returned for the moment. Government is restricting family access to work, increasing fees and cutting funds, including for the Equality Authority, which may undermine its anti-discrimination work. These exacerbate the effect of the crisis on immigrants, who are already more likely to lose jobs. ... These and other restrictions mean that ... Ireland's policies are still not halfway favourable for integration, below

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[64] The Human Rights Commission stated that it could not continue to function properly with the cuts. See "Budget cuts will severely limit effectiveness of State watchdogs", *Irish Times,* 11 November 2009. Prior to this budget, Niall Crowley resigned as CEO of the Equality Authority in protest when its budget was halved. His account of this is contained in Niall Crowley, *Empty Promises: Bringing the Equality Authority to Heel* (Farmar, 2010).

[65] The website of the Office for the Minister for Integration states that: "With regard to new structures and co-ordinating mechanisms, the Minister does not now propose to establish the three new bodies referred to in Migration Nation because such a move would be inappropriate in current circumstances when State bodies are being rationalised or abolished. She has announced (April 2010) that she is establishing a Ministerial Council on Integration which will advise the Minister on issues faced by migrants." http://www.integration.ie/website/omi/omiwebv6.nsf/page/aboutus-structures-overview-en, (27 May, 2010). The Ministerial Council was launched in September 2010 ("Minister White announces details of the newly established Ministerial Council on Integration", *Press Release of the Office of the Minister of Integration* (22 September 2010)).

Canada, the UK, and the US and new labour migration countries (Spain and Portugal).[66]

The most recent, and most significant, of the integration "casualties" of the economic recession and the consequent reorientation of government policy is the decision made by the newly elected Fine Gael-Labour coalition government in March 2011 to abolish the position of the Minister for Integration. While this clearly indicates that integration (along with immigration matters generally) has slipped down the policy agenda, the full implications of this move for the development of integration policy is still uncertain. At the time of writing, the Office of the Minister for Integration still exists (without a Minister) and the OMI has stated (informally) that it has "no information" as yet as to what will happen to its work programme or staff. It seems most likely that the OMI will become an "Integration Unit" in the Department of Justice or perhaps in the Department of Social Protection. In these circumstances, the development of a coherent, nuanced and holistic integration policy in Ireland seems unlikely.

Aside from its impact on policy infrastructure, the recession has also influenced the discourse surrounding immigration and integration. The shift in attitude has seen politicians calling for the limitation of work permits given the sharp rise in unemployment, including a suggestion from Fine Gael TD Leo Varadkar that immigrants could be paid to return to their country of origin.[67] In legal terms, there have been changes in the eligibility rules for the grant of work permits which tighten the eligibility criteria,[68] and changes to the immigration

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[66] British Council and Migration Policy Group, Migration Integration Policy Index III (2011), available at www.integrationindex.eu.

[67] See BBC News, "Foreign jobless 'paid to go' call", 4 September 2008 (http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7599298.stm).

[68] These changes apply to new applicants for work permits and include additional excluded categories, no work permits granted for jobs with salary of under €30,000 a year, (may be considered in exceptional cases) and increased renewal fees for new work permit holders. See "Employment Permit Arrangements, Guide to Green Card Permits" (Department of Enterprise, Trade and Innovation, August 2010).

regime for non-EU students.[69] It is therefore a vulnerable time for many migrants both in economic terms and in terms of social marginalisation, as recognised in changes in policy by the Department of Enterprise, Trade and Employment announced in August 2009 which provide for an increase in the 3 month "breathing space" to 6 months in order to secure further employment for any worker who has held an employment permit for less than 5 years and has been made redundant.[70] This vulnerability of migrants strengthens the case for a vigorous integration policy, as highlighted by UNHCR in the refugee context as follows:

> In the context of the current economic recession, xenophobia, intolerance and discrimination, often targeted at refugees and asylum-seekers, continue to be a serious concern across Europe, highlighting the need to support the integration of newcomers.[71]

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[69] Up-to-date details of the new immigration regime for non-EU students (which came into effect on 1 January 2011) can be found at http://www.inis.gov.ie/en/INIS/Pages/Student%20Guidelines%20-%20New%20Immigration%20Regime%20for%20Full%20Time%20non-EEA%20Students.

[70] In addition, as of October 2009 a Labour Market Needs Test will not be required in respect of Work Permit applications from current and future Employment Permit holders who have been made redundant. See "Policy for 5 year workers and redundant workers", at http://www.inis.gov.ie/en/INIS/Pages/Policy%20for%205%20year%20workers%20and%20redundant%20workers. The vulnerability of migrants in employment situations is highlighted by the Economic Social Research Institute report (Frances McGinnity, Jacqueline Nelson, Pete Lunn and Emma Quinn, "Discrimination in Recruitment: Evidence from a Field Experiment" (ESRI, 2009)), which found that job applicants with Irish names are over twice as likely to be invited to interview as candidates with identifiably non-Irish names, even though both submit equivalent CVs.

[71] UNHCR, *Update on UNHCR's operations in Europe Executive Committee 2009*, (September 2009). This was also pointed out in the final report of the steering committee for the NPAR which noted in relation to the cutbacks in the anti-racism field that: "A decision has clearly been made that we can no longer afford to confront the potential for racism, precisely at the time when many immigrants living in Ireland are at their most vulnerable." *The National Action Plan Against Racism 2005-2008: Not an End, Just a Beginning* (2009), Foreword of Lucy Gaffney at 2. She also argued that: "The same sense of purpose that led to the establishment

Nonetheless, in practical terms given the funding cutbacks to integration bodies, aswell as the abolition of the Minister for Integration, the provision of this enhanced support seems unlikely in Ireland.

2.3.3 Conflicting messages contained in Irish integration discourse

It was noted above that Migration Nation does not enter the controversial terrain of cultural integration in any detail. Moreover, Irish state institutions and politicians generally employ a rhetoric of inclusion and interculturalism when talking about integration issues.[72] However, at times conflicting discourses emerge.[73] Irish politicians frequently conflate the ideas of integration and assimilation. For example, in July 2007, when commenting on the decision of An Garda Síochána to ban turbans from its official uniform, then Minister for Foreign Affairs Dermot Ahern spoke of the need for newcomers to "assimilate" into Irish society, arguing that it was important that people who "come to our country have to assimilate into our own culture and our own norms in society".[74] The Minister for Integration, Conor Lenihan, said:

> If we are to take integration seriously, people who come here must understand our way of doing things. When the President and Ministers travel to the Middle East, they accept cultural requirements of the country and the

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of NPAR in the first place, must not be allowed to disappear in preference to a narrow short-term focus on the economy." (at 3).

[72] See for example, An Garda Siochana, note 55; Conor Lenihan, *An important year for integration* (Metro Eireann, 17 January 2008); "Lenihan stresses positive contribution of migrants", *Irish Times*, 21 January 2008.

[73] On the importance of public discourse on integration processes, see European Commission, "Handbook on Integration for policymakers and practitioners" (Brussels,3rd ed., April 2010), at 55.

[74] "Gardaí deny turban ban is based on race or religion", *Irish Times*, 24 August 2007.

culture they are operating in. It is a vice versa situation with regard to Ireland.[75]

The ban on the wearing of the Sikh turban by on-duty members of the Garda Síochána has been strongly criticised as failing to reflect the Government's stated commitment to integration, as well as sending out contradictory messages as to the meaning of integration.[76]

Another example of this underlying discourse was the comments of the then Fine Gael spokesman on immigration and integration, Brian Hayes, who expressed the view that children attending schools without a satisfactory grasp of English should be "segregated" from their classmates.[77] Similarly, when Ruairi Quinn, Labour Party spokesman on education and science was asked for his opinion on the wearing of Muslim headscarves in schools, his response could not be said to endorse an intercultural approach: "Nobody is formally asking them to come here. In the interests of integration and assimilation, they should embrace our culture."[78] These incidents illustrate not only the lack of awareness of Irish politicians of the nuances of the meaning of integration and the terminology involved

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[75] "Granting Special Status Doesn't Help Integration", *Sunday Independent*, 19 August 2007.

[76] Dr Steven Loyal, of the School of Sociology, UCD, has argued that "Rather than trying to establish a realisable, coherent and enlightened integration policy, Mr Lenihan seems to be conveying contradictory messages: telling migrant organisations, employer bodies, trade unions and other State policymakers what they wish to hear - and then doing nothing." See Steven Loyal writing in the Irish Times, "Getting our heads around reality of multiculturalism", *Irish Times*, 22 August 2007. Harpeet Singh, leader of the Sikh Council of Ireland commented: "On the one hand, the Government has spoken about bringing more people from new communities into the Garda. And, on the other hand, they say they will not allow use of the turban. They are pushing communities like ours into a corner." See "Gardaí deny turban ban is based on race or religion", *Irish Times,* 24 August 2007.

[77] Brian Hayes subsequently said that he regretted his use of terminology: "Hayes regrets 'segregation' remark", *Irish Times*, 21 August 2008.

[78] "Muslim Anger at Opposition Calls for School Ban on Hijab", *Irish Independent*, 2 June 2008.

but also perhaps an underlying tendency towards a philosophy of cultural assimilation among Irish politicians.[79]

2.4 Common Threads in Defining Integration

While the detail of the Council of Europe, UNHCR, EU and Irish approaches to defining integration differ somewhat, each of the approaches discussed follows a basic pattern: each begins by identifying a basic definition of the concept of integration and then goes on to identify a range of integration issues. This reflects the multidimensional nature and complexity of the concept. There is some convergence among the definitions on the meaning of the concept of integration: it is seen as a two-way process composed of different elements. The emphasis on a bi-directional approach indicates a subtle, inclusive understanding of integration. A two-way approach implies that integration is not about all members of a society, new and existing, becoming the same, but about an arrangement of unity despite the existence of difference:[80] unity is achieved through mutual acceptance and accommodation.

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[79] The mixed messages inherent in Irish political rhetoric on migrant issues were underlined in a 2010 report of the Migrant Rights Centre Ireland, which drew attention to the gap between the broad acknowledgment of the contribution of migrant workers and policy developments which have a damaging effect on the lives of migrant workers and their families. In particular, the report highlights the potential effects of the dismantling of the statutory infrastructure developed to promote equality, the increase in deportations and waiting times for determination of applications for citizenship and long-term residency. Niall Crowley and Migrant Rights Centre of Ireland, *Hidden Messages, Overt Agendas: A Migrant Rights Centre of Ireland Pamphlet* (9 March 2010). This critique of government policy caused some controversy and eventually resulted in the withdrawal of funding for the project by the Office of the Minister for Integration. See Statement of Mary White TD, on the Adjournment of Dáil Eireann, 24 June 2010, available at http://www.integration.ie/website/omi/omiwebv6.nsf/page/AXBN-86UKH515543228-en. In response to the pamphlet, see *Minister Curran Responds to Pamphlet Entitled "Hidden Messages/Overt Agendas* (Office of the Minister for Integration, 9 March 2010), available at http://www.integration.ie/website/omi/omiwebv6.nsf/page/CDKR-83DPR21831599-en.

[80] See Ulrike Davy, "Integration of Immigrants in Germany: A Slowly Evolving Concept" (2005) 7 *EJML* 123.

Given the emphasis on this inclusive approach in the Irish official literature on integration, the implementation of this approach in practice must be scrutinised. It needs to be considered whether the approach as articulated is mirrored in the practical reality of concrete measures actually taken, in particular whether measures taken in the field of integration in fact place a greater emphasis on migrants' rather than existing members' responsibilities throughout the integration process. This has been the case in relation to the integration and immigration policies of a number of European countries, in which the trend is towards conceiving integration as an obligation on the immigrant which must be fulfilled in order to gain access to the territory of the state for example, or to obtain citizenship.[81] In the context of the EU, Carerra observes that "(t)he paradigm of a positive, two-way process does not appear to be one that is easily implemented in practice."[82] This is an issue which will form part of the analysis throughout the substantive chapters of this thesis.

The definitions studied above attempt to divide the conceptual analysis of integration into manageable parts by looking at its various dimensions, for example by viewing the concept in terms of legal, economic and social integration,[83] or breaking the concept down to a

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[81] For example, the Netherlands. See Leonard Besselink, "Unequal Citizenship: Integration Measures and Equality" in Sergio Carrera (ed.) *The Nexus Between Immigration, Integration and Citizenship in the EU* (Challenge Collective Conference Volume, April 2006). It has been argued that the trend in EU Member States is towards conceiving integration as an obligation by the immigrant in order to be included and to have access to the different societal dimensions of the receiving state, and that "(i)ntegration is becoming a one-way process by which the responsibilities are placed exclusively on the immigrant." Sergio Carrera, *A Typology of Different Integration Programmes in the EU* (CHALLENGE Liberty and Security Briefing Paper, DG Internal Policies of the Union, Directorate C – Citizens' Rights and Constitutional Affairs, 4 December 2005), at 5.

[82] See Sergio Carrera, "Towards an EU Framework on the Integration of Immigrants", in Sergio Carrera (ed) *The Nexus Between Immigration, Integration and Citizenship in the EU* (Challenge Collective Conference Volume, April 2006), at 5.

[83] Rosa DaCosta, note 18. Similarly, the Migrant Rights Centre of Ireland ("MRCI") propose that integration be seen as a process encompassing economic, social, cultural and political dimensions. (MRCI, *Priorities for Integration*, 2007).

multi-faceted framework.[84] While the categorisation varies, the common thread underlying the definitions is that integration is relevant to and should underpin more general policies in state and society. A developed conception of integration should reflect this broad base. For the purposes of the present research, perhaps the most useful conclusion to draw from the overview in this chapter of the concept of integration is that integration should be recognised as an umbrella term suggesting a set of possible and overlapping processes and spheres.[85] This is discussed further below in developing a working definition of integration for the purposes of this thesis.

2.5 Difficulties with Integration as a Value

The question of integration as a value in itself has also been the subject of debate, notably in the sociological literature. In the United Kingdom ("UK"), research commissioned by the Home Office revealed that the term is often considered problematic for a number of reasons. The report found that some members of the NGO and community sector did not like the connotations of the term and would not choose to use it.[86] Interviewed NGO representatives commented that integration seemed to represent a kind of medicine that newcomers should take in order to 'fit in', rather than a process which ensured that they had rights and access to services they needed. The way in which the verb can be used to suggest that people would 'be integrated' through various 'integration programmes' was felt to undermine positive concepts of empowerment, choice, growth and development.[87] These findings reflect concerns raised elsewhere that "integration ... can too easily imply a largely one-sided process in which newcomers adapt themselves to the structures of life and dominant culture

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[84] The EU approach.

[85] Stephen Castles, Maja Korac, Ellie Vasta, Steven Vertovec, note 3, at 126.

[86] *Ibid.*, at 114.

[87] *Ibid.*

of their host society",[88] and that the concept of integration has "been suspected of a homogenizing bend".[89]

Furthermore, integration can be seen as based on the fiction that migrants are to be integrated into an already functioning consensual, organic whole.[90] Favell makes this argument as follows:

> (The) happy, idealized language of integration ... is ... an under-theorised, *elite* re-production of a long-lost idea of political community; papering over inequality, conflict and power relations with a therapeutical, top-down discourse of multicultural unity. Moreover, it offers hope and the glimpse of a legitimate, universal social order which *works*, in the form of a knowingly counterfactual national public philosophy, falsely projecting a normative ideal as the teleological factor of present social dynamics.[91]

Finally, integration policies could be interpreted as representing a rejection of diversity in the host society by the state concerned. Guild suggests that "(t)he idea of integration in itself presupposes that diversity is a bad thing. Diversity within the host society must be

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[88] T. Alexander Aleinikoff and Douglas Klusmeyer (eds), *From Migrants to Citizens: Membership in a Changing World* (Carnegie, 2000), at 20 (Introduction).

[89] Rosemarie Sackmann, "Collective Identities and Social Integration", in Rosemarie Sackmann, Bernhard Peters, Thomas Faist (eds) *Identity and Integration: Migrants in Western Europe* (Ashgate, 2003), at 1.

[90] See Steven Loyal, "Getting our heads around reality of multiculturalism", *Irish Times*, 22 August 2007.

[91] See Adrian Favell, "To belong or not to belong: the postnational question", in Andrew Geddes and Adrian Favell (eds) *The Politics of Belonging: Migrants and Minorities in Contemporary Europe* (Ashgate, 1999), at 214. This point, that integration is an issue which concerns society as a whole, is borne out by the 2008 Economic and Social Research Institute/Equality Authority report *Discrimination in Ireland: Analysis of work-related discrimination*, which showed that the most vulnerable groups were the unemployed and the disabled. Nationality strongly influenced the likelihood of experiencing discrimination while looking for work: 13 per cent of non-Irish job seekers reported discrimination compared to 5 per cent of Irish job seekers.

denied if one requires foreigners to integrate."[92] In a similar vein, Castles and Miller note that "integration policies are often simply a slower and gentler form of assimilation".[93] While these viewpoints are insightful, they are based on a narrow view of the meaning of integration. A narrow view of integration fails to reflect the complex nature of the concept and does not acknowledge the real dilemmas faced by states in this area of policy. However, these arguments lead to what is perhaps a more nuanced point, captured in Weiler's observation that "concern for cultural, linguistic and ethnic integration of aliens may send a signal which accentuates both the otherness of the alien and an intolerance of the dominant culture towards such otherness."[94] Viewed in this way, even well-meaning attempts to include immigrants in the fabric of the host society can be seen as contributing to the marginalisation and 'other'-ising of migrant communities. Selecting immigrants as targets for "integration" could enhance their difference and hinder their chances of integration in practice. This is one of the reasons why delineating an appropriate meaning for the term 'integration' is so important.

Despite the difficulties with the concept of integration, the concept is increasingly prevalent in the public sphere: it will be seen in the course of this thesis that the term is used by international refugee and human rights bodies such as UNHCR, UN human rights treaty bodies, the Council of Europe and European Court of Human Rights, as well in the law and policy of the EU, and there is a growing corpus of academic and governmental literature on the topic, all of which is indicative of a general acceptance of the usefulness of the concept. Moreover, there is no alternative categorisation or term which would appear to be a useful or less controversial substitute for the concept of integration. For the purposes of the present thesis at least, while the problems and controversies associated with the subjective meanings and theoretical bases of the term 'integration' must be acknowledged, the usefulness of the

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[92] Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International, 2004), at 234.

[93] Stephen Castles and Mark Miller, *The Age of Migration*, (3rd ed, Palgrave Macmillan, 2003), at 250.

[94] Joseph Weiler, "Thou shalt not oppress a stranger: On the Judicial Protection of the Human Rights of Non-EC nationals" 3 *European Journal of International Law* (1992) 65, at 67.

concept of integration depends less on the connotations of the word itself than on developing an appropriate working definition upon which to base the analysis.

2.6 Beneficiaries of Integration Policy

A central part of investigating the meaning of integration is identifying the intended beneficiaries of integration policy. The International Organisation for Migration has argued that "(i)f Ireland's integration programmes are expanded, they should include all categories of immigrants."[95] It would seem that there is no logical reason to differentiate between the integration needs of different categories of migrant. However, inclusive conceptions of integration are often subordinated to exclusionary objectives of immigration law and policy. In Ireland, the mandate of the OMI does not include migration admission issues, but begins when the legal status of the migrant is determined.[96] This covers legally-resident EU and non-EU immigrants, including refugees and beneficiaries of subsidiary protection. This definition of the personal scope of integration is wider than that of the EU Framework on Integration which applies to third country nationals only and does not include EU citizens. However, it follows from this delimitation of the mandate that asylum seekers, applicants for subsidiary protection, applicants for humanitarian leave to remain and undocumented migrants are not intended to be covered by integration-specific measures. While even UNHCR does not suggest that the full range of integration measures must legally be extended to asylum seekers,[97] from a sociological (if not a legal) perspective the process of integration begins effectively at the time refugees arrive in the host country.[98] Humane reception standards for asylum seekers increase the chances of successful integration for

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[95] International Organisation for Migration and the National Economic and Social Council, note 4, at xix.

[96] Comments of Conor Lenihan in the course of an interview with Metro Eireann newspaper, Metro Eireann, 27 June 2007.

[97] UNHCR, *Note on the Integration of Refugees in the European Union* (May 2007).

[98] See, for example, Elizabeth Mestheneos and Elizabeth Ioannidi, "Obstacles to Refugee Integration in the European Union Member States" 15 *JRS* 304.

refugees.[99] The refusal to extend the concept of integration to protection seekers perhaps indicates the desire of the State to *discourage* their integration for political reasons relating to immigration control.

Finally, in respect of second-generation immigrants, the concerns of integration undoubtedly extend to this group[100] (as recognised in Migration Nation), however Irish integration policy has focused to date focused on "newcomers" due to the relative newness of the phenomenon of immigration in Ireland. For the same reason, this thesis will mainly focus on the integration of newcomers.

2.7 Theoretical Models of Integration

Aside from the debate over the correct meaning or definition of the concept of integration, certain national examples are taken as illustrating various models of integration or civic incorporation.[101] The models usually referred to are the exclusionary model, multiculturalism and assimilation. The use of these models has been criticised and their descriptive value questioned. The models are somewhat crude and fail to reflect the complex reality of community relations in each of the countries discussed.[102] In fact, in

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[99] Rosa da Costa, note 18, at 27.

[100] Richard Alba, "Bright and Blurred Boundaries: Second-Generation Assimilation and Exclusion in France, Germany and the United States" (2005) 28(1) *Ethnic and Racial Studies* 20.

[101] For an over view of this comparative analysis as well as a look at its limitations, see Herman Kurthen and Barbara Schmitter Heisler, "Immigrant Integration: Comparative Evidence from The United States and Germany" (2009) 32 (1) *Ethnic and Racial Studies* 139.

[102] Carrera argues that "these traditional national models of integration no longer exist. ... National models and integration programmes have often been rendered moot by evolving contemporary realities, political and economic priorities and dramatic events". See Sergio Carrera, *A Typology of Different Integration Programmes in the EU* (CHALLENGE Liberty and Security Briefing Paper, DG Internal Policies of the Union, Directorate C – Citizens' Rights and Constitutional Affairs, 4 December 2005), at 4. Similarly, Christian Joppke and Ewa Morawska argue that "The popular notion of national models of immigrant integration has obscured the similarities of integration approaches and assimilation concerns across liberal states. See Christian Joppke and Ewa Morawska, "Integrating Immigrants in Liberal Nation-States:Policies

most countries, elements of each model coexist in different policy areas.[103] It has also been argued that the differences between the various models are "more apparent than real".[104] It has been suggested that other types of classification may be more suitable for capturing the nature of immigration incorporation. Richard Alba for example argues that boundary concepts such as bright and blurred boundaries between immigrant and host populations provide a productive basis for comparisons between the populations.[105] As mentioned above, UNHCR has identified practical trends in European countries of mainstreaming versus targeted approach to integration as a means of comparative analysis.

Nevertheless, while the descriptive value of these models may be limited, "(b)y liberating us from the tyranny of details ... , the models enable us to perceive the grand contours of real-life contrast."[106] The models provide a conceptual framework for the comparative analysis of various diverse issues relating to integration.[107] This is of particular value in the context of integration, where the concept is itself hotly contested and the conceptual framework is thus difficult to pin down. Furthermore, on a more concrete level and in simple terms, the models discussed below provide a useful general guide to the differing philosophies which underpin integration policies.[108] Furthermore, they are frequently referred to in academic literature on integration. For these reasons it is proposed to briefly

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and Practices", in Christian Joppke and Ewa Morawska ed.s, *Toward Assimilation and Citizenship: Immigrants in Liberal Nation-States* Palgrave Macmillan, 2003) 1, at 6-7.

[103] Stephen Castles and Mark Miller, note 93, at 250.

[104] Piaras MacEinrí, "Integration Models and Choices", in Bryan Fanning, *Immigration and Social Change in the Republic of Ireland* (Manchester University Press, 2007) 214, at 216. See also Christian Joppke, "Beyond National Models: Civic Integration Policies for Immigrants in Western Europe" (2007) 30 (1) *West European Politics* 22.

[105] Richard Alba, note 100.

[106] Mirjan Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1972-1973) 121 U. Pa. L. Rev. 507, at 577.

[107] *Ibid.*

[108] So, even Joppke and Morawska acknowledge that their critique of the "national model" notion "is not to deny significant institutional variations of integrating immigrants across states, which reflect historically particular state–and-nation-building experiences." Christian Joppke and Ewa Morawska, note 102, at 30.

describe three of the most important of the theoretical models: the exclusionary, multicultural and assimilation models.[109] Added to the description of these models is a consideration of the emerging concept of interculturalism and an exploration of the argument that there is a convergence among European countries towards an assimilation model.

2.7.1 The exclusionary model

The exclusionary model does not represent a model for integration as such, and is better described as reflecting an "anti-integration standpoint".[110] This model sees immigrants as temporary and merely of economic value and the emphasis on ethnic origin and a homogeneous culture leads to a refusal to accept immigrants and their descendents as participating members of the national polity. In legal terms, this is translated into the incorporation of immigrants in certain sectors of society (principally, the labour market) and the denial of access to other sectors (welfare systems, citizenship and political participation). The exclusionary model is typically associated with countries which in the past recruited "guestworkers", such as Germany, Switzerland and Austria, but, as MacEinrí observes, all European states have used variations of this model at different stages for different types of migrants.[111] It is widely accepted that exclusionary policies are "anachronistic" and "difficult to reconcile with prevailing market principles, to say nothing of democratic norms".[112]

2.7.2 The multicultural model

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[109] In this section I follow the categorisation laid down in Stephen Castles and Mark Miller, note 93. See also Stephen Castles, "How nation-states respond to immigration and ethnic diversity" (1995) 21 (3) *Journal of Ethnic and Migration Studies* 293; Piaras MacEinrí, "Integration Models and Choices", note 104.

[110] Piaras MacEinrí, *ibid*, at 216.

[111] Piaras MacEinrí, *ibid*, at 218.

[112] Stephen Castles and Mark Miller, note 93, at 280.

Under the multicultural model, "immigrants are granted equal rights in all spheres of society, without being expected to give up their diversity, although usually with an expectation of conformity to certain key values."[113] Castles and Miller identify two main variants of multiculturalism: the *laissez-faire* approach typical of the USA, whereby the existence of ethnic communities is accepted, but it is not seen as the role of the state to ensure social justice or to support ethnic cultures; and multiculturalism as official policy, as exemplified by Canada, Australia and Sweden, whereby the state becomes involved in protecting cultural difference and securing equal rights for minorities.[114] In the European context, the UK has been seen as the epitome of the multicultural model.[115] The UK's multicultural approach is tied to the classical liberal origins of its legal and political system and its complex relationship with its former colonies. The essence of the British approach to incorporating migrants into the structures of British society was described in 1966 by the then Home Secretary Roy Jenkins as: "(n)ot a flattening process of assimilation, but ... equal opportunity accompanied by cultural diversity in an atmosphere of mutual tolerance".[116] The emphasis has been on race relations legislation to combat individual and institutional racism, coupled with an acceptance of cultural difference and the formation of ethnic communities. Immigrants have traditionally been placed under little pressure to take on "mainstream" British values.

The current reality is that multiculturalism is itself a contested concept, in the UK and elsewhere, particularly since the September 11 attacks of 2001, the bombings in Madrid of 2004 and the London bombings of 2005.[117] McGoldrick notes that multiculturalism has

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[113] *Ibid.*, at 252.

[114] *Ibid.*

[115] Although The Netherlands and Sweden have also constituted examples of multiculturalism.

[116] Address by Roy Jenkins MP to a meeting of the Voluntary Liaison Committees, 23 May 1966.

[117] Thus, Cesari observes: "In the United Kingdom, the shock of the 7 July subway attacks by 'homegrown bombers' led to increased questioning of the entire possibility of cultural difference." Jocelyne Cesari, "The Securitisation of Islam in Europe" (Justice and Home Affairs, Challenge Papers, April 2009). Multiculturalism was undergoing a challenge and reconceptualisation (see, for example, recent debates, Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Harvard University Press, 2002)).

"faced attacks form all sides of the political spectrum",[118] with feminists questioning whether multiculturalism is bad for women,[119] liberals arguing that equality and multiculturalism are incompatible,[120] and others arguing that multiculturalism reifies ethnic difference while failing to lead to genuine equality.[121] The trend since the 1990s has been a move away from multiculturalism.[122] In the UK, multiculturalism has come under sustained criticism with concerns over the radicalisation of young British Muslims provoking a backlash against the concept.[123] Many commentators have called for a move beyond multiculturalism towards a more comprehensive framework to deal with the systemic discrimination and structural inequality faced by first and second generation immigrant communities.[124] There has been a retreat from the strong form of multiculturalism traditionally practiced in the UK in recent years - for example, as will be further discussed in

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[118] Dominic McGoldrick, "Multiculturalism and its discontents" (2005) 5(1) *HRLR* 27.

[119] See for example, See Joshua Cohen, Matthew Howard and Martha Nussbaum (eds), *Is Multiculturalism Bad for Women? Susan Muller Okin with Respondents* (Princeton University Press, 1999).

[120] See for example, Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press, 2002).

[121] See Piaras MacEinrí, "Integration Models and Choices", note 104, at 224.

[122] Castles and Miller refer to the retreat from multiculturalism in Canada and Australia, note 93, at 252.

[123] See in particular the controversial article by David Goodhart: David Goodhart, "Too Diverse?" (2004) *Prospect*. (February 2004, http://www.prospectmagazine.co.uk/2004/02/toodiverse/), widely re-published under the title "The Discomfort of Strangers". This article provoked an interesting debate involving many influential thinkers on multiculturalism. Multiculturalism has also come under scrutiny in the Netherlands, along with the position of Muslim communities, particularly in the wake of events such as the murder of Theo Van Gogh. Mieke Maliepaard, Marcel Lubbers and Mérove Gijsberts, "Generational differences in ethnic and religious attachment and their interrelation. A study among Muslim minorities in the Netherlands" (2010) 33(3) *Ethnic and Racial Studies* 451.

[124] See for example Gerard Delanty, "The Limits of Diversity: Community beyond Unity and Difference", in Flemming Christiansen and Ulf Hedetoft (eds), *Multiple Belongings in Europe and Asia* (Aldershot: Ashgate, 2004), 45. Similarly, Yasmin Alibhai-Brown puts forward new methods of social inclusion and tries to point the way to a "positive image of multi-ethnic Britain" (Yasmin-Alibhai-Brown, True Colours: Public Attitudes to Multiculturalism and the Role of Government" (Institute for Public Policy Research, 1999)). See also Robert Miles, *Racism After Race Relations* (Routledge, 1993), who argued in 1993 that the idea of race relations reifies the concept of "race" and orders social relations in a racialised form (at 6). Miles suggested that a 'racism' paradigm should replace the 'race' paradigm.

Chapter 7, individuals are now required to pass a "Life in the UK" test, evidencing a certain level of knowledge of British society, before they will be granted citizenship. In 2011, Conservative Prime Minster David Cameron expressed the view that multiculturalism is fostering extremist ideology and directly contributing to home-grown Islamic terrorism. Mr Cameron said that Britain must adopt a policy of "muscular liberalism" to enforce the values of equality, law and freedom of speech across all parts of society. This policy will include requiring immigrants to Britain to learn English and the teaching of the country's common culture in schools.[125] This reflects the culmination of the gradual erosion of the multicultural model through an emphasis in the New Labour years in government on "community cohesion".[126] The views expressed by Mr Cameron also echoed the comments of the German Chancellor Angela Merkel in October 2010, to the effect that multicultural policies in Germany had been a "failure".[127]

2.7.3 The assimilationist model

Pursuant to the assimilationist model, migrants are expected to actively take on the culture and language of the majority population and renounce their own ethnic or cultural identity: assimilation effectively requires a "one-sided process of adaptation".[128] Modern concepts of assimilation, while more subtle than older formulations, follow this basic definition, with Alba and Nee, for example, defining assimilation as the "decline of an ethnic distinction and its corollary cultural and social differences."[129] While forms of

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[125] "Cameron: My War on Multiculturalism", *The Independent*, 5 February 2011.

[126] See, for example, "Community Cohesion: A Report of the Independent Review Team (chaired by Ted Cantle)" (Home Office, 2002); and "Our Shared Future: Report from the Commission on Integration and Cohesion" (Commission on Integration and Cohesion, June 2007). Also see generally on community cohesion Ted Cantle, *Community Cohesion: A New Framework for Race and Identity* (Palgrave Macmillan, 2008).

[127] "Germany wakes up to failed ideal of multiculturalism", *Irish Times*, 18 October 2010.

[128] Stephen Castles and Mark Miller, note 93, at 250.

[129] See Richard Alba and Victor Nee, *Remaking the American Mainstream: Assimilation and the New Immigration* (Harvard University Press, 2003). On the distinction between 'assimilation' and 'integration', Alba writes: "Some may prefer the term 'integration' for this parity. The relationship between the terms

assimilation have been used in most immigration countries, today France is most closely associated with the assimilation model. The assimilationist thrust of the French state's attitude to its immigrant communities is based on France's commitment to a republican conception of citizenship and resulting strict policy of secularism.[130]

The French model of republican citizenship is based on a strict conception of equality between citizens.[131] The notion of equality has been interpreted in a formalistic and individualistic manner such that differences between citizens are not recognised: racial, religious and cultural differences are subordinate to the individual's status as a 'citizen' within the French 'nation'.[132] One major consequence of this vision of equality is that

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'integration' and 'assimilation' remains unsettled because of variations in the way that they are defined. Generally speaking, however, the term 'integration' tends to be preferred by scholars who want to allow for the possibility that parity may occur without significant diminishment of ethnic cultural and communal attachments. This possibility may be realizable for members of groups that possess or can attain substantial economic resources; but it is highly unlikely for the sort of labour-seeking immigrant group considered here. For such a group, typified by contemporary Mexican immigrants to the US and by southern Italians in an earlier era, the attainment of parity is generally accompanied by changes in other domains that are consistent with the concept of assimilation as defined by Alba and Nee (2003)." Richard Alba, "Bright and Blurred Boundaries: Second-Generation Assimilation and Exclusion in France, Germany and the United States" (2005) 28(1) *Ethnic and Racial Studies* 20.

[130] On French secularism, see, for example, Jacques Robert, "Religious Liberty and French Securalism" (2003) 2 *Brigham Young University Law Review* 637. See also Jean Baubérot, *La Laicité: Entre Passion et Raison* (Seuil, 2004).

[131] For a summary analysis of the historical construction of the concept of republican citizenship, see Elizabeth Beller, "The Headscarf Affair: The Conseil D'Etat on the Role of Religion and Culture in French Society" (2003-2004) 39 *Texas International Law Journal* 581. See also John Bowen, "Why did the French Rally to a Law Against Scarves in Schools?" (2008) 68 *Droit et Société* 35, and on the French relationship with multiculturalism, see Cécile Laborde, "The Culture(s) of the Republic: Nationalism and Multiculturalism in French Republican Thought" (2001) 29(5) *Political Theory* 716.

[132] The principles of equality and indivisibility contained in Article 1 of the 1958 Constitution have the direct result that French law prohibits any public or private data controller established in France from collecting data relating to ethnic or racial origin in studies on discrimination, integration and diversity of origins. See Mathias Möschel, "Race judicata: The Ban on the Use of Ethnic and Racial Statistics in France" (2009) 5(2) *European Constitutional Law Review* 197.

French political and legal doctrine does not recognise the existence of minorities. Immigrants are not seen as members of a linguistic or cultural community, but as part of the French political community. This in turn leads to an assimilationist model for the integration of immigrants. In its first annual report, the *Haut Conseil a l'Intégration* explained that "The French conception of integration must obey a logic of equality and not a logic of minorities."[133] In essence, the acceptance of, and participation in, French culture is the main criterion for access to citizenship and participation in the French state.

Criticisms of the French model focus on the discrepancy between the strictly egalitarian legal treatment of all French citizens and the reality of the pervasive ethnic discrimination and social exclusion which exists in French society. Patrick Haenni puts it well:

> Contrary to what is popularly asserted, the problems of the French suburbs have less to do with a clash of civilisations than the more prosaic problems of socio-economic discrimination and of political representation of the Muslim community.[134]

Despite the rhetoric of equality attached to the idea of Republican citizenship, large numbers of first and second-generation immigrants have become ghettoised in areas of social deprivation where there is a high immigrant population, high unemployment and a culture of gangs and criminality.[135] The precarious nature of social cohesion in these areas was highlighted by rioting in cities across France involving persons of mainly African and Arab/Maghrebi origin in 2005, and 2010,[136] which has been analysed as exposing a French

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[133] First report of the *Haut Conseil a l'Intégration* (Paris, 1991).

[134] Patrick Haenni, "La France face a ses musulmans: émeutes, jihadisme et dépolitisation" (2006) 10 *Esprit* 112, at 112.

[135] See for example Kriegner-Krynici, "The Second Generation: The Children of Muslim Immigrants in France", in Tomas Gerholm and Yngve Lithman (eds), *The New Islamic Presence in Europe* (Mansell, 1988), at 123.

[136] See, for example, BBC News, "France vows to restore order after rioting in Grenoble", 17 July 2010.

tradition of social ghettoisation which contradicts the dominant discourse of strict equality.[137] Recent critiques of assimilation in France have focussed on the debate over the wearing of various forms of religious dress, most significantly the Muslim veil or *hijab*, which will be discussed in greater detail in Chapter 8.

2.7.4 The convergence of traditional models

A number of contemporary commentators argue that the integration models of Western liberal democracies are converging around an assimilatory model. This modern form of assimilation is often presented as the emerging model of many European states.[138] The legal trend throughout Europe towards the use of integration tests as a pre-requisite to access to the territory and to residency and social rights as well as imposing language and integration requirements for citizenship reinforces this conclusion.[139] This conceptualisation of integration requires immigrants to re-mould themselves in the model of an idealised national citizen, in keeping with the assimilation model. This phenomenon is discussed in detail in the next chapter. It has been argued that this convergence may be a by-product of increased co-operation in the field of integration at EU level.[140] However, over-emphasising the existence of a new emerging model of assimilation may fail to recognise the reality of integration as a patchwork of multidimensional frameworks, with integration frameworks

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[137] Patrick Haenni, note 134.

[138] Rogers Brubaker, "The return of assimilation? Changing perspectives on immigration and its sequels in France, Germany, and the United States" (2001) 24 (4) *Ethnic and Racial Studies* 531; Christian Joppke and Ewa Morawska, note 102; Christian Joppke, "Transformation of Immigrant Integration: Civic Integration and Antidiscrimination in the Netherlands, France, and Germany" (2007) 59(2) *World Politics* 243.

[139] This European trend towards assimilation and "culturalisation" of immigration policies is discussed in Liav Orgad, "'Cultural Defence' of Nations: Cultural Citizenship in France, Germany and the Netherlands" (2009) 15(6) *ELJ* 719.

[140] Sergio Carrera and Anja Wiesbrock, "Civic Integration of Third Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy" (CEPS, October 2009).

comprising a mixed bag rather than representing a specific model.[141] The legal and policy convergence in countries such as France, the UK and Germany, which are traditionally seen as representing different approaches to integration, undoubtedly adds weight to the argument that the traditional models retain little of their analytical or conceptual value. However, while they may not fall neatly into the traditional categorisation of integration models, national integration policies still display significant differences in terms of the objectives and means of integration, often with multiculturalist or assimilationist leanings.[142]

2.7.5 The emergence of an intercultural model?

As discussed above, integration models based on exclusion, assimilation and multiculturalism have been criticised for a variety of reasons. Recent attempts to develop a new framework for managing cultural diversity have turned to the idea of interculturalism.[143] In the Irish context, for example, the concept of interculturalism has informed policy development in a number of areas. As noted above, policy guidelines on intercultural education have been published as well as an intercultural strategy for healthcare, and the NPAR provides an intercultural framework for dealing with racism.[144] Policy documentation from the Department of Education and Science describes the difference between interculturalism and multiculturalism thus:

> While the term 'multiculturalism' is sometimes used to describe a society in which different cultures live side by side without much interaction, the term

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[141] Herman Kurthen and Barbara Schmitter Heisler, "Immigrant Integration: Comparative Evidence from The United States and Germany" (2009) 32 (1) *Ethnic and Racial Studies* 139.

[142] Anja Wiesbrock, note 7, at 2.6.

[143] In the academic sphere, see Thomas Faist, "Diversity: A New Mode of Incorporation?" (2009) 32(1) *Ethnic and Racial Studies* 171, and Gilles Verbunt,*La Société Interculturelle* (Seuil, 2001).

[144] See Department of Education and Skills and Office of the Minister for Integration, *Intercultural Education Strategy 2010 – 2015*, note 54; Office of the Minister for Children, "Diversity and Equality Guidelines for Childcare Providers", note 54; and FAS, note 54.

> 'interculturalism' expresses a belief that we all become personally enriched by coming in contact with and experiencing other cultures, and that people of different cultures can and should be able to engage with each other and learn from each other.[145]

Interculturalism can therefore be seen as multiculturalism with a greater emphasis on "interaction, understanding, respect and integration between cultures".[146]

The concept of interculturalism is also receiving attention on a European and an international level. In the context of the EU, 2008 was dedicated as the "Year of Intercultural Dialogue".[147] Promotion of intercultural dialogue and management of diversity is one of the main priorities of the Organisation for Security and Co-operation in Europe, the United Nations, the Council of Europe and several other organizations.[148] The Council of

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[145] Department of Education and Skills and Office of the Minister for Integration, *Intercultural Education Strategy 2010 – 2015*, note 54, at 3.

[146] This is the National Consultative Committee on Racism and Interculturalism's definition of interculturalism. See NCCRI, *Spectrum*, January 2008, at 1.

[147] Decision No 1983/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the European Year of Intercultural Dialogue (2008).

[148] High-level representatives of the Council of Europe, the Organization for Security and Co-operation in Europe and the United Nations met on 7 July 2008 in Strasbourg for their annual consultations in the "Tripartite-Plus" format, the 17th in a series initiated in July 1993. The annual discussions – which are chaired and hosted in turn by the Organization for Security and Co-operation in Europe, the Council of Europe and the United Nations Office at Geneva on behalf of the United Nations – are intended to share information and improve practical cooperation by drawing on each other's expertise and know-how. The joint communiqué issued by the three organisations emphasised that the promotion of intercultural dialogue and the management of cultural diversity, based on universal human rights, minority rights and effective integration policies that respect minority identities within states, the principles of democracy and the rule of law, remained among the priorities of their organizations. The participants agreed that intercultural dialogue could help in formulating responses to current challenges and underlined that such dialogue needed a supportive political environment, aimed at greater social justice and characterised by a strong role for civil society, and that it could be facilitated by the cultural and media industry. "Annual High-level Tripartite meeting between the Council of Europe, the

Europe has produced a White Paper on Intercultural Dialogue which emphasises the potential for intercultural dialogue to unify the diverse elements of European societies.[149] Intercultural dialogue is seen as "a powerful instrument of mediation and reconciliation: through critical and constructive engagement across cultural fault-lines, it addresses real concerns about social fragmentation and insecurity while fostering integration and social cohesion."[150] It remains to be seen whether the intercultural model can achieve such a lofty ambition, or whether it will ultimately become to be seen as flawed, in a similar manner to the other models discussed. In particular, interculturalism can be criticised as vague and apolitical. It does however seem destined to become the preferred putative underlying philosophy for integration policy in Ireland for the near future at least.

2.8 Wider Perspectives on Integration

Placing integration within the context of the broader themes and clashes of interests which it involves reveals the complexity and significance of integration and illustrates the wide jurisprudential, political and cultural debates into which integration fits. This section seeks to identify connections between integration and broader themes and frame the debate on the meaning of integration in its broad interdisciplinary context. The connections identified will be used to inform the analysis in subsequent sections and throughout the thesis.

2.8.1 Links between integration and national identity

Organization for Security and Co-operation in Europe, the United Nations and partner organizations Joint Communiqué" (7 July 2008). See www.osce.org/item/32097.html.

[149] Council of Europe, *White Paper on Intercultural Dialogue: Living Together as Equals in Dignity* (Strasbourg, 7 May 2008).

[150] *Ibid.*, at 9.

Integration policy is inextricably linked to national identity and a society's conception of itself.[151] Sackmann sums up this issue well: "(t)he self-conception of the respective country of immigration provides a framework for the perception of its migrants".[152] This can also be expressed as the somewhat simplistic question: what are the defining characteristics of the society into which migrants are expected to integrate?[153] How do we reconcile the desire to continue a common national life with the fact of increasing fragmentation along ethnic and other lines?[154] Favell observes that struggles between majority populations and immigrants or minority groups over political rights or social and welfare entitlements reveal the complexities of belonging.[155] Examples of these struggles are specific political conflicts about access to housing, to welfare benefits or education; the question of voting rights for non-nationals; or in the creation of special cultural rights for ethnic minorities.

The perspective of the nation-state remains essential to understanding immigration and integration issues. Ward affirms that: "(T)he situation of the 'other' cannot readily be distinguished from that of the European polity of nation-states which accompanied the ideology of the Enlightenment."[156] The jurisprudential construction of refugees and migrants as 'others' is a direct consequence of the philosophy and politics of identity which form the basis of the nation-state.[157] The legitimacy of 'national identity' can be questioned,

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[151] In an explicit example of this, the French President and French Prime Minister have directed that national identity underpin French integration policy. *Lettre de mission du Président de la République et du Premier ministre au ministre de l'immigration, de l'intégration, de l'identité nationale et du développement solidaire* (31 March 2009). The relevant Minister's title in France is the Minister for Immigration, Integration, National Identity and Fair Trade.

[152] See Rosemarie Sackmann, Bernhard Peters, Thomas Faist (eds), note 89, at 2.

[153] See Piaras MacEinrí, "Integration into What? From de Facto Assimilationism to Ghettoisation: Challenges for the State and Civil Society", Presentation at Trinity Immigration Initiative Migration Research Fair, 27 September 2007.

[154] Attracta Ingram, "Citizenship and Diversity" in *Mosaic or Melting Pot? Living with Diversity: Proceedings of a Conference on Cultural Diversity* (Royal Irish Academy, 2003).

[155] Adrian Favell, "To belong or not to belong: the postnational question", note 91, at 211.

[156] Ian Ward, "Identifying the European Other" (2002) 14(23) *IJRL* 219, at 219.

[157] *Ibid.* See also Patricia Tuitt, *False Images : Law's Construction of the Refugee* (Pluto Press, 1996).

with the nation-state depending on a mythical commonalty that must seek to identify and distinguish 'others'. National identity can thus be seen as a flawed ideological construct which perpetuates racism, xenophobia and exclusion. However, this reaction simplifies the relevant issues to a great degree and also fails to take seriously the fact that societies and cultures do build boundaries, some of which might be argued as a necessity to build some sort of social cohesion, solidarity and community.[158] Furthermore, on a practical level, while the concept of national identity is open to criticism, it remains a significant influencing factor on the development of law and policy, particularly on issues relating to integration.

2.8.2 Management of difference and diversity in democratic societies

Schnapper argues that "(i)ntegration is foremost a value *per se*, insofar as it rests on the fundamentally democratic notion that, in spite of divergences of their beliefs and their experience and their allegiances, people who have respect for what is right and, in particular, for human rights can live in harmony."[159] This viewpoint reflects the importance of the concept of integration in one of the fundamental issues faced by modern democratic states: maintaining social cohesion in increasingly diverse societies. This is linked to the discussion in the previous section of national identity. Identifying the bases of social unity in diverse societies and delineating the parameters of common spaces are recognised as important factors for the smooth functioning and internal stability of states.[160] The demands of immigrant groups for political inclusion and recognition force states to address the question of whether the recognition of difference leads to a fragmentation of society. In this

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[158] Adrian Favell, "To belong or not to belong: the postnational question", note 91, at 210.

[159] Dominque Schnapper in Bernard Lewis and Dominique Schnapper (eds), *Muslims in Europe* (Pinter Publications, 1994), at 159.

[160] See Will Kymlicka, *Multicultural Citizenship* (1995), at 9; Ulrike Davy, note 80, at 123. See also Schnapper's argument that integration is both a political and social necessity, since everything must be done to avoid the formulation of urban ghettoes, born of poverty, exclusion and ethnic apprehension, where, as in certain sectors of American cities, social and ethnic disadvantage are compounded". (Bernard Lewis and Dominique Schnapper (eds), note 159, at 159).

way, concerns over 'integration' could be seen in another sense as concerns over 'disintegration.'

On a practical level, the primary task of states is to decide on appropriate responses to the sometimes conflicting claims of minority communities of immigrant origin and members of the majority population. Immigrants arrive in the receiving society with cultural and religious practices and beliefs which may differ from or even clash with those of the majority population. Female genital mutilation, religious dress such as Sikh turbans or Muslim headscarves, arranged marriages and multiple marriages are some of the issues which may arise. Some beliefs and practices may be met with discomfort or hostility by members of the majority population. Religious dress has been a particular focal point for such problems in European states. Overall, "(t)he issue is starkly posed whether the immigrants or new citizens should be allowed to continue their practices, or whether they should be required to follow laws and practices ... that effectively require their abolition."[161] The correct balance to be drawn on this issue constitutes one of integration's most problematic and intractable aspects. The challenge consists in considering and analysing the real issues experienced in diverse communities without problematising immigration or constructing newcomers as social enemies.[162]

State responses to the diversity created by immigration cover a wide spectrum, broadly reflecting the theoretical models discussed above, from exclusion to interculturalism. In the Irish context, it was shown above that the contours of the correct approach to these issues have yet to be worked out. As the Irish National Economic and Social Council has pointed out, large-scale migration to Ireland is too recent a phenomenon to discern its effects on

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[161] Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (3rd ed, Oxford University Press, 2007), at 616.

[162] For an interesting look at how states construct migrants as bearers of multiple social threats, with a particular focus on Italy and Greece, see Anastassia Tsoukala, "Looking at Migrants as Enemies" in Didier Bigo and Elspeth Guild (eds) *Controlling Frontiers: Free Movement Into and Within Europe"* (Ashgate, 2005).

national identity and social cohesion.[163] However, the approaches taken to the accommodation of an indigenous minority, the Travelling Community, constitute an attempt to deal with the inherent diversity in Irish society and could provide a useful guide for policymakers in the sphere of integration. Significantly, in this context, policy and legislation adopted by successive governments regarding Traveller issues have been criticised as assimilatory in nature, and as aggravating the poverty, social exclusion and discrimination experienced by many members of the Travelling Community.[164]

2.8.3 Connecting integration, social inclusion and equality

Questions of integration are intricately linked with questions of social policy, social inclusion and equality. Viewed in a broad sense as "the inability to participate effectively in economic, social, political and cultural life, and, ... alienation and distance from the mainstream society,"[165] social exclusion is the opposite of integration. The overarching aim of integration policy can be seen as to "avoid the creation of a socially excluded underclass"[166] with all the attendant social problems which this creates. This is essentially a social inclusion goal which involves acknowledging the links between poverty and marginalisation and a commitment to addressing these issues. Poverty and social exclusion are defined by the National Plan for Social Inclusion as follows:

> People are living in poverty if their income and resources (material, cultural and social) are so inadequate as to preclude them from having a standard of living which is regarded as acceptable by Irish society generally. As a result

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[163] National Economic and Social Council, *Migration Policy*, at 29, 51.

[164] See generally Gerard Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002); see also Oran Doyle, *Constitutional Equality Law* (Thomson Round Hall, 2005), at 15. See also 3.6.3

[165] Anver Saloojee, "Social Inclusion, Anti-Racism and Democratic Citizenship" (Laidlaw Foundation, 2003), at 3.

[166] International Organisation for Migration and the National Economic and Social Council, note 4, at 150.

> of inadequate income and resources people may be excluded and marginalised from participating in activities which are considered the norm for other people in society.[167]

The implication of the connections between integration and social inclusion is that "cultural" dimensions of integration should not be over-emphasised such that the role of social policy in integration is neglected. It is arguable that integration discourse should focus on the issues of poverty and the consequent marginalisation of immigrants, rather than on cultural differences. This point is made by Fournier and Yurdakul in their critique of the Muslim headscarf debates in France and Germany. [168] In their view, the political and legal debate over religious symbolism and the perceived failure of cultural integration has removed questions of socioeconomic inequality from the political arena in France and Germany. They argue that the ghettoization and exclusion of immigrant communities through structural inequalities and lack of social mobility leading to poverty are the real issues. The unequal distribution of resources and structural inequalities faced by immigrants are masked by segregation by states of immigrant groups into certain sectors and themes, such as religious rights and equality before the law. On this analysis, the real challenge for states is a social policy one: to ensure the true and effective integration of immigrants at a socioeconomic level.[169]

Saloojee makes a similar connection between racial discrimination, disadvantage and exclusion, observing that "those who are disadvantaged, marginalised and 'othered' in society do not have access to valued goods and services and are consequently excluded".[170] She argues that, viewed in a broad sense as encompassing an anti-racism discourse, social

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[167] *National Action Plan for Social Inclusion 2007-2016* (February 2007), at 20.

[168] Pascale Fournier and Gökçe Yurdakul, "Unveiling Distribution: Muslim Women with Headscarves in France and Germany", in Michal Bodemann and Gökçe Yurdakul (eds) *Migration, Citizenship and Ethnos*, (Palgrave, 2006), at 167-185.

[169] *Ibid.*, at 185.

[170] Anver Saloojee, note 165, at 9.

inclusion presents a radical alternative to the dominant discourses on how to ensure the social cohesion of communities containing immigrant groups. Social inclusion as a concept is "fully capable of both recognising the politics of difference and transcending its narrow confines precisely because it embraces an inclusive vision, which suggests that a common purpose and shared community can be achieved through inter-group solidarity."[171] Seen in this light, social inclusion provides an escape route from the restrictive conceptual framework of integration 'models' in the form of multiculturalism or assimilation and places integration in its broader societal context.

The links between integration and social inclusion are explicitly recognised in the Irish context in the National Plan for Social Inclusion. One of the high-level goals laid down by the NPSI is the development of a strategy aimed at achieving the integration of newcomers in Irish society.[172] This objective is placed in the context of the crucial importance of building and supporting sustainable communities, particularly those that are subject to disadvantage.[173] This inclusion of integration in the NPSI is a manifestation of the trend, as observed by Fanning, that the Irish debate on integration has been to date "principally shaped by social policy norms rather than debates about multiculturalism."[174] Fanning identifies a family resemblance between social inclusion goals and prevalent definitions of integration within Irish social policy debates which has been informed by similar sociological understandings of the inequalities that cause poverty and those resulting from racism.[175] These connections are made explicit in Migration Nation, which emphasises a "clear commitment to including integration in the overall social inclusion framework of planning and resource provision".[176] In addition, the "core integration services" of housing,

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[171] *Ibid*, at 18.

[172] See *National Action Plan for Social Inclusion 2007-2016* (February 2007), Goal 12, at 15.

[173] *Ibid.*, at 15.

[174] Bryan Fanning, "Integration and Social Policy" in Bryan Fanning, *Immigration and Social Change in the Republic of Ireland* (Manchester University Press, 2007) 237, at 237.

[175] Bryan Fanning, "Integration and Social Policy", *ibid*, at 239.

[176] Office of the Minister for Integration, *Migration Nation: Statement on Integration Strategy and Diversity Management*, note 42, at 15.

employment, health, education, social supports, community development and training[177] identified in Migration Nation reflect the social inclusion goals contained in NPSI, which relate to education, employment and participation, income support and housing and health. This also demonstrates the way in which 'integration' issues are not only confined to immigrants but raise questions relevant to existing structures, inequalities and exclusion in the host society.

2.9 Developing a Working Definition of Integration

The difficulties inherent in defining the concept of integration are apparent from the above discussion, with the indeterminacy of the concept meaning that any definition of integration inevitably has quite a strong normative dimension. Nevertheless, it is useful to identify relevant policy areas and desired outcomes of the integration process, using these as a starting point for discussion, without diving too deeply into the conceptual difficulties surrounding the term 'integration'. The "EU Handbook on Integration for practitioners and policy-makers", for example, employs a pragmatic approach, observing that policy-makers in the field prefer to concentrate on practical outcomes such as social and economic mobility, education, health, housing, social services, and societal participation rather than enter into familiar debates about multiculturalism or assimilation.[178] The Handbook identifies two processes as critical to improving immigrants' outcomes: the elimination of inequalities, and the acquisition of competences.[179] Similarly, the Migrant Integration Policy Index ("MIPEX"), which measures integration policies in all 27 EU Member States and 4 non-EU states,[180] does not attempt to define the concept of integration but simply

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[177] *Ibid.*, at 26.

[178] European Commission: Directorate General for Justice and Home Affairs, *Handbook on Integration for Policy-makers and Practitioners* (2nd ed., May 2007), at 10. This reflects the approach of the EU framework for integration, which has been to identify 'Common Basic Principles for Immigrant Integration Policy in the EU' to underpin the framework.

[179] *Ibid*, at 10.

[180] Canada, the United States, Norway and Switzerland.

identifies seven key policy areas: labour market access, family reunion, long-term residence, political participation, access to nationality, anti-discrimination and education and uses "policy indicators" in each area to create a picture of migrants' opportunities to participate in European societies.[181] In a similar vein, in the UK the objective in establishing a framework for a common understanding of integration was not to *define* integration as such but rather to identify the key factors that appear to contribute to the process of integration for refugees in the UK along with indicators of integration to assist in policy development.[182]

These pragmatic approaches are based on a broad-based working definition of integration as a social phenomenon cutting across intersecting policy fields. The advantages of this approach from the point of view of states are clear: adopting a working definition of integration allows all actors in host countries to have a common reference point and goal.[183] Da Costa observes, in the context of refugee integration, that "(W)hile such a definition will be a living text ... it encourages States to formulate and work towards a national vision ... and develop a common strategy for accommodating and managing a diverse population".[184] In addition, from the perspective of this thesis, there are cogent reasons in favour of outlining a working definition of integration at the outset. First, the most relevant policy areas must be identified in order to provide a frame of analysis for the relevant legal instruments at the national, regional and international level. Second, a working definition may partially neutralise the negative connotations which could be attached to the concept of integration. Overall, a clear definition of the assumptions on which it will proceed is necessary to provide a conceptual framework for this thesis.

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[181] See British Council and Migration Policy Group, Migration Integration Policy Index III (2011), available at www.integrationindex.eu. MIPEX is produced by a consortium of 25 organisations including universities, research institutes, think-tanks, foundations, NGOs and equality bodies, is led by the British Council and the Migration Policy Group, and is co-financed by the European Union.

[182] Home Office, *Indicators of Integration: Final Report* (Home Office Practice and Development Report, 2004).

[183] Rosa da Costa, note 18, at 30.

[184] *Ibid.*

Having ascertained the need to develop a working definition of integration, how is such a definition to be shaped? A conceptual framework for thinking about integration issues should be both practically relevant and theoretically sound.[185] A broad-based understanding of the concept of integration, combined with an awareness of the relevant policy areas and intended outcomes of the integration process, provides such a framework.[186] In addition, the working definition should be structured in a way which reflects the legal nature of this thesis. It needs to fit with the core concern of the thesis, which is to explore the relationship between integration and law.

The term "integration" will generally be used in this thesis in the sense of an ongoing two-way process involving a series of interlinked spheres. On top of this foundational meaning, taking into account the exploration of the meaning of integration undertaken in this chapter, it is suggested that an analysis of integration and law can be broken into "functional" and "wider" perspectives. The way in which black-letter legal rules determine access to fundamental rights and key entitlements related to integration such as a secure legal status, housing, education, healthcare, access to social benefits and family reunification is termed the "functional" perspective. The "wider" perspective is the way in which law intervenes in the broader societal themes identified in the previous section as including national identity, responses to diversity in society, social policy and equality.

The working definition of integration upon which this thesis will proceed is therefore as follows:

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[185] As Mathew Gibney proposes in exploring ways to look at the ethics and politics of asylum. See Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press, 2004).

[186] And in fact it should be noted that while the Home Office *Indicators of Integration* study discussed above did not set out to define integration, it does in fact offer a preliminary definition of integration.

> Integration is an ongoing, multidimensional, two-way process between, on the one hand, migrants and, on the other hand, existing members of the receiving society along with the receiving state itself. This process involves a series of interlinked spheres, which, for the purposes of this thesis, will be characterised as forming part of 'functional' or 'wider' perspectives on integration. 'Functional' aspects of integration include first of all protecting fundamental rights and secondly providing a legal status which acts as a gateway to the core policy areas of housing, health, education, social welfare and family reunification. 'Wider' aspects of integration connect to these functional themes but place integration in its broader thematic context. These are aspects of integration with 'wider' connections to the broader themes of national identity, responses to diversity in society, social policy and equality - most importantly, approaches to citizenship and the place of culture and religion in public space.

The next chapter will discuss the nature of the interaction between law and integration in greater depth.

2.10 Conclusion

This chapter has explored the various ways in which integration is framed in official and academic literature and commentary. It has shown that integration can be understood in terms of definitions, models and broad social themes. It was found that most conceptualisations of integration provide a basic definition of the term and then proceed to identify various categories of issues with implications for integration (such as education, housing, citizenship etc). The connections between integration and wider social themes were then highlighted. Drawing on these findings, a working definition of integration appropriate to an analysis of the concept in a legal context was proposed. This was necessary in order to define the scope of the thesis. However, the indeterminacy of the concept of integration means that it can be given a spectrum of meanings depending on the

purpose and context in which it is being defined. Thus it will be seen in the next chapter that the traditional narratives of integration explored in this chapter - within which, despite differences, integration is broadly conceived as a process of social inclusion and cohesion - have been sidelined by governments seeking to use integration as a legal means of immigration and social control.

3 The Relationship Between Integration and Law

3.1 Introduction

The conceptual foundations of integration were explored in the previous chapter. This chapter builds on that analysis to explore the relationship between integration and law in greater detail. It does this first by looking at the nature of the interaction between integration and law. A variety of ways in which law interacts with integration are considered, with both functional and wider elements of the relationship identified. This is an expansion of the working definition of integration suggested in the previous chapter. This general discussion then moves to the more specific way in which immigration law and integration have been linked in many European states, in the form of integration requirements for entrey, residence and family reunification.

Having identified a number of dimensions to the relationship between integration and law, the chapter asks what factors influence the legal approach to integration. The role of national 'public philosophies' in shaping the approach to integration (and more broadly in addressing issues related to the governance of a diverse society) is examined. Some elements of an Irish 'public philosophy' of integration, which illustrate why Ireland is a useful case study for integration and law, are outlined. Finally, the chapter introduces one of the central ideas of the thesis, that 'external influences' on integration - through the normative development of the concept in the EU and international law settings - are central to a comprehensive understanding of integration and law.

3.2 The Complexity of the Interaction between Integration and Law

The idea was put forward in the previous chapter that the relationship between integration and law can be characterised in terms of functional and wider perspectives. From the

"functional" viewpoint, the MIPEX index (which, as mentioned in Chapter 2, measures integration policies in EU Member States and four non-EU states) accurately sums up the issues as follows:

> (A)lthough government policy is only one of a number of factors which affects integration, it is vital because it sets the legal and political framework within which other aspects of integration occur. The State can strive to remove obstacles and achieve equal outcomes and equal membership by investing in the active participation of all, the exercise of comparable rights and responsibilities and the acquisition of intercultural competences.[1]

Law defines the framework within which integration does or does not happen by regulating the legal and social conditions of migrants' everyday lives. The rights of non-citizen groups are increasingly defined in terms of their membership of legal and administrative categories and law thus defines migrants' rights and obligations and grants or restricts access to essential elements of the integration process. Policies on citizenship, family reunification and the determination of legal status linked to rights of access to services are all dimensions of the integration process, as will be seen in the course of this thesis. Legal mechanisms of controlling access to social rights via the labour market or welfare need not be aimed at integration or designed with integration in mind to have a powerful impact on immigration and integration, creating 'outsiders' and 'insiders' in the process. The effects of these legal mechanisms constitute a defining feature of integration policy as well as perceptions of identity and who 'belongs' in a State. Also in the realm of concrete legal rules, the trend in European legal systems towards the use of integration as a norm in both immigration law and citizenship law are the subject of a burgeoning body of

[1] See British Council and Migration Policy Group, Migration Integration Policy Index III (2011), available at www.integrationindex.eu.

literature.[2] The normativity of integration in these countries, as discussed further below in this chapter, reveals the propensity of governments to manipulate the indeterminate concept of integration for use as a mechanism of immigration control and as a means to promote discourses of national identity. The notion of integration as a gradual process of inclusion contained in national integration policies is turned on its head, and conceptualised in legal terms as a mandatory condition of access to the territory and to a secure immigration status in that territory.

Integration also interacts with law in a wider sense. The first way in which integration interacts with law in this broad sense is in its guise as a policy issue. Integration issues are often intensely politicised and the legislature and executive enjoy a substantial measure of latitude in determining policy relating to integration. These policy choices must, however, be made within the normative constraints imposed by international and EU law aswell as domestic constitutional provisions and any discussion of integration is therefore posited in an environment of multiple legal mechanisms which constrain governmental action.

Secondly, integration is fundamentally a social phenomenon and depends on numerous factors outside the control of law and policy such as (*inter alia*) ethnic, linguistic and cultural affinities among the population, the wealth of the state and the 'integration history' of the state.[3] The discussion as to the relationship between integration and law can thus be

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[2] See for example, Sergio Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU* (Martinus Nijhoff, 2009), at 441; Elspeth Guild, Sergio Carrera and Kees Groenendijk eds, *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009); Saskia Bonjour, "Between Integration Provision and Selection Mechanism. Party Politics, Judicial Constraints, and the Making of French and Dutch Policies of Civic Integration Abroad" (2010) 12 (3) *EJML* 299; Ricky Van Oers, Eva Ersboll and Dora Kostakopoulou (eds), *A Re-Definition of Belonging? Language and Integration Tests in Europe* (Martinus Nijhoff Publishers, 2010).

[3] Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press, 2004). Gibney also considers numerous other factors that have shaped receptivity to refugees in Germany, Britain, the United States and Australia, such as levels of unemployment and the buoyancy of housing markets. He argues that the state's success in integrating refugees without social disruption or great domestic hostility depends on a range of factors whose relative weight over time is difficult

seen as a microcosm of the larger issue of the paradoxical relationship between law and society. Law is itself a social phenomenon, and is as such restrained and influenced by society while at the same time exerting authority over society; it is simultaneously an independent social formation and also interdependent with other social formations.[4] In this way, there is a two-way influence process between law and the public to which it addresses its rules, such that "(L)aw is causally determined by the societal structure but can also be viewed as a more active instrument for shaping future behaviour and social forms".[5] In the context of integration, a similarly complex relationship exists: the legal approach to integration issues is conditioned by conceptions of national identity and the organisational principles of the society in question; however the legal approach and its success or failure in promoting integration will in turn contribute to shaping these ideas.

The functional and wider elements of the integration/law dynamic frequently overlap. States may respond to the demands of specific ethnic or religious groups by providing for group-differentiated measures, in the form of what Kymlicka refers to as "polyethnic rights".[6] This includes "the most controversial demand of ethnic groups":[7] exemptions from laws and regulations that disadvantage them given their religious or cultural practices. For example, in the UK, Sikh men are exempt from the requirement to wear a safety helmet on a construction site and from the requirement to wear a helmet on a motorcycle[8] and in Ireland, Jewish shops had an exemption from evening opening hours legislation due to the fact that

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to determine. See also Elizabeth Mestheneos and Elizabeth Ioannidi, "Obstacles to Refugee Integration in the European Union Member States" 15 *JRS* 304. They identify factors such as institutionalised racism and the age and personality of the refugee themselves as being crucial to integration.

[4] Denis Galligan, *Law in Modern Society* (Oxford University Press, 2007).

[5] Vilhelm Aubert (ed), *Sociology of Law: Selected Readings* (Penguin, 1969), at 14.

[6] Will Kymlicka, *Multicultural Citizenship* (1995), at 30.

[7] *Ibid.*, at 31.

[8] For a discussion of these issues in the UK context, see Mark Hill, "Is Nothing Sacred? Clashing Symbols in a Secular World" [2007] *Public Law* 488.

they closed on Saturdays.[9] Kymlicka observes that these rights are usually intended to promote integration into the larger society.[10] Black-letter legal rules thus frame wider debates relating to the place of religion in the public sphere and the co-existence of different ethnic, cultural and religious communities.

Finally, laws delineate the parameters of the common spaces of society and impose limits on freedom of action in the private sphere, providing the starting point for answering the question "What are migrants supposed to integrate into?". For example, legal rules and decisions often prohibit multiple marriages and arranged marriages[11] and the law in liberal democracies does not generally provide for punishment for adultery or permit domestic violence. These rules are generally applicable notwithstanding the existence of contradicting religious or cultural beliefs within particular communities.

3.3 Integration as a Part of Immigration Law in European Legal Systems

Perhaps the most important integration trend in Europe from a legal perspective concerns the use of integration as a norm in immigration and citizenship law - as a condition of entry to the State or access to social welfare, residency rights or citizenship. The use of integration as a norm in citizenship law is discussed in Chapter 7. In relation to immigration law, Carrera and Wiesbrock divide these measures - adopted in France, Germany, the Netherlands and Denmark for example - into two broad categories which they label the 'external' and 'internal' dimensions of the use of integration as a mechanism of immigration

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[9] See *Quinn's Supermarket v Attorney General* [1972] IR 330, in which the Supreme Court considered a challenge to the provisions of a Ministerial Order which exempted the proprietors of Kosher shops from a ban on evening opening.

[10] Will Kymlicka, note 6, at 31.

[11] See Máire ní Shúilleabháin, "Accommodating Cultural Diversity under Irish Family Law" (2002) 9 (1) *DULJ* 175, where the writer argues that increased immigration and cultural diversity in Ireland creates a need for the reassessment of legal rules affecting the family.

control.[12] The external dimension of integration as a means of immigration control involves 'integration abroad', whereby integration tests are used as a selection and control measure at a distance for individuals seeking to gain access to the territory of the state.[13] The internal dimension involves the use of integration contracts and tests as a pre-requisite to access to social protection and security of residence.

Countries which employ integration as a tool of immigration law use variants of the external and internal dimensions of integration as a mandatory legal process. Germany, for example, does not include a civic integration component in its integration abroad test, with a language test the sole pre-entry requirement.[14] At the other end of the spectrum, France has made the grant of a visa for family reunification subject to the examination of the applicant's knowledge of the "values of the Republic" as well as the French language.[15] Similarly, the Netherlands requires knowledge of both language and society, as does Denmark. In the UK, knowledge of life in the UK is required to access indefinite leave to remain in the UK (long-

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[12] Sergio Carrera and Anja Wiesbrock, "Civic Integration of Third Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy" (CEPS, October 2009).

[13] There are significant differences between the types of integration abroad policies followed by different countries. For a comparison of French and Dutch integration abroad mechanisms, see Saskia Bonjour, "Between Integration Provision and Selection Mechanism. Party Politics, Judicial Constraints, and the Making of French and Dutch Policies of Civic Integration Abroad" (2010) 12 (3) *EJML* 299. She points out the significant differences between the two sets of measures, arguing that the Dutch programme is much more stringent than the French. While France requires only participation in an evaluation and course that are organised and financed by the French state, the Dutch government has made entry conditional upon passing a test and does not offer courses.

[14] Anja Wiesbrock, "Discrimination Instead of Integration? Integration Requirements for Immigrants in Denmark and Germany", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009) 299, at 305 et seq.

[15] *Loi relative a la maitrise de l'immigration, a l'intégration et a l'asile* no. 2007-1631 of 20 November 2007. Article 1 inserts a new provision into the French immigration code to the effect that every non-EU national over 16 and under 65 years old will be evaluated in their country of residence on their degree of knowledge of the French language and the values of the Republic.

term residence).[16] The type of required knowledge of the society also varies, with the Dutch test focusing on practical issues such as knowledge of the geography of the Netherlands and the health care system while the French test can encompass more explicitly 'national identity' centred questions such as secularism and the exercise of citizenship.[17]

With regard to the internal dimension, France and Denmark have followed a contractual approach whereby migrants are required to enter into an integration contract in order to gain access to security of residence, although in Denmark the signing of a contract is not strictly mandatory (although failure to sign will result in the delay of the acquisition of a permanent residence permit).[18] In France, the objective of assimilating migrants into French Republican identity is not disguised, with the degree of integration being evaluated by the requirements outlined in the contract and the commitment of the individual to respect the principles and values governing the French Republic.[19]

The personal scope of these integration measures, in particular those relating to 'integration abroad', illustrates both the objectives of the measures and the concepts of identity and 'otherness' which they enshrine. EU migrants are exempt from such requirements and any attempt to impose integration requirements on EU citizens would be contrary to EU law. In the case of the Netherlands and Germany, migrants entering the

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[16] Bernard Ryan, "The Integration Agenda in British Migration Law", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009), 277, at 285.

[17] Sergio Carrera and Anja Wiesbrock, "Civic Integration of Third Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy", note 12, at 12-16.

[18] *Ibid.*, at 21-23.

[19] Carrera argues that the legal developments in France have strengthened the juridical nexus between integration and immigration, and have led to the emergence of a neo-Republican integrationist doctrine. He argues that the implications of this are that the state demands non-EU nationals to abandon their differences in favour of the national perfection. Sergio Carrera, "Nationality, Immigration and 'the Republican Integration' in France", in Elspeth Guild, Kees Groenendijk and Sergio Carrera, "Understanding the Contest of Community: Illiberal Practices in the EU?", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009) 315, at 333.

Netherlands from 'developed' countries - for example, Switzerland, the US, Canada, Japan, South Korea, Australia and New Zealand - are largely exempt from integration requirements (although in the case of Germany the requirement is simply a language test).[20] This confirms that the requirements are culturally based, suggesting not only that certain types of migrants (ie those from rich developed countries) are considered more desirable than others, but also that it is presumed that migrants from developed countries can fit more easily into the social fabric of the receiving state.[21] In addition to this direct form of discrimination, certain ethnic groups are disproportionately affected by the measures. In relation to the Netherlands for example, the Turkish and Moroccan communities have been the most affected by the high costs involved and the literacy levels required to undergo the tests.[22] Human Rights Watch has criticised the 'integration abroad' measures contained in the Integration Abroad Act adopted by the Netherlands as discriminatory and in violation of the principle of non-discrimination contained in the European Convention on Human Rights ("ECHR") and the Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), arguing that the intended effect of the measures is the reduction of immigration of family migrants of these groups.[23] In its 2010 concluding observations on the state report submitted by the Netherlands, the CERD Committee echoed Human Rights Watch's

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[20] In the case of the Netherlands, see Leonard F.M. Besselink, "Integration and Immigration: The Vicissitudes of Dutch 'Inburgering'", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009) 241, at 250. In his view, the hidden rationale for this would be that these groups, although not integrated very well at all in terms of language and cultural integration into Dutch society, simply do not create any major problems in a socio-economic sense (at 251). In relation to Germany, see Anja Wiesbrock, "Discrimination Instead of Integration? Integration Requirements for Immigrants in Denmark and Germany", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009), at 305: immigrants who are allowed to enter Germany without a visa are exempted from the requirement to demonstrate a basic knowledge of the German language.

[21] Although see Besselink's argument, *ibid.*

[22] Human Rights Watch, "The Netherlands: Discrimination in the Name of Integration: Migrants Rights Under the Integration Abroad Act" (May 2008).

[23] *Ibid.*

concerns.[24] In addition, the way in which these integration abroad measures are, in the main, targeted at family migrants is of note, as this results in a 'double hit' for integration: integration becomes a mandatory process for family migrants and also makes family reunification more difficult, potentially hindering the integration of the family member already in the receiving country.

As a result of the adoption of these legal measures, the interaction between integration and law is increasingly considered within the 'integration as a condition in immigration law' frame of analysis, with the concept of integration conceived as a vehicle for discrimination and assimilation, as well as a means of immigration control.[25] Carrera and Wiesbrock conclude that:

> Integration ... is not regarded as a process of social inclusion and equalisation of rights and freedoms, but rather as a state requirement for the TCN to disappear into the homogenous national wholeness and another way for the state to promote national identity and nationalism within and beyond its territorial borders.[26]

Guild, Groenendijk and Carrera echo this conclusion, characterising these integration practices in immigration and citizenship laws as illiberal practices in liberal regimes.[27] This

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[24] The Netherlands, UN Doc CERD/C/NLD/CO/17-18 (25 March 2010), para. 5.

[25] See Ricky Van Oers, Eva Ersboll and Dora Kostakopoulou, "Mapping the redefinition of belonging in Europe", in Ricky Van Oers, Eva Ersboll and Dora Kostakopoulou (eds), *A Re-Definition of Belonging? Language and Integration Tests in Europe* (Martinus Nijhoff Publishers, 2010) 307, at 318. They observe that despite official justifications for integration requirements in terms of promoting integration, the underlying rationale is often related to the aim of controlling immigration.

[26] Sergio Carrera and Anja Wiesbrock, note 12, at 4.

[27] Elspeth Guild, Kees Groenendijk and Sergio Carrera, "Understanding the Contest of Community: Illiberal Practices in the EU?", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009) 1, at 3.

transformation of integration into a means of social exclusion and insecurity of non-EU migrants undermines the narratives of integration propounded by - *inter alia* - UNHCR, the Council of Europe and the EU, which emphasise the two-way, holistic and gradual nature of the integration process. Lochak points out the inverted nature of the concepts of integration in use in immigration law, arguing that, in the French case, the stigma attached to integration "obligations" cannot but have the effect of marginalising immigrant groups more than ever, ultimately constituting a barrier to real integration.[28] In particular, the notion of 'integration abroad' abandons the idea of integration as a multi-faceted two-way process, by requiring individuals to prove their capacity for integration before even entering the state territory.

Ostensibly, integration tests and contracts simply require individuals being admitted to the territory of the state to demonstrate a minimum commitment to adapting to the society which they are entering. However, the way in which the tests are framed and targeted suggests that the real objectives are to control certain types of immigration and compel migrants to accept elements of national identity (more than likely relinquishing their own in the process) without acknowledging the role of members of the receiving society or the receiving state itself in facilitating social and economic integration. Integration thus becomes both a tool of immigration control and a mechanism for controlling identity - sending a message that certain types of migrant, who are presumed to hold different values to members of the receiving society, will not be accepted in the receiving state if they do not accept the state's imagined national identity. As Orgad observes:

> Cultural restrictions have been introduced in response to pressures to limit immigration in general, or certain kinds of immigrants in particular, and they

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[28] Daniele Lochak, "L'intégration comme injonction. Enjeux idéologiques et politiques liés a l'immigration" (2006) 64 *Cultures et Conflits* 131, at 133.

have become a pretext for the social engineering of European demographics.[29]

3.3.1 Integration as a feature of Irish immigration law?

Irish legislation contains no express reference to integration. The Immigration, Residence and Protection Bill 2010 proposed to introduce the concept of "integration" into Irish legislation. Section 141 of the 2010 Bill gave the Minister the power to make regulations relating to immigration matters, and such regulations could provide for -

> (a) the classes of foreign nationals to whom entry permissions, residence permissions, enhanced residence permissions or long-term residence permissions (referred to as "permissions") of particular categories may be granted; and
>
> (b) such conditions attaching to the different categories of such permissions as the Minister considers appropriate.

A class of foreign nationals to whom a particular category of permission applied was to be specified by reference to "such matters as the Minister considers appropriate". In specifying categories of permission or conditions of permission, the Minister was to have

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[29] Liav Orgad, "'Cultural Defence' of Nations: Cultural Citizenship in France, Germany and the Netherlands" (2009) 15(6) *ELJ* 719. Similarly, Guild, Groenendijk and Carrera observe: "The tests not only present new barriers for many migrants, they also project the image that migrants should become like 'us', ie white, highly educated middle-class persons. Implicitly, the tests send out the message that poorly educated immigrants are disqualified and that they are less or not welcome." Elspeth Guild, Kees Groenendijk and Sergio Carrera, "Understanding the Contest of Community: Illiberal Practices in the EU?", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009), 1, note 27, at 11.

regard to whether the entry into or presence in the State of a foreign national or a class of foreign nationals to whom a permission of a category specified in those regulations may be granted will contribute to (*inter alia*) "the promotion of successful social integration of foreign nationals into the State".[30] Interestingly, the same section provided that the Minister must have regard to "the enrichment and strengthening of the cultural and social fabric of the State",[31] which seemed to acknowledge the benefits and enrichment brought by immigration. These legislative references to integration, and their recognition of the impact of immigration rules on integration, would have constituted a new departure in Irish law.

Even more significant than this general recognition of integration as an important policy consideration in the development of immigration law, however, was the provision in section 46 of the 2010 Bill on long-term residency, which provided that the Minister would grant long-term resident status to individuals satisfying the requirements set out therein. These requirements included that the person concerned had satisfied the Minister that he or she has made reasonable efforts, while resident in the State, to "socially integrate".[32] This term was not defined in the Bill and this vague condition was effectively a tool to allow the Minister to retain a high level of discretion over the granting of long-term residency. These provisions of the 2010 Bill reflect the practice discussed (and criticised) in this section of European states of using integration as a condition to access legal status and entitlements. This conflicts with the conceptualisation of integration in the Irish policy documentation as a two-way process of mutual accommodation by the migrant and the host society, and places a vague obligation on migrants which could result in the denial of important legal protections. While this Bill failed to pass through the Houses of the Oireachtas before the dissolution of the 30th Dáil on 2 February 2011, and thus lapsed before it could be adopted, similar legislation is likely to be adopted in the near future. It remains to be seen whether these elements of the legislation pertaining to integration will be retained in future proposals.

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[30] Section 141(4)(e) of the Immigration, Residence and Protection Bill 2010.

[31] Section 141(4)(d) of the Immigration, Residence and Protection Bill 2010 .

[32] Section 46(3)(d)(iii) of the Immigration, Residence and Protection Bill 2010.

3.3.2 Moving beyond the "integration as a condition of immigration law" frame of analysis

The examination of integration as a mandatory norm has become the prism through which the interaction between integration and law is currently predominantly discussed in the academic sphere, and constitutes a valuable source of academic commentary on integration and law. It has been shown in this chapter, however, that the interactions between integration and law are more far-reaching than express references to integration in immigration and citizenship law. In addition, as discussed briefly above (and as it will be seen in the course of this thesis), integration has not yet entered the Irish legal system in the form of integration conditions, tests or contracts. This thesis aims therefore to move beyond this framework for discussing the relationship between integration and law, using the broader frame of analysis outlined in this chapter and Chapter 2.

3.4 An "Integration and Law" Paradigm?

"Legal integration" is sometimes seen as a discrete aspect of the integration process. UNHCR, for example defines legal integration as the legal process and framework whereby refugees are granted a progressively wider range of rights and entitlements by the host state that are broadly commensurate with those enjoyed by citizens and "(a)ffirms the particular importance of the legal dimension of integration".[33] At the other end of the spectrum of the idea of "legal integration" is the study of the use of integration as a mandatory norm in immigration and citizenship law, discussed in detail above. However, both of these approaches underestimate the pervasive nature of the influence of law on integration, particularly when integration is viewed in its broad context as discussed in Chapter 2.[34] Some examples illustrate this point. National constitutional law provides the legal parameters for integration policy, outlines the fundamental rights of citizens and non-citizens and provides the framework for the mediation of conflicting interests. Furthermore,

[33] UNHCR Executive Committee, *Conclusion on Local Integration* 7 October 2005, No. 104 (LVI) – 2005.

[34] See 2.8.

national constitutions often disclose the values of the society into which immigrants will be integrated into,[35] and provide some indication of the extent to which ethnic, cultural and religious diversity is welcomed, tolerated or discouraged from a legal point of view. Immigration law divides migrants into legal categories, giving the individual a legal status which will define the extent of access to the employment market, social welfare benefits, and services such as education and health services. Governments may decide to deal with discrimination based on race or xenophobia by developing anti-discrimination and equality legislation. On the basis of legal provisions, governments determine the conditions of access to citizenship including language requirements and knowledge of the host society. Legal provisions can thus constitute both barriers to and instruments of integration and have a direct effect on migrants' outcomes in terms of social mobility, economic stability, societal participation, health and education.

As was seen from the section above on integration as part of immigration law in European legal systems, the literature exploring the interactions between integration and law is expanding. In addition, Chapter 2 showed that the traditional theoretical models are inadequate to cope with the complexity of integration processes. The idea of "integration and law", if given a broader meaning that that ascribed to it by UNHCR and in the use of integration as a mandatory norm in immigration law, could become a useful analytical tool. A paradigm of integration viewed through the prism of law, or "integration and law" leads away from circular discussions on the meaning of integration and towards a more meaningful debate on how integration operates in practice. "Integration and law", as conceived in terms of law's interaction with the functional and wider perspectives delineated in Chapter 2, forms the basis of this thesis.

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[35] On the constitutional expression of national identity, see for example, Anthony D. Smith, *National Identity* (Penguin, 1991).

3.5 The Role of Public Philosophy in Shaping the Legal Framework of Integration

What are the factors that shape the legal approach to integration at the national level and what are the distinctive legal approaches that arise from these factors? The legal approach to integration on a national level is conditioned by a complex combination of social, historical, political and legal factors.[36] Heckmann and Schnapper maintain that certain consistencies and common characteristics in integration policies are not the result of a conscious strategy but derive from basic socio-structural principles and institutions or the social order of a country.[37] Thus, for example, Permoser and Rosenberger argue that the strong recognition of religious citizenship and the role that this plays in integration in Austria stems from the historical legacy of the multi-ethnic Austro-Hungarian Empire and its tolerant attitudes, as well as the traditions of consociational democracy and corporatism that characterise the political system.[38] The approach to integration issues may also be determined by the sense of nationhood or concept of citizenship. Finally, integration measures may be influenced by the societal definition of the immigration situation (eg "The US is a country of immigration"). These ideologies are transformed into legal and institutional measures affecting the integration of immigrants.[39] It has been shown that integration is composed of different elements covering a wide spectrum of issues ranging

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[36] Wiesbrock counts the country's historical, political, legal and cultural framework, and the nature and extent of immigration flows as among the multiple influences that shape national legislation in the are of immigration and integration. Anja Wiesbrock, *Legal Migration to the European Union* (Martinus Nijhoff Publishers, 2010), at 728.

[37] They give the examples of French étatism or republicanism or the Dutch 'pillarisation' of society: the ways in which a country normally tries to secure cohesion, conflict solution and to solve social and economic problems will also be used when integrating migrants. Friedrich Heckmann and Dominique Schnapper eds, *The Integration of Immigrants in European Societies – National Differences and Trends of Convergence* (Lucius and Lucius, 2003), at 11.

[38] Julia Mourao Permoser and Sieglinde Rosenberger, "Religious Citizenship as a Substitute for Immigrant Integration? The Governance of Diversity in Austria?", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009), 149.

[39] *Ibid.*

from labour market participation and social mobility to cultural and religious issues. The ideological and political foundations of the state in question will determine which aspects of integration are emphasised, and these then enter the legal landscape through legal measures and institutional practice.[40]

Favell suggests that a state's 'public philosophy' provides the frame for response to ethnic dilemmas in liberal democracies.[41] The notion of a 'public philosophy' is a way of characterising the widespread political beliefs and ideas that underpin everyday politics in western liberal democratic societies. French public philosophy for example is based on the idea of universalist Republican citizenship, while British public philosophy is conditioned by classic liberalism and the idea of citizenship and incremental social progress through the pragmatism and flexibility of political and legal institutions.[42] The public philosophy of a state will form the background to the consensus for talking about integration issues and will shape the contours of the legal framework for integration. Accordingly, Britain and France have traditionally formed contrasting ideas about the correct frame for policy responses to integration issues due to their contrasting public philosophies. Favell characterises Britain as promoting the integration of ethnic minorities into a tolerant multi-national state, via the management strategy of race relations and multiculturalism, while France is viewed as envisaging the integration of *immigrés* into a universalist national community, via access to full participatory political *citoyenneté*.[43]

Favell goes on to argue that integration policies in Britain and France have important similarities in that the policy framework in both countries relies on a good deal of

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[40] International Organisation for Migration and the National Economic and Social Council, *Managing Migration in Ireland: A Social and Economic Analysis* (IOM, September 2006), at 152.

[41] Adrian Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain* (2nd ed, Palgrave, 2001).

[42] Friedrich Heckmann and Dominique Schnapper, note 37, at 12.

[43] Canada is another interesting national example, as it presents a model based on constitutional multiculturalism and recognition of difference. Multiculturalism is thus enshrined as one of the core values of the Canadian state, or in other words, as part of its 'public philosophy'. This is explored further in Chapter 5.

"mystificatory discourse"[44] in order to sustain a political consensus that is unresponsive to the social facts and demands of the situation. He concludes that states promote a centralised ideological consensus around culture and value issues while failing to address the real causes of integration failure: poverty and inequality.[45] This can be seen in practice in the renewed emphasis in western liberal democracies on questions of religious and cultural difference, charged by a linking of the ideas of failed integration and Islamic fundamentalism. This change in emphasis has arguably led to a revival of the concept of "assimilation" and a move away from particularistic models of assistance towards greater universalism and a common civic culture.[46] The focus shifts from attempting to ensure equality between immigrants and the host society, to a 'flattening' process whereby the true goal of integration is to make all members of a society the same. From a legal viewpoint, this is translated into measures such as restrictions on religious dress in public places[47] and conditions attached to the acquisition of citizenship.[48]

As mentioned in Chapter 2, the trend towards the use of integration conditions in European states, among other factors, may indicate that differences between states' approaches to integration are diminishing, or perhaps have always been overstated. However, as Wiesbrock emphasises in her overview of integration measures of the UK, the

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[44] Adrian Favell, note 41, at 120.

[45] This line of argument is echoed by Pascale Fournier and Gökçe Yurdakul, in "Unveiling Distribution: Muslim Women with Headscarves in France and Germany", in Michal Bodemann and Gökçe Yurdakul (eds) *Migration, Citizenship and Ethnos* (Palgrave, 2006).

[46] See for example Rogers Brubaker, "The return of assimilation? Changing perspectives on immigration and its sequels in France, Germany, and the United States" (2001) 24 (4) *Ethnic and Racial Studies* 531; Christian Joppke, "The retreat from multiculturalism in the liberal state: theory and policy" (2004) 55 (2) *British Journal Of Sociology* 237. The idea of the failure of multiculturalism is strongly disputed by thinkers such as Will Kymlicka. See Will Kymlicka, "Immigrants, Multiculturalism and Canadian Citizenship", in Will Kymlicka (ed) *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford University Press, 1997), in which he defends the idea of multiculturalism against criticisms that it leads to ghettoization and impedes integration of immigrants.

[47] The types of restrictions that are being applied in European states are examined in Chapter 8.

[48] For example, integration contracts, knowledge of the host society and language tests (see 1.3).

Netherlands, Denmark, Sweden and Germany, despite the trend towards increasingly restrictive integration measures in European countries, there are still major differences between the countries in terms of their objectives and means used to achieve these objectives.[49] Thus, on Wiesbrock's analysis, in Sweden and to a certain extent in the UK, the main objective of integration is to promote the socio-economic inclusion and independence of immigrants within the context of a society based on the principle of diversity. On the other hand, in Denmark, the Netherlands and Germany, the assimilation of immigrants has been officially cited as the aim of integration policies.[50] The underlying public philosophy of states thus retains an important role in determining the shape of integration measures in law and policy.

3.6 Identifying an Irish Public Philosophy: Ireland's Distinctive Features

The above discussion raises a number of related questions: what is Ireland's "public philosophy", and how can it be identified? Does this philosophy have an influence on legal measures relating to integration in Ireland, and if so, how? Is there a fundamental underlying consensus on these issues upon which debate is predicated in Ireland? Coakley makes a number of interesting observations on the nature of political culture in Ireland. He makes three principal points. First, there appears to be a consensus among the population in terms of core values relating to national identity: there is virtually universal agreement on one of the cardinal principles of Irish nationalism (the need for a separate Irish state), and the legitimacy of the Republic of Ireland is now therefore virtually unchallengeable. However, this could have the implication that "With a new, unfamiliar wave of immigration, however, it is possible that a distinctly racist ideological configuration will evolve in the years ahead."[51] Second, he identifies a strong commitment to democratic values. Third, he suggests that, in terms of values relating to principles of public policy, elements of stability

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[49] Anja Wiesbrock, *Legal Migration to the European Union*, note 36, at 673.

[50] *Ibid*, at 673-674.

[51] John Coakley, "Politics and Society", in John Coakley and Michael Gallagher (eds) *Politics in the Republic of Ireland* (4th ed, Routledge, 2005), at 66.

and of conflict can be detected. On social and economic issues, he argues, conservatism prevails, however on foreign policy issues there is a tension between cosmopolitanism and isolationism, and finally, the tension between clericalism and secularism has become a characteristic phenomenon of Irish life.

Chapter 6 explores in detail the nexus between the Constitution, identity and integration, with the aim of analysing the 'public philosophy' underpinning Irish constitutional law from an integration perspective. Chapter 7 explores the conception of the nation and the public philosophy of belonging through the prism of citizenship law. Some of Ireland's distinctive features which render it useful as a case study for integration are set out in this section.

The Strategic Statement of the Office of the Minister for Integration, "Migration Nation", points out the specificities of the Irish experience of integration which place it in a "unique" position amongst European countries.[52] The first of these is the recent nature of the immigration phenomenon in Ireland. While other European countries are dealing with second and third generation issues, Irish integration policy focuses on ''newcomers'' or ''new communities''. Migration Nation also emphasises the infrastructure which is already in place to deal with integration issues, noting that Ireland has a relatively solid legal infrastructure in the antidiscrimination area; the National Action Plan against Racism is integration driven; and social inclusion infrastructure is well-developed (although it is difficult to see how these factors render Ireland unique among European countries). Finally, it is observed that the issue of Muslim radicalisation does not have the same profile as in other countries who regard it as one of the main integration issues.[53] Ireland has historical, social and legal features which differentiate it from other national examples and which therefore make it a useful case study for integration issues. Many of these features relate to

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[52] Office of the Minister for Integration, *Migration Nation: Statement on Integration Strategy and Diversity Management* (May 2008), at 33.

[53] *Ibid.* On the position of Muslim communities in Western Europe, see generally Martin Bulmer and John Solomos, "Muslim Minorities in Western Europe" (2010) 33(3) *Ethnic and Racial Studies* 373, which presents a themed issue of *Ethnic and Racial Studies*, focussing on Muslim Communities in Western Europe.

what have been referred to as the "three life forces" of modern Irish history: colonialism, nationalism and religion.[54]

3.6.1 Ireland's colonial heritage

The first of Ireland's distinctive features is its specific colonial heritage. Unlike many states in Europe which controlled multi-nation empires, Ireland is not a formal colonial power, but a former colony. The Irish State thus has no experience of governing minorities and little familiarity with the politics of dealing with diverse religious, ethnic and linguistic communities. It also means that Ireland has a less complex relationship with its immigrants than, for example, Britain and France had with their post-war immigrants: Ireland has little historical or emotional baggage attached to the relationship with its newcomers and no perceived responsibility or moral obligation towards them which might affect its admission and its integration policies. Ireland's status as a relatively recent former colony also links to its strong sense of national identity and nationalism, which could arguably constitute a barrier to migrants' access to full membership of and participation in society. This idea is explored in detail in Chapter 6.

3.6.2 Religious difference in Irish history the influence of the Catholic Church on Irish society

The interaction of religion, politics and identity in modern Ireland is well-known due to the conflict in Northern Ireland. From a historical perspective, the divisive nature of religion in Irish history has been Ireland's primary experience of cultural and religious pluralism. Religion has been a formative influence on national identity, despite recent dramatic changes in religious belief and practice illustrated by the sharp decline in clerical recruitment, the crisis of authority of the Church borne of child abuse scandals and the

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[54] See Liam Kennedy (ed), *Colonialism, Religion and Nationalism in Ireland* (Queens University, 1996).

increase in cohabiting couples and children born outside of marriage.[55] Does this mean that newcomers with different religious beliefs and value systems, are excluded from the national identity? The question of the degree to which religious beliefs do or should influence public policy in Ireland is discussed elsewhere.[56] For the purposes of this section, it suffices to note that despite the increasingly secularised nature of Irish society, the Church continues to play an influential role in public affairs, particularly due to the existence of a denominationally-controlled, state funded education system. The relationship between the Irish State and religion is explored in detail in Chapters 6 and 8. Another area in which the church remains strong is the NGO sector. Ireland has a strong tradition, related to the prevalent Christian ethos, of the use of charitable assistance and volunteerism from the wider civil society as a mechanism to address social problems, and has effectively become an aspect of governance. As was seen from the analysis of the operation of the Office of the Minister for Integration in Chapter 2, rather than central government displaying leadership on social issues such as social exclusion and immigration the preferred method is to fund NGOs, in their efforts.[57] In these ways, the historical and current influence of the Catholic Church plays a role in the ways in which Ireland has sought to maintain a cohesive society and solve social problems.

3.6.3 Cultural and ethnic difference in Ireland

It has been argued that Ireland shares the traditions of the European nation-state in defining itself in exclusionary ways and being grounded in cultural, linguistic and historical

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[55] Coakley observes that Catholic identity – the self-perception of Catholics as an oppressed group, with both clergy and laity discriminated against by the state – became an important part of Irish national identity. He further points out that: "Like all processes of collective mobilisation, of course, the political integration of the Catholic population had a negative aspect, its differentiation from others; in this case, the excluded group was the protestant population." John Coakley, note 51.

[56] See Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002) and Gerry Whyte and Bernard Treacy, *Doctrine and Life: Religion, Morality and Public Policy* (Dominican Publications, 1995).

[57] See 2.3.1.

experiences, reflecting what has been called a WHISC (white, heterosexual, Irish settled, Catholic) discourse.[58] Mac Einri, among others,[59] has argued that the monocultural model of Irishness elaborated by the Irish state after independence has resulted in Ireland struggling to deal with difference, and has led to the discrimination against minority groups throughout the history of the state, including the Traveller Community and various refugee groups including Jewish refugees in the 1930s and Vietnamese refugees in the 1970s.[60] The perception of Ireland as a monocultural nation is highly questionable[61] with Ireland arguably having a long "theoretical and practical engagement with issues to do with belonging, citizenship, cultural difference and conflict" not only as a result of the Northern Troubles but also due to the presence of a significant minority group, the Traveller Community.[62]

In his account of constitutional equality law, Oran Doyle observes that "Ireland is not renowned as an egalitarian society"[63] and that "Travellers are probably the most marginalised and disadvantaged group in Irish society".[64] The Irish State's approach to its indigenous minority, Travellers (an indigenous nomadic community), has been fraught with difficulty, and provides some indication of the philosophy underlying the state response to diversity and minority groups. The debate on Travellers' rights and issues is entrenched and

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[58] See Attracta Ingram, "The Once and Future European Nation-State", in Joseph Dunne, Attracta Ingram and Frank Litton (eds), *Questioning Ireland* (IPA, 2000). See Piaras MacEinri, "Our Shelter and Ark? Immigrants and The Republic", in Andrew Finlay (ed), *Nationality and Multiculturalism: Irish Identity, Citizenship and the Peace Process* (LIT Verlag, 2005), at 215.

[59] For example, Bryan Fanning, *Racism and Social Change in the Republic of Ireland* (Manchester University Press, 2002) and Bryan Fanning, *New Guests of the Irish Nation* (Irish Academic Press, 2009).

[60] See Piaras MacEinri, "Our Shelter and Ark? Immigrants and The Republic", in Andrew Finlay (ed), *Nationality and Multiculturalism: Irish Identity, Citizenship and the Peace Process* (LIT Verlag, 2005).

[61] See for example, Garret FitzGerald "The Origins of Irish Monoculturalism and the late Twentieth-Century Emergence of Multiculturalism", in *Mosaic or Melting Pot? Living with Diversity: Proceedings of a Conference on Cultural Diversity* (Royal Irish Academy, 2003).

[62] Andrew Finlay (ed), *Nationality and Multiculturalism: Irish Identity, Citizenship and the Peace Process* (LIT Verlag, 2005), at 11.

[63] Oran Doyle, *Constitutional Equality Law* (Roundhall, 2004), at 20.

[64] *Ibid.*

long-running, and has had important interactions with the legal system. The campaign for the provision of suitable accommodation for Travellers in the form of halting sites has given rise to substantial public interest litigation, which was effectively stopped in its tracks in 2001 by the decisions of the Supreme Court in *Sinnott v Minister for Education*[65] and *TD v Minister for Education*[66] (which created insurmountable obstacles to public interest litigation requiring public expenditure).[67] In 2002, the Housing (Miscellaneous Provisions) Act criminalised trespass in a wide range of circumstances, rendering the nomadic way of life virtually impossible. The effective criminalisation of the Travelling way of life reinforces the systematic exclusion of Travellers from mainstream Irish society.[68] The disproportionate effect on Travellers of the Housing (Miscellaneous Provisions) Act 2002, as well as the state's refusal to recognise Travellers as an ethnic minority, was criticised by the UN Human Rights Committee in 2008 and the UN Committee on the Elimination of all Forms of Racial Discrimination in 2011[69] The living conditions of many Travellers and the State's failure to improve these conditions have consistently been noted by UN treaty monitoring bodies in their concluding observations on Ireland's state reports.[70]

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[65] [2001] 2 IR 545.

[66] [2000] 4 IR 259.

[67] Gerry Whyte discusses this litigation in depth in *Social Inclusion and the Legal System: Public Interest Law in Ireland*, note 56.

[68] For a look at pre-2002 criminalisation of Travellers, see David Joyce, "The Historical Criminalisation of Travellers in Irish Law" (2003) 13(4) *Irish Criminal Law Journal* 14.

[69] UN Doc CCPR/C/IRL/CO/3 (30 July 2008), para. 23. See also concluding observations of the UN Committee for the Elimination of all Forms of Racial Discrimination, UN Doc CERD/C/IRL/CO/3-4, in which the Committee expresses a series of concerns and makes a number of recommendations in relation to the position of the Traveller Community in Ireland. Ireland is strongly encouraged to recognise the Traveller Community as an ethnic minority (para. 12), adopt affirmative action programmes to encourage participation in politics (para. 14), and to take concrete measures to improve the livelihoods of the Traveller community (para. 13).

[70] In 2002, the UN Committee on Economic, Social and Cultural Rights expressed concern that many families of the traveller community are living in roadside encampments without access to water and adequate sanitary facilities, and are liable to be forcibly evicted (UN Doc E/C.12/1/Add.77 (5 June 2002), para. 20). In 2005, the UN Committee for the Elimination of all Forms of Racial Discrimination recommended that Ireland take "all necessary measures be taken urgently to improve access by Travellers to all levels of education, their

The model employed by the State to address Traveller issues could provide a marker as to how the presence of new immigrant communities will be approached. Gerry Whyte characterises the impulse of early Traveller policy in particular as assimilationist in nature.[71] Progress has undoubtedly been made since 1963, when the Commission on Itinerancy stated that:

> [It] is not considered that there is any alternative to a positive drive for housing itinerants if a permanent solution to the problem of itinerancy, based on absorption and integration, is to be achieved.[72]

"Membership of the Traveller Community" is one of the prohibited grounds of discrimination under the Incitement to Hatred Act 1989, the Equal Status Acts 2000-2008 and the Employment Equality Acts 1998-2008.[73] The Traveller Community is thus recognised as a separate group and is defined as:

> the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history,

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employment rates as well as their access to health services and to accommodation suitable to their lifestyle" and also that the government consider affirmative action to improve the political representation of Travellers (UN Doc CERD/C/IRL/CO/2 (14 April 2005), para.s 21 and 22).

[71] Gerry Whyte, note 56 at 217.

[72] *Report of the Commission on Itinerancy* (pr.7272, 1963), at 37, as quoted by Gerry Whyte, note 56, at 217.

[73] Section 1, Incitement to Hatred Act 1989; section 3(2) of the Equal Status Act 2000; section 6(2) of the Employment Equality Act 1998.

culture and traditions including, historically, a nomadic way of life on the island of Ireland.[74]

Nevertheless, despite these developments in equality law and a trend towards a more inclusive discourse in relation to Travellers, the approach of the Irish state to Travellers has arguably been largely based on assimilation and a reluctance to recognise cultural difference.[75] The conclusion that the dominant approach to the integration of Travellers has been that of assimilation is reinforced by the restriction of the core element of Traveller culture in the 2002 Act and the failure of the State to recognise Travellers as an ethnic group.[76] This attitude to the Traveller Community could be replicated in the long-term relationship between the State and immigrant communities that may wish to assert their separate culture and identity.

3.6.4 The recent nature of immigration and integration issues in Ireland

While issues relating to immigration and asylum have been at the heart of political debate in many other European jurisdictions since the 1960s, such issues are only now emerging

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[74] Section 2, Equal Status Act 2000.

[75] In this vein, Fanning suggests that stereotypes of the 'violent Traveller' have served to ideologically justify coercive social control measures. Bryan Fanning, *New Guests of the Nation* , note 58, at 49.

[76] Note the State's argument that "Travellers do not constitute a distinct group from the population as a whole in terms of race, colour, descent or ethnic origin" but that "In a range of legislative, administrative and institutional human rights instruments provisions, the Government has recognised the special position of Ireland's Traveller community to protect their rights and improve their situation. Whether or not Travellers are considered to form a distinct ethnic group in Irish society is of no domestic legal significance." *United Nations International Convention on the Elimination of All Forms of Racial Discrimination Combined Third and Fourth Reports by Ireland as Required under article 9 of the Convention on the legislative judicial, administrative or other measures adopted to give effect to the provisions of the Convention* (Office of the Minister for Integration, 21 December 2009), at 7.

gradually in Ireland.[77] Aside from the numerically small, well-established minorities of the Protestant churches and the Traveller community, prior to the 1990s Ireland was a relatively homogeneous state with little experience of multiculturalism.[78] The state's geographical location on the periphery of Europe, insulated by the sea, combined with its traditional economic weakness, meant that Ireland was a state with a strong tradition of emigration and little inward migration. Between 1996 and 2008, Ireland underwent the process of a fundamental change from being a country of emigration to one of immigration. A few statistics illustrate this point. In the year up to April 2005, over 70,000 people moved to Ireland, resulting in net immigration of just over 53,000, nearly double the net level of 2000.[79] The 2002 census showed that the extent of immigration had more than quadrupled since the 1986 census.[80] The Census of 2006 showed that non-Irish nationals accounted for 10 per cent of persons usually resident in the State, while the corresponding figure in 2002

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[77] In this sense, the Irish example bears similarities to that of Spain, also a country which went from being a country of emigration to immigration. Ferrerro-Turrion and Pinyol Jimenez argue that the construction of public philosophies of integration in Spain have thus far been able to manage its diversity and maintain its social cohesion. Ruth Ferrerro-Turrion and Gemma Pinyol Jimenez, "Immigration and the Construction of Public Philosophy(ies) of Integration in Spain", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009), at 357.

[78] This is borne out by the figures. For example, as noted above, in the 1991 census, 91.6 per cent of the population identified themselves as Catholics. This decreased to 88.4 per cent in 2002 and again to 86.8 per cent in 2006. According to the census of 2006, the number of persons who stated that their religion is Islam was 32,500 in April 2006, up by nearly 70 per cent compared with 2002 and continuing the growth observed between 1991 and 2002. Muslims are now the third largest religious group in the State, behind Catholics and Church of Ireland (including Protestant). Just over 55 per cent of Muslims were either Asian or African nationals with 30.7 per cent having Irish nationality. While Roman Catholic is the predominant religious category with 3.68 million adherents its share fell from 88.4 per cent in 2002 to 86.8 per cent in 2006. See Central Statistics Office, *2006 Census of Population - Principal Demographic Results* (CSO, 2007).

[79] International Organisation for Migration and the National Economic and Social Council, note 40, at xi.

[80] Central Statistics Office, *Census 2002, Principal Demographic Results* (CSO, June 2003). 2002 was the first census in which the question as to nationality was asked, prior to this, only place of birth was asked. Also reflecting the changes in the make-up of Irish society, the 2006 Census introduced a new question on ethnic or cultural background. See *The National Action Plan Against Racism 2005-2008: Not an End, Just a Beginning* (2009), Appendix 1: Changing Irish Demographics.

was 5.8 per cent.[81] From 2008 to date (as discussed in the previous chapter and in Chapter 1), the economic crisis has resulted in the reversal of these migratory flows, with immigration from EU member states in particular falling off dramatically and a return to net emigration in 2009.[82] Despite this decrease in immigration linked to the domestic financial crisis, the composition of Irish society remains fundamentally changed by the new diversity brought by the large-scale immigration in the period between 1996 and 2008. The 2011 Census will provide further information as to the nature and extent of this diversity.

Early debates engendered by the new immigration naturally related to the development of coherent asylum and immigration law and policy, and there was little discussion of the likely short and long-term social and economic effects of different migration policy measures on different groups in Ireland. The International Organisation for Migration observes that during the initial period of rapid immigration "there was relatively little discussion of distributional issues relating to the impact of migration."[83] It remains to be seen how a "landscape of ideology, policy, legislation, services, support structures and existing migrant and ethnic communities comparable to those which have been in place for decades now in the core European receiving societies"[84] will be developed, and policy-makers working in these integration-related fields generally enjoy a blank canvas. This means that whereas Britain and France are often seen as trapped by the prevailing dogma and 'mystificatory discourse' on diversity, Ireland could be seen as having the opposite problem: no clear frame of analysis exists as yet for looking at integration issues.

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[81] Central Statistics Office, *2006 Census of Population - Principal Demographic Results* (CSO, 2007). *The National Action Plan Against Racism 2005-2008: Not an End, Just a Beginning* (2009), Appendix 1: Changing Irish Demographics notes that up to 107,800 immigrants arrived in Ireland in the twelve months to April 2006, 50 per cent of whom were nationals of the 12 new accession states, ten of which joined the EU on 1 May 2004 and the remaining two on 1 January 2007. In 2002, the percentage of the population who were not of Irish nationality was 5.8 per cent and by 2006 this had increased to 10 per cent.

[82] Central Statistics Office, *Population and Migration Estimates, April 2009* (CSO, September 2009).

[83] International Organisation for Migration and the National Economic and Social Council, note 40, at xii.

[84] National Economic and Social Council, *Migration Policy*, NESC Report No. 115 (2006), at 5.

3.6.5 Membership of the EU

Finally, Ireland's membership of the EU is a further relevant feature, not least because migrants from new EU Member States have comprised the majority of immigrants in Ireland in recent years.[85] Generally, the EU constitutes a pressure on national identity and the power of its institutions weakens the national political structures of states. EU law governs the treatment of EU migrant citizens, including rights of access to employment, welfare benefits and education. Integration has also undergone significant conceptualisation under the EU Framework on Integration. On a theoretical level, the EU provides a transnational dimension to debates about identity and belonging and opens up 'postnational' possibilities beyond the nation-state, striking a blow to the idea that nation-states are self-contained, coherent cultural entities.[86] However, in practice, it may be that an unforeseen consequence of European citizenship is that it tends to highlight the existing boundaries between citizens and aliens while adding a 'brand-new' European one.[87] All this begs the question of whether there is an identity attached to EU citizenship. Carrera argues that the involvement of 'Europe' in issues related to integration can be understood as a strategy to promote European identity, sending a clear message about the existence of the perfect European citizen who holds a certain kind of identity, values and 'Europeanness'. The questions of what it means to be European and what constitutes European identity and values are even more difficult to reconcile with the rich diversities existing in an enlarged EU.[88] In any event, the developing concept of EU citizenship adds a further layer to the legal discussion and may constrain governments in decisions relating to the allocation of rights, benefits and

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[85] Between April 2006 and April 2007, 61 per cent of immigrants into Ireland were from the ten newest EU Member States. Central Statistics Office, *Population and Migration Estimates* (CSO, April 2007).

[86] Adrian Favell, "To belong or not to belong: the postnational question", in Andrew Geddes and Adrian Favell (eds) *The Politics of Belonging: Migrants and Minorities in Contemporary Europe* (Ashgate, 1999), at 220.

[87] Zeynep Yanasmayan, "European Citizenship: A Tool for Integration?", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009) 79, at 79.

[88] Sergio Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, note 2, at 448.

obligations not only in the case of EU citizens but also in relation to third country nationals.[89]

Ireland's position within the EU framework combined with its distinguishing historical, social and legal factors render it a distinctive national example, the study of which can help to illuminate some of the universal issues relating to the role of law in the integration of migrants.

3.7 The Role of External Legal Influences in Shaping the Legal Approach to Integration

While this chapter has focussed on the ways in which the public philosophy of a state influences the contours of integration, paradigms of integration are being developed in different arenas outside the traditional framework of the nation state, in ways which could fundamentally alter national approaches to integration. One of the central arguments put forward by this thesis is that "external" legal influences on integration constitute a rich resource for the development of a comprehensive understanding of integration. Integration has been conceptualised in a legal setting in the context of the European Union, the European Court of Human Rights and UN human rights and refugee law bodies. Chapters 4 and 5 respectively will consider in detail the legal conceptions of integration under construction at EU level, within the UN setting and under the rubric of the European Convention on Human Rights.

3.8 Conclusion

This chapter has highlighted the manner in which the law interacts with integration in a number of different ways and on a number of different levels. It considered a specific aspect of "integration and law" in the form of the use of integration as a mandatory process and

[89] All of these issues will be elaborated on in Chapter 5.

condition in immigration law but argued that this new dynamic in the immigration law of European states should not obscure the complexity of the relationship between integration and law. It was suggested that the idea of "integration and law", based on the working definition set out in Chapter 2, constitutes a useful analytical tool to capture the complexities of this relationship. Finally, it considered the important influence of public philosophy on the framing of integration and identified some distinctive historical social and legal features of the Irish example which lends it value as a case study. These features include Ireland's colonial heritage, religious and cultural difference in Irish history, the recent nature of immigration and integration issues and Ireland's membership of the EU.

4 The International Legal Framework for Integration

4.1 Introduction

Inextricably linked to immigration, integration is by nature an issue with international dimensions, especially in the context of an ever more integrated and globalised world. In the legal domain, migration has had a profound effect on national legal systems, importing international concerns into national legal frameworks.[1] These effects are not limited to the national level and it will be seen in Chapter 5 that international human rights law also exerts a strong influence in EU law through the general principles of EU law, limiting the discretion of states in the manner in which they implement EU immigration law.[2] It will be seen in this chapter that international law does not contain specific provisions on the integration of migrants. Nonetheless, state approaches to integration must stay within the boundaries permitted by international refugee and human rights norms. The international legal framework is thus a key element in assessing both the Irish and EU integration frameworks and in the development of a comprehensive understanding of integration and law.

This chapter investigates the legal and conceptual framework for integration contained in international refugee and human rights law. First, the primary ways in which the 1951 UN Refugee Convention[3] (together with its 1967 Protocol,[4] the "1951 Refugee Convention") is

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[1] Bhabha sketches a convincing outline of the links between migration, human rights and international law in Jacqueline Bhabha, "Rights Spillovers: The Impact of Migration on the Legal System of Western States", in Elspeth Guild and Joanne Van Selm (eds), *International Migration and Security: Opportunities and Challenges* (Routledge, 2005), 28, at 42.

[2] See 5.6.1.

[3] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

intertwined with the integration of refugees will be considered in detail. The 1951 Convention provides a comprehensive set of integration-related rights for recognised refugees and is the only international instrument to explicitly address integration as a broad-based objective in itself, as it does in Article 34. In addition, the 1951 Convention establishes an incremental approach to the grant of these rights, linked to the degree of legal integration of the refugee in the State Party. Secondly, the impact on integration of the International Covenant on Civil and Political Rights ("ICCPR"),[5] the International Covenant on Social, Cultural and Economic Rights ("ICESCR")[6] and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD")[7] will be examined. These instruments constitute the core minimum of human rights entitlements that generally apply to all persons within the territory of state parties, regardless of legal or migration status. The application of these treaties to integration will be outlined and the development of the concept of integration (if any) by the relevant treaty monitoring bodies will be considered. Finally, in Europe, migrants benefit from the protection of a powerful regional human rights mechanism in the form of the European Convention on Human Rights ("ECHR"),[8] and the final part of this chapter will outline the use of the concept of integration as an element of the legal reasoning of the European Court of Human Rights ("ECtHR") in its jurisprudence on the scope of non-citizens' right to family and private life under Article 8 of the ECHR.

It will be seen that, while international law does not provide a comprehensive legal framework for integration, a number of ways in which international law impacts on national integration frameworks (and more specifically, the Irish integration framework) can be

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[4] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

[5] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

[6] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

[7] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

[8] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5.

identified. These are outlined in detail in the conclusion to this chapter. From a wider perspective, the concepts of integration under construction by the UN treaty bodies and the ECtHR are particularly significant as they are developed outside the context of the nation state at a supranational level. They represent a normative development of integration which is independent of national public philosophies of integration. In addition, these concepts are developed in the context of human rights protection and thus constitute at heart rights-based conceptions of integration. For these reasons, they constitute a valuable resource for the interpretation of integration, removed from the identity and 'values' politics which often hinder national integration policy and practice, and constitute a counterpoint to the trend towards viewing integration and law through the prism of integration as immigration control. In particular, the paradigm of integration as the progressive realisation of equal rights as national citizens, which it is argued is emerging from the universal treaty regime, could provide the basis for the development of an inclusive and holistic integration policy in Ireland.

4.2 Integration in International Refugee Law

Local integration is commonly referred to as one of the three durable solutions available to refugees, the other two being resettlement and voluntary repatriation. UNHCR notes that this solution is based on the "assumption that refugees will remain in their country of asylum permanently and find a solution to their plight in that state."[9] While there is no formal definition of "local integration", it is generally conceived of as a process with three interrelated dimensions: legal, economic and social.[10] The 1951 Refugee Convention places

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[9] UNHCR, *Global Consultations on International Protection: Local Integration*, 25 April 2002 EC/GC/02/6.

[10] See UNHCR Executive Committee, *Conclusion on Local Integration* 7 October 2005, No. 104 (LVI) - 2005 at (k); Jeff Crisp, "The local integration and local settlement of refugees: a conceptual and historical analysis", New Issues in Refugee Research - Working Paper No. 12 (UNHCR, April 2004), at 1; Alexandra Fielden, "Local integration: an under-reported solution to protracted refugee situations", New Issues in Refugee Research - Working Paper No. 158 (UNHCR, June 2008), at 1. See the discussion of UNHCR's definition of integration at 2.2.2.

considerable emphasis on the integration of refugees. It provides for social and economic rights designed to assist integration[11] and in Article 34 calls on Contracting States to facilitate the "assimilation and naturalization" of refugees. Hathaway argues that, in essence, local integration is conceived by UNHCR as the granting of some form of durable legal status to a refugee that allows him or her to stay in the country of first asylum on an indefinite basis, and fully to participate in the social, economic and cultural life of the host community.[12] He opines that, so conceived,

> local integration is not really distinguishable from the primary solution envisaged by the Refugee Convention, namely simple respect for refugee rights. That is, the rights which are said to be the hallmarks of the solution of local integration are essentially the same rights which actually accrue by virtue of refugee status itself. Even the economic and social aspects of local integration add little substantive content to the rights already guaranteed by the Convention.[13]

In other words, the 1951 Convention itself contains the principal rights necessary to ensure local integration.

Nevertheless, it should be noted that, due mainly to the reluctance of Contracting States to take measures that might imply the acceptance of the long-term or permanent residence of

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[11] See UNHCR Executive Committee, *Conclusion on Local Integration*, note 10, at (k): "the 1951 Convention and its 1967 Protocol set out rights and minimum standards for the treatment of refugees that are geared towards the process of integration ... ".

[12] James Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005), at 978.

[13] *Ibid.* Hathaway concludes that while contemporary formulations of local integration may add something extra to the Convention by emphasizing the dynamic process necessary to transform these rights into a social reality, "as a matter of law, even this activist dimension of local integration may reasonably be thought to be implicit in the duty to implement treaty obligations in good faith."

refugees,[14] the international community has paid relatively little attention to local integration and has preferred to focus mainly on voluntary repatriation as a solutions strategy.[15] Until the mid-1990s, industrialised states generally acknowledged that those who were granted refugee status would remain on their territory indefinitely and consequently granted refugees a wide range of rights. Since then however, there has been a tendency among European states in particular to grant temporary and limited forms of protection.[16] Despite this retrenchment on the behalf of industrialised states from local integration, UNHCR has reiterated on numerous occasions that integration is the principal durable solution for refugees in the industrialised world.[17]

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[14] See Rosa da Costa, "Rights of Refugees in the Context of Integration: Legal Standards and Recommendations", UNHCR Legal and Protection Policy Research Series (UNHCR, June 2006), at 11. She suggests that the reasons for this reluctance include the following: the belief that exiled populations may represent a threat to the host State's national security, popular antagonism towards the presence of refugees and an increasingly restrictive climate, associated with the fear that States are losing their ability to control population movements across international borders. UNHCR has observed that "(E)ven for individuals in countries where asylum systems are structured to provides for refugees remaining permanently with a wide range of rights, including citizenship, this solution is made decreasingly available." UNHCR, *Global Consultations on International Protection: Local Integration*, note 9, at 1.

[15] UNHCR, *Global Consultations on International Protection: Local Integration*, note 10, at 1.

[16] This was particularly the case regarding refugees fleeing former Yugoslavia in the 1990s. See Jeff Crisp, note 10. See also, for example, Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff, 2000); and James Hathaway, "The Emerging Politics of Non-Entrée" (1992) 91 *Refugees* 40.

[17] See UNHCR Executive Committee, *Conclusion on Local Integration*, note 10, at preamble and (d) and UNHCR, *Note on the Integration of Refugees in the European Union* (May 2007). In addition, local integration has been the subject of renewed attention from UNHCR in the context of its Global Consultations on International Protection (See UNHCR, *Global Consultations on International Protection: Local Integration*, note 9) and the Framework for Durable Solutions for Refugees and Persons of Concern (UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern* (May 2003)). There has also been an increased focus at UNHCR level on local integration as a durable approach to protracted refugee situations in African and Asian countries such as Uganda and Nepal. See Sarah Dryden-Peterson and Lucy Hovil, "Local integration as a durable solution: refugees, host populations and education in Uganda", New Issues in Refugee Research - Working Paper No. 93 (UNHCR, September 2003); Susan Banki, "Refugee integration in the

The 1951 Convention provides for integration in three ways: Article 34 requires Contracting States "as far as possible" to "facilitate the assimilation and naturalization of refugees" (assimilation in this context being understood as non-coercive integration); the Convention sets out a wide range of substantive entitlements to be accorded to refugees which lay the foundations of refugee integration; and finally, the substantive rights provided for in the Convention are incrementally granted linked to legal integration within the state. Each of these will be considered below.

4.2.1 The scope of beneficiaries of the 1951 Convention

In UNHCR's view, "the 1951 Convention provisions that are not linked to lawful stay or residence would apply to asylum seekers in so far as they relate to humane treatment and respect for basic rights, including *non refoulement*".[18] An asylum seeker can possibly avail of the rights contained in Articles 3 (non-discrimination), 4 (religion), 5 (rights granted apart from this Convention), 7 (exemption from reciprocity), 8 (exemption from exceptional measures), 12 (personal status), 16 (access to courts), 20 (rationing), 22 (public education), 31 (refugees unlawfully in the country), and 33 (*non refoulement* principle). Thus asylum seekers benefit from a far narrower range of integration-related entitlements than recognised refugees.

As regards beneficiaries of complementary protection, while UNHCR has consistently advocated for this group to be accorded the same access to integration facilities as Convention refugees,[19] there is no legal obligation on Contracting States in this regard under

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intermediate term: a study of Nepal, Pakistan, and Kenya", New Issues in Refugee Research - Working Paper No. 108 (UNHCR, October 2004).

[18] UNHCR, *Reception Standards for Asylum Seekers in the European Union* (July 2000), at 5; UNHCR, *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17.

[19] See UNHCR, *Note on the Integration of Refugees in the European Union*, note 17, at 1. The ECRE has made similar recommendations: see ECRE, "Good Practice Guide on the Integration of Refugees in the

the 1951 Convention. This also applies more generally to the range of rights to which refugees become progressively entitled in the host state and states have a wide discretion as to which rights are to be afforded to those with complementary protection.[20]

4.2.2 Facilitation of "assimilation" and naturalisation under Article 34 of the 1951 Convention

Article 34 provides as follows:

> The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.[21]

The extent of Contracting States' obligations under Article 34 and the meaning of "assimilation" are key issues here. In its first sentence, Article 34 imposes a general duty on Contracting States to (as far as possible) facilitate assimilation and naturalisation. This is explicitly a duty to "facilitate" rather than an obligation of result, and thus constitutes a rather minimalist legal obligation.[22] This reflects the fact that integration strategy and

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European Union", in which it is recommended that any socio-economic rights accruing to people with full refugee status should be granted to all persons afforded complementary protection. (Recommendation 13).

[20] At European Union level, for example, the Qualification Directive allows for significantly different standards of treatment for those with refugee status and those with subsidiary protection status. Of particular importance is Article 33 of the Qualification Directive, which provides that access to integration programmes for beneficiaries of complementary protection is at the discretion of Member States. See further, 5.8.

[21] Article 34 is reinforced by the Statute of the UNHCR which "calls upon Governments to co-operate with the UNHCR in the performance of his functions concerning refugees falling under the competence of his Office", especially by: ... "promoting the assimilation of refugees, especially by facilitating their naturalisation".

[22] James Hathaway, *The Rights of Refugees Under International Law*, note 12, at 987.

naturalisation - in particular the latter - are generally conceived as matters within the sovereign discretion of States. The second sentence of Article 34 essentially does no more than provide two examples of potential modes of facilitating naturalisation by requiring Contracting States to make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings. Despite the minimalist nature of the obligations which it imposes, Article 34 represents the only major international treaty provision to specifically impose duties on States regarding integration assistance and naturalisation and as such can be accurately described "a provision without precedent in international law".[23]

As regards the obligation to facilitate assimilation, the use of the term "assimilation" is problematic, as this term has come to be understood as suggestive of forced assimilation or coercion. UNHCR's position is that the term is to be understood in the sense of integration into the economic, social and cultural and economic life of the country and not in the sense of forced assimilation; and furthermore, that this was the interpretation intended by the original drafters of the 1951 Convention.[24] This view is supported by Grahl-Madsen's view on the meaning of this part of Article 34:

> What is meant ... is in fact the laying of foundations ... so that the refugee may familiarize himself with the language, customs and way of life of the nation among whom he lives, so that he – without any feeling of coercion –

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[23] See Atle Grahl-Madsen, "Commentary on the 1951 Refugee Convention, Articles 2-11 and 13-37 (1963, re-published by the Division of International Protection of the UNHCR, 1997) at 244 and James Hathaway, *ibid.*, at 981.

[24] See UNHCR, *Global Consultations on International Protection: Local Integration*, note 9, at 2, footnote 3: "(T)he international community has always rejected the notion that refugees should be expected to abandon their own culture and way of life, so as to become indistinguishable from nationals of the host community".

> may be more readily integrated in the economic, social and cultural life of his country of refuge.[25]

He lists some examples of the means which may be employed for the purpose of facilitating integration, including language courses, vocational adaptation courses, and "stimulation of social contacts between refugees and the indigenous population."[26] More recent literature emphasises the need to adopt a regime of rights which generally accords refugees the same rights as permanent residents or nationals, thus contributing to their self-reliance and cultural integration.[27] The absence of a monitoring body for the 1951 Convention has however meant that the concept of assimilation or integration remains relatively undeveloped.

The naturalisation aspect of Article 34 is also significant as access to citizenship is an issue traditionally viewed as lying firmly within the discretion of sovereign states. Furthermore, acquisition of citizenship is seen as a key factor in successful integration,[28] a linkage which is made explicit in Article 34's housing of both assimilation and naturalisation. This linkage of integration and access to citizenship contrasts with the practice of many European states of using integration tests as a pre-requisite to naturalisation (rather than viewing naturalisation as facilitating integration).[29] Naturalisation is particularly important in the refugee context as refugees, unlike other non-nationals, lack an

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[25] Atle Grahl-Madsen, note 23, at 147. He adds that "(L)anguage courses, vocational adaptation courses, lectures on national institutions and social pattern, and above all stimulation of social contacts between refugees and the indigenous population, are but some of the means which may be employed for the purpose (of integration)."

[26] *Ibid.*

[27] Rosa da Costa, note 14, at 29.

[28] The concepts of assimilation and naturalisation as contained in Article 34 are inter-related. To the extent that integration can be viewed as a stage that precedes naturalisation, measures to facilitate integration have an important knock-on effect: to facilitate an eventual process of naturalisation. See Anna Low, "Local Integration: A Durable Solution for Refugees?" (2006) 25 *Forced Migration Review* 64.

[29] See further, 7.4.3.

effective nationality. Nevertheless, Article 34 cannot be said to contain a strong legal obligation as regards naturalisation. Article 34 does not give rise to an *entitlement* to naturalisation in any circumstances.[30] However, it seems that Article 34 is breached where a Contracting State simply does not allow refugees to secure its citizenship, and fails to provide a persuasive justification for this exclusion.[31] The duty contained in Article 34 to facilitate the naturalisation of refugees should primarily be viewed therefore as a means to *promote* access to citizenship in host countries.

4.2.3 Refugee rights and minimum standards of treatment: the foundations of integration

UNHCR's Executive Committee's "Conclusion on Local Integration" notes that the 1951 Convention and its 1967 Protocol set out rights and minimum standards for the treatment of refugees that are geared towards the process of integration.[32] The bulk of the 1951 Convention is dedicated to enumerating the entitlements that flow from refugee status, in spite of which judicial and academic commentary has focussed primarily on the interpretation of the definition of a 'refugee' and the core duty of *non-refoulement*.[33] The rights laid down in the Convention include basic rights such as the right to *non-refoulement*,[34] non-expulsion,[35] and access to the courts.[36] It also protects a number of civil

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[30] This is made clear in the negotiations of the original drafters of the Convention. Grahl-Madsen records that it was stressed in the discussions that naturalisation is a matter of such delicate nature that in every case the final decision must rest with the organs of the State concerned. The State "cannot be compelled to grant its nationality, even after a long waiting period, to a refugee settled in its territory since naturalization confers on the naturalized citizen a series of privileges including political rights". However, it was felt that without establishing formal obligations in this respect, it would be acceptable to request States to facilitate to the fullest possible extent the naturalization of refugees (*inter alia*, by giving favourable consideration to requests for naturalization received from refugees and by reducing the financial obstacles which procedural charges and costs may represent to destitute refugees). Atle Grahl-Madsen, note 23, at 145.

[31] James Hathaway, *The Rights of Refugees Under International Law*, note 12, at 989.

[32] UNHCR Executive Committee, *Conclusion on Local Integration*, note 10, at (d).

[33] James Hathaway, *The Rights of Refugees Under International Law*, note 12, at 2.

[34] Article 33.

rights such as freedom of association. Of particular importance in the integration context, however, is the range of socio-economic rights guaranteed by the Convention which contribute to refugees' economic and social integration. The rights to work[37] and to own property[38] are supplemented by the right to the same treatment as nationals as regards public relief and assistance,[39] and in relation to labour legislation and social security.[40] In this way, the 1951 Convention goes some way towards requiring the inclusion of refugees within the economic and social fabric of the host state. Furthermore, the Convention guarantees to refugees the free practice of religion and freedom, including as regards the religious education of their children,[41] reinforcing the position that refugees may not be forcibly assimilated into the culture of the host society.

4.2.4 Incremental granting of rights under the 1951 Convention

The third way in which the 1951 Convention is linked with integration is the way in which rights are attributed under the Convention. Entitlements are granted on an incremental basis, related to the length of the refugee's residence in the State and the strength of the connection between the refugee and the State.[42] The core minimum rights are granted to refugees who are simply "present" in the territory under a state's jurisdiction, and include the rights to *non refoulement*, to non-discrimination and of access to the courts.[43] The majority of rights are reserved for those who are

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[35] Article 32.

[36] Article 16.

[37] Articles 17 (wage-earning employment), 18 (self-employment) and 19 (liberal professions).

[38] Article 13.

[39] Article 23.

[40] Article 24.

[41] Article 4.

[42] This is pointed out in UNHCR, *Reception Standards for Asylum Seekers in the European Union*, at 5.

[43] Article 3 (non-discrimination), Article 4 (religion), Article 16 (access to the courts), Article 22 (public education), Article 27 (identity papers) and Article 33 (prohibition of *refoulement*).

"lawfully present",[44] or who are "lawfully staying".[45] Finally, a few rights only accrue when the refugee is habitually resident in the territory of the host state (ie, has resided there for an extended period). For example, Article 17(2) provides that restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who has been resident for three years in the country.[46] Thus, "(A)s the refugee's relationship to the asylum state is solidified over the course of this five-part assimilative path, the Convention requires that a more inclusive range of needs and aspirations be met."[47] Rights which enable the economic and social integration of refugees are granted as the refugee becomes progressively integrated in legal terms. This reflects the notion of integration as a bi-directional incremental process: as the refugee becomes progressively more embedded in the host society, the host society must make more efforts to accommodate the refugee and ensure that their integration is facilitated.[48]

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[44] Article 18 (self-employment), Article 26 (freedom of movement) and Article 32 (expulsion).

[45] See, for example, Article 15 (freedom of association), Article 19 (liberal professions), Article 21 (housing).

[46] Article 17(2) also applies to refugees who have a spouse or children possessing the nationality of the country of residence. As regards rights which accrue to habitually resident refugees, Article 7 (2)-(5) provides that the principle of legislative reciprocity laid down in Article 7(1) ceases to apply after three years' residence. See also Article 14 (artistic rights and industrial property); and Article 16(2) ("A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*")..

[47] James Hathaway, *The Rights of Refugees Under International Law*, at 156.

[48] This analysis is supported by that of Anna Low who, on the basis of UNHCR experience in Mexico, Uganda and Zambia, emphasises the incremental nature of integration, stating that local integration policies can grant refugees a progressively wider range of rights and entitlements generally commensurate with those enjoyed by local citizens. She observes that: "These include freedom of movement, access to education and the labour market, access to public services and assistance, including health facilities, the possibility of acquiring and disposing of property and the capacity to travel with valid documentation. Over time the process should lead to permanent residence rights and perhaps ultimately the acquisition of citizenship in the country of asylum", Anna Low, note 28, at 65.

4.3 The Role and Value of International Human Rights Law in Addressing Integration Issues

Moving on from international refugee law to international human rights standards, a preliminary issue to be considered is that of the role and value of international human rights law in the context of integration. Is integration an issue within the remit of international human rights law? As noted above, there are no specific provisions in the international human rights treaties on integration. Moreover, while a secure legal status is generally seen as a pre-requisite to successful integration, the type of legal residency status to be granted to migrants is not provided for by an unqualified, explicit provision in international law. In addition, integration is often seen as a matter peculiarly within the discretion of individual states due to its links with national identity and the fundamental organisational principles of particular states.[49] However, international human rights law has a significant role in the context of integration. The formal legal status of a non-citizen may represent a barrier to their integration into the host society. International human rights law, with its core content of rights applicable to all persons regardless of their legal status or any other pre-requisite, provides the legal limits and framework within which integration policy must operate. In his final report on the subject, the UN Special Rapporteur on the Rights of Non-Citizens summed up the international human rights of non-citizens as follows:

> The architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.[50]

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[49] See 2.8.1.

[50] Economic and Social Council, "The rights of non-citizens: Final report of the Special Rapporteur", UN Doc E/CN.4/Sub.2/2003/23 (May, 2003).

On a fundamental level, international human rights law involves a reshaping of the relationship between the state and persons within its jurisdiction. By accepting human rights duties which transcend the state, the state loses a degree of control over the treatment of immigrants and non-citizens, such it is no longer permitted to treat immigrants within its jurisdiction in ways which are contrary to its obligations under international human rights law. Through the engagement of supranational norms, the importance of the distinction between the individual as citizen and as foreigner, which is so central to the notion of state sovereignty as well as to national integration policies, begins to be broken down. As Guild observes:

> The individual as a holder of rights, which transcend the state's power of definition, is central to the concept of international human rights. The individual has rights because he or she exists in the human rights tradition, not because he or she forms part of the group which negotiated the constitutional settlement between the rulers and the ruled.[51]

The existence of international norms therefore provides not only a constraint on the way in which states deal with immigrants and integration issues, but a challenge to perception of the relationship between the state and persons within its borders, shifting the focus from a state/citizen nexus of rights and responsibilities to a state/individual nexus. Integration paradigms which are based on narrow conceptions of national identity and a strict dichotomy between the citizen and others are thus put under significant pressure by international human rights norms. In these ways, the supranationalisation of core rights of individuals and duties of states has a direct impact on national integration policy.

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[51] Elspeth Guild, "Cultural and Social Identity: Immigrants and the Legal Expression of National Identity", in Elspeth Guild and Joanne Van Selm (eds), *International Migration and Security: Opportunities and Challenges* (Routledge, 2005), at 108.

A further function of international human rights law in the field of integration is to provide a neutral framework for deciding on the correct balance to be struck between the competing interests which emerge in diverse societies. In essence, integration forms part of a broader question – how do people who disagree profoundly over various matters live together? Human rights principles provide a broad framework within which to balance the competing claims of different groups. It is undoubtedly the case that the 'clashes' of culture or tradition which may arise in multicultural societies - for example, debates over wearing religious dress in public spaces - raise serious human rights issues which can be resolved by reference to international norms. International human rights law has the potential to provide differing cultures with a common vocabulary and foundation on which to address these issues. Human rights law can provide a strong platform for shared values in multicultural, diverse societies, providing a guide for governments attempting to construct the parameters of a common societal space.[52]

4.4 The Impact of Universal Human Rights Mechanisms: Focus on the ICCPR, ICESCR and ICERD

Universal human rights instruments protect many of the rights which arise in the integration context including, for example, education, housing, freedom of religion and non-discrimination. The universal standards enshrined in the ICCPR and the ICESCR constitute the core rights that should in principle be available to all persons regardless of nationality or immigration status (in addition to the protections contained in the Convention Against Torture). In addition, specialised treaty rights under the auspices of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), the Convention on the Elimination of All Forms of Discrimination Against Women

[52] See for example, Morten Kjaerum, "Human Rights for Immigrants and Immigrants for Human Rights", in Elspeth Guild and Joanne Van Selm (eds), *International Migration and Security: Opportunities and Challenges* (Routledge, 2005), 51, in particular at 61-63.

("CEDAW"),[53] the Convention on the Rights of the Child ("CRC")[54] and the International Convention on the Protection of All Migrant Workers and Members of Their Families ("CMW")[55] form a second level of protection for members of those groups. The in-depth analysis in this chapter is confined to the ICCPR, the ISCER and ICERD. The principal rationale for the selection of these particular instruments is one of universality. As mentioned above, the ICCPR and the ICESCR apply to all persons in State Parties thereto and thus apply to all migrants in those states. In addition, ICERD applies to all victims of racial discrimination, as very widely defined in Article 5 as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin", and so applies to all non-citizen migrants.

The CMW will not be considered in detail in this chapter. The CMW is an ambitious document aiming to protect both legally resident and illegally resident migrant workers and represents substantive normative progress in the elaboration of binding protection guarantees specifically addressed to migrants.[56] Many of its provisions are innovative in nature and are directly relevant to the integration prospects of migrant workers.[57] Article 44, while not providing for a *right* of family reunification for documented migrant workers,

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[53] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

[54] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

[55] UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158.

[56] Its adoption also constitutes a recognition, absent from the human rights treaties discussed above, that a standard of national treatment is often insufficient to protect migrant workers on foreign soil. Navziger and Bartel conclude from an analysis of the *travaux préparatoires* of the CMW that it is this presumption which underlies the Convention as a whole. See J. Nafziger and B. Bartel, "The Migrant Workers Convention: Its Place in Human Rights Law" (1991) 25 (4) *International Migration Review* 771, at 776.

[57] Article 49 pertains to the legal status of migrant workers, an issue which is crucial to integration but rarely addressed by international law. It provides that where separate authorisations to reside and to engage in employment are required by national legislation, the States of employment shall issue to migrant workers authorisation of residence for at least the same period of time as their authorisation to engage in remunerated activity.

encourages State parties to facilitate family reunification and to protect the unity of the family. Integration is specifically mentioned in Article 45 which concerns access to education.[58] However, the emergence and normative development of this Convention has been, and continues to be, a very slow process.[59] In addition, the potential influence of the CMW is hampered by the low number of ratifications of the Convention, combined with the complete absence of Western industrialised states from the list of signatories and state parties.[60] No EU country has signed up to the Convention.[61] Most importantly for the purposes of the present thesis, Ireland is not a party to the CMW. Finally, a cursory examination of the few concluding comments of the Committee on Migrant Workers reveals a limited relevance to integration. The comments do not enter into a detailed consideration of integration, or social and economic rights of migrant workers. The focus of the concluding observations is on the right to effective procedures and developing comprehensive immigration frameworks rather than ensuring the integration of migrant workers.[62] The closest the Committee comes to discussing integration as such is in relation

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[58] Article 45(2) provides that "States of employment shall pursue a policy ... aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language".

[59] It was finally adopted by the General Assembly on 18 December 1990 after drafting negotiations spanning a period of ten years, and only acquired enough ratifications to enter into force in 2003. The first session of the Committee for Migrant Workers, the supervisory body for the Convention, took place in March 2004. (For an analysis of the drafting process by one of the drafters, see Juhnai Lonnroth, "United Nations International Convention on the Protection of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation" (1991) 25 (4) *International Migration Review* 710.) At the time of writing, the Convention has 28 signatories and 37 parties, most of these being labour-sending rather than receiving states. For example, the earliest signatories included Morocco, Mexico, The Philippines and Egypt.

[60] Possible reasons for this reluctance to be bound by the terms of the Convention include the relatively hostile climate towards migrant workers in many countries; state concerns over the links between migration, security and stability; and the absence of an organised approach to the promotion of the Convention. See Patrick Taran, "Status and Prospects for the UN Convention on Migrants' Rights" (2000) 2 *EJML* 85.

[61] This can be seen as linked to the fact that migrant workers who are EU citizens are already strongly protected in EU law.

[62] See for example, Mali, para. 18; Mexico, para. 15; Ecuador, para.s 28 and 35; Egypt para.s 48 and 49.

to the elimination of discrimination against migrant workers - where the Committee has emphasised the need to combat social marginalisation and stigmatisation of migrant workers.[63] These constraining factors limit the potential of the CMW as a mechanism with the ability to effect meaningful change in the position of migrant workers and influence the shape of national integration policies and it is for these reasons that the CMW is not examined in the same way as the ICCPR, the ISCER and ICERD in this chapter.

For the reasons outlined, this chapter focuses on the development of the concept of integration by the treaty bodies established under the ICCPR, the ICESCR and the ICERD. This will be done primarily through an analysis of their concluding observations on state reports up to 1 January 2011,[64] although the general comments of the Human Rights Committee ("CCPR") and the Committee on Economic, Social and Cultural Rights ("CESCR") and the general recommendations of the Committee on the Elimination of all Forms of Racial Discrimination (the "CERD Committee") will also be referenced. While the CCPR and the CERD Committee have the competence to consider individual complaints, the views of the CCPR have not to date specifically referred to the concept of integration and the ICERD individual complaints procedure is rarely used. In contrast, integration-related issues as well as the concept of integration itself are expressly referred to by the Committees in their concluding observations. For these reasons, this part of the chapter concentrates on the concluding observations of the Committees rather than their views in respect of individual complaints.

It will be seen that, broadly speaking, while the CCPR and the CESCR refer to integration-related matters they rarely do so under the banner of 'integration' and integration in itself is evidently not among the primary concerns of these Committees. Despite this, we shall see that the CCPR and the CESCR make many observations which are related (even if

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[63] See for example, Mexico para. 23; Egypt, para. 21(b); Ecuador, para. 20.

[64] The most recent concluding observations on the country reports for every State party to the ICCPR, the ICESCR and the ICERD at 1 January 2011 have been examined. In the case of those countries for which the most recent concluding observations date from 2010 or 2011, the previous set of concluding observations have also been examined.

for the most part indirectly) to integration. In contrast, the CERD Committee conceives of integration in terms of an objective in itself and a relatively nuanced conception of integration is under construction in its concluding observations.

4.5 The International Covenant on Civil and Political Rights

The ICCPR has been described as "probably the most important human rights treaty in the world",[65] principally owing to its protection of a large number of rights and universal coverage.[66] Article 2(1) of the ICCPR lays down the general requirement of non-discrimination in respect of the rights laid down in the Covenant, providing that each State Party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction". In its General Comment No. 15 on the position of aliens under the Covenant, the CCPR clarified the precise position relating to non-citizens as follows: "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens."[67] General Comment No. 15 outlines in detail the fundamental rights of non-citizens including the rights to life; to liberty and security of the person; to freedom of thought, conscience and religion; and (where they constitute a minority) to enjoy their own culture, to profess and practice their own religion and to use their own language.[68] There are two exceptions to this general principle of non-

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[65] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant of Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, Oxford University Press, 2004), at 4.

[66] In addition, Article 28 of the ICCPR creates a supervisory body in the form of the Human Rights Committee, which may hear individual complaints under the Optional First Protocol.[66] Thus a form of legal remedy is available for persons whose rights under the Covenant are violated, in contrast to the position under many other international human rights instruments.

[67] CCPR General Comment No. 15, "The position of aliens under the Covenant" (11 April 1986), at 1.

[68] For a full list of the relevant rights, see *ibid.*, at 2.

discrimination: political rights explicitly guaranteed to citizens[69] and freedom of movement.[70]

The freestanding equality guarantee contained in Article 26, the protection of the right of minorities to enjoy their own culture, to practice their religion and to use their own language contained in Article 27, and the protection of private and family life provided for by Articles 17 and 23 have particular significance in a discussion of integration.[71] These articles will be briefly examined before turning to the development of the concept of integration by the CCPR in its concluding observations on state reports. It will be seen that the concept of integration employed by the CCPR in its concluding observations is quite under-developed. Nonetheless, it is argued that the CCPR's approach can be characterised as defining integration in terms of the progressive realisation of rights for immigrants and their families. Other features of the CCPR's approach include the subordinate role of Article 27 (in comparison to Article 26) in the normative development of integration, and the contrasting way in which integration is dealt with by the CCPR in relation to wealthy and poorer countries.

4.5.1 Article 26: equality

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[69] See Article 25, which provides that every "citizen" shall have the right to participate in public affairs, to vote and hold office, and to have access to public service.

[70] Article 12 (4) states that no one shall be arbitrarily deprived of the right to enter "his own country".

[71] Wiesbrock notes that the principle of non-discrimination is essential to the integration process as it prohibits states from denying migrants access to employment, housing and education which would significantly undermine their integration. Also essential are freedoms to maintain cultural and religious identity. Article 27 allows migrants to maintain their cultural traditions and prohibits forced assimilation. Also in this category of protections are fundamental freedoms such as religion, language, marriage and protection of private and family life (although these will not be examined in depth in this chapter). Anja Wiesbrock, *Legal Migration to the European Union* (Martinus Nijhoff Publishers, 2010), at 708.

It has been observed that equality and non-discrimination "constitute the dominant single theme" of the ICCPR.[72] The equality guarantee contained in Article 26 enshrines these values,[73] providing a three-limbed protection: equality before the law; equal protection of the law; and a prohibition of discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[74] Article 26 is somewhat unique among non-discrimination guarantees in that it is a free-standing equality norm, meaning that a claim of discrimination contrary to Article 26 need not be linked to another Covenant right. Article 26 governs the allocation of all public goods and thus protects against discrimination in relation to social and economic rights as well as civil and political rights. The application of Article 26 to social and economic as well as civil and political rights was confirmed in the seminal case of *Broeks v The Netherlands*.[75]

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[72] Bertie G. Ramcharan, "Equality and Non-Discrimination" in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981).

[73] "All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[74] See Manfred Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* (Engel, 1993), at 463, and CCPR General Comment No. 18, "Non-Discrimination" (10 November 1989), in which it is noted that "Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[75] (172/84) CCPR/C/29/D/172/1984 (1987). The principle that Article 26 can apply in the case of social and economic rights has been affirmed in – *inter alia* – *Johannes Vos v Netherlands* (786/97) CCPR/C/66/D/786/1997 (1999); *Wackenheim v France* (854/99) CCPR/C/75/D/854/1999 (2002) (employment); and *Arieh Hollis Waldman v Canada* (694/1996) CCPR/C/67/D/694/1996 (1999) (education subsidies).

Article 26 therefore requires that all public goods be distributed to everyone without distinction. This includes distinction as to nationality[76] or citizenship[77] (once admitted, migrants must be given the same treatment as nationals unless there are reasonable and objective grounds to justify a more restrictive application) and thus has obvious implications for integration. Policies which discriminate against migrants or non-citizens in the field of education or employment, for example, are potentially in breach of Article 26. Moreover, policies and laws which do not discriminate against non-citizens as such, but which may affect non-citizens, may fall foul of Article 26 for other reasons, including on the basis of discrimination on the grounds of religion for example. The wide reach of Article 26 is illustrated by the concluding observations of the CCPR for Ireland in 2000, in which the CCPR expressed concern that exemptions under the Employment Equality Act 1998, which allow religious bodies directing hospitals and schools to discriminate in certain circumstances on the ground of religion in employing persons whose functions are not religious, may result in discrimination contrary to Article 26 of the Covenant.

In principle, therefore, Article 26 could constitute a powerful tool for immigrants seeking to establish their entitlement to equal treatment as nationals of the host State. However, the jurisprudence of the CCPR on Article 26 has a number of limitations which weakens it in this regard. First, the Committee's approach to the issue of indirect discrimination, which is of particular relevance in the context of subtle discriminatory treatment of first or second-generation immigrants, has been criticised as inadequate.[78] In particular, Hathaway accuses the Committee of engaging in superficial analysis in cases involving allegations of discrimination against non-citizens.[79] The second limitation of the views of the CCPR on

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[76] See *Gueye v France* (196/1985) CCPR/C/35/D/196/1985 (1989); and *Griffin v Spain* (493/1992) CCPR/C/53/D/493/1992 (1995).

[77] See CCPR General Comment No. 15, note 67, para. 2 - as affirmed in *Karakurt v Austria* (965/2000) CCPR/C/74/D/965/ 2000 (2002).

[78] Tufyal Choudury, "Interpreting the Right to Equality Under Article 26 of the International Covenant on Civil and Political Rights" (2003) 1 *EHRLR* 24, at 33.

[79] James Hathaway, *The Rights of Refugees Under International Law*, note 12, at 135. In *Oulajin and Kaiss v The Netherlands* for example, an allegation of indirect discrimination against migrant workers was made

individual communications is the wide margin of appreciation afforded to states in some situations in determining whether differential treatment constitutes "discrimination" (which is prohibited) or a reasonable and objective differentiation (which is permitted).[80] For example, in *Singh Bhinder v Canada*,[81] the Committee found that while a rule requiring all persons to wear hard hats in certain jobs indirectly discriminated against Sikhs, it accepted, without question or analysis of the subtle issues involved, the State's assessment that the rule was "reasonable and directed towards objective purposes that are compatible with the Covenant", as it was necessary on the basis of safety.[82]

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against a Dutch law that paid child support in respect of the natural children of Dutch residents wherever the children might live, but which denied support for foster children who were not resident in the Netherlands. The authors of the complaint argued that this was indirect discrimination against migrants as they were less likely than Dutch parents to have their foster children living with them. In fact, immigration rules had forced the migrant workers in this case to leave their children at home. The Dutch government argued that this was justified on the basis that residence was needed to prove that there was a close link between the foster children and the parents. The Committee found that the scheme was non-discriminatory, as the rule also applied to Dutch citizens whose children are resident abroad. The Committee failed therefore to address the issue in a meaningful way, and did not take into consideration the reality of the different situations of Dutch citizens and migrants. Furthermore, a number of members of the Committee indicated that the Committee would only second-guess decisions of states relating to the allocation of socioeconomic resources in the most extreme circumstances.

[80] As confirmed in General Comment No. 18, "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." CCPR General Comment No. 18, note 74, para. 13.

[81] (208/1986) CCPR/C/37/D/208/1986 (1989).

[82] *Ibid*, para. 6.2. Similarly, in cases concerning social welfare rights denied to unmarried spouses as compared with married spouses, the Committee has operated on the presumption that such a distinction is reasonable. (*Danning v The Netherlands* (180/1984), decided 9 April 1987; *Sprenger v The Netherlands* (395/1990) CCPR/C/41/D/395/1990 (1991); and *Dersken v The Netherlands* (976/2001), CCPR/C/80/D/976/2000 (2004).) The position of the Committee on the reasonableness of differentiation on the basis of citizenship is not altogether clear, and the Committee has indicated that it is necessary to judge every case on its own facts in this context. Contrast the results in *Oord v The Netherlands (658/1995) CCPR/C/60/D/ 658/1995 (1997)* - a treaty-based distinction between citizens and non-citizens is objective and reasonable - and *Karakurt v Austria (965/2000) CCPR/C/74/D/965/ 2000 (2002)* - there is no general rule that differentiation on the grounds of citizenship is reasonable.

4.5.2 Article 27: minority rights

Article 27 is "the only expression of the right to an identity in modern human rights conventions intended for universal application"[83], making it an important element of the international legal framework for integration. Article 27 provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 27 protects the rights of individuals who are members of a minority which "exists" in a State party.[84] The article therefore applies to all individuals who belong to a minority: they need not citizens or permanent residents.[85] Article 27 thus clearly imposes obligations on States in respect of all migrants belonging to an ethnic, linguistic or cultural

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[83] Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford University Press, 1991), at 142.

[84] The existence of an ethnic, religious or linguistic minority in a given State Party does not depend on a decision by that State Party, but requires to be established by objective criteria.

[85] CCPR General Comment No. 23, "The rights of minorities (Art.27)" (8 April 1994). It also states: "Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights." (at 2). It further states that "the existence of an ethnic, religious or linguistic minority in a given States party does not depend upon a decision by that State party but requires to be established by objective criteria." (at 2). See also General Comment No. 15, note 67, at para. 7, which states that "in those cases where aliens constitute a minority within the meaning of Article 27, they shall not be denied, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and use their own language."

minority.[86] The exact scope and nature of these obligations is not, however, altogether clear from the Convention itself. Poulter observes that "Article 27 is ... expressed in such vague and general terms that its precise ambit and content have been the subject of much speculation."[87] This was remedied to a certain extent by the adoption of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992 (the "Minority Declaration")[88] and CCPR's General Comment No. 23 in 1994.

The Minority Declaration goes a considerable distance towards clarifying the obligations of State Parties as regards minority rights. For example, it provides that "(P)ersons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life",[89] and that "(N)ational policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities".[90] Importantly, it clarifies that measures taken by States to ensure the effective enjoyment of the rights contained in the Declaration shall not (*prima facie*) be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights ("UDHR").[91] General Comment No. 23 further delineates the precise nature of the obligation contained in Article 27, explaining that it imposes both negative and positive obligations on State Parties, and concerns relations between the State Party and individuals

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[86] Prior to the adoption of this General Comment there was a widely-held view that Article 27 implicitly excluded aliens who did not acquire the nationality of the host state from its scope. See Patrick Thornberry, note 83, at 171-172.

[87] Sebastian Poulter, "The Rights of Ethnic, Linguistic and Cultural Minorities" (1997) 3 *EHRLR* 254. In particular, he notes that the significance of the use of negative language in the formulation of Article 27, in contrast to the positive formulation used in the bulk of the other articles of the Covenant, left the door open for restrictive interpretations of the scope of the article.

[88] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Adopted by General Assembly resolution 47/135 of 18 December 1992). Hereinafter, the "Minority Declaration".

[89] Minority Declaration, Article 2(2).

[90] Minority Declaration, Article 5(1).

[91] Minority Declaration, Article 8(3).

and also between private actors.[92] Importantly, the concept of culture as contained in the Covenant is not a narrow one. Drawing parallels between Article 27 and the references to cultural rights contained in the UDHR[93] and the ICESCR[94] Thornberry states that "the right to enjoy culture in Article 27 means all aspects of that culture; what is at stake is the ability of ethnic minorities to preserve their cultural identity and their cultural inheritance, *their own culture*"[95] and General Comment 23 confirms that "culture manifests itself in many forms."[96]

The expansive reach of Article 27 has a number of implications for integration. The first of these is that any integration policy which forced migrants who are members of a minority to forsake their culture, language or religion in favour of that of the host state would violate Article 27. This echoes the views of UNHCR regarding forced assimilation or integration by coercion in the case of refugees.[97] Indeed, as explained in General Comment No. 23, "positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community, with other members of the group."[98] Article 27 would therefore seem to require the same type of two-way definition of integration as that propounded by the Council of Europe, the European Union and UNHCR.[99] Article 27 does not, however, go as far as to prohibit all measures designed to integrate members of minorities into a host society, so long as such measures respect the individual's right to an identity as a member of a minority. Thornberry suggests that "Article 27 is ultimately no

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[92] CCPR General Comment No. 23, note 85, at 2: "Although article 27 is expressed in negative terms, that article, nevertheless, does recognise the existence of a 'right' and requires that it shall not be denied. ... *Positive measures of protection* are, therefore, required not only against the acts of the State party itself ... but also against the acts of other persons within the State party".

[93] Article 27(1) of the UDHR.

[94] Articles 13-15 of the ICESCR.

[95] Patrick Thornberry, note 83, at 187.

[96] General Comment No. 23, note 85, at para. 7.

[97] See 4.2.2.

[98] CCPR General Comment No. 23, note 85, para. 6.2.

[99] See 2.2.

barrier to assimilation *per se* but only assimilation contrary to the wishes of the members of the minority".[100] However, Article 27 certainly implies that, in implementing integration programmes, States are under a positive obligation to enable minorities to both participate in the host society and also retain their own distinctive identity.[101] At the very least, it casts doubt on the legitimacy under Article 27 of imposing integration "tests" or "contracts", which require acceptance of the majority culture, as a pre-condition to accessing the territory of the State Party or to accessing a secure legal status.

4.5.3 Articles 17 and 23: the protection of private and family life

The importance of family reunification in the integration process is well-established, and is outlined in detail in Chapter 9.[102] Protection of the family and its members is provided for by Articles 17 and 23 of the ICCPR. Article 17 of the ICCPR provides for the right of every person to be protected against arbitrary or unlawful interference with – *inter alia* – his privacy, family and home. Article 23(1) provides that the family is "the natural and fundamental group unit of society and is entitled to protection by the society and the state".[103] On the basis of these articles, the CCPR has, like the ECtHR in the context of the ECHR, found in individual communications that the deportation of a non-citizen may constitute a breach of family rights under the ICCPR, depending on the circumstances of the

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[100] Patrick Thornberry, note 83, at 206.

[101] This view is reinforced by the statement of the Chair of the Working Group on Minorities in 2003, where he noted, under the heading of "integration and pluralism" that a "positive minority policy requires a combination of equal treatment and pluralist arrangements. Equality of treatment is required in the common domain. States must ensure that everyone, including persons belonging to minorities, may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination, and in full equality before the law. This has to be balanced with the requirement to governments to encourage conditions by which the minorities can maintain their separate identity (Minority Declaration Article 1). Language and education are among the most important issues determining the scope of pluralism in society."

[102] See 9.1.

[103] In particular, Article 24 specifically protects the rights of the child to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

case.[104] Articles 17 and 23, therefore, set an outer boundary for the immigration decisions of Sate parties where family rights are involved. However, unlike the ECtHR (as will be examined below), the CCPR has not used integration as an element of its reasoning in these views, and has focused on family rights. A finding that a deportation breaches the ICCPR on the grounds of the right to family life is rare, and appears to require exceptional circumstances. These exceptional circumstances existed in *Dauphin v Canada*,[105] in which the ICCPR found that the fact that the individual in question had resided in Canada since he was two years old, had close ties to Canada and no family ties to Haiti meant that the drastic effects on the author of the proposed deportation was disproportionate to the legitimate aims pursued by the State party. Here, the CCPR found that there was a violation of Articles 17 and 23(1) of the ICCPR.

4.5.4 The concept of integration in the concluding observations of the Human Rights Committee: the progressive realisation of equal rights

4.5.4.1 Express and indirect references of the CCPR to integration: Articles 2 and 26

Express references of the CCPR to integration are sparse and arise only in the European context.[106] Express references to integration are linked to the equality guarantee contained in Article 26, and to manifestations of xenophobia and racism. Sweden, for example, is

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[104] *Madafferi v Australia*, CCPR/C/81/D/1011/2001 (2004); *Winata v Australia*, CCPR/C/72/D/930/2000 (2001); *Dauphin v Canada*. However, in contrast, see *AS v Canada*, CCPR/C/12/D/68/1980 (1981), which was a case in which a Canadian citizen with Polish origins attempted to obtain permission for her Polish daughter and grandson to join her and was refused this permission. Her argument that this interfered with her right to family life under Article 17 was deemed inadmissible by the CCPR. In the deportation context, see *Stewart v Canada*, CCPR/C/58/D/538/1993; *Canepa v Canada*, CCPR/C/52/D/558/1998; *Rajan and Rajan v New Zealand*; and *Sahid v New Zealand*, CCPR/C/77/D/893/1999.

[105] CCPR/C/96/D/1792/2008 (UNHRC, 2009).

[106] See for example the references in Lichtenstein, UN Doc CCPR/CO/81/LIE (12 August 2004) at para. 9; Sweden, UN Doc CCPR/C/SWE/CO/6 (7 May 2009) at para. 19; Finland, UN Doc CCPR/CO/82/FIN (2 December 2004) at para. 15; Georgia, UN Doc CCPR/C/GEO/CO/3 (15 November 2007).

exhorted to improve "the application of laws punishing racially motivated crimes" and "the integration into society of members of minority groups" in the context of the CCPR's noting of persistent manifestations of racism and xenophobia.[107] Similarly, while the Committee noted the measures taken by Lichtenstein to promote equality and integration of non-citizens, it also expressed its concern over the persistence of xenophobic attitudes towards Muslims and people of Turkish origin in particular which raises issues under Articles 2 and 26.[108] In relation to the Czech Republic, the CCPR again expressly linked integration and Article 26, stating:

> The Committee is concerned about reports that non-citizens living in the State party suffer from discrimination, face a wide range of difficulties with regard to their integration into Czech society, and frequently lack information about their rights. (art. 26). The State party should establish mechanisms to remove obstacles to the practical enjoyment of the rights guaranteed by the Covenant to non-citizens living in the Czech Republic. It should take effective measures to promote equality of non-citizens and citizens under the Covenant, including by providing non-citizens with information, in a language that they understand, on the rights and services which they are entitled to enjoy.[109]

The Committee has also expressed views on the necessity to integrate members of the Roma community[110] and national minorities (in a manner which is respectful of their

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[107] Sweden, UN Doc CCPR/C/SWE/CO/6 (7 May 2009) at para. 13.

[108] Lichtenstein, UN Doc CCPR/CO/81/LIE (12 August 2004) at para. 9.

[109] Czech Republic, para. 18.

[110] See Finland, UN Doc CCPR/CO/82/FIN (2 December 2004) at para. 15. The concluding observations of the CCPR relating to European countries make continuous references to the situation of the Roma, in particular the extensive discrimination suffered by the Roma and the way in which this impedes effective access to Covenant rights. See for example the concluding observations on the reports submitted by Albania, UN Doc CCPR/CO/82/ALB (2 December 2004) at para. 21; Bulgaria UN Doc CCPR/C/79/Add.24 (3 August 1993) at para. 8; Czech Republic, UN Doc CCPR/CO/72/CZE (27 August 2001) at paras 8 - 11; Hungary, UN Doc CCPR/CO/74/HUN (19 April 2002) at para. 7; Lithuania UN Doc CCPR/CO/80/LTU (4 May 2004) at

cultural identity)[111] in order to enable such persons to fully enjoy their rights under the Covenant.[112]

The non-discrimination guarantees contained in Articles 2 and 26 have also formed the basis for concerns expressed by the Committee regarding the treatment of immigrants and migrant workers which do not expressly refer to integration but which nonetheless constitute integration-related issues. The Committee has frequently expressed general concerns about hate speech and other manifestations of discrimination, xenophobia and racism directed at immigrant-origin communities.[113] More specifically, the CCPR has expressed concern at the level of discrimination in employment for persons of migrant origin,[114] and the lack of representation of racial and other minorities in public life[115] and in the judiciary.[116] The Committee has also recognised that the legal status of migrant workers may raise serious concerns under Articles 2 and 26, reflecting the importance of the relationship between integration and law which is the focus of this thesis. In relation to Thailand, the Committee commented on the "lack of full protection of the rights of registered and unregistered

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para. 8). Moldova is expressly encouraged to strengthen measures aimed at the inclusion and inclusion of Roma in broader society Moldova, UN Doc CCPR/C/MDA/CO/2 (2009), para. 27.

[111] Portugal, UN Doc CCPR/CO/78/PRT (2003), para.20.

[112] See for example Georgia, UN Doc CCPR/C/GEO/CO/3 (15 November 2007) at para. 17. In relation to Georgia, the CCPR privileges an inclusive form of integration, recommending that the Government promote the integration of minorities in the Georgian society by engaging in dialogue with the concerned groups and civil society.

[113] In relation to Australia, for example, the Committee expressed general concerns about the increase in discrimination against Muslims in Australia and the lack of adequate hate speech prohibitions (Australia, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) at para. 26). Similarly, the prevalence of hate crimes and other manifestations of racism and xenophobia were noted in relation to Russia (Russian Federation, UN Doc CCPR/C/RUS/CO/6 (24 November 2009) at para. 11).

[114] France, UN Doc CCPR/C/FRA/CO/4 (31 July 2008) at para. 25; The Netherlands, UN Doc CCPR/CO/72/NET (27 August 2001).

115 France, UN Doc CCPR/C/FRA/CO/4 (31 July 2008) at para. 26; Serbia, UN Doc CCPR/C/UNK/CO/1 (14 August 2006) at para. 21; and Croatia, UN Doc CCPR/C/HRV/CO/2 (4 November 2009) at para. 18.

[116] United Kingdom of Great Britain and Northern Ireland, UN Doc CCPR/C/GBR/CO/6 (30 July 2008), para. 8.

migrant workers in Thailand, particularly with regard to liberty of movement, access to social services and education, and access to personal documents. The deplorable conditions in which migrants are obliged to live and work indicate serious violations of Articles 8 and 26 of the Covenant."[117] In addition, observations made by the CCPR in relation to Roma and national minority issues under the rubric of Articles 2 and 26 also have application in the case of immigrant communities, for example, in the case of the issue of the de facto segregation of some Roma children in schools in Europe which has been referred to by the CCPR as raising concerns under Articles 26 and 27.[118]

4.5.4.2 References of the CCPR to integration-related matters

Aside from the express and indirect references to integration in the context of non-discrimination and equality under Articles 2 and 26, the areas of concern to the CCPR regarding non-citizens and ethnic minorities are wide-ranging but often relate to more basic civil rights than those usually associated with integration. Issues relating to the determination of immigration or asylum status, and the process for dealing with immigration and asylum applications are frequently raised by the CCPR.[119] In Europe, the concerns of the CCPR in this regard include detention for the purposes of asylum and immigration law and the conditions of such detention[120] as well as the conduct of asylum and deportation

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[117] Thailand, UN Doc CCPR/CO/84/THA (8 July 2005), para. 23. See also the concerns of the Committee in relation to the treatment of Haitians in the Dominican Republic, involving mass expulsion violating Articles 7, 12(4) and 13, the issue of the living and working conditions of Haitian workers and the failure to protect Haitians from serious human rights abuses such as forced labour. Dominican Republic, UN Doc CCPR/CO/71/DOM (26 April 2001), para.s 17 and 18 in particular.

[118] See for example Croatia, UN Doc CCPR/C/HRV/CO/2 (4 November 2009) at para. 19.

[119] The extensive comments often made on the application of refugee law are linked to the lack of a monitoring body for the 1951 Refugee Convention.

[120] This can raise issues under Articles 7, 9, 10 and 13: see for example Belgium, CCPR/CO/81/BEL (12 August 2004); Greece, UN Doc CCPR/CO/83/GRC (25 April 2005); Ireland, UN Doc CCPR/C/IRL/CO/3 (30 July 2008); Sweden, UN Doc CCPR/C/SWE/CO/6 (7 May 2009); and Australia, UN Doc CCPR/C/AUS/CO/5 (7 May 2009).

procedures.[121] Outside of Europe and North America, the concerns of the Committee relating to immigration and asylum procedures are even more basic. For example, in relation to Mali, the Committee has expressed its concern at:

> reports of the hardship suffered by some 6,000 Mauritanian refugees who, for the last 10 years, have been living in the west of the country (Kayes region), are not registered, possess no identity papers and whose right to physical security is not sufficiently protected.[122]

The issue of the ill-treatment of minorities by the police is also a pervasive concern of the CCPR, particularly in the European context. This encompasses includes both the police treatment of immigrant and ethnic groups in a physical sense and the stopping of individuals by the police on a discriminatory basis, and as such may raise issues under Articles 2 and 7.[123]

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[121] Which can raise an issue under Articles 6 and 7: see for example Belgium, CCPR/CO/81/BEL (12 August 2004), para. 14; Switzerland, UN Doc CCPR/C/CHE/CO/3 (3 November 2009); Russia, UN Doc CCPR/C/RUS/CO/6 (24 November 2009), para. 17 (returning foreign nationals to countries in which torture is allegedly practiced while relying on diplomatic assurances).

[122] Mali, UN Doc CCPR/CO/77/MLI (16 April 2003), para. 20. In the Asia-Pacific region, the CCPR has criticised the lack of asylum law in the Democratic Republic of Korea (UN Doc CCPR/CO/72/PRK, (27 August 2001), para. 21); the lack of a proper asylum system in Thailand (UN Doc CCPR/CO/84/THA (8 July 2005), para. 17); and serious defects in the asylum procedure in Japan (UN Doc CCPR/C/JPN/CO/5 (30 October 2008), para. 25. Again, similar issues arise in the Middle East/North Africa region in relation to Algeria (UN Doc CCPR/C/DZA/CO/3 (12 December 2007), para. 22); Morocco (UN Doc CCPR/CO/82/MAR (1 December 2004), para. 13); and Libya (UN Doc CCPR/C/LBY/CO/4 (15 November 2007), para. 18); and in Latin America and the Caribbean in relation to Barbados (UN Doc CCPR/C/BRB/CO/3 (11 May 2007), para. 10).

[123] See for example Belgium, UN Doc CCPR/C/BEL/CO/5 (16 Nov 2010); Czech Republic, UN Doc CCPR/CO/72/CZE (27 August 2001), para.s 14 and 15; Greece, UN Doc CCPR/CO/83/GRC (25 April 2005), para. 9; Italy, UN Doc CCPR/C/ITA/CO/5 (24 April 2006), para. 11; Portugal, UN Doc CCPR/CO/78/PRT (5 July 2003), para. 8; Slovakia, UN Doc CCPR/CO/78/SVK (22 August 2003), para. 11; Norway, UN Doc CCPR/C/NOR/CO/5 (25 April 2006), para. 17; Australia, UN Doc CCPR/C/AUS/CO/5 (7 May 2009), para. 1.

Freedom of religion, as protected by Article 18, is also a right which the Committee has examined in connection with immigrant and ethnic groups. It will be seen in Chapter 8 that issues of religious freedom have become a significant integration issue worldwide. In 2010, the Committee involved itself in the discourse surrounding controversial political issues in Switzerland, expressing the view that the adoption of a proposed referendum aimed at prohibiting the construction of minarets on mosques would bring the State party into non-compliance with its obligations under the Covenant.[124] This referendum was passed in 2010. The Committee's observations have also covered the lack of official recognition of mosques,[125] discrimination in state subsidies between schools on the basis of religion,[126] the special or established position of a religion in some States[127] and the existence of a denominational education system.[128]

Finally, the CCPR has frequently commented on family reunification in the context of the privacy and family rights protected by Articles 17 and 23 of the ICCPR. The CCPR has criticised the family reunification regimes in a number of European countries. It has suggested (in the case of Belgium) that Article 17 requires that aliens the majority of whose ties are to the host state are not to be expelled under any circumstances.[129] This provides added protection against deportation to migrants who are integrated into the host country in which they live, and goes further than the jurisprudence of the ECtHR under Article 8 ECHR (which will be discussed in detail below).

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[124] Switzerland, UN Doc CCPR/C/CHE/CO/3 (3 November 2009), para 8.

[125] Belgium, CCPR/CO/81/BEL (12 August 2004), para. 26.

[126] Canada, UN Doc CCPR/C/CAN/CO/5 (20 April 2006), para. 21 (discusses Canada's failure to respond to the views of the CCPR in *Waldman v Canada*).

[127] Denmark, UN Doc CCPR/C/DNK/CO/5 (29 October 2008), para. 5; Georgia, UN Doc CCPR/C/GEO/CO/3 (15 November 2007), para. 15.

[128] Ireland, UN Doc CCPR/C/IRL/CO/3 (30 July 2008), para. 22.

[129] UN Doc CCPR/CO/81/BEL (12 August 2004), para. 25.

The fact that integration is not explicitly linked to these rights, while it is linked expressly to equality in a small number of cases, illustrates a concept of integration which is posited in a framework of the progressive realisation of rights, with the objective of migrants obtaining equality with members of the majority population. This ties in with UNHCR's conception of integration (discussed above) as the granting of a progressively wider range of rights and entitlements generally commensurate with those of local citizens.

4.5.4.3 The subordinate role of Article 27 ICCPR in the context of integration of migrants

As noted above, the protection of minorities' rights to "enjoy their own culture, to profess and practise their own religion, or to use their own language" contained in Article 27 is an important component of the international legal framework relating to integration. The CCPR is in favour of measures "envisaged or taken to promote the integration of minorities and the protection of their rights and to guarantee respect for their cultures and dignity."[130] Issues relating to the preservation of the culture and language of national minorities are frequently considered within the framework of Article 27 and this may provide important guidance in the context of immigrant-origin minorities. The Committee has emphasised, for example, that all ethnic, religious and ethnic minorities (whether or not they are officially recognised as national minorities) should be able in practice to enjoy their own culture and to use their own language,[131] although these comments are generally made in the context of countries with significant national minority groups such as Albania, Croatia and Thailand. Articles 26 and 27 are often linked in the Committee's consideration of discrimination against national minorities. In relation to Moldova for example, the Committee opined that:

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[130] Democratic Republic of the Congo, UN Doc CCPR/C/COD/CO/3 (26 April 2006), para. 26 (in the context of the marginalisation, discrimination and even persecution of pygmies in DRC).

[131] Albania, UN Doc CCPR/CO/82/ALB (2 December 2004), para. 21 (all members of ethnic and linguistic minorities, whether or not they are recognized as national minorities), Croatia, CCPR/CO/71/HRV, 30 April 2001, para. 22, Estonia CCPR/CO/77/EST (15 April 2003), para. 16 (primarily in relation to the Russian-speaking minority).

> The State party should increase its efforts to translate its international commitments under articles 26 and 27 of the Covenant into practical achievements for its minorities, including the Gagauz and the Roma in rural communities.[132]

The Committee also provides an insight into the correct interpretation of 'integration' in noting, in the context of observations made under Article 27 along with Article 26, the need to integrate the Roma in a manner respectful of their cultural identity.[133] Latvia, which has a large Russian minority without Latvian citizenship, is urged to facilitate the integration process by enabling non-citizens who are long-term residents of Latvia to participate in local elections and to limit the number of restrictions on non-citizens in order to facilitate participation in public life.[134]

Nevertheless, in general, the Committee does not refer to Article 27 as a benchmark in matters relevant to the integration of migrants or second and subsequent generation migrant communities. The Committee does not place the same emphasis on the preservation of the culture and language of minorities resulting from recent immigration as it does in respect of

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[132] Moldova, UN Doc CCPR/CO/75/MDA (26 July 2002), para. 19. See also Ireland, UN Doc CCPR/C/IRL/CO/3 (30 July 2008), para. 23: "The State party should take steps to recognize Travellers as an ethnic minority group. The State party should also ensure that in public policy initiatives concerning Travellers, representatives from the Traveller community should always be included. It should also amend its legislation to meet the specific accommodation requirements of Traveller Families."

[133] Germany, UN Doc CCPR/CO/80/DEU (4 May 2004), para 21(a). Similarly, in relation to Greece, the Committee stated that "The State party should intensify its efforts to improve the situation of the Roma people in a manner that is respectful of their cultural identity, in particular, through the adoption of positive measures regarding housing, employment, education and social services." (Greece, UN Doc CCPR/CO/83/GRC (25 April 2005), para. 18(a).

[134] Latvia, UN Doc CCPR/CO/79/LVA (2003), para. 18. Similarly, Estonia is exhorted to "strengthen measures to integrate Russian-speaking minorities into the labour market, including with regard to professional and language training. It should also take measures to increase the confidence and trust of the Russian-speaking population in the State and its public institutions." Estonia, UN Doc CCPR/C/EST/CO/3 (4 August 2010).

national minorities, and does not refer for example to an obligation to provide an opportunity for migrant children to receive instruction in and of their languages, which it does in the case of national minorities.[135] The CCPR appears to conceive of integration issues as primarily related to equality rather then to minority and cultural rights when it comes to immigrant-origin rather than national minorities. An examination of the concluding observations relating to the country reports of the United Kingdom and the United States of America (both countries with significant immigrant-origin ethnic groups) illustrates this point. Racial minorities issues are generally discussed in terms of Article 26 rather than Article 27. In the case of the UK, issues relating to negative public attitudes towards Muslims, the low proportion of ethnic minority representation in the judiciary and racial profiling by the police are all considered in the context of Article 26 rather than Article 27.[136] In relation to the United States, racial segregation in schools and racial discrimination were dealt with under Article 26 while aboriginal peoples' rights' issues, including issues relating to culture, are dealt with under Article 27.[137] The upshot of this is that while Article 27 and the cultural rights of minorities protected thereunder provide a basic framework which integration policies must respect, Article 27 does not constitute the full picture from an integration perspective. As shown in Chapters 2 and 3, integration stretches beyond Article 27 concerns of minority language and culture (the primary concerns of Article 27) to all-encompassing social issues. The treatment of the concept of integration by the CCPR in its concluding observations suggests that the essence of integration lies in immigrants and their descendants progressively achieving equal treatment and outcomes as existing members of society, rather than centring round a narrow culture-based core.

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[135] See for example Macedonia, UN Doc CCPR/C/MKD/CO/2 (3 April 2008) para. 19; Serbia, UN Doc CCPR/C/UNK/CO/1 (14 August 2006), para. 22; Austria, UN Doc CCPR/C/AUT/CO/4 (30 October 2007), para. 21.

[136] United Kingdom of Great Britain and Northern Ireland, UN Doc CCPR/C/GBR/CO/6 (30 July 2008), para.s 16, 8 and 29 respectively.

[137] United States of America, UN Doc CCPR/C/USA/CO/3 (15 September 2006), para.s 22, 23, 24 and 27 respectively.

4.5.4.4 The CCPR's approach to integration linked to the wealth of the State Party

The contrasting way in which the ideas discussed in this section are developed in the European/North American/Australian contexts and elsewhere is striking. As noted above, the concept of integration is not expressly mentioned in the observations of the CCPR relating to the African, Asian, Latin American or Middle-Eastern/North-African regions.[138] In the context of most European countries, basic procedural safeguards and rights are generally speaking assured (or at least theoretically provided for) for refugees, immigrants and non-citizens meaning that the Committee moves on to the next stage in the progressive realisation of equal rights as the host population, which is their integration into the host state. Integration is simply not on the agenda in the same way in most African, Asian, Middle Eastern and Latin American countries, reflecting the links between integration and state expenditure, and also the fact that these State Parties are in the main more significant migrant-sending rather than migrant-receiving countries. In its African concluding observations in particular, the CCPR seems reluctant to get involved in these matters because of the enormous financial burden faced in recent years by some African countries such as Tanzania in accommodating large numbers of refugees.[139] In addition, in the case of African, Asian and Latin American states, the Committee is in general more preoccupied with the treatment of indigenous minorities than minorities of recent immigrant origin.

4.6 The International Covenant on Economic, Social and Cultural Rights

In terms of its content, the ICESCR is a crucial international legal source of integration-related rights. It contains some of the most significant and wide-ranging international legal provisions establishing economic, social and cultural rights, including rights relating to work

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[138] With the exception of the Democratic Republic of Congo, which was recommended to provide detailed information in its next report on measures envisaged or taken to promote the integration of minorities. UN Doc CCPR/C/COD/CO/3 (2006), para. 26.

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in just and favourable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, to education and to enjoyment of the benefits of cultural freedom and scientific progress. In addition, Article 2(2) imposes an obligation of non-discrimination as to the rights set down in the ICESCR and the Covenant rights apply to everyone including non-nationals, regardless of legal status and documentation.[140] Thus, in principle, the ICESCR provides migrants with the tools necessary to maintain self-reliance and an acceptable standard of life in order that they can contribute actively to the life of the country and the community and live amongst the host population without discrimination.[141] Consequently, the risk of becoming economically and socially marginalised should be reduced and integration should be facilitated.

A number of articles which protect integration-related rights will be discussed below. The development of the concept of integration by the CESCR in its concluding observations on state reports will then be assessed. The analysis of the concluding observations reveals that integration as a standalone concept is even less developed in the context of the ICESCR than in the case of the ICCPR. Nonetheless, the CESCR has recognised the impact of national legal and administrative rules on the integration of migrants. Furthermore, the CCPR's approach of conceiving integration in terms of the progressive realisation of rights for immigrants and their families is mirrored in the observations of the CESCR. Finally, the CESCR appears to endorse a multicultural approach to integration.

4.6.1 The right to work: Articles 6, 7 and 8

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[140] CESCR General Comment No. 20, "Non-discrimination in Economic, Social and Cultural Rights (art.2, para. 2)" (UN Doc E/C.12/GC/20, 10 June 2009), para. 30 on "nationality".

[141] Rosa da Costa, note 14, at 31. According to Wiesbrock, the acquisition of social, economic and cultural rights are essential to the integration process as they ensure that migrants become part of the host society (Anja Wiesbrock, note 71, at 708).

The right to work is contained in Articles 6, 7 and 8, which are inter-related.[142] Access to the labour market is a key integration issue as it provides both a means to financial stability and a means of improving language skills and establishing contacts with the local community. Article 6 provides for the basic right of everyone to gain his living by work which he freely accepts or chooses, although it clearly does not constitute an absolute and unconditional right to obtain employment.[143] Article 7 then goes on to elaborate a more extensive right of everyone to enjoy just and favourable conditions of work and a decent living for themselves and their families, including "Equal opportunity for everyone to be promoted in his employment to an appropriate higher level",[144] and "rest, leisure and reasonable limitation of working hours and periodic holidays with pay".[145] This is a far-reaching provision with the potential to reach into relationships between private individuals,[146] although the Committee has not elaborated on the meaning of the article by way of General Comment. Article 8 addresses the right of all persons to join trade unions (of their choice).

States Parties are under an obligation to respect the right to work by refraining from denying or limiting equal access to decent work for all persons (including members of minorities and migrant workers).[147] In its General Comment on the right to work contained in Article 6, the CESCR emphasises the importance of *accessibility* of the labour market. The Committee refers to article 2 of International Labour Organisation Convention No. 111, to the effect that State parties should "declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity

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[142] CESCR General Comment No. 18, "The Right to Work (art. 6)" (UN Doc E/C.12/GC/18, 6 February 2006), para. 1.

[143] CESCR General Comment No. 18, *ibid.*, para. 6.

[144] Article 7(c).

[145] Article 7(d).

[146] Indeed, Craven notes that this provision has been the subject of some controversy as it is debatable whether 'rest and leisure' are sufficiently fundamental to be established as human rights. Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford University Press, 1995), at 226.

[147] CESCR General Comment No. 18, note 142, para. 23.

and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof", and the Committee concludes that "even in times of severe resource constraints, disadvantaged and marginalized individuals and groups must be protected by the adoption of relatively low-cost targeted programmes."[148] These provisions can thus be seen as an important legal instrument for successful integration, particularly as national constitutions rarely contain such detailed provisions on socio-economic rights such as the right to work.

4.6.2 Other integration-related rights protected by the ICESCR

Article 11 incorporates a wide range of concerns relating to the lives of all residents of States Parties; in particular food, clothing and housing. [149] The CESCR has devoted particularly extensive attention to the right to adequate housing, which is "of central importance for the enjoyment of all economic, social and cultural rights."[150] As explained by the Committee, the right to adequate housing goes beyond a basic right to shelter:

> the right to housing, should not be interpreted in a narrower restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head ... Rather it should be seen as the right to live somewhere in security, peace and dignity ... .[151]

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[148] *Ibid.*, para. 12(b)(i).

[149] Craven notes that Article 11 can be seen as the epitome of economic, social and cultural rights and is clearly dependent for realisation on the economic resources of the State concerned. Matthew Craven, note 146, at 350.

[150] CESCR General Comment No. 4, "The Right to Adequate Housing" (13 December 1991), para. 1.

[151] CESCR General Comment No. 4, *ibid.*, para. 7. The 'adequacy' of housing must be assessed by reference to security of tenure, availability of services, affordability, habitability, accessibility, location and cultural adequacy.

This has resonance in the Irish context of direct provision for asylum seekers, whereby asylum seekers are often housed in unsuitable hostel accommodation.

Finally, Article 15 provides (*inter alia*) for the right of everyone to take part in cultural life. This confers a right on every person to participate in the cultural life of the society of the State party. In relation to migrants, the CESCR's view is that State Parties should pay particular attention to the protection of the cultural identities of migrants as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events. State Parties should not prevent migrants from maintaining cultural links with their countries of origin.[152] Together with Article 27, this provides a minimum standard with which integration policies must conform in order to remain in compliance with international law.

4.6.3 Limitations of the ICESCR in the integration context

Despite its clear applicability to the integration needs of immigrants and refugees, the ICESCR suffers from some limitations which have enabled State Parties to justify evading the full extent of their obligations and limit its ability to have a real impact on the integration prospects of individuals. The ICESCR is normatively underdeveloped in comparison to the ICCPR, primarily due to the fact that there has, until now, been no individual complaints procedure in place in relation to the ICESCR.[153] Secondly, the justiciability and extent of the enforceability of socio-economic rights is still matter of debate and controversy in many

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[152] CESCR General Comment No. 21, "The Right of Everyone to Take Part in Cultural Life" (UN Doc E/C.12/GC/21, 21 December 2009), para. 34. See Roger O'Keeffe, "The Right to Take Part in Cultural Life under Article 15 of the ICESCR" 1998 47(4) *ICLQ* 904.

[153] The Optional Protocol to the ICESCR, adopted on 10 December 2008 and opened for signature on 24 September 2009, provides for an individual complaints procedure. The Optional Protocol is not yet in force as it has not yet had the requisite number of ratifications or accessions. For an overview of the Committee's background, mandate and workings, see Philip Alston, "The Committee on Economic, Social and Cultural Rights" in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Oxford University Press, 1992).

of the State Parties to the ICESCR, including Ireland.[154] Finally, while it would not apply to a country such as Ireland, Article 2(3) permits developing countries to determine the extent to which they would guarantee the economic rights recognized in the Covenant to non-nationals.

4.6.4 Integration in the concluding observations of the Committee on Economic, Social and Cultural Rights: an underdeveloped concept

The importance of the acquisition of social, economic and cultural rights in terms of the integration process was highlighted above. However, despite the fact that the CESCR regularly comments in its concluding observations on the social, cultural and economic rights of migrants and asylum seekers, there has been even less development of the concept of integration by the CESCR than the CCPR.

4.6.4.1 Non-discrimination and the impact of legal and administrative rules

In its concluding observations, the CESCR consistently refers to discrimination suffered by immigrants and members of ethnic minorities in the fields of housing,[155] employment,[156] health care[157] and education.[158] Discrimination against migrants in the area of access to and conditions of employment in particular, appears as a key concern of the Committee across

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[154] See (against the enforcement of socio-economic rights through the courts) Adrian Hardiman, "The Role of the Supreme Court in our Democracy", in Joe Mulholland (ed), *Political Choice and Democratic Freedom in Ireland* (2004); and for the opposing view, see Gerry Whyte, "The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman" (2008) 28 DULJ 1.

[155] See, for example, Cyprus, UN Doc E/C.12/CYP/CO/5 (12 June 2009), para.21.

[156] See note 158 below.

[157] See, for example, the United Kingdom UN Doc E/C.12/GBR/CO/5 (12 June 2009), para. 27 (access to health care for asylum seekers).

[158] See note 160 below.

its concluding observations.[159] Access of migrant children to education of all levels is also a pervasive theme of the concluding observations, with issues including segregated schooling and the provision of intensive language training for immigrant children.[160] These are spheres which were identified as key functional aspects of integration in Chapter 2.[161]

The impact of legal and administrative rules on migrants' enjoyment of social and economic rights has also been expressly recognised by the Committee. Overlapping with the work of the CCPR, the CESCR has emphasised the manner in which immigration measures relating to family reunification may interfere with the right to enjoy family life.[162] The potentially discriminatory impact of restrictions on family reunification was noted in relation to the UK for example, the Committee observing:

> the increase of age from 18 to 21 for foreign partners to join their British partners has a discriminatory effect on some groups, in particular ethnic minorities and women. (arts. 10 and 2).[163]

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[159] Thus, for example, Cyprus is urged to "ensure strict control over the terms of employment and working conditions of migrant workers by strengthening financial and human resources of the labour inspectorate", (UN Doc E/C.12/CYP/CO/5 (12 June 2009), para.14), while in relation to the Republic of Korea, the Committee expresses its concern that migrant workers are subject to exploitation, discrimination and unpaid wages (UN Doc E/C.12/KOR/CO/3 (17 December 2009), para.21). See also the concluding observations in relation to Nigeria, which discusses the expulsion of up to half a million Chadian workers "in inhuman and undignified circumstances (UN Doc E/C.12/1/Add.23 (13 May 1998), para. 11)

[160] On segregated schooling, see United Kingdom of Great Britain and Northern Ireland, UN Doc E/C.12/1/Add.79 (5 June 2002), para. 42 (segregation along religious lines); and Bosnia, UN Doc E/C.12/BIH/CO/1 (24 January 2006), para. 50 (segregation along ethnic lines). On the provision of intensive language training, see Lichtenstein, UN Doc E/C.12/LIE/CO/1 (9 June 2006), para. 36.

[161] See the working definition set out at 2.9.

[162] Denmark, UN Doc E/C.12/1/Add.102 (14 December 2004), para.s 16 and 29; Cyprus, UN Doc E/C.12/CYP/CO/5 (12 June 2009), para. 18.

[163] The United Kingdom, UN Doc E/C.12/GBR/CO/5 (12 June 2009), para. 26.

The Committee has also commented that administrative obstacles to the enjoyment of the social and economic rights of immigrants and asylum seekers should be removed.[164] In the case of social assistance, the Committee advocates universal coverage of the social security system so as to include asylum seekers and newly-arrived immigrants.[165] The Committee expressed concern in the case of Austria that social assistance benefits provided to asylum-seekers are often considerably lower than those received by citizens of the State party - an observation which is applicable across Europe, including to Ireland.[166] As noted above, the Committee has observed that the legal status of certain groups (especially asylum seekers and undocumented workers but also migrant workers and non-citizens more generally), can constitute a barrier to their enjoyment of the rights enshrined in the Covenant. This link between immigration processes and the enjoyment of ICESCR rights was made explicit in the Committee's concluding observations on Italy's state report, in which the Committee drew attention to the fact that it was concerned about:

> the excessive time taken by the authorities to renew residence permits in the State party, which may restrict, inter alia, freedom of movement and access to social services by migrant workers and their families.[167]

Notwithstanding the applicability of these observations to integration-related issues, the observations and recommendations illustrate that the primary focus of the Committee is to ensure that the rights provided therein are secured on the territory of the State Party without

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[164] Cyprus, note 162. Similarly, in relation to the Republic of Korea, the Committee expressed concern at the length of waiting time for asylum-seekers until their asylum applications are processed, UN Doc E/C.12/KOR/CO/3 (17 December 2009), para. 10.

[165] Australia, UN Doc E/C.12/AUS/CO/4 (12 June 2009), para.20.

[166] Austria, UN Doc E/C.12/AUT/CO/3 (25 January 2006), para. 15.

[167] Italy, UN Doc E/C.12/1/Add.103 (14 December 2004), para. 17. Similarly, in relation to Monaco, the Committee recommended that the State party reduce the five-year residence requirement for non-Monegasques to enjoy the right to housing and access to social welfare and medical treatment (Monaco, UN Doc E/C.12/MCO/CO/1 (13 June 2006), para. 18).

discrimination rather than focussing on integration *per se*. Thus, as in the case of the CCPR (and even more so than in the case of the CCPR), the concept of integration only therefore enters the work of the CESCR in a subsidiary role. Moreover, in few instances are the observations of the Committee explicitly linked to the concept of integration and, reflecting the pattern in the concluding observations of the CCPR, explicit references to integration only appear in observations relating to European country reports.

4.6.4.2 The beginnings of an integration paradigm in the work of the CESCR

Despite the limited nature of its interpretation of the concept of integration, the Committee for Economic, Social and Cultural Rights has made some strong statements on the desirability of integration and has developed the beginnings of a concept of integration. Thus, in connection with Cyprus, the Committee observed:

> The Committee is [further] concerned that while third country migrants represent a large percentage of the island's population and legally live in the country, the State party has not yet adopted an effective policy for their integration. (arts. 6 and 7)[168]

Accordingly, the Committee encouraged Cyprus to "adopt and implement an effective integration policy for lawful immigrants", although it failed to outline what such an integration policy would entail.[169] In its concluding observations on Lichtenstein, the Committee called on the State Party to:

> continue and intensify its efforts to promote ethnic and religious tolerance, e.g. by including this subject in school curricula and through training of

[168] Cyprus, UN Doc E/C.12/CYP/CO/5 (12 June 2009), para. 14.

[169] *Ibid.*

teachers and public awareness campaigns, and to adopt a comprehensive strategy for the integration of persons of a different ethnic origin or religion.

In a similar vein, the Committee noted the efforts made by the government of Switzerland to integrate foreign workers and their families",[170] and recommended that "the State party take concrete measures to address the unemployment situation of vulnerable groups among the population, to promote their integration into the labour market".[171] This concept of integration seems to operate on the assumption that integration is a process of social inclusion, including inclusion in the labour market. Slightly more indirectly from the perspective of integration, Portugal is urged to "intensify its efforts to create a culture of tolerance and to eliminate all forms of discrimination, in so far as they affect women, Roma, asylum seekers and immigrants."[172] This approach seems to stem from the perception that it is difficult for immigrant or minority groups to enjoy their Covenant rights if no effort is made to integrate such persons into the host society. Thus integration functions as a pre-requisite to as well as the result of the enjoyment of ICESCR rights. This is also reflected in the comments of the Committee relating to the manner in which legal status, or lack of such legal status, may affect the ability of migrant workers or non-citizens to enjoy economic, social and cultural rights. The Committee has frequently expressed concern that non-citizens[173] or categories of non-citizens such as migrant workers[174] or refugees[175] are denied the full protection of the ICESCR.

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[170] Switzerland, UN Doc E/C.12/1998/SR.39 (26 November 1998), para. 7.

[171] Switzerland, UN Doc E/C.12/CHE/CO/2 (26 November 2010), para. 9.

[172] Portugal, UN Doc E/C.12/1/Add.53 (1 December 2000), para. 18.

[173] Latvia, UN Doc E/C.12/LVA/CO/1 (7 January 2008), para. 37; and Lichtenstein, UN Doc E/C.12/LIE/CO/1, 9 June 2006), para.s 11 and 25;

[174] Poland, UN Doc E/C.12/1/Add.82 (19 December 2002), para. 15. In the Asian context, the situation of migrant workers, refugees and North Koreans in China is criticised (UN Doc E/C.12/1/Add.107 (13 May 2005), para.s 14 and 15.

[175] In the African concluding observations, there are references to the situation of refugees in camps who are denied access to basic economic and social rights (Kenya, UN Doc E/C.12/KEN/CO/1 (19 November 2008), para. 13; and Senegal, UN Doc E/C.12/1/Add.62 (24 September 2001), para. 33 for example).

Another dimension of the Committee's approach to integration is its preference for a multicultural approach. By way of example, the CESCR is "encouraged by the development of programmes to promote multiculturalism and the recognition being placed on the racial and cultural differences" in Australia.[176] It consistently advocates for State parties to intensify their efforts to create a culture of tolerance and respect for cultural diversity and to eliminate all forms of discrimination, including in so far as they affect asylum seekers and immigrants.[177] This reflects the CESCR' s view that "the protection of cultural diversity is an ethical imperative, inseparable from human dignity",[178] especially given that:

> Culture has no fixed borders. The phenomena of migration, integration, assimilation and globalisation have brought cultures, groups and individuals int closer contact than ever before, at a time when each of them is striving to keep their own identity.[179]

Linked to this, and in common with the CCPR, the CESCR has expressed concern over the existence of racist and xenophobic attitudes across Europe in particular, however, it has not expressly linked these comments to the concept of integration.[180]

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[176] Australia, UN Doc E/C.12/1993/9 (3 June 1993), para. 5.

[177] Portugal, UN Doc E/C.12/1/Add.53 (1 December 2000) para. 18; Spain, UN Doc E/C.12/1/Add.99 (7 June 2004) para. 25; Sweden, UN Doc E/C.12/SWE/CO/5 (18 November 2008), para. 16; Macedonia UN Doc E/C.12/MKD/CO/1 (24 November 2006), para. 48.

[178] CESCR General Comment No. 21, note 152, para. 40.

[179] CESCR General Comment No. 21, note 152, para. 41.

[180] Austria, UN Doc E/C.12/AUT/CO/3 (25 January 2006), para.s 9 and 21; Denmark, UN Doc E/C.12/1/Add.102 (14 December 2004), para. 13; Poland, UN Doc E/C.12/1/Add.82 (19 December 2002), para. 13; Spain, UN Doc E/C.12/1/Add.99 (7 June 2004) para.s 8 and 25 .

4.7 The International Convention on the Elimination of All Forms of Racial Discrimination

The ICERD defines racial discrimination in Article 1, paragraph 1, as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

4.7.1 Non-discrimination and non-citizens under the ICERD

Article 5 sets out a non-exhaustive list of human rights to which the broad non-discrimination principle applies, which includes economic, social and cultural as well as civil and political rights. Of particular relevance to the integration process amongst this list are the right to nationality (Article 5(d)(iii)), the right to education and training (Article 5(e)(v)) and the right to equal participation in cultural activities (Article 5(e)(vi)). ICERD is therefore a treaty with considerable potential to protect migrants against the multiple forms of discrimination which they often face and provide the foundation for a human rights-based approach to integration. However, the application of the non-discrimination guarantee to non-citizens has been problematic as, in Article 1(2), ICERD indicates that States may make distinctions between non-citizens and citizens as long as they treat all non-citizens similarly, providing: "this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens."[181] Article 1(2), is further defined in Article 1(3), which states that:

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[181] Thus, "The text is ambiguous about whether non-citizens are included within the scope of the Convention and the extent to which non-citizens are protected under the Convention." Drew Mahalic and

> Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

The CERD Committee has recently clarified the correct implication of these provisions and the position of non-citizens under the ICERD in its General Recommendation No. 30. It states that Article 1(2) "must be construed so as to avoid undermining the basic prohibition of discrimination".[182] It goes on to explain that as regards the rights referred to in Article 5, they are, in principle (subject to some minor exceptions in the case of political rights), to be enjoyed by all persons, whether citizens or not.[183] Under the ICERD, differential treatment based on citizenship or immigration status constitutes discrimination if such differential treatment is not based on objective criteria, justified by reference to a legitimate aim and proportionate to the aim pursued.[184] Significantly, the CERD Committee in General Recommendation No. 30 does not confine itself to these general statements but goes on to make specific recommendations in a wide range of areas, including protection against hate speech and racial violence, access to citizenship and the protection of economic, social and cultural rights. These include recommendations that States pay greater pay greater attention to the issue of multiple discrimination faced by non-citizens,[185] that they ensure that immigration policies do not have the effect of discriminating against persons on the basis of

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Joan Gambee Mahalic, 'The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', (1987) 9 *Hum Rts Q* 74. This article analyses the limitation provisions contained in ICERD, and how were they were being interpreted by the Committee prior to the adoption of General Recommendation 30.

[182] CERD Committee General Recommendation No. 30, "Discrimination Against Non Citizens" (1 October 2004), para. 2.

[183] *Ibid.*, at para. 3.

[184] *Ibid.*, at para. 4.

[185] *Ibid.*, at para. 8.

race, colour, descent or national or ethnic origin,[186] and to remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health.[187] The Convention as interpreted by the Committee therefore, affects both the functional and wider dimensions of integration as set out in Chapter 2.

While ICERD provides for both an inter-state complaints procedure (Article 11) and an individual complaints procedure (Article 14), the CERD Committee works principally by analysing and commenting on reports by States.[188] It takes a broad approach to its mandate and "(i)t will consider an issue if it can find even a minimal racial element."[189] The next section considers the development of the concept of integration by the CERD Committee through its concluding observations. It will be seen that the CERD Committee places a considerable emphasis on the importance of an appropriately constructed integration policy. The CERD Committee has emphasised that, fundamentally, integration policies should not discourage members of minority groups from maintaining their cultural identity. A number of key aspects of promoting integration have also been identified by the Committee, including access to nationality, political participation and protection of social and economic rights.

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[186] *Ibid.*, at para. 5.

[187] *Ibid.*, at para. 29. States are also recommended to avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and ethnic or national origin in elementary and secondary school and with respect to higher education (para. 31).

[188] Article 14 of the Convention sets out a procedure for dealing with communications 'from individuals or groups of individuals ... claiming to be victims of a violation' by a State Party of rights under the Convention. Acceptance of this procedure is optional and many States have not opted to be party to this provision. Consequently, the individual petition procedure has not generated a significant body of case law.

[189] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing, 2006), at 259.

4.7.2 The extensive development of the concept of integration in the concluding observations of the Committee on the Elimination of All Forms of Racial Discrimination

The approach of the CERD Committee to the concept of integration is markedly different to that of the Committees examined above. "Integration" is frequently expressly referred to throughout the concluding observations of the Committee. It is seen by the Committee as a goal in its own right, an objective to be fulfilled in order to comply fully with the terms of ICERD. This fits with the objectives of the Convention to promote racial equality and push States to construct inclusive and politically inclusive societies: ICERD requires an integrationist multicultural drive on the behalf of State parties.[190] This has led to a more significant development of the standalone concept of integration in itself by the CERD Committee than in the case of the other Committees examined above.

4.7.2.1 Integration as an objective of the ICERD

In a number of its concluding observations, the Committee requests that States do more to facilitate the integration of immigrant and minority groups, with varying degrees of concern. For example, concern is expressed at acts of violence and expressions of racial hatred in Bulgaria which is seen as linked to the insufficiency of measures taken to guarantee the integration of Bulgarian citizens regardless of their race, nationality or ethnic origin;[191] while France is called on the strengthen its policy for the integration of immigrants

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[190] Article 2(e) specifically provides that "Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division." Thus in noting that political parties in Ethiopia are generally structured on ethnic lines, the Committee recommended that « the State party encourage the development of integrationist multi-racial organizations, including political parties, in line with the provisions of article 2, paragraph 1 (e) of the Convention » (Ethiopia, para. 13).

[191] Bulgaria, UN Doc CERD/C/304/Add.29 (23 April 1997), para. 9.

and population groups of immigrant origin especially in the field of housing.[192] In other instances, the Committee commends States for their commitment to integration[193] and for increasing their integration efforts.[194] The mere existence of integration policy in a State is not, however, sufficient to satisfy the demands of the ICERD. States are required to move beyond paying lip-service to the idea of integration towards ensuring that effective measures to facilitate the integration of minority groups are put into place.[195] This is illustrated by the remarks of the Committee in respect of Finland:

> The Committee notes the State party's continued commitment to the integration of persons of foreign origin. Nevertheless, it remains concerned that despite such efforts, de facto discrimination against persons of foreign origin, including Somalis, persists in a number of areas. It is particularly concerned about the lower employment rate among persons of immigrant origin, especially women, and the difficulties that persons with an immigrant

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[192] France, UN Doc CERD/C/FRA/CO/16 (18 April 2005), para. 12. See also for example the Netherlands, which is requested to pursue the effective implementation of measures to facilitate the integration of minority groups in Dutch schools (UN Doc CERD/C/64/CO/7 (10 May 2004) para. 10); and Zambia, in relation to which the Committee is concerned that the local integration of Angolan refugees is not encouraged by the relevant refugee legislation (UN Doc CERD/C/ZMB/CO/16 (27 March 2007), para. 14). In relation to Argentina, the Committee 'took note' that "no information has been provided on the existence of policies and programmes to facilitate the socio-economic integration of refugees and asylum-seekers in the State party." (UN Doc CERD/C/304/Add.112 (27 April 2001), para. 13).

[193] Sweden, UN Doc CERD/C/SWE/CO/18 (21 August 2008), para. 17.

[194] See Ukraine, UN Doc CERD/C/UKR/CO/18 (19 October 2006), para. 3; Estonia, UN Doc CERD/C/EST/CO/7 (19 October 2006), para. 4. Argentina is recommended to "continue its efforts to acknowledge and integrate the persons of African descent in the State party, along with migrants of African descent, and to achieve the full development and enjoyment of their human rights." Argentina, CERD/C/ARG/CO/19-20 (29 March 2010), para. 24.

[195] See Spain, UN Doc CERD/C/64/CO/6 (28 April 2004), para. 10; The Netherlands as discussed above; France as discussed above; Sweden, as discussed above where the State's commitment to integration is noted but the State party is recommended to intensify its efforts to combat discrimination against persons of foreign origin (para. 17).

> background and aliens continue to face when trying to access service places, such as bars and restaurants. While noting with appreciation the publication of instructions for ensuring equal treatment in client services, the Committee remains concerned at the obstacles faced by immigrants to subscribe to contractual services such as insurance policies and mobile phone services. (arts. 5 (e) and (f)).[196]

The CERD Committee concluding observations also shed some light on what the concept of integration entails within the remit of the ICERD. The Committee is at pains to emphasise that integration does not imply or allow for forced assimilation.[197] Furthermore, integration policies should not discourage members of minority groups (whether national minority or immigrant groups) from expressing their culture, using their mother tongue or preserving and developing their identity.[198] In the case of Denmark, for example, the Committee made it clear that even national measures intended to prevent marginalisation and ghettoisation should not have as a side-effect an "assimilationist effect that leads to the loss of cultural identities by those affected."[199] Overall, the CERD Committee favours a multicultural approach to dealing with diversity.[200] In its concluding observations on Namibia's report, the Committee is quite clear in what this means for State Parties from an integration perspective:

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[196] Finland, UN Doc CERD/C/FIN/CO/19 (13 March 2009), para. 19.

[197] See for example the observations of the Committee in relation to Turkmenistan, UN Doc CERD/C/TKM/CO/5 (27 March 2007), para. 12; Germany, UN Doc CERD/C/DEU/CO/18 (21 August 2008), para. 20; and Japan, UN Doc CERD/C/304/Add.114 (27 April 2001), para. 15.

[198] Denmark, UN Doc CERD/C/DEN/CO/17, 19 October 2006, para. 22;

[199] Denmark, UN Doc CERD/C/DNK/CO/18-19 (20 September 2010).

[200] In relation to Australia, for example, the Committee "encourages the State party to develop and implement an updated comprehensive multicultural policy that reflects its increasingly ethnically and culturally diverse society. The Committee requests the State party to include in its next periodic report information on its approach to multiculturalism and diversity in national policy." Australia, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010).

> Recalling that the principle of non-discrimination requires that the cultural characteristics of all ethnic groups be taken into consideration, the Committee urges the State party to ensure that its integration policies and programmes respect and protect the cultural identities of persons belonging to national or ethnic minorities within its territory. The Committee further encourages the State party to ensure the participation of these groups in the design and implementation of integration policies and programmes, at both national and local levels.[201]

The complexity of integrating the immigrant population is also recognised by the Committee, without implying more leeway for states in respect of their integration obligations.[202] In relation to Portugal, the Committee expressed its distaste for the phenomenon of 'two-speed integration' whereby European immigrants are apparently more easily integrated than those from Africa, for example.[203] Discrimination is perceived by the Committee as inimical to integration.[204]

Finally, the Committee has emphasised the two-way nature of the integration process, and the importance of maintaining an "appropriate balance between the responsibilities of

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[201] Namibia, UN Doc CERD/C/NAM/CO/12 (19 August 2008), para. 24. Similarly, in relation to the Amazigh people of Tunisia, while noting the government of Tunisia's position that the Amazigh population is fully integrated into Tunisia, the CERD Committee stated that the State Party should ensure that the right to their own culture and the use of their mother tongue and the preservation and development of their identity is guaranteed (UN Doc CERD/C/TUN/CO/19 (23 March 2009), para. 11).

[202] Norway, UN Doc CERD/C/NOR/CO/18 (19 October 2006), para. 20.

[203] Portugal, UN Doc CERD/C/65/CO/6 (10 December 2004), para. 11.

[204] In relation to France, the Committee states: "The Committee notes with regret that, notwithstanding recent policies to combat racial discrimination in housing and employment, persons of immigrant origin or from ethnic groups, within the meaning of the Convention, continue to be the target of stereotyping and discrimination of all kinds, which impede their integration and advancement at all levels of French society." France, UN Doc CERD/C/FRA/CO/17-19 (23 September 2010), para. 13.

the State under the Convention and the responsibilities of immigrant communities".[205] The Committee stated quite clearly in respect of the Netherlands that it was concerned that "the current policy on integration has effectively shifted the primary responsibility for integration from the State to immigrant communities".[206] Thus, national integration measures, such as integration tests enshrined in legislation, which place the onus of integration on the immigrant, are not consistent with the approach to integration endorsed by the CERD Committee. In particular, the Committee has criticised the civic integration tests which apply to family reunification in the Netherlands on the basis that the test is only required for individuals seeking to enter the Netherlands from certain "non-Western" countries:

> The Committee notes that, under the Civic Integration (Preparation Abroad) Act, migrants from certain countries requiring a temporary residence permit to enter the Netherlands for family formation or unification must pass the civic integration examination before entering the country. As this requirement applies only to migrants from certain countries, the Committee is concerned that the application of the Act results in discrimination on the basis of nationality, particularly between so-called "Western" and "non-Western" state nationals.[207]

4.7.2.2 Elements of effective integration

In addition to outlining these basic contours of the concept of integration, the Committee has identified some key elements of effective integration. Integration programmes, including language courses, appear to be endorsed by the CERD Committee as a means to facilitate integration.[208] Naturalisation is also seen as facilitating integration. This is

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[205] The Netherlands, UN Doc CERD/C/NLD/CO/17-18 (25 March 2010), para. 4.

[206] *Ibid.*

[207] The Netherlands, UN Doc CERD/C/NLD/CO/17-18 (25 March 2010), para. 5.

[208] In its concluding observations on the Republic of Korea's state report, CERD recommended the provision of adequate information on the country and its traditions and the organisation of language courses in

explicitly recognised in relation to the considerable number of long-term residents in Germany who are eligible for but who have not obtained citizenship. The Committee recommends that Germany:

> facilitate acquisition of German citizenship by long-term residents and persons born in Germany in order to promote the integration of such residents as may wish to acquire German citizenship without relinquishing their own.[209]

This illustrates a nuanced approach to the interaction of integration and citizenship which requires that immigrants be allowed to retain their original citizenship without this casting doubt on their commitment to integrating into the host country. In addition, while the acquisition of language is also seen as an important aspect of integration, the Committee does not approve of the lack of proficiency in the state language being used as a barrier to naturalisation.[210] This indicates that the Committee will not allow individual aspects of integration to be interpreted in a way which undermines the overall inclusionary aims of integration. This is also clear in the Committee's concerns (in the context of Switzerland) that the lack of definition of integration criteria in the naturalisation process could lead

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order to facilitate the integration of foreign-born female spouses in Korean society. Republic of Korea, UN Doc CERD/C/KOR/CO/14 (17 August 2009), para. 17.

[209] Germany, UN Doc CERD/C/DEU/CO/18 (21 August 2008) para. 20. Also on citizenship, see the Concluding Observations relating to Tanzania, in which the Committee remarks: "The Committee recommends that the State party include detailed information in its next periodic report on non-citizens and their situation, especially on immigrants and asylum-seekers, as well as on long-term foreign residents and the possibility of their acquiring citizenship, according to general recommendation XXX (2004)." Tanzania, UN Doc CERD/C/TZA/CO/16 (27 March 2007), para. 15.

[210] See Norway, UN Doc CERD/C/NOR/CO/18 (19 October 2006), para. 19, where the Committee states: "While noting the importance of adequate command of the State language as a vehicle of social integration, the Committee is concerned about the strictness of the language requirements for acquiring Norwegian citizenship in the new Nationality Act (art. 5 (d) (iii))."

municipal assemblies to adopt inconsistent standards and decisions, and effectively use integration as a way to make access to citizenship more limited.[211]

Political and civic integration has also featured as a concern of the Committee. In its concluding observations on Latvia, for example, the Committee stated that, while recognising that political rights may be limited to citizens:

> most non-citizens have been residing in Latvia for many years, if not for their whole lives, the Committee strongly recommends that the State party consider facilitating the integration process by making it possible for all non-citizens who are long-time permanent residents to participate in local elections.[212]

This represents a holistic view of the concept of integration, with the Committee reaching outside the confines of international law to recommend voting rights for non-citizens as part of the integration process.[213] Finally, the Committee has also expressly linked the protection of social and economic rights with integration. Poland, for example, is exhorted to:

> Enhance its efforts towards the full integration of the Roma into Polish society and combat discrimination against the Roma by improving the enjoyment of economic, social and cultural rights, particularly in education, employment and housing.[214]

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[211] Switzerland, UN Doc CERD/C/CHE/CO/6 (21 August 2008) para. 18.

[212] Latvia, UN Doc CERD/C/63/CO/7 (10 December 2003) para. 12.

[213] However, Latvia should perhaps be considered a somewhat atypical case in that, in common with Lithuania, Estonia and other former USSR States, it hosts a significant minority of Russian citizens who have spent all or nearly all of their lives in Latvia.

[214] Poland, UN Doc CERD/C/POL/CO/19 (14 September 2009), para. 4.

This approach accords with that of the CCPR and the CESCR in placing the emphasis on the creation of equal opportunities and equal outcomes for migrants as a pre-requisite to fully realising their rights under international human rights law.

4.7.2.3 Integration as a global issue

It should also be noted that, in contrast to the position under the ICCPR and the ICESCR, the concept of integration is referred to by the CERD Committee across the continents and is not seen as solely applicable in the European/North American/Australian context, albeit that references to integration are more extensive and more common in that context. Integration is perceived by the CERD Committee as a global issue. Thus, both Congo and Chad are exhorted to pursue the steps necessary to ensure the integration of refugees on their territory.[215] Similarly, concern is expressed that Argentina had not provided information on the existence of policies and programmes to facilitate the socio-economic integration of refugees and asylum seekers.[216] This is evidence of a more wide-reaching and proactive approach to the requirements of integration by the CERD Committee than by the other Committees examined. It would also suggest that countries may not use financial circumstances to avoid the issue of integrating refugees and immigrants in the context of their obligations under ICERD.

4.8 A Nascent Integration Paradigm in the work of the UN Committees?

The UN Committees have to date addressed the issue of integration in a haphazard and piecemeal fashion. In the context of the ICCPR and the ICESCR it cannot be said that there has been a comprehensive normative development of the concept of integration by the monitoring committees and express references to integration are quite rare. This is

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[215] Congo, UN Doc CERD/C/COG/CO/9 (23 March 2009), para. 18(d), Chad, UN Doc CERD/C/TCD/CO/15 (21 Sep 2009), para. 18(c).

[216] Argentina, UN Doc CERD/C/65/CO/1 (2004), para. 13 (n).

particularly true in the case of the CESCR. However, as illustrated above, the concluding observations of the Committees are nonetheless informative from the point of view of integration. The above analysis has attempted to highlight the most pertinent aspects of the work of both the CCPR and the CESCR from an integration perspective. The CCPR in particular frequently comments on integration-related issues, even if it does not always expressly refer to integration. These include family reunification, freedom of religion and discrimination, xenophobia and racism. It has been suggested that the framing of integration by the CCPR mainly in terms of equality under Article 26 rather than in terms of the minority protection provided in Article 27 signals a broad-based conception of integration as the progressive realisation of equality between existing and immigrant populations rather than a narrow culture-based conception of integration.

In contrast to the CCPR and the CESCR, the observations of the CERD Committee reveal a relatively well-defined concept of integration. The basic approach of the CERD Committee is that States are required to ensure that effective measures to facilitate the integration of minority groups (including immigrants) are put into place. These measures may not constitute forced assimilation and must respect the cultural identity of migrants. A two-way conception of integration is favoured whereby a balance is maintained, between the responsibilities of the receiving state and its existing communities on the one hand, and those of the migrant in the integration process on the other. The CERD Committee has also made more specific recommendations in relation to the role of political participation, access to nationality and the protection of social and economic rights in the integration process. Finally, the concept of integration is developed across the concluding observations of the CERD Commmittee, including those on the state reports of less wealthy states.

The common thread in the work of the three bodies discussed in this section is the emphasis on the protection of the human rights of migrants and the creation of equal opportunities through rights protection. This progressive realisation of equality is seen as

both a pre-requisite to and an objective of integration.[217] The dominant theme of the observations of the three bodies regarding integration and integration-related issues is the desire to eradicate discrimination against migrants in order that they can enjoy the full protection of the rights guarantees in the treaties. The overarching paradigm is thus a rights-based approach to integration, founded on the principles of equality and non-discrimination. Integration as the adoption of the presumed identity and values of the existing population in the host state has no place in the work of the UN Committees. This overarching paradigm and its function in countering restrictive national discourses on integration was made explicit by the first Special Rapporteur for the human rights of migrants who advocated:

> the development of multicultural patterns of social integration for immigrant minorities, patterns that mitigate exclusion and can stand as alternatives to those forms of integration that attempt to impose certain behavioural norms and promote an increasingly dubious social homogeneity.[218]

4.9 The Concept of Integration in the Jurisprudence of the European Court of Human Rights

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[217] This view is echoed by Anuscheh Farahat, who argues that the principle of "progressive inclusion" (whereby migrants are to be included in the host society by approximating their rights progressively to the rights of the citizens of that country, which aim shall be reached by progressively equipping migrants with ever more rights with regard to their host state depending on the duration of their stay or their social and economic ties to the host society) is grounded in international human rights law (Anuscheh Farahat, "'We want you! But . . .' Recruiting Migrants and Encouraging Transnational Migration Through Progressive Inclusion" (2009) *ELJ* 700. She refers to the work of the CERD Committee, the UN Convention on the Rights of Persons with Disabilities (Disabilities Convention) December 2006 and the ECHR expulsion case law to support this argument (at 704).

[218] Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2004/53, E/CN.4/2005/85, 27 December 2004.

Unlike any of the UN treaties discussed above, the ECHR forms part of Irish domestic law through the European Convention on Human Rights Act 2003. It also forms part of EU law, through the general principles of EU law (as do the treaties discussed above).[219] Article 6(2) TEU also provides both a legal basis and an obligation for the EU to accede to the ECHR, stating that: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms". The ECHR expressly applies to all persons on the territory of State Parties and the rights contained therein therefore extend to immigrants.[220] Articles 3 (freedom from torture and inhuman or degrading treatment or punishment) and 8 (right to family and private life) have had most impact in the field of immigration. The freedom of religion guarantee contained in Article 9 and its interaction with integration will be explored in detail in Chapter 8.[221]

This section will focus on the concept of integration under construction by the European Court of Human Rights in the context of its Article 8. The European Court of Human Rights has been grappling with integration issues in a different context to national and European policy-makers and legislators: that of the negative obligation of States under Article 8 not to expel long-term residents in certain circumstances; and the positive obligation of states- again under Article 8 - to authorise family reunification in certain circumstances. Academic attention has been focused to date on the inconsistencies and deficiencies of this jurisprudence from the perspective of immigration law generally.[222] The aim of this section, in contrast, is to illustrate the importance of this well-known body of judgments to gaining an insight into the elusive concept of integration. It assesses the concept of integration employed by the European Court of Human Rights, analysing the jurisprudence in terms of two core issues: first, the conception of integration employed in

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[219] See further, 5.6.

[220] Article 1 states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

[221] See in particular, 8.6.1 and 8.8.1.

[222] See, for example, Nicola Rogers, "Immigration and the European Convention on Human Rights: Are New Principles Emerging?" (2003) *EHRLR* 53; and Charlotte Steinorth, "*Uner v The Netherlands*: Explusion of Long-Term Immigrants and the Right to Respect for Private and Family Life" (2008) 8 (1) *HRL Rev* 185.

the jurisprudence of the European Court of Human Rights; and second, the implications of the development of the concept in terms of impacting on the right to remain in a State Party and family reunification.

The jurisprudence has established that integration does not give rise to a discrete legal category: immigrants who have spent most or all of their lives in a country remain in the same broad legal category as all immigrants. Nevertheless, the Strasbourg Court now explicitly takes into account the fact of integration in determining whether an expulsion decision violates Article 8 and in this sense integration leads to an increased level of protection from expulsion. Having established these starting points, the section goes on to outline the contours of the Court's conception of integration, which emerge quite clearly from the case law. It is argued that the Court's integration paradigm appears to place the onus of integration on the migrant rather than focussing on States' responsibilities to ensuring the integration of immigrant communities. However, the aspects of integration which are emphasised, and to some extent the form of the concept itself, depend on the facts of the individual case. In addition, and even more importantly, the weight given to integration considerations in the balancing exercise undergone by the Court in each case each case is variable. This is because integration in itself is not the primary focus of the Court's reasoning. The implications of the Court's reasoning from the integration perspective remain for the moment incidental to the broader issues in these cases. This means that the impact of the Court's development of the concept of integration on the key practical issues of the right to remain in a State Party and family unity remains limited.

Finally, it is argued - by reference to the family reunification cases in particular - that these cases are underscored by the wide margin of appreciation afforded to states. In the context of the admissions category, it is suggested that the difficulties of the Court in delineating the extent of the positive obligations of States under Article 8 is illustrative of the fundamental difficulties attached to using international law in the integration sphere. It thus remains questionable whether the ECHR as interpreted by the ECtHR will have a meaningful impact on the integration policies of European states.

4.9.1 Interactions between Article 8 ECHR and Integration

While immigrants' human rights are protected by various articles of the ECHR, with the Convention applying to all persons on the territory of a State Party,[223] the Article 8 expulsion and admission cases involve a direct clash of immigrants' desire to reside in a State Party and State Parties' right to control immigration and residence. These two interlinked strands of case law are directly linked to integration in different ways. The expulsion cases have largely concerned 'integrated aliens'[224] and/or second-generation immigrants: migrants who have lived for a long period of time in the host country (in some cases their whole lives), whom the State is seeking to expel from its territory on public order grounds following a criminal conviction. The second category of cases relates to the *positive* obligations inherent in Article 8 and concerns the situation where an applicant in a Contracting State maintains that the refusal of that State to allow the entry of a member of his family fails to respect his family life. While integration is not expressly discussed in these cases in the same fashion, family reunification is a central integration theme and these cases are thus crucial in examining integration more broadly.

4.10 The Article 8 ECHR Expulsion Cases: Developing the Concept of Integration

It is well-established that a decision to expel a non-national from a Contracting State may raise an issue under Article 8 if it would disrupt family or private life in that State. As noted above, many of these cases which have come before the Court have concerned 'integrated' or second-generation immigrants who have lived for long periods of time in the host state. Integration has thus featured as an important part of the reasoning of the Court in the Article

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[223] Article 1 provides that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention," thus making no general distinction between citizens and non-citizens.

[224] A phrase used by Judge Morenilla in his partial dissent to *Nasri v France* (1996) EHRR 458 (para. 4); see also dissenting opinion of Judge Martens in *Boughanemi v France* (1996) 22 EHRR 228 (para. 1).

8 expulsion cases. The Strasbourg Court has placed a strong emphasis on integration, in particular the social aspects of integration, in deciding whether the expulsion fails to respect the individual's private and family life. It will be shown that the Court's jurisprudence has gradually evolved to the point of assessing complex questions of the applicant's social and cultural ties and economic links to the Contracting State, in addition to the more straightforward issue of family ties.

The Court assesses these applications on a case-by-case basis rather than treating long-term immigrants as a special category whose expulsion would require exceptional circumstances.[225] This case-by-case approach led to particularly haphazard results in the early cases, which was described as "a source of embarrassment for the Court" and a "lottery".[226] No clear thread of logic underlining the importance either the seriousness of the offence or the applicant's degree of integration or the looseness of the family ties is apparent in these cases, with the Court emphasising different factors in each case.[227] Since the 2001 judgment in *Boultif v Switzerland*[228] however, the Court has followed a more structured approach, applying a defined set of criteria to each case.[229] At least three of these criteria are indirectly linked to the degree of integration of the individual in the host state: the duration of the individual's stay, his or her family situation and difficulties that would be faced by the spouse in the country of origin. This last criterion incidentally introduces a further integration dimension into the discussion (along with that of the degree of integration of the person whom it is proposed to expel) as it essentially seeks to ascertain how difficult

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[225] On this point, see the judgments of Judge Martens and Judge Morenilla in *Nasri*. It was definitively confirmed that the Court would not follow this approach in *Uner v The Netherlands* (2007) 45 EHRR 14.

[226] Comments of Judge Martens in *Boughanemi v France* (1996) 22 EHRR 228 (para. 4).

[227] Charlotte Steinorth, "*Uner v The Netherlands*: Explusion of Long-Term Immigrants and the Right to Respect for Private and Family Life" (2008) 8 (1) *HRL Rev* 185, at 186.

[228] *Boultif v Switzerland* (2001) 33 EHRR 50.

[229]These criteria include: the nature and seriousness of the offence committed; the duration of the individual's stay in the country from which he will be expelled; the time elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation; and the seriousness of the difficulties the spouse would be likely to encounter in the country of origin.

it would be for the spouse to integrate into the country of origin. Regarding the duration of stay criterion, the Grand Chamber in *Uner v The Netherlands*[230] explained its rationale as the assumption that the longer the individual stays, the closer the ties between the individual and the host state must be.[231] In addition, the Grand Chamber in *Uner v The Netherlands* added two further criteria to the list of matters to be considered in these cases:

- The best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is likely to be expelled; and
- The solidity of social, cultural and family ties with the host country and the country of destination.[232]

In light of the above, the Court accepted as 'self-evident' that special regard should be had to the situation to the position of immigrants who had spent all or most of their life in the host country, had been raised there and received their education there.[233] The question is therefore how this 'special regard' is to be exercised, and to what extent it will impact on the outcome of cases. The principles laid down in *Uner* were applied by the Grand Chamber in *Maslov v Austria*,[234] which concerned an exclusion order based on offences committed by the applicant (a twenty year old man who had lived in Austria since the age of six) while he was a juvenile. The Court stated:

> In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so

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[230] (2007) 45 EHRR 14.

[231] *Ibid.*, at para. 58.

[232] *Ibid.*

[233] *Ibid.*

[234] Application no. 1638/03, Judgment of the Grand Chamber of 23 June 2008.

where the person committed the offences underlying the expulsion measure as a juvenile.[235]

In *Uner* then, the ECtHR placed increased emphasis on the fact of integration by including it as one of the express criteria to be applied by the courts.[236] This was of course really nothing new as integration had implicitly been considered since the early cases – which looked at the links of the immigrant and their families to the host country including - *inter alia* - whether they were educated in the country, and the links to the country of origin including knowledge of the language and the presence of family in that country. Since *Boultif*, in particular, the Court had looked at the social ties which the person had established in the host country.[237] However, the express recognition in *Uner* of a requirement to consider a person's social and cultural ties opens the door to a balancing exercise of a complexity which had not existed before this. The significance of this development is two-fold: it constitutes an acknowledgement that courts can become involved in assessing integration issues and the extent of a person's integration; and also indicates the basic implications of integration in terms of the ECHR– integration has the potential to impact on

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[235] *Ibid.*, at para.75. For a commentary, see ECHR case comment, (2008) 6 EHRLR 781.

[236] This built in particular on the Court's judgment in *Benhebba v France* (Application No. 53441/99) Judgment of 10 July 2003, which considered the *Boultif* criteria and added that as well as these factors, the person's links with the host country where they had spent most of their life should be considered. Here, however, the ten-year exclusion from the country was found to be proportionate, with his links to the country outweighed in the balancing exercise by the severity of the offence.

[237] See *Benhebba v France*; *Radovanovic v Austria* (2005) 41 EHRR 6; *Keles v Germany* (2007) 44 EHRR 12. This analysis of social ties in relation to second-generation immigrants and immigrants who come to the host country at a very young age is explained in *Benhebba v France* as follows: "Added to these (Boultif) criteria, the links which these immigrants have formed with the host country in which they have spent most of their lives. They received their education there, formed most of their social ties, and so developed most of their *identité propre* (own identity). Born or having arrived in the host country as a result of their parent's emigration, most of their family ties are there. Some of these immigrants have not maintained any link with their country of origin except for the fact of nationality." (para. 33).

the legal security of residence of certain immigrants in certain circumstances. Thym makes this point well:

> The resulting proportionality test will be much more complex than in cases concerning the 'simple' protection of family life and cover criteria whose interaction is not always straightforward in a plurilateral balancing exercise. Decisive factors will include the integration into the labour market, dependence on social assistance, language skills as an indicator of social integration, criminal behaviour, and links with the country of origin or their absence and the duration of the stay in the host country. Here, the eight Boultif criteria may only be a starting point for a complex jurisprudence which the Court has only started to develop.[238]

It will now be considered how integration is conceived by the Court and how the integrated status of some immigrants has affected the Court's analysis of their case in practice.

4.10.1 The scope and content of the integration criterion

It is clear that integration is one of the criteria to be considered by the Court, but the question of the scope and content of the conception of integration remains. Indications as to the content of the Court's conception of integration are provided throughout the jurisprudence. *Slivenko v Latvia*[239]- a case involving different considerations to the others under discussion here as none of the applicants had been convicted of any criminal offence -

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[238] Daniel Thym, "Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?" (2008) 57 *ICLQ* 87, at 92.

[239] *Slivenko v Latvia* (2004) 39 EHRR 24.

contains an interesting discussion of the applicant's integration in Latvia.[240] The applicants were a family who had resided in Latvia almost all their lives but had become stateless when Latvia regained its independence in 1991, and were required to leave the country under a deportation order issued in respect of them as members of the family of a retired Russian military officer. The Court rejected the claim of the Latvian Government that the applicants had not been sufficiently integrated into Latvian society.[241] The Court first observed that the applicants had spent virtually all their lives in Latvia. It accepted that the applicants were not of Latvian origin, and that they arrived and lived in Latvia – then part of the USSR – in connection with the service of members of their family in the Soviet armed forces, however, these factors were outweighed by the genuine and strong personal, social and economic links in Latvia.[242]

In conclusion, the Court found that "at all times they were sufficiently integrated into Latvian society",[243] and that in the circumstances, Article 8 was breached. This view of integration suggests that integration has occurred where the immigrant or settler forges personal, social and economic ties with the host society by living among the community, being educated and working in this community. In other words, simply being in the country on a long-term basis and living and working among its citizens was seen as the main

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[240] Daniel Thym presents an interesting analysis of *Slivenko v Latvia*, arguing that the Court re-conceptualizes family and private life; "the Court restricts its formerly wide understanding with a new focus on the 'nuclear family' of spouses and minor children, while at the same time broadening the protective reach of Article 8 ECHR to the network of personal, social and economic relations that make up the private life of every human being." Daniel Thym, note 239, at 88.

[241] *Slivenko v Latvia*, para. 88.

[242] In the words of the Court: "the applicants also developed personal, social and economic ties in Latvia unrelated to their status as relatives of Soviet (and later Russian) military officers. This is shown by the fact that the applicants did not live in army barracks or any other restricted area, but in a block of flats in which there were also civilians. Nor did they study or work in a military institution. The first applicant was able to find employment in Latvian companies after Latvia regained its independence in 1991." (*Slivenko v Latvia*, para. 123).

[243] *Slivenko v Latvia*, para. 123.

indicator of integration. The Court did not require the applicants to reject or renounce their country or language of origin in order to evidence their integration.

This approach has not been echoed in the cases involving convicted criminal offenders, as will be seen below. It should also be noted that *Slivenko* was also somewhat unusual in that the Court has rarely discussed 'integration' as such, but has used the vocabulary of 'ties to the host country' and 'ties to the country of origin'. Overall, the Court has viewed a number of key factors as relevant in their consideration of integration. These are: the acquisition of nationality, links to the country of nationality, language, and labour market integration.

4.10.1.1 Attempts to acquire nationality

One of the questions which the Court asks is as to the reasons why the individual did not have nationality of the host country - most importantly, the issue of whether they were entitled to nationality of the host country and if so, whether they made efforts to obtain such nationality. In *Boughanemi v France*,[244] Court stated that the applicant "kept his Tunisian nationality and, so it would seem, never manifested a wish to become French. It is probable, as the Government pointed out, that he retained links with Tunisia that went beyond the mere fact of his nationality. Before the Commission he did not claim that he could not speak Arabic, or that he had cut all his ties with his country of birth, or that he had not returned there after his deportation."[245] In *Kaya*, the Court did not accept the applicant's claim that even had he applied for German nationality, he would have been unsuccessful.[246]

This approach places great symbolic importance on the acquisition of nationality as an indicator of integration. However, it can effectively result in the penalisation of those who

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[244] (1996) 22 EHRR 228.

[245] See also *C v Belgium*, Application No. 21794/93, 7 August 1996, and *Baghli v France* (2001) 33 EHRR 32.

[246] *Kaya v Germany* (1998) 28 EHRR 1, para. 64.

do not choose to become naturalised citizens for whatever reason, and it fails to recognise the reality (admittedly changing but which still persists) of migrants in countries such as France and Germany maintaining their original nationality even through to the second generation of migrants, a tradition stemming from the initial belief that such workers were temporary 'guestworkers'.[247]

4.10.1.2 Links to the country of nationality

The Court assesses the strength of the applicant's links to the country of nationality asking questions such as: have they got family in the country of origin? Did they often return there, or holiday there? The rationale for this is that the interference with private and family life is not so drastic where the person has real links with the country of origin.[248] This ties in with the consideration of the duration of the individual's stay in the host country, however - as can be seen from the cases - the fact that the applicant has lived virtually all his or her life in the host state does not always mean that the links to the country of origin have been severed in the view of the Court. The jurisprudence shows that relatively tenuous links have been seen to establish significant ties to the country of origin.

If one takes *Baghli v France* by way of example, this becomes clear. The applicant entered France in 1967 at the age of two and, with the exception of the period he spent doing his military service in Algeria, lived there until he was excluded in 1994. He had received all his schooling there and worked there for several years. Nevertheless, the fact that he had done military service in Algeria, had been on holidays there and had "never suggested that he cannot speak Arabic", coupled with his lack of desire to become French, led the Court to

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[247] For a discussion of the long-term effects of the early policies in France and Germany, see Pascale Fournier and Gökçe Yurdakul, "Unveiling Distribution: Muslim Women with Headscarves in France and Germany", in Michal Bodemann and Gökçe Yurdakul (eds), *Migration, Citizenship and Ethnos* (Palgrave, 2006).

[248] See *C v Belgium* Application No. 21794/93, 7 August 1996; *Dalia v France* (2001) 33 EHRR 26.

the conclusion that the applicant had preserved ties with his native country.[249] Similarly, in *Uner v The Netherlands*, the Grand Chamber opined that:

> while it is true that the applicant came to the Netherlands at a relatively young age, the Court is not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society.[250]

In short, the Court attempts to determine whether the nationality of that country is merely a legal fact or if it reflects certain emotional and social links,[251] in order to ascertain whether the person has become so "estranged" from the country that they would not be able to settle there if deported there.[252] On the basis of the above cases, it seems that the Court will readily imply these emotional and social links and will rarely conclude that the estrangement is so complete as to render settling in the country of nationality impossible. For the sake of completeness, however, it is necessary to refer to *Mehemi v France*[253] - one of the few cases in which the Court accepted that the applicant had no links with the country of origin other than nationality. This was a somewhat exceptional situation in that the applicant had been born in France and had had French nationality until he was a year old, losing it only because

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[249] *Baghli v France* (2001) 33 EHRR 32, para. 48.

[250] *Uner v. Netherlands* (2007) 45 EHRR 14, para. 63. See also *C v Belgium*, Application no. 21794/93, 7 August 1996.

[251] *Dalia v France* (2001) 33 EHRR 26, para. 53. The Court concluded that as the applicant had lived in Algeria until the age of 17 or 18, for two years without her parents, she had maintained certain family relations, spoken the local language and established social and school relationships. In those circumstances, the Court concluded that her Algerian nationality was not merely a legal fact but reflected certain social and emotional links. See also *Baghli v France* (2001) 33 EHRR 32, para. 48; *Boulchekia v France* (1998) 25 EHRR 686, paras. 46 and 50.

[252] *Keles v Germany* (2007) 44 EHRR 12, para. 62

[253] For the same situation with regard to nationality and links to the country of origin, see also *Beldjoudi v France* (1992) 14 EHRR 801, in which the Court also accepted that the applicant had no links to Algeria apart from that of nationality.

his father failed to complete the correct formalities. He was also married to a French national and had three minor children of French nationality. In the circumstances, the Court was compelled to accept that he had no links with Algeria beyond nationality.[254]

4.10.1.3 Language

A further subsidiary question which is linked to the consideration of the extent of the individual's ties to the host country is the extent of the individual and the affected family members' linguistic ties to the country of nationality. In many cases the Court has employed the applicant's knowledge of the language of their country of nationality as a relevant factor in the balancing process, with linguistic ties featuring in the Court's reasoning to varying effect.[255] In *Kaya v Germany*, the applicant went to great lengths to protest that he knew no Turkish; however the Court placed importance that he had written letters to his mother from prison in Turkish, even though he insisted that he had dictated them to a cell-mate. In *Beldjoudi*, emphasis was placed on the fact that the applicant appeared not to know Arabic (he had been born and educated in France) in concluding that he had no links with Algeria apart from that of nationality.[256] In addition, his wife could not be expected to follow her husband to Algeria, "a State whose language she probably does not know."[257] In the same vein, in *Keles v Germany*, while the Court presumed that the applicant was familiar with the Turkish language, the applicant's children could not be expected to follow him to Turkey,[258] even though they were Turkish nationals and probably spoke some Turkish, as:

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[254] A similar approach was taken in *Maslov*, in which the Grand Chamber noted that the applicant did not speak Bulgarian and could not read or write the Cyrillic alphabet and further, "It has not been shown, nor even alleged, that he had any other close ties with his country of origin" (para. 97).

[255] See for example *Baghli v France*; *Dalia v France*.

[256] Para. 77.

[257] *Beldjoudi v France* (1992) 14 EHRR 801, at para. 78.

[258] The applicant's spouse, however, was Turkish and having arrived in Germany at the age of ten, it was "assumed that she has sufficient links which would allow her to re-integrate into Turkish society" (para. 63).

> Even if the children should have knowledge of the Turkish language, they would necessarily have to face major difficulties with regard to the different language of instruction and the different curriculum in Turkish schools.[259]

In these circumstances, Article 8 was violated by the applicant's expulsion.[260]

4.10.1.4 Labour market integration

Interestingly, in a number of cases the Court has looked at the extent of the applicant's integration into the labour market of the host country, thus bringing economic links into the equation. The Court often takes into account whether a person had worked in the host country as part of the analysis of their ties to the host country.[261] In *Uner*, the Grand Chamber considered whether the applicant who had lived in Germany since age twelve had integrated into the labour market.[262] In *Kaya v Germany*, the Court considered that even though the applicant had been born and spent all his life in Germany, it could not overlook the fact that he was not integrated into the labour market as had never worked, but lived off money extorted from his former partner.[263] Finally, as pointed out above, the fact that the husband/father has been working in Latvian companies post-independence was also considered to be an indicator of integration in *Slivenko v Latvia*.[264] On one level, this is an

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[259] *Keles v Germany* (2007) 44 EHRR 12, para. 66.

[260] For similar reasoning, see *Amrollahi v Denmark* (Application No 56811/00), 11 July 2002, in which it was accepted that the applicant's mother tongue was Farsi however the Court concluded that in spite of this the applicant could not be considered to have maintained strong ties to Iran. In addition, and most significantly, the wife spoke none of the language. See also *Maslov*, where it was accepted that the applicant did not speak Bulgarian as he was a member of he Turkish minority in Belgium.

[261] See for example *C v Belgium*, Application no. 21794/93, 7 August 1996; *Baghli v France* (2001) 33 EHRR 32. However, it was not a significant factor in either of these cases and no violation of Article 8 was found in either case.

[262] *Uner v Netherlands* (2007) 45 EHRR 14, para. 65.

[263] *Ibid.*

[264] *Slivenko v Latvia* (2004) 39 EHRR 24.

interesting endorsement of inclusion in the labour market as an important instrument of integration and recognises to an extent that occupational or economic ties form a part of integration. However, it seems unfair to consider this in the abstract without looking at the background causes of unemployment and marginalisation. In addition, it seems that this consideration carries more weight in its negative sense as further illustration of the lack of contribution which the applicant makes to the host society: there are few examples of where positive engagement in the labour market was seen as a significant factor which rendered the individual more integrated and thus more difficult to remove from the host country.[265]

4.11 An Emerging Integration Paradigm in the Article 8 ECHR Expulsion Cases

The above analysis reveals a specific conception of integration which appears to be a composite of strong links to the host country and an absence of strong links to country of origin. The Court is involved in a double-sided inquiry looking at two fundamental questions:

1. how integrated is the applicant and his family in the host country and to what extent does the expulsion consequently interfere with private and family life in that country; and
2. how difficult would it be for the applicant and his family to re-integrate into the country of nationality?

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[265] In *C v Belgium,* Application no. 21794/93, 7 August 1996 the Court acknowledged that the applicant had established social ties in Belgium, amongst other things by working there for a number of years (para. 32). However, this was outweighed by the seriousness of the offences in question and his persisting links to Morocco (para. 34 and 35). However, see *Boultif v Switzerland* (2001) 33 EHRR 50, where the applicant had worked as a painter and at various other jobs and had the possibility of further employment. This, along with his exemplary conduct in prison, mitigated fears that he constituted a danger to public order and security for the future (para. 51). Similarly, in *Keles v Germany* (2007) 44 EHRR 12 a violation of Article 8 was found, and the fact that he had been employed for a certain period of time in Germany was referred to, although this was not considered by the Court as one of the particular factors which leaned in favour of the applicant.

This approach would seem to require migrants to relinquish the identity of their country of origin in order to secure their place in the host society. This is problematic from a number of perspectives. First, it runs contrary to modern conceptions of integration which stress that immigrants are entitled to maintain their cultural and linguistic identity.[266] In terms of international human rights law, this view of integration would appear incompatible with *–inter alia* - the rights of minorities as guaranteed by Article 27 of the International Covenant of Civil and Political Rights and the interpretation of the concept of integration in the concluding observations of the CERD Committee.[267] On a practical level, it also fails to recognise the increasing reality of dual nationalities and transnational belonging and identities.[268]

Another conclusion which follows on from this is that the ECtHR places the onus of integration squarely on the migrant. The migrant as seen as the sole agent of integration with responsibility for establishing links with the host country. This is clear particularly in

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[266] See Council of Europe, *White Paper on Intercultural Dialogue: Living Together as Equals in Dignity* (Strasbourg, 7 May 2008), at 6; UNHCR's definition of integration as set out in UNHCR Executive Committee, *Conclusion on Local Integration*, note 10, at preamble and (k); and in the EU sphere, Justice and Home Affairs Council Conclusions, *Common Basic Principles on Immigrant Integration*, Council Document 14615/04, Brussels, 19 November 2004.

[267] In relation to Article 27 of the ICCPR and integration, see the concluding observations of the Human Rights Committee in relation to Albania (UN Doc CCPR/CO/82/ALB (2 December 2004), at para. 21); Germany (UN Doc CCPR/CO/80/DEU (4 May 2004), at para. 21); and Greece (UN Doc CCPR/CO/83/GRC (25 April 2005), at para. 18). In relation to CERD, the CERD Committee is at pains to emphasise that integration does not imply or allow for forced assimilation (see the concluding observations of the CERD Committee in relation to Turkmenistan (UN Doc CERD/C/TKM/CO/5 (27 March 2007)), Germany (UN Doc CERD/C/DEU/CO/18 (21 August 2008)) and Japan (UN Doc CERD/C/304/Add.114 (27 April 2001)). Furthermore, integration policies should not discourage members of minority groups from expressing their culture (Concluding observations relating to Denmark (UN Doc CERD/C/DEN/CO/17 (19 October 2006)).

[268] On transnationalism and dual citizenship, see for example Nancy Poner, "Engagement Across National Borders: Then and Now" (2006-2007) 75 *Fordham Law Review* 248; and Linda Bosniak, "Multiple Citizenship and the Postnational Transformation of Citizenship" (2001-2002) 42 *Virginia Journal of International Law* 979, at 981.

relation to the Court's consideration of an individual's integration into the labour market. The State is not seen as having any responsibility for undertaking to integrate the person into the fabric of the host society. This is partly explicable by the fact that the Court focuses on social and personal integration. However, for a different slant on this question, see the comments of Judge Morenilla in his partial dissent in *Nasri v France*:

> A State which, for reasons of convenience, accepts immigrant workers and authorises their residence becomes responsible for the education and social integration of the children of such immigrants as it is of the children of its "citizens". Where such social integration fails, and the result is antisocial or criminal behaviour, the State is also under a duty to make provision for their social rehabilitation instead of sending them back to their country of origin, which has no responsibility for the behaviour in question and where the possibilities of rehabilitation in a foreign social environment are virtually non-existent.[269]

On this view, the Court, through these judgments, allows governments to abdicate their responsibility for education and social integration to a State in which the person concerned has, in most cases, never lived or lived for a very short period of time. However, to follow Judge Morenilla's reasoning would involve the Court in complex issues of social, economic rights and social exclusion, a course which it would be unlikely to favour. In this way, the cases under discussion highlight the limitations of reliance on civil and political rights to deal with what at root may be social and economic problems.[270] The rather one-sided conception of integration being developed by the Court also constitutes a point of divergence from most definitions of integration, which emphasise the "two-way" nature of

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[269] 1996) EHRR 458, para. 3 of partly dissenting opinion of Judge Morenilla.

[270] Ann Sherlock makes this point well in her commentary on the Article 8 cases, suggesting that the applicants in these cases perhaps emphasise purely family life as problems of social exclusion and high unemployment may make somewhat unusual any cases where 'private life' is the dominant feature. See Ann Sherlock, "Deportation of Aliens and Article 8 ECHR" (1998) *ELR* 23, at 29.

the integration process. It was seen above that the conceptions of integration contained in the concluding observations of the CCPR, the CESCR and the CERD Committee emphasise the responsibilities of the host state to ensure access to education, citizenship and the institutions of the host society, as opposed to focussing on the individual migrants' responsibility in the integration process. This divergence in approach stems partly from the different context in which the Court is considering the concept of integration: that of the proposed deportation of individuals rather than the examination of state law and policy undertaken in the concluding observations of the UN treaty monitoring bodies. This narrow approach makes it very difficult for the ECtHR to develop a holistic concept of integration.

4.11.1 The prominence of the dissenting judgments in the Article 8 expulsion cases

The comments of Judge Morenilla quoted above form part of the strong line of dissents which have characterised the Article 8 immigration case law since its inception. One of the distinctive features of this jurisprudence is the high degree of disagreement between the judges of the Strasbourg Court on fundamental aspects of the legal reasoning to be employed in determining these cases. In the early cases, the divisions centred round two fundamental points. The first of these was the uncertainty caused by adopting a case-by-case approach and the unpredictability this was causing. This has been remedied to a certain degree by the development of the *Boultif* criteria as discussed above. The second, more fundamental, area of disagreement concerned the correct approach to the legal status of long-term immigrants in these circumstances, with a number of judges passionately arguing that such individuals should be protected against deportation save in the most extreme circumstances. Over ten years since the first wave of cases, it now appears to be settled that this will *not* be the approach taken by the Court, with the Court's reasoning proceeding on the assumption that long-term immigrants do not form a discrete legal category.[271]

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[271] This being said, the Court sees "little room for justifying an expulsion of a settled migrant on account of mostly non-violent offences committed when a minor" (*Maslov v Austria*, Application no. 1638/03, Judgment of the Grand Chamber of 23 June 2008, para. 81).

More recently, the case law remains characterised by deep disagreement. In the Grand Chamber's judgment in *Uner*, the three dissenting judges (Judges Costa, Zupancic and Turmen) found, in contrast to the majority, that an assessment of the criteria pointed to a violation of Article 8. This is illustrative of the new difficulties posed by the development of a set of criteria without a clear indication of the relative weight of these criteria: a key issue which is discussed further in the next section. More fundamentally, the minority opinion referred back to the old question of the status of long-term residents, arguing that "foreign nationals – in any case those who, like Mr Üner, have been residing legally in a country – should be granted the same fair treatment and a legal status as close as possible to that accorded to nationals".[272] The minority further argues that the majority judgment fails to construe Article 8 in light of other international texts dealing with the rights of long-term immigrants.[273] This continuing debate over such a foundational issue reflects the indeterminacy of international law relating to the legal status and rights of non-citizens.

4.11.2 The relative weight of integration in the balancing exercise

Leaving aside for a moment the precise scope and meaning of the integration criterion, it is unclear how much weight it will actually be given in the balancing exercise undertaken by the Court in each case. The failure to address this lacuna has been seen as one of the major failings of the *Uner* judgment.[274] One of the key factors which may tip the balance in favour

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[272] *Uner v Netherlands* (2007) 45 EHRR 14, minority opinion, para. 5.

[273] According to the minority judges, these texts included the Conclusions of the Presidency of the Tampere European Council on 15 and 16 October 1999; The Council of Europe Committee of Ministers Recommendation Rec (2000)15, Parliamentary Assembly Recommendation 1504 (2001) and Committee of Ministers Recommendation Rec (2002); and the 1989 United Nations Convention on the Rights of the Child. See also *Maslov v Austria*, Application no. 1638/03, Judgment of the Grand Chamber of 23 June 2008, in which the Grand Chamber found that there had been a violation of Article 8. Judge Steiner dissented from the majority's assessment of the proportionality of the measure on the basis that the possibility would be open to the applicant to the applicant after a period of time to request the authorities to reverse their decision.

[274] See Charlotte Steinorth, note 228.

of the State is the severity of the offence in question. In *Boulchekia v France*,[275] the fact that the applicant had been living in France since the age of two, and had received all his education in France was outweighed by the severity of the crime of aggravated rape which he had committed as a minor.[276] The Court has viewed drugs offences as particularly serious, affording governments a considerable margin of discretion in dealing with drug offenders by deportation.[277]

However, the severity of the offence has not consistently trumped the other considerations. If we compare a number of judgments this becomes apparent. In *Mehemi v France*, the applicant received a permanent exclusion order after being convicted of cannabis dealing - a serious crime in the view of the Court. However, he had been born in France and had two French children and an Italian wife. It was found that, despite the severity of the offence, his family life would be disproportionately interfered with by the expulsion. In contrast, in *Baghli v France* the severity of the offence (the 'severity' of which was questionable: the applicant had been sentenced to three years imprisonment, two of which were suspended, for dealing in a small quantity of heroin) was not similarly outweighed by the other circumstances of the case, even though, as in *Mehemi*, the applicant had entered France aged two, and "his main family and social ties are in France."[278] The Court laid emphasis on the fact that in this case the exclusion was for the determinate period

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[275] *Boulchekia v France* (1998) 25 EHRR 686.

[276] See also *Boughanemi v France* (1996) 22 EHRR 228, in which the serious nature of the offences in question (including living on the earnings of prostitution with aggravating circumstances) was taken into account. Conversely, in *Moustaquim v Belgium*, Application no. 12313/86, 18 February 1991 the Court emphasised the minor nature of the offences in question in deciding that the expulsion would breach Article 8 (para. 44). In *Ezzhoudi v France*, the offences were similarly minor, and this played a large part in the reasoning of the Court.

[277] The Court has expressed the view that "In view of the devastating effects drugs have on people's lives, the Court understands why the authorities show great firmness to actively contribute to the spread of this scourge" (*Amrollahi v Denmark,* Application no. 56811/00, 11 July 2002, para. 37); see also for example *Dalia v France* [2001] 33 EHRR 26, para. 92.

[278] *Mehemi v France* (1997) EHRR 6, at para. 48.

of ten years, and thus would constitute less of an interference with the applicant's rights.[279] The real difference between these two cases appears to be the family status of the applicant: the applicant in *Baghli* was unmarried and had no children. Nevertheless, the family status of the applicant will not always be determinative either. For example, in *Uner* the applicant had a Dutch partner and two sons in the Netherlands, with Dutch nationality. However, the Court did not accord as much weight to this as it had in previous cases, adopting a rather dismissive approach to the issue of the proposed splitting up of the applicant's family.[280]

One of the outstanding issues in relation to this case-law is thus the relative weight of the various factors. While integration is an important factor, it has been seen that it is often outweighed by the seriousness of the crime or the situation of the other members of the family. Many of the inconsistencies in the case-law arise from the *ad hoc* approach to the balancing exercise undertaken in each case, to the extent that:

> The present approach of the ECtHR, ... , leaves both prospective applicants and national authorities with little guidance as to whether an expulsion of a long-term immigrant will be deemed a proportionate measure. It would thus be preferable for the ECtHR to take a clear stance as to whether it gives primary significance to the legitimate interests of States in securing public order or to the right of long-term immigrants to remain in their host country.[281]

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[279] Judges Costa and Tulkens issued strong dissents on this point, noting that ten years is long enough for a person's family and social life in the host country to be obliterated.

[280] The Court remarked that: "The Court concurs with the Chamber in its finding that at the time the exclusion order became final, the applicant's children were still very young – six and one and a half years old respectively – and thus of an adaptable age (see paragraph 46 of the Chamber judgment). Given that they have Dutch nationality, they would – if they followed their father to Turkey – be able to return to the Netherlands regularly to visit other family members residing there (para. 64).

[281] Charlotte Steinorth, note 228, at 196.

If the Court were to assign greater weight to the criterion of "the solidity of social, cultural and family ties with the host country and the country of destination", long-term immigrants would almost certainly enjoy greater security of residence in the host country.

4.12 The Article 8 ECHR Admission Cases: Limited Consideration of Integration in the Context of Family Reunification

The typical admission case has concerned the situation where an applicant in a Contracting State maintains that the refusal of that State to allow the entry of a member of his family (most often a child) fails to respect his right to family life. In conceptual terms, the distinguishing feature of these cases is therefore that they concern a positive obligation of the State rather than the negative obligation at play in the expulsion cases. As the Court has reiterated:

> the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision (art. 8) do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.[282]

This passage suggests that the principles to be applied in relation to the negative and positive obligations contained in Article 8 are broadly similar. In the early admission cases in particular, however, the Court took a very restrictive approach towards applicants making

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[282] *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) EHRR 471, para. 67.

this type of claim, affording states a wide margin of appreciation in determining whether a positive obligation existed at all. The Court stated in *Abdulaziz, Cabales and Balkandali*, the first of these cases, that:

> as far as positive obligations are concerned, the notion of 'respect' is not clear-cut: having regard to the diversity of the practice followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case.[283]

The jurisprudence of the Court shows that the State's right to control the entry of non-nationals into its territory will rarely be outweighed by the circumstances of the individual applicants. First, the Court has been clear in its position that Article 8 does not impose on a State "a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory".[284] In assessing the circumstances of the applicants, the Court will consider whether admission is the only way to develop true family life: are there are insurmountable obstacles to setting up family life in the country of origin? This is a high hurdle for applicants to overcome, as illustrated by *Gul v Switzerland*[285] and the subsequent case of *Ahmut v The Netherlands*.[286] In its harsh decision in *Gul*, the Court found that while the circumstances of the family in question were compelling "very difficult from the human point of view",[287] there was no such obligation in this case as there were "strictly speaking, no obstacles preventing them from developing

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[283] *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) EHRR 471, at para. 67.

[284] *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) EHRR 471; *Gul v The Netherlands* (1996) 22 EHRR 93; *Ahmut v The Netherlands* (1996) 24 EHRR 62; *Sen v The Netherlands* Application no. 31465/96, 21 December 2001.

[285] (1996) 22 EHRR 93. It is particularly difficult for applicants to succeed where the separation was caused by a deliberate and voluntary decision on the behalf of the parent or parents, as was the case in *Ahmut*.

[286] (1996) 24 EHRR 62.

[287] Para. 42.

family life in Turkey."[288] A similar approach was taken in *Ahmut v The Netherlands*,[289] in which the father had actually obtained Dutch nationality.[290]

It seems that one circumstance in which the Court will find that insurmountable obstacles exist to settling in the country of origin is where the applicant(s) have started a family in the host country and other children have been born or substantially brought up in that country. Here the Court acknowledges that the State's decision effectively requires the applicants to choose between their children in the host country and those in the country of origin, compelling an impossible choice which does not respect the applicants' right to family life.[291] This formed the basis of the reasoning of the Court in *Sen v The Netherlands*[292] and *Tuquabo-Tekle v The Netherlands*,[293] which seemed to signal a shift towards a less restrictive attitude of the Court towards these cases.[294] However, the limited number of cases which make it past the admissibility stage illustrates how difficult it remains to succeed in these cases.[295]

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[288] Para. 42. In a strong dissenting opinion, Judge Martens criticised what he viewed as the artificial distinction drawn by the majority between positive and negative obligations, and concluded that the interference with family life in this case disproportionate and violated Article 8, particularly as it effectively required the parents to chooses between renouncing their son and renouncing their daughter who was settled in Switzerland. In his view, there had to be a limit to the Court's deference to domestic immigration law and policy (para. 9).

[289] (1996) 24 EHRR 62.

[290] There were four dissenting judges in this case, including Judge Valticos who stopped just short of accusing the Dutch government of racism, given that the father in this case was a Dutch national.

[291] *Sen v The Netherlands*, para. 41.

[292] Application No. 31465/96, 21 December 2001.

[293] Application No. 60665/00, 1 December 2005.

[294] See Nicola Rogers, "Immigration and the European Convention on Human Rights: Are New Principles Emerging?" (2003) *EHRLR* 53, at 64, where the author expresses the opinion that the *Sen* case signalled a "move away from state interests engendered by a greater emphasis on the need to fulfil positive as well as negative obligations under Article 8."

[295] See for example *Benamar v. the Netherlands* (dec.), Application No. 43786/04, 5 April 2005; *I.M. v. the Netherlands* (dec.), Application No. 41266/98, 25 March 2003; and *Chandra and Others v. the Netherlands* (dec.), Application No. 53102/99, 13 May 2003.

Integration is not as significant an issue in the admission cases as in the expulsion cases considered above. This is understandable, as the child has not, for the most part, entered the receiving country yet and so no question of his or her integration could arise. The Court considers the extent of the child's "cultural and linguistic links" to the country of *origin* in determining the viability of developing family life in that country.[296] It also considers the child's degree of dependence on the parents,[297] and in this context, the age of the children may be an important factor.[298] Interestingly however (and as touched upon in the previous paragraph), in cases of split families where there are children which have been brought up in the host country, the Court may also consider their degree of integration in the host country in order to ascertain the impact on them of moving to the country of origin to join the other family members. In *Sen v the Netherlands*, the Court considered that the two children who had been born and grown up in the Netherlands and were receiving their schooling there had few or no links to the country of origin aside from the legal fact of nationality, and in these circumstances the most appropriate way to develop true family life was to allow the entry of the son who was in Turkey.[299] In this limited sense, there is a certain degree of overlap here with the expulsion cases considered above.

It seems that it is only in a very narrow set of circumstances that the Court will compel a State to authorise family reunification on the basis of Article 8. Furthermore, even though the Court has insisted that the same principles are applicable in the case of the negative and positive obligations under Article 8, it is clear that the Court is reluctant to first of all find

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[296] *Gul v The Netherlands* (1996) 22 EHRR 93, para. 42; *Ahmut v The Netherlands* (1996) 24 EHRR 62, para. 69; *Sen v The Netherlands*, para. 37.

[297] See for example *Sen v The Netherlands*, para. 37.

[298] See *Tuquabo-Tekle v The Netherlands*, Application No. 60665/00, Judgment of 1 December 2005, para. 49, where it is stated that "The Court has indeed previously rejected cases involving failed applications for family reunion and complaints under Article 8 where the children concerned had in the meantime reached an age where they were presumably not as much in need of care as young children and increasingly able to fend for themselves". These included *Benamar v. the Netherlands, I.M. v. the Netherlands* and *Chandra and Others v. the Netherlands* discussed above.

[299] Para. 40.

that a positive obligation exists at all and secondly that the positive obligation is breached. This is consistent with the general observations made above in relation to the difficulties inherent in identifying and enforcing positive obligations in international law. Overall, the analysis of the family reunification judgments of the ECtHR in this section confirms that in the specific field of family reunification, States are relatively unconstrained by the ECHR in their formulation of law and policy, and – more generally - that States have a wide margin of appreciation in matters relating to the entry and residence of non-nationals.

As noted above, the Article 8 case-law has been criticised from both within the Court itself and by academic commentators for its incoherence and instability.[300] These difficulties have stemmed from the high degree of deference shown to domestic immigration policy in the judgments of the Court, which has led to conceptual confusion to the point where "it is difficult to extrapolate clear principles identifying the application of Article 8".[301] States are thus free to decide on the most appropriate way to deal with the key integration issue of family reunification, providing they stay within the generous margin of appreciation delineated by the Court in *Sen* and *Tuquabo-Tekle*. This is perhaps indicative of the broader difficulties faced when applying international law in the integration context. Integration is by its nature an area involving the progressive realisation of rights, of positive rights involving complex and delicate issues of social policy closely related to issues of national identity and sovereignty. International law's focus on negative obligations of States and leaving States with a margin of appreciation thus may limit the applicability of international human rights law in the integration context.

4.13 The Influence of the Normative Development of Integration by the European Court of Human Rights

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[300] In addition to the comments of the dissenting judges referred to above, see Catherine Dembour, "Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-nationals at Strasbourg" (2003) 21 *Netherlands Quarterly of Human Rights* 63.

[301] Nicola Rogers, note 295, at. 53.

The readiness of the Court in recent cases to explicitly protect long-term residents under the heading of private life involves it in a complex and nuanced balancing exercise which includes integration as one of the express criteria to be considered by the Court. This makes explicit the integration analysis in which the Court had been implicitly engaging since the early cases. While the jurisprudence relating to what actually constitutes 'integration' is very much in its infancy, the implications of this move extends beyond the circumstances of the applicants in these cases and signifies the start of a normative development of the concept of integration by the European Court of Human Rights.

Nevertheless, it remains to be seen whether the increased emphasis of the Court on the integration criterion in the expulsion cases influences the Court's approach to key integration issues such as family reunification and in turn whether this filters down to legislators and policymakers at the national level. The impact of the developing concept of integration on the outcome of the expulsion cases is variable and in some cases unclear, as the integration criterion is only one element of a complex balancing exercise undertaken by the Court. In addition, it has been seen that the specific context in which the Court considers integration has led to some differences in the emerging integration paradigm employed by the Court and those put forward by the UN CCPR, CESCR and CERD Committees, for example. The one-sided approach of the Court to the notion of 'integration', placing the onus of integration principally on the individual concerned, has been criticised here. This integration paradigm conflicts with those being developed by the UN treaty monitoring bodies, which it was shown above have focussed on a holistic, rights-based and equality-based vision of integration involving obligations of the State as well as of the migrant. Chapter 6 will consider the influence of the Article 8 expulsion case law on judicial decision-making in this sphere in Ireland.

Finally, as the admissions cases clearly demonstrate, the Court continues to operate within the restraints of Article 8 and in the awkward space between international obligations and states' margin of appreciation in immigration matters, which raises the question of how far the ECtHR can hope to influence state practice in this sphere, particularly where the

circumstances relate to positive obligations of States. Chapter 9 will examine the interpretation of the Article 8 admissions case law by the Irish courts.

4.14 Conclusion

The protection of the fundamental rights of migrants can be seen as a pre-requisite to integration as it places them on an equal footing with nationals of the host state at a basic level. In this sense, the human rights treaties discussed above are the cornerstones of a rights-based conception of integration and the starting point for the development of an inclusive integration strategy. More generally, the principles of non-discrimination and equality, which form the dominant philosophical thread running through the treaties, constitute the foundation of a human rights based integration paradigm.[302] The inherent dignity and "the equal and inalienable rights of all members of the human family" were recognised in the Universal Declaration of Human Rights as the "foundation of freedom, justice and peace in the world",[303] and this overarching commitment to equality is reflected in each of the universal human rights instruments discussed above. This provides a framework of equality within which the discussion of integration at the national level must be posited. This is reflected in the development of a nascent integration paradigm in the work of the CCPR, the CESCR and the CERD Committee which is based on non-discrimination and the progressive realisation of equality for migrants. It is also reflected in the incremental granting of rights under the 1951 Refugee Convention.

Despite this crucial contribution of international law, international refugee and human rights instruments do not, individually or collectively, provide a comprehensive framework for the development of national integration policies. International law does not contain anything resembling a general "right" to integration or an obligation on states to facilitate integration, aside from the limited obligation imposed by Article 34 of the 1951 Refugee

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[302] See for example Andrew McColgan, "Principles of Equality and Protection from Discrimination in International Human Rights Law" (2003) 2 *EHRLR* 157.

[303] UDHR, preamble, para. 1.

Convention. Migrants' integration-related rights under international law are fragmented, with migrants having variable rights depending on their status as refugees, migrant workers or family members of these groups, or as members of the sub-categories of women, children or members of a racial minority. In particular, in comparison to other migrants, refugees benefit from a wide range of integration-related rights, tailored to their particular situation, as a matter of settled international law. One consequence of this for national integration law and policy is that national frameworks may have to provide for differentiated forms of integration which take into account specific international obligations to refugees. This fragmentation is reflected in the normative development of integration in international law. It was seen above that in the case of the UN human rights treaty monitoring bodies, the limited development of a conception of integration is in the early stages and fragmented between the different bodies, with each of the Committees examined having a slightly different focus in relation to integration. It was also shown that the jurisprudence of the ECtHR pursues a somewhat different vision of integration to that employed by the UN treaty monitoring bodies. In addition, the interpretation of integration by the ECtHR is limited in the sense that it is rooted in the narrow field of application of Article 8 ECHR on the right to family and private life. The one-sided nature of the analysis of integration by the ECtHR, whereby the onus of integration appears to rest on the migrant, was also identified. Finally, in the case of international refugee law, the absence of a monitoring body in the case of the 1951 Convention has meant that the only specific provision relating to integration in international law – Article 34 of the 1951 Convention - is normatively undeveloped.

Despite these critical limitations, it has been shown that international norms potentially have an impact on national integration measures in a number of specific ways, as follows:

- ❖ International refugee law requires a wide range of integration-related rights to be guaranteed to refugees.
- ❖ Article 27 ICCPR, together with Article 15 ICESCR and Article 5(a) ICERD, prohibit forced assimilation and national integration policies may not therefore force members of a minority to forsake their culture, language or religion in favour of that

of the host state without violating these provisions. This sets a minimum standard for integration policies.

- The ICCPR, the ICESCR and the ICERD provide the basis for an equality-based paradigm of integration, by generally requiring states to provide the rights enshrined therein to all persons on their territory without discrimination on the basis of nationality, race religion or immigration status. An equality-based paradigm of integration is apparent in the concluding observations of the CCPR, the CESCR and the CERD Committee. In addition, all the international law instruments considered in this chapter (including the ECHR) support the theory that the more integrated the individual migrant becomes, the wider and stronger his or her rights on the territory of the State Party become.
- Given the relatively detailed development of the concept in the concluding observations of the CERD Committee, these concluding observations could be used as a benchmark for integration policy at the national level in order to ensure conformity with best practice in international human rights law.
- The ECHR requires State Parties to consider the degree of integration of non-citizens whom they are seeking to expel from their territory prior to their expulsion, as part of a matrix of factors to be considered pursuant to Article 8's protection of private and family life. This contrasts with the use of integration as a legal barrier to immigration in the law of certain countries and as endorsed in EU law.
- The ECHR and the 1951 Refugee Convention in particular place limits on state discretion in the sphere of family reunification. The impact of this on the family reunification regime in Ireland will be specifically explored in Chapter 9.

Overall, the interpretation of the concept of integration by the UN treaty bodies and by the European Court of Human Rights in particular constitutes a valuable, legal, contribution to the emerging discourse on the nature, scope and implications of integration. The approaches of these international law bodies to both the meaning and consequences of integration provide a starting-point for the positive, human rights based, notion of integration advocated

by academic commentators.[304] This constitutes an important counterpoint to the increasing trend across European states to use the concept of integration in a negative sense as a condition of citizenship and as a barrier to entry for immigrants and their family members. The potential influence of these concepts of integration on the development of the Irish approach to integration will be considered in the concluding chapter.

[304] See, for example, Ricky Van Oers, Eva Ersboll and Dora Kostakopoulou, "Mapping the redefinition of belonging in Europe" in Ricky Van Oers, Eva Ersboll and Dora Kostakopoulou (eds), *A Re-Definition of Belonging? Language and Integration Tests in Europe* (Martinus Nijhoff Publishers, 2010, at 326; Sergio Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU* (Martinus Nijhoff, 2009); Anja Wiesbrock, *Legal Migration to the European Union*, note 71, at 734.

5 Concepts of Integration in European Union Law and Policy

5.1 Introduction

Understanding the legal framework for integration constituted by EU law is central to understanding integration in Ireland. In strictly legal terms, EU law constitutes a significant body of norms impacting on integration in all Member States.[1] On a more abstract plane, the European Union provides a supranational dimension to citizenship and belonging, potentially leading to a cosmopolitan openness towards the 'other' at the national level.[2] The transformative potential of EU law in the field of migration and integration has been witnessed in the case of EU citizens. EU law relating to the free movement of workers has altered the status of EU migrant workers and their families in a legal sense with a consequent change in the way in which such migrants are perceived. Nationals of EU Member States living and working in other Member States have been gradually transformed from 'immigrants' subject to the conditions of entry and residence imposed by the State, to EU citizens, entitled to equal treatment and the same respect as the host population.[3] It has thus been seen that EU law can in itself constitute an instrument of integration.

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[1] As the Irish Minister for Integration has observed: "globalisation, among other international phenomena, binds us together with other States and standardises experiences generated by the movement of people. As an EU Member State, this binding is a powerful determinant of integration issues and the role of the EU is particularly relevant." Office of the Minister for Integration, *Migration Nation: Statement on Integration Strategy and Diversity Management* (May 2008), at 29.

[2] Dora Kostokopoulou, "European Union Citizenship: Writing the Future" (2007) 13(5) *ELJ* 623, at 628-629.

[3] Kostakopoulou makes the point that by adopting a rights-based approach aimed at procuring equality of treatment, the Community has gradually transformed foreigners into associates in a common venture and pioneered wide-ranging social change. Dora Kostakopoulou, "European Citizenship and Immigration after Amsterdam: Silences, Openings and Paradoxes" (1998) 24(4) *Journal of Ethnic and Migration Studies* 639. See also Elspeth Guild, "Cultural and Social Identity: Immigrants and the Legal Expression of National

This chapter aims to examine the conceptual and legal framework formed by EU law and policy in respect of the integration of both non-EU national migrants (referred to in this chapter as "third country nationals" or "TCN"s)[4] and EU citizen migrants exercising their right to free movement within the EU (generally referred to in this chapter as "EU citizen migrants" or "EU migrants"), with the primary aim of determining whether EU law and policy contains a coherent paradigm of integration. EU integration law and policy in respect of TCNs can be split into three separate but interlinked spheres: specific integration policy and concepts of integration contained in (i) general immigration and (ii) asylum law. Each of these spheres will be examined in the part of the chapter dealing with TCNs. In contrast, in the case of EU citizen migrants, there is no specific integration policy, and the analysis is confined to the framework for integration formed by the law relating to free movement, equal treatment and EU citizenship. The bulk of the chapter is devoted to the approach to the integration of TCNs enshrined in EU law and policy.

It will be argued that EU law and policy encompasses a number of conceptions of integration (largely dependent on the legal classification of the individual concerned), such that no coherent paradigm of integration can be identified in the EU framework. This lack of coherence is due in part to the preoccupation of Member States with maintaining tight

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Identity", in Elspeth Guild and Joanne Van Selm (eds), *International Migration and Security: Opportunities and Challenges* (Routledge, 2005), 101, at 107.

[4] The EU's relationship with third country nationals is a complex one dependent on a system of categorisation of different types of non-EU citizens. Nationals of countries belonging to the EEA area are accorded rights close to those of EU migrants. Another privileged group of third-country nationals are family members of migrant Community nationals, which will be discussed below. On top of these categories, the EU has entered into special arrangements for the nationals of certain non-Member States via an extensive patchwork of Treaties with third countries such as Turkey. Those falling outside these categories do not enjoy either the privileged status of EU migrants or the higher protection afforded to these groups and, as Guild observes, can legally be treated as 'others' for the purposes of EU law (Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International, 2004), at 218). For a detailed examination of "The Community Acquis on Legal Migration", see generally, Anja Wiesbrock, *Legal Migration to the European Union*, (Martinus Nijhoff, 2010), Chapter 2.

control over the area of migration and citizenship and the treatment of TCNs in particular. This control has been eroded in certain limited cases due to the demands of international law (refugees) and economic self-interest (students, researchers and highly skilled workers).[5] The analysis contained in this chapter points to the conclusion that the lack of a coherent integration paradigm in EU law and policy undermines its potential to provide an alternative approach to integration to that based on national public philosophies of integration. The scope for EU law and policy to influence the scope and content of integration at the national level is therefore quite constrained. This ultimately weakens the transformative potential of EU law in the field of integration.

5.2 Integration Policy for TCNs: The EU Framework on Integration

Prior to the adoption of the Lisbon Treaty, there was no explicit legal basis for the development of EU cooperation in the field of integration. As will be discussed further below, the harmonisation of the laws and regulations of Member States relating to integration remains excluded under the amended Treaty on the Functioning of the European Union ("TFEU").[6] It is arguable that even if such competence existed, harmonisation in the field of integration would be undesirable due to the cultural and legal differences between

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[5] This is an idea echoed by Kostakopoulou, Carrera and Jesse in "Doing and Deserving: Competing Frames of Integration in the EU", in Elspeth Guild, Sergio Carrera and Kees Groenendijk (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009), 167. The "competing frames" which they examine are the conception consistently applied to nationals of member states, based on equal rights, agency and participation in political communities, juxtaposed against what they describe as the new conception of integration applicable to third country nationals which centres on migration control and the preservation of the alleged homogeneity of national bodies. (at 168). It is argued in this chapter that the concepts of integration in EU law and policy are still more complex and numerous than these frames.

[6] Article 79.4 TFEU provides: "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States."

the Member States and their various groups of immigrants.[7] Furthermore, Member States use widely differing definitions and notions of key concepts, including the concept of 'integration' itself, which would render agreement on binding policy very difficult to achieve. It has been argued that vocabulary of integration is "inappropriate to a polity in which there is (i) a plurality of cultures and sub-cultures (ii) no shared definition of a 'common life' and (iii) multiple definitions of communal 'homes' formed at national, subnational and supranational levels of governance."[8] In short, the question of what migrants are expected to integrate into is particularly indeterminate on the level of the EU.

Nevertheless, a significant body of soft law (policy) has emerged on the specific theme of integration of TCNs, and a common policy framework has been developed which is intended to serve as a guide for national policies. This specific integration policy framework applies to TCNs only. The so-called "Framework for the Integration of Third-Country Nationals in the EU" ("EU Framework on Integration") comprises several substantive and institutional mechanisms: the Common Basic Principles on integration ("CBP"s), three Handbooks on Integration for Policy Makers and Practitioners, three Annual Reports on Migration and Integration, the National Contact Points on Integration ("NCPI") and the European Fund for the Integration of Third Country Nationals ("EIF"). Political debate on integration takes place at Ministerial Conferences on Integration.[9] In addition, in 2009, two instruments of exchange and information were introduced to support the framework: the European Website on Integration and the European Integration Forum. The EU Framework on Integration is thus evolving in different institutional settings and through various means.

5.2.1 The origins of EU integration policy

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[7] See Katja Ziegler, "Editorial: Integrating Integration" (2005) 7 *EJML* 119.

[8] Dora Kostakopoulou, "Integrating Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms" (2002) 8 *Columbia Journal of European Law* 181, at 188.

[9] These have taken place in 2004 (Groningen), 2007 (Potsdam), 2008 (Vichy) and 2010 (Zarazoga).

The impetus for the development of a specific EU integration policy for TCNs started with the entry into force of the Treaty of Maastricht, which provided for the possibility of co-ordination in immigration and asylum matters by identifying areas of common interest. The Treaty of Amsterdam conferred full competence on the Union to develop policies in the field of freedom, security and justice, and one of the tasks of the newly created Directorate General for Justice and Home Affairs was to examine options for developing policies on the integration of migrants and refugees.[10] The basis for policy development in the sphere of integration was set out by the 1999 Tampere European Council. The conclusions of the Tampere Council – in the context of setting out the political guidelines for the EU immigration framework – favoured an inclusive integration policy based on equal treatment and a secure legal status, particularly in the case of long-term residents. The Council requested the creation of a uniform set of rules through which "fair treatment" of all TCNs residing legally in the EU Member States should be ensured.[11] This fair and equal treatment paradigm of integration[12] envisaged that a "vigorous integration policy" should aim at granting legally resident TCNs rights and obligations comparable to those of EU citizens[13] and granting long term resident TCNs "a set of uniform rights which are as near as possible to those enjoyed by EU citizens".[14] However, despite this broad mandate, aside from the creation of National Contact Points on Integration in 2002,[15] "the integration aspects of the

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[10] For a comprehensive overview of the political and legal evolution of EU integration policy, see Helene Urth, "Building a Momentum for the Integration of Third-Country Nationals in the European Union" (2005) 7 *EJML* 163, at 164.

[11] Tampere European Council 15 and 16 October 1999: Presidency Conclusions, para. 18.

[12] This phrase is coined by Sergio Carrera, in Sergio Carrera, *Benchmarking Integration in the EU: Analyzing the Debate and Moving it Forward* (Bertelsmann Foundation, 2008), at 8. See also Sergio Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU* (Martinus Nijhoff, 2009), at 49.

[13] *Ibid.*

[14] Tampere European Council 15 and 16 October 1999: Presidency Conclusions, para. 21.

[15] The National Contact Points were endorsed by the Thessaloniki European Council. See Thessaloniki European Council 19 and 20 June 2003: Presidency Conclusions, at 10. The tasks of the NCPI network include exchanging information, monitoring integration programmes nationally and strengthening policy coordination at the national and EU levels. They have also contributed to the handbooks on integration.

Tampere conclusions did not advance very fast and ... integration had never been fully developed by the Commission."[16]

The development of an EU integration policy was revived in 2003 by the Commission's Communication on Immigration, Integration and Employment, which embodies a broad-based, inclusive conception of integration, emphasising its economic and human rights dimensions. The importance of immigration in the context of the demographic change (*ie* ageing and decline) of European populations is emphasised, and the Communication points out that "(T)he successful integration of immigrants is both a matter of social cohesion and a pre-requisite for economic efficiency."[17] The Communication stresses the need for a two-way, holistic approach to integration, which is based on mutual rights and obligations of the immigrant and the host society and takes into account not only the economic and social aspects of integration but also issues relating to cultural and religious diversity, citizenship, participation and political rights. Key elements in holistic integration policies are also identified, including integration into the labour market,[18] education and language skills[19] and housing and urban issues.[20] Some of the observations made in the Communication are quite far-reaching, and touch on sensitive national sovereignty issues such as access to citizenship. For example, it is stated that "It is widely recognised that acquiring nationality is a means of facilitating integration, although it need not be the ultimate aim of the integration process".[21]

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[16] Helene Urth, note 10, at 167.

[17] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Immigration, Integration and Employment* (COM (2003) 336 final), at 17.

[18] *Ibid.*, at para. 3.3.1.

[19] *Ibid.*, at para. 3.3.2.

[20] *Ibid.*, at para. 3.3.3.

[21] *Ibid.*, at 22. On a practical level, the Communication also (at para. 4.2.1) introduced the idea of an Annual Report on migration and integration to help ensure the overall consistency of EU policies with an impact on migration and integration and national policies, and to inform the Council on progress made in the mainstream policies and programmes. The first such report was issued in June 2004. While these reports are clearly limited in the sense that they are primarily based on Member States reporting on their own policies and

5.2.2 Development of the Framework on Integration

Integration received renewed attention in the Hague Programme[22] which, significantly, identified integration as a separate policy area to that of "migration management" and a high-priority area for attention by the EU.[23] More generally, the Hague Programme emphasised the human rights dimension of migration while at the same time restating the major concerns of security and fighting terrorism.[24] This focus was somewhat somewhat inevitable given the shift which had taken place since the terrorist attacks of September 11 2001 and other events such as the Madrid bombings of 2003, which had led to the emergence and development of anti-immigrant and anti-Muslim discourses at the national level.[25] The Hague Programme takes a step back from the Tampere paradigm and does not reiterate the aims of the Tampere Programme in relation to a more vigorous integration policy and the near-equal treatment of TCNs: the furthest it goes in this respect is to state that:

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expected outcomes, they provide a valuable source of information on the aims and evolution of national integration policies and represent a further step in the creation of an EU integration policy.

[22] Brussels European Council 4 and 5 November 2004: Presidency Conclusions, Annex 1 - "The Hague Programme: Strengthening Freedom, Security and Justice in the European Union" (hereinafter, the "Hague Programme").

[23] Communication from the Commission to the Council and the European Parliament, *The Hague Programme: Ten priorities for the next five years* (COM (2005) 184 final).

[24] See for example Thierry Balzacq and Sergio Carrera, "The Hague Programme: The Long Road to Freedom, Security and Justice", in Thierry Balzacq and Sergio Carrera ed.s, *Security Versus Freedom: A Challenge for Europe's Future* (Ashgate, 2006), 1.

[25] The importance of the security discourse in the Hague Programme is explicit: "The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004" (The Hague Programme, at 3).

> While recognising the progress that has already been made in respect of the fair treatment of legally resident third-country nationals in the EU, the European Council calls for the creation of equal opportunities to participate fully in society.[26]

The Programme stated that greater co-ordination of national integration policies and EU initiatives were needed and that a framework based on common basic principles should form the foundation for future initiatives in the EU. This framework is intended to assist the EU in helping Member States to better their integration policies, with the express aim of creating equal opportunities to participate fully in society and removing barriers to integration.[27]

The Common Basic Principles ("CBPs"), adopted soon after the Hague Programme in 2004, are expressly not intended to form the basis for a binding EU policy on integration. They are principally intended to "assist Member States in formulating integration policies by offering them a simple non-binding but thoughtful guide of basic principles against which they can judge and assess their own efforts."[28] While the effectiveness of the CBPs is limited by their non-binding nature, the principles are centrally important as they delineate the contours of the EU approach to integration.[29] Integration is defined as a "dynamic, two-

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[26] The Hague Programme, at 10.

[27] See The Hague Programme, at para. 1.5, Communication from the Commission to the Council and the European Parliament, *The Hague Programme: Ten priorities for the next five years* (COM (2005) 184 final).

[28] Justice and Home Affairs Council Conclusions, *Common Basic Principles on Immigrant Integration*, Council Document 14615/04, Brussels, 19 November 2004 (hereinafter, the "Common Basic Principles" or the "CBPs"), Common Basic Principle 8. They also aim to serve as a basis for Member States to explore how EU, national, regional, and local authorities can interact in the development and implementation of integration policies, and to assist the Council to reflect and agree upon EU mechanisms and policies to support national integration efforts. (Common Basic Principle 8).

[29] As Pratt observes, these principles "provide a first definition of what we mean by integration in the EU". See Sandra Pratt, "Immigration, Integration and Citizenship: Latest Developments and the EU's Role", in Sergio Carrera (ed), *The Nexus Between Immigration, Integration and Citizenship in the EU* (CEPS, 2006), 10, at 10.

way process of mutual accommodation by all immigrants and residents of Member States";[30] and the basic requirements of integration laid down: respect for the basic values of the European Union,[31] including the diversity of cultures and religions;[32] and a basic knowledge of the host society's language, history and institutions.[33] The introduction of these requirements, contained in CBPs 2 and 4.2, have been interpreted as representing a new departure in EU integration policy by introducing a nexus between integration and the adoption of 'values' which was absent from previous integration discourse in the EU context and from the fair and equal treatment paradigm contained in the Tampere Programme.[34] For some commentators, this represented the start of the transmission of national discourses and categories of integration to the EU level.[35] However, the 'culture and values' principles constitute just one dimension of the CBPs. A number of key integration issues which emphasise the state's role in the integration process are also identified, including access to employment,[36] education[37] and access to institutions on an equal basis to national citizens.[38] Finally, a number of ways to enable integration are outlined, including frequent interaction between immigrants and Member State citizens;[39] mainstreaming integration policies and measures;[40] and developing clear policy goals, indicators and evaluation mechanisms.[41]

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[30] Common Basic Principle 1.

[31] CBP 2.

[32] CBP 8.

[33] CBP 4.

[34] Sergio Carrera and Anja Wiesbrock, "Civic Integration of Third Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy" (CEPS, October 2009), at 8 and 9; Dora Kostakopoulou, Sergio Carrera and Moritz Jesse in "Doing and Deserving: Competing Frames of Integration in the EU", in Elspeth Guild, Kees Groenendijk and Sergio Carrera, *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009), 167, at 183.

[35] Kostakopoulou, Carrera and Jesse, *ibid*, at 180.

[36] CBP 3.

[37] CBP 5.

[38] CBP 6.

[39] CBP 7.

[40] CBP 10.

[41] CBP 11.

Aside from the argument that the CBPs represented a paradigm shift in EU integration policy towards a more culture and values-centred concept of integration, they can be criticised as being vague and depoliticised,[42] a criticism which could apply to EU integration policy generally. CBP 2, for example, which refers to respect for the "basic values" of the EU, does not specify what these values are.[43] Indeed, it is arguable that the inherent vagueness of any policy guidelines aimed at all Member States, with their diverse migration experiences and immigration, citizenship and integration practices, makes it almost impossible for such guidelines to espouse a clear vision of what integration actually encompasses. This effectively leaves Member States free to fill in the gaps with their own national conception of integration, detracting from the value of the elaboration of EU guidelines.

The CBPS are fleshed out and built upon by the Commission's 2005 Communication on the Framework for the Integration of Third Country Nationals in the European Union, which contains proposals for concrete measures to put the CBPs into practice, both at national and at EU level. It stresses the links between the legal framework constituted by the legislative instruments on the conditions of admission and stay of TCNs and integration policy, and the supportive role of the anti-discrimination legislation in the context of integration. In relation to the 'new', values-centred, aspect of EU integration discourse contained in CBPs 2 and 4.2, the Commission's recommendations in relation to the national level include "strengthening the integration component of admission procedures"[44] and "assuring that all residents, including immigrants, understand, respect and benefit from common European and national values".[45] However, the Communication also emphasises other wider and more

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[42] Piaras Mac Einri, "Integration Models and Choices", in Bryan Fanning (ed) *Immigration and Social Change in the Republic of Ireland* (Manchester University Press, 2007), at 231.

[43] Although these are elaborated upon in later documents, as will be discussed below.

[44] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 1 September 2005 – A Common Agenda for Integration – Framework for the Integration of Third-Country Nationals in the European Union (COM(2005) 389 final – Not published in the Official Journal), at 7.

[45] *Ibid*, at 16.

inclusive dimensions of integration, stating that "(t)he promotion of fundamental rights, non-discrimination and equal opportunities for all are key integration issues" and stressing the need to eliminate structural barriers to integration.[46]

A number of EU mechanisms which support the integration framework are also referred to in the Commission's Communication. These include the NCPI and Annual Reports,[47] as referred to above, as well as the Handbook for Integration, which contains examples of good practice and lessons learned by policy-makers across the Member States.[48] Another supporting mechanism is the European Fund for the Integration of Third Country Nationals, which aims to support national efforts in enabling TCNs to fulfil conditions of residence and to facilitate their integration, through *inter alia* the development of transnational co-operation networks and benchmarking techniques.[49] These mechanisms represent a move to a "more structured approach to exchange of information, best practices and monitoring of Member States policy development".[50]

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[46] *Ibid*, at 3 and 4.

[47] There have been three Annual Reports on Migration and Integration thus far: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 16 July 2004, *First Annual Report on Migration and Integration* (COM(2004) 508 final – Not published in the Official Journal); European Commission Staff Working Document of 30 June 2006 – *Second Annual Report on Migration and Integration* (SEC(2006) 892 – Not published in the Official Journal); and Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 16 July 2004 – *First Annual Report on Migration and Integration* (COM(2004) 508 final – Not published in the Official Journal).

[48] There have been three editions of the Handbook on Integration thus far: European Commission, *Handbook on Integration for Policy-makers and Practitioners* (Brussels, November 2004), European Commission, *Handbook on Integration for Policy-makers and Practitioners* (Brussels, 2nd ed., May 2007), European Commission, *Handbook on Integration for policymakers and practitioners* (Brussels, 3rd ed., April 2010).

[49] Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General Programme "Solidarity and Management of Migration Flows", OJ L 168/18.

[50] Helene Urth, note 10, at 174.

The move towards a more structured approach to the sharing of "best practices" is reflected in the production of three editions of the Handbook on Integration, the product of technical seminars held by national ministries involved in integration. These Handbooks avoid theoretical questions relating to integration and focus on approaches to the improvement of practical "outcomes" of immigrants,[51] based on the idea that:

> Integration policies aim to bring about, over time, a convergence of societal outcomes for all. This requires the active involvement of all citizens and residents; those with and without an immigrant background. They can contribute to the social, economic, cultural and civic life of society by using their skills and competencies.[52]

However, the commentary in the Handbook's third edition on "the naturalisation process" demonstrates the way in which this method of co-operation can lead to the sharing and replication of integration strategies which conflict with the fundamental EU definition of integration as a two-way process of mutual accommodation by immigrants and the host community. The section on integration and language tests for access to citizenship outlines the different approaches taken by Member States, thereby implicitly endorsing the use of such tests as an acceptable means of pursuing the aims of integration, and also implying that citizenship represents a reward for integration rather than a tool in the integration process.[53]

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[51] The third edition, for example, addresses the diverse topics of "European Exchange of Information and Good Practice", "Mass Media and Integration", "Acquisition of Nationality and the Naturalisation Process", "Awareness Raising and Migrant Empowerment" and "Dialogue Platforms", thereby acknowledging the complexity and multifaceted nature of integration.

[52] European Commission, *Handbook on Integration for policymakers and practitioners* (Brussels,3rd ed., April 2010), at 8.

[53] The uncritical tone of the Handbook's description of state practices is encapsulated in the following passage: "Most naturalisation procedures find it reasonable to expect that most first-generation applicants, eligible only after several years of residence, have been able to acquire a basic knowledge of one of the common languages of communication in the country. The standards and effects of several recently adopted language or integration/citizenship conditions, including courses and tests, would still need to be externally

This represents the transfer of national discourses on integration onto the EU level and effectively legitimises a one-sided conception of integration which places the onus of integration on the migrant. It provides a good illustration of the way in which the sharing of 'best practice' in the sphere of integration brings the risk that the reorientation of integration as a tool for immigration control and a barrier to accessing citizenship, as practiced in some Member States, will be perpetuated in other Member States as 'best practice'.[54]

In parallel to the holding of technical seminars and Ministerial Conferences on integration, the Council and Commission have continued to produce soft law on integration. In 2007, the Council adopted a further set of conclusions on strengthening integration policies in the EU.[55] The Conclusions recognise the social inclusion aspect of integration policy and invite the NCPI to consider approaches to integration that involve society as a whole: including to explore how integration programmes and policies can contribute to the prevention of social alienation and radicalisation.[56] The 2008 Communication on a

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evaluated as to their efficiency and ultimate effectiveness before being confirmed as integration incentives. Some Member States have adopted these conditions, with the rationale that, the long-term immigration population will be encouraged to improve their language skills and knowledge of public institutions and the political system. At the same time, others have removed or minimised these very same conditions, viewing them as disincentives for naturalisation that serve other policy goals and have a disproportionate impact on certain groups like those with less education or a lower socio-economic status" (at 111). Having accepted that integration tests can be a viable part of the naturalisation process, the Handbook concentrates on how it can be ensured that such tests are "efficient" in promoting integration, opining that: "An efficient language or citizenship condition for naturalisation is introduced in a way that continues to encourage applications and implemented in a way that enables applicants to succeed. It is proven to be effective if those completing the condition participate more in social, economic, and political life and report a greater sense of belonging than before" (at 113). While this attempt to lay down a minimum benchmark for member states' integration practices could be seen to be a positive aspect of European involvement, this is outweighed by this approach's legitimation of this type of 'integration' measure at the national level.

[54] Sergio Carrera, *Benchmarking Integration*, note 12, at 62.

[55] Council of the EU, *Strengthening of Integration Policies in the EU*, Council Document 10267/07 Luxembourg, 12-13 June 2007. (principle 9).

[56] Council of the EU, *ibid.*, at Principle 9. The Conclusions also invited the NCPI and the Commission to look at the idea of promoting the development of common indicators for member States to use on a voluntary

Common Immigration Policy in Europe: Principles, Tools and Actions[57] contains the Commission's 'blueprint' for developing a common EU immigration policy. Ten principles are identified which provide the foundation on which the immigration policy should be based. These relate to three main areas: "prosperity", "security" and solidarity", with integration described as "the key to successful immigration", and interestingly being placed under the heading of "prosperity". The Communication confirms the trend of co-operation in the field of integration being based on Member States' exchange of 'best practice' and the development of benchmarking 'indicators' rather than the elaboration of standards or a common shared approach to integration.

5.3 A New Legal and Policy Context for Integration Policy?

The adoption of the Lisbon Treaty in 2009, as well as the adoption of the Stockholm Programme, which outlines the EU's Area of Freedom, Security and Justice for the period 2010-2014, has provided a new legal and policy context for the development of integration policies by the EU.

5.3.1 The Lisbon Treaty: putting integration on a Treaty footing

The Lisbon Treaty inserted Article 79.4 into the TFEU, as follows:

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basis to assess their own policies. As a starting-point, the Third Annual Report on Migration and Integration, which followed these conclusions, provides an overview of migration and integration policies in the Member States of the EU, placing them to the Common Basic Principles.[56] See *Third Annual Report on Migration and Integration* (COM (2007) 512).

[57] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Common Immigration Policy in Europe: Principles, Tools and Actions* (COM (2008) 359 final). See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strengthening the Global Approach to Migration: Increasing Coordination, Coherence and Synergies* (COM (2008) 611 final).

> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

In addition to the symbolic significance involved in the political act of inserting integration into the TFEU, this provides a clear legal basis for the coordination of integration policy at EU level and clarifies that integration will continue to be dealt with by way of policy coordination and not by way of legal harmonisation.[58] Finally, the strengthened role of the European Parliament helps address democratic deficit concerns in relation to the soft-law mechanisms comprising the Framework on Integration.[59]

The Lisbon Treaty also made the EU Charter of Fundamental Rights binding on Member States,[60] with implications for TCNs and for integration both in terms of the express rights contained therein and the scope of the protection of the Charter. Article 22 of the Charter expressly requires the Union to "respect cultural, religious and linguistic diversity," reflecting the commitment in Article 2 TEU to the values of pluralism, non-discrimination and tolerance. Article 18 expressly protects the right to asylum, which is not explicit in the constitutions of most Member States. Chapter III of the Charter is devoted to Equality, with a prohibition on discrimination on "any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion,

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[58] Reinforcing this, a clear statement of the EU's perception of its own role relating to integration is contained in the Stockholm Programme, to the effect that "European cooperation can contribute to more effective integration policies in Member States by providing incentives and support for the action of Member States". Council of the EU, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Council Document 17024/09, Brussels, 2 December 2009, at 64, para. 6.1.5.

[59] See Sergio Carrera, *In Search of the Perfect Citizen*, note 12, at 108.

[60] Article 6 TEU gives the Charter the same legal value as the Treaties.

membership of a national minority, property, birth, disability, age or sexual orientation" contained in Article 21. These provisions provide the normative context for the elaboration of integration policy at European level in a similar way to the expression of the "public philosophy" of nation states in national constitutions (as will be explored in detail in the case of Ireland in Chapter 6). In addition, the majority of the rights set out in the Charter (including those described above) are not limited to EU citizens, bringing TCNs within the scope of its protection in respect of most of the rights contained therein. EU action in the sphere of integration must comply with the rights enshrined in the Charter. This lends further weight to the arguments in favour of an equality-based, rights-based conception of integration at EU level along the lines of that enshrined in the Tampere Programme, however it remains to be seen whether the Charter impacts on the evolution of integration policy in this way in practice, with such an impact (if it happens) likely to be over a long period of time.[61]

5.3.2 A mixed paradigm of integration in the Stockholm Programme?

In terms of the Stockholm Programme, the European Pact on Immigration and Asylum,[62] which was devised by the French government and adopted by the European Council in 2008, provided a basis for the Programme.[63] While the Pact is a political, non-binding document,

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[61] Also note Guild's observations to the effect that the Charter is unique in that it constitutes a bill of rights which is not enshrined in a national constitution or an international human rights treaty. (Elspeth Guild, "The European Union after the Treaty of Lisbon: Fundamental Rights and EU Citizenship", Global Jean Monnet/European Community Studies Association World Conference, 25-26 May 2010.) It is a creature of EU law and cannot be modified by any one member states' authorities, directly constraining Member State action in the sphere of implementation of EU law relating to integration and backed up by the enforcement mechanisms of EU law. This represents another limitation – along with the limitations imposed by international law - on the discretion of member states in respect of the treatment of TCNs within their territory.

[62] Council of the EU, *European Pact on Immigration and Asylum*, Council Document 13440/08, Brussels, 24 September 2008.

[63] Council of the EU, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Council Document 17024/09, Brussels, 2 December 2009.

it is endorsed in the Stockholm Programme and will therefore have a substantial influence on the future direction of immigration and integration policy.[64] Regarding family reunification, the Pact expresses the view that in order to manage family migration "more effectively", Member States could take into account in national legislation its own "reception capacities" and "families' capacity to integrate", which could be evaluated by, for example, assessing their knowledge of the language.[65] Overall, it has been observed that:

> the Pact ... heralds a more conservative approach to immigration, in line with changing public and political attitudes. It looks at immigration policies through the prism of 'control first', making this more explicit that in the past".[66] The pervasive driving forces of the Pact – nationalism and intergovernmentalism - will almost inevitably lead to an emphasis on Member States' self-interest in controlling immigration to the detriment of an

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[64] The Stockholm Programme states that the Pact provides "a clear basis for further development" in the field of migration. Council of the EU, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, Council Document 17024/09, Brussels, 2 December 2009.

[65] This idea that Member States have a reception capacity is a new one. These types of restrictions on family reunification would leave the door open for exclusionary integration provisions along the lines of those discussed in the context of the Family Reunification Directive. Furthermore, while the Pact insists that a "balance" is required between migrants' rights and duties, the duties of migrants are emphasised whereas there are few references to the human rights of migrants. See Elspeth Guild and Sergio Carrera, "The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs Europeanisation? Security vs Rights?" (CEPS Policy Brief, September 2008). In addition, the original Proposed Pact would have introduced the idea of 'integration contracts' similar to those in use in France and the Netherlands. These proved too controversial and the idea was abandoned, however the rationale behind integration contracts (*ie* exclusion and/or assimilation) persists in the statements relating to integration contained in the Pact.

[66] Elizabeth Collett, "The EU Immigration Pact – from Hague to Stockholm, via Paris" (European Policy Centre, October 2008).

integration paradigm which seeks to respect the interests of TCNs and their families.[67]

The 2008 Council conclusions are similar in tone to the Pact, reiterating the idea that Member States should "stress respect for the identities of the Member States and the European Union and for their fundamental values, such as human rights, freedom of opinion, democracy, tolerance, equality between men and women, and the compulsory schooling of children", and includes "the promotion of the fundamental values of the European Union" as one of the principal themes to be explored under the CBPs.[68]

The Stockholm Programme does not specifically invoke the identities of Member States in the same way as the Pact and the 2008 Council Conclusions. However, the theme of the Programme is "serving and protecting the citizens", raising the questions of, first, who is considered to be a citizen and second, what are the implications of falling outside of this category? It is clear from the Programme and surrounding documentation that 'citizens' in this context is intended to encompass EU citizens in the legal sense of those holding the nationality of a Member State - excluding TCNs.[69] From an integration perspective, this

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[67] On the nationalist and intergovernmentalist leanings of the Pact, see Elspeth Guild and Sergio Carrera, "The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs Europeanisation? Security vs Rights?" (CEPS Policy Brief, September 2008).

[68] Council of the EU, *Conclusions of the Council and the Representatives of the Governments of the Member States on integration policies in the European Union*, Council Document 15251/08, Brussels, 6 November 2008, at 4.

[69] This is in spite of Carrera and Wiesbrock's convincing arguments in favour of a wider conception of EU citizenship which takes into account the increasingly citizenship-like elements of the status of TCNs in the EU, Sergio Carrera and Anja Wiesbrock, "Whose Citizenship to Empower in the Area of Freedom, Security and Justice? The Act of Mobility and Litigation in the Enactment of European Citizenship" (CEPS, May 2010). They argue that the progressive judicialisation of citizenship and migration matters – through cases such as *Metock*, *Soysal* and *Chakroun* – along with the expansion to TCNs of the freedom of movement and non-discrimination on the basis of nationality are deeply transforming classical understandings of European citizenship-related and citizenship-like freedoms for TCNs beyond nationality-centred perspectives and

maintains and widens the gap between EU citizens and TCNs and legitimates legal and policy distinctions based on these categories. The full implications of the focus on the EU citizen in terms of the evolution of actions taken pursuant to the Stockholm Programme remain to be seen.

In addition, while the Stockholm Programme is more subtle when it comes to promoting nationalism than the Pact or the subsequent 2008 Council Conclusions, it confirms the integration/values nexus, stating that "the interconnection between migration and integration remains crucial, inter alia with regard to the fundamental values of the Union".[70] It provides some guidance as to what the "values" of the EU are, including respect for the human person and human dignity and for the other rights set out in the Charter of Fundamental Rights and the European Convention on Human Rights;[71] values which are incompatible with crimes against humanity, genocide and war crimes;[72] democracy, human rights and the rule of law.[73] While the integration/values nexus contained in the EU approach to TCNs is often criticised, it must be acknowledged that these are quite basic values which would not seem to require cultural assimilation but rather a basic acceptance of universal human rights principles. In addition, the Programme specifically refers back to the fair and equal treatment objectives of the Tampere Programme in its consideration of the position of TCNs:

> The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations

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member states' competences. See also Sergio Carrera and Anja Wiesbrock, "Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU" (2010) 12 (3) *EJML* 337.

[70] Stockholm Programme, at 59.

[71] Stockholm Programme, at 4.

[72] *Ibid.*, at 12.

[73] *Ibid.*, at 82.

> comparable to those of EU citizens. This should remain an objective of a common immigration policy and should be implemented as soon as possible, and no later than 2014.[74]

The Stockholm Programme thus seems to blend the Tampere fair and equal treatment paradigm with the newer emphasis on the duty of migrants to adopt the values of the EU, as developed during the course of the Hague Programme. In light of this, the contention that the Tampere Programme is a "forgotten vision", replaced by a neonational conception of integration based on conditioned membership is inaccurate.[75] Rather, it seems that the newer idea of requiring immigrants to accept a minimum set of common values, which emanates from national integration discourses, has been grafted on to the fair and equal treatment paradigm. The endorsement of the values dimension of integration at EU level could be seen as legitimating Member States' national policies and practices of using integration as a mandatory process and as a tool of immigration law. However, there is as yet no evidence of a strong paradigm of integration as conditioned membership in EU policy itself.[76] The EU Framework on Integration enshrines a holistic approach to integration encompassing social, economic, political and cultural (or "values") dimensions of integration. Member States may however choose to emphasise some of these dimensions over others.[77]

The mixed paradigm identified above is also reflected in the Commission's Report to the 2010 Ministerial Conference on Integration, which provides a good snapshot of the current

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[74] *Ibid.*, at 64.

[75] Dora Kostakopoulou, Sergio Carrera and Moritz Jesse, note 34, at 184.

[76] For the argument that there has been a shift from equal treatment to conditioned membership at the European level, see Dora Kostakopoulou, Sergio Carrera and Moritz Jesse, note 34, at 168.

[77] This is reinforced by the European Parliament's view, which has been to call for the Member States to implement of the CBPs, without emphasising some over others. European Parliament resolution of 2 April 2009 on problems and prospects concerning European Citizenship OJ C 137E/10, at para. 20.

focus of the Framework on Integration.[78] The key 'priorities' addressed in the Report include the promotion of common EU values and the development of European modules on integration. The three themes involved in the promotion of European values are fundamental rights, intercultural dialogue and active citizenship, with the aims of providing equal rights and equal opportunities for TCNs along with the participation of immigrants in formulating integration policy and in community and democratic life forming a common thread between the themes.[79] The promotion of 'values' - associated with the new negative framing of integration at national level as transposed to the European stage through the mechanisms of intergovernmental co-operation - is therefore married with the fair and equal treatment model enshrined in the early policy documentation.[80]

Finally, on a practical level, it seems that the trend of cooperation through exchange of practices and the development benchmarking and indicators will be continued and further developed in the Stockholm Programme, with the development of a "coordination mechanism involving the Commission and the Member States using a common reference framework".[81] The introduction in the Stockholm Programme of the idea of joint practices

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[78] European Commission (staff working document), "The Consolidation of the EU Framework on integration – Report to the 2010 Ministerial Conference on Integration" (SEC (2010) 357 final).

[79] *Ibid*, at 4, 5 and 6 for example.

[80] The Action Plan Implementing the Stockholm Programme gives further expression to this mixed paradigm, stating that "The EU must strive for a uniform level of rights and obligations for legal immigrants comparable with that of European citizens. These rights, consolidated in an immigration code, and common rules to effectively manage family reunification are essential to maximise the positive effects of legal immigration for the benefit of all stakeholders and will strengthen the Union's competitiveness. The integration of migrants will be further pursued, safeguarding their rights whilst also underlining their own responsibilities to integrate into the societies in which they live." Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme" (Brussels, 20.4.2010) (COM(2010) 171 final), at 7.

[81] The following principles would underlie the cooperation:

- to incorporate integration issues in a comprehensive way in all relevant policy areas,

and European modules on integration raises issues relating to the scope and nature of such modules. The Commission's Report to the 2010 Ministerial Conference confirms that the technical seminars which produced the Handbooks will form the basis for this new instrument of co-operation. It was argued above that the Handbooks represent the sharing of information by national policymakers in a rather uncritical manner. The Commission has also selected some projects focussing on various aspects of integration, which include research on "integration and naturalisation tests". There would seem to be a real risk therefore that these modules would contain elements which would support national restrictive and coercive conceptions of integration, which contradict the EU's own basic principle of a two-way definition of integration. Even if the European modules were to explicitly exclude the idea of using these modules in a mandatory fashion, the focus on such 'modules' provides support for a conception of integration as achieved through a finite programme, course or module undergone by the immigrant. This further erodes long-term, social inclusion visions of integration involving both the immigrant and the host society.

5.4 The EU Framework on Integration: A Largely Inclusive, Two-Way Integration Paradigm

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- towards the identification of joint practices and European modules to support the integration process, including essential elements such as introductory courses and language classes, a strong commitment by the host community and the active participation of immigrants in all aspects of collective life,
- towards the development of core indicators in a limited number of relevant policy areas (e.g. employment, education and social inclusion) for monitoring the results of integration policies, in order to increase the comparability of national experiences and reinforce the European learning process,
- for improved consultation with and involvement of civil society, taking into account integration needs in various policy areas and making use of the European Integration Forum and the European website on Integration,
- to enhance democratic values and social cohesion in relation to immigration and integration of immigrants and to promote intercultural dialogue and contacts at all levels. (Stockholm Programme, at 65.)

The soft law instruments discussed above represent an evolving EU policy on integration. As regards the conceptual foundations of this integration policy, despite criticism of the CBPs dealing with migrants' responsibilities in the integration process,[82] on the whole the relevant instruments propose an inclusive and participatory form of integration centred on the idea of a positive two-way process involving input from both immigrants and members of the host society. It is certainly arguable that the policy documentation is becoming more restrictive. Increasingly prevalent references to the duties of the migrant in the integration process and the onus on the migrant to adopt the 'fundamental values' of the EU and those of the Member States can be seen as representing a shift away from the Tampere paradigm of integration as fair and equal treatment towards a model which requires the individual migrant to remake him or herself to resemble an idealised version of existing members of the imagined political community. This is particularly the case in the policy documents emanating from the Council and the Ministerial Conferences, and in the European Pact on Asylum and Immigration, examined above.

Despite these developments, overall it must be conceded that the Framework on Integration by and large represents an attempt to aid policymakers in the construction of two-way, holistic integration policies. The policy documentation does not in itself conceive of integration as a mandatory tool of immigration law or advocate the use of integration 'measures' or 'conditions' (although it does seem to accept the legitimacy of these measures and conditions in some parts). The ultimate aims of integration as the achievement of equal opportunities and participation are consistently emphasised. There has also been a move towards trying to include civil society and other representative voices in the coordination of integration policy.[83] Thus, while elements of different paradigms co-exist within the policy

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[82] Sergio Carrera argues that "CBPs 2 (respect for the basic values of the Union) and 4.1 (basic knowledge of the host society's language, history and institutions is indispensable for integration) alter how integration is conceived in the EU framework. They are difficult to reconcile with the two-way process principle (CBP 1)." Sergio Carrera, *Benchmarking Integration*, note 12, at 15. It is difficult to see how this argument stands up to scrutiny as it is hard to see how these minimalist obligations could be seen as not falling within the remit of a 'two-way' process involving commitment on the part of the host society and the immigrant.

[83] Stockholm Programme, at 65.

framework, overall a broad-based and inclusive paradigm predominates, which resembles in many respects the working definition of integration set out in the first chapter of this thesis.

In the final analysis, whether or not the policy instruments examined above help to promote an inclusive and human rights-based concept of integration within the EU, the real test for the EU Framework on Integration is whether it can be said to inform the content of binding legislative measures in the field of immigration law, which probably "have more influence on the actual integration on the societies of member states than the handbooks, lists of good practices, integration websites or National Contact Points figuring in the most recent EU documents on integration policy."[84] Is the broadly positive, two-way approach to integration envisaged in the Framework translated into binding legal measures? In particular, are the aspirations contained in the Common Basic Principles translated into real measures to promote integration or are they mainly symbolic? The next section will examine the assertion that:

> The Common Basic Principles are complementary to and in full synergy with the Community legislative instruments on the admission and stay of legally residing third-country nationals concerning family reunion and long term residents ... .[85]

5.5 Integration of TCNs in EU Immigration and Asylum Law

The links between immigration law and integration policy have been consistently emphasised by the Commission and the Council. The Third Report on Migration, for

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[84] Kees Groenendijk, "Integration Policy and Community Law" in Sergio Carrera (ed), *The Nexus Between Immigration, Integration and Citizenship in the EU* (CEPS, 2006), 7, at 8.

[85] Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General Programme "Solidarity and Management of Migration Flows", OJ L 168/18.

example, notes that the link between legal migration policies and integration strategies needs to be reinforced, and that consolidating the legal framework for the conditions of entry and stay of TCNs is essential to the development of a coherent EU approach to integration.[86] As will be explored in Chapter 9, while immigration law measures are not necessarily drafted with the specific intention of addressing integration or creating an immigrant 'other', that is often their effect. EU immigration law measures reveal much about the position of TCNs in the EU legal order and have a powerful impact on the process of integration. Five main Directives have been adopted to date in the field of immigration to the EU: Directive 2003/86/EC on the right to family reunification;[87] Directive 2003/109/EC on a long-term resident status for third country nationals who have legally resided for five years in the territory of a Member State;[88] Directive 2004/114 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service;[89] Directive 2005/71 for the facilitation of the admission of researchers into the EU;[90] and Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.[91] In terms of asylum law, the centrepiece of the Common European Asylum System is Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.[92]

This part of the chapter will begin by assessing two of these measures with close links to integration: the Family Reunification Directive ("FRD") and the Long-Term Residents Directive ("LTRD"). It should be noted that Ireland and the UK opted out of both these

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[86] *Third Annual Report*, note 56, at X.

[87] "The Family Reunification Directive", or "FRD".

[88] "The Long-Term Residents Directive", or "LTRD".

[89] "The Students Directive".

[90] "The Researchers Directive".

[91] "The Blue Card Directive".

[92] The "Qualification Directive".

Directives and are not therefore bound by their terms.[93] Nevertheless, an examination of these Directives is key to understanding the approach to integration at the EU level. It will be argued that while the FRD and LTRD formed part of the Tampere Programme's drive towards approximating the statuses of EU citizens and TCNs, the content of the Directives and the concept of integration contained within them mutated significantly during the course of Council negotiations, with the end result that the meaning and function of the concept of integration contained in these Directives diverges from the way it is conceived in the Tampere Programme.[94] The brief examination of these two Directives reveals a gap between the holistic vision of integration contained in the Common Basic Principles and Framework on Integration and the actual legally binding acts being produced by the EU institutions. The Students, Researchers and Blue Card Directives (of which Ireland opted in to the Researchers Directive and the UK did not opt in to any) will then be briefly touched on to illustrate that, in contrast to the position under the FRD and LTRD, the fair and equal treatment paradigm of integration has been employed in practice in relation to these special categories of TCN. Finally, the legal concept of integration in the context of refugees and beneficiaries of subsidary protection will then be addressed, by looking first at the relevant provisions of the Qualification Directive and then the position of refugees and beneficiaries of subsidiary protection under the general immigration law measures.

It will be seen that, in terms of integration, the broad legal category of TCNs is split in a dichotomy between beneficiaries of international protection and economic migrants. Refugees occupy a privileged position in relation to access to integration-related rights, as they do in international law and also in most domestic legal systems. Beneficiaries of subsidiary protection similarly enjoy privileged treatment in comparison to other TCNs, but not to the same extent as refugees. Within the category of economic migrants, certain sub-categories benefit from legal rules at EU level which grant them near-equality with nationals

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[93] The UK and Ireland secured an opt-out from the entire Title IV EC with the "Protocol on the position of the United Kingdom and Ireland" annexed to the Treaty of Amsterdam (Protocol 4 annexed to the Treaty of Amsterdam). Both have the possibility to opt in to the adoption of any measure adopted under Title IV within 3 months of a new proposal (Article 3 of the Protocol).

[94] See Sergio Carrera, *Benchmarking Integration*, note 12, at 9.

of Member States in certain areas. Overall, it will be shown that the legally binding measures relating to integration contain elements of different paradigms. However, the dominant vision of integration contained in the immigration law framework contrasts with that contained in the policy instruments as set out above. The EU legitimates and reinforces discriminatory practices of Member States by utilising the concepts of integration 'conditions' and 'measures' in its legislation, and EU law's differentiation between different categories of TCNs weakens the position of TCNs as a group. Overall, the transformative potential of EU law in the integration sphere is not realised in the case of TCN migrants.

5.6 Integration as a Mandatory Process in the Family Reunification and Long-Term Residents Directives[95]

5.6.1 The Family Reunification Directive

Family reunification is a key dimension of integration, and will be explored in detail in Chapter 9.[96] As the FRD itself states: "Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion."[97] It is also a human rights issue, as is clear from the analysis of the international legal framework for integration contained in the previous chapter.[98] However, for states, a tension arises between the human rights dimension of family reunification and its significance as an immigration issue. This tension can be described as follows:

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[95] See generally, the detailed analysis contained in Sergio Carrera, *In Search of the Perfect Citizen*, note 12, at 102.

[96] On the interaction of family reunification and integration, see 9.1.

[97] Family Reunification Directive", at Recital 4.

[98] In addition to the discussions in the previous chapter, see Ryszard Cholewinski, "Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right" (2002) *EJML* 271.

> Family reunification (can) be seen, on the one hand, as a humanitarian or human rights issue, and, on the other, as an immigration matter which might place a strain on the labour market and social facilities, such as housing, education and medical facilities.[99]

This tension underlies the FRD and gives rise to the contradictory approaches contained within the Directive which will be identified below.

The Amsterdam Treaty provided in Articles 63(3) and (4) for the power to adopt measures in respect of TCNs including family reunification. The Directive represents an attempt to realise the fair and near-equal treatment goals set by the Tampere Council.[100] The initial proposal for the Directive was made by the Commission in 1999,[101] and, after two revised proposals were presented,[102] the Directive was finally adopted in 2003. It codifies the right to family reunion, defines who can apply for family reunification, sets out the conditions for admission, gives a certain level of protection against expulsion and provides family members with certain rights of access to the labour market, education and equal treatment. The provisions of the Directive have been analysed in detail elsewhere[103] and will not be re-examined here. It is sufficient for present purposes simply to observe that the scope and the substance of the Directive were watered down in the course of the legislative process and the conditions for admission expanded, such that the final Directive "places

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[99] Gisbert Brinkmann, "Family Reunion, Third Country Nationals and the Community's New Powers", in Elspeth Guild and Carol Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart Publishing, 2001), 241, at 243.

[100] See the Family Reunification Directive, at Recital 3.

[101] Proposal for a Council Directive on the right to family reunification OJ C 116 E/66.

[102] Revised proposals for a Council Directive on the right to family reunification, OJ C 62 E/99 and OJ C 203 E/136.

[103] See for example, Helen Oosterom-Staples, "The Family Reunification Directive: A Tool Preserving Member State Interest or Conducive to Family Unity", in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing, 2007) 234. See also Elspeth Guild, *The Legal Elements of European Identity*, note 4, at 119.

many objects of a variety of different types in the place of (third country nationals') family reunification",[104] and "primarily serves as a means to preserve Member States' interest".[105] The analysis here will be limited to the approach (or indeed, approaches) to integration embodied in the Directive.

As a measure in itself, the Directive is a positive step for integration, providing TCN national immigrants with an EU law basis for the enjoyment of family life within the EU, thus bringing their status closer to that of EU citizens; and a legal status for family members encompassing a level of access to the institutions of the host society including the labour market and the education system. A positive, participatory concept of integration, reflecting that contained in the policy framework for integration, is contained in the numerous references to integration in the preamble recitals. Recital 3 refers to the Tampere objective of an integration policy linked to rights comparable to those of EU citizens; Recital 4, for example, recognises that family reunification facilitates integration by providing socio-cultural stability; and Recital 15 underlines that the integration of family members must be promoted by granting them a status independent of that of the sponsor, and access to education, employment and vocational training.

However, other references to integration inserted by the Member States during the course of the legislative process espouse a contradictory vision of the concept of integration, its meaning and function. The last subparagraph of Article 4(1) allows Member States the possibility of derogating from the general obligation to authorise the entry and residence of minor children, providing that Member States may verify that children over the age of 12 travelling independently meet a condition for integration laid down in national legislation. This provision was inserted at the insistence of Austria, Germany and the Netherlands in the late stages of the negotiating process.[106] Recital 12 provides the 'justification' for this provision, stating that it is "intended to reflect the children's capacity for integration at early

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[104] Elspeth Guild, *The Legal Elements of European Identity*, note 4, at 123.

[105] Helen Oosterom-Staples, note 103, at 487.

[106] See Kees Groenendijk, "Legal Concepts of Integration in EU Migration Law" (2004) 6 *EJML* 111.

ages and shall ensure that they acquire the necessary education and language skills in school." The notion of integration is therefore turned on its head and used not as a means of inclusion, but as a potential barrier to family reunification. In addition, the rationale for the provision seems to be assimilationist in nature: the younger a person is, the easier it will be to make them 'the same' as members of the host society.

This subparagraph of Article 4(1) formed one of the bases for the annulment procedure initiated against the Council by the European Parliament.[107] In its decision upholding the validity of the Directive, the Court of Justice ("CJEU") rejected the Parliament's arguments that the provision violated international law, particularly the European Convention on Human Rights ("ECHR") and the UN Convention on the Rights of the Child ("CRC"). It found that the relevant international instruments, while stressing the importance of the best interests of the child, did not create an individual right for family members to be allowed to enter the territory of a State. Furthermore, the Court emphasised that these international instruments leave a margin of appreciation to States when assessing an application for family reunification. The Court seemed to approach the issue from the viewpoint that the FRD, overall, constitutes a specific restriction of this margin of appreciation of Member States, and that the final subparagraph of Article 4(1) represents one area in which the Member States' margin of appreciation in respect of family reunification under international law remains untouched.[108] The Court also considered whether the integration condition and

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[107] Case C-540/03 *European Parliament v Council* [2006] ECR I-5769. Also challenged were Article 4(6) which permits Member States to refuse reunification to children over the age of fifteen in certain circumstances, and Article 8, which allows a waiting period of two or three years for family reunification, depending on the circumstances. For commentary on this decision, see Eleanor Drywood, "Giving with One Hand, Taking with the Other: Fundamental Rights, Children and the Family Reunification Decision" (2007) 32(3) *ELRev* 396; Martin, "Comments on *European Council v Parliament* (2007) 9(1) *EJML* 148; and Rick Lawson "Family Reunification and the Union's Charter of Fundamental Rights, Judgment of 27 June 2006, Case 540/03" (2007) 3 *European Constitutional Law Review* 324.

[108] Case C-540/03 *European Parliament v Council* [2006] ECR I-5769, at para. 60 of the judgment which states as follows: "Going beyond those provisions (of international law), Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since

age limitation violated the right to respect for family life contained in Article 8 ECHR, and concluded that it did not, finding that integration can in itself constitute a "legitimate aim" for a restriction of right to family life under Article 8(2) ECHR, and accepting the Council's logic that the provision is intended "to reflect the children's capacity for integration at early ages and is to ensure that they acquire the necessary education and language skills in school."[109] Importantly, the Court found that integration conditions do not violate the ECHR or the CRC *per se*. Furthermore, it held that integration could be a valid rationale for the imposition by a Member State of a residence condition and/or a waiting period prior to family reunification, as is permitted under Article 8 of the FRD.[110]

Nonetheless, this seminal judgment recognises the binding effect of the ECHR, the CRC (for the first time) and other international human rights norms in EU law through the general principles of EU law and underlines the limits that this places on Member States' discretion in using derogations contained in EU immigration law. On this basis, the Court laid down a minimum standard in respect of the concept of integration which may be employed by Member States in determining the nature of integration conditions, holding that:

> The fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights. The Member States which wish to make use of the derogation cannot employ an unspecified concept of integration, but must apply the condition for

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it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation."

[109] Case C-540/03 *European Parliament v Council* [2006] ECR I-5769, at para. 67.

[110] The Court found that the provision "does not have the effect of precluding family reunification, but preserves a limited margin of appreciation for Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration." (para. 98).

integration provided for by their legislation existing on the date of implementation of the Directive ... .[111]

The Court also ruled that any integration condition should have, in light of recital 12 of the FRD, the general objective of facilitating integration by making family life possible through reunification. The Court thus laid down a minimum standard for integration conditions used by Member States in implementing the FRD. The Court's concept of integration in this context was rooted in the two-way inclusive conception expressed in the preamble of the FRD rather than in a vision of integration as a tool of immigration control. This vision was also evident in the subsequent judgment of the CJEU in *Chakroun*,[112] which confirmed that authorisation of family reunification was the rule under the Directive and that derogations contained therein must be interpreted strictly.[113]

Despite these positive aspects, the judgment of the Court also highlights the gap between the aspirational concept of integration presented within the Framework on Integration and the actual legal constraints on Member States' adoption of binding measures connected with integration. In the view of the CJEU, legally binding integration measures are ultimately constrained only by a minimalist obligation to respect fundamental rights and international law as filtered into the EU legal order through the general principles of European law. In addition, while the CJEU's conclusion that integration conditions do not of themselves necessarily constitute an infringement of the right to family and private life contained in

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[111] Case C-540/03 *European Parliament v Council* [2006] ECR I-5769, para. 70.

[112] Case C-578/08 *Chakroun* [2010] ECR I-0000.

[113] On this basis, the CJEU held that Article 7(1)(c) of the Family Reunification Directive precludes Member States from adopting rules in respect of family reunification which result in reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family. This is the case even if the sponsor, given the level of his resources, will nevertheless be entitled to claim special assistance. Secondly, the Court found that the Family Reunification Directive precludes national legislation which, in applying the income requirement set out in Article 7(1)(c) of the FRD, draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State.

Article 8 ECHR is correct, the endorsement of the use of integration conditions and measures does not sit well with the European Court of Human Rights' normative development of integration in the sense of a barrier to deportation, as traced in the previous chapter. The CJEU's analysis certainly does not constitute a radical approach to integration or to the legal boundaries of Member State approaches to integration.

A second express reference to integration in the body of the FRD is contained in Article 4(5). Article 4(5) relates to restrictions which Member States may place on the admission of spouses. It states:

> In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her.

It is difficult to see the logic behind this provision. First, ensuring integration and preventing forced marriages are surely separate issues and it is not clear why they are put together in this way to justify age restrictions for the admission and residence of spouses. It is also difficult to see how the age of the spouse could impact on their ability to integrate. As Groenendijk observes, the reasoning here appears to be diametrically opposed to that underlying Article 4(1).[114] While children are expected to integrate better when they are younger, spouses are expected to integrate better when they are older. This internal inconsistency adds to the incoherency of the approach to integration contained in the Directive.

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[114] Kees Groenendijk, "Legal Concepts of Integration in EU Migration Law", note 106, at 119. He adds that this provision was inserted at the final stage of negotiation in the Justice and Home Affairs Council of 27 February 2003 at Dutch or German initiative, and that it created room for the introduction of this rule in Dutch law. This contradiction is also criticised by Dora Kostakopoulou, Sergio Carrera and Moritz Jesse in "Doing and Deserving: Competing Frames of Integration in the EU", in Elspeth Guild, Kees Groenendijk and Sergio Carrera, *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009), 167, at 180. They argue that this introduces a paradoxical conception of integration.

Finally, Article 7(2) allows Member States to require TCNs to comply with integration measures,[115] without indicating the types of measures with which compliance might be required. The distinction between integration 'conditions' and integration 'measures' is not altogether clear, although it seems that integration 'measures' are probably imposed when family reunification has already been granted rather than as a condition of family reunification imposed prior to the admission of the family migrant(s). The provision is silent on the nature of the sanctions which could be imposed for failure to comply with integration measures. Although not as draconian as the integration "conditions" allowed by Article 4(1), this provision eschews the central idea put forward in the soft law instruments discussed above of a holistic approach to integration based on participation and co-operation, in favour of a conception of integration as a condition which may be imposed by Member States. This places the onus of integration solely on the migrant, in contrast to the soft law instruments.

The concept of integration is used as an instrument of exclusion in the FRD, contrary to the dominant vision of integration as set out in the soft policy mechanisms as discussed above. This leads to the incongruous situation whereby a legal instrument which is intended among other things to facilitate the integration of TCNs also allows for the use of the concept of integration as a barrier to their families' access to the EU. The appearance of these conflicting ideas of integration renders the underlying approach to integration incoherent and unsatisfactory. Guild goes further than this, suggesting that:

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[115] The second sentence of Article 7(2) provides that "With regard to the refugees and/or family members of refugees referred to in Article 12 the integration measures referred to in the first subparagraph may only be applied once the persons concerned have been granted family reunification." Integration policy regarding refugees will be discussed further below.

> Identity politics based on integration are used to justify punish third country nationals for having foreign family members. Implicit is the argument that they should abandon their foreign identities (and families) and start again.[116]

While this statement may seem extreme, it must be acknowledged that the substantive provisions on integration in the FRD come close to presenting at best an assimilationist model whereby diversity is rejected and TCNs must 'fit in', in a way in which the Member State is free to define, or stay out and at worst an exclusionary model. Under the FRD, integration becomes a mechanism by which Member States can retain a degree of control over immigration conditions.[117] It is certainly fair to say that Member States interests' in maintaining control of immigration, and the restrictive attitude of some states to the concept of integration, prevailed over the holistic vision of integration contained in the Framework on Integration.

5.6.2 The Long-Term Residents Directive

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[116] See Elspeth Guild, *The Legal Elements of European Identity*, note 4, at 123.

[117] The problems with the implementation of the Directive, illustrating Member States' diverse approaches to family reunification and their reluctance to concede discretion in this sphere, are set out in the Commission's Report on its implementation, which states that "the harmonisation of national legislation on family reunification remains rather limited," and that "in certain cases, the transposition or the application of the directive has been incorrect". While it should be noted that the Report finds that in practice only a few Member States have introduced integration conditions, this does not detract from the significance the relevant provisions have in terms of the conceptions of integration contained in EU law. Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the Right to Family Reunification, 9 October 2008, COM (2008) 610 final. On the implementation of the FRD in Sweden, Germany, Denmark and the Netherlands, see Anja Wiesbrock, *Legal Migration to the European Union*, note 4, at 363.

The acquisition of a secure legal status and equality of treatment are often characterised as two of the prerequisites for successful integration.[118] This was acknowledged in the Tampere Programme, which – as discussed above - envisaged that long-term resident TCNs be granted a uniform set of rights "as near as possible" to those enjoyed by EU nationals, as part of a more vigorous integration policy. The LTRD is an effort to fulfil this mandate and the rationale for the Directive is therefore inextricably linked to integration. As the preamble indicates:

> In order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive.[119]

The Directive, the background and provisions of which have been discussed in detail elsewhere,[120] has three key dimensions. First, TCNs who have legally resided in a Member States for five years are entitled to a special secure residence status, which can only be

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[118] See for example Jan Niessen, "Integration, Citizenship and the Benchmarking of Integration in the EU", in Sergio Carrera ed, *The Nexus between Immigration, Integration and Citizenship in the EU* (CEPS, 2006); Kees Groenendijk, "Legal Concepts of Integration in EU Migration Law", note 106; and Thomas Gross, "Integration of Immigrants: The Perspective of European Community Law" (2005) 7 *EJML* 145.

[119] Recital 12. Recital 4 also points out that "(t)he integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty."

[120] See for example Kees Groenendijk, "The Long-Term Residents Directive", in Anneliese Baldaccini, Elspeth Guild and Helen Toner, *Whose Freedom, Security and Justice?EU Immigration and Asylum Law and Policy* (Hart Publishing, 2007), at 429; Sonja Boelaert-Suominen, "Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals who are Long-Term Residents: Five Paces Forward and Possibly Three Paces Back" (2005) *CMLR* 42; Louise Halleskov, "The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?" (2005) 7(2) *EJML* 181.

withdrawn on certain limited grounds.[121] Secondly, persons with this status are entitled to equal treatment as nationals in a range of areas such as employment, education, social security, tax advantages and freedom of association (this principle of equal treatment is subject however to the possibility of significant derogations in a number of areas).[122] Finally, TCNs are granted a conditional right to free movement within the EU.[123] As with the FRD, the adoption of the LTRD in itself represents an improvement on the legal position of TCNs residing in the EU. The Directive strengthens the position of TCNs in EU law and from an integration perspective, the creation of a secure status which brings TCNs closer to the privileged status enjoyed by citizens of Member States, (particularly as regards the right to free movement) reflects a positive concept of integration involving a process of legal and social inclusion of immigrants in the structures of the host society.

However, as with the FRD, the inclusive concept of integration underlying the LTRD was manipulated in the course of the negotiating process by Member States attempting to maintain a degree of control over the treatment of TCNs. The clause on integration laid down in Article 5(2), which was inserted primarily as a result of strong advocacy on the part of Germany, Austria and Holland,[124] provides a good example of this.[125] Article 5(2) provides that as one of the conditions for acquiring long-term resident status, "Member States may require TCNs to comply with integration conditions, in accordance with national law." No definition of an "integration condition" is provided and no limitations are set on the extent or nature of the conditions which Member States may set.[126] Thus, in a similar

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[121] See Long-Term Residents Directive, Articles 4-10.

[122] Long-Term Residents Directive, Article 11.

[123] Long-Term Residents Directive, Chapter III: Residence in other Member States.

[124] Kees Groenendijk, "Legal Concepts of Integration in EU Migration Law", note 120, at 120.

[125] The provision has been described as the "Achilles heel" of the Directive. Sonja Boelaert-Suominen, note 120, at 1023 and Kees Groenendijk, "The Long-Term Residents Directive", note 120, at 442.

[126] This, combined with the absence of a standstill provision on this issue, leads Boeleart-Suominen to the conclusion that "(T)he spectre of Member States placing and continuously moving the bar of integration requirements so high that certain third-country nationals may simply be unable to obtain the desired secure legal status, may not be far-fetched. The Commission and the CJEU will have to be vigilant to ensure that Article 5(2) is not used as a vehicle to erode the basic rationale of the Directive: to promote the integration of

manner to Article 4(1) of the FRD, integration is inverted and used as an instrument of exclusion and assimilation. The assimilatory aim of such integration conditions is even clearer here than in the case of Article 4(1), as in the case of the LTRD, the TCN has already legally resided in the Member States for five years, and therefore must have attained a certain level of integration in the host society already. Integration is not to be measured simply through residence and participation in the host society for a period of time, implying that cultural integration is also required.

Integration "measures" also feature in the LTRD as a condition that may be placed on long-term resident TCNs' right to free movement within the EU once long-term resident status has been obtained. Article 15(3) provides that "Member States may require third-country nationals to comply with integration measures, in accordance with national law." Such integration "measures" cannot, however, be applied where the TCN concerned has already been required to comply with integration conditions in order to be granted long-term resident status, in accordance with the provisions of Article 5(2).[127] This at least removes the risk of TCNs being required to undergo multiple integration tests and measures. Finally, even if the person has passed integration conditions in the first Member State (in which they obtained long-term resident status), they may still be required to attend language courses in the second Member State. Overall, Article 15(3) could constitute a significant obstacle to the free movement of long-term residents and it stands in stark contrast to the free movement rights afforded to EU nationals. This undermines the objective of the Directive as a whole to ensure that long-term residents enjoy rights which are "as near as possible" to those of EU citizens.

In summary, while the LTRD contains many positive aspects and is, in principle, to be welcomed, the above analysis reveals a tension between the overall aims of the Directive and the limitations contained in its specific provisions. The most striking example of this is

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third-country nationals who have been long-term residents in EU Member States". (at 1023). For an analysis of the way in which this has been implemented in Germany, the Netherlands, Sweden and Denmark, see Anja Wiesbrock, *Legal Migration to the European Union*, note 4, at 343.

[127] Article 15(3), second subparagraph.

Article 5(2), which raises the possibility of the paradoxical situation arising whereby "an integration requirement may turn out to be the main obstacle to the full effectiveness of a Directive aiming at the integration of long-term immigrants".[128] In this Directive, as well as in the FRD, an undefined concept of integration is inserted by Member States as a tool to retain a measure of national control over the status of long-term resident TCNs. However, the concept of integration employed by Member States in implementing the LTRD must respect the boundaries set by the CJEU in *European Parliament v Council*.[129]

At a more fundamental level, the LTRD in fact confirms and perpetuates the differential treatment of TCNs in the EU legal framework which is inimical to integration. The provisions on equal treatment laid down in Article 11 have been criticised as embodying a low minimum standard and falling far short of the Tampere commitment to "near-equality", primarily due to the limitations placed on the right of access to employment and the right to social benefits.[130] The Directive as a whole, perhaps unsurprisingly, does not represent a move away from the assumption that there is a fundamental inequality between TCNs and EU nationals, particularly as regards the right to free movement. Such a move would have been easiest to achieve in this relatively well-accepted category of long-tern resident TCNs. In this sense, Halleskov's assertion that "(b)y failing to grant Long Term Residents the foundation necessary for their full integration into the Community – i.e. the right to equal treatment with nationals – the Council signals that the Member States still consider TCNs, even after they have resided and worked legally in a Member State for more than five years

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[128] Kees Groenendijk, "The Long Term Residents Directive", note 120, at 442.

[129] [2006] ECR I-5769.

[130] For a detailed analysis of the equal treatment provisions, see Louise Halleskov, note 116. Article 11(1)(a) contains a broad public service exception, and an optional derogation clause is enshrined in Article 11(3)(a) of the Directive, whereby Member States "may" retain restrictions to long term residents' access to employment "in cases where, in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens". As to social benefits, Member States may restrict social benefits to 'core benefits' under Article 11(3).

and fulfilled the numerous conditions laid down in the Directive, to be second class citizens"[131] is justified.

5.7 A Fair and Equal Treatment Paradigm of Integration for Special Categories of TCNs

Outside of long-term residents, some selected categories of TCNs have been afforded certain free movement rights and the right to enjoy near equal treatment and non-discrimination with nationals of the receiving state. These are students, researchers and highly skilled workers dealt with under the Students Directive, the Researchers Directive and the Blue Card Directive respectively (of which Ireland opted into the Researcher's Directive). The most significant of these is the Blue Card Directive, which aims to establish a common procedure for admission and residence of more than three months for highly skilled workers and their family members. The Directive affords Blue Card holders equal treatment with nationals of the Member State issuing the Blue Card as regards a wide range of socio-economic rights and provides for freedom of movement within the EU (for the purpose of highly qualified employment) after eighteen months of residence in the first Member State as an EU Blue Card Holder. The Researchers' Directive aims to establish a common procedure for the admission of third-country researchers to the Member States for more than three months, provides for a degree of mobility of Member States and equal treatment as regards recognition of qualifications, working conditions, certain branches of social security, tax benefits and access to goods and services. The Students' Directive is the least far-reaching of the three Directives. It outlines the conditions of admissions and procedural rules regarding the admission of TCNs for the purpose of studies, pupil exchange, unremunerated training or voluntary service, again providing for a certain level of intra-EU mobility for such students and access to economic activity in the host Member State (although the situation of the labour market in the host Member State may be taken into account, and Member States can determine the maximum number of hours allowed for

[131] Louise Halleskov, note 120, at 201.

such an activity). Students are not, however, afforded equal treatment entitlements in the same way as researchers and Blue Card holders.

Integration conditions and measures are not permitted as a pre-requisite to access to the intra-EU mobility or equal treatment provided for by the Directives. In fact, integration does not feature as a normative concept at all in the framework of entitlements provided by the Directives. In addition, these Directives provide for free movement and equal treatment (to varying degrees) in a way such that the status of the selected categories of TCNs is brought closer to that of EU migrant, narrowing the rights gap between the two.[132] Highly skilled workers in particular are given special treatment in comparison to other categories of TCNs in a number of key integration areas. Family reunification is made easier for holders of Blue Cards by way of derogations from certain provisions of the FRD, the most significant of which in the context of integration is the derogation from the last subparagraph of Article 4(1) and Article 7(2), whereby "the integration conditions and measures referred to therein may only be applied after the persons concerned have been granted family reunification".[133] This means that integration cannot be used as a barrier to access to the right to family reunification, and constitutes a tacit acknowledgement that Articles 4(1) and 7(2) permit integration to be used by Member States as a tool of migration control, and a 'push factor'. In addition to the special treatment of Blue Card Holders in relation to family reunification, holders of the status can accumulate periods spent in

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[132] It is however arguable that the limited scope of the mobility provisions and their restrictive application in the Member States constitutes a missed opportunity to generate full inclusiveness of TCNs in the internal market. Wiesbrock argues that the raison d'etre of the Directives is undermined by subjecting TCNs to numerous, nationally-determined requirements. Anja Wiesbrock, "Free Movement of Third Country Nationals in the European Union: The Illusion of Inclusion" (2010) 35(4) *Eur L Rev* 455.

[133] Article 15(3), Blue Card Directive. Article 15 deals with the position of family members and lays down a number of derogations to the Family Reunification Directive, including that family reunification shall not be made dependent on the requirement of the Blue Card holder having reasonable prospects of obtaining the right of permanent residence and having a minimum period of residence (by way of derogation from Article 3(1) and 8 of the FRD), and that the duration of validity of the residence permits of family members shall be the same as that residence permits issued to that of the residence permits issued to the EU Blue Card holder insofar as the period of validity of their travel documents allow it.

different EU countries for the purposes of obtaining long-term resident status, provided certain conditions are fulfilled – something which is not possible for any other category of migrant.[134]

These Directives enshrine a conception of integration of fair and equal treatment combined with access to integration-related rights, which is closer to that in use in the policy Framework on Integration than that contained in the FRD and LTRD. In fact, they represent a concept of integration which comes close to that enshrined in EU law in respect of EU citizen migrants (as examined below). The Directives enshrine a fair and equal treatment paradigm of integration along the lines set out in the Tampere Programme. This being said, however, it is clear from the preambles of these Directives that the underlying rationale for the approach taken is the economic interest of the Union rather than a concern with the rights or integration of TCNs. In addition, the personal scope of the Directives is very narrow and thus this parallel integration discourse to that contained in the FRD and LRTD affects only a very small pool of TCNs. The concept of integration represented in the Directives is not therefore strong enough to balance out the strong paradigm of integration as a mechanism of immigration control as enshrined in the LTRD and FRD. In addition, a gap is created between highly educated, highly skilled migrants and those with those in lower paid jobs with less education who are targeted for integration as a mandatory legal process and do not benefit from the fair and equal treatment paradigm, turning the idea of integration as a means of social inclusion on its head in the process.

5.8 Integration of Refugees and Beneficiaries of Subsidiary Protection: Access to Integration-Related Entitlements and Facilities

The effective integration of refugees and beneficiaries of subsidiary protection is perceived at EU level to be one of the key challenges facing the Common European Asylum System ("CEAS"), as reflected in the *Policy Plan on Asylum*, which emphasises that the

[134] Article 16, Blue Card Directive.

need to ensure high quality protection standards extends right throughout the asylum process to the full integration of those granted protection.[135] In the previous chapter, it was seen that refugees enjoy an unparalleled range of specific, integration-related, rights in international law. Similarly, in the EU context, refugees and beneficiaries of subsidiary protection benefit from a particular range of rights and entitlements attached to their status, reflecting Member States' wide-ranging obligations under the 1951 Convention. These are contained in Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the "Qualification Directive").[136] Ireland opted in to the Qualification Directive, which is implemented by way of the European Communities (Eligibility for Protection) Regulations 2006 (which should be read together with the Refugee Act 1996). The provisions of the Qualification Directive as they relate to integration will be examined, followed by an assessment of the position of refugees and beneficiaries of subsidiary protection under the provisions of general immigration law discussed in the previous section.

5.8.1 Integration in the Qualification Directive

The Qualification Directive constitutes the centrepiece of the Common European Asylum System, the progressive establishment of which was another of the objectives set by the Tampere Council in 1999. Article 1 states the purpose of the Directive to be to "lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the

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[135] See "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Policy Plan on Asylum-An Integrated Approach to Protection Across the EU", COM (2008) 360 final [SEC (2009) 2029; SEC (2008) 2030)], p. 11.

[136] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304/04.

protection granted".[137] The scope of the qualifying grounds for international protection and the provisions contained in the Directive on exclusion, revocation and *non-refoulement* have been extensively discussed elsewhere.[138] From an integration perspective, the most relevant provisions pertain to the *content* of international protection – *ie* the rights and entitlements flowing from refugee and subsidiary protection status. This section will assess the perspective on integration embodied in the Directive and consider whether the provisions of the Directive facilitate the integration of refugees and persons with subsidiary protection.

Chapter VII of the Directive, which sets out "The Content of International Protection", covers a range of issues impacting on integration. Article 21 provides the most fundamental of protection rights: protection from *refoulement*.[139] The Directive also lays down rules regarding travel documents;[140] access to employment on the same terms as nationals; [141] and entitlements to social welfare, accommodation and social welfare.[142] Refugees are broadly speaking granted the right to equal treatment as nationals with regard to these core entitlements. Articles 23, 24 and 33 are of particular importance in a discussion of integration. Article 23 deals with "Maintaining Family Unity", providing that "Member States shall ensure that family unity can be maintained".[143] In contrast to the position under the FRD, there is no mention of "conditions" or "measures" in the context of Article 23.

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[137] 'International protection' in the context of the Directive means 'refugee and subsidiary protection status' as defined in Articles 2(d) and (f) and expanded upon in Articles 2(c) and (e) respectively.

[138] See for example, Maria-Teresa Bil-Bazo, "Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to Be Granted Asylum", in Anneliese Baldaccini,

Elspeth Guild and Helen Toner, *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing, 2007), 229; and Jane McAdam, "The European Qualification Directive: The Creation of a Subsidiary Protection Regime" (2005) *IJRL* 461.

[139] This protection may only be revoked where a refugee constitutes a danger to the security of the Member State or the community of that Member State. Article 21(2)(a) and (b). Gil-Bazo criticises the scope of the circumstances in which *refoulement* is permitted (*ibid*, at 252).

[140] Article 25.

[141] Articles 26 and 27.

[142] Articles 28, 31 and 29.

[143] Article 23(1).

Member States may only refuse to provide family reunification where the family member would be excluded from refugee status or subsidiary protection,[144] or "for reasons of national security or public order."[145] Article 24 addresses the issue of residence permits, specifying the minimum period of time for which Member States may issue residence permits to beneficiaries of international protection. A minimum of three years for refugees and one year for beneficiaries of subsidiary protection is laid down.[146]

The only provision of the Directive which expressly refers to 'integration' is Article 33 on "access to integration facilities", which reflects Member States' duties under Article 34 of the 1951 Refugee Convention to facilitate refugee integration. Article 33(1) provides:

> (i)n order to facilitate the integration of refugees into society, Member States shall make provision for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes.

Article 33(2) creates a more limited obligation in the case of persons granted subsidiary protection – members of this category will only be granted access to such programmes where Member States "consider appropriate.[147]

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[144] Article 23(3).

[145] Article 23(4).

[146] This at least places refugees and beneficiaries of subsidiary protection in a relatively secure legal position within the host state for a minimum period of time. Nevertheless, this limited validity required of residence permits has led to the concern being expressed that "the non-renewal of permits may become an easy way for Member States to deny protection without having to engage in a formal procedure to withdraw status." Maria-Teresa Gil-Bazo, note 138, at 260. This possibility is expressly adverted to in Article 21(3), whereby Member States may "revoke, end or refuse to renew or to grant the residence permit of (or to) a 'refugee'" who falls under the exceptions in Article 21(2) as discussed above.

[147] According to the UNHCR's report on the implementation of the Directive at least 16 Member States do not differentiate between refugees and beneficiaries of subsidiary protection with respect to access to

The understanding of integration underlying Article 33 reflects the inclusive and participatory conception of integration contained in the CBPs and Framework on Integration. Whereas it was seen above that the FRD and the LTRD use integration as an instrument of exclusion and a condition of admission, Article 33 refers to integration in the sense of a process that is to be commenced once the refugee is installed in the country of asylum, in order to facilitate their participation in society on an equal footing with nationals of the Member State. Integration is thus conceptualised as an entitlement rather than an obligation. This approach fits with UNHCR's definition of refugee integration as a "dynamic and multifaceted two-way process which requires efforts by all parties concerned, including a preparedness on the part of refugees to adapt to the host society without having to forego their own cultural identity, and a corresponding readiness on the part of host communities and public institutions to welcome refugees and meet the needs of a diverse population".[148] Nevertheless, the vagueness of Article 33 leaves it Member States to determine the content and objectives of integration programmes, with UNHCR's report on the implementation of the Qualification Directive illustrating that in practice the integration programmes provided for are sometimes very limited and may cover only language training or financial loans.[149] Several Member States, including Ireland, do not even formally provide for integration programmes for beneficiaries of international protection and in some countries access to integration programmes is reported to be on a discretionary basis.[150] The impact of Article 33 on Member State law and policy appears thus far to have been quite minimal.

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integration facilities (UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, para. 5.5.14).

[148] UNHCR Executive Committee, *Conclusion on Local Integration* (No. 104 (LVI) 2005), preamble and (k). See also UNHCR, Note on the Integration of Refugees in Europe (UNHCR, May 2007).

[149] UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, note 147, para. 5.5.14.

[150] This is the case in Hungary. *Ibid.*, para. 5.5.14.

For the most part, the content of the status recognised to refugees in the Qualification Directive mirrors that of the 1951 Refugee Convention and in relation to some rights - the rights of access to employment, education and healthcare for example - the Directive goes beyond the standards set by the 1951 Convention. Thus it can be said that (aside from the problems posed by the limited minimum period for which a residence permit must be granted) once an individual has been granted refugee status, the rights flowing from this status provide the basic conditions necessary for participation in the society of the country of asylum. One area in which there is a significant lacuna is regarding access to citizenship. Article 34 of the 1951 Convention, which requires state parties to facilitate the naturalisation of refugees, is not reflected anywhere in the Qualification Directive. While it is disappointing that this innovative provision of international law is not taken up on in the Qualification Directive, it is hardly surprising given that the allocation of national citizenship lies firmly within national rather than EU competence. Of greater concern is the limited range of rights extended to those granted subsidiary protection. The status of and standards of treatment to be afforded to beneficiaries of subsidiary protection is a contentious issue, and one which led to persistent divergences between Member States during negotiations on the Qualification Directive.[151] It is arguable that differential treatment of refugees and beneficiaries of subsidiary protection is unjustified given that both groups have been identified as having a genuine, pressing and broadly similar need for protection.[152] From an integration perspective, both categories of persons have comparable needs when they arrive in the host country.

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[151] In addition, as regards the duration of protection, Vedsted-Hansen notes that "it can be assumed that international law leaves (states) a rather wide discretion, in so far as they respect the various prohibitions of *refoulement*". Jens Vedsted-Hansen, "Assessment of the Proposal for an EC Directive on the Notion of Refugee and Subsidiary Protection from the Perspective of International Law", in Daphne Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Bruxelles, 2002), 57, at 77. This applies more generally to the whole of the content of subsidiary protection: unlike in the case of Convention refugees, international law does not spell out specific standards of treatment for beneficiaries of subsidiary or complementary protection. .

[152] Rohl argues that it is "hard to think of a non-discriminatory reason which would justify why they (beneficiaries of complementary protection) should not be granted the same rights and benefits as Convention refugees". See Katherine Rohl, "Fleeing Violence and Poverty: *Non-Refoulement* Obligations Under the

Notwithstanding the arguments in favour of granting equal rights to refugees and beneficiaries of subsidiary protection, the Qualification Directive takes advantage of the discretion afforded by international law on this point. Most strikingly, Article 24(2) provides for a minimum duration of one year for residence permits granted to beneficiaries of subsidiary protection, while refugees must be granted a permit for a minimum of three years.[153] Chapter VII also includes a number of derogations that allow for significantly lower standards of treatment of treatment for beneficiaries of subsidiary protection. States are permitted, under certain conditions, to limit the access of those with subsidiary protection to – *inter alia* – healthcare,[154] employment[155] and integration facilities.[156] The denial of equal access to integration facilities in particular seems illogical.[157] In this sense, the limited rights granted to beneficiaries of subsidiary protection under the Qualification Directive represent a victory of state concerns relating to deterrence and restriction over the facilitation the integration of a group of legally resident vulnerable TCNs.[158] The *Policy*

European Convention on Human Rights", New Issues in Refugee Research - Working Paper No. 111 (UNHCR, January 2005), at 30.

[153] Article 24(1).

[154] Article 29(2) provides that "Member States may limit health care granted to beneficiaries of subsidiary protection to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals".

[155] Article 26(3) provides that regarding beneficiaries of subsidiary protection, the "situation of the labour market" may be taken into account in determining the extent of their access to employment.

[156] Article 33(2).

[157] The European Council of Refugees and Exiles ("ECRE") makes the point that these provisions illustrate "the lack of recognition of the need to promote independence and facilitate the participation of *all* persons in need of protection in all aspects of the economic, cultural, civil and political life of the country of asylum as early as possible." ECRE, "Broken Promises, Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection" (ECRE, 2004), at 20.

[158] That being said, UNHCR's evaluation of the implementation of the Directive shows that in practice few Member States make use of the possibility to differentiate between refugees and beneficiaries of subsidiary protection in terms of the content of the protection granted (despite difficulties with the differing level of protection granted in different Member States). UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, note 147.

Plan on Asylum expresses the Commission's desire to reconsider the level of rights and benefits to be secured for beneficiaries of subsidiary protection, in order to "enhance their access to social and economic entitlements which are crucial for their successful integration".[159]

5.8.2 Integration of refugees and beneficiaries of subsidiary protection in general immigration measures

The previous section outlined the unique range of rights and entitlements attached to refugee and subsidiary protection status in EU law. This section will briefly explore the position of refugees and beneficiaries of subsidiary protection under the general provisions of EU immigration law.

In addition to the importance attached to "maintaining family unity" by Article 23 of the Qualification Directive, refugees are also covered in the FRD. Chapter V sets out specific rules relating to the family reunification of refugees, creating more favourable rules in certain situations in order to take the particular circumstances of refugees into account.[160] Most importantly in the context of the present discussion, refugees are exempted from the controversial integration derogation contained in Articles 4(1), meaning that integration

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[159] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Policy Plan on Asylum-An Integrated Approach to Protection Across the EU* (COM (2008) 360 final), at 6.

[160] Special rules apply concerning documentary evidence of the familial relationship, for example (Article 11). Moreover, with regard to the definition of a 'family member', Article 10(2) states that "Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee". Member States cannot require refugees or their family members to provide evidence that they have fulfilled the requirements under Article 7 (ie accommodation/sickness insurance/stable and regular resources). In addition, Member States cannot require refugees to have lived for a certain period of time before having his or her family members join them (Article 12(2)).

cannot constitute a barrier to family reunification for refugees.[161] As regards the 'integration measures' which Article 7(2) allows to be imposed by Member States, refugees cannot be obliged to comply with integration measures until family reunification has been granted, meaning again that integration measures cannot be used as a barrier to admission of family migrants in the case of refugees.[162] The FRD does not apply to beneficiaries of subsidiary protection.[163]

The LTRD excludes refugees and beneficiaries of protection status[164] from its scope.[165] This was not the case in the original Commission proposal, which only excluded TCNs who had applied for refugee status and whose application was still pending.[166] This exclusion has been termed "the largest and most disappointing omission from the scope of the Directive".[167] In a similar manner to the position under the LTRD, refugees and

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[161] Article 10 provides: "Article 4 shall apply to the definition of family members except that the third subparagraph of paragraph 1 thereof shall not apply to the children of refugees."

[162] Article 7(2) provides: With regard to the refugees and/or family members of refugees referred to in Article 12 the integration measures referred to in the first subparagraph may only be applied once the persons concerned have been granted family reunification.

[163] The Commission reports that in practice, family reunification for non-Convention refugees varies across the Member States (Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the Right to Family Reunification, note 117, at 4). The Commission also states that it is committed to closing this gap in Community law and is considering amending the Qualification Directive in order to do this (at 4). The FRD does not apply to beneficiaries of temporary protection either.

[164] *Ie* subsidiary and temporary protection.

[165] Article 3, Long-Term Residents Directive.

[166] See Article 2(c) of the original proposal. Boelaert-Suominen argues that a good case can be made for interpreting this exception narrowly: for example, in the situation where a third-country national's refugee status ceases, the time spent as a refugee should be counted towards the five-year period of legal and continuous residence required by Article 4(1). Furthermore, family members should be able to rely on the Directive unless they have refugee or protection status themselves. Sonja Boelaert-Suominen, note 120, at 1022.

[167] Steve Peers, "Implementing Equality? The Directive on Long-Tern Resident Third-Country Nationals" (2004) 29(4) *ELRev* 437, at 443.

beneficiaries of international protection are excluded from the scope of the Students' and Blue Card Directives (although they fall within the scope of the Researchers' Directive).[168] It has been argued that these Directives embody a fair and equal treatment paradigm of integration. Overall then, refugees and beneficiaries of subsidiary protection avoid the most restrictive concept of integration as contained in FRD (and the LTRD), but are also excluded from the elements of the fair and equal treatment paradigm of integration contained in the LTRD, Students' and Blue Card Directives.

5.8.3 An integration paradigm for refugees and beneficiaries of international protection?

It can be seen from the above that the position of beneficiaries of protection status in EU law is therefore weaker than might be imagined. While the minimum standards of treatment provided by the Qualification Directive place refugees in particular in a position of near-equality to EU nationals in certain spheres of society and in a privileged position amongst TCNs, beneficiaries of international protection do not fall within the scope of the instrument which provides the most secure legal status along with a conditional right to free movement (ie the LTRD). Overall then, while refugees are not subjected to the concepts of integration as a mandatory element in immigration law, equally EU asylum and immigration law does not really require Member States to take measures towards an acceptance of refugees as long-term members of the societies of EU Member States (by requiring naturalisation or long-term residence, for example). As regards beneficiaries of subsidiary protection, Member States retain under the Directive a wide margin of discretion when it comes to extending integration-related rights and integration facilities to beneficiaries of subsidiary protection. As is becoming a common theme of the analysis in this chapter, there is no real coherent approach to the integration of refugees and beneficiaries of subsidiary protection in EU law.

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[168] Articles 2(a), 2(b) of the Students' and Blue Card Directives, respectively.

5.9 Integration of EU Migrants: Progressive Realisation of Equality

This chapter has concentrated on the EU law and policy framework for the integration of TCNs. "Integration" is rarely discussed as such at EU level in the context of EU migrant citizens and Guild argues that the EU abhors the concept of integration when it comes to its own nationals.[169] Nonetheless, as pointed out in the introduction to this chapter, EU law has had a transformative effect on the way in which EU migrants are perceived in Member States and constitutes a powerful instrument for their integration. Fundamentally, the twin principles of free movement and non-discrimination, as reflected in the Treaties, secondary legislation and case-law, have required Member States to treat EU migrant workers on more or less equal terms as national citizens. The provision of equal social and economic rights for EU workers and their families allows them to make a life for themselves in the host state and claim an equal place in the host society, facilitating the ultimate goal of free movement of persons. EU workers are essentially assimilated to the position of a national citizen – rendering the question of their "integration" almost superfluous. The basic conditions for the free movement of citizens and entitlements in the host state are set out in Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the "Citizenship Directive").[170] The concept of EU citizenship has led to the strengthening of the principle of non-discrimination and facilitated access to integration-related rights for both workers and economically inactive migrants. In particular, the approach of the CJEU in the citizenship cases indicates that access to social benefits must in general be extended to all EU citizens lawfully resident in the host Member State, whether or not the citizen is economically active, as will be seen from the examination of the 'students' cases below.

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[169] Elspeth Guild, *The Legal Elements of European Identity*, note 4, at 124.

[170] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L 158/77.

5.9.1 The role of integration in the interpretation of Regulation 1612/68

"Integration" has played a significant role in the reasoning of the CJEU in cases involving the entitlements of EU migrant workers. Regulation 1612/68 provides a comprehensive array of social rights to workers and their families by guaranteeing equal treatment in respect of access to a broad range of social rights.[171] Under the Regulation, EU nationals are entitled *inter alia* to take up employment in another Member State on the same terms as nationals[172] and to the same social and tax advantages as nationals and equal access to vocational training.[173] Children of a resident worker are also entitled to equal access to the State's educational courses. The CJEU has taken a broad view of what is required of Member States under the Regulation, with integration forming an express part of the rationale for this approach. In *Echternach and Moritz*, the CJEU put this in plain terms:

> The equal treatment, in relation to national workers, to which workers of a Member State who are employed in another Member State are entitled as regards the benefits granted to members of their families, contributes to their integration in the society of the host country, in accordance with the aims of freedom of movement for workers.[174]

The significance of this line of case law is illustrated in *London Borough of Harrow v Nimco Hassan Ibrahim*[175], in which the CJEU concluded that the children of a national of a Member State who works or has worked in the host Member State, as well the parent who is their primary carer, can claim a right of residence in the latter state on the sole basis of

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[171] Council Regulation 1612/68/EEC of 15 October 1968 on freedom of movement for workers within the Community OJ L 257/2.

[172] Article 1, Regulation 1612/68.

[173] Article 7.

[174] Para. 20.

[175] C - 310/08 (not yet reported, Judgment of 23 February 2010).

Article 12 of Regulation 1612/68. That right is not conditional on their having sufficient resources and comprehensive sickness insurance cover in that State, as would be required by Article 7(1)(b) and (d) and (2) of the Citizenship Directive. This decision was based partly on the reasoning that "a contrary conclusion would be liable to compromise the aim of integrating the migrant worker's family into the host Member State".[176]

5.9.2 Integration in the students' cases

Similarly, integration is a significant element of the Court's jurisprudence on access to social benefits for EU citizen students engaged in study in a Member State other than their own. In *Bidar*,[177] the CJEU found that students who are engaged in a course of study in a host member state are entitled to equality of treatment in relation to access to maintenance grants, if they can satisfy reasonable integration conditions which may be imposed by states. The CJEU made it clear that while no right to maintenance assistance for students (and therefore other economically inactive persons) is contained in the Citizenship Directive, such a right could be directly derived from Articles 12 and 18 EC on the basis that such assistance is to be considered a benefit within the scope of the Treaty. The host Member State may require students to demonstrate a certain degree of integration into their society and for this purpose they may demand that students are settled or have resided for a certain period in its territory.

Bidar also left some room for speculation as to what constituted a "degree of integration" and how this could be measured by Member States. Subsequent case law has provided some clarification as to the nature of the integration requirements which may be imposed. In *Forster*,[178] a condition of five years' uninterrupted residence was found to be appropriate for the purpose of guaranteeing that the applicant is integrated into the society of the host

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[176] *Ibid.*, at para. 43.

[177] Case 209/03 *Bidar v London Borough of Ealing* [2005] ECR 1-2119.

[178] C-158/07 [2008] ECR I-8507

Member State. In contrast, in *Morgan*,[179] the requirement of a first stage of studies in the student's Member State of origin was disproportionate as it was not indicative of the degree of integration into the society of the said Member State at the time the grant is applied for. Member States will not, it seems, be allowed to use the integration test as a barrier to the rights of EU citizens exercising their free movement rights under EU law. In addition, it seems that integration is conceived mainly in terms of length of residence. A comparison with long-term resident TCNs is instructive in this regard. As was shown above, long-term resident TCNs are not considered to be integrated by virtue of their length of residence alone - they may also be required to pass integration tests and language tests in order to prove their integration and access long-term resident status.

5.9.3 Integration as a barrier to expulsion for EU migrants

Finally, "integration" is expressly referred to in Article 28 of the Citizenship Directive. Article 28 provides that before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. This mirrors both the ECHR jurisprudence examined in Chapter 4 and, in the Irish context, the factors which the Minister for Justice must take into account in considering an application for leave to remain under section 3 of the Immigration Act 1999. "Social and cultural" integration is probably specified in order to distinguish this type of integration from the integration which is generally deemed to be achieved by EU citizen migrants through length of residence alone. The function of integration in the Citizenship Directive thus contrasts with the express use of "integration" in the FRD and LTRD. In those Directives, it is conceptualised as a potential barrier to admission for TCNs, whereas in the Citizenship Directive it is conceived as a barrier to expulsion.

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[179] Joined cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161.

5.9.4 Integration as inclusion for EU migrants

Overall, EU law relating to the free movement of EU citizens enshrines a vision of integration as the progressive realisation of equal rights. This mirrors the conception of integration under development by the UN human rights treaty monitoring committees, as explored in the previous chapter. In addition, integration is conceived of as primarily dependent on residence and not on assimilation into the culture or values of the host state. It would be contrary to EU law to subject EU workers or their families to integration tests or language proficiency tests, especially prior to admission to a Member State or as a pre-condition to the exercise of free movement. As Kostakopoulou observes, the exercise of the wide range of substantive rights enjoyed by EU workers does not require any transfer of loyalty to the host state.[180] She accurately points out that:

> All this suggests that the Community views the integration of the worker and his or her family into the social fabric of the host state as the end product of equalisation, and not of assimilation into the values and culture of that state.[181]

The thesis that the aim of integration in the context of EU migrants is not to assimilate individuals into the cultural and political values of the host society, but rather to include them in the social and economic fabric of the state, is supported by the decision of the CJEU in *Garcia-Avello*.[182] In this case, the Court refused to accept "integration" as a justification for restricting rights of EU nationals. Mr Garcia Avello, a Spanish national, and his Belgian spouse, Ms Weber, wished that their children's surname be Garcia Weber, in accordance with well-established usage in Spanish law whereby the surname of children of a married

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[180] See Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union* (Manchester University Press, 2001), at 71.

[181] *Ibid.*.

[182] C-148/02 *Garcia-Avello v Etat Belge* [2003] ECR I-11613.

couple consists of the first surname of the father followed by that of the mother. The Belgian government rejected their application to have the children's name registered, stating that that type of application was habitually rejected on the ground that, in Belgium, children bear their father's surname. The government argued that this position was justified *inter alia* on the basis that it contributed to facilitating the integration of the children in Belgium. The Court rejected this claim outright, finding that:

> With regard to the objective of integration pursued by the practice in issue, the practice in issue is, in view of the coexistence in the Member States of different systems for the attribution of surnames applicable to those there resident, neither necessary nor even appropriate for promoting the integration of the nationals of other Member States within their State of residence.[183]

This judgment signals that arguments made to justify restriction of the rights of EU citizen migrant based on integration concerns will be given short shrift by the CJEU, in stark contrast to the position discussed above under the LTR and FR Directives.[184]

5.10 The Status of TCN Family Members of EU Citizens

Having analysed the position of family members of TCNs under the terms of the FRD, it is useful to briefly consider the status of family members of EU migrants. Their legal

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[183] Para 45.

[184] The *Garcia-Avello* ruling was followed in C-353/06 *Stefan Grunkin and Dorothee Regina Paul* ECR [2008] I-07639, in which the CJEU found that "Article 18 EC precludes the authorities of a Member State, in applying national law which uses nationality as the sole connecting factor for the determination of surnames, from refusing to recognise a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth".

position is considerably stronger than that of family members of TCNs.[185] Family members of EU citizens who exercise their free movement enjoy derived rights under EU law regardless of nationality. This means that in practice, TCN family members of citizens of the Union who exercise their free movement rights are entitled to the same treatment as their EU national principal. The Citizenship Directive comprehensively outlines these rights. The class of family members entitled to admission include spouses and registered partners if the host state already gives similar treatment to married couples, direct descendants under 21 or dependent and direct dependent ascendants.[186] They are entitled *inter alia* to work or self-employment.[187] An important innovation of the Directive is to provide family members with an independent right of residence after five years,[188] thus improving their security of status. Furthermore, Article 13(2) protects the right of residence of family members whom are not EU nationals in the event of divorce, annulment of marriage or termination of a registered partnership, in a number of circumstances.[189] In *Metock*,[190] the CJEU confirmed that the provisions of the Citizenship Directive applied to family members of Union citizens irrespective of whether they have previously resided in a Member State, lawfully or otherwise.

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[185] See generally Gavin Barrett, "Family Matters: European Community Law and Third-Country Family Members" (2002) 40(2) *CMLRev* 369.

[186] Article 2, Citizenship Directive.

[187] Article 23, Citizenship Directive.

[188] See Article 18 and, for the administrative formalities, Articles 19-21. Non-EU nationals are given a "permanent residence card" which is to be automatically renewed every ten years, and the validity of the card is not affected by absences of less than two consecutive years.

[189] Article 13(2) provides that the right of residence will not be lost where (a) the marriage or registered partnership had lasted at least three years including one year in the host Member State, or (b) where the spouse who is not an EU national retains custody of the EU citizen's children, or (c) where it is warranted by particularly difficult circumstances such as having been a victim of domestic violence during the marriage/partnership, or (d) where the non-EU national spouse or partner has the right of access to a minor child and where the court has ruled that such access must be in the host Member State, for as long as required.

[190] Case C-127/08, *Metock and Others* [2008] ECR I-6241.

Even for those falling outside the scope of the Citizenship Directive, the concept of EU citizenship has indirectly benefited non-EU national family members of EU citizens, through recent case law's emphasis on the human rights of citizens and particularly the importance of the citizen's right to family life. *Chen*[191] concerned a Chinese woman who came to the UK and subsequently entered Northern Ireland to give birth to her child in order that the child would obtain Irish citizenship. The CJEU, while ruling that Mrs Chen could not be considered a "dependent relative" in order to derive a right of residence through her child's EU citizenship, found that a refusal to grant a right of residence to the parent who was the carer of the child and who had sufficient resources and sickness insurance would render the child's right to residence useless in practice. This reasoning applied whether the parent was an EU national or not.[192]

While in *Chen* the rights of the parent had been linked to the exercise of the EU citizen child of his or her free movement rights, in March 2011, the CJEU extended the reach of the case law even further in its decision in *Zambrano v Office National de l'Emploi (ONEm).*[193] Mr. and Mrs. Zambrano were Columbian nationals who had come to Belgium and had unsuccessfully applied for asylum. The Zambranos subsequently had two children in Belgium, who were granted Belgian nationality. At various points in time, Belgian authorities had rejected their applications for residence permits and had denied Mr. Zambrano unemployment benefits on grounds that he had been employed without a work permit. Mr. Zambrano challenged these decisions. The CJEU agreed with the Zambranos' contention that Article 20 of the TFEU precludes a Member State from refusing a TCN, upon whom his minor EU citizen children are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that TCN, in so far as such decisions deprive those children of the genuine enjoyment of

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[191] Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

[192] See also C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091 and C-112/00 *Carpenter v Secretary of State for the Home Department,* [2002] ECR I-6279 for other examples of where the enhanced focus on family rights indirectly benefited non-EU national family members of Union citizens.

[193] Case C-34/09 *Zambrano v Office National de l'Emploi*, Judgment of the CJEU of 8 March 2011.

the substance of the rights attaching to the status of European Union citizen. This applies even when the child has never exercised his or her right to free movement within the territory of the Member States. This decision constitutes a new departure in EU citizenship law and will significantly limit the discretion of Member States in dealing with parents of children holding the national citizenship of that Member State.

Overall, the position of non-EU family members of EU citizen migrants is strikingly favourable when contrasted with the position of family members of TCNs under the FRD as discussed above. Family members do not face the possibility of being subjected to integration tests in order to join their family in the host country. Furthermore, no length of residence or employment conditions are imposed on the sponsor before the non-EU family members may enter the host state. The law relating to TCN family members of EU citizens, not only those citizens exercising their right to free movement but also (in certain circumstances) those remaining in the country of national citizenship, constitutes a significant constraint on national immigration law. The impact on Irish immigration law and practice of EU law, in particular the seminal decision in *Metock,* will be considered in Chapter 9.[194] In addition, the approach taken by the CJEU in *Zambrano* is in direct conflict with the approach of the Irish courts in their constitutional jurisprudence on the residency rights of non-national parents of Irish citizen children, and the implications of this will be discussed in Chapter 6.[195]

5.11 Conclusion

As noted in the introduction to this chapter, understanding the legal framework constituted by European Union law is vital to understanding integration in Ireland. The majority of economic migrants to Ireland over the last number of years have been EU nationals. This was recognised in the strategic statement of the Office of the Minister for Integration, which stated that "Ireland's pattern of inward migration is distinctly different to

[194] See 9.2.1.

[195] See 6.6.

what has occurred elsewhere in Europe and the world in that the great bulk of our migrants come from within the European Union as opposed to other continents."[196] Irish integration policy expressly takes its lead from EU integration policy. One major difficulty with adopting this approach is that EU integration policy applies to TCNs only and not to EU citizens, while Irish integration policy applies to all legally resident migrants, including EU citizens. Another gap is that while Ireland purports to use EU integration policy as a baseline for its own integration initiatives, Ireland has not opted in to the legally binding measures which have potentially the greatest impact in practice on migrants' integration: the LTRD and the FRD.

Perhaps the most significant difficulty in basing Irish integration policy on the EU approach, however, is the lack of an overarching paradigm of integration embodied in EU law. Conflicting conceptions of integration prevail in relation to EU migrants on one hand and TCN immigrants on the other. For EU migrants, integration is conceptualised as a process of social insertion or inclusion, with a progressively wider range of rights being granted to EU citizen migrants as they become integrated in the host Member State. Integration is not equated with social and cultural integration or with the acceptance of the migrant of the "values" of the host state, rather it appears to be measured by length of residence. In contrast, integration for TCNs is seen as a multi-faceted process including social and cultural integration and acceptance of national values. Integration for TCNs is also conceptualised as a potential condition precedent to legal immigration and as a mandatory process which may be imposed by states. Within the broad category of TCNs, further contradictions also exist. Regarding the integration of TCNs, the (broadly speaking) inclusive concept of integration contained in the policy documentation is turned on its head in legally binding immigration measures, with the concept of integration used as an instrument of immigration control and exclusion in the FRD and LTRD. Other legally binding immigration measures (for example, the Blue Card Directive) do not expressly refer to the concept of integration but provide for integration-related rights in the form of equal

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[196] Office of the Minister for Integration, *Migration Nation: Statement on Integration Strategy and Diversity Management* (May 2008), at 8.

treatment and free movement rights. In the case of refugees, access to integration programmes must be "facilitated" and refugees must be afforded a range of integration-related rights which brings their position closer that of EU migrants rather than other categories of TCN. There is no consistent approach to integration across the legal categories of TCN

All of this weakens the potential of the EU approach to integration to influence Ireland and other Member States in constructing coherent integration policies. The conflicting legal conceptions of integration employed in the contexts of TCNs and EU citizens could mean that different integration policies are required for EU citizens and other migrants. This is perhaps an inevitable consequence of the project of European integration. However, the division of migrants into EU migrants and others, with different levels of integration rights and responsibilities, introduces a differentiated form of integration which seriously undermines the ability of the EU approach to integration to influence Member States in the adoption of inclusive, equality-based integration strategies.

On the whole, those with hopes for the EU as a model for an innovative paradigm of community, belonging and entitlement detached from the nation state will be disappointed. If one considers the basic dichotomy between EU citizens and TCNs, this becomes clear: barriers to free movement within the EU for EU nationals are increasingly lifted whereas the legal measures relating to TCNs, even where relatively inclusive as in the case of refugees, confirm their position as outsiders. EU law on free movement and citizenship thus replicates the approach of the statist model of inclusion and exclusion on the basis of nationality. The construction of a European postnational space and identity is highly beneficial to migrants originating within the EU but legitimates the exclusion of those from third countries. Such migrants must overcome barriers to entry and integration erected by Member States but also by the EU. It thus seems that the more that is required of states as regards solidarity with their EU partners, the deeper the divide between EU migrants and other classes of migrants, ultimately undermining the social cohesion and equality aspects of integration.

6 The Irish Constitutional Framework for Integration

6.1 Introduction

It has been frequently argued that Ireland has had difficulty in moving beyond a narrow and outdated cultural conception of the nation which has been endorsed since independence, with the result that Irish society has been ill-equipped to deal with religious, cultural and ethnic difference.[1]

Delanty argues that this stems from the weak civic tradition which characterises political modernity in Ireland, similar to that in England and in contrast to the Scottish definition of nationhood. The concept of a civic nation, which envisages a political community of citizens and signals an inclusive conception of the polity rather than one defined in purely exclusionary, power or cultural terms (which might have been expected to take root given the aspirations of Irish Republicanism),[2] was never fully embraced by the Irish State to the extent that:

> From 1922 political and cultural nationalism combined to produce a political culture in which ethnos and demos were effectively equated; political liberty tended towards cultural authoritarianism; and the idea of self-determination, the nation's right to autonomy, mutated into the right of the nation to decide who should belong to it and under what terms. The civic nation with its

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[1] See, for example, Gerard Delanty, "From Nationality to Citizenship: Cultural Identity and Cosmopolitan Challenges in Ireland", in Andrew Finlay (ed), *Nationalism and Multiculturalism: Irish Identity, Citizenship and the Peace Process* (LIT Verlag, 2005), 183, at 199; Piaras MacEinri, "Our Shelter and Ark? Immigrants and The Republic", in Andrew Finlay (ed), *Nationality and Multiculturalism: Irish Identity, Citizenship and the Peace Process* (LIT, Verlag, 2005) at 85; Bryan Fanning, *Immigration and Social Change in the Republic of Ireland* (Manchester University Press, 2007).

[2] See for example the Proclamation of 1916.

> cosmopolitan elements was entirely eroded by a centralising ideology that put the rights of the nation above the rights of the citizens.[3]

Chapter 3 discussed the idea that a two-way mutually reinforcing influence process takes between law and society. This chapter builds on this idea in investigating whether or to what extent the ideology described in the above quote is reflected in law through the provisions and interpretation of the Constitution, and the implications of this for integration. This involves a consideration of the nexus between the Constitution, identity and integration. The overall aims of this chapter are to gain an understanding of the 'public philosophy' underpinning Irish constitutional law from an integration perspective, and to assess the implications of this in terms of identifying an Irish integration paradigm. In order to do this, the chapter will be split into two sections.

The first section will concentrate on a textual analysis of the 1937 Constitution. Some of the distinctive features of the Constitution which have a bearing on integration will be identified, including the role of religion in the constitutional order and the influence of nationalism. These distinctive features reveal the philosophical sources and constitutional values underlying the Constitution, which in turn impact on the ability of the Constitution to accommodate diversity: the Constitution provides an indication of what constitutes "us" and "them" when it comes to the Irish polity. The second section will analyse further the foundations of Irish constitutional law as related to integration, moving beyond the bare text of the Constitution to consider the protection of the constitutional rights of non-citizens and citizens with non-citizen family members. The analysis will show how the 1937 Constitution has been interpreted by the courts in the changing social and legal context of inward migration, highlighting the challenges faced by the courts in reconciling the interests of the State in exercising control over immigration with the personal rights of the individuals

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[3] Gerard Delanty, note 1, at 201. Mac Einri echoes these views, arguing that, "The instinct of the Irish, it would seem, has been to expel, to corral or to contain, or at least to insist that those who are different should know their place, that is, remain silent or not assert their difference in the public domain". Piaras Mac Einri, "Our Shelter and Ark? Immigrants and The Republic", note 1, at 86.

involved. The section demonstrates the limitations of Irish constitutional law in protecting the fundamental rights of non-citizens and family members of non-citizens, while in the process exploring the attitudes and assumptions of the Irish courts to issues of citizenship and belonging. It also underlines the evolving influence of the European Convention on Human Rights ("ECHR") on Irish jurisprudence on immigration law and family rights.

It should be noted at this point that constitutional law is relevant to many of the chapters in Part III, and specific aspects of constitutional law will be discussed in these chapters. In particular, the constitutional protection of individual freedom of religion and the regulation of the State's relationship with religion is considered in detail in Chapter 8. The purpose of the present chapter, in contrast, is to identify the philosophical constitutional foundations of Irish law as related to immigration and integration in order to provide a basis for the issues discussed in Part III of this thesis and provide a framework within which these more specific concerns can be understood.

6.2 The Legal, Political and Social Functions of Constitutions: Constitutions as Expressions of National Identity

Gallagher identifies the functions of constitutions generally as follows:

> Constitutions are important in liberal democracies. They lay down the ground rules about how political power is attained and how it can be exercised, about what governments can and cannot do. They set out the rights of the citizens and often specify certain values, held to be central to the country's political culture, and deem it the duty of the state to promote or defend these.[4]

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[4] Michael Gallagher, "The Constitution and the Judiciary" in John Coakley and Michael Gallagher (eds) *Politics in the Republic of Ireland* (4th ed, Routledge, 2005).

As well as the primary function of constitutions in laying down the modes of governmental operation and the fundamental rights of citizens (probably the most important functions of constitutions in practice), constitutions also therefore can act as a covenant, symbol and aspiration.[5] In the specific context of the Irish Constitution, the Supreme Court has stated that it "expresses not only legal norms but basic doctrines of political and social theory" and "reflects, in part, [the people's] aspirations and aims".[6] Walsh J, writing extra-judicially, has echoed this approach, expressing the view that:

> The function of the Constitution is to order the social, legal and political structure of the State. It is therefore a social document, a legal document and a political document. ... It is a law that embraces both social and political objectives, which are also to be seen as contemporary statements and to be interpreted as such.[7]

Constitutions can thus be seen as the legal expression of important elements of political and social philosophy as well as national identity.[8] They frame discussions about a shared

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[5] See Walter F. Murphy, "Constitutions, Constitutionalism and Democracy" in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, Steven C. Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993), at 3.

[6] *The Criminal Law (Jurisdiction) Bill, 1975* [1977] IR 129, at 147 (*per* O'Higgins J).

[7] *Ibid.*, at 86.

[8] See Thomas J. Barron, Owen Dudley Edwards and Patricia J Storey (eds), *Constitutions and National Identity* (Quadriga,1993), in particular D. W. Harkness, "The Constitutions of Ireland and the Development of National Identity", at 304. For the argument however that due to the practice of comparative constitutional law, constitutions should not be perceived in this particular and local way, see Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 *Indiana Law Journal* 819. He argues that comparative analysis informs the creation of new constitutions and permeates constitutional adjudication, argument and academic commentary, such that we must come to terms with the globalization of modern constitutionalism (at 820-821). Constitutional interpretation is taking on an increasingly cosmopolitan character as comparative jurisprudence comes to assume a central place in

conception of the common good and a desired form of life that is put forward as authentic.[9] Jurgen Habermas has observed that constitutional discourse enables the participants to clarify the way that they want to understand themselves as citizens of a specific republic, as inhabitants of a specific region, as heirs to a specific culture, which traditions they want to perpetuate and which they want to discontinue, how they want to deal with their history, with one another and so on.[10] Thus, for example, Article 1 of the French Constitution of 1958 enshrines the fundamental principles of the French Republic, including *laicité* and equality before the law, in the following terms:

> France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis.
>
> Statutes shall promote equal access by women and men to elective offices and posts as well as to position of professional and social responsibility.[11]

In the same vein, the Turkish Constitution of 1982 declares the secular nature of the Turkish Republic,[12] and the 'multicultural' foundations of Canada are acknowledged in the

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constitutional adjudication. For Choudury, this forms part of the larger phenomenon of the globalization of the practice of modern constitutionalism. See also Bruce Ackerman, "The Rise of World Constitutionalism" (1997) 83 *Virginia Law Review* 771.

[9] Jurgen Habermas, "The European Nation State: Its Achievements and its Limitations: On the Past and Future of Sovereignty and Citizenship" (1996) 9 *Ratio Juris* 125, at 125.

[10] *Ibid*, at 124.

[11] *La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances. Son organisation est décentralisée.*

La loi favorise l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives, ainsi qu'aux responsabilités professionnelles et sociales.

Canadian Charter of Rights and Freedoms.[13] Article 1 of the Basic Law of Germany 1949 expressly constitutionalises the respect for human dignity, reflecting the legacy of the Second World War.[14] Similarly, the legacy of apartheid is clear in Article 1 of the South African Constitution of 1996, which includes the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms" and "non-racialism and non-sexism" among the founding values of the state. In this way, every constitutional order, legal community and democratic process for actualising basic rights is permeated by ethics.[15] In the integration context, the permeation of ethics throughout the constitutional order is significant, because "ethical-political decisions are an unavoidable part of politics, and because their legal regulation expresses the collective identity of a nation of citizens, they can spark cultural battles in which disrespected minorities struggle against an insensitive majority culture".[16]

In practice, the expression of the legal and political identity of states contained in constitutions has a demonstrable impact on constitutional adjudication. For example, in the Canadian case of *Multani v Commission Scolaire Marguerite-Bourgeoys*,[17] the Canadian Supreme Court struck down an order of a school authority that prohibited a Sikh child from wearing a kirpan to school as a violation of freedom of religion under the Canadian Charter of Rights and Freedoms. A large part of the reasoning of the court revolved around the

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[12] Article 2, 'Characteristics of the Republic' asserts that "The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble".

[13] Article 27 provides that "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".

[14] Article 1 "Human dignity" of the Basic Law of Germany provides in its first two paragraphs:

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

[15] Jurgen Habermas, note 9, at 125.

[16] Jurgen Habermas, note 9, at 125.

[17] [2006] 1 SCR 256, 2006 SCC 6.

importance of adhering to Canadian values of multiculturalism and religious tolerance.[18] Similarly, in the South African case of *MEC for Education: Kwazulu Natal v Pillay*,[19] the Supreme Court of South Africa held that a school's refusal to allow an exemption from the school code which prohibited the wearing of any jewellery for a Hindu student who wished to wear a nose stud was discriminatory, even though the wearing of the stud was not a mandatory religious practice but a voluntary cultural practice. In coming to this conclusion, the Court emphasised the centrality to the South African constitutional project of the positive commitment to the accommodation of religious and cultural diversity, "which not only affirms diversity, but promotes and celebrates it."[20] These cases demonstrate the importance of constitutional identity in adjudicating issues related to integration. In the Irish context, the Catholic ethos of the State, as reflected in the Constitution, has shaped the contours of Irish constitutional adjudication throughout the history of the State. This comparative jurisprudence shows that when constitutional language fails to offer an unequivocal directive for decision, one option for the resolution of the dispute and to explain the result is to turn inward and reflect upon the legal culture in which the dispute is embedded. One way in which to understand this sub-category of decisions is to see them as "expressions of the decision-makers' constitutional identities."[21] The fundamental values

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[18] *Ibid.*, at paragraph 79, for example, the Court states: "A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects." (Judgment of McLachlin C.J. and Bastarache, Binnie, Fish and Charron JJ. delivered by Charron J.).

[19] Case CCT 51/06, [2007] ZACC 21, 7 October 2007.

[20] *Ibid.*, at para. 65, *per* Langa CJ. He opined that: "The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains."

[21] George Fletcher, "Constitutional Identity" (1992-1993) 14 *Cardozo Law Review* 737, at 737. He gives, amongst others, the examples of the Miranda principles in the USA stemming from the nature of US criminal

enshrined by constitutions thus can constitute important "preinterpretive principles" for judges engaged in the task of judicial interpretation,[22] even though such preinterpretive values may be difficult to discern.

While most constitutions contain references to such founding principles, some constitutions are more value-laden than others. The French Constitution of 1958 is confined in the main to outlining the workings of the public institutions and the apparatus of the Republic. The US Constitution, prior to the adoption of the Bill of Rights, was also principally concerned with establishing a system of government. Bunreacht na hEireann is clearly a different style of constitution, "conceived in part as a manifesto rather than a bare law".[23] This is evidenced in the rhetorical flourishes and religious language contained throughout the Constitution, along with the aspirations contained in the preamble, the provisions on the family, education, religion and the Directive Principles of Social Policy. Parallels can be drawn with the Italian constitution of 1947, which contains an emphasis on the social teaching of the Catholic Church and a programmatic commitment to a wide range of welfare policies intended to promote greater social equality and solidarity within the whole society.[24] Many other Constitutions of the mid to late twentieth century are also

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law principles, and the decisions of the Rehnquist court on flag-burning in the late 1980s and early 1990s as characterisations of the identity of the US legal system. He opines that "the grooves in the American legal mind lead one toward identifying the right of the individual and the opposing interests of the state or community. There is no slot for duty, no niche for civic responsibility as a constitutional principle" (at 742).

[22] See Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002), at 46, where he argues that the commitment to social justice and social inclusion is an important preinterpretive principle informing the Constitution.

[23] John M. Kelly, "The Constitution: Law and Manifesto", in Frank Litton (ed), *The Constitution of Ireland 1937-1987* (IPA, 1987) 208, at 209.

[24] See Nevil Johnson, "Constitutionalism in Europe since 1945: Reconstruction and Reappraisal", in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, Steven C. Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993), at 26.

similar in style to the 1937 Constitution, including the Constitution of India of 1950, which drew inspiration from the Irish example.[25]

6.3 Irish Constitutional Values: a Textual Analysis

This section addresses the issue of what sort of constitutional framework emerges for dealing with integration on a textual analysis of the Irish Constitution. What follows is a discussion of the implications of the Catholic, nationalist and liberal democratic ideological elements of the text of the Constitution for integration, without going in any depth into areas that are covered in other chapters.

6.3.1 Catholic Values

While the extent of the influence of religion on the 1937 Constitution has been the source of considerable academic commentary since the Constitution's inception, at this stage it is accurate to observe that: "No one denies that the Constitution was influenced to some extent by Catholic teaching and doctrine."[26] Examination of the drafting history of the Constitution reveals the Catholic influence on the drafting thereof, largely through the strong influence which John Charles McQuaid (later to become Archbishop of Dublin) had with Eamon de Valera, along with the weaker input of the Irish Jesuit order.[27] This influence is clearest in the preamble, which provides:

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[25] Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution* (3rd ed, Butterworths, 2003), at 2078-2079 where they note that Article 45 inspired, or partially inspired, articles of the Indian Constitution 1950, the Constitution of the Union of Burma 1947, the Constitution of Nigeria 1989 and the Constitution of Namibia 1990.

[26] Gerard Hogan, "De Valera, the Constitution and the Historians" (2005) *Irish Jurist* 293, at 294.

[27] See the only such comprehensive examination in the excellent study contained in Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937* (Mercier Press, 2007), in particular Chapters 3 and 4.

> In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
>
> We, the people of Éire,
>
> Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,
>
> Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,
>
> And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,
>
> Do hereby adopt, enact, and give to ourselves this Constitution.

While no decision has been solely based on the preamble; it "has been judicially adverted to in a number of cases".[28] The religious dimension of the preamble has been referred to in numerous cases, most notably in *Quinn's Supermarket v Attorney General*[29] in which Walsh J interpreted the preamble as acknowledging that "we are a Christian people".[30] In any case,

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[28] Gerard Hogan and Gerry Whyte, note 25, at 53. The idea of "prudence, justice and charity" in particular has been used on numerous occasions as an interpretative device.

[29] [1972] IR 1.

[30] See also *Norris v Attorney General* [1984] IR 36, at 64, in which the Court asserted that "It cannot be doubted that the people, so asserting and acknowledging [in the preamble] their obligations to Our Divine Lord Jesus Christ, were proclaiming a deeply religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs"; and, more recently, in *Sinnott v Minister for Education* [2001] 2 IR 545 the preamble formed the basis for the view of Murphy J that the religious understanding of the destiny of individuals and states provides the logical basis for the constitutionally protected rights of the individual.

from a textual perspective, this "monolithic statement of credal faith"[31] appears to endorse the authority of a Christian, Catholic God as the ultimate source of authority in the State, and the source of validity of the Irish legal system, contradicting the notion, also contained in the Preamble, that the source of legal validity of the legal system is popular sovereignty – the will of the people.[32] The language of the preamble was viewed as problematic by the Constitution Review Group in 1995, most members of which felt that "the language, reflecting the ethos of the 1930s, is overly Roman Catholic and nationalist in tone, and would be objectionable to many in Ireland today".[33] In particular, the Review Group noted that the terms of the preamble fail to avoid divisiveness or to recognise any diversity of traditions and ideals in Irish society, making the point that "the diversity of belief in present-day Ireland raises the question whether any wording corresponding to the present first and third paragraphs is now appropriate"[34] and furthermore that "there should be recognition of the diverse origins and traditions, ethnic, historical, political and spiritual, of the people, their varying social and cultural heritages".[35] Overall, a majority of the Review Group favoured the replacement of the present preamble by a more basic enactment of the Constitution of Ireland by the people of Ireland.[36] The preamble, although not an operative part of the Constitution, has thus been relatively influential and has been used as a reference point for determining the underlying values of the constitution.

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[31] Richard Barrett, "Church and State in Light of the Report of the Irish Constitution Review Group" (1998) 5(1) *DULJ* 51.

[32] The problems inherent in the natural law and the popular sovereignty accounts of legal validity are explored by Doyle in Oran Doyle, "Legal Validity: Reflections on the Constitution" (2003) 10 (1) *DULJ* 56.

[33] *Report of the Constitution Review Group* (1996), at 4.

[34] *Report of the Constitution Review Group* (1996), at 5.

[35] *Ibid.*

[36] The conclusions of the Constitution Review Group on the subject of the Preamble, and more generally on the place of religion on the Constitution have been challenged by Gerry Whyte. The critical problem with the Report, in his view, is that the effect of the recommendations of the Group would, as a whole, be to shift the philosophical template of our constitutional order to an altogether more secular setting, without fully debating the implications of this. See Gerry Whyte, "Discerning the Philosophical Premises of the Report of the Constitution Review Group: An Analysis of the Recommendations on Fundamental Rights" [1998] *Contemporary Issues in Law and Politics* 216, at 220-222.

Article 6 - which sets out the mandate of the executive, legislative and judicial powers of government -[37] echoes the notion contained in the preamble that the power resides with the people, *under God*, although it manages to avoid invoking a specifically Catholic God[38] and thus can be seen as less sectarian in nature than the preamble. This religious dimension of Article 6 is given concrete expression in the restriction of access to a number of important public positions to individuals who are willing to swear religious oaths. The presidential oath is provided for in Article 12.8[39] and members of the Council of State, which has an important role in advising the President, must take a similar (although not as religious) oath under Article 31.4.[40] In a similar manner, Article 34.5.1 provides that judges must take the following oath:

> In the presence of Almighty God, I do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (*or as the case may be*) without fear

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[37] Article 6(1) provides: "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", and Article 6 (2): "These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."

[38] Although this has been described as a "happier formula" than that employed in the preamble, due to the fact that it renders the explicit invocation of the Trinity into a more opaque one. See Richard Barrett, note 31, at 54. A majority of the Constitution Review Group considered that the words 'under God' are widely acceptable, while others preferred that religious references generally should be reviewed by the Oireachtas in the context of amendment of the Preamble and other relevant parts of the Constitution. *Report of the Constitution Review Group* (1996), at 13.

[39] The oath is as follows: "In the presence of Almighty God, I do solemnly and sincerely promise and declare that I will maintain the Constitution of Ireland and uphold its laws, that I will fulfil my duties faithfully and conscientiously in accordance with the Constitution and the law, and that I will dedicate my abilities to the service and welfare of the people of Ireland. May God direct and sustain me."

[40] "In the presence of Almighty God I, , do solemnly and sincerely promise and declare that I will faithfully and conscientiously fulfil my duties as a member of the Council of State."

or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me.

The religious nature of these oaths raises a number of issues, chiefly the problem of the exclusion of individuals from these public offices who, for whatever reason, would be uncomfortable with the formulation of the oath. In its 1993 concluding observations on Ireland's state report, the UN Human Rights Committee expressed the view that "The Constitutional requirement that the President and judges must take a religious oath excludes some people from holding those offices."[41] Members of minority or immigrant groups could fall into this category. The taking of a religious oath by judges raises wider concerns more than simply the exclusion of certain individuals from taking office, as it also undermines the perceived neutrality of the legal system. In 1995, the Constitution Review Group recommended that Article 34.5.1 should be amended so that it contains one declaration without religious references, the rationale for this being that "the daily exercise of the judicial function requires that a judge's impartiality should not be put in doubt by a public declaration of personal values".[42] In the case of the President, the head of State's mandate includes a representative function which should include the representation of different views of society, meaning that a public commitment to a certain set of beliefs is inappropriate.

The fundamental rights provisions, particularly Articles 41 and 42 on the family and education and Article 43 concerning property rights, expressly invoke natural law and are generally accepted as being significantly influenced by Catholic social teaching of the

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[41] (UN Doc CCPR/C/79/Add.21 (3 August 1993), para. 15.) In light of this, the Constitution Review Group recommended that provision should be made for the President to make either a declaration or an affirmation. (*Report of the Constitution Review Group* (1996), at 33.) The UN Human Rights Committee in its 2008 Concluding Observations expressed concern once again over the requirement that judges take a religious oath. (UN Doc CCPR/C/IRL/CO/3 (30 July 2008), para. 21).

[42] *Ibid.*, at 179. The Group noted however that this concern does not apply to the President.

time,[43] even though "in many cases there is nothing visibly Catholic about the phraseology to the uninformed eye – only those familiar with Catholic social thought of the period would be able to identify the origins of the expressions used".[44] The duty of the State to defend and vindicate the right to life of the unborn child[45] and the prohibition of blasphemy[46] provide further evidence of Judaeo-Christian[47] ethico-legal foundations of the Constitution; and in the constitution as originally enacted, the ban on divorce and the special position accorded to the Catholic Church were a clear reflection of the Catholic orientation of the document. In addition, the (non-justiciable) Directive Principles of Social Policy contained in Article 45 enshrine a communitarian (ie non-individualist) vision of society derived from Catholic social philosophy, which encompasses "a vision of social peace pervading a society in which all elements fulfil their moral duty".[48] While Article 45 is expressly a non-justiciable provision,[49] Gerry Whyte has used the values contained in Article 45 to help

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[43] See Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution*, note 28, at 1827 (in relation to the family) and at 1969 (in relation to private property). See Dermot Keogh and Andrew McCarthy, note 27, at 111-122, which compares the papal encyclicals of the time with the private property article of the first printed draft of the constitution, revealing a remarkable degree of overlap.

[44] Michael Gallagher, note 4, at 77-78.

[45] Article 40.3.3 provides: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

This subsection shall not limit freedom to travel between the State and another state.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

[46] Article 40.6.1i provides: "The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law".

[47] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland*, note 22, at 47.

[48] Anthony Coughlan, "The Constitution and Social Policy" in Frank Litton, *The Constitution of Ireland 1937-1987* (IPA, 1987) 143, at 147.

[49] While in a number of High Court cases the view emerged that Article 45 was justiciable as an aid to constitutional interpretation (see the decisions in *Murtagh Properties v Cleary* [1972] IR 330; *Rogers v ITGWU* [1978] ILRM 5; *Landers v Attorney General* [(1975) 109 ITLR 1 for example), subsequent cases indicate that Article 45 is not justiciable. In *McGee v Attorney General* [1974] IR 284, four members of the Supreme Court did not consider Article 45 at all and the fifth (dissenting) judge held that Article 45 was not

construct his concept of the "preinterpretive values" of the 1937 Constitution which give constitutional support to social inclusion and legitimate the judicial enforcement of social and economic rights.[50]

Of particular interest to the present discussion is the much-discussed provision on the free practice of religion, Article 44. As it originally appeared in the 1937 Constitution the article read:

1.

1. The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.
2. The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.
3. The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.

2.

1. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
2. The State guarantees not to endow any religion.
3. The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.
4. Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be

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cognisable by the Court. This view was reflected in *DPP v O'Shea* [1982] IR 384 and *Mhic Mhathúna v Ireland* [1989] IR 504.

[50] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland*, note 22, at 46.

such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

5. Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.
6. The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

This stood in contrast to the freedom of religion guarantee contained in Article 8 of the 1922 Constitution, which was secular in its terms.[51] The position to be accorded to the Catholic Church was one of the thorniest issues faced by de Valera and his team of drafters in the drafting of the Constitution. The Catholic Church was putting de Valera under immense pressure, both in Ireland and from Rome, to recognise the Catholic Church as the "one true church", whereas de Valera favoured a less confessional article which would preserve equality before law for religious minorities.[52] De Valera's own thinking is revealed in his comments in defence of Article 44.2.3 when he declared that "notwithstanding that the vast majority of our people belong to one faith, nevertheless the State recognises the liberty

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[51] Article 8 provided that: "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation."

[52] For a detailed description of the process of negotiation and drafting of Article 44, see Dermot Keogh and Andrew McCarthy, note 27, at 150-173.

of every citizen to practice his religion and to adore the Almighty in public and private".[53] The compromise which was eventually reached was subsequently criticised as giving offence to non-Catholics,[54] with the Committee on the Constitution of 1967 recommending that "the deletion of this provision would, in particular, dispel any doubts and suspicions which may linger in the minds of non-Catholics, North and South of the border, and remove an unnecessary source of mischievous and specious criticism".[55] The provisions were deleted following a referendum in 1972.[56]

Despite the criticism subsequently levelled at Article 44.2.3, it should be noted that at the time of its enactment, the provision was viewed with a certain amount of disappointment by elements in the Catholic Church, whereas the recognition of the minority religions was welcomed by these groups.[57] Article 44.2.3 represented the only explicit constitutional recognition of the pluralist nature of Irish society in the 1937 Constitution. From this perspective, while the deletion of this provision was necessitated by the deletion of the "special position" clause (which is to be welcomed from the point of view of accommodating diversity of beliefs), the constitution has now unfortunately lost this express

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[53] Dáil debates, Vol 67, Col. 1, 890, 4 June 1937, as quoted in Dermot Keogh and Andrew McCarthy, note 27, at 180.

[54] Committee on the Constitution (1967).

[55] *Ibid.*

[56] Fifth Amendment of the Constitution Act 1972.

[57] Barrington J gives a potted history of the controversial provisions in his judgment in *Campaign to Separate Church & State Ltd v Minister for Education* [1998] 3 IR 321, at 355 as follows: "This wording was a compromise and it satisfied for a time. It was pluralist in the sense that all the religious denominations existing in the State at the date of the coming into operation of the Constitution were "recognised". Those which could be identified by name were recognised under the title by which they described themselves. Many of the minority denominations, including in particular the Jewish congregations, were very pleased with the result. The better opinion appeared to be that the recognition of the "special position" of the Roman Catholic Church was merely a recognition of a fact and implied no privileged position in law. Nevertheless the term "special position" was a source of misunderstanding. As long as it remained there was a latent suspicion that while all citizens were equal, Roman Catholics might, in some sense, be more equal than others. In the aftermath of the civil rights movement in Northern Ireland and in the run up to the Sunningdale Agreement Article 44.1.2 and 3 were seen as an embarrassment and in 1972 they were removed by the Fifth Amendment to the Constitution."

recognition of religious diversity,[58] even though the list of religions referred to would now be outdated, causing a different set of problems. In any event, shorn of its most controversial elements, "the underlying secular nature of the rest of Article 44 fully shone through"[59] and Article 44 now constitutes a fairly conventional freedom of religion provision. In 1995, the Constitution Review Group firmly stated that "The Review Group is, of course aware that it has been frequently suggested that the State has a confessional ethos which tends to favour the majority religion at the expense of religious minorities. If this is so, then the fault lies elsewhere than with these provisions."[60] Article 44.1 still poses some difficulty however, with its statement that "the homage of public worship is due to Almighty God. It shall hold His name in reverence, and shall respect and honour religion", open in theory at least to the interpretation that the respect for religion applies only to Judaeo-Christian beliefs or to members of monotheistic faiths and more fundamentally, open to the criticism that it enshrines a view which a majority of the population may no longer hold, completely excluding non-religious beliefs from the scope of protection. Article 44 will be discussed in greater detail in Chapter 8.

The Constitution is undoubtedly, at least in part, inspired by Judaeo-Christian thinking and in places endorses a specifically Catholic ideology. Criticisms of this have been based on an evolving series of concerns related to the political and legal concerns of the day. Concerns relating to the Catholic underpinnings of the Constitution and potential divisiveness of this aspect of the Constitution were initially linked to the conflict in Northern Ireland and the worry that Ireland would effectively become a sectarian state. In more recent times, following the signing of the Belfast Agreement, the principal argument against this dimension of the Constitution has been that the emphasis on Catholic social principles, particularly the conservative ideology relating to the family, is increasingly at odds with the

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[58] Walsh J in *McGee v Attorney General* [1974] 1 IR 284, at 317 considered the effect of the deletion of Article 44.1.2 and 44.1.3, concluding that "In my view, the subsequent deletion of sub-ss. 2 and 3 of Article 44 by the fifth amendment to the Constitution has done nothing to alter this acknowledgment that, religiously speaking, the society we live in is a pluralist one."

[59] Gerard Hogan, "De Valera, the Constitution and the Historians" (2005) *Irish Jurist* 293, at 302.

[60] *Report of the Constitution Review Group* (1996), at 369.

social reality in the country given the sharp trend towards secularisation of Irish society.[61] On this point, Oran Doyle has pointed out that the Irish courts have systematically favoured the rights of the religious over the non-religious in their interpretation of the free practice guarantee set out in Article 44.2, to the extent that "the Irish Constitution position is decidedly non-neutral as between religions and non-religions."[62] Freedoms *from* religion are thus subordinated to freedoms *of* religion: a constitutional position which is constitutionally mandated, even possibly *required* by the invocation of Almighty God linked to the respect of religion in Article 44.1.[63]

Most recently, fresh challenges are posed by the new diversity of religious and non-religious belief and custom which has been brought about through immigration. From an integration perspective, the real issue in the context of this latest evolution is whether the role of religion in the Constitution constitutes a potential barrier to integration for non-Catholic immigrants. The close association envisaged by some provisions of the Constitution and Catholicism has an exclusionary effect on individuals who come from outside this tradition, such that it can be fairly observed that "the present constitutional provisions cannot be regarded as completely satisfactory insofar as they are, in some respects, offensive and divisive".[64] If the Constitution enshrines a vision of society which is based on a Catholic view of the world, it must be queried (a) whether this is appropriate in an increasingly secular and multicultural society; and (b) whether this renders integration into the constitutional fabric of Irish society unattainable for those who do not subscribe to Catholic social teaching.

At this juncture it is useful to draw on the work of Gerry Whyte, who has argued that the Christian ethos of the Constitution provides the constitutional foundations for a

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[61] See for example Gerry Whyte, "Some Reflections on the Role of Religion in the Constitutional Order", in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution: 1937-1997* (Hart, 1999), 51, at 52.

[62] Oran Doyle, "Article 44: Privileging the Rights of the Religious", in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008) 476, at 478.

[63] *Ibid.*, at 479.

[64] Gerry Whyte, "Some Reflections on the Role of Religion in the Constitutional Order", note 61, at 52.

communitarian understanding of society.[65] It thus follows that the Constitution endorses an ideological position which commits the State to working towards social inclusion. In Whyte's view, this ideological commitment justifies the courts in acting to protect such socio-economic rights as are necessary to enable the individual or group to participate in society in cases where ordinary politics has failed a marginalised group or individual. He rests his case for the judicial recognition of socio-economic rights under the Irish Constitution on the argument that, as the Constitution is inspired by the Judaeo-Christian tradition, it can be read as endorsing an understanding of rights which encompass socio-economic rights promoting social justice and participation in society. In advancing this view, Whyte acknowledges that this raises one crucial question: to what extent, if at all, is it permissible in a pluralist democracy to rely on a religious tradition in making the argument he advances? He advances two arguments to justify reliance on religious values in making the case he argues for. According to the first argument, one might have to agree, as a matter of textual analysis, that the Constitution endorsed a religious view on some issues even though one might prefer that that approach had not been taken. This argument fails to address the issue and the second argument is Whyte's preferred option. According to this argument, reliance is permissible where: (a) the text of the Constitution expressly refers to these values and (b) the policy formulated is also capable of being supported by secular argument. Whyte maintains that this second point saves his argument, as the policy of judicial enforcement of socio-economic rights is capable of being supported by secular argument, on the basis that the constitutional objectives, as contained in the preamble, of assuring the freedom and dignity of the individual and of attaining true social order justify a reading of the Constitution that promotes social inclusion and that protects implied socio-economic rights.[66]

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[65] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland*, note 22, particularly Chapter 1, "The Legitimacy of Judicial Activism on behalf of the Disadvantaged".

[66] For the argument that the natural law conception of the Constitution can be regarded as a secular one, se Richard Humphreys, "Constitutional Interpretation" (1993) 15 *DULJ* 59. For a discussion of human dignity as a constitutional value, see John O'Dowd, "Dignity and Personhood in Irish Constitutional Law-with special reference to representations of the human person", in Attracta Ingram and Gerard Quinn (eds), *Justice and Legal Theory in Ireland* (Oak Tree Press, 1995) 163 and William Binchy, "Dignity as a Constitutional

This final proposition is problematic, not least as the "true social order" originally envisaged by the Constitution is clearly a Catholic one, thus bringing an element of circularity to the argument. Moreover, there are many secular arguments *against* the enforcement of socio-economic rights.[67] Nevertheless, moving beyond the issue of whether the inclusion of religious values and language in the Constitution is *morally* permissible in a liberal multicultural state, Whyte's comments raise two important practical points regarding the nexus between religion, the constitution and integration. The first of these concerns his discussion of the philosophical sources of the Constitution. Is an article intrinsically defective because it is Catholic in inspiration and expression?[68] While the articles on the family and education are clearly based on Catholic thinking the scope of the relevant articles is clearly not limited to protecting those who ascribe to the philosophy underlying the provisions. The question of whether the constitutional rights provisions in fact provide effective protection for immigrants is of course a separate issue, and one which will be considered below.

The second point is a related one and encompasses the idea that the particular ethico-legal foundations of the Constitution in fact constitute a benefit to all groups in society, particularly marginalised minorities. From this perspective, the communitarian dimensions of the Catholic social thought which permeates the text of the Constitution can be seen as standing for a rejection of individualism which would benefit all members of society, no matter what their faith or background. In particular, given that the circumstances of certain immigrant groups, for example asylum seekers, can result in marginalisation and social exclusion, the ethos of the Constitution could be interpreted as beneficial to such groups. In

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Concept", in Eoin Carolan and Oran Doyle, *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008).

[67] As rehearsed by Hardiman J in the Supreme Court in *TD v Minister for Education* [2000] 4 IR 259, at 338 *et seq*, for example.

[68] This issue is raised by Dermot Keogh and Andrew McCarthy, note 27, at 207.

this way, if the Constitution were to be purged of religious language,[69] it is not certain that this would not have an adverse effect on the position of non-Catholic marginalised groups. Thus a paradoxical situation arises whereby while the religious, specifically Catholic, ideology endorsed in the Constitution could be interpreted as a barrier to the integration of individuals with different religions and belief systems, it could also be interpreted as a potential instrument of social inclusion which could benefit all marginalised groups, including immigrant and immigrant-origin groups.

Finally, Whyte concludes that even if one cannot rely on religious tradition in interpreting the constitution, "one can still argue that the constitutional objectives of assuring the dignity and freedom of the individual and of attaining true social order justify a reading of the Constitution that promotes social inclusion and that protects socio-economic rights"[70]. This brings us to the final point to be made in this discussion of religion in the Constitution: that perhaps the supposedly exceptional nature and import of the religious dimensions of the Constitution have been over-stated. For example, even the original provisions on religion creating a special position for the Catholic Church did not go so far as to create an established church in Ireland, such as exists in many countries which are acknowledged to be functioning liberal democracies, such as the United Kingdom and Norway. The 'special position' approach is also used in numerous European constitutions including the Italian Constitution of 1948 and the Greek Constitution of 2001.[71] Viewed like this, there is nothing particularly exceptional about Article 44, even prior to the deletion of the first two paragraphs.

6.3.2 Liberal Democratic Values

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[69] Whyte uses this terminology in Gerry Whyte, "Some Reflections on the Role of Religion in the Constitutional Order", note 61, at 53.

[70] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland*, note 22, at 50.

[71] Gerard Hogan, "De Valera, the Constitution and the Historians", note 59, at 299-301.

While the constitution can fairly be said to endorse a Christian, even a Catholic, ideology, this is not the only tradition embraced by the Constitution. An examination of the Constitution reveals the liberal democratic and republican concepts underpinning the Irish state. The sovereignty of the people is declared, qualified only by a recognition that all authority is under God (as discussed above).[72] The state is declared to be democratic and it is explicitly stated in Article 5 that "Ireland is a sovereign, independent, democratic state." The Constitution has provided and continues to provide an effective legal framework for the functioning of a modern parliamentary democracy. A republican conception of citizenship is contained in Article 9, which provides that "fidelity to the nation and loyalty to the state are fundamental political duties of all citizens". Article 1 governs "The Nation" and declares that "The Irish nation hereby affirms its inalienable, indefeasible and sovereign right... to develop its life, political, economic and cultural, in accordance with its own genius and traditions".[73]

These are standard approaches to regulating society in any liberal democracy. The influence of classical liberal values can be seen particularly in Article 40, which guarantees equality before the law; the protection of life, person, good name and property; personal liberty; habeas corpus; the inviolability of the dwelling and free speech, assembly and association. Aside from the anti-abortion provision contained in Article 40.3.3, inserted in 1983, it has been remarked that "one would be hard put to find *any* Catholic influences whatever in Article 40."[74] Article 40 owes its existence to principles enshrined in the

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[72] Article 6 reads: "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."

[73] Irish nationalism is revealed in the text of the Constitution in the commitments to the Irish language and the tricolour, as well as the aspiration to unity, despite the amendments to Article 2 and 3 prompted by the signing of the Belfast Agreement in 1998. For a detailed consideration of this topic, see Desmond Clarke, "Constitutional Bootstrapping: The Irish Nation" (2000) 18 *ILT* 74, and see 6.3.3 below.

[74] Gerard Hogan article, "De Valera, the Constitution and the Historians", note 59, at 307. Note also however the opposing view put forward by Oran Doyle, whereby he argues that the reference to "as human persons" in Article 40.1 is unquestionably traceable to Catholic thought, and that the rest of that article is at

English common law and American constitutional thought. In addition, the institutions of the State provided for in the Constitution in Articles 4 – 11 are classically liberal-democratic in nature and contain elements of the systems of government of Britain and the United States.

Furthermore, while Articles 41 and 42 have been described as "the only feature of the fundamental rights declarations which is original and unusual amongst constitutions",[75] these rights are not all that unusual as human rights protections. The protection of family life in Article 41 for example, which is considered to be particularly influenced by Catholic thought, is mirrored in Article 23 of the International Covenant on Civil and Political Rights on the right to family and private life, which provides that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". The liberal democratic philosophical foundations of the Constitution may also be detected in the preamble, which refers to the "freedom and dignity of the individual" as one of the objectives of the Constitution.[76] Respect for human dignity underlies the fundamental rights provisions, notably the equality provision contained in Article 40.1.[77] The secular touchstone of human dignity is also contained in the universal human rights instruments: the preamble to the Universal Declaration of Human Rights for instance recognises "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[78] Similarly, the UN Charter reaffirms "faith" in the dignity and worth of the human person.[79] Aside from the issue that

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least as consistent with Catholic thought as it is with anything else. See Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press, 2009), Chapter 3.

[75] John M. Kelly, *Fundamental Rights in Irish Law and in the Constitution* (Allen Figgis & Co., 1967), at 37.

[76] Human dignity as a constitutional value is discussed above at note 66.

[77] This is one of Binchy's central arguments in William Binchy, note 66.

[78] Universal Declaration of Human Rights (10 December 1948, GA res 217 A III), Preamble, paragraph 1.

[79] Charter of the United Nations (26 June 1945) (as amended), Preamble, paragraph 2. Glendon notes that 'dignity' appears at so many key points in the declaration that many scholars believe it represents the Declaration's ultimate value. See Mary Ann Glendon, "Foundations of Universal Human Rights: the Unfinished Business" (1999) 44 (1) *American Journal of Jurisprudence* 1, at 2.

the meaning of dignity is "a hard nut to crack",[80] these recognitions of the value of human dignity raise a more fundamental question: what is the basis of this value? It has been argued that the notion of human dignity is inescapably religious,[81] bringing us full circle to the conclusion that the basis of rights protection in liberal democracies is in fact religious at its heart. This brief discussion demonstrates the problems inherent in any attempt to separate the liberal-democratic from the religious elements of the Irish Constitution in a neat manner.

In short, it is far too simplistic a reading of the Constitution to ignore its liberal democratic origins in favour of emphasising the influence of religion. Keogh credits the civil servants who were selected to draft the Constitution with preserving a balance between the various influencing philosophies, arguing that

> The civil servants who were selected to carry out the task were representative of a very broad political culture. Most, if not all, had been formally educated before the foundation of the Irish state as had de Valera himself. ... Perhaps, or indeed, de Valera was far more complex a political thinker and constitutionalist than may yet have been realised. *Bunreacht na hEireann* revealed the richness of the constitutional learning of those virtually forgotten civil servants and politicians who rose so discreetly to the challenge set them by de Valera.[82]

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[80] *Ibid*, at 13.

[81] For the argument that human rights are religious in origin, see Michael J Perry, "Is the Idea of Human Rights Ineliminably Religious?" (1992-1993) 27 *University of Richmond Law Review* 1023. Perry explores the link between universal human rights and religion, suggesting that the conviction that every human being is sacred is inescapably religious and therefore that therefore the idea of human rights is ineliminably religious (at 1073). He argues that the conviction that every human being is sacred is embedded in a religious cosmology and there is no coherent secular version of the idea of human rights (at 1073).

[82] Dermot Keogh and Andrew McCarthy, note 27, at 207.

The tensions between the two dominant ideologies contained in the Constitution are apparent and would appear difficult to resolve.[83] Oran Doyle, for example, has questioned the compatibility of a constitutional bias favouring religious over non-religious beliefs and liberal democracy, in view of the undermining of the core liberal principal of autonomy.[84] Another example of this clash of philosophies is the prohibition of blasphemy in Article 40.6.1i, in the middle of a fairly standard freedom of expression provision.[85] In the early part of the history of the State, on a rhetorical level at least, the religious origins of rights protection were emphasised in constitutional jurisprudence. Nevertheless, there has been a sharp move away from natural law theory in constitutional adjudication and now that Irish society embraces the free market and Irish economic life is more like that in other Anglo-American liberal democracies, with the attendant philosophy of individualism, it is arguable that the liberal democratic elements of the Constitution have already and will increasingly predominate over the Christian-based communitarian ideology discussed above.[86]

6.3.3 The influence of nationalism

Barrington J in *McGimpsey v Ireland* commented that "One thing that can be said about the Constitution is that it is a nationalist constitution."[87] The Constitution represented de Valera's desire to replace the 1922 Free State Constitution, which "(H)aving been conceived under duress and enacted through a series of threats", he considered as "an imposition rather

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[83] Ivana Bacik, *Kicking and Screaming: Dragging Ireland into the 21st Century* (O'Brien Press, 2004), at 26. See also Ivana Bacik, "Future Directions for the Constitution", in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008) 135 where she argues that neither ideology gives sufficient weight to socio-economic rights - which make a real difference to the lives of those who are most disadvantaged (at 141).

[84] Oran Doyle, "Article 44: Privileging the Rights of the Religious over the Non-Religious", note 62, at 178.

[85] Article 40.6.1.i. states: "The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law".

[86] See Gerard Quinn, "The Nature of Critical Legal Studies" (1989) 7 *ILT* 282, at 287.

[87] *McGimpsey v Ireland* [1988] IR 567, at 583, *per* Barrington J.

than a document worthy of a free and proud people."[88] The 1922 Constitution contained for example an obligation for Irish members of parliament to swear an oath of fidelity to the British monarch,[89] until the deletion of this provision by de Valera in 1933.[90] The strong nationalist dimension to the 1937 Constitution is thus rooted in the specific historical context in which it was drafted. The nationalist elements of the Constitution have come under particular scrutiny in the Irish context, however, due to the context in which the Irish state was formed, as well as the conflict in Northern Ireland.

Nationalism is clearly present in the language of the preamble, which acknowledges the people's obligations to Jesus Christ, who "sustained our fathers through centuries of trial", "gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation". This also illustrates how nationalism and religion became intertwined in post-independence Ireland.[91] Nationalism is also evident in Article 8's consecration of the Irish language as the first official language of the state and the relegation of English to the status of second official language,[92] despite the fact that the language was

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[88] Dermot Keogh and Andrew McCarthy, note 27, at 62.

[89] Article 17 of the 1922 Free State Constitution provided for the following oath to be taken by incoming members of Parliament: "I ... do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established, and that I will be faithful to H.M. King George V, his heirs and successors by law in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of nations."

[90] Constitution (Removal of Oath) Act 1933.

[91] Chubb explores this relationship, noting that "Irish Republican thought, though deriving in general from American and French ideals, was never in the main stream of European liberal theory. It had on the whole not been doctrinaire or dogmatic and was now, with national independence achieved, becoming ever more qualified and modified by the influence of Catholic teaching." Basil Chubb, *The Constitution and Constitutional Change in Ireland* (IPA, 1978), at 25.

[92] This stands in contrast to the way in which the language issue was dealt with in the 1922 Free State Constitution: Article 4 provided that "The National language of the Irish Free State ... is the Irish language, but the English language is equally recognised as an official language. Nothing in this Article shall prevent special provisions being made by the Oireachtas for districts or areas in which only one language is in general use."

in 1937, and is today, only spoken fluently by a small minority of the population.[93] The practical effects of this article are somewhat unclear, with the complex position of the Irish language in public life riven with contradictions and paradoxes.[94]

Articles 1-3 are classified under the heading "The Nation" in the text of the Constitution.[95] Article 1 enshrines the "inalienable, indefeasible, and sovereign" right of the Irish Nation to "choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions", however the focus of legal and political attention has always been on Articles 2 and 3. Prior to the amendment of the Constitution in 1998,[96] Articles 2 and 3 included a territorial claim to Northern Ireland, and the original articles have been described as a "paradigm expression of a nationalist philosophy."[97] Thus, Hogan and Whyte accurately assert:

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[93] Beytagh describes Irish as one of "the most tangible expressions of national identity", Francis X. Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective* (Round Hall Sweet & Maxwell, 1997) at 121. Clarke points out that multiculturalist disputes elsewhere in the world, including highly developed constitutional democracies such as Canada and Belgium, testify to the significance of language as a central factor in cultural identity (Desmond Clarke, "Nationalism, the Irish Constitution and Multicultural Citizenship" (2000) 51(11) *Northern Ireland Legal Quarterly* 100). See also Louis De Paor, "Understanding One Another Better: Language, Conflict and Cultural Diversity" in Andrew Finlay (ed), *Nationalism and Multiculturalism: Irish Identity, Citizenship and the Peace Process* (LIT Verlag, 2005) 43.

[94] Gearóid Ó Tuathiagh, "The Irish Nation-State in the Constitution", in Brian Farrell (ed), *De Valera's Constitution and Ours* (Gill and MacMillan, 1988), 46, at 48.

[95] The terms "the People", "Nation" and "national" are employed in various places throughout the Constitution, not always in a consistent fashion. Moreover, the distinction between the notions of the "Nation" and the "State" in the Constitution is not altogether clear. See Gerard Hogan and Gerry Whyte, note 28 at 71-72; and Richard Humphreys, "Constitutional Contradications: Accommodating Multiple Identities after the Good Friday Agreement, in Oran Doyle and Eoin Carolan (eds), *Governance and Values* , 114, at 114-115.

[96] The Nineteenth Amendment of the Constitution Act, 1998 allowed the State to consent to be bound by the British-Irish Agreement and provided that certain further amendments to the Constitution, notably to Articles 2 and 3, would come into effect when that agreement entered into force. See also CR.

[97] Desmond Clarke, "Nationalism, the Irish Constitution and Multicultural Citizenship", note 93, at 109.

> The original understanding of the Irish nation in the Constitution identified that nation with those people on the island whose forefathers struggled to regain the rightful independence of the Nation (the preamble), who themselves aspired to territorial unity (Article 3) and whose cultural heritage embraced the Irish language and the tricolour (Articles 7 and 8). Controversially this version of nationalism also asserted the right of the Irish nation to territorial unity in Article 2.[98]

In spite of the removal of the territorial claim by the 1998 amendment, the amended articles continue to reflect a (toned-down) nationalist philosophy. Article 3 affirms the "firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions", even though it is expressly stated that this aspiration to unity can only be achieved by peaceful means.[99] Citizens of Ireland are also part of the Irish Nation, with Article 2 stating that "It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation", and "That is also the entitlement

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[98] Gerard Hogan and Gerry Whyte, note 28, at 72.

[99] The meaning of Article 2 in the context of immigration was considered *obiter* by Fennelly J in his dissenting judgment in *AO and LO v Minister for Justice, Equality and Law Reform* [2003] 1 IR 1, at 181 where he opined: "Article 2 of the Constitution now reads: "It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage." These words represent are a particularly strong and solemn declaration made very deliberately by the people in referendum. They are a qualitative statement of the nature of citizenship going beyond what formerly resulted from the exercise of the delegated legislative competence effected by s. 6 of the Act of 1956. The "birthright of every person born in Ireland .... to be part of the Irish nation" must have real content and should cannot be treated as a piece of empty sloganeering. The Irish born citizen's participation in "the Irish nation" includes its "cultural identity and heritage." This emerges from the third sentence of Article 2 and is what "people of Irish ancestry living abroad" share with Irish born citizens. At this point, it suffices to say that each child born in Ireland has its own unique value and enjoys the same rights as a citizen regardless of the circumstance of his or her birth."

of all persons otherwise qualified in accordance with law to be citizens of Ireland." In addition, the other elements of the identity of the Nation contained in Articles 7 and 8 – the Irish language and the tricolour - remain intact today. The implications of the 1998 amendment in citizenship terms and the subsequent amendment of the Constitution in 2004 which qualified the automatic birthright to citizenship will be discussed in detail in Chapter 7. Reflecting the country's experience of emigration, the third sentence of Article 2 states that "Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage." This conception of the Nation is ethno-cultural in nature, reveals a gap between members of the 'Nation' and 'citizens', and suggests that the bonds between members of the Irish Nation are based on a shared common past rather than a shared social space.[100]

What are the implications for integration of importing nationalism into the Constitution? Nationalism in its most rudimentary form as the existence of the nation-state is at the root of the legitimating of the separation of the immigrant from the citizen, with all that this entails.[101] The principal criticism of giving constitutional expression to nationalism lies in the "apparent homogeneity that is often implicit in speaking about a single people or nation." [102] The essentialism claimed by nationalism is problematic in the context of integration.[103] Nationalism can exhibit a cultural blindness which fails to recognise the reality of multiculturalism, and determines the 'other' as someone who does not fit with the perceived homogeneity of the construct of the Nation. Clarke notes the essentially contested

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[100] This is discussed in detail in 7.4.2.

[101] See Elspeth Guild, "Cultural and Social Identity: Immigrants and the Legal Expression of National Identity", in Elspeth Guild and Joanne Van Selm (eds), *International Migration and Security: Opportunities and Challenges* (Routledge, 2005), 101, at 107, where she argues that the "differentiation of citizens from individuals in general as rights-holders is central to the concept of sovereignty, tied to the nation-state".

[102] Desmond Clarke, "Nationalism, the Irish Constitution and Multicultural Citizenship", note 93, at 100. Similarly, Elspeth Guild, referring to the work of Ernest Gellner, notes that "Nationalism is a political principle which maintains that similarity of culture is the basic social bond." Elspeth Guild, *ibid.*, at 101.

[103] Elspeth Guild, note 101, at 110.

nature of the concept of nationalism, which he interprets as a cultural construct. His conclusions on this point run as follows:

> the concept of nationality which is pervasive in the Constitution is a cultural construct which emerged from the anti-colonial political struggles of the last three centuries; ... the understanding of the 'national language' and the 'national territory' in 1937 was a function of a nationalist political philosophy that was prevalent at that time, rather than an uncontentious historical fact; and ... the way in which Irish people (however they are to be defined) specify their nationality in the late twentieth century is not determined uniquely by our past, but is open to redefinition in virtue of our current beliefs about what we have in common.[104]

This quote also illustrates the related problem of the discordance between the conception of the Nation as enshrined in the Constitution and the social reality of increased immigration and diversity in society and the consequent increased proliferation of cultural claims, the continued decline of the Irish language and increasing disinterest in the fate of Northern Ireland.

On the basis of the above, it is arguable that the 1937 Constitution presents an already–constructed paradigm of Irishness, without providing the flexibility for this paradigm to adapt to the changes brought about by increased ethnic, cultural and religious diversity. The narrow, backward-looking conception of national identity enshrined in the Constitution could lend legitimacy to an assimilatory approach to integrating newcomers, particularly those of radically different religious, ethnic and cultural backgrounds, into the fabric of the "Irish Nation". In this sense, the nationalist values expressed in the Constitution can be seen as an impediment to the participative, two-way adaptation process conception of integration endorsed by the official policy documentation as discussed in Chapter 2. Finally, the type of

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[104] Desmond Clarke, "Nationalism, the Irish Constitution and Multicultural Citizenship", note 93, at 116.

nationalism present in the text of the Constitution does not take account of the "post-national" challenges to national identity and belonging taking place on the European and international levels and thus it could be argued does not present a full or accurate picture of modern identity. This renders the Constitution as informed by nationalism a shaky foundation on which to rest integration policy and conceptions of who can become part of the Irish polity.

6.4 The Impact of Catholic, Liberal Democratic and Nationalist Constitutional Values on the Irish Public Philosophy of Integration

Due to the historical context in which it was conceived, Bunreacht na hÉireann does not expressly promote the values of multiculturalism or diversity, unlike its Canadian and South African counterparts (which, it must be noted, are exceptional among constitutions in doing so). As touched on above, it is unavoidable that constitutions are to a certain extent influenced by the preoccupations of the time in which they are conceived. Murphy eloquently describes the phases of the relationship between constitutions and the polity as follows:

> Insofar as a constitution is a covenant by which a group of people agree to (re)transform themselves into a nation, it may function for the founding generation like a marriage consummated through the fledgling partners' positive, active consent to remain a nation for better or worse, through prosperity and poverty, through peace and war. For later generations, a constitution may operate more as an arranged marriage in which consent is passive, for the degree of choice is then typically limited.[105]

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[105] Walter F. Murphy, note 5, at 9.

This is probably true of Bunreacht na hEireann, which is expressive of a form of nationalism and a commitment to religious belief which no longer represents the views of the majority of citizens.[106] This reflects the significance of the economic and social change which has taken place in the state since the Constitution was enacted in 1937.[107] However, short of enacting a new Constitution, how can the values of modern Ireland be determined? If such a new Constitution were drafted, in a pluralist multicultural society, there is likely to be profound disagreement on such values.

In any event, it must be acknowledged that the historical background and Catholic and nationalist ideologies endorsed in the text of the Constitution do not render the text in its application incapable of accommodating the diversity caused by immigration, nor do they necessitate an exclusionary model of integration. While symbolically speaking, a Catholic ideology is endorsed, no provision of the Constitution allows for legal discrimination against any religious or ethnic group. It has been argued that the religious nature of the oaths required to take up certain important public positions means that access to these positions could be more difficult for those not coming from the majority Christian traditions, thus constituting a barrier to migrants' integration into the political and judicial structures of the State. Nevertheless, overall, the Constitution provides for the separation of Church and

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[106] Thus Mac Einri opines that "the Republic has definitively crossed a line from the near 'theocracy of the deValera era to the modern, or postmodern multi-ethnic and partly secularised Irish state of today". Piaras Mac Einri, "Our Shelter and Ark? Immigrants and The Republic", note 1, at 101.

[107] The work of Declan Kiberd on the literature and culture of post-colonial Ireland is perceptive in this regard. He argues that in the wake of independence, Ireland became 'not England' in both the Irish and English consciousness. Irish identity became based on a 'not English' idenity. (See Declan Kiberd, *Inventing Ireland: The Literature of a Modern Nation* (Random House, 1995), at 9.) Parker draws on this to analyse the provisions of the 1937 Constitution, arguing that Dev's constitution can be seen in this light as driven as much by a desire to define what Ireland was *not* as it was to define what Ireland *was*: Ireland was not Protestant; the people of Ireland would not speak English; Ireland was not a modern industrial society; Ireland was not confined to the lifeless positive law of John Austin. At the current stage of its development however, Parker argues, "Ireland no longer needs a foil to define itself." See J. Wilson Parker, "Must Constitutional Rights be Specified? Reflections on the Proposal to Amend Article 40.3.1" (1997) 32 *Irish Jurist* 102, at 115.

State,[108] and freedom of religion is strongly protected in the Constitution under Article 44. The sparse jurisprudence on Article 44 indicates that the free expression of other religions will be protected and accommodated.[109] The provisions of Bunreacht na hÉireann do not subordinate one religious group to another and never have, even before the deletion of the special position provision. While nationalism is also strongly represented in the text of the Constitution, the constitution does not enshrine any legal basis for an advantageous position for any particular ethnic or social group. It has been shown that most of the fundamental rights provisions would not be out of place in a standard constitution of any liberal democracy. Furthermore, many of the more idiosyncratic features of the 1937 Constitution have been removed or modified by constitutional amendment. As a result of the amendments on - *inter alia* - the special position of the Catholic Church, divorce and the Belfast Agreement, it can be said that the Constitution no longer constitutes an impediment to the liberal agenda.[110]

It has also been argued that with regard to marginalised groups, which immigrant-origin communities can often become, the theocratic communitarian elements of Constitution could be said to provide an important counterweight to the individualist leanings of liberal democracy. On this point, Gerard Quinn points to the Papal Encyclical entitled "Pacem in Terris" (Pope John XIII, 1961), which emphasises individual duties and responsibilities towards the collectivity as well as individual human rights, observing that "theocracy bestows group rights on the patriarchal family whereas liberal-democratic theory exhausts the legal universe with the individual and the state."[111] In the democratic rule-of-law state, political theory rules out the notion that either one ism - ie, individualism or

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[108] Article 44.2.2 provides: "The State guarantees not to endow any religion".

[109] See *Quinn's Supermarket v Attorney General* [1972] IR 1.

[110] Michael Gallagher, note 4.

[111] Gerard Quinn, "The Nature of Critical Legal Studies" (1989) 7 *ILT* 282, at 283. Quinn also argues that such an emphasis on human duties is at odds with the dominant liberal philosophy found in most Western constitutions and in many international human rights treaties. See for example, Johannes Morsink, "The Philosophy of the Universal Declaration of Human Rights" (1984) 6 *HRQ* 309.

communitarianism - or the other should predominate.[112] In the Irish context, the co-existence of liberal democratic and theocratic ideologies in the constitutional framework mandates an integration framework based on principles of social inclusion as well as individual fundamental rights, which recognises the importance of the immigrant *qua* individual and also as part of family, cultural and religious groups.

6.5 Identifying Constitutional Values Through Case-Law: Immigration and the Position of Non-Citizens in the Constitutional Order

Gerard Hogan has remarked that:

> There is a sense in which the actual text and the provenance of this text does not particularly matter. Indeed, the accumulated sense of legal tradition and case-law, combined with legal methodology and reasoning, make up a sort of *acquis constitutionnel* and this is what really counts.[113]

While this may go too far,[114] the thrust of the point is instructive. Assessing the Irish constitutional order by reference to the text alone does not provide an accurate or complete picture of the state of the law. Given the large body of constitutional jurisprudence, it is accurate to observe that "(a)t this stage, any fair-minded critique of the Constitution must also have regard to the vast corpus of case-law which has been generated since 1937".[115]

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[112] Mary Ann Glendon, "Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accomodations" (1993) 2 *Brigham Young University Law Review* 385, at 390.

[113] See Gerard Hogan, "The Constitution, Property Rights and Proportionality" (1997) 32 *Irish Jurist* 373.

[114] For a riposte to this article, see Rachael Walsh, "The Constitution, Property Rights and Proportionality: A Reappraisal" (2009) 16(1) *DULJ* 1. She argues that Hogan's contention that that the proportionality principle has rendered the text of the Constitution largely irrelevant in property rights adjudication has been proven wrong, as Articles 40.3.2 and 43 still retain importance in the jurisprudence.

[115] Gerard Hogan, "De Valera, the Constitution and the Historians", note 59, at 317.

This part of the chapter will address this need to go beyond the text by analysing the application and interpretation of the Constitution in cases involving the interaction of the fundamental rights of non-citizens and their Irish citizen family members and immigration law. Fundamental rights protection is a pre-requisite to integration, and the application of core rights protections to non-citizens represents a fundamental form of integration in the constitutional system.[116] A shared entitlement to core rights constitutes a basic form of equality which is essential to an equality-based paradigm of integration.[117] In addition, the position accorded to non-citizens in the scheme of rights protection contained in the Constitution indicates whether the State has an inclusive understanding of belonging and entitlement or whether it seeks to narrowly limit rights protection to citizens. The analysis in this section therefore contributes to identifying the contours of an Irish public philosophy in relation to integration matters.

Citizenship and rights frameworks and the position of non-citizens in the constitutional order are rooted in a number of fundamental understandings which must be taken into account when assessing the interaction of constitutional law, fundamental rights and integration. The first of these is that the human community is juridically and politically ordered into states. The second is that these states are comprised of groups that form

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[116] Donald Kerwin, "Immigrant Rights, Integration and the Common Good", in Michael Fix (ed), *Securing the Future, US Immigrant Integration Policy, A Reader* (Migration Policy Institute, 2006) 45, at 47. Kerwin argues that 'rights' and 'integration' are mutually reinforcing, reflecting the US constitutional tradition. He concludes that 'rights' must be incorporated into an immigrant integration agenda.

[117] Alistair Ager and Alison Strang, "Understanding Integration: A Conceptual Framework" (2008) 21(2) *JRS* 166, at 176: The importance of rights was consistently underscored by the fieldwork interviews conducted on the topic of refugee integration. Refugees, and workers and volunteers involved in the support of refugees and asylum seekers, were generally clear that in an 'integrated' community, refugees should have the same rights as the people they are living amongst. This shared basis of entitlement was seen as an important prerequisite for refugees to live harmoniously with non-refugees. A number of refugees also pointed out that the establishment of equal rights had an impact on the way people view them; where there are not equal rights, there is less respect.

national political communities.[118] The product of these assumptions is the power to admit, exclude and expel aliens which is perceived as one of the fundamental rights of sovereign states.[119] Finnis locates the justification for this principle in the common good, arguing that where a foreigner's recalcitrant failure to assimilate his conduct to the particular conceptions of the common good that are embodied in constitutional law can lawfully and appropriately be met by refusing him entry or requiring his departure.[120] States are required to accept risks from its subjects which it is not required to accept from non-citizen outsiders and thus the fundamental premise of citizenship frameworks can be seen as the limitation of threat to the political community from non-members. Finnis argues that this is legitimate and necessary because political societies need a common bond to hold them together, giving a solidarity among citizens which is necessary in democratic societies to promote a common life and accept and contribute towards common benefits and burdens.[121]

This conception of the common good assumes that nationality is the common bond within the political communities constituted by states, an idea which is inherently contestable.[122] Nevertheless, it reflects the conception of the common good employed by the Irish courts in adjudicating on constitutional issues connected with immigration law. The idea of the common good and the duty of the State (by way of executive action in most instances) to protect the common good by guarding the polity against the risks posed by non-citizens is a recurring theme of the Irish constitutional jurisprudence which is discussed below. It is significant from an integration perspective that throughout the case law, the

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[118] Finnis sets out these fundamental principles as the foundations of citizenship law. John Finnis, "Nationality, Alienage and Constitutional Principle" (2007) 123 *LQR* 417.

[119] For a discussion of the nexus between foreigners, expulsion and security, see Elspeth Guild, *Security and Migration in the 21st Century* (Polity, 2009), at 52. She poses the question, why do states expel foreigners? She concludes that the arguments for expelling foreigners are all related to security in one form or another.

[120] *Ibid.*, at 418.

[121] John Finnis, note 118, at 444. This echoes one of the central questions underlying integration: how can societies create common bonds that unite culturally, religiously and ethnically diverse, multicultural societies.

[122] For a challenge to the validity of this assumption, see Joseph Raz, "Multiculturalism" (1998) 11 *Ratio Juris* 137.

'common good' is seen as the common good of the bounded national polity rather than the common good of all members of society, citizen and non-citizen. This is both a state-centred and a nationalist common good paradigm.

This section of the chapter outlines the rights of non-citizens in Irish constitutional law and examines the interpretation of Article 40.3 and Article 41 rights in the context of the body of jurisprudence which has evolved around the residence and deportation of non-citizen parents of Irish citizen children. The below analysis will show that the remit of constitutional protection does not extend to non-citizens in all circumstances and, where it does, the level of protection may not be as high as in the case of citizens. In the case of citizens who have family members who are non-citizens, it will be seen that - in relation to family rights in the context of deportation at least - the level of constitutional protection is eroded by the existence of non-citizen family members. The meaning of the concept of the 'common good' and its role in constitutional decisions at the intersection of rights, immigration and sovereignty is highlighted, as is the influence of the ECHR on this area of Irish constitutional law.

6.5.1 The rights of non-citizens in Irish constitutional law

Some rights provided for in the Constitution are clearly and uncontroversially restricted to citizens, such as the right to stand for election to the Oireachtas[123] and for President[124] for example.[125] More significant from a rights-protection point of view, however, are the rights

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[123] Article 16.1.1 provides that members of the Dáil must be citizens, and Article 18.2 provides that members of the Seanad must be eligible to be Members of the Dáil.

[124] Article 12.4.2 provides that only citizens can be elected as President.

[125] Interestingly, non-citizens are not constitutionally precluded from voting in national elections. Article 16. 1.2 provides that "i All citizens, and ii such other persons in the State as may be determined by law" are eligible to be elected to Dáil Eireann." UK citizens have the right to vote in national elections. Furthermore, it should be noted that Ireland allows all residents, including non-citizens, to vote and to be elected in local elections, a position which led to the election of Rotimi Adebari in 2007 as Mayor of Port Laoise, Ireland's first

to trial in due course of law, provided for in Article 38.1, and the fundamental rights contained in Articles 40-44. While it appears certain that non-citizens enjoy the benefit of the right to trial in due course of law,[126] the extent of the protection afforded by Articles 40-44 is more uncertain and will be discussed in detail in this section.

The remit of the constitutional guarantees contained in Articles 40-44 has been problematic due to the pervasive references to 'citizens' in these provisions. The equality provision in Article 40.1 confusingly provides that "All *citizens* shall, as *human persons*, be held equal before the law" (emphasis added). Thus equality is tied to the human condition generally, but in the same breath seemingly limited to citizens. A similar conflict is evident in Article 40.4, which prohibits the deprivation of liberty of "citizens" save in accordance with law in the first paragraph, but allows for *habeas corpus* applications to be made on behalf of "any person". The other provisions in Article 40 focus in the main on protecting the 'citizen', including the right to a good name;[127] the right to freedom of expression;[128] of assembly;[129] of inviolability of the dwelling;[130] and of association.[131] In contrast, the scope of Articles 41, 42 and 43 (protecting family, education and property rights respectively), in tune with the universalistic tone of the articles and their invocation of natural law, is not restricted by references to citizens. Finally, in Article 44, freedom of conscience and the free profession and practice of religion are guaranteed to every 'citizen'.[132]

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black Mayor. See Houses of the *Oireachtas*, Press Release, "*The Ceann Comhairle, John O'Donoghue TD, welcomes the newly elected Mayor of Portlaoise, Mr. Rotimi Adebari*", 5 July 2007.

[126] Article 38.1 refers to the 'person' rather than the citizen.. It was confirmed in *Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2002] 2 IR 360, that non-citizens enjoy the right to trial in due course of law.

[127] Article 40.3.2.

[128] Article 40.6.1i.

[129] Article 40.6.1ii.

[130] Article 40.5.

[131] Article 40.6.1iii.

[132] Article 44.1.

Judges have had to grapple with this "variable usage"[133] of the concept of a 'citizen' in the text of the Constitution, with mixed results. The jurisprudence on this point has evolved in a piecemeal and *ad hoc* fashion, representing a variety of viewpoints on the remit of constitutional protection. One approach has been to extend the protection provided in the Constitution to non-nationals, with the courts justifying the extension of constitutional rights to non-nationals on the basis of their duty to administer justice or alternatively on a natural law basis. In cases involving personal liberty, for example, the courts have seemed ready to assume that non-citizens enjoy the benefit of the right.[134] Similarly, it has been held that, in principle, non-nationals enjoy the right of access to the courts[135] and to basic fairness of procedures.[136] In *Finn v AG*,[137] a liberal approach to the use of the word 'citizen' was apparent in a interesting dictum of Barrington J, where he concluded that to relieve the State of the obligation to defend and vindicate the lives of persons who are not citizens would be contrary to "the whole scheme of moral and political values which are clearly accepted by the Constitution".[138] He opined:

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[133] Gerard Hogan and Gerry Whyte, note 28, at para. 7.1.32.

[134] In *The People v Shaw* [1982] IR 1 and *Ji Yoa Lau v Minister for Justice* [1993] 1 IR 116, the courts assumed that aliens can invoke the protection of the Constitution. Regarding *habeas corpus*, it seems settled that non-citizens have access to this remedy. See *State (Kugan) v O'Rourke* [1985] IR 658; *State (Bouzagou) v Station Sergeant, Fitzgibbon St Garda Station* [1985] IR 426; *Eastern Health Board and TM and AM v An Bord* Uchtála [1990] 2 IR 151. This is unsurprising, as the text of the Constitution refers to a 'person' invoking the remedy rather than the 'citizen'.

[135] *Re Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999* [2002] 2 IR 360, at 385 *per* Keane CJ, who expressed the view that "It would be contrary to the very notion of a state founded on the rule of law ... if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights." This comment reinforces what had already been stated by the Court in *Murphy v Greene* [1990] 2 IR 566, where Griffin J stated that "it is beyond question that every individual, be he a citizen or not, has a constitutional right of access to the courts" (at 578).

[136] See *State(McFadden) v Governor of Mountjoy Prison* [1981] ILRM 113.

[137] [1983] IR 154.

[138] *Ibid.*, at 159.

> It is arguable that these rights derive not from a man's citizenship but from his nature as a human being. The State does not create these rights, it recognises them, and promises to protect them. The French Declaration of Rights, 1789, is entitled 'Declaration of the Rights of Man and of the Citizen.' Sometimes the citizen is referred to in the text, but Article 1 opens with the statement 'Men are born free and remain free and equal ... .' A similar switching of gear can be discovered in Articles 40-44 of the Constitution. Articles 41, 42 and 43 recognise that man has certain rights which are antecedent and superior to positive law. By doing so, the Constitution accepts that these rights derive not from the law but from the nature of man and society, and guarantees to protect them accordingly ... The fact that the wording of Article 40.3 commits the State to protect and vindicate the life of 'every citizen' does not justify the inference that it relieves the State of the obligation to defend and vindicate the lives of persons who are not citizens.[139]

This conception of citizenship, clearly based on a higher or natural law approach, comes closer to broad sociological or political formulations of citizenship than a formal legal conception of state membership.

A similar approach was evident regarding the right to equality provided for in Article 40.1 in *Re Article 26 and the Employment Equality Bill 1996*,[140] where the Supreme Court stated that:

> [Article 40.1], in common with the other Articles of the Constitution which are concerned with fundamental rights, does not confer a right on any person

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[139] *Ibid.*

[140] [1997] 2 IR 321.

which, in the absence of the Constitution, he would not in any event enjoy as a human being.[141]

In other circumstances however,[142] most notably in cases involving immigration law, the approach taken in the case law has been more restrictive. One of the most extensive examinations of the extent of the constitutional protection enjoyed by non-nationals was conducted by the Supreme Court in *Re Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999.*[143] In this case, the Supreme Court was required to rule on the constitutionality of sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999.[144] In a section of the judgment entitled 'The constitutional status of non-nationals', the Court started with a reminder that "the State ... must have very wide powers in the interest of the common good to control aliens, their entry into the state, their departure and their activities within the state".[145] In spite of this strong endorsement of state discretion in the sphere of

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[141] *Ibid.*, at 346-347. This does not of course mean that non citizens must be treated the same as citizens in all respects.

[142] See for example *State (Nicolaou) v An Bord Uchtála* [1966] IR 567. Henchy J in the High Court stated at 617 of the judgment that "In my view the citizens referred to in Article 40.1 are the same as those referred to in Article 40.2, namely, the citizens defined by Article 9. The purpose of Article 40.3 of the Constitution – and of other provisions ... - is to state a constitutional right which attaches to citizenship and falls as a duty on the State. It is only a citizen who can claim that right ... The preamble of the Constitution ... shows that this is basically a constitution of the Irish people for the Irish people." Teevan J's judgment contradicts Henchy J's analysis, finding that non-citizenship will not always preclude a claim for protection under Article 40. The Supreme Court did not comment on this issue, reserving for a more appropriate case the effect of non-citizenship upon the interpretation of the Articles in question.

[143] [2000] 2 IR 360.

[144] Section 5 of the Bill limited the possibility of challenging a deportation order to judicial review proceedings, reducing the time-limit within which such an application must be made to fourteen days and providing that leave to apply for judicial review was only to be granted where the applicant could show 'substantial grounds' for believing that the decision in question ought to be quashed. Under Section 10 of the Bill, a person against whom a deportation order is in force could be detained for up to eight weeks provided a number of criteria were satisfied.

[145] At 382, quoting from the judgment of Costello J in *Pok Sun Shum v Ireland* [1986] ILRM 593.

immigration, the Court accepted that non-nationals were entitled to the enjoyment of certain constitutionally protected rights, including the right to invoke the remedy of *habeas corpus* (Art 40.4.2), the right to equality (Art 40.1) and the unenumerated rights protected under Article 40.3.2, encompassing the right of access to the courts and the right of fair procedures. The right of access to the courts was seen as essential to the rule of law, with the legal status of the affected person immaterial.[146] Similarly, non-nationals were found to enjoy the right to fair procedures and natural and constitutional justice.[147] Notwithstanding this important concession that non-nationals were "not without rights while they are in the jurisdiction of the state",[148] the Court however went on to differentiate between the scope of the rights enjoyed by citizens and by non-nationals, stating that non-nationals may be subject to conditions and limitations which nationals may not be subjected to.[149] The principle that non-citizen's rights are not always co-extensive with the rights of the citizen was expressly confirmed in *Oguekwe v Minister for Justice, Equality and Law Reform*, which will be considered below.[150]

While this approach whereby non-citizens' rights are not seen as co-extensive with those of citizens may seem unsurprising given the founding principles of constitutional law and citizenship as noted above, the way in which the courts have applied these principles in

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[146] This was reiterated in *Meadows v Minister for Justice Equality and Law Reform* [2010] IESC 3 *per* Denham J at para. 13.

[147] [2000] 2 IR 360, at 385.

[148] *Ibid.*, at 384. Thus, it could be said that what the Court gave with one hand it took with the other. See Mary Rogan, "Higher, Faster, Stronger? Sections 5 and 10 of the Illegal Immigrants (Trafficking) Act, 2000" 10 *Irish Student Law Review*.

[149] *Ibid.*

[150] Denham J expressly endorsed the statement of the Supreme Court in *Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* to the effect that: "... a person who is not entitled to be in the State cannot enjoy constitutional rights which are co-extensive with the constitutional rights of citizens and persons lawfully residing in the State. There would however, be a constitutional obligation to uphold the human rights of the person affected which are recognised, expressly or by implication, by the Constitution, although they are not co-extensive with the citizen's constitutional rights." *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 IR 795, at 811.

some cases, for example in *Re Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999*, is the cause of some concern. Applying the presumption of constitutionality strictly, the Court in that case upheld the constitutionality of the sections, engaging in a minimalist and literal review of the sections. For example, in assessing whether the time limits introduced by section 5 were 'unfair, arbitrary or invidious', the Court - accepting the submissions of the Attorney General – simply concluded that the limitations satisfied a legitimate purpose, namely the efficient administration of justice and the desire for legal certainty.[151] Overall, it must be accepted that the decision reveals a restrictive view of the extent of the constitutional protection of non-citizens based on a "state-centred conception of the common good" and reflecting a preoccupation in official discourse with issues of security of control of migrants.[152] From an integration perspective, illegal 'aliens' appear to be viewed with suspicion by the Court,[153] a problem to be dealt with through the extensive discretion of the executive and legislative branches of government before becoming further 'enmeshed'[154] in society, rather than as actual or potential members of Irish society. If conceptions of citizenship and rights are to provide the normative context for integration policy, the indications provided by this judgment of the Supreme Court are that citizenship and rights issues will be seen through the prism of state control and sovereignty, which does not provide a strong foundation for the inclusive two-way approach to integration favoured in the official policy documentation considered in Chapter 2.

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[151] *Re Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999* [2002] 2 IR 360, at 56-57. For a detailed analysis of the decision, see Siobhán Mullally, "The Irish Supreme Court and the Illegal Immigrants (Trafficking) Bill, 1999" [2002] 13 *IJRL* 354. Mullally argues that "The Court's judgment displays a remarkable reluctance to examine the context within which deportation orders are issued in Ireland. It was unwilling to look beyond the legal text of the Trafficking Bill or to examine the fairness and sustainability of the deportation process in practice" (at 358).

[152] *Ibid.*, at 356 and 362.

[153] Both the Bill and the judgment of the Supreme Court conflate the ideas of failed asylum seekers and illegal immigrants.

[154] *AO and LO v Minister for Justice, Equality and Law Reform* [2003] 1 IR 1, at 21.

6.5.2 Article 41: Restriction of family rights in the immigration law context

In an ironic twist, it is Articles 41 and 42 on the family and education - the fundamental rights provisions which are not restricted to 'citizens' in the text of the Constitution - which have been most problematic, and the focus of numerous judgments on the issue of the extent of the rights of non-citizens and citizen family members of non-citizens. A body of jurisprudence on the issues surrounding the residency rights of non-citizen parents of Irish children has been evolving for a number of years in the context of increased immigration into Ireland.[155] These cases (which will be referred to as "the Irish citizen child cases") involve a number of overlapping and competing rights. The principal relevant constitutional rights are the right of the citizen child to the company and care of their parents within the family unit (an unenumerated right protected by Article 40.3.2), the Article 41 family rights of the Irish citizen child and the Article 41 family rights of the non-citizen members of the family unit. These are balanced with the 'right' of the State to control the entry and residence of non-citizens on its territory.

One of the key issues raised by the Irish citizen child cases is whether the non-citizen family members have constitutional rights under Article 41. As already noted, the wording of Article 41 would suggest that all persons are entitled to its protection. This view is reflected in the comments of Hamilton J in *Northants Co Council v ABF*,[156] where he stated that:

> the natural law is of universal application and applies to all human persons, be they citizens of this State or not, and in my opinion it would be inconceivable that the father of the infant child [the father was not an Irish

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[155] The importance of these cases in the context of the key integration issue of family reunification will be discussed in Chapter 7.

[156] [1982] ILRM 164.

citizen] would not be entitled to rely on the recognition of the family contained in Article 41.[157]

The courts have not always been ready to extend the rights contained in Article 41 to non-nationals, particularly in cases involving immigration law, for reasons closely aligned to the discussion above of sovereignty, constitutional principle and executive discretion. A variety of approaches have been taken to the issue. For example, in *Fajujonu v Minister for Justice,* Finlay CJ refused to extend the protection of Article 41 and 42 to non-national parents of Irish citizens, deciding the case on the basis of the rights of the Irish citizen family members only.[158] This reflected his views as previously expressed in *Kent Co Council v CS*[159] and *Saunders v Mid-Western Health Board.*[160] Finlay CJ based his decision on the constitutional right of the citizen child to the company, care and parentage of their family unit within a family unit which – subject to the exigencies of the common good – could be exercised in the State.

A third approach is discernible in the case law, the rationale of which integration in its wide sense forms a central part of.[161] The genesis of this approach can be found in the judgment of Walsh J in *Fajujonu v Minister for Justice*, where he extended the protection of Article 41 to the whole family of applicants, non-nationals included, implicitly on the basis of their long-term residence in the state. He stated:

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[157] *Ibid.*, per Hamilton J at 166. See also the judgment of Walsh J, where he remarked that "the individual has natural and human rights over which the State has no authority; and the family as the natural primary and fundamental group of society has rights as such which the State cannot control."

[158] [1990] 2 IR 151.

[159] [1984] ILRM 292.

[160] Supreme Court, Unreported, 23 June 1987.

[161] Hogan and Whyte note the judicial willingness to consider a person's connection with the State as relevant in assessing whether they enjoy the protection of the Constitution. See Gerard Hogan and Gerry Whyte, note 28, at para. 7.1.42.

> In my view, the first two plaintiffs and their three children constitute a family within the meaning of the Constitution and the three children are entitled to the care, protection and society of their parents in this family group which is resident within the state. There is no doubt that the family has made its home and residence in Ireland.[162]

The issue of the correct interpretation of the principles laid down in *Fajujonu* came before the Supreme Court in 2003 in *AO and LO v Minister for Justice, Equality and Law Reform*,[163] in which the State was seeking to deport family members of Irish citizen children who had been in the asylum process when their children were born and obtained citizenship. Keane CJ distinguished *Fajujonu* on the basis of the facts in that case, *ie*:

> (1) The "appreciable time" ... for which the Fajujonu family had resided, as a family, in Ireland;
>
> (2) The fact that, in *Faujonu*, the family had made its 'home and residence' in Ireland;
>
> (3) The fact that, in *Fajujonu*, the first plaintiff had been offered employment, that the relevant authority was prepared to issue him a work permit and that the only ground on which a permit would not be issued was that the Minister in that case had refused to grant him permission to stay in Ireland.[164]

This was a position which was shared by the majority. The majority appeared to accept that the family unit comprised of Irish citizens and non-nationals did have some

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[162] *Fajujonu v Minister for Justice* [1990] 2 IR 151, at 164.

[163] [2003] 1 IR 1. This decision is critiqued in Claire Breen, "The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing" (2008) 20(4) *IJRL* 612; Donncha O'Connell and Ciara Smyth "The Constitution and Family Rights", in Ursula Fraser and Colin Harvey, *Sanctuary in Ireland? Perspectives on Asylum Law and Policy* (IPA, 2003); Siobhán Mullally, "Citizenship and Family Life in Ireland: Asking the Question 'Who Belongs?" (2005) 25 *Legal Studies* 578.

[164] [2003] 1 IR 1, at 38-39.

constitutional status,[165] but the extent of the protection of family rights could be affected by numerous factors, including the connection of the family to the State: in other words, integration. To quote Denham J:

> The family of the child is still a unit. But the rights given to the family are not absolute. There are restrictions permitted for the common good. Other factors, such as the fact that members of the family are non-nationals, their history, social and economic factors, their status in the immigration process and foreign policy, are all relevant.[166]

In terms of constitutional principle, the linkage between integration or - to use the terminology of the Court – 'connection to the state' and the protection of constitutional rights is difficult to justify. Fennelly J drew attention to the anomalies inherent in this approach in his dissenting judgment in *AO and LO*, asking how, in terms of principle, the extent of the constitutional rights of a citizen child could be affected by the length of residence of his or her parents in the State.[167] In a similar vein, it could be asked how, if the

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[165] See for example the comments of Murray J at 82-83, where he expressed the view that the protection afforded to the family by the Constitution is not entirely dependent on whether it counts among one of its members a citizen of the State.

[166] *Ibid.*, at 61. A similar type of approach has been taken in cases involving married couples where one member of the couple is a non-national. In these cases, the Courts have been willing to allow that Article 41 applies. However, the protection afforded to such a couple is not as strong as where both members of the couple are Irish. The Supreme Court has made it clear that the Minister is entitled to take into account, when considering whether to revoke a deportation order of a non-national married to an Irish citizen, the length of time during which the parties had lived together as a family unit. See *TC and AC v Minister for Justice, Equality and Law Reform* [2005] 4 IR 109. In that case, the Supreme Court held that the requirement that parties have lived together for an appreciable period of time was not a disproportionate interference with constitutional or convention rights having regard to the fact that the State was not obliged to respect the choice of residence made by married couples particularly, in circumstances where one spouse was aware at the time of marriage of the precarious immigration history of the other.

[167] [2003] 1 IR 1, at 193-194.

family as a unit is accepted as having rights under Article 41, these rights could be limited according to the strength of the family's connection to the State, and how this connection is to be measured with any accuracy. From an integration perspective, this approach focuses on the existing integration or connection of adults or parents rather than the future connections to be developed by the children, "with the importance of connection to a community or territory assessed in terms of the length and depth of past association, rather than the salience or value of future connection."[168] Nevertheless, this approach appears to have been accepted and extended in the Supreme Court decision in *Oguweke v Minister for Justice, Equality and Law Reform*,[169] in which the level of integration of the citizen child him or herself is included as a factor to be taken into account in deciding whether the deportation of non-national parents infringes constitutional or Convention rights.[170] The idea that *citizens* could be afforded variable levels of constitutional rights protection depending on their integration in the state of nationality is unjustifiable from the perspective of constitutional principle. Citizens are fully integrated in the constitutional order by virtue of their nationality.

On the issue of family rights of families comprising citizens and non-citizens, the decision in *Oguekwe* introduced a further note of confusion into the law. The judgment of the Supreme Court, delivered by Denham J, in finding that the Minister must consider the constitutional and Convention rights of the parties concerned in making the decision to deport the parents of citizen children, stated that while that consideration had to be given to the constitutional rights of all the applicants (*ie* the whole family), 'express' consideration must be given to the rights of the citizen children in these cases and a reasoned decision given in this regard. The acknowledgment that the constitutional rights of the family unit must be considered in the context of deportation is to be welcomed. However, it is still not

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[168] Siobhán Mullally and Liam Thornton, "The Rights of the Child, Immigration and Article 8 in the Irish Courts", in Ursula Kilkelly (ed) *The ECHR and Irish Law* (2nd ed, Jordans, 2009), at 146.

[169] [2008] 3 IR 795.

[170] In *Oguekwe*, Denham J states that the age of the child, the length of time he or she has been in the state and the part, if any, he or she has taken in the community are all factors which may be taken into account, as well as how long the child has been in the education system.

clear what the precise nature or extent of these constitutional rights actually is, especially as (as noted above) Denham J also stated that the constitutional rights of non-nationals may not be equivalent to those of citizens in certain circumstances. Furthermore, the value of requiring consideration which is seemingly not required to be 'express' is questionable. In practical terms, this effectively allows the Minister to make the decision without considering the Article 41 rights of the family. Judgments in Irish citizen child cases, reflecting the uncertainty as to the nature and weight of the Article 41 rights of the citizen and non-citizen members of the families involved, have increasingly centred on the child's right to the company, care and parentage of their parents within the family unit and the rights of the child and of the parent(s) under Article 8 ECHR rather than under Article 41 of the Constitution. As a rule, the rights of the non-citizen parent under Article 41 of the Constitution are not adverted to in the judgments.[171]

6.5.2.1 Balancing of individual and family rights with the powers of the State in the Irish citizen child cases

The decision of the Supreme Court in *AO and LO* established that non-citizen parents did not have a right to assert a choice of residence on behalf of their Irish citizen children, and that the constitutional right of such children to the company, care and parentage of their parents within the State was not absolute. This decision effectively allowed the State to rely on the "common good" in the form of immigration control concerns to disregard the rights of the citizen child to the company and care of their parents within the family unit and illustrates the shift in the traditional balance between family rights and the sovereign rights of the State in Irish constitutional law which was occasioned by the onset of inward migration in the 1990s. The shift away from the special emphasis on the rights of the family and the State's duty to defend the family against attack, towards according primacy to the

[171] See, by way of example, *Alli v Minister for Justice, Equality and Law Reform* [2009] IEHC 595; *Asibor v Minister for Justice, Equality and Law Reform* [2009] IEHC 235.

"rights" of the State – at least in cases involving transnational families - is clear in the following statements of Denham J.:

> The family is the fundamental unit of society but the State governs, not the family. ... The State by its laws, made for the common good, may so order society as to restrict family life in Ireland. The family is the primary unit group – but it is a unit of the state"[172]; and
>
> The family of the child is still a unit. But the rights given to the family are not absolute. There are restrictions permitted for the common good. Other factors, such as the fact that members of the family are non-nationals, their history, social and economic factors, their status in the immigration process and foreign policy, are all relevant.[173]

The high watermark of this line of reasoning was the decision in *Bode v Minister for Justice, Equality and Law Reform*,[174] in which the Supreme Court held that the Irish-B Child/05 Scheme (a scheme introduced to assess residency applications after the decision in *AO and LO* - discussed in Chapter 7) was a purely administrative scheme made possible by the generosity of the Minister, that his discretion in determining applications under the scheme was absolute and that the State did not have to demonstrate that the constitutional or Convention rights of the parties involved had been considered in making a decision under the scheme. The Supreme Court held that "the IBC 05 Scheme was a scheme established by the Minister, exercising executive power, to deal administratively with a unique group of foreign nationals in a generous manner, on general principles".[175] The Court recognised that "at no stage was it intended that within the ambit of the scheme the Minister would consider,

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[172] [2003] 1 IR 1, at 60.

[173] *Ibid*, at 64.

[174] [2008] 3 IR 663.

[175] *Ibid*., at 666.

or did the Minister consider, Constitutional or Convention rights of the applicants".[176] The Supreme Court clarified that constitutional and Convention rights of Irish citizen children and their families must be considered in the context of representations to the Minister pursuant to Section 3 of the Immigration Act, 1999 (after receipt of a notice of the Minister's intention to issue a deportation order) and thus ensured that constitutional and convention rights were not sidelined in these cases. The judgment should be interpreted in the context of the exceptional nature of the IBC/05 scheme, which has been recognised by the courts, and the principles outlined in the case will not be readily applied to Ministerial decision-making in all immigration-related administrative schemes.[177] Nevertheless, this case tilts the balance too far in favour of state concerns relating to immigration control and illustrates the extent of the deference paid by the courts to the State's interest in immigration control.[178]

The clash between the 'common good' in the guise of the protection of the immigration/asylum system and the family and other constitutional and ECHR rights of non-citizens has been a recurrent theme of decisions following the *AO and LO* decision as the courts seek to strike a balance between individual rights and the rights of the State. While it is for the Minister to decide where the balance lies in individual cases, a court will assess whether this balancing exercise was carried out in accordance with natural and constitutional justice.[179] Fundamentally, the decision must be reasonable and proportionate. The Minister must demonstrate a "substantial reason" relating to the individual circumstances of the case and associated with the common good which justifies the rights violation occasioned by the

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[176] *Ibid.*, at 695.

[177] In *T v MJLER* [2008] IEHC 361 Hedigan J held that the principles applied in the case of the IBC/05 Scheme could not be said to apply in context of section 18 Refugee Act 1996 applications for family reunification.

[178] Mullally and Thornton observe that the reasoning of the Supreme Court is open to question, not least under the terms of the European Convention on Human Rights ("ECHR") Act 2003 itself, and argue that a strict reading of the ECHR Act 2003 would suggest that there is an obligation of the Minister to consider Convention rights in the execution and administration of the IBC 05 scheme. Siobhán Mullally and Liam Thornton, note 168, at 13.22.

[179] *R O'C and VR v Minister for Justice, Equality and Law Reform* [2008] IEHC 367.

deportation of the non-citizen parent of an Irish citizen child.[180] General or formulaic references to the common good, as represented by the maintenance of the integrity of the immigration/asylum system, do not suffice as a substantial reason, without a consideration of the individual facts of the case.[181] A "substantial reason" is one that is "reasonable and weighty and not trivial or tenuous and that it is in furtherance of an orderly immigration policy which serves the common good."[182] This requires careful consideration of all the relevant factors in the case.[183]

A list of sixteen factors to be considered by the Minister in each case was laid down by the Supreme Court in *Oguekwe v Minister for Justice, Equality and Law Reform* and this has been applied in subsequent High Court cases.[184] An important element in this matrix of factors is the right of the State to control the entry, presence, and exit of foreign nationals, subject to the Constitution and international agreements. Thus it was confirmed in *Oguekwe* that the State may consider issues of national security, public policy, the integrity of the

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[180] *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 IR 795.

[181] See the High Court decisions in *MA v Minister for Justice* [2007] 3 IR 421; *OE v Minister for Justice* [2008] 3 IR 760; and *Amadasun v. The Minister for Justice, Equality and Law Reform* [2007] 3 IR 421. Although the Court may conclude that in spite of the use of standard phrases, the Minister had due regard to the various competing interests and he weighed and balanced those interests against one another - *Alli v Minister for Justice, Equality and Law Reform* [2009] IEHC 595.

[182] *Alli v Minister for Justice, Equality and Law Reform* [2009] IEHC 595, para. 88.

[183] In *R O'C and VR v Minister for Justice, Equality and Law Reform* [2008] IEHC 367, Hedigan J found that the departmental analysis of the case including the facts that the applicant did not reside with either of his daughters, that he had only recently sought to become guardians of the children, that if the children's mothers stayed in the State the deportation would not have the same impact as if the children were older and living with their father and mother as a family unit, and that he had been flagrantly evading the asylum system revealed good and sufficient reason to deport the applicant. Conversely, in *MA v Minister for Justice* [2007] 3 IR 421, the Court found that the decision of the Minister did not disclose sufficient reason for the deportation other than general references to maintaining the integrity of immigration/asylum procedures and on this basis Peart J quashed the decision of the Minister.

[184] Nevertheless, general policy considerations will suffice as a "substantial reason" provided that the Minister has carried out a fact-specific analysis in the applicants' case and has engaged in a proper balancing exercise.

immigration scheme, its consistency and fairness to persons and to the State. Nevertheless, Denham J, in delivering the judgment of the Supreme Court, did not equate the rights of the State with the "common good" and found that the common good embraces both statutory and constitutional principles as well as the ECHR. A more nuanced conception of the common good has thus evolved in the case law than might have been expected from a reading of the *AO and LO* decision. The use of the concept of "the common good" is more limited than was suggested in *AO and LO*, in the sense that it cannot be invoked as a blanket justification for the deportation of individuals without considering the facts of the individual case. At the same time, the meaning of the concept is broader in the sense that it stretches beyond what the executive branch of government considers to be in the common good and encompasses constitutional and ECHR rights. This is an illustration of the limitation of traditional principles of state sovereignty by individual rights.

The effect, however, of the setting down of a list of factors to be considered by the Minister in *Oguekwe* has been neutralised somewhat by the finding that these factors need not all be expressly considered by the Minister.[185] In addition, the obligations in *Oguekwe* apply only in the narrow circumstances of the deportation of a parent of an Irish citizen child.[186] From subsequent cases it is also clear that reference to the single reason of the integrity of the immigration and asylum system can be a sufficiently "substantial reason" to justify the Minister's decision to deport a non-citizen parent of an Irish child.[187] It seems that *Oguekwe*, therefore, did not significantly alter the high level of deference that continues to be paid by the courts to the Minister in the exercise of his discretion under section 3 of the

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[185] *Alli v Minister for Justice, Equality and Law Reform* [2009] IEHC 595; *Asibor v Minister for Justice, Equality and Law Reform* [2009] IEHC 235.

[186] *OO v Minister for Justice, Equality and Law Reform* [2008] IEHC 325. This leave application concerned the deportation of the grandmother of Irish citizen children. Hedigan J found in refusing leave to commence judicial review proceedings that the obligation to expressly consider the rights of the Irish citizen children as set out in *Oguekwe* did not apply where the proposed deportation relates not to a parent but to a grandmother. See also *YO v Minister for Justice, Equality and Law Reform* [2009] IEHC 148 (also a leave application) which concerned the deportation of the second cousin of Irish children.

[187] *O(AN) and OE (a minor) v Minister for Justice, Equality and Law Reform* [2009] IEHC 488.

Immigration Act 1999. This continued deference to the executive branch of government is illustrated to a certain extent by the judgments of individual members of the Supreme Court in *Meadows v Minister for Justice, Equality and Law Reform*.[188] Overall, the Supreme Court found that the courts may assess the reasonableness of an administrative decision in light of the concept of proportionality, at least in cases where fundamental rights are at stake, constituting a significant development from the perspective of the oversight of the ministerial discretion which is pervasive in immigration law, and a crucial step towards the development of a more rights-based system of judicial review. However, in the case of decisions on deportation founded on section 3 of the Immigration Act 1999, which involve the Minister exercising his discretion in deciding whether to deport an individual based on a number of considerations set out in section 3, the Supreme Court endorsed the rationale for the virtually unfettered discretion of the Minister in making the decision:

> For the avoidance of doubt or misunderstanding, it should be clearly understood that this judgment is not intended to express or imply any view as to how the Minister should decide cases involving deportation of persons relying on a risk or a danger of infringement of their human rights. Matters of policy are for the Minister. He has been assigned the responsibility of deciding how the balance is to be struck between the rights of persons subject to being deported and the common good in maintaining the integrity of the asylum and immigration systems. He might, for example decide as the Refugee Appeals Tribunal had done in this case or that the degree of risk to the individual was outweighed by the need to protect the integrity of the system. The Minister would be entitled to take account of the entirety of the problem of which an individual person was merely one example and the feasibility for the State of offering refuge to a large number of people from other countries.[189]

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[188] [2010] IESC 3.

[189] *Ibid.*, para. 82.

Even where fundamental rights are at stake, immigration control concerns may trump the rights of the individual, albeit that in light of *Meadows* the ministerial decision to deport must be proportionate and the court may exercise a level of scrutiny in its review of the decision which is commensurate with the seriousness of the issues involved.[190] At a fundamental level, the flaw in the current approach of the courts is that, in devising a list of factors which the Minister must consider, the courts require the Minister to weigh incommensurable things in the balance (family rights, state security). The result of this is that it is impossible to ever say that they have been weighed incorrectly (or unreasonably) so that in practice there is substantively no review of the decision at all, once each of the factors has been taken into account.

6.6 The Role of Integration in the Irish Expulsion Cases and the Influence of Article 8 ECHR

6.6.1 Social and community ties in the reasoning of the Irish courts

The extent of the integration in Ireland of the individual concerned as well as their family question forms part of the matrix of factors which may be considered by the Minister is coming to a reasonable and proportionate decision on a proposed deportation, reflecting the statutory criteria laid down in section 3 of the Immigration Act 1999.[191] Section 3(6) provides that in deciding to make a deportation order the Minister can have regard to, inter alia, the duration of residence in the State of the person[192] and the nature of the person's connection with the State.[193] The applicant's employment or prospects of employment are

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[190] For a critique of *Meadows* and its implications, see Alan Brady, "Proportionality, Deference and Fundamental Rights in Irish Administrative Law: The Aftermath of *Meadows*" (2010) 17(1) *DULJ* 136.

[191] Section 3(6) of the Immigration Act 1999.

[192] Section 3(6)(b) of the Immigration Act 1999.

[193] Section 3(6)(d). Note also however that the concept of the common good is also a consideration under section 3(6)(j) and it has been shown that this concept has been almost synonymous with state concerns of

also a consideration to which the Minister may have regard.[194] The judgments reveal that social ties, or integration, are frequently invoked in applications to the Minister for Justice under section 3.[195] However, the courts do not generally see their role as encompassing a review of the applicant's submissions as such but to ensure that the Minister has not erred in the *way* in which he which he applied the statutory framework to the facts of the case. The Minister is free to interpret and apply section 3 to the facts of the case, as he sees fit. This is due to the nature of the judicial review process by which administrative decisions are reviewed, whereby the court does not revisit the substance of the decision but looks at the procedural propriety of the decision. There have, however, been a small number of judgments which have referred to the concepts of attachment to the community and social ties as potential barriers to deportation.[196] The Supreme Court decision in *Oguekwe v Minister for Justice, Equality and Law Reform*,[197] delivered by Denham J, clarified that (in the case of decisions to deport parents of Irish citizen children):

> the consideration of the Minister should be fact specific to the individual child, his or her age, current educational progress, development and opportunities. This consideration relates not only to educational issues but also involves the consideration of the attachment of the child to the community, and other matters referred to in s. 3 of the Act of 1999. The extent of the consideration will depend on the facts of the case, including the age of the child, the length of time he or she has been in the State, and the

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migration control. Considerations of national security and public policy so far as they appear to the Minister are also factors to be taken into account by the Minister under section 3(6)(k)

[194] Section 3 (6)(e) and (f).

[195] See *A v Minister for Justice, Equality and Law Reform* [2009] IEHC 245 for example, in which the Court referred to the applicant's submission to the Minister that she had undergone a "significant process of cultural integration". See also *S v Minister for Justice, Equality and Law Reform* [2007] IEHC 298 in which it was argued that the applicant's family had integrated well into the community, and that he as a part of that family had an expectation that he would be permitted to remain with them.

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[197] [2008] 3 IR 795.

> part, if any, he or she has taken in the community. Thus, his or her education, and development within the State, within the context of his or her family circumstances, may be relevant. If the child has been in the State for many years, and in the school system for several years, and taken part in the community, then these and related facts may be very pertinent. However, if the child is an infant then such considerations will not arise.[198]

Thus, while the specific term "integration" is not referred to, it is clear that in practice the Minister must consider the extent of the integration of the child in these cases, which may in turn impact on the deportation of their parents. Similarly, in *O(AN) and OE (a minor) v Minister for Justice, Equality and Law Reform*,[199] it was found that the level of integration of the deportee and his or her family has an impact on the substantiality of the State's reason for deportation:

> [T]he substantial character of the State's reason for deporting is relative and will alter when assessed against the circumstances of the deportee and his or her family including, obviously, how long they have been in the State, what roots if any they have put down here, whether the minor children are at school and at what stage of schooling they may be and so on.[200]

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[198] *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 IR 795

[199] [2009] IEHC 488.

[200] See also *Igiba v Minister for Justice, Equality and Law Reform* [2009] IEHC 593 in which Clark J emphasised the "tenuous" links of the applicants to the State (in spite of the fact that one of the children was an Irish citizen) and that the family were not 'settled migrants' within the meaning of the jurisprudence of the European Court of Human Rights. See also *Alli v Minister for Justice, Equality and Law Reform*, in which Clark J stated: "As an example: if the family are not long term residents in the host state and there are, for instance, no language or cultural barriers to their returning to their home state, it will usually be said that there are not any insurmountable obstacles to their pursuing family life together in the home state. On the other hand, if the family has spent so much time away from the home state that they have lost the ability to speak

References are occasionally made to the "social ties" of the applicant in the state, a concept clearly derived from the ECHR case-law discussed in depth in Chapter 4. In *N v Minister for Justice, Equality and Law Reform*[201] McCarthy J agreed with the decision of Finlay Geoghegan J in the High Court in *Bode v Minister for Justice, Equality and Law Reform* where she referred to the fact that the European Court of Human Rights had held that respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings, and that the concept of "private life" was recognised as being wide in ambit.[202] Unfortunately, McCarthy J did not go into this point in further detail as the applicant's case was based upon the availability of treatment for her medical condition (HIV). In *A v Minister for Justice, Equality and Law Reform* Clark J accepted that the proposed decision to deport the applicant could constitute an interference with her right to respect of private life within the meaning of Article 8 ECHR.[203] This related to the applicant's work, educational and social ties that she had formed in the State as well as any other matters relating to her personal development since her arrival in the State. However this case also illustrates the difficulties inherent in relying on this ground to resist deportation, as Clark J ultimately found that she could not accept that "such interference will have consequences of such gravity as potentially to engage the operation of Article 8."[204] On this logic, it is difficult to see how interference with the social ties formed by an applicant could ever of itself be of sufficient gravity to engage the operation of Article 8 as interpreted by the Irish courts.[205]

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their original language or they no longer have an extended family there, it may well be unreasonable to expect them to return there". *Alli v Minister for Justice, Equality and Law Reform* [2009] IEHC 595, at para. 48.

[201] [2008] IEHC 8.

[202] *N v Minister for Justice, Equality and Law Reform* [2008] IEHC 8, at paragraph 31.

[203] *A v Minister for Justice, Equality and Law Reform* [2009] IEHC 245, at paragraph 32.

[204] *Ibid*, at paragraph 32.

[205] See also *I(S) v Refugee Appeals Tribunal* [2009] IEHC 8. In that case, the official in the office of the Minister for Justice, Equality and Law Reform, in his report on the deportation of the applicant accepted that the proposed deportation may have constituted an interference with the applicant's "private life", relating to each of the applicant's work, educational and other social ties as well as her personal development. In each

6.6.2 The influence of the ECHR on the Irish expulsion cases

The approach of the courts in referring to the social and economic ties of the applicant, as described above, mirrors the approach of the European Court of Human Rights in the expulsion cases under Article 8 ECHR, reflecting the pervasive influence of the ECHR in these cases. De Blacam observes that "In the Irish experience to date, the ECHR has had its most profound impact in claims initiated by immigrants".[206] The Irish courts have been expressly considering the family rights/deportation cases in the light of the European Court of Human Rights' ("ECtHR") Article jurisprudence since the *AO and LO* judgment,[207] and are required to do so since the indirect incorporation of the ECHR into Irish law at a sub-constitutional level by the European Convention on Human Rights Act 2003. The Minister is required to consider the Convention rights of the applicants in the context of his decision to deport a parent of an Irish citizen child under section 3 of the Immigration Act 1999. The Article 8 jurisprudence of the ECtHR explored in Chapter 4 is consistently referred to in the judicial review of proposed deportations, both in the context of the courts' consideration of ECHR rights and also in looking at the ambit of constitutional rights. As expressly pointed out in *Oguekwe*:

> The Minister should ... consider the Convention rights of the applicants, including those of the Irish-born child. These rights overlap to some extent and may be considered together with the constitutional rights.[208]

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case, he found that such an interference would not have consequences of such gravity as potentially to engage the operation of Article 8. This approach was accepted by the Court.

[206] Mark De Blacam, *Judicial Review* (2nd ed, Tottel Publishing, 2009), at 18.19.

[207] See generally Siobhán Mullally and Liam Thornton, note 168, at 13.18-13.27.

[208] *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 IR 795, at 823.

The Article 8 jurisprudence has in this way infused constitutional decision-making in the sphere of immigration law. In spite of this however, the nuanced concept of integration under development by the ECtHR in the context of the expulsion cases, as outlined in Chapter 4, does not appear to have yet percolated through to the Irish courts. While the Irish courts will consider the extent of the family members' ties to Ireland and to the country of origin, the nuances of the ECtHR's examination of integration, particularly in terms of protecting long-term residents by way of considering their integration as an element of their private life, have not appeared as yet in the Irish case law. The Irish courts have not expressly considered the applicants' linguistic abilities, nor their integration into the labour market, nor attempts to acquire nationality in the way that the Strasbourg court has. Overall, the Irish courts have considered integration in a rather haphazard manner to date. Part of the reason for this is that the Irish courts seem to consider the principles laid down in *Uner v The Netherlands* as applicable only in a very narrow range of circumstances: in cases involving "settled migrants" or long-term residents.[209] Given that most of the immigrants involved in these cases have not been resident in Ireland for more than a few years, this approach renders the *Uner* principles of very limited applicability in the Irish context.

One of the factors in the reluctance of the courts to extend constitutional rights to the non-citizen family members of Irish citizen children appears to be that these individuals will be able to avail of Article 8 ECHR protection. This seems to form an implicit part of the reasoning in *Oguweke*. Indeed, as pointed out above, many of the judgments in deportation cases involving non-citizens now focus solely on Article 8 ECHR to the exclusion of the consideration of Article 41.[210] The ambit of constitutional protection has thus effectively been limited by the availability of protection under the ECHR. While this is understandable, as ECHR rights expressly extend to all those on the territory of the State Party regardless of citizenship, unlike the constitutional rights. However, it is unsatisfactory from a rights protection perspective as the family rights guarantees contained in the Constitution are in

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[209] *U v Minister for Jusice, Equality and Law Reform* [2008] IEHC 385; *O(OL) v Minister for Justice, Equality and Law Reform* [2008] IEHC 307; *I(S) v Refugee Appeals Tribunal* [2009] IEHC 8.

[210] See above, at note 171.

general terms stronger than those in the ECHR and traditionally have been interpreted in a way that gives primacy to the family unit.[211] In addition, the ECHR was incorporated into Irish law at a sub-constitutional level and thus does not have an equivalent legal status within the domestic legal order as the Constitution. Furthermore, as discussed in Chapter 4, the ECHR jurisprudence on family life in the context of proposed deportation has itself been criticised on the basis that it is too deferential to states' interest in immigration control.[212]

6.6.3 Different visions of integration of the European Court of Human Rights and of the Irish courts

The Irish courts have considered integration in a rather haphazard manner to date, and the weight to be given to integration in the balancing exercise undertaken by the Minister and by the courts in deciding and reviewing these cases has yet to be worked out. In particular, the occasional references to social ties and attachment to the community by the Irish courts are a long way from the methodical and consistent manner in which integration is beginning to be considered by the ECtHR in expulsion cases and it remains to be seen whether judicial reasoning in these cases in Ireland ever reaches this point. In addition, it seems that the Irish courts would consider the development of a substantive concept of integration as outside the scope of their reviewing function in the context of judicial review. It is unlikely that the courts will develop a nuanced or clear conception of integration, even in the deportation cases. More fundamentally, it is unlikely that integration would be used judicially outside the context of one of a matrix of factors in deportation cases and thus the use of the normative concept of integration by the Irish courts is limited.

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[211] Edwards J stated in *M v Minister for Justice, Equality and Law Reform* [2009] IEHC 500, at para. 83, that "it seems clear from a superficial comparison of both provisions that Article 41 is more extensive in its scope than Article 8".

[212] See 4.14.

6.7 The *Zambrano* decision: Impact of EU law

While the analysis of the approach of the Irish courts undertaken above remains important, it should be noted that the complex position taken by the Irish courts on the question of the right to remain and residency of parents of Irish citizen minor children has effectively been overtaken by the decision of the Court of Justice of the EU ("CJEU") in *Zambrano v Office National de l'Emploi (ONEm)*.[213] The CJEU held that a non-EU national parent of an EU citizen child has a right not only to reside within the EU Member State of their child's citizenship, but also to be granted a work permit in that Member State. This applies regardless of whether the citizen child has exercised their right to free movement. The basis for this highly significant decision was the EU Treaty provision on EU citizenship (Article 20 of the Treaty on the Functioning of the EU), which in the view of the CJEU precludes national measures which have the effect of depriving citizens of the Union of the "genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union". The CJEU stated:

> A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
>
> It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to

[213] Not yet reported, Judgment of 8 March 2011. See also 5.10.

> exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.[214]

This stands in stark contrast to the view of the Irish courts on this issue. As shown above, the Irish courts' approach has been that while Irish citizen children have a right to reside in the State, they do not have capacity to make the decision as to where to reside, and that in the circumstances where their own residence would be unlawful, the non-citizen parents do not have a right to assert a choice of residence in Ireland on behalf of their Irish citizen children. This approach, combined with the fact that the right of the Irish citizen child to the company, care and parentage of their parents within the State is not absolute, has justified the deportation of parents of Irish children in Irish constitutional law. At the same time, the Irish courts have maintained that the minor applicants in these cases:

> are and were Irish citizens and their constitutional and legal rights as such citizens are no greater and no less than those enjoyed by all Irish citizens, whether born in Ireland or otherwise qualified in law to be Irish citizens, prior to the amendment of Article 2 of the Constitution.[215]

The Irish courts have consistently avoided considering the real effect of the deportation of the non-citizen parent on the citizen child's *genuine enjoyment* of the substance of the rights conferred on them by virtue of their status as Irish citizens.

The upshot of the *Zambrano* decision is that, regardless of the position in Irish constitutional law, EU law requires Ireland to grant residency and a work permit to parents of Irish citizen children. Many questions remain in relation to the precise impact that *Zambrano* will have, not only on Irish law, but within the laws of each of the 27 EU Member States: Do the rights of the non-national parent continue to apply after the EU

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[214] *Ibid.*, at para. 43-44.

[215] *AO and LO v Minister for Justice, Equality and Law Reform* [2003] 1 IR 1, at 18, *per* Keane J.

citizen child reaches the age of majority? To what extent will the judgment be applied to a non-marital family? Can a parent who does not have an involvement with the care and upbringing of the EU citizen child rely on the decision in *Zambrano*?[216] It is also as yet unclear what approach the Irish government and the courts will take in response to the *Zambrano* decision, not least to the question of what should happen in respect of the parents of Irish citizen children who have already been deported.[217] Fundamentally, however, the CJEU's approach to citizenship represents a more open concept of citizenship than that in use by the Irish courts and authorities, illustrating the different outcomes which can ensue when the consideration of issues relating to citizenship and rights is detached from state concerns as to security and migration control, and the baggage of the nation-state when it comes to the treatment of non-citizens. From the EU perspective, the citizen child is no "less" an EU citizen because of his or her origins outside the dominant national group of the state of nationality, whereas this appears to form part of the subtext of the position of the Irish courts. Whereas in the Irish cases, the citizenship of the citizen child is devalued by the non-citizenship of the parent, in *Zambrano* the strength of the EU citizenship rights of the child results in a benefit to the non-EU citizen parent.

6.8 The Problematic Position of Non-Nationals and their Families in the Irish Constitutional Order: Implications for an Irish Public Philosophy of Integration

The above analysis highlights a series of problems relating to the protection of the fundamental rights of non-citizens in the Irish constitutional order. The jurisprudence constitutes a hotchpotch of decisions from which no cogent approach or clear rationale emerges for extending (or not extending) the protection of constitutional rights to non-citizens. For this reason, William Binchy, writing prior to the 2004 referendum which

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[216] These questions are raised by Liam Thornton in his blog piece on the *Zambrano* decision. http://www.humanrights.ie/index.php/2011/03/09/impact-of-the-cjeu-decision-zambrano-and-irish-law/.

[217] The Immigrant Council of Ireland has called for these individuals to be allowed to return to Ireland. See "Mothers seek return of deported spouses after court ruling", *Irish Times*, 11 March 2011.

proposed to qualify the automatic right to citizenship of children born on the island of Ireland, criticised the referendum on the basis that:

> [T]he present jurisprudence on the relationship between citizenship and the protection of constitutional rights is undeveloped and confused. When one examines the case law on the question, it becomes apparent that crucial questions have yet to be resolved. To deny citizenship to a range of children who will be born in Ireland would inevitably leave their constitutional position in an uncertain state. The only certainty is that some reduction in the protection of their constitutional rights-perhaps of a radical character-would result.[218]

Caught in the mix of conflicting decisions is the problem of how to reconcile the natural law origins of Articles 41 and 42 with the narrow view of the scope of these provisions taken in the immigration cases, where non-specific, theoretical concerns such as "the integrity of the asylum system" and administrative process concerns have trumped individual and family rights in specific cases. How is the restrictive approach to the rights of non-citizens taken in decisions such as *AO and LO* to be squared with the natural law approach taken in the text of Articles 41-43 and in the case law in other areas? Hogan and Whyte draw attention to this fact, observing that it would seem to be a corollary of natural law theory that "non-citizens should be able to rely on the fundamental rights provisions of the Constitution or, at the very least, those provisions which explicitly acknowledge a natural law origin".[219] However, it must be recognised that the courts have retreated from

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[218] William Binchy, "The Implications of the Referendum for Constitutional protection and Human Rights-Part I" (2004) 22 *ILT* 154, at 154. In a similar vein, reporting in 1996, the Constitution Review Group recommended that fundamental rights be in general explicitly extended to non-citizens (although the group also stated that there may be some rights which should be confined to citizens). See *Report of the Constitution Review Group*, (1996), at 265.

[219] Gerard Hogan and Gerry Whyte, note 28, at para. 7.1.31.

the logic of natural law in recent years.[220] Finally, it was shown above that integration has played a part in determining both the existence and the weight of an individual's constitutional rights (mirroring the example of the ECtHR). The constitutional basis for this pragmatic approach and the details of how it is to be applied in each case remain unclear.

The above analysis also highlights the tendency in cases involving immigration issues to focus on perceived State interests and the interests of the 'common good' to the detriment of the individual rights of non-citizens and citizens with non-citizen family members. The deference shown by the courts to state sovereignty and the State's "right" to control entry and residence of aliens means that the constitutional rights of the parties involved are often outweighed, and judges will consider the facts in the light of the overarching aim of respecting the executive and parliamentary role in immigration policy.[221] The subtext of many of the decisions is captured neatly in the words of Gannon J in his High Court judgment in one of the early cases, *Osheku v Ireland*, where he stated that these cases involve "fundamental rights of the state itself as well as fundamental rights of individual citizens, and the protection of the former may involve restrictions in circumstances of necessity of the latter."[222] Gannon J went on to link these rights of the State to control immigration with the maintenance of the social order of the state, opining that: "The integrity of the State constituted as it is for the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution".[223] The balance is thus tilted in favour of immigration control considerations affecting even those with citizenship, citizens with non-citizen family members being punished by a lesser form of protection for their own rights, exposing the limitations of

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[220] Following the 1995 decision of the Supreme Court in *Re Article 26 and the Information (Termination of Pregnancies) Bill* [1995] 1 IR 1.

[221] *Re Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360.

[222] [1986] IR 733 at 745.

[223] *Ibid.*

formal citizenship status.[224] This imbalance is seemingly justified by reference to the threat posed to "true social order" by non-citizens.

The approach taken in the Irish citizen child cases whereby family rights may be subordinated to the rights of the State contrasts with the deference shown by the courts to the family unit in other spheres of law, as in *Northwestern Health Board v HW*,[225] for example. In that case, Keane CJ took quite a different approach, recalling that

> While the family, because it derives from the natural order and is not the creation of civil society, does not, either under the Constitution or the positive law, take the form of a juristic entity, it is endowed with an authority which the Constitution recognises as being superior even to the authority of the State. While there may inevitably be tensions between the laws enacted by the state for the common good of society as a whole and the unique status of the family within that society, the Constitution firmly outlaws any attempt by the State in its laws or executive actions to usurp the privileged role of the family in the social order.[226]

The strength of the constitutional protection generally afforded to the family unit was also evident in the 2006 Supreme Court decision in *N v Health Services Executive*,[227] in which a child was returned to her natural parents after two years with her adoptive family. The basis for the Supreme Court decision was that the effect of Article 42 of the Constitution was that, in the case of married parents, there was a constitutional presumption

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[224] It can be seen from *AO and LO* and subsequent judgments that under Irish constitutional law, citizens with non-citizen family members can be indirectly deported, and that citizen children's right of company and care of their parents may be restricted where the parents are non-nationals. In *Oguekwe*, it was even considered appropriate to assess how 'integrated' citizens are in the country in some cases.

[225] [2001] 3 IR 622.

[226] *Ibid.*, at 687.

[227] [2006] 4 IR 374.

that it was in the best interests of the child to be with the natural parents unless there were very exceptional circumstances which have been defined as being either "compelling reasons" why such a result cannot be achieved or a failure of duty of the kind envisaged by Article 42.5.[228] This level of protection for the indivisibility of the family unit is noticeably absent when it is at the centre of a challenge to a ministerial decision to deport one of its members.

The observations made in this section help to provide an outline of the Irish public philosophy of integration and illustrate the way in which the traditional constitutional framework of rights protection has come under pressure from increased immigration. The majority of immigrants in Ireland are non-citizens due to the recent nature of immigration in Ireland and thus enjoy uncertain levels of constitutional protection. The strict dichotomy between Irish citizens and non-citizens – particularly evident in the cases involving immigration law – clashes with the idea of integration as the attainment of equal status and rights.

Overall, the case law reveals an endorsement by the Irish courts of a paradigm of relations between the State and its immigrants which centres on control and security. The idea of the protection of a bounded national community permeates the jurisprudence, with immigrants and their families often characterised as a threat to the common good. The different level of family rights protection afforded to Irish citizens who have non-citizen family members than that afforded to other Irish citizens identifies these citizens as different. The position of these citizens in a family unit which is characterised as posing a threat to the common good of the State legitimises their exclusion from the full force of the protections which flow from being part of the imagined national community. This paradigm

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[228] Article 42 protects the role of the Family as the primary and natural educator of the child and "guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children". Article 42.5 provides: "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

of security and control is placed under significant pressure by the recent decision of the CJEU in *Zambrano*,[229] and it remains to be seen how this decision impacts on Irish constitutional adjudication in the long term. It must be acknowledged however that these difficulties flow in part from the context: the courts are considering these issues in the politically-charged setting of the deportation process, a constraint also encountered by the ECtHR as shown in Chapter 4. Outside of the immigration sphere, it was shown that non-citizens and immigrants benefit from similar levels of protection as citizens in relation to the right to fair procedures and the right to trial in due course of law, for example.

The perspective whereby access to and protection of fundamental rights is seen as a pre-requisite to integration is absent from Irish constitutional law. Integration is conceptualised in the constitutional jurisprudence in terms of past integration or 'connection to the State' resulting in a higher level of protection of constitutional rights rather than fundamental rights protection being conceived as a tool for integration. Equally, the conceptualisation of integration as the progressive realisation of equality, as seen in the work of the UN treaty bodies in Chapter 4, has not entered the Irish case law. If adequate fundamental rights protection is a pre-requisite to integration, the foundations of the Irish model are problematic.

6.9 Conclusion

Constitutions need not contain express references to multiculturalism to protect varied interests in a society. As mentioned above, the form and express values of constitutions depend on the historical context in which they are conceived. The Canadian Charter of Rights expressly refers to multiculturalism because of the specific history of that country and the diverse ethnic and cultural makeup of its population with the indigenous population, French and English speakers and immigrants all co-existing for centuries. The South African Constitution was drafted in the very specific political and historical post-Apartheid

[229] Not yet reported, Judgment of 8 March 2011.

context. While the 1937 Constitution was evidently not drafted with a multi-faith, multicultural society in mind, and tolerance of and accommodation of different cultures, traditions and religions is not a key element of Irish public philosophy, the principal issue for the Irish constitutional order in the context of integration is whether, notwithstanding the pervasive influences of Catholic and nationalist thought, it is flexible enough to accommodate this new reality. The discussion in this chapter points to the conclusion that the text of the Constitution is sufficiently flexible in this regard. Despite the strong Catholic and nationalist influences on the 1937 Constitution therefore, the constitutional text should not in itself be understood as a barrier to integration.

Nevertheless, the analysis of the constitutional case law on immigration and non-citizens revealed a reduced level of constitutional protection for non-citizens, particularly in the context of immigration law. It was pointed out that the perspective whereby access to and protection of fundamental rights is a key aspect of integration is absent from Irish constitutional adjudication, and that the judicial interpretation of the relationship between the State and immigrants centres on the ideas of security and control. These and the other features of the constitutional case law identified in the previous section conflict with the social inclusion-based, intercultural integration paradigm endorsed in Irish integration policy as explored in Chapter 2. In particular, the judicial characterisation of immigrants as a threat to the common good can be interpreted as legitimising the separation or exclusion of immigrants from the host community and thus as constituting a barrier to integration. However, it was also shown how this approach of considering immigration and rights as linked to security and control is restricted and put under pressure by developments under Article 8 ECHR and also in EU law.

7 Access to Citizenship in Irish law

7.1 Introduction

Integration studies and commentaries have frequently underlined the important interaction between integration and citizenship. Ager and Strang, for example, identify "rights and citizenship" as the foundational domain of their conceptual framework for understanding refugee integration.[1] In this conceptual framework, "rights and citizenship" is characterised as the starting point for "articulating the (potentially conflicting) assumptions and principles that shape policy and public debate" on integration.[2] In their view, notions of nationhood and citizenship shape core understandings of the rights accorded, and responsibilities expected, of refugees such that, in order to develop an effective integration policy, governments need to clearly articulate policy on nationhood and citizenship.[3] This is particularly so given that national citizenship law remains a *domaine reservé* to the Member States, with EU law having minimal influence in this sphere.[4] All of this supports the idea discussed in Chapter 3 that national public philosophy shapes integration principles and practice.

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[1] Alistair Ager and Alison Strang, "Understanding Integration: A Conceptual Framework" (2008) 21(2) *JRS* 166.

[2] *Ibid.*, at 174.

[3] *Ibid.*, at 175. Building on their original conceptual framework, Ager and Strang in later writings re-emphasise the importance of prevailing notions of nationhood and citizenship in determining understandings of integration, and argue that this powerfully shapes the social space available to refugees with regard to 'belonging'. Alison Ager and Alistair Strang, "Refugee Integration: Emerging Trends and Remaining Agendas" (2010) 23(4) *JRS* 589.

[4] Anja Wiesbrock, *Legal Migration to the European Union* (Martinus Nijhoff Publishers, 2010), at 729. She states that the objective of facilitating the acquisition of the nationality of the Member State of residence of Third Country Nationals has certainly not become a reality.

Citizenship framed in this way also has multiple connections with the working definition of integration outlined in Chapter 2. From the functional perspective, citizenship forms a central constituent part of fundamental rights protection. This was explored in the Irish context in the previous chapter. From the wider perspective, the potential of citizenship discourse to influence and shape issues of social inclusion, diversity and equality in turn impacts on the integration framework. The links between citizenship and national identity in particular are an important component of the wider context in which integration takes place on the national level.[5] Nationality is the "juridico-political expression of membership"[6] in modern societies, providing - on a legal level at least - a preliminary answer to the question 'who belongs?'.[7] It is also the ultimate expression of sovereignty, states being more or less free to determine the criteria for entry into the national polity, in this way delineating the boundaries of national membership.[8]

Other writers, organisations and state practices mirror the approach of Ager and Strang in linking citizenship and integration,[9] with citizenship cast in the dual role of instrument and indicator of integration.[10] In the Irish context, the International Organisation for Migration

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[5] Faist makes this point succinctly, stating that: "Citizenship politics is first and foremost about the integration of societies which conceive of themselves as polities." Thomas Faist, *Dual Citizenship in Global Perspective: From Unitary to Multiple Citizenship* (Palgrave Macmillan, 2008), at 15.

[6] Siobhán Mullally, "Citizenship and Family Life in Ireland: Asking the Question 'Who Belongs?" (2005) 25 *Legal Studies* 578, at 578.

[7] See Siobhán Mullally, *ibid.*. She refers in turn to Carens, "Who Belongs? Theoretical and Legal Questions on Birthright Citizenship in the United States" (1987) 37 *University of Toronto Law Journal* 413.

[8] As we saw in Chapter 3, international law does not generally interfere with the domain of citizenship.

[9] See for example Adrian Favell, "To belong or not to belong: the postnational question", in Andrew Geddes and Adrian Favell (eds) *The Politics of Belonging: Migrants and Minorities in Contemporary Europe* (Ashgate, 1999); Immigrant Council of Ireland, "Getting On: From Immigration to Integration" (ICI, May 2008); and Gokce Yurdakul and Michael Bodemann ed.s, *Citizenship and Immigrant Integration* (Palgrave Macmillan, 2007), in particular Chapter 3, Irene Bloemraad, "Citizenship and Pluralism: Multiculturalism in a World of Global Migration".

[10] On a European level, citizenship is seen as one of the key indicators by which integration can be benchmarked, with the Migrant Integration Policy Index ("MIPEX") recording the best and worst practices regarding access to nationality in 31 countries (British Council and Migration Policy Group, Migration

has emphasised the symbolic power of the institution of citizenship,[11] and on the level of governance the Irish Minister for Integration envisaged a formal pathway to permanent residency and citizenship as one of the key actions to be undertaken in integration policy.[12] Despite the potential of citizenship as an integration tool, however, citizenship is also, by its nature, an exclusionary device.[13] The exclusionary elements of citizenship are reflected in the way that integration tests are being used in some countries as a barrier to accessing citizenship, which will be looked at below. More fundamentally, formal legal citizenship is a powerful instrument of social closure,[14] and thus constitutes a key way in which 'outsiders' may become 'insiders' in a society, but also a mechanism to keep undesired

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Integration Policy Index III (2011), www.integrationindex.eu) In the United States, naturalisation is an essential instrument of integration, particularly as the USA has not traditionally engaged in formulating integration policy at a formal level (See the contributions to Michael Fix (ed), *Securing the Future, US Immigrant Integration Policy, A Reader* (Migration Policy Institute, 2006), particularly Michael Fix, "Immigrants Integration and Comprehensive Immigration Reform: An Overview, in which he describes integration as "one of the most overlooked issues in American governance" (at 3). Citizenship is an issue which is continually "very much on America's collective mind." (Peter H. Schuck, "The Re-Evaluation of American Citizenship" 12 (1997-1998) Geo. Immigr. L.J. 1). The debate there is increasingly focussed on the fact that "integration must go beyond facilitating the requirements for naturalization" (Lauren Gilbert, "National Identity and Immigration Policy in the U.S. and the European Union" 1(2007-2008) 14 Colum J Eur L 99, at 143).

[11] International Organisation for Migration and the National Economic and Social Council, *Managing Migration in Ireland: A Social and Economic Analysis* (IOM, September 2006), at para. 9.4.14, where it is suggested that "citizenship is fundamentally an instrument defining membership in a society" and should be seen as a powerful device for facilitating inclusion and for signalling national preferences regarding the future face of the population and the preferred terms of allegiance.

[12] Office of the Minister for Integration, *Migration Nation: Statement on Integration Strategy and Diversity Management* (May 2008), at 9. Migration Nation also cites a table which includes the naturalisation rate as an indicator of integration, as indicating true adaptation and becoming full-fledged citizens (at 25).

[13] Bryan Fanning and Fidele Mustawaribo, "Nationals/Non-Nationals: Immigration, Citizenship and Politics in the Republic of Ireland" (2007) 30(3) *Ethnic and Racial Studies* 439. Similarly, Rogers Brubaker observes: "(a)lthough citizenship is internally inclusive, it is externally exclusive. There is a conceptually clear, legally consequential, and ideologically charged distinction between citizens and foreigners (Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press, 1994), at 21).

[14] Rogers Brubaker, *ibid.*, at 23.

outsiders as such. Approaches to nationhood and citizenship thus provide the "normative context for understanding integration".[15] Different national traditions of citizenship provide differing normative contexts and have given rise to different models of integration policy, as discussed in Chapter 2. The French and the German,[16] the British and German[17] and the US and Israeli citizenship traditions are often compared and contrasted, for example.[18] This chapter will use a comparative perspective in parts, with the aim of putting the Irish position in a broader context.

The previous chapter highlighted the importance of citizenship by discussing the position of non-nationals in constitutional law, focusing on fundamental rights. This chapter will be broken into two parts, starting by looking at some of recent experiences and debates in Ireland in the area of citizenship, most notably the 2004 constitutional referendum which removed the automatic right to Irish citizenship of children born in Ireland (Irish-born children of migrants will be referred to in this context as "Irish-born children"). The repercussions of the referendum and the change in the law from an integration perspective will be discussed, using the parliamentary debates concerning the referendum and the subsequent legislation as a guide to the discourse surrounding the referendum. The second part of the chapter concentrates on access to citizenship, looking at the ascription of birthright citizenship, naturalisation procedures and the use of 'integration' as a barrier to accessing citizenship.

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[15] Alistair Ager and Alson Strang, note 1, at 176.

[16] See for example Rogers Brubaker, note 14.

[17] See for example Adrian Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain* (2nd ed, Palgrave, 2001).

[18] Abraham argues that thinner visions of citizenship, along the US model of individualistic equal protection of mostly negative rights, are better suited to integrating foreigners into the solidarity of social life by way of civic-constitutional and cultural principles than thicker citizenship foundations with sharper exclusions on ethnocultural lines and more explicit social rights and ties - such as those traditionally present in Germany and Israel (David Abraham, "Constitutional Belonging, Citizenship and Belonging" (2009) 6(1) *ICON* 137).

7.2 Setting the Law in Context: Citizenship Debates in Ireland and the 2004 Referendum

It is necessary to gain a basic understanding of the historical, social and political context in which the current law operates in order to understand citizenship law in Ireland. This section gives a brief overview of citizenship debates in Ireland since the signing of the Belfast Agreement in 1998, with a particular focus on the 2004 citizenship referendum. This ground has already been covered in academic writing in some detail,[19] reflecting the import of the 2004 referendum - which has been described as "the most significant event in the politics of immigration in the Republic of Ireland".[20] It will be seen from the survey of the literature and the parliamentary debates that the 2004 referendum mobilised a number of discourses relating to citizenship and immigration.[21] The overarching theme to emerge from the lead-up and result of the referendum was the sense in which citizenship was perceived by the contributors to the debate on the 2004 referendum not just as a set of rights, but primarily as a mechanism of exclusion of immigrants who had "not made a contribution to Irish society".[22] The evolution described below of the use of citizenship from a symbol of inclusion and reconciliation in the context of the Belfast Agreement to a means of exclusion due to the changing social environment reflects the interconnectedness of law to its societal and political context.

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[19] The following writings are drawn upon extensively in this section: Siobhan Mullally, "Citizenship and Family Life in Ireland: asking the Question 'Who Belongs'?", note 6; Bryan Fanning and Fidele Mutwarasibo, note 13; Steve Garner, "Babies, Bodies and Entitlement: Gendered Aspects of Access to Citizenship in the Republic of Ireland" (2007) 60(3) *Parliamentary Affairs* 437; Donncha O'Connell and Ciara Smyth "The Constitution and Family Rights", in Ursula Fraser and Colin Harvey, *Sanctuary in Ireland? Perspectives on Asylum Law and Policy* (IPA, 2003); Bryan Fanning and Fidele Mustawaribo, "The Citizenship Referendum" in Bryan Fanning, *New Guests of the Irish Nation* (Irish Academic Press, 2009).

[20] Bryan Fanning and Fidele Mutwarasibo, "Nationals/Non-Nationals: Immigration, Citizenship and Politics in the Republic of Ireland", note 13, at 439.

[21] Steve Garner, note 19, at 448.

[22] See for example the remarks of the then Minister for Social and Family Affairs, Mary Coughlan, quoted in "Amendment will Guard Citizenship from Abuse, says Government", *Irish Times*, 11 June 2004.

7.2.1 The legal and factual context of the 2004 referendum

On foot of the Belfast Agreement, signed as a central part of the peace process in Northern Ireland in 1998, the Nineteenth Amendment to the Constitution Bill 1998 which proposed the amendment of Articles 2 and 3 of the 1937 Constitution (amongst other articles), was approved by the Irish electorate. The amended Article 2 affirmed the entitlement of every person born on the island of Ireland to be part of the Irish Nation.[23] This changed the existing position under the 1937 Constitution whereby access to citizenship was simply to be determined "in accordance with law",[24] and in effect reinstated the constitutional imperative of birthright citizenship which had been contained in the 1922 Constitution.[25] This brought access to Irish nationality into the constitutional sphere. Irish-born children of immigrants were the unintended beneficiaries of the inclusive spirit of the Belfast Agreement and the constitutionalisation of the *jus soli* principle, which coincided with a significant increase in immigration into Ireland. This coincidence was subsequently described by the Irish Supreme Court as an "accident of history".[26]

The amended Article 3 asserts the state's desire to recognise the "diversity of traditions and identities on the island of Ireland". Article 3, as amended, is in integration terms perhaps the most significant provision in the Constitution, symbolically speaking, as it

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[23] The text of the amended Article 2 reads: "It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."

[24] Article 9.1.2 of the 1937 Constitution.

[25] Article 3 of the 1922 Constitution provided that those domiciled in the area of the jurisdiction of the Free State at the time of its coming into force who had been born in Ireland, had parents born in Ireland or had been ordinarily resident in the area of the jurisdiction of the Free State for seven years would become citizens, however anyone who was the citizen of another state could choose not to become an Irish citizen.

[26] *AO and LO v Minister for Justice, Equality and Law Reform* [2003] 1 IR 1, at 172, *per* Fennelly J.

constitutes the only express recognition of the value of diversity in the 1937 Constitution.[27] This broad phrase was not conceived in order to address the diversity of identity and tradition created by immigration and it will be shown how the spirit of the provision has been undermined by subsequent events, culminating in the constitutional amendment of 2004. In the context of a sharp increase in immigration, it became clear that the wider implications for citizenship of the inclusive impulse which had driven the amendment of Articles 2 and 3 in the context of the reconciliation of communities in Northern Ireland had not been considered.[28]

In parallel to these constitutional changes the jurisprudence of the Irish courts on the residency rights of non-citizen family members of Irish citizens was evolving. The Supreme Court in *Fajujonu v Minister for Justice*[29] had determined that asylum seekers and other immigrants with Irish citizen children were entitled to reside in Ireland on the basis of their children's constitutional right to the care and company of their parents. Following this decision, applications for residency from parents on the basis of their children's citizenship were routinely granted throughout the 1990s. With the advent of significant inward migration into the state, questions surfaced in relation to the perceived 'loophole' created by the combination of automatic birthright citizenship and the administrative approach followed in relation to residence permits which had followed the *Fajujonu* decision. The *Fajujonu* approach was effectively reversed with the decision of the Supreme Court in *AO*

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[27] Speaking at a conference on "Diverse Views on Diversity", the President of Ireland Mary McAleese emphasised that the respect for diversity and the right to equality are enshrined in the words of the 1916 Proclamation of Independence and the Irish Constitution. She said those sentiments should not be seen as "just words, they are intended to be a way of living, of acting and of thinking". Speech of Mary McAleese, President of Ireland, at "Diverse Views on Diversity", Immigrant Council of Ireland conference, 3 November 2010.

[28] Deputy Power put it as follows in the Dáil debate following the referendum: "It was never the intention that the constitutional provisions arising from that Agreement would lead to the position in which we found ourselves through no fault of those who drafted the Agreement or the referendum subsequent to that Agreement." Dáil Éireann - Volume 591 - 28 October 2004 - Irish Nationality and Citizenship Bill 2004: Second Stage (Resumed).

[29] [1990] 2 IR 151.

and LO v Minister for Justice, Equality and Law Reform,[30] which was discussed in detail in Chapter 6. Nevertheless, media and public attention remained focussed on the issue of birthright citizenship.

Outside of the legal sphere, there was a corresponding increase in public discussion of immigration and asylum issues between 1997 and 2004.[31] The politicisation of immigration gathered momentum in the run-up to the 2002 general elections, with immigration predominantly characterised as an asylum-seeker 'crisis'.[32] Two anti-immigration independent candidates, belonging to the "Immigration Control Platform", stood in these general elections, with neither being elected. In North Central Cork, a Fianna Fáil TD was elected on the basis of what many saw as populist exploitation of the asylum issue.[33] The conflation of the issues of illegal immigration and asylum in the public mind extended to legislative provisions, with the *Illegal Immigrants* (Trafficking) Act 2000 (italics added for emphasis) targeting trafficking of asylum seekers.

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[30] [2003] 1 IR 1.

[31] This is explored in detail by Bryan Fanning, "The Political Currency of Irish Racism 1997-2002" (2002) 91 *Studies* 319, at 442 *et seq*.

[32] Also discussed in Bryan Fanning, *ibid*.

[33] For a discussion of this, see the contributions of Senators Minihan and Mansergh, amongst others, in the Seanad in the run-up to the citizenship referendum. Seanad Eireann – Volume 176 – 7 April 2004 – Citizenship Rights for Non-Nationals: Motion. Deputy O'Flynn himseelf, speaking on the Bill after the citizenship referendum, had the following to say: "We in this State have the right to respect and cherish our Irish citizenship. ... We could not allow our natural stature to be diminished by those who would have blatantly continued to manipulate our laws. They would deny us the right to expect that our nationality be given the level of respect and esteem it so richly deserves. Members all know I was vilified publicly for airing this view in this House and in the media in January 2002. My views have been decisively proven to be an accurate reflection of the national viewpoint. I was berated by very vocal interest groups which denounced what they described as my racist and bigoted views when I spoke out on the abuse of our hospitality by some illegal immigrants. I never uttered a word which could be interpreted as racist. They said I was out of touch with the public. Time has proven that those groups are well able to express themselves, but it has also shown that they are capable of seriously misinterpreting the public mind." Dáil Éireann - Volume 591 - 28 October 2004 - Irish Nationality and Citizenship Bill 2004: Second Stage (Resumed).

7.2.2 The conduct of the 2004 referendum

In April 2004, the government announced that a referendum was to take place. The Twenty-Seventh Amendment of the Constitution Bill 2004 proposed that Article 9 be amended to include the following section, Article 9.2:

> 9.2.1 Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and its seas, who does not have, at the time of his or her birth, at least one parent who is an Irish citizen or entitled to Irish citizenship or nationality, unless otherwise provided for by law.
>
> 9.2.2 This section shall not apply to persons born before the date of the enactment of this section.

Garner distils a fourfold justification presented by the government for holding the referendum. First, the IBC 'loophole' was threatening the 'integrity' of the immigration system; secondly, membership of the EU required in practical terms the approximation of Irish citizenship laws with those of other EU countries to avoid 'citizenship tourism';[34] thirdly, people with no real links to Ireland should not be allowed to benefit from citizenship; and finally, a crisis was being caused in the maternity system by non-national mothers seeking to give birth in Ireland in order to obtain citizenship for their child.[35] The most emotive of these claims and the one which engendered the most controversy was the essentially economic claim of 'baby tourism' perpetuated by the Minister for Justice of the time, Michael McDowell, to the effect that national maternity hospitals were being overrun

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[34] This argument was direct result of the decision of the European Court of Justice in *C-200/02 Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925, which is discussed at 5.10.

[35] Steve Garner, note 19, at 439.

by non-national pregnant mothers seeking to give birth in Ireland for the purpose of obtaining citizenship for the child and residence for the rest of the family.[36]

The Minister made a number of striking observations in support of the amendment which directly related to integration. He consistently rejected the suggestion that the aim of the amendment was to deny children of the immigrant community access to citizenship, stating, for example:

> The changes we make to citizenship law must show that there is a continuing céad míle fáilte for those who migrate legitimately to Ireland with a view to establishing a substantial connection with the State by creating new livelihoods for themselves, contributing to the development of society, sharing in our prosperity and founding families and raising children here.[37]

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[36] See "Proposed Citizenship Referendum" (Michael McDowell: Minister for Justice, Equality and Law Reform), *Sunday Independent*, 14 March 2004. See also the response of the Minister to a question on the citizenship referendum of Deputy Finian McGrath, Dáil Eireann – Volume 586 – 27 May 2004 – Written Answers – Citizenship Referendum. In essence, the accusation was that non-national mothers were abusing the Irish health system in their efforts to gain access to Irish citizenship and residence. This view is encapsulated in the comments of Deputy O'Flynn (who had been accused of racism and exploitation of the asylum issue in the run-up to the 2002 election) in the Dáil debates after the referendum was passed: " ... non-national mothers who arrived in our country in the late stages of pregnancy and who left as soon as they had given birth to their little babies. The mothers of the children had come to Ireland as a result of legal advice received abroad. They were told that their children would automatically become Irish citizens and that they could use that as a lever to secure citizenship for the whole family. They were making a mockery of our citizenship. This blatant exploitation of Irish hospitality was done at considerable expense to Irish taxpayers." Dáil Eireann – Volume 591 – 28 October 2004 – Irish Nationality and Citizenship Bill 2004: Second Stage (Resumed).

[37] Dáil Éireann - Volume 591 - 27 October 2004 - Irish Nationality and Citizenship Bill 2004: Second Stage. During the Seanad debate on a motion to delay the referendum, the Minister had refuted the characterisation of the referendum as intending to debar children of the immigrant community from the entitlement to citizenship, asserting that: "On the contrary, the implementing legislation will act as a positive acknowledgement of the place of immigrants settled in Irish society by ensuring that their children acquire that

This quote begs the question as to what the Minister meant by 'legitimate' migrants: does this exclude asylum seekers and refugees, for example (a refugee's time spent in the State as an asylum seeker is not reckonable for the purposes of access to citizenship, as will be seen below), or individuals who have been smuggled into that State (who seem to be classed as illegal immigrants under the Illegal Immigrants (Trafficking) Act 2000)? From the viewpoint expressed in this statement, the situation prior to the amendment of the Constitution devalued citizenship as a tool of integration, as citizenship was too easily accessible for children born to families with no real connection to the State and therefore with questionable links to the rest of the polity and consequent lack of commitment to the State. This raises the question as to whether integration in Ireland is to be based on a commitment to inclusion, openness and ensuring equal rights for all members of Irish society, old and new, or on requiring immigrants prove their "fidelity to the nation". The political discourse surrounding the referendum debates and the parliamentary debates on the Irish Nationality and Citizenship Bill 2004 following the endorsement of the constitutional amendment reveal a spectrum of views on the intersection between immigration, integration and citizenship. Fianna Fáil and the Progressive Democrats, the political parties in government at the time, focussed on the idea that Irish citizenship was something to be earned by those who had contributed to Irish society.[38] Others voiced the opinion that granting citizenship may encourage immigrants "to contribute more to our democratic society and promote an effective integration, harmony and mutual respect."[39] Others

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entitlement. Those whose relationship with the State is far more transient or negligible cannot reasonably expect their children's entitlements to be the same as the entitlements of those with some connection to the jurisdiction." (Seanad Eireann – Volume 176 – 7 April 2004 – Citizenship Rights for Non-Nationals: Motion.)

[38] Dáil Eireann – Volume 591 – 28 October 2004 – Irish Nationality and Citizenship Bill 2004: Second Stage (Resumed), comments of Deputy Power. "It is clear that Irish citizenship should be available to those from other shores who have lived in and contributed to Irish society and who wish to apply for citizenship (373).

[39] Dáil Eireann – Volume 593 – 24 November 2004 – Irish Nationality and Citizenship Bill 2004: Report Stage. (Comments of Deputy Breen).

expressed frustration at the inefficiency of the asylum system at the time and the lack of a coherent immigration policy, which in their view impeded integration.[40]

In spite of the considerable controversy engendered by the proposed amendment,[41] the referendum was passed by a three to one majority, proving resoundingly popular with the Irish electorate. The position introduced only six years previously regarding constitutionally protected birthright citizenship was reversed. The Irish Nationality and Citizenship Act 2004, the details of which will be discussed in the next section, was adopted, and commenced on 1 January 2005.[42]

A side effect of these constitutional and legislative changes, combined with the effect of the *AO and LO* judgment, was that the status of families with citizen children born prior to the commencement of the 2004 Act became uncertain. This issue was addressed by the introduction of an administrative scheme called the Irish Born Child Scheme 2005 ("IBC/05"), by the Minister for Justice, Equality and Law Reform in January 2005. Under the scheme, non-national parents of children born in the State prior to 1 January 2005 could apply to the Minister for leave to remain for an initial period of 2 years. Among the criteria that had to be satisfied were continuous residence in Ireland, the absence of any criminal conviction and economic viability. The nature of this scheme and the extent of any judicial

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[40] See the comments of Deputy McGuinness, Dáil Éireann - Volume 591 - 28 October 2004 - Irish Nationality and Citizenship Bill 2004: Second Stage and Deputy Costello, Dáil Éireann - Volume 591 - 27 October 2004 - Irish Nationality and Citizenship Bill 2004: Second Stage.

[41] A number of prominent legal academics expressed deep concern that that this amendment would leave Irish-born children of non-national parents in a precarious position regarding constitutional rights (see the proceeding of a conference hosted by Trinity College Law School, "The Citizenship Referendum: Implications for the Constitution and Human Rights" (Trinity College Dublin, May 2004)). The Irish Human Rights Commission also expressed concern about the implications of the proposed amendment ("Commission 'concerned' over citizenship referendum", *Irish Times*, 5 May 2004). The speed of the whole process and lack of public consultation prior to announcing the referendum was also criticised, with the Labour Party among the critics of the referendum on this basis ("Referendum a Railroading Affair", *Irish Times*, 15 May 2004).

[42] Irish Nationality and Citizenship Act 2004 (Commencement) Order 2004 (Statutory Instrument No. 873 of 2004).

review were considered by the Supreme Court in *Bode v Minister for Justice, Equality and Law Reform*[43] and *Oguekwe v Minister for Justice, Equality and Law Reform* ,[44] as discussed in Chapter 6. From January 2007, persons granted residency permits under the IBC/05 scheme could apply for a renewal a month before the expiry date of their leave to remain. Under this renewal scheme the leave to remain could be extended for 3 years subject to certain conditions, and a further renewal scheme whereby the leave to remain can be extended by a further three years was put in place in 2010.[45] The IBC/05 and renewal schemes have effectively brought closure to the issue of the residency rights of children born to non-national parents prior to the commencement of the 2004 Act.

7.3 The National/Non-National Dichotomy and its Implications for an Irish Public Philosophy of Integration

Two referendums (and a significant body of case law) later, the importance of the citizenship dimension of Irish public philosophy and political thought is clear. It was seen in Chapter 6 that the 'national'/'non-national' dichotomy is the principal legal division in terms of protection of constitutional rights. It has been argued that this national/non-national dualism has become the conceptual framework for talking about immigration matters more generally in Ireland.[46] It was shown above that the 2004 referendum was characterised as principally revolving around access to the benefits of citizenship and the welfare state. In this sense, the referendum was not overtly racist or exclusionary in character. Indeed, framing immigration issues in terms of access to prized social goods is the acceptable face of exclusion across Europe. In Western liberal democracies with highly developed welfare systems, citizenship is the gateway to a full set of valuable social and

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[43] [2008] 3 IR 663.

[44] [2008] 3 IR 795.

[45] See the Irish Naturalisation and Immigration Service website, at http://www.inis.gov.ie/en/INIS/Pages/WP07000030.

[46] Bryan Fanning and Fidele Mutsawaribo, "Nationals/Non-Nationals: Immigration, Citizenship and Politics in the Republic of Ireland", note 13.

economic, as well as political, rights. Indeed, most European countries now operate their citizenship regimes on the basis of a similar type of approach to that enshrined in the amendment to Article 9. The UK and France have imposed restrictions on the *jus soli* principle in response to increased immigration.[47] Despite this widespread acceptance of the legitimacy of this approach, citizenship conceived in these terms is not just a set of rights but a device of exclusion. More open conceptions of citizenship are evident in the United States, where the *jus soli* principle still applies to almost all children born there.[48]

It has been argued that the primary implication of 2004 referendum is that an entitlement to 'Irishness' is primarily an essence that can be transmitted genetically.[49] On this view, the Irish state's legislative power was "channelled into excluding particular bodies from membership of the nation: most interestingly through the racialised bodies of their parents".[50] In terms of access to the polity, the present position certainly privileges those with Irish parents or grandparents even when they do not live in the State or may never have been in the State, over those present in the State with non-Irish parents. As will be explored in more detail below, under the Irish Nationality and Citizenship (Amendment) Act 2004, introduced following the referendum, children born to non-national parents may acquire citizenship by birth only if the non-national parents can show a 'genuine link' to Ireland (which is proved if one parent has been lawfully resident within the state or in Northern Ireland (or entitled to be resident) for a period of three years or more).[51] In integration terms, this means that citizenship of children born in Ireland depends on a degree of integration of their parents, measured through length of residence. The use of the concept of

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[47] In Britain, this was done via the British Nationality Act 1981 (section 1). In respect of France, see below.

[48] See generally, Lauren Gilbert, "National Identity and Immigration Policy in the U.S. and the European Union" (2007-2008) 14 Columbia Journal of European Law 99, in which she discusses the implications for integration of the fact that, while the US lacks a well-defined integration policy for newcomers, it provides citizenship to nearly every person born on US soil.

[49] Steve Garner, note 19, at 443.

[50] *Ibid.*

[51] Section 6A of the Irish Nationality and Citizenship Act 1956, as inserted by the Irish Nationality and Citizenship Act 2004.

citizenship in the Irish context as a tool of integration is thus, in the case of Irish citizen children, dependent on a certain level of integration having already been attained by a third party – a parent. The Irish public's endorsement of the constitutional amendment involved a complex series of concerns ranging from competition for resources to national identity, which are difficult to assess. However, if these developments are linked back to the ideas of public philosophy and the nexus between citizenship and national identity put forward in Chapter 2 and in the beginning of this chapter, the institution of citizenship in Ireland appears to reveal a relatively closed conception of community, with ramifications for the "normative context" provided by citizenship for integration.

Finally, the evolution of constitutional citizenship law in Ireland is a classic example of the mutually influencing process between law and society highlighted in Chapter 2. The legal conditions of citizenship as created in 1998 were the product of citizenship and identity concerns relating to the conflict in Northern Ireland, which were overtaken by changes in Irish society brought by immigration, ultimately leading to the amendment of the law in 2004. This legal change and the manner in which it was achieved in turn sets the context for the public perception of immigrants and the approach to be taken to the integration of the immigrant population. It may be that:

> The devices of exclusion that have been put in place in recent legislative and constitutional changes ensure that future generations of children, born to immigrant parents will continue to be denied a sense of belonging in the state.[52]

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[52] Siobhán Mullally, "Citizenship and Family Life in Ireland: asking the Question 'Who Belongs'?", note 6, at 600.

7.4 Access to Citizenship: Birthright Citizenship and the Law of Naturalisation

The capacity of states to define their nationals is a key aspect of state sovereignty.[53] In allocating citizenship, states determine who 'belongs' by regulating who enjoys safety from exclusion and expulsion as well as the full range of social, economic and political rights available to citizens. Citizenship is attributed by birth or through naturalisation processes, both of which will be discussed below.

7.4.1 Birthright citizenship: *jus soli* v *jus sanguinis* approaches to citizenship

Looking at whether a state employs a *jus soli* or a *jus sanguinis* approach to citizenship can be seen as an outmoded way to view citizenship regimes.[54] Most countries now operate on a mixture of the two, even countries such as Germany which traditionally operated a descent-based citizenship regime,[55] and the UK and France which generally ascribed citizenship to most persons born on their territory.[56] Nevertheless, the ascription of birthright citizenship remains central to understanding conceptions of membership and citizenship underlying citizenship regimes.

Sections 6-12 of the Irish Nationality and Citizenship Act 1956, as amended (the "1956 Act"), govern the acquisition of Irish nationality at birth, with section 6, 6A and 6B and 7 containing the most important provisions. A person is entitled to be an Irish citizen if either of their parents was an Irish citizen at the time of their birth, irrespective of their place of

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[53] This was conclusively established as a matter of international law in the Nottebohm case (*Licthenstein v Guatemala*) (second phase) 1955 ICJ 4.

[54] Siobhán Mullally, "Citizenship and Family Life in Ireland: asking the Question 'Who Belongs'?", note 6, at 580.

[55] The German Citizenship Act of 2000 introduced a *jus soli* element into German citizenship law. See Anja Wiesbrock, *Legal Migration to the EU* (Martinus Nijhoff, 2010), at 648.

[56] See above.

birth. If they were born outside Ireland to an Irish citizen who was himself or herself born in Ireland, then they are automatically an Irish citizen. Section 7(3) provides that while a person born outside Ireland to an Irish citizen who was also born outside Ireland is entitled to citizenship, they are not automatically an Irish citizen. Such persons' birth must be registered under section 27 in order to obtain citizenship, and citizenship commences only as and from the date of such registration.[57] The Irish citizenship of successive generations living outside of Ireland may be maintained in this way by each generation registering in the Foreign Births Register before the birth of the next generation.

A more complex picture emerges for children born in Ireland to non-national parents. Pursuant to section 6A of the 1956 Act (as inserted by the Irish Nationality and Citizenship Act 2004 (the "2004 Act")), a person born in Ireland with neither of their parents Irish citizens or entitled to be Irish citizens is not entitled to be an Irish citizen unless one of his or her parents has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years. Thus, citizenship for such persons born in Ireland is not automatic. Section 6B details the meaning of 'residence in the island of Ireland' for the purposes of section 6A and provides for the furnishing of a declaration that the parent resided in Ireland for the period stated in the declaration.[58] Importantly, periods spent as a student or an asylum seeker are not reckonable in calculating the period of residence.[59] In relation to asylum seekers, this controversial policy decision was based on the rationale that to provide otherwise "would serve to encourage false claims and the protraction of the

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[57] This registration requirement was introduced by section 2 of the Irish Nationality and Citizenship Act 1986.

[58] The Irish Nationality and Citizenship Regulations 2005 (Statutory Instrument No. 1 of 2005) provide further detail on the form of the declaration and who may witness the declaration. Section 29A of the Irish Nationality and Citizenship Act 1956 creates the offence of knowingly and recklessly making a false or misleading declaration.

[59] Section 6B(4)(b) and (c).

asylum process".[60] This is an illustration of the overlapping factors shaping citizenship policy.

The legislative provisions thus enshrine a mixture of a *jus soli* (much diluted post - 2004 Act) and a *jus sanguinis* approach. The above analysis reveals the differential expectation of attachment and belonging in relation to those who obtain Irish citizenship by descent and those who obtain it due to presence in the State. The Irish diaspora can obtain Irish citizenship through successive generations without any residence in the State, but immigrants to Ireland must prove their commitment to the State through residence of a minimum of four years residence prior to the birth of the child who is obtaining citizenship on *jus soli* grounds. The method of ascription of Irish citizenship by descent reflects the country's extensive experience of emigration and diaspora, and has symbolic importance in that context. It also illustrates the foundations of citizenship laws in national identity, historical experiences of migration and public philosophy. When juxtaposed against the regime for children of relatively new migrants, however, a contradiction becomes apparent between immigrants living in the State who will be required to prove their commitment to the State through a period of residence, and successive generations of Irish emigrants who may never have lived in Ireland and are not subject to this requirement. This diasporic conception of Irishness represents a different perception of connections or ties to the state to that contained in US citizenship law, according to which persons who have acquired US citizenship by descent cannot in general transmit US citizenship to their children unless they have previously established residence in the United States.[61]

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[60] Minister McDowell justified this policy choice relating to students and asylum seekers on the following grounds during the Dáil debates on the Bill: "Permission to reside in Ireland for the purposes of study is purely temporary in nature. It is given for the expected duration of the course of study only and the expectation is that the person will return at the end of the course or, in the case of a multi-year course, at the end of each academic year. As for asylum, any proposal to include in the reckoning a period spent as an asylum seeker would serve to encourage false claims and the protraction of the asylum process." Dáil Éireann - Volume 591 - 27 October 2004 - Irish Nationality and Citizenship Bill 2004: Second Stage.

[61] Section 301 (c) – (g) of the Immigration and Nationality Act [8 U.S.C. 1401].

Citizenship regimes are among the clearest expressions, from a legal perspective, of the public philosophy of a state, with national identity, sovereignty and historical experience shaping the legal rules for attribution of citizenship. In France, the concept of citizenship has always been the centrepiece of the Republican form of government, with French citizenship theory based on the idea of political community rather than ethnic origin. [62] The idea of "*droit du sol*" has traditionally applied in France whereby all persons born in France were entitled to French citizenship, which has been diluted to a certain extent in recent decades. The application of this principle was the main subject of the debates which took place in the 1990s surrounding the concept of citizenship.[63] Between 1992 and 1998 the controversial "*loi Pasqua*" operated to require French-born children of non-citizen parents born abroad to state their wish ("*volonté*") to acquire French nationality between the ages of 16 and 21 and satisfy a number of conditions. Reform in 1998 reinstated the legal position pertaining prior to 1992, whereby French-born children of non-citizens born abroad acquire French nationality automatically when they reach the age of eighteen. The criteria for the grant of citizenship in these cases are that the individual must have been born and reside in France and have had their usual place of residence there for a period of at least five years since the age of 11. In addition, there is provision for the citizenship of French-born children of French-born parents, regardless of the citizenship of the parents ("*double droit du sol*"). The French mode of ascription of birthright citizenship thus bears similarities with the unqualified form of *jus soli* in operation in the United States, where almost all US-born individuals are entitled to US citizenship.[64]

These open conceptions of citizenship can be contrasted with the theoretical and historical foundations of citizenship in Germany and Israel. Until 2000, German citizenship was ascribed at birth only to children of German descent, with ethnicity forming the clear

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[62] On the French conception of citizenship, see generally, Patrick Weil, *Qu'est-ce qu'un Francais? Histoire de la nationnalité francaise de la Révolution a nos jours* (Grasset, 2002).

[63] The evolution of the law in this area is traced by Sergio Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU* (Martinus Nijhoff, 2009), at 312-318.

[64] Section 301 (a) and (b) of the Immigration and Nationality Act [8 U.S.C. 1401].

basis for nationality.[65] In the case of Israel, the tensions undercutting Israeli law generally between the democratic nature of the state and the state's Jewish identity is reflected in its citizenship law.[66] The Law of Return, the centrepiece of Israeli citizenship policy, automatically entitles every Jew in the world to enter Israel and acquire citizenship. Thus every Jewish person is entitled at birth to become an Israeli citizen regardless of their other ties to the Israeli state, residence, knowledge of the language etc. While this is an ethnocentric, closed method of ascribing citizenship rooted in the persecutions of the Jewish people throughout history, Israel also has a neutral citizenship law containing standard provisions on naturalisation for non-Jewish persons (even though when compared with the automatic granting of citizenship to Jewish immigrants the conditions of naturalisation are very restrictive).[67] However, the special treatment of Jewish individuals can be contrasted with the long denial of citizenship to Arab refugees who had occupied the territory prior to the formation of the State, and citizenship laws in Israel must be seen as an exclusionary device in that regard.

As Brubaker observes, the ascription of citizenship at birth is based on a presumption of membership, which reflects the fact that at birth certain persons have a high probability of developing the close attachments and loyalties to a particular society and state that are supposed to underlie citizenship.[68] The ascription of citizenship at birth is thus an indication of membership. It has been seen in this section that Irish birthright citizenship reflects an understanding of membership shaped by a combination of the historical experience of emigration and a rapid increase in immigration. In comparative terms, Irish citizenship law

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[65] See note 55 above.

[66] See Daphne Barak-Erez, "Israel: Citizenship and Immigration Law in the Vise of Security, Nationality an Human Rights" (2008) 6(1) *ICON* 184.

[67] See Ayelet Schachar, "Citizenship and Membership in the Israeli Polity", in T. Alexander Aleinikoff and Douglas Klusmeyer (eds), *From Migrants to Citizens: Membership in a Changing World* (Carnegie, 2000), at 386, in particular at 409-410. For example, individuals who obtain citizenship by naturalisation must renounce the citizenship of their former home while Jewish immigrants are permitted to maintain dual citizenship.

[68] Rogers Brubaker, note 14, at 35.

enshrines a middle-ground between the very open birthright citizenship regime in the US and the traditionally ethnically centred citizenship frameworks in Germany and Israel.

7.4.2 The law of naturalisation

While the acquisition of citizenship at birth is symbolic of attitudes to political and social membership, most immigrants will acquire citizenship through naturalisation, and access to citizenship through naturalisation can be characterised as a key integration mechanism.[69] Dual citizenship is permitted under Irish citizenship law and this common characteristic of citizenship frameworks can be seen as an indicator of an open and inclusive citizenship regime. From an integration perspective, this allows immigrants to maintain the identity of their country of origin on a legal level while adding another layer to their identity in the form of Irish citizenship. This accords with the two way conception of integration which does not require immigrants to relinquish their identity in order to become part of the polity of the host country.

Part III of the 1956 Act, as amended, (sections 14-20) governs the acquisition of citizenship by naturalisation in Ireland. Citizenship is conferred by means of a certificate of naturalisation granted by the Minister (section 14) and the conditions for the issue of this certificate are set out in section 15. These are that the applicant is of full age, of good character, has had a period of one year's continuous residence in the State immediately before the application and four year's residence out of the previous eight years, intends to reside in the state after naturalisation and has made an oath of fidelity to the nation and loyalty to the State. Section 15 provides for the 'absolute discretion' of the Minister in deciding whether to grant the application for naturalisation on satisfaction of these conditions – one of the few instances in Irish law where a Minister is granted the sole power of deciding an outcome of an application in his absolute discretion.[70] This discretion is

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[69] As it is in the MIPEX study, for example. See note 10.

[70] The unusual nature of the power was pointed out by Clark J in *Abuissa v Minister for Justice, Equality and Law Reform* [2010] IEHC 366.

subject only to the requirements of constitutional justice.[71] The Minister is entitled in exercising this absolute discretion to take into account public policy considerations, including in relation to immigration policy, which have little or nothing to do with the facts in the individual case.[72] The relevant statutory provisions do not require the Minister to give reasons for his decision to refuse a certificate of naturalisation, and it was confirmed in *Abuissa v Minister for Justice, Equality and Law Reform* that the Minister is not obliged to give reasons for his decisions for a refusal to grant a certificate of naturalisation in a given case.[73] The upshot of this is that while the decision of the Minister whether or not to grant the certificate of naturalisation is reviewable, the decision not to give reasons for the decision on the application is not reviewable. In the absence of reasons, the substantive decision of the Minister becomes un-reviewable in practice.

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[71] *Mishra v Minister for Justice* [1996] 1 IR 189. Kelly J found that in this case, the requirements of natural and constitutional justice had not been met and required the Minister to give fresh consideration to the application. *Mishra* was followed in *Robert and Muresan v Minister for Justice, Equality and Law Reform*, High Court, Unreported, Peart J, 11 February 2004. The judgment was also cited in the context of ministerial discretion in deportation proceedings in *Sinik v Minister for Justice, Equality and Law Reform*, High Court, Unreported, Smyth J, 19 July 2002 and in the context of ministerial discretion in awarding subsidiary protection in *Gavrylyuk v Minister for Justice, Equality and Law Reform* [2008] IEHC 321. An example of a case in which the Minister was found to have acted incorrectly was in *H(L.G.) v Minister for Justice, Equality and Law Reform* [2009] IEHC 78, in which Edwards J found that it was offensive to notions of justice that a person could be prejudiced in the consideration of their citizenship application on account of their family associations where they themselves are of good character, and accordingly that the Minister was wrong to have taken the applicant's son's convictions into account. However, in making his decision Edwards J emphasised that an applicant for naturalisation has no right or entitlement to a particular outcome, reflecting the general approach and the courts' reluctance to interfere with the Minister's discretion in citizenship matters.

[72] *Ibid*, at 204. In *Mishra*, Kelly J observed that the Minister was entitled to adopt a general policy not to naturalise people who would be unemployable in their chosen profession and would therefore emigrate after naturalization.

[73] Although it seemed from *Mishra v Minister for Justice*, at 203 and *H(L.G.) v Minister for Justice, Equality and Law Reform* that this decision could be open to review in the interests of natural and constitutional justice. Clark J in *Abuissa* analysed these decisions and concluded that there was no authority for the propostion that the courts do, and have in the past, reviewed the decisions made in his absolute discretion. In her view, the previous decisions concerned the question of whether one of the statutory pre-conditions to the Minister's exercise of his absolute discretion had been met (para.58).

The extent of the discretion afforded to the Minister underlines that the granting of a certificate of naturalisation under Irish law is not a right to which a person who appears to satisfy all the conditions is entitled, but rather a "privilege",[74] reflecting the assumptions regarding the extensive powers of the State to deal with non-citizens on which citizenship frameworks are based. There is no legitimate expectation to a grant of citizenship consequent upon fulfilling all of the statutory criteria.[75] The wide margin of appreciation given to the State and the subjective nature of the concept of 'good character' offers to the nation-state, via the Minister for Justice, Equality and Law Reform, a mode of legitimation of its sovereignty and emphasises the vulnerability of the migrant individual in the face of the State.[76]

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[74] This was emphasized in *Robert and Muresan v Minister for Justice, Equality and Law Reform*, High Court, Unreported, Peart J, 11 February 2004. In this case, the applicants had applied for certificates of naturalisation and had been refused on the basis that the time spent in the asylum process did not contribute towards the five year residence requirement for naturalisation (the applications were made before legislative amendments enshrined this policy in the 1956 Act). The applicants submitted that in applying this policy the Minister had unlawfully fettered his discretion and that the applicants had a legitimate expectation that they would be granted a certificate of naturalization. These arguments were rejected by Peart J in finding that the wide discretion of the Minister reflected the nature of the granting of citizenship as a privilege and not a right, and that the Minister had not fettered this wide discretion through an overly rigid adherence to a set policy.

[75] *Ibid.* See also *H(L.G.) v Minister for Justice, Equality and Law Reform* 2009 [IEHC] 78. The level of ministerial discretion in the naturalisation process has been criticised as leading to uncertainty and a lack of transparency (Immigrant Council of Ireland, "Getting On: From Immigration to Integration" (ICI, May 2008, Recommendation 14).

[76] Sergio Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU* , note 63, at 443. See also Immigrant Council of Ireland, *ibid.*, Recommendation 14. The Immigrant Council of Ireland ("ICI") has advocated for paths to citizenship and long-term residence to be made easier and calls for a streamlined procedure for granting citizenship which "should, in all but the most exceptional of cases, be non-discretionary". The ICI has also pointed to a number of serious problems in the practice of the citizenship application process including "delays, the lack of proportionality in decisions to refuse applications, unfair procedures and the need for a definition for what constitutes "good character" for the purposes of citizenship applications" (ICI News Bulletin, Issue 67 (2010), 13 May 2010).

Amongst other conditions set out in section 15, the applicant must be of 'good character'[77] and must make a declaration of fidelity to the nation and loyalty to the State before a Judge of the District Court.[78] Of most significance from a practical perspective is the required period of residence, which amounts to one year's continuous residence immediately before the date of the application as well as at least four years 'reckonable residence' during the preceding 8 years. 'Reckonable residence' is an important concept here as in the context of birthright citizenship, and is detailed in s. 16. Again, periods spent as a student or as an asylum seeker are not reckonable periods of residence for the purposes of Section 16A.

The overarching theme of ministerial discretion in the field of citizenship is evident in the Minister's power to dispense with the conditions of naturalisation in certain cases as set out in section 16. These include in the case of recognised refugees or stateless persons (s. 16(1)(g)); naturalised citizens applying on the behalf of a minor child; and where the applicant is "of Irish descent or Irish associations" (s.16(1)(a)). A person is of 'Irish associations' if:

(a) He or she is related by blood affinity or adoption to a person who is an Irish citizen or entitled to be an Irish citizen; or

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[77] The Garda Siochána will be asked to provide a report about the person's background.

[78] When an application for naturalisation is approved by the Minister for Justice, Equality and Law Reform, the applicant is given a copy of the prescribed declaration form. The applicant goes to the District Court and reads the contents of the form aloud in court. This oath is simple and runs as follows: "I.....(Name) of.....having applied to the Minister for Justice, Equality and Law Reform for a certificate of naturalisation, hereby solemnly declare my fidelity to the Irish nation and my loyalty to the State." The Judge will then sign the form which is lodged with the Department of Justice Equality and Law Reform. Once other procedures are completed (payment of the fee, lodgement of outstanding documents etc) a formal certificate of naturalisation is issued. Migration Nation states that it has been suggested that a civic citizenship ceremony may be more appropriate than the present ceremony whereby the swearing is done in front of a District Judge, and may be done among criminal cases (at 25).

(b) He or she was related by blood, affinity or adoption to a person who is deceased and who, at the time of his or her death, was an Irish citizen or entitled to be an Irish citizen.

The concept of Irish associations is therefore synonymous with association through blood rather than extending to associations with the Irish State or contribution to Irish society.

7.4.3 Integration and language requirements in naturalisation procedures

In the European context, common barriers to accessing citizenship relate to language proficiency and proving a certain degree of integration or knowledge of the host country.[79] Most European states require a competency in the local language before citizenship is granted. In addition, many states are introducing tests of knowledge of life, culture and institutions in the host country as a prerequisite to obtaining citizenship. These integration tests evidence a requirement for a more active participation for those seeking citizenship who do not passively belong, territorially or ethnically. Those without citizenship by birth must prove their commitment to the State and ability to participate in social solidarity.[80] Thus prospective naturalised citizens are expected to gain a knowledge of the functioning of the society and political system that is in many cases beyond that of the majority of members of the polity by birthright.[81] Thus, Waldrauch et al noted in their Europe-wide study of the acquisition of nationality that:

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[79] See generally, the contributions to Ricky Van Oers, Eva Ersboll and Dora Kostakopoulou (eds), *A Re-Definition of Belonging? Language and Integration Tests in Europe* (Martinus Nijhoff Publishers, 2010), in particular Bernhard Perchinig, "All you Need to Know to Become an Austrian: Naturalisation Policy and Citizenship Testing in Austria" (at 25); Ricky Van Oers, "Citizenship Tests in the Netherlands, Germany and the UK" (at 51); and Judit Toth, "Ethnic Citizenship: Can it be Obtained and Tested?" (at 211).

[80] See David Abraham, note 18.

[81] A good example here is the Life in the UK test, which has been criticised on the basis that most Britons would not pass if given the test. Carrera describes the purpose behind the normativity of integration in nationality law as follows: "the use of integration as a legal condition aims at managing and safeguarding the notion of the 'perfect citizen' belonging to the nation-state. This notion is based on a compendium of features

> In the literature on nationality law, the assumption is of convergence towards more liberal naturalisation policies, with the aim of including large groups of permanently resident immigrants. Naturalisation has been perceived and used as an instrument supporting the integration of immigrants. Thus, the acquisition of nationality by second generation immigrants was facilitated, the requirements for naturalisation by first generation immigrants were reduced and multiple nationality was accepted. On these three issues, we observed recent developments in the opposite direction. ... Access to naturalisation by first generation immigrants has become more difficult in several countries with the introduction of stricter language and integration requirements. ... The concept of 'naturalisation as a means of integration' is apparently being replaced by another paradigm of naturalisation as the 'crowning of a completed integration process'. The implications of this policy shift are evident, for example, in the introduction of formal examinations of language skills and knowledge of society.[82]

In the context of naturalisation, European governments frequently test individual commitment to integration on a superficial level without connecting integration to real equality or inclusion (ie the governmental responsibilities in integration).[83] This

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and characteristics composed of subjective stereotypes, traditional perceptions and visions of the past and present, principles and classical values deemed to rule the 'one and only society', and conceptions of the self and the Other". Sergio Carrera, *In Search of the Perfect Citizen? The Intersection Between Immigration, Integration and Nationality in the European Union*, note 63, at 441.

[82] Rainer Bauböck, Eva Ersbøll, Kees Groenendijk and Harald Waldrauch (ed.s), *Acquisition and Los of Nationality, Summary and Recommendations* (Institute for European Integration Research Austrian Academy of Sciences, Vienna, January 2006), at 7.

[83] Amitai Etzioni makes the point that: "In nations, however, if the tests are not to act as anti-immigration and discriminatory measures, they must be coupled with suitably extensive and qualified opportunities for citizenship education and for test preparation. The limited data briefly cited here strongly suggest that neither is

convergence of European naturalisation practice around the features of integration and language tests supports the argument explored in Chapter 2 that despite certain historical and contemporary differences, integration and citizenship regimes are converging around an exclusionary model tilting towards the assimilation model of integration.[84]

Individuals applying for citizenship through naturalisation in Ireland are not required to demonstrate proficiency in English (or Irish), nor are they required to satisfy any integration requirements. This is unusual amongst wealthy Western nations, as can be seen from the brief analysis above. On comparison with other citizenship frameworks then, and perhaps contrary to some of what has been argued in this chapter, Irish citizenship law could be said to encompass an open form of citizenship, using residence alone as the indicator of embededdness in Irish society. However, a more pragmatic view would seem to be that rather than being founded on inclusive integration principles or an open conception of membership, this openness is explicable by reference to the context in which the citizenship framework was developed: that of negligible inward migration. This reflects the trend that:

> Choices among citizenship rules are usually shaped more by historical experience, existing cultural norms, and expedient political calculations than by deduction from abstract principle or compelling reasons of logical consistency.[85]

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currently the case in any of the nations under study." Amitai Etzioni, "Citizenship Tests: A Comparative, Communitarian Perspective" (2007) 78(3) *Political Theory* 353, at 361).

[84] Thus, from his survey of citizenship tests in the Netherlands, Germany and the UK, Ricky Van Oers notes that "At least in the Netherlands and Germany (and increasingly in the UK ...) naturalisation is regarded as the culmination of a completed integration process, which can only take place when applicants have more or less assimilated into the majority culture". Ricky Van Oers, note 79, at 101.

[85] See T. Alexander Aleinikoff and Douglas Klusmeyer (eds), *From Migrants to Citizens: Membership in a Changing World* (Carnegie, 2000), at 2.

Proposals for the reform of certain aspects of the acquisition of citizenship would bring Ireland closer to the model of access to naturalisation currently in use across Europe. Migration Nation envisages a formal pathway to permanent residency and citizenship for those who qualify as one of the key actions to be taken in the sphere of citizenship.[86] This formal pathway would include making citizenship and residency contingent on proficiency of skills in the spoken language of the country.[87] The statement also notes that it has been suggested that there should be a test on showing knowledge of how Irish society is organised, although it does not comment on this proposal.[88] It remains to be seen whether these proposals are built upon in future citizenship legislation.

7.5 Alternatives to Citizenship: Long-term Residency[89]

The importance of access to citizenship in the Irish context is heightened in the Irish context due to the lack of legal provision for a secure long-term resident status. As discussed in Chapter 5, Ireland has not opted in to the LTRD at EU level, meaning that third country nationals residing in Ireland are exempted from the Directive.[90] In common with many aspects of the Irish immigration framework, there is no formal statutory scheme in existence in Ireland providing for a long-term resident status. The secondary legislation,

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[86] Migration Nation, note 12, at 9.

[87] *Ibid.*

[88] *Ibid.*, at 52. The IOM study of Ireland, in contrast, states that rather than tying citizenship to migrant incorporation and homogenous values which narrows national identity and scope for belonging, governments should focus on inclusion and enhancing the capacity for collective action, providing an example of the disjuncture between state and NGO views on appropriate conceptions and methods of integration. (International Organisation for Migration and the National Economic and Social Council, note 11, at 166).

[89] See generally Kees Groenendijk, Elspeth Guild and Halil Dogan, "Security of Residence of Long-Term Migrants: A Comparative Study of Law and Practice in European Countries" (Council of Europe, 1998), http://www.coe.int/t/dg3/migration/Documentation/Legal_texts/Security_residence_long-term_migrants_report_en.pdf.

[90] In practice, this opt-out means that long-term residents in Ireland are significantly worse off in Ireland in comparison to all other EU states (except the UK and Denmark), as they do not benefit from the EU law requirement of a long-term resident status after 5 years.

which provides for the fee of 500 euro for each application, simply states that "Long Term Residency is a status capable of being conferred on qualifying persons who have been legally resident in the State on the basis of a work permit/work authorisation/work visa conditions and have made application to have that status conferred upon them."[91] Long-term residency is dealt with in Ireland by way of administrative scheme, whereby individuals who have been legally resident in the State for a minimum of five years on the basis of work permit, work authorisation or working visa conditions may apply to the Irish Naturalisation and Immigration Service for a residency extension of five years.[92]

Expulsion of long-term residents is not specifically restricted in any way in Ireland, although (as was seen in Chapter 6), in general terms, the courts will take into consideration the length of time an individual has been in the State in adjudicating on the Minister's decision to deport them. There is no simplified or automatic procedure for the acquisition of citizenship by long-term residents or for family reunification of long-term residents. Long-term residents do not benefit from a special legal status distinct from other migrants aside from the fact that they are permitted to reside in the State for a period of five years, which may thereafter be renewed in five year periods. "Long Term Residency" in Ireland thus provides little security. From an integration perspective, Long Term Residency does not recognise prolonged residence in the State or provide an acknowledgment of the contribution that the migrant has made through any specific benefits. Overall, Long Term Residency status in Ireland is certainly not a viable alternative to citizenship status for individuals seeking to make their home in Ireland on a long term basis, illustrating the continued importance of the rules governing access to citizenship in the Irish context in particular.

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[91] Long Term Residency (Fees) Regulations 2009 (Statutory Instrument No. 287 of 2009).

[92] Non-citizens may also obtain "permission to remain without condition as to time" after a period of 8 years. As was noted in Chapter 2, provision for the acquisition of long-term residency under certain conditions – including an integration condition - was made in the Immigration, Residence and Protection Bill 2010 (as discussed in Chapter 2).[92] This indicates that the need to address the gap in the present system has been recognised. However this Bill lapsed on the dissolution of the 30th Dáil in February 2011 and so for the moment, long-term residency is in the main unlegislated for.

7.6 Conclusion

This chapter has emphasised the importance of citizenship from an integration perspective and explored the Irish citizenship regime in comparative perspective. However, the limitations of formal citizenship in integration terms are apparent. Formal citizenship cannot of itself ensure social inclusion, and many members of Irish society who are citizens by birth are excluded and marginalised despite their legal status. In addition, the primacy of national citizenship and its allied understandings of bounded national community and rights protection are challenged by the development of universal human rights, globalisation and regionalisation. Chapter 4 illustrated that conceptions of integration which are based on narrow conceptions of national identity and a strict dichotomy between the citizen and those are put under significant pressure by international human rights norms. The supranationalisation of core rights of individuals and duties of states through the medium of international human rights law has a direct impact on the form of national integration policy. Furthermore, as discussed in Chapter 5, the EU presents an example of a supranational organisation with its own legal form of citizenship, and the *Zambrano* decision discussed in that chapter illustrates the impact which the openness of the EU citizenship regime can have on national immigration law.

The significance of citizenship and national identity in Irish public philosophy has been illustrated in this chapter. The incoherency of the Irish citizenship framework is also evident. The discourse surrounding the 2004 referendum revealed a relatively closed conception of belonging and a preoccupation with maintaining the borders of the welfare state. More generally, it is much easier for those with ethnic Irish background who have never spent any time in the state to obtain citizenship than it is for immigrants who have lived in the state and contributed to Irish society, also providing evidence of an ethnically-centred conception of citizenship. Nevertheless, it was also shown that Irish law imposes few conditions on access to citizenship, unlike most European states which impose language and integration requirements on applicants for citizenship. Related to this point, the role of

integration in the Irish citizenship framework is also unclear. While the discourse surrounding the citizenship referendum suggested that the law was devised to ensure that children of those without some degree of integration into Irish society did not obtain citizenship, this has not as yet been translated into integration conditions in the naturalisation process. In addition, 'integration' in the sphere of citizenship appears to be perceived as mainly relating to length of residence rather than commitment to the state or cultural integration, with primary example of this being that the birthright citizenship of children born to non-national parents depends on the degree of integration of their parents measured solely in terms of length of residence. Overall, the question of whether citizenship is a tool for progressive integration or a reward for completed integration is as yet unresolved in Irish law.

8 Religion, Education and Integration in Irish Law and Practice

8.1 Introduction

In *Campaign to Separate Church and State v Minister for Education*[1] Keane J observed:

> As in many other countries around the world, religion plays an important part in Irish life and has done so for many centuries. That unquestionable fact is reflected in the provisions of Article 44 of the Constitution. Even were such provisions absent from the Constitution, however, the Courts could not disregard, at least in a context where it becomes relevant, the fact that religious beliefs and practices are interwoven through the fabric of Irish society.[2]

Keane J supported this broad statement by giving some examples of the ways in which Irish law accommodates the practice of religion, including the way in which the Irish law of trusts continues to treat trusts established for the advancement of religion as entitled to charitable status without any proof that they are for the public benefit (such trusts are presumed to be for the public benefit),[3] and the exemption as of right of ministers of religion and others from the obligation of jury service.[4] If we add to this list the prohibition on

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[1] [1998] 3 IR 321.

2 *Ibid.*, at 359.

3 This position pertains even after the modernisation of the law of charities by the Charities Act 2009. See section 3(4) of the Charities Act 2009, which provides that "It shall be presumed, unless the contrary is proved, that a gift for the advancement of religion is of public benefit."

4 Juries Act 1976, Schedule I, Part II.

blasphemy in the Constitution[5] and the constitutional requirement for the President and judges to take a religious oath,[6] a clear sense of the legal recognition of the importance of religion in Irish public life begins to emerge.[7] The Irish constitutional and legislative framework for the protection of religious liberty was developed in the context of the numerical and cultural dominance of the Catholic faith (with established small minorities in the form of the Church of Ireland and Jewish religions). It remains to be seen how this framework copes with, on the one hand, the increased secularisation of Irish society and, on the other hand, the diversification of religious belief brought about by immigration.

This chapter will use the two interrelated issues of the state funding of the denominational education system and the presence of religious symbols in the public sphere (in particular in state education) to address the question of how the existing legal framework copes with the diversity of religious belief now represented in Irish society. The first of these issues forms part of the broader issue of the regulation of the State's relationship with religion and has been the subject of perennial debate in Ireland as well as a certain body of case law. The second is illustrative of the legal approach to the protection of individual religious liberty and, while it has not arisen in a controversial way in Ireland as yet, has arisen as a key legal issue in other jurisdictions. In the case of each of these subjects, the current legal position in Ireland will be analysed (with the underlying aim of assessing what kind of integration paradigm emerges from Irish law and practice) and also assess the compatibility of the Irish approach with international law in light of European Convention on Human Rights ("ECHR") jurisprudence and the Optional Protocol jurisprudence of the Human Rights Committee (the "CCPR") along with the Concluding Observations of the CCPR on state reports.[8] Before embarking on this substantive legal analysis I will briefly assess the nexus between religion, education and integration (with the purpose of delineating

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[5] Article 40.6.1i.

[6] Articles 12.8 and 34.5.1.

[7] See also section 36 of the Defamation Act 2009, which establishes a controversial prohibition on the publishing or the utterance of blasphemous matter.

[8] For an interesting discussion of the relationship between international law and religion generally, see Mahshood A. Baderin, "Religion and International Law: Friend or Foes?" (2009) 5 *EHRLR* 637.

more clearly the aims of the chapter) in addition to describing the content of and background to the relevant Irish constitutional provisions.[9]

8.2 The Nexus between Religion, Education and Integration

While overall, the role and position of religion in the public arena can be seen as demonstrative of how the common spaces of society are delineated, issues relating to religion can be more specifically classed as impacting on the integration paradigm in two main ways, described by Oran Doyle as "freedoms *from* religion" and "freedoms *of* religion".[10] The first of these concerns the regulation of the relationship between the State and religion, which impacts on freedom *from* religion. The approach taken to this complex question throws into relief the relationship between members of majority and minority religions and the capacity of minority religions to survive. If the State consistently and in legal terms supports the existence of one religion and privileges it over others, this may diminish the capacity of adherents to minority religions to express and practice their religion in the public arena. Equally, if the policy of the State is to maintain a policy of not supporting religion at all or seeking to exclude religion from the public sphere, as is historically the case in France, this may cause difficulties in terms of religious practices with public manifestations. Finally, it may indicate on an institutional level the level of openness of the institutions of the State to those who do not form part of the traditional majority.

The second way in which religion and integration interact is on the level of individual religious liberty and freedom *of* religion: to use the wording of Article 44.2.1 of the Irish

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[9] At this point it is necessary to distinguish between the aims of this chapter and those of Chapter 5 dealing with the constitutional framework for integration, as that chapter also contained a discussion of the constitutional provisions on religion. That chapter examined religion in the Constitution from the perspective of how it forms part of the constitutional or public philosophy of the State. The objective of this chapter, in contrast, is to examine the black-letter legal rules that have been developed in relation to religion and see how they apply in the evolving social context to integration matters.

[10] Oran Doyle, "Article 44: Privileging the Rights of the Religious", in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution: Governance and Values* (Thomson Round Hall, 2008).

Constitution, the guarantee of "free profession and practice of religion". The extent to which this right is protected has a direct impact on the integration paradigm embodied in states' legal practice. This links to the core question of the approach taken to cultural integration and whether individual immigrants are required to remake themselves in the mould of an idealised member of the imagined political and cultural community in the course of the integration process. States take different approaches to this question, with some following the legal approach that to allow manifestation of private beliefs in the public sphere reinforces difference, works against integration and has the potential to lead to societal conflict, while others have followed a multicultural policy of permitting individuals to visibly maintain their cultural and religious identity.[11] The lack of consistency in the approach of states to the question of the manifestation of religious belief in the public sphere has been referred to by the European Court of Human Rights on numerous occasions.[12]

The two discrete issues on which this chapter will focus are illustrative of these two elements of the relationship between religion and integration but are also notable in that they both concern education, reflecting the fact that education is frequently "the main battlefield in state-religion controversies".[13] Education also has a complex nexus with integration,

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[11] France on the one hand and the United Kingdom/Canada on the other hand are often portrayed as occupying the opposing ends of the spectrum on this point. See for example Adrian Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain* (2nd ed, Palgrave, 2001); Sebastian Poulter, "Muslim Headscarves in Schools: Contrasting Legal Approaches in England and France" (1997) 17 *Oxford Journal of Legal Studies* 43.

[12] See, for example, *Sahin v Turkey* [2005] 41 EHRR 8, at para. 109, in which the Court states: "Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially (as the comparative-law materials illustrate – see paragraphs 55-65 above) in view of the diversity of the approaches taken by national authorities on the issue. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society, and the meaning or impact of the public expression of a religious belief will differ according to time and context."

[13] See Ahmet T. Kuru, "Passive and Assertive Secularism: Historical Conditions, Ideological Struggles and State Policies Towards Religion" (2007) 59 *World Politics* 568, a 569.

cutting across many policy areas.[14] Education is a key element of the fundamental rights protection which is a pre-requisite to integration, in its role as "that most significant human right, ... in the absence of which many other human rights are likely to be beyond reach."[15] As well as providing the skills and competences necessary for full societal participation and the key to attaining substantive equality, schools are also an important place of contact for immigrant and local communities.[16] Educational issues such as language support are high profile integration issues involving public funding,[17] and in Ireland the issue of admission

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[14] Ager and Strang, for example, identify education as one of the four overall 'markers and means' of integration in their construction of a system of indicators for integration (Alistair Ager and Alison Strang, "Understanding Integration: A Conceptual Framework" (2008) 21(2) *JRS* 166). The Migrant Integration Policy Index ("MIPEX") categorises "Education" as one of the seven key policy areas involved in integration (British Council and Migration Policy Group, Migration Integration Policy Index III (2011), available at www.integrationindex.eu). The importance of education across the relevant policy domains for integration is also strongly emphasised by Heckmann and Schnapper (Friedrich Heckmann and Dominique Schnapper eds, *The Integration of Immigrants in European Societies – National Differences and Trends of Convergence* (Lucius and Lucius, 2003), at 10-11).

[15] Dympna Glendenning, *Education and the Law* (Butterworths, 1999), at 251.

[16] See Alistair Ager and Alison Strang, note 14, at 172. The 'practical approach' advocated in the EU Handbook on Integration considers the 'acquisition of comptetences' as one of two processes critical to improving immigrants' outcomes in terms of social and economic mobility, education, health, housing, social services, and societal participation (European Commission, *Handbook on Integration for Policy-makers and Practitioners* (Brussels, 2nd ed., May 2007)). It should be noted that the MIPEX index ranked Ireland among the least prepared of the 31 countries surveyed to help newcomers with specific needs to do just as well in school. The report states: "Since 2010, disadvantaged children have 1 free pre-school year. All can access compulsory education and general support. But migrants with specific needs enjoy less favourable targeted measures than in most new immigration countries. Boom-time funding and projects did not create systems that allow all schools to address or monitor these needs today. Now, many language support teachers are disappearing and organisations [promoting interculturalism] are closed. Ireland offers less than most on intercultural education or new opportunities." (British Council and Migration Policy Group, Migration Integration Policy Index III, note 14).

[17] According to the European Commission, poor language ability is seen by EU Member States as the main barrier to successful integration: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Immigration, Integration and Employment* (COM (2003) 336 final), at 20. Similarly, an Immigrant Council of Ireland Report on "The Feminisation of Migration: Experiences and Opportunities in Ireland" found that language

policies to schools has recently come to the fore. Thus education forms part of the functional aspects of integration identified in Chapter 2. On a more theoretical plane, states often consider state education as the medium by which to convey shared national values to young citizens.[18] Thus the Canadian Supreme Court has emphasised that "teachers are a medium for the transmission of values"[19] and has stated that:

> A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.[20]

This forms part of the liberal approach to education in the tradition of John Rawls whereby liberal values are communicated to children in school in order to educate them as good citizens of the liberal state.[21] While the approach encapsulated in the above quote is reflected to a certain degree in the Irish constitutional jurisprudence which acknowledges that the ethos of the school in question forms part of the education of the child, unlike the Canadian example, the Irish model considers the moral education of the child to rest mainly at the discretion of the parents, with the State's role limited to facilitating this education. The entanglement of religion, education and integration forms the subject-matter of this chapter.

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learning is key to improving the accessibility of services for women migrants (Immigrant Council of Ireland, "The Feminisation of Migration: Experiences and Opportunities in Ireland" (ICI, November 2007), at 85).

[18] See Jean Baubérot, "Secularism and French Religious Liberty, A Sociological and Historical View" (2003) *Brigham Young University Law Review* 451.

[19] *Ross v New Brunswick School District No 15* [1996] 1 SCR 825, at para. 42.

[20] *R. v. M. (M.R.)*, [1998] 3 SCR 393.

[21] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005), at 230.

8.3 Irish Constitutional Provisions on Religion and Education

Chapter 6 briefly described some of the ways in which the Irish Constitution can be said to be influenced by Catholic doctrine and teaching and the amendment which removed the provision for the special position of the Catholic Church (which also recognised the position of the Protestant and Jewish faiths), discussing the implications of these in terms of integration.[22] After the removal of the controversial special position provision, Article 44 represents a standard secular free practice of religion clause similar to that contained in the secular 1922 Constitution, with the notable exception of Article 44.1 which states that:

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

Religious belief and expression is thus positively endorsed and encouraged by Article 44.1. It may be argued that Article 44.2 (the substantive freedom of religion guarantee) must be read in light of Article 44.1, with the consequence that the courts are obliged to prefer religious to pointedly non-religious world views, the scheme of constitutional protection on balance therefore favouring religious over non-religious belief and expression.[23] This view is reinforced by the judgment in *McGee v AG*[24] in which the Supreme Court clarified that Article 44 applies to acts related to religious conscience and not more generally to non-religious based social conscience.[25] Overall, the 1937 Constitution and most specifically Article 44 emphatically do not enshrine an approach of

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[22] See 6.3.1.

[23] Oran Doyle, "Article 44: Privileging the Rights of the Religious", note 10.

[24] [1974] 1 IR 284.

[25] In that case, Mrs McGee's objection on the putting of fluoride in water was not religious in nature but was a form of social belief and therefore not protected under Article 44.

state neutrality towards religion (as will be clearly seen from the discussion below on endowment of religion and state funding of denominational schooling). This has formed the starting point for judicial reasoning in the cases which will be discussed below and is key in integration terms as it has formed part of a matrix of factors which has arguably lead to a *de facto* establishment of the Catholic Church in Ireland.[26]

At the same time however, Article 44 does not allow for any discrimination to be made on the ground of religious profession, belief or status and this has been interpreted as encompassing both positive and negative discrimination.[27] The courts have consistently emphasised the requirement of neutrality as between the religions as the basis for the scheme of constitutional protection of religion. Keane J remarked in *Campaign to Separate Church and State v Minister for Education*:

> there is no reason in principle why the State, through its different organs, should not confer benefits on religious denominations, provided – and it is, of course, a crucial proviso – that in doing so it remains neutral and does not discriminate in favour of particular religions.[28]

The conclusions reached on a preliminary literal reading of Article 44 would therefore be that the State has a positive attitude towards religion (Article 44.1) without straying into the territory of the funding of religion ('endowment' of religion being prohibited in Article

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[26] See Rex Ahdar and Ian Leigh, note 21, at 80, where it is argued that there may exist informal, de facto establishments of religion where one particular faith may be favoured by the state in practice due to its numerical or cultural dominance in that country or where the state promotes a generic form of religion by passing laws and implementing public policies that reflect the broad tenets and ideals of a religion-for instance, laws that broadly concur with Judaeo-Christian principles. In the Irish case the constitutional and legislative framework along with the numerical and cultural dominance of the Catholic faith could be interpreted as leading to de facto establishment of the Catholic religion in Ireland.

[27] *Quinn's Supermarket v Attorney General* [1972] IR 1.

[28] *Campaign to Separate Church & State Ltd v Minister for Education* [1998] 3 IR 321, at 359.

44.2.2) whilst also maintaining a strict policy of neutrality as between religions (Article 44.2.3). On this basis, immigrants seeking to preserve their religious identity might expect that:

1. Religious belief is probably more strongly protected than non-religious belief including cultural belief;
2. Expressions of religious belief would be strongly protected; and
3. Minority religions would be legally required to be placed on a level footing as the well-established, numerically dominant religions.

The following chapter should shed some light on whether these assumptions are correct. We will see that in practice, the case law has been "anything but neutral on the question of religion".[29]

As mentioned above, debate throughout Europe and the world on religion and integration has focussed on the education system. Through the interaction of Articles 41 and 42 of the 1937 Constitution, parents are constitutionally entitled to insist on their children receiving religious formation as part of their education.[30] Article 42 places education firmly within the control of the autonomous 'moral institution' protected by Article 41 – the family.[31] Article 42.1 provides that:

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[29] Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press, 2009), at 10-01.

[30] See Michael Farry, *Education and the Constitution* (Round Hall Sweet and Maxwell, 1996), in particular Chapter 7, "Rights and Duties of the Family and Parents", at 56-74, and Chapter 8, "Control of Education and Parents", at 75-101.

[31] Article 41 provides: "1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

> The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

The State must ensure that "the children receive a certain minimum education, moral, intellectual and social",[32] while Article 42.3.2 excludes the possibility that the State could require parents to give their children a religious education. The State is required to 'provide for' primary education rather than to simply 'provide' such education,[33] as well as to endeavour to "supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions" but with the express caveat that State provision of education must respect the rights of parents regarding religious and moral education. The minimalist nature of the State's role in the provision of education has been consistently upheld by the courts.[34] This constitutional structuring of the right to education has been interpreted as forming the basis for the State funding of a denominational education system whereby children are educated in a segregated manner along religious lines.

8.4 Denominational Education and State Funding

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[32] Article 42.3.2.

[33] Article 42.4 states: "The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."

[34] *Crowley v Ireland* [1980] IR 102; *Conway v INTO* [1991] 2 IR 305. More recently, the High Court has applied this approach in finding that the State is not vicariously liable for the sexual abuse of children in national schools: *O'Keefe v Minister for Education and Science* [2006] IEHC 13; *O'Callaghan v McDonnell, Minister for Education and Science* [2006] IEHC 299; *TM v JH, JM and Minister for Education* [2006] IEHC 26.

8.4.1 Irish law and practice

The Education Act 1998 ("the 1998 Act") essentially codifies the form of the education system which has been in place since at least the foundation of the State, [35] whereby the State finances denominationally controlled education, with recognised schools receiving state funds but run by the religious 'patron' through a board of management.[36] 97 per cent of primary schools in the State are of the Roman Catholic or Church of Ireland ethos (91 per cent being Catholic and 6 per cent being Church of Ireland.[37] The 1998 Act confirms the minimalist role of the State in the running of schools which it funds, providing only a limited amount of general guidance on the way in which the powers of the patron and of the board of management are to be exercised. The board of management is required (*inter alia*) to "uphold, and be accountable to the patron for so upholding, the characteristic spirit of the school as determined by the cultural, educational, moral, religious, social, linguistic and spiritual values and traditions which inform and are characteristic of the objectives and conduct of the school"[38] while at the same time "have regard to the principles and requirements of a democratic society and have respect and promote respect for the diversity of values, beliefs, traditions, languages and ways of life in society."[39] How these duties are to be reconciled in the case of a conflict is unclear and this will be discussed further in the context of the discussion below on religious dress. The functions of a school under the 1998 Act include the promotion of the "moral, spiritual, social and personal development of

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[35] Michael Farry states that "State control of education and partisan support for denominational education had been a feature of the Irish educational experience from the middle ages." Michael Farry, note 30, at 102.

[36] A "school" for the purposes of the 1998 Act is defined as an establishment which provides primary education to its students and which may also provide early childhood education, or provides post-primary education to its students and which may also provide courses in adult, continuing or vocational education or vocational training (section 2(1), Education Act 1998).

[37] At the date of writing, there are two Muslim primary schools, one Jewish school, one Jehovah Witness school, one Quaker school and 69 multi-denominational schools. In addition, two community national schools – directly state-established and run – are currently being piloted. See Department of Education, "Information on Areas for Possible Divesting of Patronage of Primary Schools", www.education.ie.

[38] Section 2(b) of the Education Act 1998.

[39] Section 2(e) of the Education Act 1998.

students ... , in consultation with their parents, having regard to the characteristic spirit of the school."[40] The right of schools to guard their 'characteristic spirit' (including religious ethos) is therefore protected in law. Furthermore, at primary school level, the religious education element of the school curriculum is not devised or supervised by the State as is the case for other elements of the curriculum, but is determined by the relevant denomination in charge of the school.[41]

The protection of the 'ethos' of denominationally controlled schools is further supported by the Employment Equality Act 1998 (as amended by the Equality Act 2004) and the Equal Status Act 2000 and 2004. These Acts allow for teachers to be selected on the basis of their religion as well as for students to be admitted (or not admitted) on the basis of their religion, in order to preserve the ethos of the school. Section 37(1) of the Employment Equality Act 1998, which it is useful to quote in full, provides for an exemption from employment equality law for religious-run institutions in the following terms:

> A religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives

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[40] Section 9(d) of the Education Act 1998. Also relevant in this regard are the Rules for National Schools, 1965, which were promulgated in 1965 and have been amended numerous times since then. While these rules do not have a legislative basis, they are adhered to by every State funded national school in the country as a prerequisite to obtaining funding for staff and teacher salaries. Rule 68 states that "Of all parts of a school curriculum, Religious Instruction is by far the most important, as its subject matter, God's honour and service, includes the proper use of all a man's faculties and affords the most powerful inducements to their proper use. Religious instruction is, therefore, a fundamental part of the school course, and a religious spirit should inform and vivify the whole work of a school".

[41] *The Primary School Curriculum* (Department of Education and Science, Dublin 1999), Introduction. The Primary School Curriculum 1999 also provides guidance for schools in relation to the integration of learning across the curriculum, stating that "It is important ... to make connections between learning in different subjects. As they mature, integration gives children's learning a broader and richer perspective, emphasises the interconnectedness of knowledge and ideas and reinforces the learning process." This would allow for the 'integrated curriculum' whereby religious instruction is incorporated into the teaching of other subjects.

include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person for the purposes of this Part or Part II if-

(a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or

(b) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.

Similarly, section 12(4) of the Employment Equality Act 1998 allows for admissions to schools of nursing and teaching to be determined on the basis of religion, in order to allow denominationally-run hospitals and schools to maintain their religious ethos.[42] Equivalent provisions in the Employment Equality Bill 1996 (which was found to be unconstitutional for other reasons) were found by the Supreme Court to be permissible on the grounds that they were necessary to give life to the free practice and profession of religion guarantees also contained in the Constitution.[43] The Court followed earlier jurisprudence in coming to the conclusion that it is constitutionally permissible to make distinctions or discriminations on the grounds of religious profession, belief or status, but only insofar as this may be "necessary to give life and reality to the guarantee of the free profession and practice of religion in the Constitution",[44] accepting the Attorney General's argument that it was the legislative intention to allow for positive discrimination with this aim in mind.[45]

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[42] For example, Employment Equality Act 1998 (Section 12) (Church of Ireland College of Education) Order 2008 (Statutory Instrument No. 251 of 2008).

[43] *In re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321. See also *McGrath and O Ruairc v Trustees of Maynooth College* [1979] ILRM 166 in which the plaintiffs argued that their dismissal from academic positions in Maynooth College following their laicisation constituted discrimination on the grounds of their religious status. In that case, the Supreme Court found that the provision was inapplicable to private institutions not in receipt of state funding.

[44] *In re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, at 356.

[45] *Ibid.*, at 358.

Regarding admission policies, section 7(3) of the Equal Status Act 2000 allows primary and post-primary educational establishments to admit persons of a particular religious denomination in preference to others or refuse to admit as a student a person who is not of that denomination where the "objective of the school is to provide education in an environment which promotes certain religious values".[46] In the case of a refusal, it must be proved that the refusal is essential to maintain the ethos of the school but in the case of preference of one religious denomination over another this step is seemingly not required. While this would appear to conflict with the requirement set out in Article 44.2.4 that "Legislation providing State aid for schools ... shall not be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school", the case law (including the Supreme Court decision in *Re Article 26 and the Employment Equality Bill 2006*[47]) would suggest that the courts would uphold this provision on the basis that it is necessary in order to preserve the religious ethos of schools and thus to protect the free practice and profession of religion.[48] The practical consequences of the exception from non-discrimination rules for admission policies were seen in 2007, when a number of children mainly of African origin failed to gain places in

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[46] In its 2011 concluding observations, the CERD Committee expressed its regret that the provisions of the Equal Status Act give the power to schools to refuse to admit students to denominational schools on grounds of religion if it is deemed necessary to protect the ethos of the school. UN Doc CRC/C/IRL/CO/2 (29 September 2006), para. 26. It recommended that Ireland consider amending the legislation in this regard.

[47] [1997] 2 IR 321.

[48] Whyte notes that two constitutional principles are potentially in conflict here. He says that on the one hand, one could argue that the public funding of schools that discriminate on the grounds of religion in relation to admissions policy implicates the State in religious discrimination contrary to Article 44.2.3. On the other hand, "the State is clearly free, under the Constitution, to finance denominationally controlled education and one could argue that the concept of denominationally controlled education necessarily assumes that schools should be free to have regard to religion inn deciding which students to admit". Gerry Whyte, "Religion and Education – the Irish Constitution", Paper presented by Gerry Whyte at Joint Conference of the Irish Human Rights Commission and Trinity College School of Law, "Religion and Education: A Human Rights Perspective", 27 November 2010.

primary schools due to overcrowding and a policy of admitting Catholic children first.[49] This sparked debate over the nature of the education system and has led to the establishment of a number of multi-denominational and non-denominational schools.[50]

The preservation of religious ethos consistently trumps ordinary equality rules in Irish law with the result that freedom *of* religion is privileged over freedom *from* religion.[51] The legislative provisions ensure the preservation of the status quo whereby the public services of education and hospital care are predominantly provided by religious bodies and funded by the State. This approach taken together with the factual situation that the relevant religious denomination and 'ethos' in the majority of cases is the Catholic religion means that the majority of children of immigrants (Catholic and non-Catholic alike) will through necessity attend schools run by Catholic entities with Catholic teachers and a legally protected Catholic ethos - if they gain access to such a school.

It has been argued before the courts that the system of denominational education violates Article 44.2.2, which provides that "The State guarantees not to endow any religion." The

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[49] For commentary on this see, for example, "Education and integration", *Irish Times*, 7 September 2007; and "School admission policies open to equality challenge" *Irish Times*, 13 September 2007. In response to the outcry and to a letter sent to them by the Equality Authority, the Catholic bishops released a press statement on 27 September 2007 stating that the admission policies of the Catholic primary schools were not in breach of the Equal Status Acts 2000 and 2004: Statement by the Catholic Primary Schools Management Association (CPSMA) on Catholic Primary Schools admission policies (27 September 2007). However, in 2009, Archbishop of Dublin Diarmuid Martin acknowledged that the present structuring of the system may be untenable: "Catholic control of schooling not tenable, says archbishop" *Irish Times*, 17 June 2009. For an analysis of school admission policies generally and the debates surrounding this issue, see Economic and Social Research Institute, "Adapting to Diversity: Irish Schools and Newcomer Students" (ESRI, Research Series No. 8, June 2009), at 58-68.

[50] See Oireachtas Library and Research Service, "Understanding the Challenges of Immigration for Education Provision" (Spotlight No. 1, 2008), at 22-23.

[51] Gerry Whyte, "Protecting Religious Ethos in Employment Law: A Clash of Cultures" (2005) 12 (1) *DULJ* 169, in which he discusses the extent to which Irish employment law protects the religious ethos of employers as well as more generally, the challenge posed to liberalism by pluralism, especially where religious beliefs are concerned.

courts have taken the view that the constitutional requirement to allow for the promotion of a religious ethos, particularly in the educational context where the wishes of parents in respect of religious education must be respected, qualifies the constitutional prohibition of endowment. 'Endowment' has been interpreted in a narrow sense as meaning the vesting of property or income in a religion *as such* in perpetual or quasi-perpetual form. In contrast to the narrow meaning of 'endowment', the legal concept of religious 'education' under the Irish Constitution is broad, with a distinction being drawn between religious 'instruction' in the form of formal religion classes and religious 'education' which is more nebulous and may permeate the ethos of the school. The approach taken in Irish constitutional law on questions of endowment contrasts with the treatment of the United States ("US") Constitution's Establishment Clause by the US Supreme Court for example,[52] which has been interpreted as envisaging "a wall of separation between church and state",[53] which "must be kept high and impregnable" (although this separation is imperfect in practice).[54] The US courts have developed a complicated and sometimes confused jurisprudence on how and under what circumstances public aid can be given to religion indirectly.[55] McMenamin J summed up the distinction between the Irish and American constitutional schemes for religion when he stated in *McNally and Reilly v Attorney General*[56] that:

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[52] The First Amendment (the Establishment Clause) states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[53] Thomas Jefferson, "To Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut", January 1, 1802 (available at http://www.stephenjaygould.org/ctrl/jefferson_dba.html).

[54] *Everson v Board of Education* 330 US 1 (1947) at 18. The US Supreme Court has held that the Establishment Clause prohibits the State from providing religious instruction in public schools.

[55] See for example the controversial decision in *Zelman v Simmons-Harris* 536 US 639 (2002) in which a narrow majority of the Supreme Court held that the government could provide financial support to private religious schools. See Christopher Eisgruber and Mariah Zeisberg, "Religious Freedom in Canada and the United States" (2006) 4(2) *ICON* 244 which compares the constitutional treatment of religion in the United States and Canada in light of differing patterns of religious practice in the two countries.

[56] [2009] IEHC 573.

> where the terms of the Establishment Clause are neutral, or "blind" as to religion, the Constitution of Ireland actively recognises the existence of diverse religious denominations and guarantees them certain rights. It might be said that in United States jurisprudence there is a wall of separation; under the Constitution of Ireland there is a constitutional "domain" of religious recognition.[57]

The justification for the approach of the Irish courts in endorsing the state funding of a denominational education system has been largely based on the importance of the parental role in education. In *Campaign to Separate Church and State v Minister for Education*, Barrington J used a historical approach in considering the meaning of the relevant provisions of the Constitution. He reasoned that the Constitution foresees children receiving religious education in schools recognised by the State in accordance with their parents' wishes. He then distinguished between religious 'instruction' and religious 'education', finding that parents were "not obliged to settle merely for 'religious instruction'".[58] He thus found that the present system, which in the instant case meant that chaplains in community schools were paid by the state, was a manifestation under modern conditions of recognised and approved principles in Articles 42 and 44 of the Constitution.[59] Under Article 44.2.4, children cannot be required to attend religious instruction in schools in receipt of public funding and this means that children are entitled to be excused from classes specifically aimed at teaching religion. In *Campaign* however it was found that this does not extend to an entitlement to religious 'education' in its broad sense. This was put in blunt terms by the Supreme Court, as follows:

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[57] *McNally and Reilly v Attorney General* [2009] IEHC 573, at para. 139.

[58] *Campaign to Separate Church & State Ltd v Minister for Education* [1998] 3 IR 321, at 356.

[59] In reaching these conclusions, the Supreme Court endorsed the approach previously taken in the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

> A child who attends a school run by a religious denomination different from his own may have a constitutional right not to attend religious instruction at that school but the Constitution cannot protect him from being influenced, to some degree, by the religious ethos of the school. A religious denomination is not obliged to change the general atmosphere of its school merely to accommodate a child of a different religious persuasion who wishes to attend that school.[60]

This implies that the display of religious symbols in schools in receipt of public funds and probably the integrated curriculum employed by the majority of schools – whereby religious education is not confined to a formal class but is integrated throughout the curriculum[61] - are constitutionally permissible.[62] Nevertheless, the Supreme Court gave no indication how, outside of religious 'instruction' classes, schools were to balance the rights of parents to insist that their children receive a holistic religious education with the rights of parents who did not wish their children to receive such an education.

The courts have also emphasised that the main pre-condition to the adoption of this approach is equality as between religions. This requirement has been emphasised since the earliest cases to address the constitutional provisions on religion. In *Re Tilson*,[63] for

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[60] *Campaign to Separate Church & State Ltd v Minister for Education* [1998] 3 IR 321, at 358.

[61] The integrated curriculum can be seen as resting on sections 15(2)(b) and 9(d) of the 1998 Act, as well as Rule 68 of the Rules for National Schools, 1965. See Oran Doyle, "Egalitarianism, Religious Preferences and the Integrated Curriculum", Joint Conference of the Irish Human Rights Commission and Trinity College School of Law: "Religion and Education: A Human Rights Perspective", 27 November 2010.

[62] Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution* (3rd ed, Butterworths, 2003), at 318. Nevertheless, Doyle points to another strand to the courts' jurisprudence which appears to have grown stronger over the last number of years: namely, recognition of parental autonomy over their children (see *Northwestern Health Board v HW* [2001] 3 IR 622 and *N v Health Services Executive* [2006] 4 IR 374 for example). For this reason he suggests that it is difficult to predict what the courts' approach to the integrated curriculum would be. Oran Doyle, *ibid.*, at 8.

[63] [1951] IR 1.

example, the Supreme Court hastened to clarify that a decision of the High Court in upholding the validity of a pre-nuptial agreement that the children of the marriage would be brought up as Catholics would apply equally in the case of any other religion.[64] In *Corway v Independent Newspapers*[65] the Supreme Court expressed doubts that the common law crime of blasphemy which had at its heart the protection of the established Church had survived the Constitution. In the *Campaign* decision itself, the Court emphasised the importance of the constitutional requirement that if a school is in receipt of public funds then any child must be eligible to attend it and must have the right not to attend any course of religious instruction. It is difficult to reconcile this finding that any child must be eligible to attend a school which is in receipt of public funds with section 7(3) of the Equal Status Act 2000 which allows for admission policies to operate on the basis of religion. Of even greater importance in terms of equality as between religions is the point made by Laffoy J in her judgment in *O'Shiel v Minister for Education*[66] in which she observed that for parental choice of education to be meaningful, the state must fund a number of options.[67] The reality that there is no permanent public sector for primary education and only a very limited provision in secondary school education means that there is no alternative to denominational education (overwhelmingly Catholic in nature) for a large number of parents and their

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[64] *Ibid.*, at 43-44. See also *Quinn's Supermarket v Attorney General* [1972] IR 1, at 24.

[65] [1999] 4 IR 485.

[66] [1999] 2 IR 321.

[67] The learned judge stated, at 348, as follows: "I reject the defendants' contention that they have discharged their constitutional obligation to the plaintiffs by provision of funded denominational national schools in East Clare. I also reject the plaintiffs' contention that once the parent plaintiffs, being a group of parents exercising a similar lawful preference as to the manner in which they educate their children, establish in this Court that they are providing education for their children in a school which meets the standard which can be reasonably defined as primary education, this Court can direct that they be funded on the same basis as primary schools recognised by the State are funded. The correct constitutional position is somewhere between the two polarised positions adopted by the parties in these proceedings. Fulfilment of the State's constitutional obligation under Article 42.4 must take account of the parental freedom of choice guaranteed by Article 42, but it must be based on arrangements which have a rational foundation and prescribe proper criteria for eligibility which accord with the purpose of Article 42 and of the provisions of the Constitution generally."

children, particularly outside of the small number of urban centres in which the number of multi-denominational schools has been rapidly growing.[68]

A key question arising from these observations is whether the current status quo constitutes discrimination in favour of the longer-established religions, in violation of the obligation in Article 44.2.3 not to "impose any disabilities or make any discrimination on the ground of religious profession, belief or status". Does the Constitution require the State to fund alternative schools such that new minority religions are on an equal footing as the Catholic Church and the Church of Ireland? On balance, it seems that no such obligation exists under Article 44.2.3, read with the other relevant provisions of the Constitution. If the government chose to fund only Muslim schools into the future in order to facilitate the free practice of Islam in the state, such a policy would be constitutionally unassailable, as we have seen that positive discrimination in favour of a religion is permissible if necessary to permit the free practice and profession of that religion. However, it seems that the nature of the State's obligation in relation to education: namely to "provide for" education rather than to "provide" education, is too weak to *compel* the State to take such a course of action. In any event, in the wake of *TD v Minister for Education*[69] and *Sinnott v Minister for Education*,[70] the courts will not compel the executive branch of government to spend public funds in such cases by way of mandatory injunctive relief.[71] Finally, in practical terms, it must be acknowledged that current policy is to fund the establishment of multi-denominational schools with Educate Together as the school patron.

On balance then, the Irish framework is ill-fitted to the current reality that nearly 60 per cent of primary schools have newcomer pupils and over 90 per cent of secondary schools have newcomer pupils, many of whom do not share the religion which forms the basis of the ethos of the school.[72] In this context, the difficulty posed by the legal position that "(a)

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[68] Dympna Glendenning, *Religion, Education and the Law* (Tottel Publishing, 2008), at 294.

[69] [2000] 4 IR 259.

[70] [2001] 2 IR 545.

[71] See generally Conor O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall, 2006).

[72] Economic and Social Research Institute, note 49, at 45.

religious denomination is not obliged to change the general atmosphere of its school merely to accommodate a child of a different religious persuasion who wishes to attend that school"[73] crystallises. This approach is predicated on the assumption that parents each of religious denomination may opt to send their children to schools run by that denomination, which is not the case in practice. The combination of the legal and the factual situation outlined in this section would thus appear to negate both the 'parental choice' theory and the equality theory underlying the constitutional framework. The case law leaves unresolved many of the questions arising in the context of a more religiously diverse society, stemming from the fact that the last major case to deal with Article 44 was decided more than a decade ago when this diversity had not yet developed. Nonetheless, it seems from the judgment of McMenamin J in the High Court in *McNally and Reilly v Attorney General*[74] that the traditional approach of the courts to religion in the Constitution will continue to be adopted by the courts in the context of increased religious diversity. Without making any reference to the changing patterns of religious belief in Ireland, he invoked the 'pluralistic Christian values' underlying Article 44, stating:

> Article 44.2.3 prohibits any disabilities or discrimination on the grounds of religious belief or status. But these provisions must be seen as being embedded within the overall constitutional framework of Article 44, informed by its pluralistic Christian values, but to be interpreted harmoniously *inter alia* by reference to the Article 44.2.5 guarantee of religious autonomy, which, far from eschewing internal disabilities and discriminations which flow from the tenets of a particular religion, may on occasion actually allow for support subject to other constitutional rights

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[73] *Campaign to Separate Church & State Ltd v Minister for Education* [1998] 3 IR 321, at 358, per Barrington J.

[74] [2009] IEHC 573.

guarantees. In this way the State may on occasion justifiably "lend its weight" to the support of one denomination in autonomous affairs.[75]

8.5 An Integration Paradigm Emerging from the Legal Framework for Education?

As outlined in Chapter 2, official Irish integration policy places little emphasis on 'cultural' or religious aspects of integration and the links between the form of the education system and integration have not yet been formally acknowledged. Migration Nation simply states that "respecting cultural differences'" is important without going into detail as to how, and observes that Ireland differs from other European countries in that the issue of Muslim radicalisation has not come to the fore in Ireland while in many European countries it is considered a key integration issue.[76] Nevertheless, the law and practice of the Irish education system described in this section can be analysed in integration terms, and in these terms can be viewed in three ways. The first of these is linked to the question as to whether in practice the equality as between religions upon which the constitutional and legislative scheme is purportedly based actually exists. It is arguable that the system enshrines a *de facto* assimilation approach because most members of minority religions (along with those of no religion) will through lack of alternative attend Catholic schools, where they are entitled to be excused from formal religious instruction but are unable to escape a broader religious education. Recent empirical research which suggests that in second-level schools at least, almost all non-Catholic newcomer students attend religion classes (even if not all of those attending participate) would appear to support this viewpoint.[77] In addition, in her study of the experiences of minority belief parents in the denominational primary system, Lodge concludes that "...differences in belief are denied in the denominational primary

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[75] *Ibid.*, at para. 150.

[76] Office of the Minister for Integration, *Migration Nation: Statement on Integration Strategy and Diversity Management* (May 2008), at 33.

[77] Economic and Social Research Institute, note 49, at 105.

system and those whose beliefs are different are rendered invisible and subordinate."[78] Tied to this point is the fact that the structure of the school system places Catholic immigrants (eg the majority of Polish immigrants) in a better position than non-Catholic immigrants, potentially making it easier for them to integrate. This may create a differentiated form of integration whereby those resembling the host community in religious terms are permitted to maintain their identity while those from different religious backgrounds are required to relinquish their identity and fit into a Catholic school system.

Alternatively, the situation could be interpreted as protective of minority religions, as positive discrimination is clearly permitted under legislation and the Constitution in order to protect religious practice and ethos. Research has established that those schools that use 'religion' as a selection mechanism in fact have a higher proportion of newcomer students.[79] The relevant ESRI report suggests the explanation that this may be due to the fact that "some schools which very openly select on religion are actually minority faith schools, and these schools are more likely to have newcomer students".[80] The Church of Ireland College of Education, for example, has used statutory instruments in order to ensure priority in allocation of places is given to members of the Church of Ireland.[81] Similarly, the Protestant 'Block Grant' whereby schools are allocated a grant for qualifying pupils which is offset against fees is designed to counteract the problem that due to the geographical distribution of Protestant schools most parents seeking to have their children educated in a school with a Protestant ethos would be required to send their children to boarding schools and render this affordable for parents.[82] In 2009, the Minister for Education announced that he was

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[78] Alison Lodge, "Denial, Tolerance or Recognition of Difference? The Experiences of Minority Belief Parents in the Denominational Primary System" in Deegan, Devine and Lodge (eds), *Primary Voices:Contemporary Issues in Primary Education* (IPA, 2004), at 32.

[79] Economic and Social Research Institute, note 49, at 64.

[80] *Ibid.*

[81] The Employment Equality Act 1998 (Section 12) (Church of Ireland College of Education) Order 2008 (Statutory Instrument No. 251 of 2008) is the most recent of these.

[82] See Dympna Glendenning, *Education and the Law*, note 68, at 75 for an explanation of the background and operation of the Protestant Block Grant.

considering abolishing this grant, sparking controversy.[83] In 2008, members of the Jewish community were allowed to go into 'quarantine' while a state exam was sat on a Saturday and sit the exam the following day, in order to protect their observance of the Sabbath.[84]

The third perspective relates to the manner in which schooling under the current system is effectively segregated along religious lines. While the growing number of multi-denominational schools which are run by the non-denominational patron Educate Together must be acknowledged, (as must the establishment of a number of state-run primary schools on a pilot basis[85]) the proportion of these schools in the system remains negligible.[86] We have seen that the system of denominational education is protected in the Constitution as well as enshrined in legislation. This certainly cannot be characterised as "interculturalism", which is often expressed as the guiding principle for Irish integration.[87] The efficacy of the Intercultural Education Strategy 2010 – 2015 (which was published in September 2010 but the implementation of which has been allocated no funding) must be questioned when the fundamental philosophy underlying the education framework is that each religion or philosophy is educated with their own.[88] Desmond Clarke examined the implications of the Irish education system in a forceful manner in 1998, even before immigration increased religious diversity in Ireland, expressing the view that:

> By adapting its educational policy to the theologies of competing churches, the State reinforces the divisive and sectarian theologies of the churches in the civil life of citizens. ... (A)n education policy which supports, protects and finances the sectarian theological divisions of churches is inconsistent

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[83] See "O'Keeffe 'on collision course with Protestant faith'", *Irish Times*, 21 October 2009.

[84] See "Jewish pupils face quarantine over postponed Leaving exam", *Irish Times*, 5 June 2009.

[85] See "First State-run primary schools to open today", *Irish Times*, 1 September 2008.

[86] Although this may start to change very gradually. In 2010, the Department of Education conducted a study on areas for possible divesting of patronage of primary schools – "Information on Areas for Possible Divesting of Patronage of Primary Schools" (Department of Education, 2010).

[87] See 2.3.

[88] Department of Education and Skills and the Office of the Minister for Education, *Intercultural Education Strategy, 2010 – 2015* (16 September 2010).

with the constitutional requirement to treat all citizens equally and to provide publicly funded services, such as healthcare or education, through institutions which treat all citizens in a non-discriminatory manner.[89]

This leads back to the broader integration debate as to whether accommodating diversity leads to separation and fragmentation within societies.[90] Ahdar and Leigh criticise the paradox whereby the religious diversity which many commentators celebrate in society as a whole is seen as a symptom of failure if it leads to fragmented worship through the withdrawal of pupils.[91]

8.6 Compatibility of the Irish Education System with International Human Rights Law

8.6.1 European Convention on Human Rights

The European Court of Human Rights' ("ECtHR") approach to the relationship between State and religion has been characterised by the Court's willingness to allow states a broad discretion by way of a wide margin of appreciation and also a wide interpretation of the limitation provisions in Article 9, which provides:

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[89] Desmond Clarke, "Education, the State, and Sectarian Schools", in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution: 1937-1997* (Hart, 1999), 65, at 75.

[90] For a discussion of some of the related issues in the education context (focussing on the UK), see Laura Lundy, "Family Values in the Classroom? Reconciling Parental Wishes and Children's Rights in State Schools" (2005) 19 *International Journal of Law, Policy and the Family* 346. She concludes that "parental requests for diversity should be accommodated in situations where the outcome does not deny the child an effective education and the decision making process takes appropriate account of the child's views" (at 364).

[91] Rex Ahdar and Ian Leigh, note 21, at 260.

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

These limitation provisions are mirrored in part in Article 44 of the Irish Constitution which makes the protection of religious freedom subject to "public order and morality." The substantive approach taken in cases such as *Kokkinakis v Greece*,[92] *Karaduman v Turkey*,[93] *Otto-Preminger-Institut v Austria*[94] and *Murphy v Ireland*[95] has led to criticism of the Court on the basis that it has not always acted in accordance with its own conception of the importance of the protection afforded by Article 9, as encapsulated in the often quoted passage from *Kokkinakis*:

> (a)s enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a

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[92] (1994) 17 EHRR 397.

[93] (1993) 74 DR 93.

[94] (1994) 19 EHRR 34.

[95] (2004) 38 EHRR 13.

democratic society, which has been clearly won over the centuries, depends on it.[96]

Nevertheless, the limits of state support for a particular religion in pluralist societies has been the focus of a number of ECtHR judgments, with the Court placing increasing emphasis on the role of States in promoting pluralism through tolerance. This has resonance in the Irish context discussed above. The case-law interpreting Article 2 of Protocol 1 to the ECHR, which provides that "no one shall be deprived of an education and requires the State to respect the rights of parents to have their children educated in accordance with their religious and philosophical convictions", is of special interest from an Irish perspective.[97] This jurisprudence interprets the rationale of the second sentence of Article 2, Protocol 1 as safeguarding the possibility of the educational pluralism - which is key to a democratic society – and "(i)n view of the power of the modern State, it is above all through State teaching that this aim must be realised".[98] The key entitlement of parents is "to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions."[99] While the second sentence of Article 2 of Protocol 1 does not prevent States from imparting through education information or knowledge of a directly or

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[96] *Kokkinakis v Greece* (1994) 17 EHRR 397, at 418. See Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Sweet and Maxwell, 2009), at 347.

[97] Ireland has a reservation to Article 2, Protocol 1 ([1954] Ir TS, No 3) to the effect that the right to education in the Protocol was not sufficiently explicit in protecting parental choice of schools and the right to educate in the home whether or not such schools were private schools or schools recognised or established by the state. For an overview of the case law, see Carolyn Evans, "Religious Education in Public Schools: An International Human Rights Perspective" (2008) 8 (3) *HRL Rev* 449.

[98] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 737, at para. 50. Approved in *Folgerø v Norway* (2008) 46 EHRR 47, at para. 84. On *Folgero*, see Peggy Ducoulombier, "*Folgero v Norway*: dispensation from religious education: from the United Nations Human Rights Committee to the European Court of Human Rights" [2008] 3 *EHRLR* 391.

[99] *Kjeldsen, Busk Madsen and Pedersen v Denmark*, at para. 54 (as approved in *Valsamis v Greece* (1997) 24 EHRR 294, at para. 31).

indirectly religious or philosophical kind, and the State enjoys a margin of appreciation in respect of decisions relating to the school curriculum, the State must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner.[100] On the basis of this reasoning, the Court found violations of Article 2 of Protocol 1 in *Folgero v Norway*[101] and *Zengin v Turkey*,[102] finding that the syllabuses under examination in each case gave preponderant weight to one religion over all others (Christianity and the Sunni interpretation of Islam, respectively). Above all, States are prohibited from pursuing "an aim of indoctrination that might be regarded as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded."[103] Importantly from the perspective of the present discussion, schools must be a meeting place for different religions and philosophical viewpoints and the State's obligation of neutrality implies that pluralism must be guaranteed.[104] The Strasbourg Court's vision of the relationship between religion and education thus clearly encompasses an emphasis on pluralism, inclusion and dialogue between religions.

The scope of States' margin of appreciation in providing education in a manner which respects pluralism and parental choice was the subject matter of the recent decision of the Grand Chamber in *Lautsi v Italy*.[105] This case concerned the display of crucifixes in state schools in Italy, which the applicant argued was contrary to the principle of secularism by which she wished to bring up her children. The school in question refused to remove the

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[100] *Kjeldsen, Busk Madsen and Pedersen v Denmark*, at para. 53, approved in *Folgero v Norway* (2008) 46 EHRR 47, at para. 84.

[101] (2008) 46 EHRR 47.

[102] (2007) 46 EHRR 44.

[103] *Kjeldsen, Busk Madsen and Pedersen v Denmark*, at para. 53, as cited in - *inter alia* - *Valsamis v Greece* (1997) 24 EHRR 294). In *Valsamis*, the Court found that the requiring of pupils to participate in parades commemorating the onset of the war between Greece and Italy in 1940, under pain of suspension, was not an infringement of Article 2, Protocol 1. The case was taken by the Jehovahs Witness parents who argued that participation in the parade was contrary to their pacifist beliefs. The main rationale for the decision was that the suspension was of a limited duration only.

[104] *Folgerø v Norway* (2008) 46 EHRR 47, at para. 84.

[105] Unreported, Application No. 30814/06, Judgment of the Grand Chamber of 18 March 2011.

crucifixes. The applicant complained before the Court that the display of the crucifix in the state school was in breach of Article 9 and of Article 2 of Protocol 1. The Chamber of the Court found that there had been a violation of Article 2 of Protocol 1 together with Article 9.[106] In particular, the Chamber emphasised that the State was obliged to maintain religious neutrality in the context of public education and stated that the presence of Catholic religious symbols in classrooms could not be reconciled with the educational pluralism which is essential to democratic societies, as envisaged by the ECtHR. This decision was overruled by the Grand Chamber in March 2011.

In its Grand Chamber judgment, the Court found that there was no violation of Article 2 of Protocol 1 (also holding that no separate issue arose under Article 9). The Court's starting point was that there was no evidence that the display of a religious symbol on classroom walls may have an influence on pupils. The Court also seemed to accept the Italian government's argument that the presence of crucifixes in State-school classrooms was the result of Italy's historical development, a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate. The Court then emphasised the margin of appreciation enjoyed by States in reconciling the exercise of their functions in relation to education with respect for the rights of parents to ensure such education and teaching in accordance with their own religious and philosophical convictions. The Court found that, in principle, it must therefore respect States' decisions in these educational matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination. This margin of appreciation was considered to be particularly important in the situation under consideration as there is no European consensus on the question of the presence of religious symbols in schools. The Court assessed the question of the impact of the display of the crucifix in light of all the circumstances, noting in particular that the presence of the crucifixes was not associated with compulsory teaching about Christianity. In addition, the Court placed some weight on the fact that "Italy opens the school environment to other

[106] Judgment of 3 November, 2009. See also the case comment of Nicholas Gibson, "Right to Education in Conformity with Philosophical Convictions" [2010] *EHRLR* (2) 208.

religions".[107] The evidence showed that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation, for example, and alternative arrangements were possible to help schooling fit in with non-majority religious practices. There was nothing to suggest that the authorities were intolerant of non-Christian pupils. Crucially, the Court characterised the crucifix as an "essentially passive symbol", which could not be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.[108] In all the circumstances, despite the fact that the display of the crucifix granted preponderance to the majority religion in the classroom, it did not form part of a process of indoctrination and there was thus no violation of Article 2 of Protocol 1.

While the decisions in *Folgero* and *Zengin* indicated a trend towards narrowing states' margin of appreciation in the sphere of religion and the provision of education, in particular in relation to the content of the school curriculum,[109] the Grand Chamber's judgment in *Lautsi* illustrates the limits of this approach, which seemingly will not be extended to all practices in schools with a religious dimension. The key finding that the presence of religious symbols in schools, in the absence of any other form of indoctrinating or proselytising pressure, will not in itself constitute indoctrination constitutes an acknowledgement from the Court that freedom of religion can be protected in settings which are not necessarily purely secular. The Court's approach means that its requirement of state "neutrality" in public education will not necessarily be equated with pure secularism. Thus, in her concurring opinion, Judge Power (the Irish judge) stated, in explaining where the judgment of the Chamber had gone wrong:

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[107] *Lautsi v Italy*, Unreported, Application No. 30814/06, Judgment of the Grand Chamber of 18 March 2011, at para.74.

[108] *Ibid.*, at para. 72.

[109] This point is made by Peggy Ducoulombier, note 98; see further Samantha Knights, *Freedom of Religion, Minorities and the Law* (Oxford University Press, 2009), at 335. Knights cites *Hasan and Chaush v Bulgaria* (2002) 34(6) EHRR, para. 62; *Metropolitan Church of Bessarabia and others v Moldova* (2002) 35 EHRR 306, para.s 116 and 119.

> The Chamber referred, correctly, to the State's duty to uphold confessional neutrality in public education (§ 56). However, it proceeded, to conclude, incorrectly, that this duty required the effective preference or elevation of one ideology (or body of ideas) over all other religious and/or philosophical perspectives or world views. Neutrality requires a pluralist approach on the part of the State, not a secularist one. It encourages respect for all world views rather than a preference for one. To my mind, the Chamber Judgment was striking in its failure to recognise that secularism (which was the applicant's preferred belief or world view) was, in itself, one ideology among others. A preference for secularism over alternative world views-whether religious, philosophical or otherwise-is not a neutral option.[110]

It seems that the Court will consider whether, taking into account all the circumstances, the practice in question has a meaningful impact on religious freedom, such that it is a form of indoctrination. It will also bear in mind the historical and cultural context in which the practice of the education system of States has developed. This nuanced position is to be welcomed. However, the Court's reasoning in its very brief judgment is unsatisfactory in a number of respects. Its reference to the crucifix as a "passive symbol" is tautologous, as symbols are by nature passive – what would constitute an "active symbol"? Most importantly, the analysis of the Court does not provide any real guidance as to what precisely will result in a practice falling on either side of the dividing line between acceptable practice and "indoctrination".

The *Lautsi* decision is highly significant from an Irish perspective. On the specific issue of religious symbols, most Irish public schools under the patronage of the Catholic Church have Catholic religious symbols including crucifixes on display in classrooms and throughout the school. The small proportion of schools under the patronage of other religions may equally display religious symbols associated with their faith. This practice is

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[110] Concuring opinion of Judge Power.

probably acceptable under the Irish Constitution (as mentioned above), and it would appear from the *Lautsi* decision that this display of religious symbols in state-funded schools in itself does not violate Article 2 of Protocol 1.

However, when viewed in the context of the education system as a whole, the question as to whether the display of religious symbols in Irish schools form part of a process of indoctrination becomes more complex. The curriculum cases decided by the ECtHR indicate that States have a narrow margin of appreciation in respect of the religious content of compulsory elements of the school curriculum. Article 2 of Protocol 1, together with Article 9, requires that knowledge or information contained in the curriculum must be conveyed in an objective, critical and pluralistic manner. In the Irish setting, while children may be exempted from religious instruction, the general ethos of the school and the integrated curriculum which is in use in the majority of schools cannot be avoided – in fact, that is the whole point of the integrated curriculum. The Court's judgment in *Folgero v Norway*[111] makes it clear that the principles derived from the ECHR case law apply not only to specific religious instruction but to education in the broad sense as referenced by Barrington J in *Campaign to Separate Church and State*. As the Court in *Folgero* stated:

> Article 2 of Protocol No. 1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme. That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State. The verb "respect" means more than "acknowledge" or "take into account". In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State.[112]

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[111] (2008) 46 EHRR 47.

[112] *Ibid*,.

The Irish educational setting, in which religious symbols are displayed as part of an approach whereby a particular religious ethos is integrated into every aspect of school life, could be found to have an influence on pupils which falls foul of the requirement that "the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism."[113] This would place the ECHR in direct opposition to the Irish Constitution, as interpreted by the Supreme Court, under which parents are entitled to insist on their children receiving a broad religious education going beyond religious instruction to permeate the ethos of the school.

There are some weighty counter-arguments that can be made in defence of the Irish education system. Unlike Italy, Ireland's education system is denominational rather than secular. As mentioned above, the role of the State in Irish public education is somewhat unique, with boards of management in charge of the direct running and decision-making in schools and the State refraining from interference in the religious education and instruction of pupils. Thus the State could argue that it cannot be accused of imposing beliefs in the classroom as it is, in both legal and practical terms, a degree removed from decision-making in this sphere and merely facilitates the education of children in accordance with parental wishes as required by the Constitution. There is no state regulation of religious symbols or religious symbols in schools (unlike the Italian model, in which the display of the crucifixes was prescribed by law). In addition, similarly to in Italy, expression of religious difference is accepted in Irish schools, with pupils allowed to wear religious dress if they choose and attempts are generally made to accommodate the practice and profession of all religions. Moreover, it could be argued that in Ireland the State maintains religious neutrality and facilitates pluralism by following a policy of equality between the religions, in principle allowing for funding of minority religious schools and non-religious schools. This would ignore the reality that the majority of children of minority religions and no religion attend Catholic schools out of necessity through lack of choice. Overall, from the brief, poorly

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reasoned analysis in *Lautsi*, it is difficult to assess whether the Irish education system - with its integrated curriculum and overwhelmingly Catholic state-funded denominational schools - could be said to enshrine "indoctrination". However, it does seem on the basis of *Lautsi* that the ECtHR will not rush to classify school systems as contrary to Article 2 of Protocol 1. The Irish education system would be assessed, in the light of the historical and cultural context in which it developed, in terms of whether the school setting has an actual proselytising effect on pupils.

8.6.2 International Covenant on Civil and Political Rights

The Human Rights Committee ("CCPR") expressed concern in its 2008 concluding observations on Ireland's state report on its implementation of the ICCPR that the vast majority of Ireland's primary schools are privately run denominational schools that have adopted a religious integrated curriculum, thus depriving many parents and children who so wish to have access to secular primary education.[114] The CCPR viewed this situation as raising issues under Articles 2 (prohibition of discrimination), 18 (freedom of religion), 24 (children's rights) and 26 (right to equality) and observed that Ireland should "increase its efforts to ensure that non-denominational primary education is widely available in all regions ... , in view of the increasingly diverse and multi-ethnic composition of the population of the State party".[115] A similar recommendation was made by the CCPR in relation to Greece, where allegations were made concerning discrimination against members of minority religions in the field of education, with individuals being required to declare their religion prior to being exempted from compulsory Greek Orthodox religious instruction classes. The CCPR encouraged Greece to hold consultations with representatives of minority religions, in order to find practical ways to permit religious instruction to be given to those desiring such opportunities.[116]

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[114] UN Doc CCPR/C/IRL/CO/3 (30 July 2008), para. 22.

[115] *Ibid.*

[116] Greece, UN Doc CCPR/CO/83/GRC (24 May 2005), at 14.

Article 18 ICCPR, which protects freedom of religion, is particularly important in this context and is striking in its similarity to Article 44 of the Irish Constitution. It provides:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

General Comment 22 goes some way towards clarifying the implications of Article 18(4) in terms of the relationship between the state, parents, religion and education.[117] Public school instruction in subjects such as the general history of religions and ethics is permitted under Article 18(4) if it is "given in a neutral and objective way". Public education that includes instruction in a particular religion or belief is inconsistent with Article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would

[117] CCPR General Comment No. 22, "The right to freedom of thought, conscience and religion (Art. 18)" (30 July 1993).

accommodate the wishes of parents and guardians. Thus while the guarantees relating to parental choice in education in Article 44 and 42 of the Irish Constitution are interpreted by the Irish courts as justifying the funding of denominational schools, Article 18(4) of the ICCPR is interpreted in the reverse, as placing limits on instruction in a particular religion in public education.[118]

The CCPR has dealt with the issues arising in this chapter in a number of its Optional Protocol decisions, which have considered the issues in terms of Article 2, 18 and 26. Articles 18 and 26 are closely linked, as "in general, arrangements in the field of religious education that are in compliance with Article 18 are likely to be in conformity with Article 26 as well, because non-discrimination is a fundamental component in the test under Article 18(4)".[119] This approach mirrors that of the Irish courts, which have emphasised the importance of equality of treatment of religions by the State. The jurisprudence of the CCPR in this sphere has not been subject to the same criticism as the ECtHR as it has not allowed States as wide a margin of discretion as that Court.[120] In *Waldman v. Canada*,[121] the author claimed that providing Roman Catholic schools in Ontario with full State funding

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[118] The protection of religious freedom in the ICCPR reflects Article 18 of the Universal Declaration of Human Rights, which states that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." It is reinforced by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981, which defines religious discrimination, prohibited in Article 2(1), as "distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis." The Declaration is however non-binding and has no monitoring body. The freedom of religious minorities is also protected through Article 27 of the ICCPR, which provides that "[i]n those States in which...religious...minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion...".

[119] *Arieh Hollis Waldman v Canada* (694/1996) CCPR/C/67/D/*694/1996* (1999), concurring statement of Mr Scheinin, para. 3.

[120] Paul M. Taylor, note 96, at 178.

[121] *Waldman v Canada* (694/96), CCPR/C/67/694/1996 (1999).

- while he was required to send his children to a private Jewish school as no funding was available for other non-secular schools - impaired in a discriminatory fashion his right to manifest his religion including to provide a religious education for his children. The CCPR found that this constituted a violation of Article 26, confirming that the ICCPR does not impose any obligation on States to fund religious schools but if it decides to do so, the funding must be made available without discrimination. Here, the traditional preferential treatment of Roman Catholic schools with the aim of protecting the Roman Catholic religion did not justify the discrimination. To apply this reasoning to the Irish context, in principle, the Irish system is non-discriminatory, as funding is in theory available without discrimination to schools of all religions as well as secular schools. However, in Ireland the vast majority of schools are Catholic and therefore it is arguable that the Irish system enshrines a form of indirect discrimination.

A number of other decisions have dealt with the provision of religious education and further illustrate the problematic nature of the Irish denominational education system in the light of international human rights law. *Hartikainen v Finland*[122] dealt with the compulsory teaching of the history of religion and ethics as an alternative to religious instruction. In the view of the CCPR, the alternative classes were adequate as they were delivered in a neutral and objective way which respected the beliefs of those of all religions and none. *Leirvag et al v Norway*[123] took place at the same time as the ECHR case *Folgero v Norway* and involved exactly the same issues. The authors claimed that the framework of the mandatory religious instruction class in Norwegian schools, from which only limited exemptions were available, violated their Article 18(4) rights. The CCPR came to the same conclusion as the ECtHR, upholding the authors' claim that the operation of the subject and in particular the partial exemption system violated Article 18(4) of the ICCPR. Of interest from an Irish point of view was the following statement:

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[122] (40/1978), 9 April 1981.

[123] (1155/2003) CCPR/C/82/D/1155/2003 (2004).

> (T)he Committee notes that the CKREE subject combines education on religious knowledge with practising a particular religious belief, e.g. learning by heart of prayers, singing religious hymns or attendance at religious services. While it is true that in these cases parents may claim exemption from these activities by ticking a box on a form, the CKREE scheme does not ensure that education of religious knowledge and religious practice are separated in a way that makes the exemption scheme practicable.[124]

This criticism is directly applicable to the Irish education system generally. While Article 44.2.4 of the Irish Constitution specifically provides for the right of every child to attend a school in receipt of public monies without attending religious *instruction* at that school, the use of the integrated curriculum in denominational schools along with the pervasive ethos of the school means that such a child may be exposed to a religious *education*, perhaps rendering the exemption insufficient to satisfy the requirements of Article 18. Education of religious knowledge and religious practice are inseparable in the Irish context. The lack of real choice for those who do not wish to attend Catholic schools compounds the problem. Finally, the former UN Special Rapporteur on Freedom of Religion or Belief has described the "sectarian" approach, whereby each pupil learns only about his or her religion separated from children of other beliefs, as a "ghetto approach". He supported the idea of a more comprehensive scheme of religious education in which all children could participate, which would contribute to the understanding of others, to cultural and moral differences and foster a spirit of human rights and tolerance.[125] The Irish education system enshrines this "ghetto approach" with a ripple effect for the integration paradigm in Irish law, as discussed above. This segregated approach to education has also been criticised by the UN Committee for the Elimination for all Forms of Racial

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124 *Ibid.*, at para. 14.7.

[125] Carolyn Evans, note 97, at 452, citing Amon, Introductory Note to International Consultative Conference on School Education in Relation to Freedom of Religion or Belief, Tolerance and Non-Discrimination, 2002.

Discrimination in relation to Ireland,[126] and the UN Committee for Economic, Social and Cultural Rights in relation to Northern Ireland.[127]

8.7 Individual Expression of Religious Belief: Religious Symbols in Schools

8.7.1 The 'headscarf debate' - the transformation of the public sphere?

The wearing of religious clothing and symbols, most notably the Muslim headscarf, in the public sphere and in particular in public schools has been the focus of much judicial and academic discussion since the changes in world and religious politics brought about by the events of September 11, 2001. The importance of the issue has been characterised in diverse ways in terms of social cohesion,[128] gender equality,[129] children's rights, individual human rights[130] and immigrant integration.[131] In integration terms the chosen approach clearly

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[126] In 2011, the CERD Committee recalled its previous concluding observations stated that it "noted with concern that the education system in the State party is still largely denominational and is mainly dominated by the Catholic Church. The Committee further notes that non-denominational or multi-denominational schools represent only a small percentage of the total and, regrets that, according to reports, there are not enough alternative schools, and students of the Catholic faith are favoured for enrolment into Catholic schools against students of other faiths in case of shortage of places." UN Doc CERD/C/IRL/CO/3-4 (10 March 2011), para. 26.

[127] The CESCR reiterated the concern that it had expressed on previous occasions that "the educational structure in Northern Ireland continues to be heavily segregated on the basis of religion, despite the increased demand for integrated schools." UN Doc E/C.12/1/Add.79 (5 June 2002), para. 23.

[128] See *R (Begum) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100, per Baroness Hale, at 132.

[129] Siobhan Mullally, "Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case" (2004) 24 *Oxford Journal of Legal Studies* 671. See also Pascale Fournier and Gökçe Yurdakul, "Unveiling Distribution: Muslim Women with Headscarves in France and Germany", in Michal Bodemann and Gökçe Yurdakul (eds) *Migration, Citizenship, Ethnos* (Palgrave, 2006), at 167-185.

[130] See for example Tom Lewis, "What not to Wear: Religious Rights, the European Court and the Margin of Appreciation" (2007) 56 *ICLQ* 395.

indicates the extent to which visible difference is accepted and the extent to which immigrants are expected to relinquish their religious identity in favour of an identity modelled on that of a model member of the host community. Significantly, the presence of religious symbols including the headscarf is viewed by some as evidence of the 'failed' integration of immigrants, or even as a symbol of a reluctance to integrate, particularly in the case of Muslim immigrant-origin communities.[132] Accordingly, the legal position regarding religious symbols in public space can be seen as an indication of the importance which a state places on cultural integration.

The spectrum of legal approaches taken to the issue in different jurisdictions is also striking, with much academic commentary focussing on comparing and contrasting the types of legal approaches in operation across the globe.[133] It has been argued in this thesis that state responses to integration issues and particularly 'cultural integration' issues are conditioned by conceptions of national identity and membership, historical experience and organisational political principles (the 'public philosophy' of the state) and from this perspective the varying responses of states to the regulation of religious dress in public space is unsurprising. Nevertheless, European legal practice would appear to be converging to a certain degree around the restriction of the presence of religious dress in the public sphere. This trend is manifested in various forms in different countries. In 2003, France passed a law prohibiting the wearing of ostentatious religious symbols in public schools.[134]

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[131] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing, 2006), at 17.

[132] *Ibid.*, at 17-20.

[133] Sebastian Poulter, note 11; Manisuli Ssenyonjo, "Limits on the Freedom to Manifest One's Religion in Educational Institutions in Uganda and the United Kingdom" [2009] 7(2) *ICON* 275; Dympna Glendenning, *Religion, Education and the Law*, note 68, in which she surveys legal practice in numerous jurisdictions.

[134] *Loi du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* (JO, 17 mars 2004); see also *Circulaire du 18 mai 2004 relative à la mise en oeuvre de la loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* (JO, 22 mai 2004). For a critical analysis of the law, see Joseph

In the same year the German Supreme Court held that a teacher was prohibited from wearing a headscarf while teaching in the classroom.[135] In the UK the House of Lords has found that it is permissible for schools to prohibit the wearing of certain religious symbols in circumstances where this is a proportionate response. In 2009, one canton in Switzerland went a step further in the related sphere of places of worship, with the population voting to ban the construction of Muslim minarets.[136] In 2010, Belgium and France became the first European countries to ban the full face-covering veil in public places.[137] At the level of international law, these developments have been endorsed and perhaps even encouraged by the jurisprudence of the European Court of Human Rights. This will be discussed in greater detail below.

Carens, "Démocratie, multiculturalisme et *hijab*" (2005) 1 *Esprit* 54. See also Claire de Galembert, "Le voile en procès" (2008) 68 *Droit et Société* 11.

[135] Judgment of 24 September 2003-BVerfGE 108, 282. See Cindy Skach, "Case Comment – Sahin v Turkey App. No. 44774/98 / Teacher Headscarf Case; Case No. 2BvR 1436/02" (2006) 100 *American Journal of International Law* 186; and Christine Langenfeld and Sarah Mohsen, "The Teacher Headscarf Case" (2005) 3(1) *ICON* 86.

[136] See BBC, "Swiss voters back ban on minarets", 29 November 2010, http://news.bbc.co.uk/2/hi/8385069.stm. There are a number of applications pending in the European Court of Human Rights in relation to the Swiss ban on the building of minarets. See Application 66274/09, *Association Ligue des Musulmans de Suisse and Others v. Switzerland*, and Application 65840/09 *Ouardiri v. Switzerland*.

[137] The level of parliamentary consensus on the desirability of these measures was striking, with no Belgian deputies of the lower house of Parliament opposing the Belgian law and only one French deputy in the National Assembly voting against the adoption of the French law. For a report on the Belgian ban, see BBC, "Belgian lawmakers pass burka ban", 30 April 2010, http://news.bbc.co.uk/2/hi/8652861.stm. The Parliamentary report which preceded the adoption of the law in France essentially justified the adoption of the law on the grounds that the full veil was a symbol of Islamic fundamentalism, and that it was oppressive to women, contrary to the constitutional principle of equality. *Rapport d'Information fait en l'application de l'Article 145 du Reglement au Nom de la Mission d'Information sur la Pratique du Port du Voile Intégral sur le Territoire National* (Report of the National Asssembly, 26 January 2010). The constitutional validity of the law was confirmed by the Conseil Constitutionnel (Decision no. 2010-613 DC of 07 october 2010 - *Loi interdisant la dissimulation du visage dans l'espace public*).

These developments can be seen (notwithstanding important differences between the approaches of states) as pointing in the direction of a structural transformation, by way of law, of public spheres in Europe with countries in Europe increasingly employing models of secularism that they hope will limit (rather than exacerbate) social conflict.[138] A significant element of this trend is that the wearing of the Islamic headscarf in public schools is frequently taken as having in and of itself an important political significance that threatens public order and individual freedom in a democracy.[139] Approaches in other jurisdictions on other continents have differed. In Canada, constitutionally enshrined values of tolerance and multiculturalism have been at the heart of the rationale not to allow restrictions on the wearing of religious symbols in as blunt a manner as many European jurisdictions.[140] The South African courts have taken a broadly similar approach, stressing that it is incumbent on schools to instil in its learners the values of cultural and religious tolerance.[141] In the US, secularism has been viewed in a primarily negative sense as prohibiting state interference with personal behaviour and this, taken with the strong emphasis on freedom of expression, has meant that religious dress has been broadly tolerated.[142]

8.7.2 Irish law and practice

In contrast to many other European jurisdictions, the issue of the wearing of religious dress and symbols has not as yet arisen in Ireland in a legal setting and from the limited available research it does not appear to have arisen in a controversial way in schools.[143] An

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[138] Cindy Skach, note 133.

[139] *Ibid.*.

[140] *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 4 LRC 496; 2006 SCC 6.

[141] *Pillay v KwaZulu-Natal MEC of Education and Others* [2007] 1 LRC 125, para. 62.

[142] *Tinker v DesMoines Independent Community School District* 393 U.S. 503 (1969).

[143] Economic and Social Research Institute, note 49. The issue came to the fore in 2008 however, when a controversy arose in Gorey Community School in 2008 and the school principal requested national guidelines from the Minister on the matter. See "Principal calls for Guidelines on Wearing of Hijab in Schools", *Irish Times*, 19 May 2008; "Groups to Lobby for Right to Wear Hijab", *Irish Times*, 2 September 2008. The increased interest in Ireland on the question of religious dress is evidenced in the academic commentary on the

exception occurred in 2009 when correspondence between a school principal and the Department of Education and Science on the topic of the wearing of the hijab was published by a national newspaper.[144] In response to the public debate provoked by this publicity, the Minister for Integration carried out a consultation with key stakeholders (including the principals of every primary and secondary school in the country) to determine whether there was a need for formal guidelines to be developed. The Minister made the following recommendations, taking into account - *inter alia* - the legal position in Ireland and policy in the EU:

1. The current system, whereby schools decide their uniform policy at a local level, is reasonable, works and should be maintained.
2. In this context, no school uniform policy should act in a way that, in effect, excludes students of a particular religious background from seeking enrolment or continuing their enrolment in a school. However this statement does not recommend the wearing of clothing in the classroom which obscures a facial view and creates an artificial barrier between pupil and teacher. Such clothing hinders proper communication.
3. Schools, when drawing up uniform policy, should consult widely within the school community.
4. Schools should take note of the obligations placed on them by the Equal Status Acts before setting down a school uniform policy. They should also be mindful of the Education Act 1998. As previously mentioned, this obliges boards of management to take account of "the principles and requirements of a democratic society and have

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issue. See generally Tom Hickey, "Domination and the *Hijab* in Irish Schools" (2009) 16(1) *DULJ* 127 and Eoin Daly, "Restrictions on Religious Dress in French Republican Thought: Returning a Secularist Justification to a Rights-Based Rationale" (2009) 16(1) *DULJ* 154.

[144] See "Principal calls for guidelines on wearing of hijab in schools", *Irish Times*, 19 May 2008.

> respect and promote respect for the diversity of values, beliefs, traditions, languages and ways of life in society.[145]

Official policy therefore favours a flexible response contingent on the circumstances. If these matters came before a court however, what is the position in Irish law? The legislation affords little assistance, as boards of management are required under the Education Act 1998 to both uphold the characteristic spirit of the school and promote tolerance and diversity. The case law indicates the priority accorded to freedom to practice and profess religion in rights-balancing exercises. In *Quinn's Supermarket v AG*[146] and subsequent cases the Supreme Court has effectively elevated the free practice guarantee over the non-discrimination guarantee,[147] making it clear that discrimination – in either a negative or positive sense – on the basis of religion may be justified on the basis that the discrimination is necessary to allow free practice of religion.[148] In delivering his judgment in *Quinn's Supermarket*, Walsh J made the following, often-quoted statement, which is directly relevant to the discussion on the wearing of religious symbols and religious dress:

> It appears to me, ... that the primary object and aim of Article 44, ... and in particular the provisions of s.2 of that article, was to secure and guarantee freedom of conscience and the free profession and practice of religion

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[145] Report on the need for a Guidance Note to Schools when reviewing their policies on School Uniforms prepared by the Minister for Integration, Conor Lenihan TD, and jointly launched by Minister for Eduation and Science, Batt O'Keeffe TD and Minister for Integration, Conor Lenihan TD, (2008) at 6.

[146] [1972] IR 1.

[147] Oran Doyle, *Constitutional Law: Text, Cases and Materials*, note 29, at 10-08.

[148] This approach was followed in *Mulloy v Minister for Education* and the Attorney General [1975] 1 IR 88. In that case the Supreme Court found that the discrimination on the ground of religious status by a scheme run by the Department of Education was repugnant to Article 44 of the Constitution on the basis that there was no question that the discrimination was required in order to facilitate the free practice and profession of religion. *M v An Bord Uchtála* [1975] was decided on similar grounds. See also *McGrath and O Ruairc v Trustees of Maynooth College* [1979] ILRM 166 and most recently *Re Article 26 and the Employment Equality Bill* [1997] 2 IR 321.

> subject to public order and morality ... Any law which by virtue of the generality of its application would by its effect restrict or prevent the free profession and practice of religion by any persons would be invalid having regard to the provisions of the Constitution, unless it contained provisions which saved from such restriction or prevention the practice of religion of the person or persons who would otherwise be so restricted or prevented.[149]

It thus seems almost certain that legislation along the lines of that adopted in France - a blanket ban on particular ways of manifesting religious belief in schools or in public – would be unconstitutional in Irish law. The *Quinn* decision embodies a vision of societal cohesion which involves society making exemptions from norms in certain circumstances in order to accommodate those of different religious beliefs, in contrast to the approach taken in France that religious practices must be subordinated to secularist norms in order to maintain a cohesive society. The approach in *Quinn* is encapsulated in the comments of Kenny J in stating that:

> We are in religion a pluralist society made up of people of people of many persuasions and beliefs and so it is likely that parts of legislation will occasionally indirectly affect the practice of some religion. If the State has to abstain from law-making on matters which indirectly affect the practice of religion by some of its citizens, the scope of legislation will be seriously reduced. Yet this will be the result if the State cannot exempt from the application of some of its legislation those whose practice of their religion will be affected by it.[150]

Nevertheless, the free practice of religion may be restricted on the grounds of public order and morality. "Public morality" in particular is a nebulous and potentially wide

[149] [1972] IR 1, at 23-24.

[150] *Ibid.*, at 34.

restriction on religious freedom[151] and cannot be dismissed, the extent to which courts may be influenced by populist religious intolerance having been shown in *Schlegel v Corcoran*[152] in which the Irish High Court found that to refuse to give consent to the assigning of rooms to a Jewish person (in this case the rooms were used for a dental practice) was not 'unreasonable' in legal terms, basing the decision on the following reasoning:

> The plaintiff's objection has been characterised as a caprice and as mere prejudice; but caprice is not the right word for anti-Semitism, which, far from being a peculiar crochet, is notoriously shared by a number of other citizens; and, if prejudice be the right word, the antagonism between Christian and Jew has its roots in nearly 2000 years of history and is too prevalent as a habit of mind to be dismissed offhand, in a country where religion matters, as the eccentric extravagance of a bigot, without regard to the actual conditions under which the consent was withheld. I fail, by the way, to see the supposed connection between the problem before Mrs Schlegel and the constitutional veto (Art.44.2.2) upon any discrimination by the State on the grounds of religious belief.[153]

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[151] See Oran Doyle, *Constitutional Law: Text, Cases and Materials*, note 29, at 10-06. He uses the example of *DPP v Draper* 24 March 1988, The Irish Times, to pose the question "If religious freedom is to be protected only to the extent that it does not offend public morality, what exercises of religious freedom are likely to be protected from state interference? Is the delineation of an act as an offence by the criminal law sufficient to determine that it offends public morality and hence cannot be protected as an exercise of religious freedom?" Note also that CCPR General Comment No. 22, note 115, states that "limitations on the right to manifest a religion or belief for the purposes of protecting morals must be based on principles not deriving exclusively from a single tradition" (para. 8).

[152] [1942] 1 IR 19.

[153] *Ibid., per* Gavan Duffy J at 25.

In *DPP v Draper*,[154] the Court of Criminal Appeal also dealt with the concept of 'public order,' which relied on the exception to find that freedom of conscience and free profession and practice of religion could not prevent the conviction of a man for malicious damage to religious statues. Doyle argues that while it must be accepted that the decision is not an easy one to distil general principles from, it raises the question of whether the delineation of an act as an offence by the criminal law is sufficient to determine that it offends public morality and hence cannot be protected as an exercise of religious freedom.[155] This analysis could be relevant to a legislative ban on certain types of religious expression.

The Supreme Court decision in *Murphy v IRTC*[156] provides a more concrete, recent example of the way in which competing rights may be balanced by a contemporary court, even though the judgment does not refer to the specific exception of "public order and morality". In *Murphy* a legislative prohibition on religious advertising on the radio was upheld. One of the fundamental elements of the reasoning of the Court was that the legislative prohibition in question was not an "attack" on the free practice of religion, rather a limited "restriction" on the manner in which the citizen may profess, express or practice his or her religion.[157] If the wearing of religious symbols was similarly characterised as a "limited restriction", then the level of protection seemingly granted in *Quinn* could be significantly eroded. In considering this question, a court would likely take the *Quinn* approach of considering the importance of the practice given the tenets of the religion in question, taking a subjective perspective.[158] The Supreme Court in *Murphy* also accepted the social cohesion argument made by the High Court, in considering the proportionality of the legislative ban. This was put as follows by Geoghegan J:

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[154] 24 March 1988, The Irish Times. Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution*, at 7.4.83.

[155] Oran Doyle, *Constitutional Law: Text, Cases and Materials*, note 29, at 292.

[156] [1999] 1 IR 26.

[157] *Ibid.*, at 23.

[158] [1972] IR 330.

> Irish people with religious belies tend to belong to different churches and that being so religious advertising coming from a different church can be offensive to many people and might be open to the interpretation of proselytising.[159]

If the Irish courts were to take a similar view as the European Court of Human Rights and opt to characterise the headscarf as a powerful external symbol with a potentially proselytising effect this would have the effect of bringing into play "public order" considerations and justifications. Finally, *Murphy* illustrates the role of the principle of proportionality in decision-making in this area, with the Court stating that once this principle is respected by the legislature the courts must not interfere with its acts. The Supreme Court's view that in this case, the limitation placed on the various constitutional rights was "minimalist" was more or less determinative of the outcome of the case.[160]

Overall then, while it is difficult to conceive of an Irish court upholding an outright ban on religious dress or symbols in schools it is possible that depending on the way in which the issues are framed, some lesser form of restriction might be tolerable. In particular, the structure of the education system may give rise to some thorny legal questions in the Irish educational context. As regards teachers, under section 37(1) of the Employment Equality Act 1998, if a teacher was to wear religious dress which is not in keeping with the denominational ethos of the school, the school would be entitled to take action which is "reasonably necessary" from undermining the religious ethos of the institution and thus teachers could be prevented from wearing religious garb from outside of the denomination of the school. What then of children practicing and professing their religion, in accordance with the wishes of their parents, in a denominational school which is not their own denomination? What is the legal position if a Muslim girl wears a headscarf in a Catholic school, and Catholic parents complain that this is interfering with the Catholic ethos of the school, which they are entitled to insist upon as part of the broad religious education of their

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[159] [1999] 1 IR 12, at 18.

[160] *Ibid.*, at 26.

child? If a court seised of this issue were to use a social cohesion approach similar to that in *Murphy* and opted to characterise the headscarf as a powerful external symbol with a potentially proselytising effect this question could become particularly problematic. The court would likely use a subjective analysis to assess the importance of the religious practice within the religion in question, and if the restriction constituted by restricting or prohibiting certain forms of dress were characterised as 'minimalist', then the claims of parents trying to maintain the 'ethos' of the school might be held to outweigh the individual right to religious freedom.

While I have attempted to use the general principles of the case law to discern how an Irish court might approach the issues raised in this chapter, it is quite difficult to predict the outcome in cases where two 'free practice' rights come head to head, as in the example above. The broad parameters of the Irish courts' approach to the potentially divisive issues involved in the wearing of religious dress and symbols in public spaces, and more specifically schools, remain to be determined. However, as yet schools have managed to resolve these issues in a way which appears to have avoided serious conflict and balanced the rights of those involved. It has been argued that Muslim children in particular are better integrated in the Irish school system than elsewhere in Europe, as their religious freedom is given greater respect.[161] Perhaps this shows that despite the criticisms levelled at the Irish education system in this chapter, religious freedom is better protected overall within the structures of the Irish system than in other countries especially in Europe. In turn then, perhaps this also gives force to the argument that the Irish model shows that, in terms of individual religious freedom, religious freedom may be best protected in states with established religions or legal frameworks favourable to religion.[162]

8.8 Religious Symbols, Education and International Law

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[161] Dympna Glendenning, *Religion, Education and the Law*, note 68, at 360.

[162] Rex Ahdar and Ian Leigh, note 21, at 95-96.

8.8.1 European Convention on Human Rights

There is a significant body of literature addressing the European Court of Human Rights' approach to restrictions imposed by states on the wearing of headscarves (and other forms of religious dress), with most of this comment critical of the growing body of case law.[163] The Court has shown an apparent willingness to allow states wide discretion to impose such restrictions, through the use of the doctrine of the margin of appreciation and a broad interpretation of the limitation provisions. High priority has not been granted to the right to wear religious clothing in public places, which has often been outweighed by the desire of secular states to preserve a secular public sphere.[164] Thus the Court and the Commission found in *Dahlab v Switzerland* (in which the application was considered to be inadmissible),[165] *Sahin v Turkey*[166] and *Dogru v France*[167] that restrictions imposed by the state on the wearing of headscarves in educational institutions were permissible.[168] In 2008, the application in *Mann Singh v France*,[169] which concerned a Sikh man who had held driving licenses in France for thirty years displaying a photo of him in his turban and then was told that he must remove his turban for the photo for a new driving licence, was dismissed as inadmissible without a consideration of why this change in the law was necessary.[170]

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[163] See amongst others Tom Lewis, note 128; Mark Hill and Russell Sandbergh, "Is Nothing Sacred? Clashing Symbols in a Secular World" [2007] *Public Law* 488; Anastasia Vakulenko "Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends"; (2007) 7 *HRL Rev* 717.

[164] Samantha Knights, note 106.

[165] Application No. 42393/98, 15 February 2001.

[166] (2005) 41 EHRR 8.

[167] [2009] 49 EHRR 8.

[168] See also *Karaduman v Turkey* (Unreported, App. No 16278/90, Judgment of 3 May 2003), and *Mann Singh v France* (Unreported App. No. 24479/07, Judgment of 27 November 2008).

[169] Unreported App. No. 24479/07, Judgment of 27 November 2008.

[170] *Mann Singh v France* (unreported App. No. 24479/07, Judgment of 27 November 2008). In 2009, it was decided that five applications of Muslim and Sikh children seeking to wear items representing their religious belief to school after the adoption of the law in 2004 that prohibited symbols which conspicuously represent a religious belief were inadmissible. The Court relied heavily on its previous judgment in *Dogru*,

The use of the notion of 'respect' for the religious feelings or beliefs of others, along with the promotion of pluralism and tolerance, has been one of the principal justifications of the ECtHR's support for state restrictions on the wearing of religious symbols.[171] This is tied to the perception of the Court of the Muslim headscarf as a threat to social cohesion and as a practice that could place pressure on and even have a proselytising effect on other students in the educational setting. Thus in the early case of *Karaduman v Turkey*[172] it was established that institutions of higher education may impose restrictions as to the place and manner of manifestation of the rites and symbols of religion "with the aim of ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others." In *Dahlab*, which concerned the teacher of a class of small children, the Court stressed among other matters the "powerful external symbol" which her wearing a headscarf represented and expressed the view that wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils.[173] Building on this logic, in *Sahin* the Court stated that:

> where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so

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which concerned the position in France prior to the adoption of the 2004 law. See *Aktas v France* (43563/08: wearing of religious items in French schools)" (2009) 6 *EHRLR* 814.

[171] The Court has stated: "In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected" (*Sahin*, citing *Kokkinakis*, cited above, at 18, para. 33). See Paul M. Taylor, note 96.

[172] (Unreported, App. No 16278/90, Judgment of 3 May 2003).

[173] *Dahlab v Switzerland* Application No. 42393/98, 15 February 2001.

> consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.[174]

The ECtHR's narrow analysis in linking the headscarf to gender inequality without a detailed exploration of the issue, together with the characterisation of the headscarf as a proselytising symbol with the potential to disrupt social cohesion, undermines the aim of the Court in these cases to promote equality, respect for all religions and tolerance.[175] It contrasts sharply with the Court's characterisation of the Christian crucifix as a "passive symbol" (as discussed above). It should be recognised however that the Court's willingness to find that the wearing of the headscarf could disrupt social cohesion in these cases was in part tied to the context in these cases - the ardent secular approaches followed in Turkey and Switzerland. In the case of Ireland with its different attitude to religion in public space, the ECtHR would not perhaps be so quick to find that religious symbols would disrupt social cohesion in the Irish context.[176]

Overall, the willingness of the Court to insist that schools encourage and promote tolerance and pluralism in the context of religious instruction and education, as discussed above, has not therefore impacted on the approach to the wearing of religious dress in the way which might have been expected. The rationale for this (as observed above) appears to be that the Court interprets the wearing of the headscarf in particular as itself a potential threat to tolerance and pluralism. The Court envisages the protection of pluralism as necessitating the suppression of visible religious symbols, a theory which is inherently contestable especially given its disproportionate effect on members of religious minorities in

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[174] *Sahin v Turkey* (2005) 41 EHRR 8, para. 116.

[175] For an exposition of the 'narrowness' of the Court's approach, see Cindy Skach, note 133, at 190-193.

[176] This point is made in the context of the United Kingdom in the Case Comment in the European Human Rights Law Review, "*Aktas v France* (43563/08: wearing of religious items in French schools)" (2009) 6 *EHRLR* 814, where it is noted that given that it is accepted by the Court that Article 9 is interfered with in these cases, it may be that an applicant from a country with no equivalent constitutional principle of secularism would have better success before the Court.

European societies. The Court clearly envisages the preservation of a secular public sphere as the manner in which state neutrality towards religion may be maintained.[177] This forms part of the Court's seeming preference for secular over religious world-views,[178] which can be seen as an important element of the foundations of the Court's attitude to dealing with diversity. The upshot of this is that freedoms *from* religion (e.g. religious education) are generally favoured over freedoms *of* religion (e.g. wearing religious dress), the reverse position to that pertaining in Ireland. A specific integration paradigm emerges from the case law discussed in this section which stresses that expression of religious difference may disrupt harmonious (secular) societies. This stands in contrast to the Irish model which favours individual religious expression and appears to envisage that harmony will be achieved if diversity is maintained but one religion is not imposed on other religions or convictions. This is achieved by allowing each religion or conviction their own part of the public space. In practical terms the ECtHR's paradigm along with its willingness to leave states a wide margin of appreciation in these cases may provide justification for national integration programmes which require 'visible' immigrants to relinquish their religious or cultural identity in favour of an idealised national identity of the state in question.[179]

On the specific question of permissible restrictions on religious expression in schools, the ECHR as interpreted by the ECtHR undoubtedly provides a lower standard of protection for individuals than Irish constitutional law. If the Irish courts were - due to the lack of relevant Irish jurisprudence - to look to ECHR jurisprudence for guidance the result could be a dilution of the strong protection for the free practice of religion. This dilution has already

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[177] See Andrew Geddis, "You Can't Say God on the Radio: Freedom of Expression, Religious Advertising and the Broadcast Media After *Murphy v Ireland*" (2004) 2 *EHRLR* 181. The author criticises as unsustainable the argument that the particular, culturally specific risk of harm arising from religious expression warrants giving contracting states a wider margin of appreciation when regulating this form of speech and argues that the Court has through its decisions on religious expression effectively demeaned the value of religious expression in relation to political expression.

[178] See Andrew Geddis, *ibid*, and Tom Lewis, note 128.

[179] See Elspeth Guild, "Cultural and Social Identity: Immigrants and the Legal Expression of National Identity", in Elspeth Guild and Joanne Van Selm (eds), *International Migration and Security: Opportunities and Challenges* (Routledge, 2005).

taken place (albeit in a very different constitutional setting) in the UK where it has been argued that the traditional principles of tolerance present in the common law are being eroded through the replication of the inadequacies of the ECtHR judgments being replicated by domestic courts.[180]

8.8.2 International Covenant on Civil and Political Rights

In terms of the ICCPR, religious dress is specifically dealt with in General Comment No. 22 as one of a broad range of acts encompassed in the freedom to manifest religion or belief, with the Human Rights Committee ("CCPR") stating that:

> The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head-coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.[181]

The CCPR has specifically criticised the French legislative ban on 'conspicuous' religious symbols in schools in its 2008 concluding observations on France's state report, stating that "respect for a public culture of *laïcité* would not seem to require forbidding wearing such common religious symbols", and recommending:

> The State party should re-examine Act No. 2004/228 of 15 March 2004 in light of the guarantees of article 18 of the Covenant concerning freedom of conscience and religion, including the right to manifest one's religion in

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[180] See Mark Hill and Russell Sandbergh, note 161.

[181] General Comment No. 22, "The right to freedom of thought, conscience and religion" (30 July 2003), para. 4.

public as well as private, as well as the guarantee of equality under article 26.[182]

In the few Optional Protocol decisions on the issue of religious dress the CCPR has taken a similar approach, placing emphasis on the importance of respecting external manifestations of religious belief. In *Raidon Hudoyberganova v Uzebekistan*[183] the HRC found that the author's exclusion from the university in which she worked because she wore a headscarf for religious reasons and refused to remove it constituted a violation of Article 18(2) of the Convention.[184] The primary reason for the decision was that the State had failed to provide a specific justification for the restriction, simply justifying the expulsion of the author from the university by her refusal to comply with the ban. The decision is therefore of limited value as a precedent as it is something of a 'default' decision in light of the lack of argument presented by Uzbekistan.[185] Ruth Wedgwood in her individual opinion drew attention to the 'obscure' nature of the facts in this case. While on the one hand criticising the "problematic" approach of the European Court of Human Rights in *Sahin v Turkey*,[186] she did not exclude the possibility that some restrictions on permissible dress in educational institutions may be permissible under Article 18(2), opining that "a state may be allowed to restrict forms of dress that directly interfere with effective pedagogy, and the covering of a student's face would present a different set of facts."[187] This mirrors the approach taken by the Irish Ministers for Integration and for Education in devising the guidelines for school principals discussed above.

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[182] UN Doc CCPR/C/FRA/CO/4 (31 July 2008), at 23.

[183] *Raidon Hudoyberganova v Uzebekistan* (931/2000) CCPR/C/82/D/931/ 200 (2004).

[184] Article 18(2) provides: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

[185] Dominic McGoldrick, note 129, at 153. Sir Nigel Rodley in his individual opinion appended to the decision drew attention to the fact that the CCPR had been unable to taken into account the specifics of the context as did not explain on what basis it was seeking to justify the restriction imposed on the author.

[186] [2005] 41 EHRR 8.

[187] *Raidon Hudoyberganova v Uzebekistan* (931/2000) CCPR/C/82/D/931/ 200 (2004).Wedgwood opinion, para.s 3 and 4.

In *Boodoo v Trinidad and Tobago*,[188] the CCPR followed a similar approach outside of the educational setting, finding that a violation of the Article 18 rights of a Muslim prisoner who had had (amongst other things) his beard forcibly removed. Again the State had failed to provide a justification and the reasoning of the CCPR was therefore constrained. Despite the CCPR's protective approach in these decisions, it allowed a restriction on the wearing of Sikh turbans on the basis of safety in *Singh Bhinder v Canada*.[189] In *Singh Bhinder*, the CCPR found that the enforcement of hard hat regulations in Canada, which meant that the author (a Sikh man) was obliged to remove his turban, did not violate Article 18 or Article 26 of the ICCPR.[190] The limitation could be justified under Article 18(3); or if the issue was approached from the perspective of Article 26 the legislation was reasonable and directed towards objective purposes that are compatible with the Covenant. Thus even the protection under the ICCPR is not absolute and may in individual cases be trumped by safety or other considerations.

8.9 Conclusion

To go back to the three assumptions which it was suggested at the beginning of this chapter might be made about the Irish framework for the protection of religious freedom reveals a paradox. The first of these assumptions, that religious belief is more strongly protected within the constitutional and legislative order than non-religious belief is undoubtedly true, given the express protection in Article 44 and the approach taken in legislation and in the case law. Similarly, broadly speaking expressions of religious belief are strongly protected - even though this protection has not been tested outside of the context of the religions which were formerly expressly recognised in Article 44 and a number of

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[188] *Boodoo v Trinidad and Tobago* (721/1997) CCPR/A/57/40 (2002).

[189] *Singh Bhinder v Canada* (208/1986) CCPR/C/37/D/208/1986 (1989).

[190] This outcome reflects similar jurisprudence under the ECHR; in *X and Y v United Kingdom* [1985] 8 EHRR 235, for example, where it was found that an exemption from motorcycle helmet laws could not be made for Sikh men whose religion obliges them to wear helmets at all times.

ways in which a court might justify permitting restrictions on the wearing of religious symbols have been outlined. In relation to the third assumption, that minority religions would be legally required to be placed on a level footing as the numerically dominant religions, it has been seen that this is not necessarily the case. The analysis in this chapter has shown that the equality between religions, which forms the cornerstone of the constitutional framework, is in practice more superficial than real. The denominational education system is characterised by a lack of meaningful choice of school for most parents and their children from outside of the Catholic religion. Thus religious freedom in Ireland is protected but in the context of the hegemony in practical terms of the Catholic Church, which status quo is protected by the law.

Nevertheless, while the legal framework for education system as a whole is open to criticism on the basis that it has not kept up with increased religious diversity and that it encourages the segregation of religions, the strength of the religious freedom guarantees in the Constitution provide significant protection for members of minority religions. With regard to the ECHR, while the position of the Court is not altogether clear, some elements of the education framework could be characterised as forming a process of "indoctrination", rendering the education system incompatible with the ECHR. However, overall, the Irish Constitution appears to provide greater protection for the manifestation of religious belief than the ECHR. Similarly, while some aspects of the relationship between the state, education and religion are problematic by reference to the ICCPR, overall the protection of religious freedom in Ireland has contributed to the acceptance of new religious practices brought by immigration, in line with the requirements of Article 18. Finally, the underlying assumptions upon which the ECtHR in particular seems to operate are questionable, with its contrasting approaches to Christian and Muslim religious symbols failing to reflect the Court's stated philosophy of promoting neutrality in respect of religion.[191]

From an integration perspective, it has been argued that the structure of the education system could be interpreted as representing a 'segregation' approach whereby children

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[191] See Oran Doyle, "Egalitarianism, Religious Preferences and the Integrated Curriculum", note 61, at 11.

belonging to different religious denominations are educated separately in accordance with the tenets of their own religion. This model contrasts with the largely secular vision of education employed by the European Court of Human Rights and gives strong protection to expression of religious belief and parental rights in relation to education. Some commentators have concluded that this approach has led to easier integration of Muslim children for example than in other jurisdictions as visible expressions of religious belief are not legally stigmatised in Irish law. In practice however, the system may enshrine an assimilation approach in which children from minority religions are compelled to attend Catholic schools through lack of choice and thus in an indirect manner are absorbed into the Catholic ethos of the school.

9 The Impact of Immigration Law: Family Reunification in Ireland

9.1 Introduction

The "normativity" of integration is frequently expressed through black letter rules in the legal systems of European countries.[1] It was seen in Chapter 3 that in France, the Netherlands and Germany for example, the satisfaction of integration 'conditions' as a pre-condition to legal migration and to accessing certain legal statuses has become an accepted part of immigration law and policy.[2] Under this conception, integration is no longer a two-way process that takes place as immigrants live in new host countries and interact with the locals, but rather "acts as a cultural filter to prevent entry of certain sorts of would-be immigrants".[3] Integration conditions have not yet entered the immigration system in Ireland in the form of rules of this nature. Nevertheless, the Irish legal system contains legal rules which have a direct impact on integration, in particular in the key integration areas of family reunification and long-term residence. The lack of a long-term resident status in Irish law was addressed in Chapter 7.[4]

The aim of this chapter is to demonstrate the way in which black-letter legal rules may constitute instruments of or barriers to integration, even where that may not be their primary object. Legal status is one of the key determinants of integration for a number of reasons.

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[1] Sergio Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU* (Martinus Nijhoff, 2009).

[2] See 3.3.

[3] Cathryn Costello, "*Metock*: Free Movement and 'Normal Family Life' in the Union" (2009) 46 *CMLRev* 587, at 591.

[4] See 7.5.

Legal status creates a variety of restrictions on decision-making, self-sufficiency, and the capacity of migrants to benefit from basic economic, political, social, and cultural opportunities and services.[5] Moreover, in Hofinger's words, the "prolongation of legal differences between citizens of a state and migrants reinforces social discrimination against the latter", thus forming part of the root causes of racism, stereotyping and marginalisation which are anathema to integration.[6] This chapter will examine the connection between legal classification, immigration status and integration in Irish law. This will involve an analysis of the entitlement to family reunification attached to different categories of legal status, which is an example of a 'functional' element of integration referred to in Chapter 2.

A key finding of the chapter concerns the impact of EU and international law on domestic immigration law and policy. In the context of immigration law generally, many international norms are perceived to be inapplicable or outweighed by the sovereign prerogative of the state to control the entry and residence of non-citizens in the State.[7] Similarly, EU law has a limited impact on domestic immigration law, especially in the case of Ireland given the state's decision not to opt in to the majority of the binding EU law immigration measures.[8] Nevertheless, the ECHR and EU frameworks as well as international and EU refugee law have had a significant impact in certain areas of immigration law. The influence of international norms on immigration rules was illustrated in the overview of the impact of the ECHR on judicial review of immigration cases in Ireland contained in Chapter 6.[9] In the family reunification context, this chapter will show that the European Court of Justice's ("CJEU") approach to family reunification for EU citizens exercising free movement rights has won out against state efforts to maintain a measure of discretion. In Ireland, this has created a more favourable situation for EU citizens exercising their free movement rights seeking family reunification with third-country nationals ("TCNs") than Irish citizens in the same situation. The scope of the CJEU

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[5] Immigrant Council of Ireland, "Getting On: From Immigration to Integration" (ICI, May 2008), at 6.

[6] Christoph Hofinger, *Measurements and Indicators of Integration* (Council of Europe, 1998), at 29.

[7] See generally, Chapter 3.

[8] See 5.5.

[9] Mark De Blacam, *Judicial Review* (2nd ed, Tottel Publishing, 2009), at 18.19.

case law was extended to static EU citizen minor children in the *Zambrano* decision of the CJEU,[10] which is discussed below. In addition, it will be seen that the obligations imposed by international refugee law mean that family reunification for refugees is provided for by statute, unlike for other categories of family reunification application.

9.2 Family Reunification in Ireland: Complexity and Differentiation

For the purposes of this chapter, 'family reunification' will be taken to mean the process whereby family members who are separated due to forced or voluntary migration regroup in a country other than the country of origin of one or more of the family members. Family reunification is treated by scholars and immigrant advocates as a key element of the integration process and as essential for migrants' wellbeing.[11] The socio-political consequences of failure to facilitate family reunification have been emphasised by the International Labour Organisation in the following terms:

> Prolonged separation and isolation lead to hardships and stress situations affecting both the migrants and the families left behind and prevent them from leading a normal life. The large numbers of migrant workers cut off from social relations and living on the fringe of the receiving community create many well-known social and psychological problems that, in turn, largely determine community attitudes towards migrant workers.[12]

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[10] C-34/09 *Zambrano v Office National de l'Emploi (ONEm)*, (not yet reported, Judgment of 8 March 2011).

[11] See Kate Jastram and Kathleen Newland "Family Unity and Refugee Protection", in Erika Feller, Voller Turk and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, 2003), at 555, in which the writers emphasise the importance of family reunification to integration. In the refugee context, see UNHCR Executive Committee, *Conclusion on Local Integration* 7 October 2005, No. 104 (LVI) – 2005, para. 2. In the Irish context, see Immigrant Council of Ireland, "Getting On: From Immigration to Integration" (ICI, May 2008), at 148.

[12] International Labour Conference, 59th session, 1974, Report VII (I), *Migrant Workers*, 1973, 27.

However, official policy relating to integration often ignores the relevance of family reunification, most likely due to the perception that "more generous family sponsorship provisions tend to raise the overall costs of integration and dilute the economic benefits produced by the original labour entrants."[13] Irish official discourse on integration has to date avoided reference to family reunification as a potential tool for integration, reflecting policy and practice in many European states.[14] In legal terms, the lack of emphasis on family reunification in Ireland is highlighted by the fact that outside of the field of refugee law, there is no legislative provision for family reunification. This official discourse is reflected to a considerable degree in the jurisprudence of the Irish courts, which have been influenced by the difficulty in reconciling the conflicting interests at the centre of family reunification disputes. In the words of Fennelly J in the Supreme Court, "The legitimate interest of the State in the control of immigration frequently conflicts with claims of migrants based on family reunification."[15]

The legal position relating to family reunification depends on the legal classification of the person concerned. Different rules apply to Irish citizens, nationals of EU member states, refugees and other categories of non-EU migrants who wish that their family members join them in Ireland.[16] It will be seen that EU migrants are in the most favourable position in relation to family reunification due to the protection afforded by EU law, followed by refugees whose family reunification regime is grounded in statute. In contrast, the family reunification of Irish citizens (with the exception of Irish citizen minor children, in the wake

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[13] International Organisation for Migration and the National Economic and Social Council, *Managing Migration in Ireland: A Social and Economic Analysis* (IOM, September 2006), at 158.

[14] UNHCR noted in a recent report on integration that none of the European countries researched for the report emphasized facilitation of family reunification as part of their integration efforts. UNHCR, "Mapping Integration: UNHCR's Age, Gender and Diversity Mainstreaming Project on Refugee Integration in Ireland – 2008/2009" (UNHCR, 2009), at 10.

[15] *TC v Minister for Justice, Equality and Law Reform* [2005] 4 IR 109, *per* Fennelly J at 111.

[16] It should be noted that in the Irish system, nationals of European Economic Area countries are treated the same as EU nationals for the purposes of family reunification.

of the *Zambrano* ruling of the CJEU)[17] and non-EU citizens is based on ministerial discretion and is consequently fraught with uncertainty for applicants. A cursory look at the rules relating to each of the categories thus reveals an anomaly: EU citizens exercising their right to free movement in Ireland, along with recognised refugees, are better off in family reunification terms than Irish citizens. The lack of legislative provision for family reunification does not seem to be of pressing concern to legislators. The Immigration, Residence and Protection Bill 2010 provided the Minister for Justice and Law Reform with the power to make regulations which could have provided for conditions relating to "the extent to which foreign nationals may enjoy family reunification in the State", however the Bill did not provide for family reunification in the primary legislation.[18] This Bill lapsed in February 2011 but is likely to be resurrected in a similar form in the course of the next Dáil.[19]

The differentiated rules which will be explored in this section have a variety of rationales, none of which are directly related to integration. In the case of EU migrants, the rationale for the right to family reunification in EU law relates to the objectives of the single market and the realisation of free movement of persons. In the case of refugees, the entitlement to family reunification is linked to the inability of the refugee to return to their country of origin. Nevertheless, the rules in relation to these two categories are both indirectly related to integration concerns in the sense of constituting an acknowledgement that individuals find it difficult to settle and integrate in a country without their family unit. The position in relation to Irish citizens and non-EU citizens, on the other hand, is bound up with the

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[17] C-34/09 *Zambrano v Office National de l'Emploi (ONEm)*, (not yet reported, Judgment of 8 March 2011).

[18] Section 141(2)(b)(x) of the Immigration, Residence and Protection Bill 2010.

[19] In its 2011 concluding observations on Ireland's state report, the CERD Committee regretted that due to the political situation in Ireland, efforts to enact legislation such as the Immigration and Residence Protection Bill 2010 had stalled. UN Doc CERD/C/IRL/CO/3-4 (10 March 2011), para. 15. The Committee specifically regretted the lapsing of the Immigration Residence and Protection Bill, as it had provided that family reunification could be provided for in a statutory instrument (para. 26).

concerns of immigration control and the desire to maintain a high degree of executive control over the immigration and asylum systems.

The constraints placed on national family reunification regimes by the EU and international frameworks are an important feature of the law in this area. Jastram and Newland argue that:

> Family reunification across borders is shaped, but not entirely defined, by the State's sovereign power to control the entry of non-nationals. As with the right to family unity, there has been a progressive development in the international law of family reunification over the past fifty or so years. It is now widely recognized that the State has an obligation to reunite close family members who are unable to enjoy the right to family unity elsewhere.[20]

This view is vindicated in this section which reveals that state discretion in the sphere of family reunification in Ireland is being eroded, in particular by domestic obligations under EU law, international refugee law and the ECHR. This poses a significant challenge to the state-centred paradigm of family reunification still perpetuated by the Irish government, and to a certain extent by the courts. However, it will also be seen that states still enjoy a wide margin of appreciation as regards the domestic legal framework for family reunification, except in the case of EU citizens.

9.2.1 EU citizens seeking family reunification with third-country nationals: the removal of national discretion by EU law

[20] Kate Jastram and Kathleen Newland, note 11, at 576

As outlined in Chapter 5, family members of EU citizens who exercise their free movement enjoy derived rights under EU law regardless of their nationality. This means that, in practice, third country national family members of citizens of the Union who exercise their free movement rights are entitled to the same treatment as their EU national principal, with Directive 2004/38 (the "Citizenship Directive") comprehensively outlining these rights.[21] The concept of EU citizenship has also indirectly benefited non-EU national family members of EU citizens falling outside the scope of the legislation, through the emphasis in the case law on the fundamental rights of citizens and particularly the importance of the citizen's right to family life.[22] This is particularly evident in the light of *Zambrano*,[23] in which the CJEU held that non-EU citizen parents of EU citizen children must be permitted to reside in that Member State, in order to allow the EU citizen childr to obtain the benefits of EU citizenship in practice. The law relating to family members of EU citizens constitutes a significant constraint on national immigration law. For countries with integration conditions and tests for family reunification, such conditions may not be applied in the case of TCNs reuniting with their EU national family member who is exercising their free movement rights in that country. In the case of Ireland, nationals of other Member States who have chosen to exercise their right of free movement to come to Ireland and are seeking reunification with TCN family members in Ireland are in a more favourable legal position than TCNs seeking reunification with TCN family members, as well as Irish citizens resident in Ireland seeking reunification with TCN family members.

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[21] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L 158/77. See for example Articles 3 (beneficiaries of the Directive), 5 (right of entry), 6 (right of residence for up to three months), 7 (right of residence for more than three months), 9 (administrative formalities).

[22] See 5.10

[23] C-34/09 *Zambrano v Office National de l'Emploi (ONEm)*, (not yet reported, Judgment of 8 March 2011).

This position was reinforced in the wake of the CJEU ruling in *Metock*.[24] In its decision in *Akrich*[25] the CJEU had introduced the "prior lawful residence" requirement, holding that a TCN spouse "must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated."[26] On the basis of *Akrich* (and despite further rulings in *Jia*[27] and *Eind*[28] which had rendered the application of *Akrich* questionable) Ireland had introduced a prior lawful residence requirement in its implementing legislation for the 2004 Directive,[29] and this was the basis for the Article 134 reference in *Metock*. The reference queried the legality of the prior lawful residence requirement. The CJEU found (basing its decision on the Citizenship Directive rather than general fundamental rights principles) that the provisions of the Citizenship Directive applied to family members of Union citizens, irrespective of whether they have previously resided in a Member State, lawfully or otherwise.[30]

The combined effect of the Citizenship Directive and the *Metock* decision has been that, in many EU Member States, EU citizens exercising free movement rights with TCN family members are not merely legally assimilated to the position of a national citizen but are actually placed in a better position in family reunification terms.[31] In Ireland, the State has

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[24] Case C-127/08, *Metock and Others* [2008] ECR I-6241.

[25] Case C-109/01, *Secretary of State for the Home Department* v. *Hacene Akrich* [2003] ECR I-9607.

[26] *Ibid.*, para. 50.

[27] Case C-1/05, *Jia* v. *Migrationsverket* [2007] ECR I-1.

[28] Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie* v. *Eind* [2007] ECR I-10719.

[29] European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (Statutory Instrument No. 656 of 2006). Regulation 3(1) and (2) introduced the limitation that the Regulations would not apply to a family member unless that family member had been lawfully resident in another Member State.

[30] The scope of Regulation 3(1) and (2) was amended by Statutory Instrument No. 310 of 2008 (European Communities (Free Movement of Persons) (Amendment) Regulations 2008) in order to accommodate the ruling in *Metock*. SI No. 310 of 2008 deleted the requirement that the Regulations would not apply to a family member unless that family member had been lawfully resident in another Member State.

[31] On the implications of the *Metock* decision and the emergence of reverse discrimination, see Alina Tryfonidou, "Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach" (2009) 15(5) *ELJ* 634.

continued to resist this loss of discretion over the entry and residence of TCN family members of EU citizens. The courts have been obliged to apply EU law in decisions which effectively have compelled changes to government policy and practice in this regard. In *John Tagni v the Minister for Justice, Equality and Law Reform*,[32] Edwards J found that where the Minister for Justice, Equality and Law Reform (the "Minister") is uncertain about the nature of an application but the applicant has provided all the required documentation, the residence card must be granted within the six month period. This decision makes the six-month time frame allowed under EU law for the Minister to decide a residency application of a TCN family member of an EU citizen exercising their right to free movement mandatory in all cases. Edwards J stated that the risk of fraud could be appropriately dealt with by revoking the residence card after it is granted in cases of fraud.

A further illustration of the extent of the restrictions placed by EU law on governmental discretion in this sphere is the decision in *Decsi v Minister for Justice, Equality and Law Reform*.[33] In June 2010, the Irish government had introduced a policy to not allow the non-EU citizen family members of EU citizens to work or set up a business while their application for a residence card was being processed (which routinely takes six months). This was successfully challenged in the *Decsi*, in which Cooke J confirmed that the right of the family member to take up employment, under Regulation 18(1) of the European Communities (Freedom of Movement of Persons) (No.2) Regulations 2006 and 2008 (along with the right of residence itself under Regulation 6(1)) was exercisable as of the date of the acknowledgment notice issued by the Minister of receipt of a valid application for residence. This was because the Citizenship Directive, as implemented by the Regulations, directly confers the right to work or set up a business on family members of EU nationals who have the right to reside in Ireland, as opposed to these rights being conferred by the residence permit issued by the Irish government. The practice of refusing the right to work pending

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[32] [2010] IEHC 85.

[33] [2010] IEHC 342. See "New working restrictions repealed after legal defeat", *Irish Times*, 5 August 2010.

receipt of a residence card was in breach of Article 23 of the Citizenship Directive which states:

> irrespective of nationality, the family members of a Union citizen who have the right of residence in a Member State shall be entitled to take up employment or self-employment there.

This position, whereby neither the right of residence nor the entitlement to take up employment is dependent upon or postponed to the issue of the residence card by the national authority, effectively removes national control over this group of family migrants.

9.2.2 EU law and "sham marriages"

Much of the Irish policy and practice discussed above has been justified as necessary to counteract the spectre of "sham marriages", whereby third country nationals enter into marriages with EU citizens in Ireland for the purposes of obtaining a residence permit. These so-called sham marriages have been the focus of much media and public attention.[34] The most recent of these initiatives which purported to deal with sham marriages was section 138 of the Immigration Residence and Protection Bill 2010, which provided:

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[34] By way of example, see "Registrar warns of rapid rise in 'sham marriages', 17 August 2010; and Gardai object to 57 suspected 'sham' marriages", *Irish Times*, 18 August 2010. See also the announcement of the Minister for Justice and Law Reform that the reduced level of asylum applications in the year 2010 had to be seen "in the light of the nearly 1,900 applications made in 2010 by non-EU nationals for residence based on marriage to an EU national in Ireland under EU Treaty Rights legislation. The largest non-EU nationality group making such applications were from Pakistan which accounted for nearly 20% of all EUTR applications. More significantly, I would draw attention to the fact that almost two-thirds of these Pakistani applications involved an EU partner from the Baltic States." ("Minister Dermot Ahern announces end of year asylum statistics", *Press release, Department of Justice and Law Reform*, 7 January 2011.)

> The Minister, in making his or her determination of any immigration matter, may disregard a particular marriage as a factor bearing on that determination where the Minister under this section deems or determines that marriage to be a marriage of convenience.

Section 138(5) set out the factors which the Minister may take into account in reaching such a decision, including for example the nature of the relationship between the parties prior to the marriage and whether the parties are each familiar with the other's personal details. As noted above, this Bill failed to pass through the Houses of the Oireachtas before the dissolution of the Dáil and thus will not become law - it therefore remains to be seen what approach to this issues is taken by the Fine Gael-Labour coalition government. Legislation in this area has been made very likely by the decision of Hogan J in the High Court in *Izmailovic & Anor v Commissioner of An Garda Siochana & Ors*[35] in which he clarified that, as the law stands, gardaí have no power to prevent non-EU citizens entering into a marriage of convenience for immigration purposes, as the Gardai have no free-standing power to object to a marriage under section 58 of the Civil Registration Act 2004. In fact, as the law stands, a marriage of convenience is not an invalid marriage. While the Minister has the power under the 2006 Regulations to refuse certain rights and entitlements to TCN spouses of EU citizens where it is shown that they entered into a marriage of convenience, the law does not allow for a review of the validity of the marriage before the marriage takes place.[36] For this reason, the arrest and detention of an Egyptian man in an effort to prevent his marriage to a Lithuanian woman (which gardaí suspected was a marriage of convenience) was deemed unlawful and the release of the man was ordered. Hogan J stated:

> I quite appreciate that the decision in this case may present the authorities with very considerable difficulties in this problematic area. … As this decision in its own way

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[35] [2011] IEHC 32.

[36] See Regulation 2(1) of the 2006 Regulations which provide that the word "spouse" does not include a party to a marriage of convenience and Regulation 24 on "Cessation of Entitlements".

illustrates, the problems encountered here are difficult ones and present complex questions of public policy in relation to marriage and immigration. These, however, are ultimately policy questions which only the Oireachtas and, again if needs be, the Union legislature can resolve.[37]

The CJEU's ruling in *Metock* essentially turns on the idea that if family members are not permitted to join them then EU citizens would be hindered in their ability to exercise their free movement rights. This is fundamentally an integration rationale. Conversely, the manner in which many EU states make it difficult for non-EEA national residents to obtain family reunification could be interpreted as intended to discourage this type of migrant from entering the state at all, and from integrating into the host state. As will be seen below, Irish citizens are also effectively discouraged from entering into marriages with non-EEA nationals. While the rules may not have been devised with these effects in mind, this is their practical impact, demonstrating the way in which legal rules may on the one hand facilitate and on the other create barriers to integration.

9.2.3 Refugees: statutory provision for family reunification

Despite the fact that family reunification is not specifically provided for in the 1951 Refugee Convention,[38] most states provide for family reunification for refugees in their domestic asylum systems and, in general, refugees are treated more generously in terms of family reunification than other categories of migrants.[39] In Ireland, family reunification for refugees is governed by section 18 of the Refugee Act 1996, which provides that the Minister "shall" grant permission to family members to enter and reside in the State if he is

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[37] *Izmailovic & Anor v Commissioner of An Garda Siochana & Ors* [2011] IEHC 32, at para. 72.

[38] Although the 1951 Convention provides protection for the refugee family in a number of articles, including Article 22 on access to education for refugee children and Article 12(2) which provides that rights attaching to marriage shall be respected.

[39] For example, family members of refugees are not generally required to pass integration tests in countries in which integration conditions are placed on family reunification. Patricia Brazil, "Recent Issues in Refugee Family Reunification under Irish Law" (2009) 16(1) *DULJ* 412.

satisfied that they are a family member of the recognised refugee.[40] "Family members" include spouses, children under eighteen years and parents in the case of refugees less than eighteen years.[41] In addition, a second class of family reunification is created for "dependent family members" (which may include a grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully), who "may" be granted permission to enter and reside in the State, at the discretion of the Minister.[42] Individuals who are granted permission to enter and reside in the State under section 18 are granted the same rights as those extended to recognised refugees under section 3 of the 1996 Act.[43]

The existence of this statutory framework means that decision-making in respect of the family reunification of refugees, while resting with the Minister, is not completely discretionary, in contrast to the situation for all other types of non-EEA migrants. This was confirmed in the decision of Hedigan J in *T v Minister for Justice, Equality and Law Reform*,[44] in which he confirmed that the principles set out in *Bode v Minister for Justice, Equality and Law Reform*[45] (to the effect that in the case of special administrative schemes the Court would not interfere with the discretion of the Minister) did not apply to the section 18 procedure by which the Minister assesses an application for family reunification. In the instant case, the delay of four years in considering the applicant's request for family reunification was a breach of fair procedures. Unusually for an Irish judge, Hedigan J referred to the broader international and regional context of Irish refugee law, stating:

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[40] Section 18(3)(a).

[41] Section 18(3)(b).

[42] Section 18(4)(a) and (b).

[43] See section 18(3)(a) and section 3.

[44] [2008] IEHC 361.

[45] [2008] 3 IR 663.

> The administrative IBC/05 scheme that was at issue in *Bode* cannot be compared to the section 18 procedure by which the Minister assesses an application for family reunification; the IBC/05 scheme was not placed on a statutory basis whereas the right to family reunification is grounded not only in s.18 of the Refugee Act 1996 but also in regional and international law and practice.[46]

Even more unusually in the context of refugee and immigration law adjudication, Hedigan J emphasised both the constitutional importance of the protection of the family and the centrality of family unity to integration, noting the linkage in Recital 4 of the preamble of the Family Reunification Directive between family reunification and integration. He opined that:

> The matter of family reunification is a matter of great urgency and importance. The fundamental importance of the family unit and its right to be protected is enshrined at the heart of the Irish Constitution. It is further protected by Article 16 of the Universal Declaration of Human Rights and Article 8 of the European Court of Human Rights, among other domestic, regional and international instruments. ... Thus, family reunification is not only a way of bringing families back together but it is also essential to facilitate the integration of third-country nationals into the State and into the EU.[47]

This approach contrasts sharply with the state-centred approach of the courts to family reunification for those without refugee status. In the case of refugees, the constitutional imperative of protecting the moral institution of the family is invoked to give a greater level of protection for family rights than in the case of other migrants (although the family

[46] *T v Minister for Justice, Equality and Law Reform* [2008] IEHC 361, at para. 17.

[47] *Ibid*, para.s 14 and 15.

reunification regime for refugees can be criticised on the basis of the failure to lay down clear guidelines for the processing, investigation and determination of family reunification applications).[48] However it will be seen that this rationale is absent from the reasoning of the courts in the case of families not comprised of refugees. The use of this approach in the case of refugees seems to owe more therefore to the proliferation of international and EU law affecting refugee rights, in addition to the existence of a domestic statutory scheme, than to Irish public philosophy in respect of the family.

9.2.4 Irish citizens: ministerial discretion

Irish citizens do not have an automatic right to be united with their non-citizen spouse or parents in the State[49] and the family reunification regime for Irish citizens is based around the concept of ministerial discretion. A non-EEA national who wishes to reside in the State on the basis of their marriage to an Irish national must make an application for permission to remain in the State. The applicant will usually have to provide evidence of the existence of a valid and genuine marriage and of joint residence. It is not guaranteed that such an application will be successful and the Minister retains discretion over all applications. In the case of married couples, the Minister is entitled to take into account, for example, the length of time the applicants have resided together as a family unit, as the approach of the Irish courts has been that "a state is not bound to respect the choice of residence made by married

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[48] See Patricia Brazil, note 39. Brazil notes that "Section 18 is remarkably lacking in detail in respect of crucial aspects of the family reunification process: what is the extent and nature of the "investigation" to be conducted by the Refugee Applications Commissioner? Is the Minister required, or even permitted, to conduct his own investigations upon receipt of the Commissioner's report? Does the family reunification procedure permit or require oral interview, or must it be an application on the papers only? What is the definition of "dependency"?" (at 412). The main criticism of the refugee family reunification regime in Ireland, according to UNCHR, is the processing time, "which can take up to 18 or 24 months" (UNHCR, "Mapping Integration: UNHCR's Age, Gender and Diversity Mainstreaming Project on Refugee Integration in Ireland – 2008/2009", note 13, at 86).

[49] *TC v Minister for Justice, Equality and Law Reform* [2005] 4 IR 109 (in relation to spouses), approved in *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 IR 795.

couples,"[50] even where one of the couple is a citizen of the State. In the case of Irish citizen children with non-citizen parents, the Supreme Court in its seminal decision in *AO and LO v Minister for Justice, Equality and Law Reform*[51] found that the Minister was entitled to consider applications for residency of non-citizen parents of Irish-born children on a case-by-case basis, balancing the individual rights in question with the concerns of the State to protect the integrity of the immigration system.[52] While the facts of this case did not constitute a classic family reunification situation, whereby it is sought to admit family members who are outside the jurisdiction, the decision illustrates the manner in which family rights may be outweighed by concerns relating to the running of the immigration system. However, as mentioned in Chapter 6, this decision has been effectively overtaken by the CJEU's finding in *Zambrano*,[53] in which it was determined that a third country national parent of an EU citizen child has a right not only to reside within the EU member state of the child's national citizenship, but also to be granted a work permit, so as to ensure that the EU child can genuinely benefit from their rights as an EU citizen. This means that Irish citizen minor children are in a more advantageous position than other classes of Irish citizen in terms of family reunification, due to the intervention of EU law.

Overall, the net effect of the discretionary regime in place in relation to the family reunification of families containing Irish citizens is to place Irish citizens (with the exception of Irish citizen minor children) in a more uncertain position than nationals of other EU states exercising their freedom of movement rights in Ireland. While the rights of TCN family members of EU citizens and Irish citizen minor children are enforceable through the courts via EU law, the family rights of Irish citizens and non-EEA nationals resident in Ireland continue to be outweighed by a state discretion centred paradigm of immigration control. In Costello's words:

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[50] *TC v Minister for Justice, Equality and Law Reform* [2005] 4 IR 109.

[51] [2003] 1 IR 1.

[52] *AO and LO v Minister for Justice, Equality and Law Reform* [2003] 1 IR 1.

[53] *Zambrano v Office National de l'Emploi (ONEm)*, (not yet reported, Judgment of 8 March 2011).

> In the absence of political voice, or EC judicial protection for the static EU Citizen, "exit" to the transnational realm becomes the only option. *Metock* should thus prompt deeper reflection on agency, belonging and identity in the EU. National governments' reflex is to insist on discretionary control over TCN entry to the EU. In contrast, the ECJ's rights-based approach supports a vision of residence rights in which origins and belonging in the EU are decoupled, and blended families benefit from secure rights and entry and residence along the model established for EU citizens themselves.[54]

This model contrasts with the approach taken by the Irish courts in both the family reunification and the deportation cases, whereby the rights of members of "blended families" comprised of both citizens and non-citizens gravitate towards the lowest common denominator of the restricted rights of the non-citizen members of the family.[55]

The legality of the differential treatment of Irish citizens and EU workers exercising their free movement rights was confirmed by Edwards J in the High Court in *M v Minister for Justice, Equality and Law Reform*, which involved a naturalised Irish citizen seeking reunification in Ireland with her non-citizen mother.[56] Edwards J disposed swiftly of the applicant's argument that the legal position constituted reverse discrimination against Irish citizens, finding that Irish citizens were not in an equivalent position to a non-Irish EU worker exercising their free movement rights, as Irish citizens do not have to exercise rights under the Treaty or any Directive in order to work in the state. In these circumstances, there could be no discrimination and the applicant had not established the substantial grounds necessary for leave to seek judicial review. Moreover, he reasoned that if the applicant were herself to exercise her free movement rights, she would be treated in exactly the same way as any other EU national exercising those rights. Accordingly, if she decided to move to Spain or to France or to Sweden or to any other EU country, she too would be entitled to

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[54] Cathryn Costello, note 3, at 593.

[55] See 6.10.

[56] [2009] IEHC 500

have her non-EU national mother accompany her and reside with her in that country. Furthermore, he found that in any case, EU law has always recognised the principle of reverse discrimination, such that "Ireland is entitled to treat the applicants less favourably than a national of another Member State who is in a position to rely upon a specific Treaty right that the applicants are not in a position to avail of."[57]

9.2.5 Other non-EU migrants: ministerial discretion

Ireland exercised its right to opt out of the Family Reunification Directive (which was discussed in detail in Chapter 5)[58] and, as a result, the overarching theme of family reunification in the case of non-EU migrants is ministerial discretion: there is no legislation governing rights of residence for this group and the arrangements are of an administrative nature. It is open to a non-EU migrant to apply to the Irish Naturalisation and Immigration Service for anyone (including a partner) to be allowed to join them in Ireland, however there is no legal certainty about whether such an application will be granted. Family members who are given permission to enter and reside in the State are generally spouses and children under the age of 18.[59] Once family reunification is granted, the family members' right to remain in Ireland depends on the sponsor's right to remain, although they may become entitled to a right of residence in their own right, by obtaining a work permit or Green Card. This dependence on the sponsor for legal status may put women in particular in a precarious position and leave individuals vulnerable to domestic violence or abuse.[60]

While extensive discretion forms the basis of family reunification for non-EU nationals, specific policy approaches are taken in the relevant administrative arrangements for different

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[57] *Ibid.*, para.s 81 and 82

[58] See 5.6.1.

[59] It is not the general policy to allow dependants over the age of 18 to join family members in Ireland.

[60] See Immigrant Council of Ireland, *The Feminisation of Migration: Experiences and Opportunities in Ireland* (ICI, 2008), at 4.

types of non-EU migrants.[61] Holders of work permits are generally permitted to bring their family to live in Ireland after they have been legally working in the country for a year, if they can show that they can support the relevant family members. Spouses and dependants aged less than 18 may apply for a spousal/dependant work permit once they are legally resident in Ireland on the basis of being a spouse or dependant. Holders of Green Card permits and Scientific Researchers are in a privileged position in that they may bring their family to live with them in Ireland immediately, who may then obtain spousal/dependant work permits. In the converse position are international students, the general policy in relation to which is to refuse to allow family members to join them in Ireland.

The potential for ministerial decisions regarding family reunification to be challenged by way of judicial review is particularly limited in light of the approach of the Supreme Court in *Bode v Minister for Justice, Equality and Law Reform* (discussed in Chapter 6),[62] where it was held that the Minister did not have to consider the constitutional and human rights of an Irish citizen child when processing an application by his or her parent under a specific administrative scheme. Nevertheless, it is important to note that decisions of the Minister on family reunification *are* in principle open to review. This was clarified in *Khalimov v Minister for Justice, Equality and Law Reform*,[63] in which the court rejected the Minister's argument that his power to grant or refuse entry visas for the purposes of family reunification was purely discretionary and not reviewable. However, while the courts may review a ministerial decision in this regard, it seems that in practice such a decision will very rarely be overturned. The courts' perception of their role in the family reunification regime is clearly illustrated in *R&H v Minister for Justice, Equality and Law Reform*.[64] Here, a man who had been granted leave to remain in Ireland for twelve months subsequently entered into an arranged marriage in Sri Lanka and applied for his spouse to join him in Ireland,

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[61] These policy approaches are outlined and updated on the website of the Irish Naturalisation and Immigration Service.

[62] See 6.5.

[63] [2010] IEHC 191.

[64] [2009] IEHC 279.

which application was refused. Clark J in the High Court appeared to have little patience for the application for judicial review of this decision, commenting that:

> There are some issues in this case which cause surprise. There was a presumption that a person in the husband's position has a right to bring his spouse into the State. As the application is based on a false premise the application is misconceived. It is for the Minister to determine the conditions under which foreign nationals enter, remain and leave the State – this has been stated on many occasions by the Courts …
>
> It is clear that the Minister is under no legal obligation to grant a visa – the grant or refusal of visas is entirely within his discretion and it is for the visa applicant to convince the Minister that he or she should be granted a visa. Government policy determines which foreign nationals require visas to visit or transit the State and whether they can work in the State.[65]

This passage reveals an extraordinarily state-centred conception of family reunification, and one which appears to clash with the approach of the High Court in *T v Minister for Justice, Equality and Law Reform*, as discussed above. However the judgment in *R&H v Minister for Justice, Equality and Law Reform* is consistent with the reasoning of the courts generally in dealing with migrant families whose legal position is subject to ministerial discretion, whereby family rights may be outweighed by administrative concerns and the protection of the "common good" by way of the preservation of the integrity of the asylum and immigration system. The approach of the courts in these cases is encapsulated in the view of Hardiman J in delivering the judgment of the Supreme Court in *P, B & L -v- Minister for Justice, Equality and Law Reform*,[66] where he stated:

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[65] Para. 25.

[66] [2002] 1 ILRM 16.

> The state's obligation to protect with special care the institution of marriage and protect it against attack cannot, in my view, be invoked to limit the Minister's discretion in relation to an individual applicant whose application for asylum has been refused.[67]

The important position of the family in the Irish constitutional order is therefore displaced in the context of immigration issues by the concerns of migration control. The net effect of these decisions is to render the scope for family reunification decisions to be successfully challenged, on the basis of constitutional rights or otherwise, relatively limited. The decision of the Supreme Court in *Meadows v Minister for Justice, Equality and Law Reform*[68] in which the majority held that the courts, when assessing the reasonableness of administrative decisions in cases affecting fundamental rights, are entitled to consider the proportionality of the decision may lead to a recalibration of the standard of judicial review in these cases with a corresponding reduction in the scope of the discretion of the Minister. It remains to be seen however whether this recalibration occurs and how significant the impact of this is.[69]

9.3 Compatibility of the Irish Family Reunification Regime with International Law[70]

The Irish courts have proceeded on the basis that family rights may not operate to limit ministerial discretion in the sphere of family reunification and that there is no entitlement to family reunification for Irish citizens or non-EU migrants other than recognised refugees. Is this consistent with international law? The difficulties in relation to discerning a right to

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[67] *Ibid.*, at 24.

[68] [2010] IESC 3.

[69] For a critique of *Meadows* and its implications, see Alan Brady, "Proportionality, Deference and Fundamental Rights in Irish Administrative Law: The Aftermath of *Meadows*" (2010) 17(1) *DULJ* 136.

[70] See generally, Anja Wiesbrock, *Legal Migration to the European Union* (Martinus Nijhoff Publishers, 2010), at 689-700 ("The right to family life and family reunification").

family reunification in international law are summarised by Anderfuhren-Wayne as follows in assessing the links between family reunification and the right to family unity as enshrined in numerous international instruments:

> On the one hand, family reunification calls for the movement of persons from one State to another. On the other hand, outside of specific bilateral or multilateral treaties, there is no right to immigrate and no general duty on the part of States to allow persons to enter their territories. Although, practically speaking, family reunification 'should be considered as a means of implementing the principle of family unity .. .', under general international law it is merely a policy the force of which is vague and undefined — in effect, a right of unity without a clear means of executing it.[71]

9.3.1 Article 8 ECHR and family reunification

It was seen in Chapter 4 that the European Court of Human Rights has been slow to develop an extensive right to family reunification in the positive sense of requiring states to admit family members of migrants living in the state (although it has required states to do this on a number of occasions).[72] There have been very few instances where the Irish courts have been required to apply the Article 8 case law in a pure family reunification as opposed to a deportation situation. Despite the dearth of case law in this area, the approach of the High Court in *Khalimov v Minister for Justice, Equality and Law Reform*[73] may give some indication of how the Irish courts will approach these cases. The applicant was a national of Uzbekistan whose mother, half sister and step father lived in Ireland pursuant to the Irish-Born Child 05 scheme. His sister was permitted to join them in 2009. The Minister had

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[71] Cynthia S. Anderfuhren-Wayne, "Family Unity in Refugee and Immigration Matters: United States and European Approaches" (1996) 8(3) *IJRL* 347, at 351.

[72] See 4.13.

[73] [2010] IEHC 191.

refused to grant the applicant a visa to enter and live in the State and the applicant sought to judicially review that decision. He challenged the legality of the decision on the basis of, amongst other things, the failure of the Minister to consider his individual circumstances and his right to respect for private and family life pursuant to Article 8 ECHR. Clark J found that the applicant did not in fact enjoy any Article 8 rights in the circumstances as the requisite family ties did not exist (the applicant was not a minor and was not dependent on his parents) and in addition, Uzbekistan was not a Contracting Party to the ECHR - raising the issue of the extra-territorial application of the ECHR. Although this effectively disposed of the Article 8 point, Clark J went on to note that even if the ECHR did apply, that Article 8 does not guarantee the right to choose the most suitable place to family life, and that the *Sen v The Netherlands* decision meant that it was only where the family cannot be reunited elsewhere that states are compelled to allow family reunification within their borders. It thus seems that the Irish courts will take a narrow view of the State's family reunification obligations under Article 8 ECHR. Nonetheless, the implications of the judgment in *Khalimov* are that in the right circumstances, Article 8 could apply, leaving the door open for its application in future family reunification cases.

9.3.2 UN human rights treaties

Similarly, while the right to freedom from interference with family life and the right to the family are protected under the ICCPR, there is no clear and unambiguous right to family reunification under that instrument, even though the right to family unity contained in Article 23 is a positive rather than merely a negative right.[74] In its General Comment on the position of aliens under the ICCPR, the Human Rights Committee (the "CCPR") noted that the Covenant does not recognise the right of aliens to enter or reside in the territory of a state party - it is, in principle, a matter for the state to decide who it admits to its territory. This key principle constitutes the critical difficulty with any attempt to establish the existence of a right to family reunification in international law. However, the General Comment stresses

[74] CCPR General Comment No. 19, "Protection of the family, the right to marriage and equality of the spouses" (27 July 1990), para. 3.

that, "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise."[75] The CCPR has also determined that states are under a duty to take measures to "ensure the unity or reunification of [refugee] families."[76] In Hathaway's view, the question of when such affirmative efforts are sufficient will likely be measured in relation to the usual "reasonableness" standard meaning that conditioning family reunification on sponsor's ability to support them, or public policy or security would be acceptable once it didn't stray into the realm of the arbitrary.[77] The provisions of the ICCPR relating to the family thus represent a rather limited constraint on the general power of states to determine who may enter and reside in their territory. In addition, as the ICCPR does not form part of domestic law, it would be very difficult for an individual applicant to seek to rely on the ICCPR in front of an Irish court. Nevertheless, a refusal to permit family reunification could (in circumstances where the decision is arbitrary and unreasonable) result in the state being in breach of its international legal obligations under the ICCPR.

The right to family reunification is expressly protected in the CRC and the CMW, although neither instrument provides an unqualified "right" to family reunification.[78] In its

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[75] CCPR General Comment No. 15, "The position of aliens under the Covenant" (11 April 1986), para. 5.

[76] CCPR General Comment No. 19, note 74, para. 5.

[77] James Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005), at 551.

[78] Article 10 of the CRC states: "In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family". Article 44(2) provides: "States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children." Article 44 of the CMW deals with family reunification, stating: "1. States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the

concluding comments on Ireland's state report, the Committee on the Rights of the Child commented on the narrow scope of family reunification entitlements in Irish immigration law:

> The Committee notes that the Refugee Act of 1996 provides for an adequate legal framework for family reunification. However, family reunification in accordance with article 10 of the Convention also applies to other situations, including migration. The Committee is concerned that family members seeking reunification do not have access to procedural information, and that the principle of the best interests of the child is not taken into account in the decision-making process.[79]

The Committee recommended *inter alia* that Ireland consider establishing a legal framework for family reunification outside situations falling under the Refugee Act.[80] This recommendation was reiterated by the CERD Committee in 2011.[81] It is a matter of some debate as to whether - under the CRC in particular - a right to family reunification has begun

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State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers. 2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children. 3. States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers."

[79] UN Doc CRC/C/IRL/CO/2 (29 September 2006), para. 30. Hathaway argues in the context of discussing refugee rights that "Article 23(3) is a standard against which the sufficiency of an asylum state's *affirmative* efforts to preserve family unity, including by way of reunification efforts, can legitimately be measured." James Hathaway, note 77, at 540.

[80] UN Doc CRC/C/IRL/CO/2 (29 September 2006), para. 30(b).

[81] UN Doc CERD/C/IRL/CO/3-4 (10 March 2011), para. 25.

to develop in international law.[82] On this basis, the Irish system relating to the family reunification of non-EU family members could be incompatible with the international framework. The intricacies of this debate are beyond the scope of this discussion. From an Irish perspective however, it is sufficient to note that the practical impact of the development of a "right" to family reunification under the CRC and the CMW is limited. Ireland is not a party to the CMW, and the provisions of the CRC have not been incorporated into domestic law. Overall, in practical terms the nebulous right to family reunification in international human rights law is likely to make little impact on the Irish administrative regime on family reunification.

9.3.3 Future developments

Given the above analysis, it is unsurprising that the Migration Integration Policy Index ("MIPEX) found in 2011 that Ireland had the least favourable family reunion policies in 31 countries examined in Europe and North America.[83] However, significant change in the area of family reunification for non-EU migrants seems unlikely, in the near future at least. The Immigration, Residence and Protection Bill 2010 failed to address family reunification and if and when legislation is passed to overhaul the immigration system, Ireland may still be the only country in Europe without a legislative regime for family reunification.[84] The

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[82] Jastan and Newland argue that such a right is under construction. Jastram and Newland, note 11. For a different viewpoint, see Cynthia S. Anderfuhren-Wayne, note 71. Although Professor Hathaway attempts to make a case for the recognition of a customary legal norm to protect the family unity of refugees, he acknowledges in the context of refugee law that on close examination "it is clear that while there is a continuing insistence that the family members of a primary applicant refugee should be admitted to protection, most refugee-specific formulations fail to define with any precision the content of an affirmative dimension of the principle of family unity." Hathaway, note 77, at 545.

[83] British Council and Migration Policy Group, Migration Integration Policy Index III (2011), available at www.integrationindex.eu. The index states: "With the least favourable family reunion policies in Europe or North America, Ireland shows little respect for the family life of its non-EU residents and discourages their integration once arrived".

[84] See Immigrant Council of Ireland, *Information Update on Immigration Matters* (May 2009), at 9.

current administrative regime is remarkable for its lack of transparency and judicial oversight and focus on the rights of the state to the detriment of family rights. However, it should also be acknowledged that the immigration legislation relating to family reunification in many EU countries has taken a restrictive turn. The introduction of administrative delays before legal status is granted to the spouse, and integration conditions whereby the family member must prove their integration potential before they have even entered the state are amongst the tools used by states to restrict family reunification for certain types of migrants.[85] Any Irish legislative initiatives in the field of family reunification should avoid imposing these types of integration "pre-conditions" on family migrants.

In the meantime, the legal regime for family reunification in Ireland remains characterised by a patchwork of differentiated rules and policies - shaped partly by EU law, partly by international refugee law, and mainly by the principle of executive discretion in the field of immigration law. While this discretion-centred paradigm is undoubtedly placed under pressure by developments in the field of EU and international law, meaningful development of a "right" to family reunification at the level of international law continues to be inhibited by the principle on which the discretion-centred paradigm is based: the sovereign power of states to decide who may be admitted to their territory.

9.4 Conclusion

This chapter started from the assumption that migration status plays a key role in integration. The analysis has shown that EU migrants and refugees are treated more favourably in respect of the 'functional' elements of integration than other categories of migrants, with access to family reunification easier (and indeed a matter of entitlement in most cases) for migrants with these statuses. Secondly, despite the state-centred approach taken by the Irish courts in relation to the family reunification claims of Irish citizens and

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[85] Cathryn Costello, note 3, at 590, where she cites Rainer Bauböck, Eva Ersbøll, Kees Groenendijk and Harald Waldrauch (ed.s), *Acquisition and Los of Nationality, Summary and Recommendations* (Institute for European Integration Research Austrian Academy of Sciences, Vienna, January 2006).

non-EU migrants, it was shown that EU and international law have a significant influence on the field of family reunification. A comprehensive account of integration must therefore be situated in the context of the EU and international legal frameworks in order to take account of the elements of these frameworks which influence national integration processes. In addition to these key findings, it was shown that the legal position in respect of family reunification contradicts the rhetoric of social inclusion and interculturalism contained in official integration policy, with non-EU migrants in a precarious position in this legal domain due to the operation of the largely discretionary family reunification regime.

10 Conclusions

10.1 Summary

This thesis has examined the interaction between integration and law, from an Irish perspective. It has sought to identify legal elements of the concept of integration, not only in the Irish context but also in the international and EU law settings. It has shown that these legal elements of integration are fragmented and disparate but nonetheless significant. Legal rules and frameworks, particularly in domains such as religious freedom, immigration, social welfare and citizenship, are inevitably part of the integration process whether or not they are recognized as such by lawmakers, and whether they form part of a broader integration policy framework or not. For these reasons, along with the direct influence of law on the status, entitlements and opportunities of immigrants, the legal framework for integration must be acknowledged and identified as such. Above all, the thesis has argued for a more developed paradigm of "integration and law" which emphasises the extent of law's influence on the integration process whilst recognising the limits of this influence. It has also sought to underline the importance of not only the internal legal foundations of national integration policy but also the pervasive influence of international and EU law on national integration frameworks.

This concluding chapter will deal first with the descriptive question of the form and content of the Irish integration model, drawing on the analysis through all the chapters, but particularly drawing on the findings of Chapter 2 and 3. Having done this, the major thematic conclusions to emerge from the thesis will be discussed. The first of these highlights the indeterminacy of the concept of integration and the contribution which law can make in delineating the meaning of integration. The incoherency and contradictions at the heart of each of the international, EU and Irish frameworks for integration are the second major theme. Finally, the complex intersection between the frameworks of international,

EU and Irish law and the impact which this has on the shape of integration at the national level is a key finding of the thesis. Taken together, these conclusions help to broaden our understanding of the nexus between integration and law. Building on these conclusions, a two-pronged approach to the development of a human rights-based approach to integration is suggested. This involves the use of a broad-based definition of integration which takes into account both its functional and wider dimensions, and the development of a conceptual framework for policy development which recognises and utilises the extent of the interaction between integration and law. On this basis, a number of basic recommendations for the development of a holistic and human-rights based integration policy in Ireland are outlined

10.2 The Irish Framework for Integration

10.2.1 A piecemeal policy framework

The practical dilemmas faced by traditional institutions in dealing with the new diversity in Irish society are summed up by a comment made during the course of a study of teacher and student perspectives on increasing ethnic diversity in Irish schools by a principal teacher of a Catholic school: "*is it possible to have a Catholic, multi-denominational, multicultural school?*".[1] Ireland has only just started to address the issues arising in migrant-receiving, diverse societies. State bodies have begun to develop the policy infrastructure of integration, for example in the form of intercultural policies in the fields of education, healthcare and policing. It was seen in Chapter 2 that it cannot truly be said that these policies are informed by any clear central strategy or policy, aside from vague and undefined references to "interculturalism". The sole recent and clear policy statement relating specifically to integration is the 2008 ministerial statement on integration, Migration Nation, which was the only significant publication to emanate from the Office of the Minister for

[1] Dympna Devine, *Teacher and student perspectives on increasing ethnic diversity in Irish schools*, Presentation made by Dympna Devine at Roundtable Discussion on Education and Integration, organised by the Immigrant Council of Ireland, 5 February 2008.

Integration in the three years of its existence. As a result of the economic recession and subsequent decline in available funding, as well as the decline in immigration itself, the Office of the Minister for Integration was abolished in March 2011 and it is unclear how integration strategy will be dealt with going forward. In these circumstances, it is doubtful that a clear conception of integration will be developed in policy terms in the near future.

Despite the piecemeal nature of Irish integration policy, some conclusions on a nascent Irish integration paradigm can be drawn from the preceding chapters, particularly Chapters 2 and 3. In terms of integration policy, a mainstreaming approach has been adopted whereby integration policies are linked to general social inclusion policy. Integration is framed in terms of anti-racism, social inclusion and equality. Official integration policy in Ireland is not ostensibly focussed on cultural integration or matters of identity. Policy documents relating to 'diversity' emphasise interculturalism. In practice, the focus has been on funding community initiatives for integration rather than a developing a centralised approach. Finally, there are no centralised formal integration 'programmes' (of either a mandatory or a voluntary nature) in the form of language courses, civic orientation courses or integration tests or contracts for newcomers (with the exception of resettled refugees), in contrast to policy in many European states.

10.3 A legal framework for integration?

In terms of law, it has been shown that the term "integration" is rarely used *per se* in the legal sphere in Ireland. In contrast to the approach taken by the European Court of Human Rights, it was seen in Chapters 6, 7, 8 and 9 that there has been little normative development of the concept of integration by the courts. Neither is the concept explicitly used in legislation, as it has been in other European jurisdictions. In fact, there is little recognition in Irish integration discourse of the interaction of integration and legal processes. Nonetheless, in spite of the lack of express references to integration in Irish legislation and jurisprudence, this thesis has shown that a significant mutually influencing process takes place between integration and law in the Irish context.

The domestic legal foundations of this mutually influencing process can be located in the "public philosophy" embodied in the Irish constitutional order. It was argued in Chapter 6 that the text of the Constitution should not be understood as a barrier to an inclusive, two-way paradigm of integration, notwithstanding the pervasive influences of Catholic and nationalist thought thereon. It was argued that the values underlying the text of the Constitution mandate an approach to integration which combines social inclusion with the strong protection of individual rights. However, the analysis of the constitutional case law on the protection of the constitutional rights of non-citizens and the recent case law in the Irish expulsion cases undertaken in Chapter 6 revealed a conception of state-immigrant relations which is deeply rooted in the paradigm of the nation state, sovereignty and executive discretion. This paradigm is also evident in the courts' attitude to non-EU citizens' claims for family reunification. The Irish public philosophy of immigration and integration, as expressed through the decisions of the Irish courts, seems therefore to be based on these foundational elements rather than the achievement of equality and the protection of fundamental rights.

Part III of the thesis illustrated some of the aspects of the mutually influencing process between integration and law by assessing the legal position in relation to a number of functional and wider integration perspectives. In terms of citizenship and the politics of identity, it was shown in Chapters 6 and 7 how national citizenship law retains a key symbolic and practical importance for migrants seeking full access to the social, economic and constitutional structures of Irish society. Recent developments in Ireland – most importantly the citizenship constitutional amendment in 2004 - suggest a relatively closed conception of the national community, with implications for the form of integration measures. However this has not so far been translated into integration conditions placed on access to citizenship as it has in other jurisdictions. The question of whether citizenship is a reward for completed integration or a tool for progressive integration is as yet unresolved in Irish law.

Integration issues arising in the field of religion and education were discussed in Chapter 8. It was shown that the legal approach to the historically divisive issue of religious difference has combined a strong protection for religious freedoms with the endorsement of a 'segregated' education system. This segregated and overwhelmingly Catholic education system can be interpreted as enshrining a *de facto* assimilation model, in light of the diversity of religious belief brought about by immigration. On the other hand however, the constitutionally mandated general tolerance of religious symbols and dress in schools allows pupils from outside the well-established religions to maintain their religious identity, which may in turn promote a greater acceptance of religious difference in broader society than has been evident in other European states.

Chapter 8 illustrated how immigration law and legal status impact on integration opportunities through an examination of the Irish family reunification regime. Legal categorisation creates significant boundaries between migrants and the existing population and on also between different groups of migrants. Thus, for example, EU workers are entitled to the company of their non-EU family members in the host state, while non-EU migrants and Irish citizens are subject to a discretionary and un-transparent system of ministerial discretion. The entitlements and restrictions attached to legal status constitute tools of and barriers to integration.

The legal structures relating to these various aspects of integration have few connections and have developed on a standalone basis. No coherent conception of integration, legal or otherwise, emerges from this discussion of integration and Irish law. It cannot be said that the Irish example fits into one of the traditional integration models of exclusion, assimilation or multiculturalism, with elements of each model present in the legal framework. Equally, the legal elements of the integration framework do not match the stated aim of integration policy of embodying an intercultural approach. This is most obvious in relation to the school system which is organised along denominational lines, supported by legislation and jurisprudence. This thesis therefore supports the view that the traditional framework for viewing integration in terms of models does not accommodate the reality of integration as a patchwork of multidimensional frameworks, with integration frameworks comprising a

'mixed bag' rather than representing a model of assimilation or multiculturalism. Close examination of the legal elements of integration in the Irish context suggests that such legal elements are determined not by reference to models or principles but by a complex mix of normative processes involving national, EU and international law, political decision making and existing legal rules which were not adopted with integration concerns in mind. For these reasons, this thesis demonstrates that it is more useful from an analytical perspective to gain an understanding of the influences which shape national integration frameworks rather than attempt to place the results of the analysis in limited categories or conceptualise them as representing models.

Notwithstanding the above criticisms, overall the Irish legal framework for integration in many ways compares favourably with those contained in other European legal systems. Ireland does not at present follow the practice, developed in other EU Member States and replicated on the EU level, of enshrining integration as a mandatory condition in immigration and citizenship law. The introduction of language, integration or citizenship tests into Irish immigration and citizenship law would constitute a significant change in the Irish integration model. These concepts have never formed part of Irish law and would signal the introduction of a one-sided and coercive conception of integration as the remodelling of individual migrants in the mould of an idealised member of the imagined national community - an exclusionary and problematic conception of integration which has been criticised throughout this thesis.

10.4 Thematic Conclusions

10.4.1 The indeterminacy of integration

The concept of integration is largely indeterminate. Competing narratives of integration emerge from international bodies dealing with migrants, governments, NGOs and academics. A pervasive theme of this thesis has been the disjuncture between the framing of integration by NGOs and immigrant advocates on the one hand and governments on the

other hand. Radically different interpretations of the meaning of integration persist such that the various actors involved in integration are often talking at cross-purposes. As pointed out above, the limitations of the traditional theoretical models of assimilation and multiculturalism have been exposed throughout the thesis, and these models do not capture the complexity of integration processes. Similarly, alternative models for understanding integration such as comparing mainstreaming with targeted integration measures do not capture the full spectrum of integration concerns.

The problems caused by the indeterminacy of integration extend to the legal sphere as different conceptions of integration are developed in different legal settings. Part II of this thesis explored the normative development of the concept of integration within the European Union and by the European Court of Human Rights ("ECtHR") and the UN treaty bodies. Different visions of integration are pursued by national legislation, national courts, the ECtHR, at EU level and by the UN treaty bodies with no clear indication of how the parallel normative development of integration within these different legal frameworks hangs together. In addition, within these different legal spheres the indeterminacy of the concept persists, and the difficulty inherent in attempting to identify a comprehensive legal understanding of integration within any of these legal frameworks is a defining characteristic of the normative development of integration - illustrating the problems attached to imposing a legal structure or analysis on an underlying concept which remains indeterminate.

In spite of these difficulties, legal elements of integration are crucial to gaining an understanding of integration; as such elements are concrete and (for the most part) binding on national decision-makers. Law therefore has an important contribution to make to the integration debate. Assessing the legal elements of integration provides an escape route from the circular question of what integration *means* and presents an opportunity to observe how it operates in practice. Looking at integration through the prism of law can move the debate in different directions to that engendered by sociological definitions of the term. In order to identify the legal elements of integration, this thesis has traced how integration is conceptualised in a legal context in national legislation and jurisprudence in addition to at

EU level and by international law bodies. It has also sought to underline how law intervenes in the key integration issues as identified in Chapter 2. It has proposed a broad conceptual framework for the understanding of the nexus between integration and law which goes beyond looking at the express use of "integration" as a legal concept in immigration and citizenship law.

10.4.2 Incoherency and contradictions within the international, EU and Irish frameworks for integration

It was shown in the first section of this concluding chapter that the Irish legal framework for integration is not coherent. This lack of coherence is perhaps linked to the difficulty of determining a strong public philosophy of integration in the Irish context, but primarily stems from the piecemeal nature of the policy framework and the reluctance of Irish courts to engage with the concept of integration and its implications in legal terms. This lack of coherence is not confined to the national level and similar difficulties arise in relation to the normative development of integration by the ECtHR and the UN treaty bodies. In relation to the ECtHR, the relative weight of the various factors used to assess integration is uncertain and it was shown that the inconsistencies arising in the jurisprudence take away from the important work which the Strasbourg Court is doing in delineating the meaning of integration. The precise role of integration itself in the balancing exercise undertaken by the Court in the expulsion cases is not altogether clear, and the role (if any) of the concept of integration outside the context of the Article 8 immigration cases is unclear. As for the UN bodies, the limited development of a concept of integration is in the early stages and fragmented between the different bodies. It was seen that the framing of integration by the UN bodies is different depending on the context and purpose for which it is being examined, in addition to the way in which the state reports and shadow reports frame integration. These incoherencies reflect the indeterminacy of integration discussed above.

On top of its fundamental lack of coherence, the Irish framework for integration is riven with contradictions and paradoxes. At a basic level, the rhetoric of interculturalism and

social inclusion contained in Irish integration policy is contradicted in almost every aspect of Irish law considered in this thesis. Contradictions can be identified within each of the individual areas of law considered in the thesis. The constitutional recognition of the "diversity of traditions and identities on the island of Ireland" contrasts with the changes to citizenship law which effectively restrict the *jus soli* principle to children of Irish citizens and long-term residents. The natural law origins of the fundamental rights articles of the Constitution are overridden in the immigration context by the national/non-national dichotomy. One of the cornerstones of Irish constitutional law, the protection of the family, is undermined in the case of families containing non-citizens. In the case of religion, religious expression is strongly protected while inadequate provision for education in different religious ethos settings persists, meaning that an approach which celebrates freedom of religion and difference co-exists with a *de facto* assimilation model. The strong protection of freedom of religion under the Constitution and the interculturalism espoused in the policy document are bypassed in the case of Sikh men wishing to join An Garda Siochana and wear their traditional headgear. Integration policy is supposedly directed at all migrants (aside from asylum seekers), however in practice different types of migrants are granted completely divergent integration opportunities by law.

These contradictions mirror similar difficulties in the EU framework. It has been argued that there are multiple, conflicting conceptions of integration contained in the framework for integration at EU level. For example, integration is conceptualised as a mandatory condition in the Family Reunification Directive and the Long-Term Residents Directive but as a justification for the extension of valuable social and economic rights in the case of EU citizens. In the case of refugees, integration programmes are conceptualised as an entitlement whereas in the case of third-country nationals ("TCN"s) such programmes may be mandatory. It has been argued that these multiple conflicting interpretations of integration may be fatal to the potential of EU law and policy to provide a new frame of analysis for national policymakers in the field of integration, which would open the door to a more cosmopolitan conception of citizenship and the extension of equal treatment to TCNs.

10.4.3 External influences

Many studies on integration have emphasised the important influence which a country's history, ideology of nationhood, and associated citizenship regime have on the process of immigrant integration. In the case of Ireland, this influence is clearest in relation to the strong protection of religious freedom which stems from the central place of religion in the constitutional order. Similarly, in the context of citizenship law, the influence of the historical experience of emigration on the concept of the nation was illustrated. While acknowledging the role of national public philosophy, the thesis has demonstrated that the approach to integration at the national level is also now shaped by international and regional legal frameworks. This is explicit in some instances - Irish integration policy is expressly informed by EU integration policy, for example. In other instances the connections are not so readily identifiable. Multiple connections between the concept of integration, the Irish legal framework and EU and international law have been identified. The influence of international and EU norms is an evolving phenomenon and certainly constitutes the most important change to both the policy and legal frameworks for integration at the national level in past decades.

EU law has the most significant influence on the national framework, and the intersection between EU law, immigration, citizenship and national law is well-documented. EU law requires the acceptance of EU migrants into the structures of the host state on almost the same terms as national citizens. EU migrants achieve integration through economic activity rather than through proof of cultural adaptation. Aside from EU law, another area of law which has a formative influence on integration is international refugee law, as conducted in recent years through the medium of EU law. The law relating to family reunification – generally seen as a central integration issue - provides a good example of the processes involved. Family reunification for EU migrants, exercising their free movement rights, with TCN family members is automatic. Family reunification for refugees is difficult, but is governed by a statutory framework which was put in place in order to comply with Ireland's obligations under the 1951 Refugee Convention. Both these groups – and particularly EU migrants - are in a better position than Irish nationals seeking family reunification with

TCN family members, who (along with non-EEA nationals) are subject to the discretionary decision-making power of the Minister for Justice, Equality and Law Reform. Groups which are not subject to the influence of international or EU legal processes are thus left vulnerable and subject to the wide discretion of national decision-makers. Another clear example of the influence of external normative processes on the national framework for integration is the manner in which the development of the concept of integration by the ECtHR in the context of the protection of family and private life constitutes a direct limitation on how the State uses its power to expel non-citizens. This constitutes a counterpoint to the emphasis of the Irish courts on the extensive nature of the power of the State to control immigration.

The importance of these parallel, overlapping and intersecting legal frameworks means that the normative development of integration taking place within those frameworks contributes to a comprehensive understanding of integration and law. In addition, looking to the international and supranational elements of integration may provide an escape route from the politics of identity inherent in considering integration solely in the context of the nation state. Current literature has identified and analysed the trend towards the conceptualisation of integration as a mandatory obligation in immigration and citizenship law. In order the refocus the debate in a more human rights-oriented direction, there is a need to move beyond this framework and to develop a wider conceptual framework for discussing integration and law. One way to refocus integration policy and practice on social inclusion and equalisation of opportunity is to insist on the recognition of the concepts of integration under construction by EU and international actors. Highlighting the contributions of EU and international law helps to decouple integration and national identity which is at the root of the twin national trends towards perceiving integration as primarily linked to identity and enshrining integration conditions in immigration legislation. In particular, the approach of international human rights bodies to integration is by nature human-rights based in nature and focuses on non-discrimination and equality, providing the basis for an alternative approach to integration to those based on national public philosophy.

Nevertheless, looking to EU and international law presents its own difficulties. In the EU context, Chapter 5 identified serious inconsistencies and a fundamental lack of coherence in the EU framework for integration. In the international context, in the case of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights in particular, express references to integration are sparse and under-developed. The ECtHR's concept of integration is also limited in the sense that it is employed mainly in the narrow context of challenges to deportation decisions of national authorities. Overall, neither EU nor international law provides a comprehensive legal framework for integration. In addition, to reiterate the points made above, integration is being conceptualised and interpreted in these different legal arenas in a way which is often contradictory. There is no coherence between the concepts of integration being developed in the Irish, EU, Council of Europe and UN settings. Thus, while acknowledging the impact of external influences on integration is crucial, these external influences do not necessarily resolve the issues relating to the indeterminacy of integration and the paradoxes inherent in the connections between integration and law.

10.5 Reconfiguring the Integration Debate

There is a need to broaden the integration debate and place it in a human rights context. This thesis has suggested two main ways in which this could be done. The first way in which integration can be reoriented in this way is by using a broad definition of integration which recognises the complexity of the issues involved. As elaborated in Chapter 1, the following definition was proposed:

> Integration is an ongoing, multidimensional, two-way process between, on the one hand, migrants and, on the other hand, existing members of the receiving society along with the receiving state itself. This process involves a series of interlinked spheres, which, for the purposes of this thesis, will be characterised as forming part of 'functional' or 'wider' perspectives on integration. 'Functional' aspects of integration include first of all protecting

fundamental rights and secondly providing a legal status which acts as a gateway to the core policy areas of housing, health, education, social welfare and family reunification. 'Wider' aspects of integration connect to these functional themes but place integration in its broader thematic context. These are aspects of integration with 'wider' connections to the broader themes of national identity, responses to diversity in society, social policy and equality - most importantly, approaches to citizenship and the place of culture and religion in public space.

The second means of reconfiguring the integration debate is to develop a conceptual framework for the analysis of integration and law which takes into account that integration is the subject of normative processes beyond its use as a mandatory immigration obligation in the legal system of an increasing number of European states. This thesis has identified specific dimensions of the interaction of integration and law which could potentially and usefully influence the approach to integration in Ireland in a number of concrete ways. The following are a number of basic recommendations for the development of the Irish approach to integration, based on the findings of the thesis.

1. **Engagement with the paradigm of integration as the progressive realisation of equality**

   The UN human rights treaty bodies are, in their concluding observations on state reports, developing a nascent conception of integration which centres on a two-way, non-coercive process of the progressive realisation of equality for migrants. This nascent integration paradigm, in conjunction with the philosophy of equality and non-discrimination generally enshrined in human rights law, could provide the foundation of the Irish approach to integration, rather than relying on theoretical models such as multiculturalism, assimilation or interculturalism.

   It was shown in Chapter 3 that Ireland is a distinctive case study, due in part the relatively recent nature of the emergence of immigration and integration issues and the

resulting absence of a preconceived frame of analysis for integration issues. Integration is a policy area in which Ireland has an opportunity to move beyond minimum standards set in the EU and international law arenas. There is no reason why Ireland should not engage with the equality-based integration paradigm evolving in the context of the UN treaty monitoring bodies in developing its own public philosophy of integration. This argument is strengthened by the fact that there are already elements of the progressive realisation of equality paradigm contained in Ireland's framework. The progressive equality paradigm enshrined in international human rights law is reinforced through international refugee law, as implemented by domestic legislation, which requires the Irish State to grant to refugees a range of integration-related rights on an incremental basis, reflecting their progressive integration in the host state. In relation to EU migrants, EU law on the free movement of persons (which is binding on Ireland) illustrates the transformative potential of law in the sphere of integration. It provides the model for a concept of integration based on inclusion, equality and non-discrimination, without any focus on cultural integration. The model adopted in the case of refugees and EU migrants should be adopted across the legal categories in order to create a more coherent framework which reflects best practice on and EU and international level.

2. **Use of the CERD Committee's concept of integration as a guideline for policy development**

   Following on from the above point but more specifically, the CERD Committee is, through its concluding observations, in the process of constructing a relatively nuanced and detailed concept of integration. The observations of the CERD Committee on the integration policies and practices of states could be used as a guideline for Irish integration policy in order to ensure compliance with best practice in international law, and to implement the progressive realisation of equality paradigm in practice.

3. **Facilitation of integration and naturalisation of refugees, pursuant to international law obligations**

   Ireland is required under international refugee law to "facilitate" the integration and naturalisation of refugees. Article 34 provides two examples of ways in which access to

naturalisation could be facilitated, which could be used by Ireland as a starting point for real engagement with these innovative provisions of international law. In addition, as noted above, Ireland already provides integration-related rights to refugees which place them on a similar footing as Irish citizens, pursuant to its international and EU obligations in this regard.

4. The jurisprudence of the ECtHR as a foundation on which to develop the rights of settled migrants

There has been significant normative development of the concept of integration by the ECtHR in its Article 8 expulsion cases. Integration is part of a matrix of factors that restricts the sovereign right of States to deport individuals in certain circumstances. This is recognised in Irish jurisprudence, which has acknowledged the importance of the individual's social and community ties in Ireland as a factor in the balancing process to be undertaken by the Minister. In Irish constitutional law, it was seen in the context of the deportation cases that integration (or "connection to the State", to use the terminology of the courts) may affect the level of protection of the constitutional rights of families composed of citizens and non-citizens. A more detailed consideration by the Irish courts of integration as an aspect of "private life" and consequently as part of a matrix of factors that restricts the sovereign right of the State to deport in certain cases could provide additional protection against expulsion for non-citizens in certain circumstances. Some of the problems and contradictions identified in the approach of the ECtHR could be avoided if the Irish judiciary is aware of the unaddressed issues and lacunae in the ECtHR's reasoning. Integration will become a more important feature of the Irish immigration case law as, due to the passage of time, a higher proportion of migrants living in Ireland could be considered to be "settled" or long-term migrants.

5. The jurisprudence of the ECtHR as a guide to indicators of integration

The limited context in which the concept of integration is being developed by the ECtHR, along with the problems associated with the one-sided nature of the concept as pointed out in Chapter 4, means that overall the normative concept of integration under construction by the Strasbourg court is less useful in a general sense than that under

construction within the universal treaty regime. However, the jurisprudence provides some helpful insights on the assessment of practical indicators of integration (including language, labour market integration and acquisition of citizenship, for example), which could be drawn on in conjunction with the EU Framework on Integration (discussed below).

6. **Cautious use of the EU Framework on Integration as an aid to policy development**
Despite the deficiencies in the EU approach to integration, as identified in Chapter 5, EU policy on the integration of TCNs generally seeks to outline ways to realise the goal of integration as a two-way process of mutual accommodation by migrants and the host society. Provided that the output of the EU Framework on Integration is approached with a level of caution, it could provide Irish policymakers with a useful practical tool for learning about the development of integration policy and practice.

7. **Recognition of the importance of "integration and law" as a starting point for the development of a holistic and human rights-based integration policy**
National constitutional law and international human rights law provide a minimum core of fundamental rights which apply to migrants, and which may be closely related to integration. The effective protection of these rights may be instrumental to the integration process, for example in the case of the protection to family unity, educational rights and the right to social security and public relief benefits. On a more concrete level, in Irish law, a myriad of legal rules (as interpreted by the courts) directly affect the integration prospects of migrants, including those rules relating to family reunification, long-term residence, citizenship, religion and education. The recognition of the impact of these legal elements of integration by policymakers, legislators and the courts is a crucial part of a comprehensive integration policy, and the key to improving migrants' outcomes in terms of participation, social mobility and integration in the labour market.

10.6 Concluding remarks

While this thesis has highlighted the importance of recognising the impact of law on integration, as integration is not itself a legal concept, there are limitations on the contribution of the law to integration in the absence of a clear policy framework. There is a need for a more developed, nuanced and long-term approach to integration than that in existence in Ireland at present. On the basis of thesis, a wide approach which recognises the connections between the various themes, socio-economic dimensions and legal elements involved in integration, is merited. This wide approach should reflect the external influences on integration, beyond simply looking to the EU Common Basic Principles as a benchmark for Irish integration policy.

Beyond the policy sphere, the Irish courts should acknowledge that "integration" does not exclusively concern non-justiciable social issues but also encompasses core constitutional and other legal rights and issues. Overall, on the evidence of other European examples, the key challenge for both policymakers and legislators is how to recognise the contribution of "integration and law" to the development of integration policy, without equating this with the introduction of integration conditions and requirements into legislation. This is a delicate balancing act which in reality is probably a long way from being achieved or even contemplated. Whatever route is taken, until the approach to integration undergoes a fundamental change in Ireland, it is unlikely that Ireland will progress beyond being a country which is "halfway favourable" to the integration of immigrants.[2]

Finally, this Irish case study provides some lessons for the development of integration on the regional and international levels. This thesis has identified many deficiencies in the approaches of the regional and international bodies. These include the fragmentation and vagueness in the work of the universal treaty regime, the haphazard nature of the development of the concept of integration in the ECtHR, and the fundamental lack of coherence in the EU approach. If the deficiencies identified in the course of the thesis in the approaches of these regimes are acknowledged and addressed by the relevant bodies, they

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[2] British Council and Migration Policy Group, Migration Integration Policy Index III (2011), available at www.integrationindex.eu.

would constitute a more consistent and powerful influence on domestic integration frameworks.

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Abbreviations

CBP	Common Basic Principle
CEAS	Common European Asylum System
CESCR	UN Committee on Economic, Social and Cultural Rights
CEPS	Centre for European Policy Studies
CMLRev	Common Market Law Review
DULJ	Dublin University Law Journal
ECRE	European Council of Refugees and Exiles
EEA	European Economic Area
EHRLR	European Human Rights Law Review
EJML	European Journal of Migration and Law
ELJ	European Law Journal
ELRev	European Law Review
EU	European Union
HRL Rev	Human Rights Law Review
Hum Rts Q	Human Rights Quarterly
ICI	Immigrant Council of Ireland
ICLQ	International and Comparative Law Quarterly
ICON	International Journal of Constitutional Law
IJRL	International Journal of Refugee Law
ILT	Irish Law Times
INIS	Irish Naturalisation and Immigration Service
JRS	Journal of Refugee Studies
LQR	Law Quarterly Review
MLR	Modern Law Review
OJ	Official Journal
SI	Statutory Instrument
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nationals High Commissioner for Refugees
UNHRC	United Nations Human Rights Commission