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The 'Education of Public Opinion' and the 'Criticism of Government Policy': A Social Utility Examination of Political Speech Rights and Irish Democracy under Articles 6.1 and 40.6.1

In consideration of the Degree of Doctor of Philosophy in Law
Trinity College Dublin 2015

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Summary

This thesis represents a socio-legal exploration of the relationship between political speech rights and democracy in Ireland. In particular, the thesis focuses on the ability of citizens to exercise their right to 'criticise government policy' under Article 40.6.1(i) when the direct and indirect restrictions on political speech are considered. This thesis will also consider how the role of citizens under Article 6.1 is affected when these restrictions are analysed.

The first element in this research is an investigation of the nuances of the Irish political speech right under Article 40.6.1(i). It will then assess the political speech rights under the provisions of the British Common Law, the US First Amendment and the European Convention on Human Rights. The examination of the relevant laws under these systems will be used to compare and contrast the exercise of political speech rights in Ireland and see what may be used to expand the meaning and the scope of Irish free speech jurisprudence by means of persuasive precedent. The right to political speech will also be assessed in terms of the development of democracy in the Irish State and the consequent impact on the rights of citizens and the framing of the Constitution.

The nature and evolution of democracy in Ireland will then be explored to harmoniously interpret the provisions of Article 6.1 to add further meaning to the purpose and effect of the Irish political speech right. Under Article 6.1, the role of the citizen is placed in conjunction with the organs of government with regard to policy matters. The thesis will assess the balance of power between the citizen and the organs of government when access to policy and the 'rightful criticism of government policy' is at issue. Of late, case law in political speech has also included the function of the citizen within policy discussion. From this, the thesis will then set down the thematic basis for this argument in terms of political equality and the public interest.

As the aim of the thesis is to match the right to political speech to the restrictions that block the discussion of government policy, the thesis will assess the restrictions that impact on the ability to 'criticise government policy'. These restrictions appear in the guises of direct restrictions on political speech and indirect restrictions which limit the amount of policy information which may be accessed and indirectly restrict the ability to criticise such policy. Both forms of restriction inhibit the flow of policy information and debate to the wider electorate. In order to assess the effectiveness of both Articles, the thesis will then compare and contrast the direct restrictions on broadcasting and political advertising against the indirect restrictions of administrative impediments from the Executive.

The direct restrictions are referred to as content restrictions as they are based on the content of the expression, whereas the indirect restrictions are referred to as class restrictions as they are based on the class of document and not the content. Both the direct

and indirect restrictions impede the dissemination and discussion of government policy, and thereby undermine the right to political speech protected by Article 40.6.1(i). The consideration of the direct or content restriction will focus on an assessment of restrictions on broadcasters regarding national security and political advertising. These provisions influence the Articles at the heart of this constitutional argument insofar as they regulate the debate on government policy that is expressly considered in the wording of Article 40.6.1(i). However, as will be argued at least these restrictions are subject to the rigours of judicial review.

On the other hand, the consideration of the powers of the Executive will be made based on the theory of the Separation of Powers and the privileging of executive information. Many Executive practices amount to indirect restrictions upon political speech, and act as the greatest impediment to the full use of Article 6.1 in terms of the debate and criticism of government policy and the 'education of public opinion' as set out in Article 40.6.1(i). These restrictions are believed to be the most insidious as they are not subject to the scrutiny of the courts as they do not emanate from law subject to judicial review and are removed from the view of the courts due to the separation of powers.

The thesis will conclude with a consideration of the thematic framework as laid down previously, assess the case for reform and question the legitimacy of the restrictions set out above. This thesis therefore provides not only a thorough assessment of the theory of freedom of expression for the promotion and propagation of democracy, but it is also a full restatement of the right to political speech as a matter of Irish law. In particular, this thesis demonstrates that assumptions about the privileges of the Executive are inconsistent with the unique structure of Irish democracy flowing from Article 6.1 and undermine the exercise of the express constitutional right to political speech contained in Article 40.6.1(i).

Acknowledgements

I would like to dedicate this thesis to my grandmother, Margaret (Peggy) Kelly who passed away at the start of the research for my thesis in 2009.

This work would not have been possible without the enduring support and love of my parents, Marie and Sean Kavanagh. They have always encouraged me to follow my interests. They have also given me the greatest gift of all: a love of learning.

I would also like to thank my supervisor, Dr. Eoin O'Dell for his supervision and support over the past five years.

Also, to Danny who has been a constant source of support.

During the course of this thesis I have continued to work full time in Waterford Institute of Technology as a Law Lecturer. I would like to thank my many work colleagues who have given advice and acted as a listening ear through the research and writing up process. This research was funded by Waterford Institute of Technology through their staff development fund.

I would also like to thank my many peers within legal and political science education who have challenged some of the arguments through conferences and publications allowing for a greater critical insight into this area.

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1 Introduction

1.1 Research Question

This thesis examines the social utility of the free speech guarantee for political expression as constructed in Article 40.6.1(i). In order to add extra context to the discussion, the unenumerated right to freedom of expression will also be assessed. This research will be set against the emerging jurisprudential concept of political equality and the well-established ground of the public interest. Both are central concerns in the maintenance of efficient democracy. In order to examine the concept of democracy in Ireland, the provisions of Article 6.1 will be also be balanced against the provisions of Article 40.6.1(i). Article 6.1 places the citizens as the final arbiters of government policy[1]. Article 40.6.1(i) allows for the citizens to express their convictions and opinions. This article is focused on speech, which is political in nature, and frames the media as the 'educators of public opinion' and restricts the government from passing legislation with the sole purpose of restricting the criticism of government policy.

Furthermore, a comparative analysis will be conducted of the Irish right to freedom of expression to examine parallels and weaknesses of the Irish approach. This analysis with the English and American approaches and the jurisprudence of the European Court of Human Rights will be conducted to assess relative strengths and weaknesses of the Irish approach.

The thesis will then look at the restrictions that are placed on political speech. The thesis will look at the areas of broadcast regulation and political advertising; the so-called direct or content speech restrictions. These restrictions directly affect the ability of political speech to be communicated to the citizens but are applied because of the content of the communication. Moreover, and uniquely, this thesis will then critically assess the constitutional impediments that are placed as indirect or class restrictions. Such indirect restrictions are not designed as a blockage on policy information but the effect of their use indirectly prevents the communication of government policy. They can also be regarded as class restrictions as the restriction is based on the class of information, such as cabinet documents, but it does not have any relationship to the type or content of the information.

There is a substantial gap in the literature on such constitutionally mandated restrictions from constitutional theory and practice. The effect of such restrictions has not been either

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[1] The wording of Article 6.1. states that all powers of government, legislative, executive and judicial come, under God, from the people of Ireland and ' whose right it is to designate the rules of the State and, in final appeal, to decide on all questions of national policy, according to the requirements of the common good'. The degree of the power of final appeal may be queried but this thesis looks on the ability to access government policy as part of the exercise of citizens' ability to act in democracy.

compared to the direct restrictions or evaluated against their effect on the constitutional right to freedom of expression. Additionally, the doctrine of separation of powers has never been examined for the restrictions it may impose on the exercise of citizen's constitutional rights and the citizens' place in the priority of the structures of government. In this case, an unwritten constitutional theory shaping democracy may be detrimental to the exercise of the very democracy that it seeks to protect.

On consideration of the above areas the thesis will then conclude by addressing the reality of political speech rights when the restrictions discussed above are examined. It will reapply the thematic framework that was outlined earlier and consider the role of the citizen in Ireland and their ability to realistically criticise government policy. It will also address the issue of the reality of freedom of expression in order to criticise government policy and the 'education of public opinion'. This will conclude with an evaluation of the social utility of Articles 6.1 and 40.6.1 (i) in light of the totality of the discussion.

In conclusion, therefore, this thesis will first assess the democratic impact of the right to freedom of political expression on the propagation of democracy in Ireland. Second, it will examine the influence of other common law jurisdictions to on the evolving jurisprudence on this issue. Third, it will examine, from a socio-legal standpoint, the influence of political science and democratic theory on the development of political speech rights in Ireland. Finally, this thesis will assess the damage to democracy that may be caused, when articles of the Constitution and constitutional practice act to inhibit the fundamental rights of the citizen. The main findings of the thesis substanciate the argument that in order to give full meaning to the concepts contained in in Article 6.1 and in particular Article 40.6.1(i), a right to dissemninate government policy information needs to be supported in order to create a more connected democracy in line with the aspirations contained in the role of the citizen.

1.2 Research Methodology

This thesis is a thematic and deductive examination of the reality of freedom of expression in Ireland when compared internationally. The use of themes will allow for a more contextualized and critically evaluative piece of work. The central areas for consideration are political equality, to allow for more engagement in policy discussions and the concept public interest, in particular as outlined in caselaw. This work will be deductive[2] as it is challenging the accepted framework of the importance of political speech and the constitutionally and desirability of certain constitutional practices affecting the right to political speech. The research will take a socio-legal studies approach to the regulation of access to and communication of government policy in Ireland. It will build from a detailed examination of what freedom of expression is for matter relating to the communication and criticism of government policy in Ireland.

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[2] Chris Hart, Doing a Literature Review: Releasing the Social Science Research Imagination (Sage Publications, 1998) 192

The most effective way to test the argument of the thesis is to carry out the research by means of a qualitative assessment of the available literature in the area. Using a thematic approach, as outlined above, the means of restricting political speech will be assessed in a comparative fashion to the close common law neighbours of the United States and the United Kingdom with reference to the jurisprudence of the European Convention on Human Rights. This method has been chosen, as it will allow for a detailed investigation into the traditions that shape this area of law.

This thesis will, by means of a socio-legal studies research methodology, approach the wider implications of freedom of expression on democracy. As the socio-legal research theory is suited for the study of 'power and conflict[3]' it is felt that it is especially relevant to the assessment of political speech regulation. It will be based on the relevant theories of constitutional and media law that shape the doctrinal study of this area but it will also be informed by the relevant political and democratic arguments that exist in the area. The study is not interdisciplinary in nature as the relevant democratic and philosophical studies only inform the research and are not a central focus of study. The selected method can focus on the impact of an imbalanced speech protection system to democracy as opposed to a purely doctrinal legal study of the area. A socio-legal studies approach allows for a more harmonious research methodology to critically appraise such tensions and highlight possible means for reform and future research.

In developing the socio-legal studies approach the thesis will use sources from political science to broaden the examination of the research question. The use of sources from political scientists [4] will give a greater insight to the contemporary challenges in constitutional theory from an alternative viewpoint. The incorporation of politics also broadens the consideration in the thesis and the perspectives that can be used in creating solutions to extend the dissemination of government policy information. The benefit of including such viewpoints adds to the analysis of particular aspects of this thesis; in particular, the development of Irish democracy[5], the examination of the nature of Irish Politics[6] and the consideration of the challenges of open government to the Executive[7]. The thesis also references media studies in the consideration of the wider arguments surrounding political advertising[8].

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[3] Alan Norrie, 'From Critical to Socio-Legal Studies: Three Dialectics in Search of a Subject' (2000) 9 (1) Social and Legal Studies 85, 108

[4] For example authors such as Eoin O'Malley, Hament Bulsara, Bill Kissane, Neil Collins, John Garry, Basil Chubb, Arend Lijphard and Brian Farrell.

[5] Section 2.4

[6] Section 2.2

[7] See section 4.1 to 4.3

[8] See section 3.5

1.3 Structure of Argument

The thesis will build, section-by-section, upon the theory and relevant legal sources, which shape the right to freedom of expression for political speech issues. The specific sections are also linked to the evolution of the research questions as described above.

1.1.1 Section One - Rights and Reality

This section will analyse the current interpretation of the right to freedom of expression as pure constitutional theory and its impact on democracy. It will examine the theory and underlying constitutional concepts that shape political speech rights in Ireland, the United Kingdom, the United States and the European Convention on Human Rights comparatively. Emphasis will then be placed on the particular aspects that reference the ability of citizens to access policy information and the legal tools available to governments to restrict such information. This section will also examine the connection between democracy, the public interest and freedom of expression in Ireland. This section will examine the historical development of democracy in Ireland. In particular, this section will focus on the tensions that surrounded the creation of democracy and influenced the development of political expression in Ireland. The nature of democracy at present in Ireland and role of the citizen as envisaged in the Constitution will be considered. Turning to the establishment of the thematic framework, this section will introduce the areas of the public interest and political equality. It will examine the case law surrounding the public interest and the reason for such importance being attributed to the role of freedom of expression in democracy and seeks to create a new framework to measure the importance of freedom of expression for democracy, the philosophical rationales for such protection and its application to the restrictions. These themes will be referred to through the thesis to assess the legitimacy and impact of speech restrictions.

1.1.2 Section Two – The Limits of Political Speech Protection

With section one addressing the scope of the right to political speech in a comparative sense, section two will map out the boundaries of the right. Section two will look at the direct restrictions on freedom of expression to assess their legitimacy and impact on the flow of speech. This section will look at the more overt restrictions on speech such as the effect of national security restrictions, political advertising and broadcasting restrictions. Even though these are restrictions that have a clear impact on political speech, their practical impact may harm the democracy that it seeks to protect. It may have demonstrable effect with legitimate aims; the result may not be in the interests of democracy. For example, the restrictions, which were heretofore imposed pursuant to section 31 of the Broadcasting Authority Act, 1960, prevented the criticism of government policies on issues pertaining to Northern Ireland from those involved in the situation. Similarly, section 41 of the current Broadcasting Act, 2009 forbids the broadcast of political advertising. Recent case law from the European Court of Human Rights will also be considered regarding its impact on Irish domestic law.

However, the most insidious restrictions are those that are not classified as restrictions *per*

se. These restrictions are found in administrative and procedural rules emerging from the Executive. These restrictions can be considered as both indirect and class restrictions. These indirect impediments have been created by constitutional traditions and norms. The focus of this section will assess the constitutional provisions, practices and administration of executive government that prevents and restricts the flow of policy information. Many of these restrictions have been interpreted into the Constitution by the adherence to the doctrine of the Separation of Powers. However, this section will assess the suitability of this doctrine from its inheritance from the Westminster form of government and the suitability of this doctrine considering the nature of Irish democracy. Furthermore, the speech rights, in general, of the Executive will be considered in light of the referendum speech cases which restrict government speech to protect the plebiscitary nature of Irish democracy. Moreover, these cases contain the seeds of a doctrine of political equality as an aspect of Irish political speech jurisprudence.

1.1.3 Section Three – An Even Handed Justice?

This section will examine and critique the impact of both forms of restrictions on freedom of expression to assess which form of restriction is more detrimental to free speech and the total effect of such restrictions on the reality of democracy. The effect of the restriction will be assessed on the theory of freedom of expression as discussed in section one. It will try to quantify which form of restriction is the most damaging and find some new balance in a reinvigorated interpretation in light of the reality of the public interest and democracy. This section will also assess which body in the system of checks and balances is the most relevant to adjudicate on issues of information release. This section will also revisit the thematic framework as set out in section one: political equality and public interest. This section will use these themes as a means of assessing the totality of the restrictions discussed in the previous sections.

1.1.4 Section Four - The Social Utility of Political Speech Rights

This section will consider and summarise the main points from the research by addressing the main research question concerning the social utility of Articles 6.1 and 40.6.1(i) in relation to the propagation and promotion of democracy in Ireland. Means of reform including constitutional and legislative challenges will be considered. This section will also discuss any legislative changes on the current legislative programme that may influence the subject matter discussed in this thesis. The section will pin point the way for further research in this area. The section will conclude with a brief summary of the issues and findings contained in this thesis.

SECTION ONE

RIGHTS AND REALITIES

'Democracy means government by discussion, but it is only effective if you can stop people talking'.

Clement Attlee[9]

[9] *The Times*, (London, 15 June 1957) as cited in Amartya Sen, *The Idea of Justice* (Allen Lane, 2009) 342

2 Section One – Rights and Reality

1.4 Nature of Politics in Ireland

Representative democracy is founded on the idea that political representatives represent their constituents, creating a forum where concerns are voiced and policies questioned. The Oxford Concise Dictionary of Politics defines representative government as a 'form of government or a legislature with significant decision-making powers that is freely elected' and democracy as 'being synonymous with majority rule'[10]. Democracy is based on rule by consent and citizens need to be able to voice their concerns when measures are taken against their will. Therefore freedom of expression is considered to be a primary right for exercise of the representative function of representative democracy, where by the views of citizens can be conveyed by their elected representatives. Irish democracy is regarded as a form of representative democracy[11] and requires a free and unfettered flow of government policy information for its effective use. Citizens should be able to inform themselves of government policy and then criticise such policy[12].

Ireland is characterised as a country which has dominant democratic values[13]. Coakley states that 'those who are involved politically must be reasonably well informed about politics and be broadly supportive of democratic institutions'[14]. There are certain characteristics that may undermine this position. In particular, Irish democracy reflects at least a few social characteristics[15] which may undermine a true democratic framework to underpin the political institutions established in the Constitution[16]. Laver found when looking at the social catagories in Ireland and voting that a picture emerged of a

> system of politics ***with some*** social bases. These are not the same bases as those to be found in many European systems and in particular are not necessarily the basic occupational categories that people are used to linking with patterns of partisanship in Britain[17]

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[10] *The Concise Oxford Dictionary of Politics* (3rd edn, Oxford University Press, 2009) 459 and 139

[11] See the provisions of Article 16 of the 1937 Constitution, which establishes the constitutional foundations for the representational nature of Irish constitutional democracy.

[12] Also see Hogan J. in *Doherty v. Referendum Commission* [2012] IEHC 211 in section 2.7.3

[13] John Coakley, 'Society and Political Culture' in John Coakley and Michael Gallagher (eds.) *Politics in the Republic of Ireland* (5th edn, Routledge, 2010) 54-55

[14] *ibid* 55

[15] For a full evaluation of the social characteristic of Irish Democracy see Bill Kissane, 'The Not-So-Amazing Case of Irish Democracy' (1995) 10 Irish Political Studies 43

[16] See further Michael Laver, 'Ireland: Politics with Some Social Basis: An Interpretation based on Survey Data' (1986) 17 (3) The Economic and Social Review 193. Also see John Whyte, 'Ireland: Politics without social bases' in Rose, Richard.(ed.) 1974, *Electoral Behaviour: A Comparative Handbook*, (Free Press, 1974) 619-651

[17] Michael Laver, 'Ireland: Politics with Some Social Basis: An Interpretation based on Survey Data' (1986) 17 (3) The Economic and Social Review 193, 212

Also Brian Farrell viewed the rise of stable democracy in Ireland as an anomaly due to the prevailing political culture in the country[18].

The social characteristics which undermine democratic values are fourfold: authoritarianism[19], conformism[20], loyalty and anti-intellectualism[21]. These social conditions led Coakley to state the democratic relationship is dependent on a 'commitment to opinions received from above, and a suspicion of those who are not prepared to accept these'. In fact, these very social conditions lead Byrne to state that the power of the Catholic Church in Ireland lead to this culture of authoritarianism is articulated through

> ...The acceptance of hierarchy and espousal of conservativism, the expression of public trust through the prism of familial values and finally the blanket emphasis on loyalty which embraced deference as a core virtue.[22]

This authoritarian nature of Irish political culture has had a major influence on the ability of freedom of expression to allow for political opinions to be treated equally[23]. The characteristic of authoritarianism refers to a 'distinctive type of attitude that combines deference to the view of established leaders with intolerance of those who dissent from these views'[24]. The views of 'above' as in the government or those who possess the traditional offices of power are more readily accepted than those who dissent and the legal landscape has reflected this political culture. In the current framework of speech protection in Ireland, there is an undue level of protection and privilege given to Government. In turn, the Government has been granted too much power to restrict or censor criticism of its policies by the citizens, or those deemed to 'dissent' from the views of established leaders.

A literal interpretation of Article 40.6.1(i) would suggest that the promulgation of laws to restrict freedom of expression cannot be valid if the sole aim of the legislation was to restrict the criticism of 'Government policy'. Where the analysis diverges is in the nature of the right. The level of engagement, which the Government must have in the pursuance, and protection of this right, is not a settled issue.

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[18] Brian Farrell, Chairman or Chief: The Role of the Taoiseach in Irish Government (Gill and MacMillian, 1971)

[19] David E. Schmitt, The Irony of Irish Democracy: The Impact of Political Culture on Administrative and Democratic Political Development in Ireland (Lexington Books, 1973) 43-54.

[20] Michael Gallagher, *The Irish Labour Party in Transition 1957-1982* (Gill and Macmillian, 1982) as cited in John Coakley, 'Society and Political Culture' in John Coakley and Michael Gallagher (eds.) *Politics in the Republic of Ireland* (5th edn, Routledge, 2010) 55

[21] Basil Chubb, The Government and Politics of Ireland (Longman, 1992) 19-20

[22] Elaine A. Byrne, *Political Corruption in Ireland 1922 – 2010: A Crooked Harp?* (Manchester University Press, 2012) 225

[23] This 'speech discrimination' will be further explored in political equality aspects of political speech regulation in section 2.7.2.

[24] John Coakley, 'Society and Political Culture' in John Coakley and Michael Gallagher (eds.) *Politics in the Republic of Ireland* (5th edn, Routledge, 2010) 55

For the purposes of the discussion of the role of the citizen and Article 6.1, the framing of Article 40.6.1(i) accepts the important role of political speech in the political activities of citizens. Citizens should be able to engage in constructive action with regard to the criticism of Government policy. The constructive action that is questioned here is the ability to have a voice in the policy and subsequent legislation that emanates from the deliberative processes of government and the legislative system.

It will be argued in the thesis that the restrictions on Government policy information are found in two levels. The first level of restriction placed on the flow of information on government policy emanates from constitutional and executive practice. Executive secrecy in this regard not only affects the flow of policy information to the citizens but also undermines the role of the legislature in holding the Executive to account. The second area of restriction is that of national security. It may be argued that such restrictions could possibly be legitimate; nevertheless, this can be invoked in order to restrict policy information in a subtler manner. This area needs to be carefully scrutinised to ensure that the classification of such sensitive information is decided appropriately yet still independently. This sphere also creates a tension between the aims to create more transparent government and the need to protect the integrity of the state.

In terms of the discussion of government policy and the nature of Irish politics, the current constitutional provision that protects freedom of expression, in particular political speech, has been undermined by two factors. The first is the imbalance in speech protection between the elected and the electorate. Moreover, the inertia within the structures of Irish Government has created a culture of secrecy and a form of cultural sclerosis in the face of the growing need to liberalise the balance of speech rights[25]. The net result of this situation is the suppression of policy information, by both overt and covert means and the creation of a situation where the criticism of such policies was impeded. This is illustrated by the historical impact of the 'section 31' orders on the discussion of Government policy in relation to Northern Ireland[26]. The changing relationship between government and the citizen with the introduction of a degree of transparency has only made citizens more curious to know about government policy and to engage with government policy. The theories of citizen engagement are being met with practical application in the current Constitutional Convention[27] and the previous 'We the Citizens' experiment[28]. This has led to growing calls from civil society organisations for growing transparency and accountability

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[25] This 'culture of secrecy' is still prevalent in the Civil Service structure to this day and was recently derided in the Toland Report. Department of Justice and Equality, (2014) 'Report of the Independent Review Group on the Department of Justice and Equality' (Toland Report)<http://www.justice.ie/en/JELR/RptReviewGroupDeptJustice .pdf/Files/RptReviewGroupDeptJustice.pdf> Accessed 12 August 2014

[26] See section 3.4.3

[27] The work of the Constitutional Convention can be found at www.constitution.ie

[28] David M. Farrell, Eoin O'Malley and Jane Suiter, 'Deliberative Democracy in Action Irish-style: The 2011 We the Citizens Pilot Citizens' Assembly' (2013) 28 (1) Irish Political Studies 99

in the organs of government. Even though Freedom of Information has gone some way in addressing the information needs of the citizen, the call for the further dissemination of policy information is apparent in the many references and proposed reforms to this scheme[29].

1.5 Democracy and Political Speech

Democracy is a hard ideal to define. In its simplest form, it means rule by consent and popular majority. In reality, this is a form of governance where citizens have a say in the running of their country by means of periodic elections to a representative legislative chamber. In Schumpeter's *Capitalism, Socialism and Democracy*, the classical theory of democracy was criticised. Instead, the democratic method was put forward, stating that it was the 'institutional arrangement for arriving at political decisions in which individuals acquire power to decide by means of a competitive struggle for people's votes'[30]. In Huntington's study of democracy and the new wave which developed in the late twentieth century, the 'Schumpeter' theory of Governance was applied to the study of the role of democracy in which Huntington described a twentieth-century political system as democratic when

> ...its most powerful collective decision makers are selected through fair, honest and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote[31].

Huntington also accepts that this 'implies the existence of those civil and political freedoms to speak, publish and assemble, and organize that are necessary to political debate and the conduct of electoral campaigns'[32]. In fact, true democracy tends to be considered in a wide fashion which borrows from the original French revolutionary phrase of *liberté, egalité, fraternité,* where there is 'effective citizen control over policy, responsible government, honesty and openness in politics, informed and rational deliberation, equal participation and power, and various other civic virtues'[33].

As an international monitor of the level of democratic governance across the world, the Sustainable Governance Indicators were set up to monitor the responses and capability of

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[29] See section 4.5.1 and 6.2.1

[30] Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (2nd edn, Harper, 1947) 269 as cited by Samuel P. Huntington, *The third wave: democratization in the late twentieth century*, (University of Oklahoma Press, 1993) 6

[31] Samuel P. Huntington, *The third wave: democratization in the late twentieth century*, (University of Oklahoma Press, 1993) 7 This definition is also used as a determination for democracy in O'Connor which also cites Huntington's categorisation of Ireland as one of the world's ten oldest democracies as it continued to be democratic from the early twentieth century to the present day. See Nat O'Connor, *The role of access to information in Ireland's democracy*, TASC Discussion Paper July 2010.

[32] *ibid* 7

[33] *ibid* 9

democratic reform of OECD member countries[34]. The indicators measure the quality of democracy and rule of law that exist within a country[35]. Part of the survey assessed the role of governance by those outside of the executive, for example the ability of citizens to engage in the workings of the executive. The authors of this report cite the work of Pierre and Peters who state that

> ...States must be open to a wide range of information, including much that is uncomfortable and dissonant, if it is to be successful in governing. In other words, states must be in close contact with the society and utilize social information openly and accurately when governing. This further implies that the state is likely to be in close communication with societal actors who possess much of the information that would be required for effective governing and also generally that the state must be willing to engage in a formal or informal exchange of power over decisions for that information.[36]

Representative Democracy allows citizens to engage in periodic elections to represent their views in the national legislative chamber. This form of democracy is exercised by Ireland, England[37] and the United States. The form of voting may vary but the effect is the same. The free flow of debate in the chamber of Dáil Éireann is both the political exercise of the representative nature of Irish democracy but it is also the legal exercise of the right to freedom of expression in the context of politics. In order for elected representatives to serve their electorate, members of parliament must be afforded a right to represent their views and concerns, pursuant to the central characteristics of a representative democracy. The relationship between representative democracy and the monitoring of government is central to the powers of the Dáil to hold the executive to account[38].

Participatory Democracy is almost an evolution of representative democracy, where the citizens seeks to move their formal connection with the democratic system from participation in elections or referenda but seek to have a more engaged role in the business

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[34] Organisation for Economic Co-Operation and Development (OECD), Members and Partners, <http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html >Accessed 30 May 2012

[35] Martin Brusis & Jörg Siegmund, *Designing Sustainable Governance Indicators 2011: Criteria and Methodology*, <http://www.sgi-network.org/pdf/SGI11_Criteria_Methodology_EN.pdf > Accessed 30 May 2012

[36] Jon Pierre, and Guy B. Peters. Governing Complex Societies. Trajectories and Scenarios. (Palgrave Macmillan, 2005) as cited in Martin Brusis & Jörg Siegmund, *Designing Sustainable Governance Indicators 2011: Criteria and Methodology*, <http://www.sgi-network.org/pdf/SGI11_Criteria_Methodology_EN.pdf > Accessed 30 May 2012

[37] Or subjects as in the case of England where it forms part of a constitutional monarchy.

[38] Martin, S. (2012) 'Monitoring Irish Government' in E. O'Malley & M. MacCarthaigh, eds. *Governing Ireland: From Cabinet Governance to Delegated Governance* (Institute of Public Administration) 152-172

of government and the formulation of policy[39]. It could be argued that Alexander Meiklejohn's work on the First Amendment and Self Government, Free Speech and its Relation to Self Government[40], marked the beginning of using speech rights as a means to have greater control over the direction and policy of government by the citizens, outside of the formal process of democracy encapsulated in elections and referenda. The concept of the role of speech in democracy is measured by the social utility of such speech to the governance of a nation. Alexander Meiklejohn took up the question of the absolute nature of freedom of expression protection[41]. He argued that the right to freedom of expression should be interpreted in an absolutist manner and that the courts should entertain no restriction. Meiklejohn argued in 'The First Amendment is an Absolute'[42] that there was considerable disagreement over the correct interpretation of the first line of the First Amendment and whether it created an absolute protection for freedom of expression.[43] Indeed, the current application of the First Amendment came from a democratic experiment and the power to restrict the citizens must be found in the Constitution. He argues that the power to restrict speech does not exist in the Constitution. For Meiklejohn, the essence is that any form of restriction or prohibition of speech relating to government was undemocratic in itself[44].

This is reflected, to a degree, in the United States jurisprudence where the restriction of speech will only be judged in accordance of the utility of such speech, with political speech being granted the highest level of protection. With regard to participatory and representative democracy, the social utility of such speech is more important than possible damage that may be caused by such speech and restriction will only be carried out in the most urgent of cases[45]. For example, this position is stated very clearly by Robert Post. 'The function of public discourse is to enable person to experience the value of self –

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[39] The idea of participatory democracy and its inclusion in Ireland has already come up as part of Local Government Reform. See further Department of Environment, Heritage and Local Government, *Executive Summary Green Paper on Stronger Local Democracy- Options for Change* (2008), Department of Environment, Heritage and Local Government, Green *Paper on Stronger Local Democracy- Options for Change* (2008) (n. 19) p. 4 and Active Citizenship Office, *Active Citizenship in Ireland: Progress Report 2007 – 2008 and Action Plan 2008 – 2009* (Government Publications Office 2008) 16

[40] Alexander Meiklejohn, Free Speech and its Relation to Self Government (Harper & Brothers, 1948). For similar theorist on this point see Thomas Emerson, *The System of Freedom of Expression* (Random House, 1970) and Cass R. Sunstein, *Democracy and Problem of Free Speech* (The Free Press, 1993)

[41] Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) The Supreme Court Review 245-266

[42] Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) The Supreme Court Review, 245

[43] 'Congress shall make no law'

[44] For a full discussion on speech restriction and the nature of democracy, please see section 2.5

[45] See further Robert Post, 'Participatory Democracy and Free Speech', Vol. 97:3 Virginia Law Review Journal, 477, 483

government'[46]. This has been further refined by James Weinstein in 'Participatory Democracy as the central value of an American Free Speech Doctrine'[47]. This article used the framework of the First Amendment as a testing ground for using political speech rights to further strengthen democratic decision-making. Weinstein focuses on the social utility of the role of speech in public discourse especially in relation to democratic decision-making and the ability of each citizen to participate.

> If an individual is excluded from participating in public discourse because the government disagrees with the speaker's view or because it finds the ideas expressed too disturbing or offensive, any decision taken as a result of that discussion would, as to such an excluded citizen, lack legitimacy... This concern for legitimacy also explains why the right to participate in public discourse free of government-imposed content restrictions is not just a collective interest inherent in popular sovereignty, but also a fundamental individual right that government may legitimately infringe, if at all, only in truly extraordinary circumstances.[48]

The idea of participatory democracy is an emerging form of democracy whereby both the citizens and their representatives' act together in order to govern the country. The ability to have an effective system of Participative Democracy is affected by the importance of speech rights. Any restriction on freedom of expression for political issues must have a legitimate aim. This has been echoed in the development of open government theories. These theories seek to give citizens a greater degree of access to the workings of government[49].

The democratic concept which has found most favour with the Irish judiciary is that of the Plebiscitary Democracy. The idea of a plebiscitary democracy was outlined by Hamilton CJ in *Hanafin v. Minister for the Environment*[50] as follows

> The submission to the people of a proposal to amend the Constitution must of necessity be made in a manner which has regard to the democratic process and the constitutional rights of the citizen to participate therein and in

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[46] *ibid*

[47] James Weinstein, 'Participatory Democracy as the Central Value of an American Free Speech Doctrine', Vol. 97:3 Virginia Law Review, 491, James Weinstein, 'Participatory Democracy as the basis of an American Free Speech Doctrine: A Reply', Vol. 97:3 Virginia Law Review, 633

[48] James Weinstein, 'Participatory Democracy as the Central Value of an American Free Speech Doctrine', Vol. 97:3 Virginia Law Review, 491, 498. This also resonates with the early ground-breaking work on Free Speech by John Stuart Mill. On Liberty and Other Essays (Oxford: Oxford University Press, 1991)

[49] Richard Sinnott, 'Cleavages, parties and referendums: Relationships between representative and direct democracy in the Republic of Ireland', (2002) 41 European Journal of Political Research

[50] [1996] 2 IR 321

> particular must have regard to the right of the people to be informed with regard to the nature of the issue involved and its implications; the right of freedom of discussion thereon; the right of the people to persuade and to be persuaded; the right of the people to campaign, either individually or in association, in favour of or against the proposal; the right of the people to vote thereon in the secrecy of the ballot and to have the proposal enacted into law if the majority of the votes cast shall have been case in favour of the proposal.[51]

This idea was to find favour in the judgments of *McKenna (No2)*, *Coughlan* and *Doherty*[52]. The notion of Deliberative Democracy has also been commented on by both Barrington J. and Denham J. in *Coughlan v. RTÉ*[53]. The emphasis on Direct Democracy in the nature of the Constitution and the role of the citizen was laid down by Denham as follows

> The sovereign power is in the people and is exercised by them through elected representatives in representative government, or directly. Government by representatives of the people is the norm. ... A referendum is an exercise in direct democracy by their people.[54]

The main point from this except from Denham J.'s judgment is to demonstrate that the form of democracy in Ireland is primarily representative democracy but the contents of Article 6.1 places the focus firmly on the participative nature of democracy. In this case, the key participative element is the ability for the Constitution to be changed by way of referendum. This idea of the direct nature of democracy indicated by the mechanism of the referendum process was also commented on by Barrington J. in the same case as follows

> ... a referendum to amend the Constitution is not the mere public opinion poll. It is the ultimate act of sovereignty. The people are not debating the abstract merits of some particular proposition. They are making a political decision.[55]

This extract describes the policy decisions, which are to be taken by the citizens in the exercise of the democracy created by the Irish Constitution[56]. Their role as the final

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[51] Hamilton CJ in *Hanafin v. Minister for the Environment* [1996] 2 IR 321, 422

[52] *McKenna v. An Taoiseach (No.2)* [1995] 2 IR 10, *Coughlan v. Broadcasting Complaints Commission* [2000] 3 IR 1, *Doherty v. Referendum Commission* [2012] IEHC 211 and for a further discussion of these cases in relation to the regulation of referendum speech by Government see section 4.4.1

[53] *Coughlan v. Broadcasting Complaints Commission* [2000] 3 IR 1

[54] Denham J in *Coughlan v. Broadcasting Complaints Commission* [2000] 3 IR 1, 28

[55] Barrington J in *Coughlan v. Broadcasting Complaints Commission* [2000] 3 IR 1, 43

[56] Richard Sinnott, 'Cleavages, parties and referendums: Relationships between representative and direct democracy in the Republic of Ireland', (2002) 41 European Journal of Political

arbiters of Government policy as laid out under Article 6.1 comes to the fore in this situation. If the reader was left in any doubt of the role of the citizens in the Irish democratic framework the above excerpts demonstrate this role.As a counterpoint in *De Búrca v. Attorney General*[57], Pringle J. narrowed the concept of the citizen in terms of democratic input as follows

> A democracy, as I understand it, is a form of government in which the sovereign power resides in the people as a whole and is exercised by the people either directly or through their elected representatives. This obviously does not mean that every citizen has the right to take part personally in the government of the county[58].

This statement demonstrates that certain decisions, which could be framed pursuant to the limitations in the right to freedom of expression, can still be privileged to the Executive. This also abides by the principle and demarcations of responsibility under the tripartite division of powers. Yet, it confuses the issue when the interpretation of policy matters and the role of the citizens in such debates is considered[59]. However, it may incorrectly interpret the delegation of citizen responsibility, to the sole function of electing representatives.

However, there is a genuine tension between those that seek openness and transparency in the workings of government and the need for legitimate secrecy in government[60]. The conflict between the needs of genuine secrecy and traparency is neatly summed up in this extract from the judgment of the UK Supreme Court in *Kennedy v. The Charities Commission*[61]

> Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise the press, NGOs and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection. But information can be genuinely private, confidential or sensitive, and these interests merit respect in their own right and, in the case of those who depend on information to fulfil their

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[57] *De Búrca v. Attorney General* [1976] IR 38

[58] *ibid* 47 *Cf. O'Donovan v. Attorney General* [1961] IR 114, 137 Budd J. 'all citizens have equal political rights'

[59] This will be discussed in sections 4.2 and 4.4 later.

[60] Such arguments for legitimate secrecy are, in the main put forward in the sphere of national security restrictions. These restrictions are discussed in section 4.5.3

[61] [2014] UKSC 20

functions, because this may not otherwise be forthcoming.[62]

There is a distinction to be made between 'operational' secrecy and overt secrecy. It is accepted that there is a degree of operational secrecy required for the effective running of the State. For example, in the Freedom of Information Act 2014 there is an overall liberalisation of the right of access to national security records which were previously exempted. However, this right of access is provided on the basis that there will be no harm caused by the access to such documents[63]. The rationale for cabinet confidentiality was also stated by the Austrialian Parliament's Department of Parlimentary Services Background Note as follows

> The resistance to transparency in Cabinet suggests that there is a practical and political limit to openness in government.[28] If the proceedings of Cabinet were to be made fully transparent, it is likely that crucial ministerial discussions would be undertaken elsewhere, perhaps in the office of the Prime Minister. This would result in a greater concentration of power within the Prime Minister's Office, possibly leading to less informed and considered decisions.29 Further, the wider and more open the Cabinet consults on its deliberations, the broader the policy agenda and the less control the government has over that agenda. It is in the political interests of the government to maintain control over its agenda, support an efficient decision making process, and maintain a system that provides the appearance of a strong and decisive government. This political imperative to maintain the confidentiality of Cabinet underpins the argument for protecting Cabinet material as a general class, rather than on the basis of the actual harm individual documents might cause.[64]

The provision of cabinet confidentiality also aids in the upholding of the principle of collective responsibility under Article 28.4.2. This argument is also put forward by Eoin O'Malley from a political science perspective who states that 'if discussions were publicised unanimity could not realisitically be maintained – it also enables frank discussion'[65].' However the issue which this thesis concerns itself is with overt secrecy[66]. For example under the National Archives Act 1986 the time frame for the retention of documents for

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[62] *Kennedy v. The Charity Commission* [2014] UKSC 20, paragraph 1

[63] See further section 4.5.3 and Jennifer Kavanagh, 'Freedom of Information and National Security: Where's the Harm in That?' in Tom Felle and Maura Ashead (ed.) Ireland and the Freedom of Information Act (Manchester Univeristy Press, 2015)

[64] Mark Rodrigues, Cabinet Confidentiality: Background Note (Department of Parliamentary Services Parliament of Australia, 2010) 8

[65] Eoin O'Malley, 'The Apex of Government: Cabinet and Taoiseach in Operation' in O'Malley, E. & MacCarthaigh, M. (eds) Governing Ireland: From Cabinet Governance to Delegated Governance. (Institute of Public Administration, 2012) 39

[66] See section 4.3 and 4.5.1 for a further discussion

the reason of cabinet confidentiality is 30 years. It is this culture of overt secrecy, which feeds into a system of executive secrecy as illustrated by the operation of the Official Secrets Act 1963 which is questioned in this thesis.

1.6 The Evolution of the Right to Freedom of Expression

The development of the right to freedom of expression, as encapsulated by Article 40.6.1, must also be considered in light of the evolution of the Irish State[67]. The first framing of an Irish constitution was set against the background of the First Dáil in 1919. The short document produced in Irish was to set out the aspirations of an embryonic State at the brink of recognition[68]. Even though the constitution, which emanated from this first Dáil, had no legal effect, it was a declaration of inspirational independence[69]. Even though the 1916 Proclamation did not have any specific provision for freedom of expression either, it did provide that for religious and civil liberty, equal rights and equal opportunities to all its citizens.

The first Constitution, which had legal effect in Ireland, was the 1922 Constitution of the Irish Free State. This Constitution contained a provision dealing with freedom of expression. Article 9 of the 1922 Constitution was to lay down the framework of the right which would be followed in the 1937 constitution. Yet, it did not contain an expansive section regarding the organs of public opinion[70]. Hogan and Whyte[71] comment that this article did not receive judicial scrutiny in the years when the 1922 Constitution was active. Furthermore, during this time there were many restrictions placed on the media in relation to the discussion of government policy[72].

The main article dealing with the restrictions on speech for the purpose of the criticism of government and accessing policy information was Article 2A. It was introduced by the Constitution (Amendment No. 17) Act 1931 as part of an 'infatuation with draconian security powers'[73]. The long title of the Act states that its purpose was to prevent disorder. The implications for freedom of expression were to be found in Section 23(1) and 23(2) which restricted the dissemination of information on behalf of unlawful organisations[74]. This

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[67] A further historical analysis of the right to freedom of expression in the Irish state will be carried out in sections 2.3 and 2.4 later.

[68] Dáil Debate 21 January 1919 vol F col 13

[69] Historical Dáil Debates, Dáil Éireann - Volume 1 - 21 January, 1919 <http://historical-debates.oireachtas.ie/D/DT/D.F.O.19190121 0005.html> Accessed 01/08/2012

[70] Article 9 stated: The right of free expression of opinion as well as the right to assemble peaceably and without arms, and to form associations or unions is guaranteed for purposes not opposed to public morality. Laws regulation the manner in which the right of forming associations and the right of free assembly may be exercised shall contain no religious or class distinction.

[71] Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (4th edn, Tottel Publishers, 2006), 1726

[72] For a detailed consideration of the influence of Irish Political and Constitutional history on the current framework for political speech, rights in Ireland see the discussion in section 2.3.

[73] Peter Martin, *Censorship in the Two Irelands* 1922 – 1939 (Irish Academic Press, 2006) 124

[74] Section 23(1) stated ' It shall not be lawful to print, publish, distribute, sell or offer or expose

was subsequently mirrored in the section 31 provisions which were brought forward to deal with 'The Troubles' from the late sixties onwards[75]. According to Martin, this provision gave the Government enormous powers even though many media outlets were in favour of the restriction. The *Irish Times* 'admitted that it encroached on the liberties granted by the Constitution'[76]. The *Irish Press* considered the provisions to be 'the most far-reaching measure of coercion since the Act of Union'[77].

1.7 The Historical Evolution of Democracy in Ireland

The undeniable influence of our traditional link to the Westminster Governance system has affected Irish constitutional development. This is in spite of a divergence in the sources of sovereignty. In Ireland, under Article 6.1., the citizen is the source of all power. In the United Kingdom, the Parliament is sovereign[78]. This factor was referred to by Ó Dálaigh CJ in *Melling v. Ó Mathghamhna*[79] as follows

> If our Constitution and the Constitution of Saorstát Éireann both have adopted the theory of the tripartite separation of the powers of government with express limitations on the power alike of Legislature and Executive over the citizen, the reason is not unconnected with our previous experience under an alien government whose parliament was omnipotent and in whose executive lay wide reserves of prerogative power[80].

This did not impede the creation of executive governance in Ireland which mirrors British

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for sale any book, newspaper, magazine, periodical, pamphlet, leaflet, circular or other document which is issued or published on behalf of an unlawful association.' Section 23(2) stated 'Every person who shall print, publish, distribute, sell or offer or expose for sale any book, newspaper, magazine, periodical, pamphlet, leaflet, circular, or other document in contravention of this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding one hundred pounds or, at the discretion of the Court, to imprisonment for any term not exceeding six months or to both such fine and such imprisonment or, on conviction by the Tribunal, such punishment as the Tribunal shall think proper to inflict, and also in any case to forfeiture of every copy of such document in his possession and also, in the case of a person found guilty of the offence of printing any such document, to forfeiture of all printing machinery in his possession.'<http://www.irishstatutebook.ie/1931/en/act/pub/0037/sched1.html> Accessed 06/09/2012

[75] For a discussion of National Security Legislation and the Section 31 Broadcasting Restrictions please see 3.4.3 and 3.4.4

[76] Peter Martin, *op. cit.* 124-125

[77] *ibid* 125

[78] See further Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change*, (Hart Publishing, Oxford, 2010), Clyve Jones (Ed.), *A Short History of Parliament*, (The Boydell Press, 2012), Vernon Bogdanor, *The New British Constitution*, (Hart Publishing, 2009), Jeffery Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, (Cambridge University Press, 2010) and Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999)

[79] *Melling v. Ó Mathghamhna* [1962] IR 1

[80] *ibid* 39

executive governance[81]. Even though a detailed examination of the translation of United Kingdom rules to Ireland will be carried out later[82], the historical development and cleavage of the Irish republic from the United Kingdom must be carried out. The state was founded from a violent struggle for independence from Britain that culminated in the Anglo-Irish Treaty[83] in 1922.

The historical development of Irish politics has also shaped what is found in Article 40.6.1(i). The political rhetoric that shaped the independence debates contrast greatly to the political reality that shaped the state post-independence[84]. The aspirational notions of citizen engagement, which marked the early rhetoric of Sinn Fein before independence, find a resonance in the 1919 Constitution.

At the start of the Home Rule and Independence movement, the rhetoric of the leaders of the moment sought to completely distance the new State from that of the United Kingdom, and any form of administration that resonated with it. The original democracy ideal was documented by Kissane in 'The Constitutional Revolution That Never Was: Democratic Radicalism and the Sinn Féin Movement'[85]. This idea of democracy rejected all that was British. According to Kissane, the Sinn Fein movement believed that 'as the state collapsed, this civil society would claim its place and a more organized form of democracy would emerge'[86]. The retention of representative democracy and the echoing of popular sovereignty in the 1922 Constitution were explained by Kissane as follows

> The Irish obviously took the notion of popular sovereignty very seriously and were willing to think of the institutions to give expression to it. If parliamentary sovereignty was being rejected, it made sense to locate sovereignty in the people, and both the 1922 and 1937 constitutions made

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[81] A further examination of the suitability of such translation of United Kingdom Cabinet Rules to the Irish situation will be carried out later in section 4.2.1

[65] See the discussion of the unintended consequences of the separation of powers in section 4.2

[83] The official name was the Articles of Agreement for a Treaty Between Great Britain and Ireland

[84] The historical context of the Constitution has been cited as being part of the contemporary interpretation of the Constitution. Murray J. *obiter* in *Sinnott v. Minister for Education* [2001] 2 IR 545, 680 as follows 'Agreeing as I do with the view that the Constitution is a living document which falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores, this does not mean, and I do not think it has ever been so suggested, that it can be divorced from its historical context. Indeed, by definition that which is contemporary is determined by reference to its historical context.' Also see Walsh J, *McGee v. Attorney General* [1974] I.R. 284, 319 as follows 'no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts. The development of the constitutional law of the United States of America is ample proof of this.'

[85] (2009) 104 Radical History Review 77

[86] *ibid* 88

this claim[87].

The ideology of the party was quite distinct from the British model. Even if the hallmarks of British Government were placed on the signatories of the Treaty, and were the catalyst for a Civil War in Ireland, such commitments were not in existence at the time of creating the 1937 Constitution. Moreover the framers of the 1937 Constitution did not see fit to re-examine and include the founding philosophies of those that created the 1919 Constitution and examine the current political and constitutional climate to see if the original ideas could resonate in a redrafted Constitution for Ireland.

In 'Ireland and the Empire: The Ambivalence of Irish Constitutional Nationalism', Pauline Collombier-Lakeman argues that instead of Ireland being treated as the first model of decolonization as is the case in International Democracy studies, Ireland was actually inspired by the nations granted political independence[88]. Quoting from Justin Huntley McCarthy's book The Case for Home Rule[89], Collombier-Lakeman states that

> Home Rulers [did] not in the least desire to see the Victorian constitution superimposed upon Ireland since England's colonies [were] not fitted with precisely similar constitution and there [was] no reason why [Ireland] should be made an exception [to the prevailing rules]'[90].

The 1922 Constitution, the result of an independence treaty for Ireland, was to establish the forms of Executive Governance that were recognisable to the United Kingdom. In fact, commentators such as Neil Collins state that the 'Irish Free State inherited an almost complete administrative system'[91]. Even though the 1922 Constitution was said to comprise of 'experimental features', the system conformed to that of Westminster[92], and the suitability of translating such a system to the Irish constitutional landscape was never fully analysed.

Some commentators suggest that the dependency on the Westminster model is

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[87] *ibid*

[88] Pauline Collombier-Lakeman, 'Ireland and the Empire: The Ambivalence of Irish Constitutional Nationalism', (2009) 104 Radical History Review 57

[89] *ibid* 70

[90] *ibid* 70

[91] Neil Collins, 'Parliamentary Democracy in Ireland', (2004) 57 (3) Parliamentary Affairs, 601, 601

[92] Hament Bulsara and Bill Kissane, 'Arend Ljiphard and the Transformation of Irish Democracy' (2009) 32 (1) West European Politics 172, 173. The involvement of the British Cabinet in the creation of the 1922 Constitution could be suggested as a reason for the reliance of the Whitehall/Westminster form of governance in the 1922 constitution considering their level of involvement. See further Thomas Mohr, 'British Involvement in the Creation of the First Irish Constitution' (2008) 15 (1) Dublin University Law Journal 166

overplayed[93]. The traditions of Executive government which restrict the flow of information were one of the 'three key features'[94]. The fact remains that the provisions of inherited Executive Government acted, and continues to act, as a restriction on the flow of policy information in Ireland. This is in spite of the 1922 Constitution containing a similar provision to the 1937 Constitution regarding the source of power in the State. Article Two of the 1922 Constitution stated that

> All powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland, and the same shall be exercised in the Irish Free State (Saorstát Éireann) through the organisations establish by or under, and in accordance with, this Constitution [95].

The quote above may be in reference to the ability of the Dáil to amend parts of the Constitution for a certain specified period after its passage in the provisions of the 1922 Constitution[96]. After this period, any proposal for the amendment of the 1922 Constitution was to be placed before the people[97]. This article was to underline the tensions between the Treaty and Sinn Féin constitutionalists and was argued to create rival claims of Monarchy and Republic according to Kissane [98]. According to Daly, this new constitution 'unambiguously discarded the primacy of parliamentary sovereignty'[99]. Yet, this degree of removal of parliamentary sovereignty is questioned by O'Cinnede[100]. O'Cinnede states that

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[93] 'There is nonetheless a general perception that Irish democracy is still based on the Westminster model. The standard constitutional histories all emphasised its centrality, but more recently innovative elements have been emphasised... though Ireland exhibited three key features of the Westminster model, it had not been realised how far the state now deviated from the pure model'. Hament Bulsara and Bill Kissane, 'Arend Ljiphard and the Transformation of Irish Democracy' (2009) 32 (1) West European Politics 172, 173

[94] *ibid*

[95] Article 2, The Constitution of the Irish Free State <http://acts.oireachtas.ie/en.act.1922.0001.2.html> Accessed 24 June 2013. For the purposes of comparison, the text of the 1937 Constitution at Article 6.1. reads as follows: '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.' However, the 1992 article does not include the role of the citizens as the final arbiters in questions of national policy.

[96] Article 48, *ibid*

[97] In fact, this never transpired as Article 50 was amended in the Constitution (Amendment No. 16) Act 1929. Also the direct democracy aspect of the Constitution was removed in the Constitution (Amendment No, 10) Act 1928. See further Seamus Ó Tuama, 'Revisiting the Irish Constitution and DeValera's Grand Vision' 2 (2) Irish Journal of Legal Studies 54, and Gerard Hogan, *The Origins of the Irish Constitution 1928 - 1941*, (Royal Irish Academy, 2012)

[98] Bill Kissane, New Beginnings: Constitutionalism and Democracy in Modern Ireland (UCD Press, 2011) 29

[99] Eoin Daly, 'Residual Conventions of the Irish Constitution: the Incongruous Example of Collective Responsibility' (2011) Oct. Public Law 703, 708

[100] Colm O'Cinnede, 'The People are the Masters – The Paradox of Constitutionalism and the Uncertain Statue of Popular Sovereignty within the Irish Constitutional Order' (2012) 2 The

such popular sovereignty is a 'highly intangible and abstract thing'[101], stating further that

> The people may be the masters, but only in a formal sense: the radical innovations of 1922 has given way to a passive acceptance that constitutional governance must adhere to the liberal constitutionalist template[102].

Therefore, if the citizen were to approve of a Constitution that places them at the heart of the policy making process then the judiciary has a duty to read this into the Constitution. This jurisprudential development has started with the area of political equality and the recent directions in the referendum cases. In addition, in *TD v. Minister for Education*, Denham J. stated that

> In 1937, Ireland did not favour the Westminster model. Rather an approach was taken more similar to that of the United States of America. As a consequence of this approach, the High and Supreme Courts of Ireland were given the constitutional duty of judicial review. The courts were made guardians of the Constitution.[103]

With regard to the relevant speech rights, the 1922 Constitution provided for speech rights in line with its current grouping under Article 40.6.1[104]. The Article did not encompass the role of the media. It also failed to mention the 'education of public opinion' and the 'criticism of government policy'. Even at the time, in 1922, there was a civil war raging regarding the acceptance of the treaty[105]. The protection of the authority of the state was not included in the formulation of Article 9, unlike the current Constitution which specifically mentions sedition in the formulation of the political speech right as encompassed in Article 40.6.1(i). The 1922 Constitution was criticised by some stating that it represented a 'characteristically English liberal document'[106]. It is arguable that the 'English' framework of governance found resonance with the creation of Executive powersin the emerging Irish

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[101] *ibid*

[102] *ibid*

[103] *TD v. Minister for Education* [2001] 4 IR 259, 312

[104] Article 9 of the 1922 Constitution protected freedom of expression in the following manner 'The right of free expression of opinion as well as the right to assemble peaceably and without arms, and to form associations or unions is guaranteed for the purposes not opposed to public morality. Laws regulating the manner in which the right of forming associations and the right of free assembly may be exercised shall contain no political, religious or class distinction.'

[105] See section 3.4.1 for a further examination of the role of Sedition and the current events of the time in shaping speech restrictions to promote the authority of the state and national security. For a full historical examination of the period Bill Kissane, *New Beginnings: Constitutionalism and Democracy in Modern Ireland* (UCD Press, 2011) and Bill Kissane, *Explaining Irish Democracy* (UCD Press, 2002)

[106] Bill Kissane, New Beginnings: Constitutionalism and Democracy in Modern Ireland (UCD Press, 2011) 40

state and was retained in the 1937 Constitution. The 'complete administration system', which was inherited by Ireland in the wake of the Treaty and Constitution of 1922, was to be continued in the 1937 Constitution and no further refinement for the source of power was undertaken. As stated by Kissane

> Yet just as there was no new beginning in symbolic terms, such were the claims of the Westminster model that a new beginning also proved hard to accomplish in institutional terms.[107]

The popular attitudes and values of the Irish people towards the idea of popular sovereignty were summed up in the following extract from the 1967 Report on the Committee on the Constitution and highlighted by David E. Schmitt as follows

> ... the republican state of the State, national sovereignty, the supremacy of the people, universal franchise, fundamental rights such as freedom of speech, association, and religion, the rule of law and equality before the law, were all part and parcel of this nation's struggle for independence and it is not surprising, perhaps, that in the minds of the people, they are not to be regarded as virtually unalterable[108].

The evolution of Irish democracy from the start of the Home Rule movement, through to the leaders of Sinn Féin, the provisions of the 1916 proclamation, the 1919 Constitution and the Treaty and subsequent Constitution of 1922, shows a change in policy from organic local and responsive democracy, eschewing British features, back to embracing them once more. The fact that such administrative measure and constitutional practices were unwanted pre 1919 and incompatible with popular sovereignty did not result in any reformulation of such bodies in 1937. The state was left with a Constitution which proclaimed popular sovereignty yet used the Constitution itself to shield the organs of government, especially the Cabinet, from the very citizens that were supposed to be its sovereigns.

1.8 The Connection between Political Speech Rights and Democracy

Ronald Dworkin stated the relationship between freedom of expression and democracy as follows:

> Free speech is a condition of legitimate government. Laws and policies are not legitimate unless they have been adopted through a democratic process, and a process is not democratic if government has prevented anyone from

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[107] *ibid*

[108] David E. Schmitt, *The Irony of Irish Democracy: The Impact of Political Culture on Administration and Democratic Political Development in Ireland* (Lexington Books, 1973) 40

> expressing his convictions about what those laws and policies should be...[109]

The Irish state is one which openly categorises itself as democratic. This is found in both Articles 5 and 6(1) which state respectively that:

> 'Ireland is a sovereign, independent, democratic state' and '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[110].

Therefore, this extract demonstrates that Ireland is a democratic country with the people at the heart of its system of governance. In presenting the draft of the 1937 Constitution to the Dáil, De Valera declared that 'if there is one thing more than another that is clear and shining through this whole Constitution, it is the fact that the people are the masters'[111]. When the information which the 'masters' are entitled to is considered then this position is doubtful. When the rights of the citizen in freedom of expression are compared to that of the government, the chasm becomes clear. The government has elevated its position as regarding the privileging of communication and the restriction of other voices over the citizens

In order for citizens to empower their representatives to act on their behalf then they need to be able to communicate their political thoughts, convictions and opinions to their representatives. This point was emphasised by Boyle as follows

> The ideal democracy might be direct decision-making by all citizens but the Greek city state experience is not replicable in modern political systems ...Therefore we have evolved the idea of representatives to carry out the democratic wishes of the people. The role of a democratic system is to ensure that such representatives are accountable not only at election times but on a permanent basis to those they represent. Freedom of expression is clearly a central freedom within such a model. It enables people to be informed about and to debate ideas. .... The media, newspapers and electronic media, are a critical means to ensure that citizen are informed and in a position to ensure that government activity is accountable to them at all times. Greater participation by citizens at all levels of decision-making required that they are informed or able to inform themselves about public

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[109] Dworkin, 'The Right to Ridicule', New York Review of Books, 23 March 2006 and see the discussion of Meiklejohn at section 2.2

[110] Articles 5 and Búnreacht na hÉireann

[111] Chubb, *The Constitution and Constitutional Change in Ireland,* (Institute of Public Administration, 1978), 25 quoting Dáil Debates, 11 May 1937, col 40

issues[112].

Their representatives then need to use political speech rights to communicate these messages in the legislative chamber in order to seek change in the governance of a country[113]. The executive, the cabinet in the Irish context, will then be responsible for the construction of government policy which will then shape the laws to be passed. As will be demonstrated in this thesis, the executive has both constitutional doctrine and legislation to protect their political communications. Ministers are also able to privilege their speech and have easier access under broadcasting regulation to bring their messages to a national audience[114]. Representatives are entitled to the exercise of parliamentary privilege for their statements in the legislature and confidentiality for their communications. The citizens, who are the source of power under our constitutional structure, have the least protection and least access to information. The right in the Constitution which they seek to rely on is considered to be a negative right which needs no support from the organs of government.

1.9 The Right to Freedom of Expression

Freedom of expression is a general term for the ability to communicate ideas, thoughts and opinions. The exercise is not restricted to the expression ofpolitical issues and the measure of proportionality is set against the category of speech at issue[115]. The specific form of protection in question here is the ability of individuals to communicate political ideas and criticism of government policy. Without the ability to freely communication convictions and opinions on the nature of government, representative democracy is a mere semantic idiom in the relationship between citizens and their elected government. In order to exercise this role in a constructive manner, citizens need access to policy, the media must be able to impartially disseminate such information and citizens must be able to access a mutuality of voices and opinions on issues of national importance. In order for a strong democracy to flourish, citizens need a right to political information but also a right to official information.

In Ireland, the right to freedom of expression with regard to the ability to speak on politics is accepted. The right to political expression is found in Article 40.6.1(i); the right to

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[112] *Kevin Boyle 'Freedom of Expression and Democracy' in Liz Heffernan (ed.) Human Rights: A European Perspective (Roundhall, 1994) 211, 216 - 217*

[113] The necessity for full and free political speech rights is mirrored in the protections in Article 15.10 where each House 'shall have power to ensure freedom of debate' and Article 10.12 where all 'utterances made in either House...shall be privileged'. See further Jennifer Kavanagh, 'Defamation in the Dáil: The Right of Reply for Citizens, the Use of Standing Order 59 and Parliamentary Reform', Irish Political Studies <http://www.tandfonline.com /doi/full/10.1080/07907184.2013.838223#.U0MQI151iVw> 15 October 2013

[114] Section 122 (4) Broadcasting Act 2009

[115] See Eric Barendt, *Freedom of Speech* (2edn, Oxford University Press, 2005) 19, 155 - 162 and 392, where the relative protections are discussed. Barendt posits that the right to individual communication is given a liberal protection; the right to political communication is given a high protection, whereas commercial communication is given a lower protection. This situation is reflected in the varying levels of scrutiny applied under the jurisprudence of the First Amendment. Also see the broader discussion in section 2.6.3.2

communicate in general has been grounded in the unenumerated rights article. Article 40.6.1(i) protects the convictions and the opinions of the citizen. It also frames the right to criticise government policy through the media as part of their role as 'educators of public opinion'. The Constitution is silent on the right to official information. There is an argument for a right to information and possibly official information which may be interpreted from the provisions of the unenumerated rights article[116].

Furthermore, the right to political speech under Article 40.6.1 (i) has not been given the critical examination that is required when its importance to a functioning democracy is considered. This interpretation has recently emerged from cases on the interpretation of 40.6.1(i). Here, the judiciary has evolved the debate on political speech from an examination of the appropriate constitutional ground for protection to a harmonious interpretation.

Many issues surrounding Article 40.6.1(i), such as whether the right can be exercised in a positive or negative fashion, still have to be settled. Stemming on from this debate, this thesis will examine whether a liberal interpretation of Article 40.6.1(i) in line with wider democratic and political philosophy allow for citizen to act as their own form of watchdog in connection with the business of politics by grounding a greater right to information and criticism of government policy.

2.1.1 Free speech and the Fundamental Rights Provisions of the Constitution

The right to freedom of expression for political speech is to be found as an enumerated right in the text of Article 40.6.1 where the full protection for freedom of expression is split over two articles. Article 40.6.1 covers freedom of expression in connection to the discussion of government policy and Article 40.3.1 has been used to develop a liberal unenumerated speech right. The citizen's freedom to debate matters of government policy is extremely important to the functioning of a democracy as it is interlinked with the concept of representative democracy[117] under which the democratic order of the Irish state seeks to find its validity by virtue of Article 6.1. This could be argued as a reason why Article 40.6.1 specifically mentions its role in this regard[118].

The personal rights of the citizen under the Irish Constitution are to be found in the broad provisions of Article 40. These rights are also referred to as the fundamental rights of the citizen. Article 40.6.1 makes specific reference to the liberty for the exercise of a number

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[116] See section 2.6.1

[117] This form of democracy is envisaged by Article 16.2.1 of the Constitution, which states that 'Dáil Éireann shall be composed of members who represent constituencies determined by law.'

[118] The Constitution Committee of 1934 was focused on the assembly aspect of the old Article 9 and the ability of the police to deal with meetings that were calculated to cause a breach of the peace. Gerald Hogan, *The Origins of the Irish Constitution*, (Royal Irish Academy, 2012) 39

of rights. These rights are expression of convictions and opinions[119], the right to assemble peacefully and without arms[120] and the formation of association and unions[121]. The collection of these rights is generally referred to as the civil and political rights. They directly affect political protest, speech and the formation of parties and unions which have an influence on the direction of governance and political protest in a democracy. Article 40.6.1(i) incorporates the 'criticism of government policy' as part of the rightful liberty of expression that is bestowed on the organs of public opinion in their mandate of educating public opinion. This is in line with the general tenor of the rights incorporated in the general framework of Article 40.6.1. This is not the sole source for a right to freedom of expression within the constitutional framework. The interpretation of the unenumerated rights pursuant to Article 40.3.1 has also led the creation of a liberal right to communication in *Attorney General v. Paperlink*[122]. Therefore, the Irish right to freedom of expression has both a liberal and political expression in the Constitution and both need to be examined in turn.

2.1.1.1 The Political Right to Freedom of Expression

The right to freedom of expression has been given a particular political construction from the interpretation of Article 40.6.1(i). This is due to specific reference to the right 'to express freely convictions and opinions[123]' but also the role of the media in the exercise of political expression. The media's role as a conduit of public discourse is acknowledged. The Constitution imbues them with a particular role as the 'educators of public opinion'. The exercise of this role is specifically protected with the regard to the 'criticism of government policy'. The only restriction placed in the article is in connection with the protection of public order and morality. However, the media clause is subject to the restriction of the 'authority of the state'. Furthermore, the whole clause is finished off with the three speech crimes; blasphemy, sedition and obscenity, which are also restrictions but not central to the discussion of political speech freedoms.

The wording of this article does contain a number of complexities[124]. The phrasing of the restrictions in connection with government policy may not create a positive right, there is no obligation on the government to facilitate or encourage the criticism of government policy. The wording of the article only restrains the legislature from placing impediments in the way of citizens criticising government policy, especially via the media. The second paragraph of the Article relates in its entirety to the organs of public opinion, in other

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[119] Article 40.6.1 (i)

[120] Article 40.6.1 (ii)

[121] Article 40.6.1 (iii)

[122] *Attorney General v. Paperlink* [1984] 1 ILRM 1

[123] Article 40.6.1(i)

[124] These complexities are also referred to by Oran Doyle who also questions the construction of the right of the free speech guarantee in the Constitution regarding the express statement of certain aspects to the citizen and the statement of the remainder of the rights regarding the media. Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press, 2008) 198. This point is also referenced in Patrick Dillion-Malone 'Privacy and Media Law' in Ursula Kilkelly (ed.) *ECHR and Irish Law* (Jordans, 2004)

words, the media. At the time of the drafting of the article the media solely comprised of the radio, cinema and the press. The media has since evolved and now comprises of television and the Internet. Regarding 'organs of public opinion' and whether there is a divergence in protection between the citizen and the media, Barrington J. held that 'it would be absurd to suggest that the press enjoys constitutional protection under Article 40.6.1 (i) when criticising government policy but not when reporting the facts on which its criticism is based'[125]. Furthermore, Barrington J. stated that it would seem 'absurd to suggest that the constitutional right of the citizens to express freely their convictions and opinions does not also protect, subject to constitutional exceptions, their right to state facts'[126].

In addition, at that time the media was also a much smaller group of people working in established media outlets some of which were either linked to the Government or regulated by the Government[127]. At the time of drafting the 1937 Constitution, there were concerns voiced by the Institute of Journalists that the provision to restrict speech in order to ensure that the media was not used as a means to undermine the authority of the state was 'dangerously wide, and ambiguous, and could be used as a cover to interfere with the rights of journalists and constitute a menace to the liberty of the press'[128].

The emphasis in the Article is actually focused on the undermining of public order, morality or the authority of the State. Therefore, the primary objective of the article was to prevent the organs of public opinion from being used to overthrow this order. It could be argued that the mention of freedom of expression and in turn the criticism of government policy is really a secondary aim of the paragraph to balance the restriction in question. Therefore it could be argued that due to these concerns, the clear statement of the right to political speech may have been viewed as secondary to the primary concerns of the drafters.

It could be argued that the protection in the second paragraph is really a 'but for' right in that it is there in spite of a restriction on the exercise of a human right: in this context the right to freedom of expression. Even though the right is added in this fashion it still expands the right to freedom of expression in the Irish Constitution. Therefore the 'rightful liberty of expression, including criticism of Government policy' is merged together into a power democratic right which can be exercised in a court. In construing the article in this manner

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[125] *Irish Times v. Ireland* [1998] 1 IR 359, 406 also see the discussion regarding *Murphy v. Independent Television and Radio Commission* [1999] 1 IR 122 later in this section.

[126] *ibid*

[127] For example, the Irish Press had well documented links with Fianna Fail and Radio Éireann (which was the precursor to RTÉ) was the state broadcaster. However the current situation has improved with Ireland receiving a top score of ten for independence of media under the *Sustainable Governance Indicators, Sustainable Governance Indicators 2011, Quality of Democracy: Access to Information*, <http://www.sgi-network.org/pdf/SGI11_Democracy_AccessToInformation.pdf p. 3> Accessed 30 May 2011

[128] Letter from J.W. Kelly to Eamon DeValera representing the Committee of the Dublin and Irish Association District of the Institute of Journalists No 212: NAI, DT S9931A as reproduced in Gerald Hogan, *The Origins of the Irish Constitution*, 588

it could be argued that firstly the Government has been remiss in the balancing of speech rights and speech protections in this country and secondly, there are significant questions to be answered with respect to the legislation that has criminalised or restricted speech by citizens in this country.

The Constitutional Law Review Group felt that the framing of Article 40.6.1 (i) was in order to protect the substance of the right but allowed it to be qualified in certain circumstances.[129] Nevertheless, the wording was described by McGonagle[130] as 'qualified and ambivalent'. Also Hogan & Whyte contend that the Group

> 'in particular...considered that the right to free expression should not be subject to the test of 'public order or morality or the authority of the State' as this test was too all-ambracing (sic)[131].

In *Irish Times v. Ireland* [132], the judgment of Barrington J. touched on the level of facilitation required for freedom of expression. It was held that the right to freedom of expression was a 'positive right which the State is pledged to defend'[133]. He further stated that it was a 'function of the court is to preserve the balance ... in such a way as to give to the right guaranteed life and reality'. Barrington J. also emphasised the differences between the Irish protection and that of a common law country where 'the citizen is entitled to say anything he wishes as long as it is not illegal'[134].

This judgment highlighted the debate surrounding the constitutional framing of the right as a negative right[135] or as a positive right that the State must protect.. In that, the State must vindicate the right where necessary yet the State may not do anything to fetter the exercise of the right[136]. It is true to say that constitutional rights are either negative or positive. The

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[129] Also see 2.7.3 for a further discussion of the considerations of the LRC in the Report on the Civil Law of Defamation report and constitutional protection of the media.

[130] 'Freedom of Expression and Information', *Irish Human Rights Yearbook* (1995) 130

[131] Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th edn, Tottel Publishing, 2006) 1779

[132] [1998] 1 IR 359

[133] *ibid*

[134] *ibid*

[135] See also Larry Alexander, *Is there a Right to Freedom of Expression?* (Cambridge University Press, 2005) 4

[136] The judgment of Budd J. in *Educational Company of Ireland Ltd. v. Fitzpatrick (No. 2)* [1961] I.R. 345, 368 would also back up this assertion "If an established right in law exists a citizen has the right to assert it and it is the duty of the Courts to aid and assist him in the assertion of his right. The Court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it. To say otherwise would be tantamount to saying that a citizen can set the Constitution at naught and that a right solemnly given by our fundamental law is valueless. It follows that the Courts will not so act as to permit anybody of citizens to deprive another of his constitutional rights and will in any proceedings before them see that

State, in the case of freedom of expression, is in a position where there is no duty to enforce the right but there is also to be no interference with the right. Therefore it could be argued that the right should be facilitated in so far as practicable in a proportionate manner. In the course of the judgment, Barrington J. further stated that the context of the right, amongst the fundamental rights, is important to its interpretation. He stated that the rights that are related to freedom of expression in the constitutional landscape all related to the 'public activities of the citizen and...the practical workings of a democratic society (forming) part of the dynamics of political change'[137]. Barrington J. then got to the core of the issue in the following statement, 'they are at once both vitally important to the success of a democracy and potentially a source of political instability'[138].

In the case of *Murphy v. Independent Television and Radio Commission*[139], the applicant sought judicial review on the decision of the respondent commission to restrict the broadcast of a radio advertisement by the plaintiff. In Barrington J.'s judgment, reference was made to the grouping of freedom of expression, freedom of assembly and the right to join associations together in Article 40.6.1. In the High Court, Geoghegan J. expressed his 'puzzlement' at such an arrangement[140]. In the Supreme Court, Barrington J. stated that 'the framers of the Constitution had deliberately included them in the one sub-section for a reason. Geoghegan J. drew the conclusion that the reason was that they were concerned with the influencing of public opinions.[141]' Furthermore, Geoghegan J., in the High Court, contended that the provisions of Article 40.6.1 'did not seem to have any application to the right of a private citizen to express private opinions with a view to influencing some other person or persons.[142]' Barrington J., in the Supreme Court, was of the opinion that the rights were grouped in such a fashion as they concerned the 'public activities of the citizen in a democratic society'[143].

The Law Reform Commission Report on the Civil Law of Defamation in 1991 specifically addressed the complexities in the interpretation of Article 40.6.1. In relation to the Dáil Debates on the Constitution, the Commission drew attention to the second part of the article in relation to the limitation pertaining to public order and morality[144]. The Commission stated that 'it was felt by some deputies that this (provision) had potential for

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these rights are protected, whether they be assailed under the guise of a statutory right or otherwise."

[137] [1998] 1 IR 359, 404

[138] *ibid*

[139] *Murphy v. Independent Television and Radio Commission* [1999] 1 IR 12

[140] *ibid* 17

[141] *ibid*

[142] *ibid*

[143] [1999] 1 IR 12, 24

[144] Also see Eoin O'Dell 'Reflections on a Revolution in Libel' (2012) 30 ILT 1 and also see section 2.7.3.3 which looks at the role of the media and the constitutional protection of the meida in the second part of Article 40.6.1(i)

becoming a means of curtailing government criticism'[145]. With regard to the education of public opinion, it was suggested that the phrase 'was misconceived, it being thought that opinion should be allowed to compete with each other and that this was preferable to a set of opinions being approved in some sense by the State'.[146]

The most recent case to discuss the direct link between freedom of expression and political debate was that of *Doherty v. Referendum Commission*[147]. In this case the judgment of Hogan J. considered the link between the role of the citizen under Article 6.1 and the construction of Article 40.6.1. Hogan J. stated that the nature of Article 6.1 created the form of popular sovereignty where citizen were to be called on to make 'critical decisions'[148], that Article 40.6.1 envisaged 'informed citizenry'[149], and where referendums encouraged the citizens to 'engage in robust political debate so that the forces of deliberation will prevail over the arbitrary and irrational so that, in this civic democracy, reasoned argument would prevail in this triumph of discourse'[150]. It was also stated that under the provisions of Article 9.3 that the Constitution placed a 'premium on honest and fearless debate' in times of referendums[151].

2.1.1.2 Impact of the European Convention on Human Rights Act 2003

Like with the United Kingdom, which will be discussed later, the introduction of the European Convention on Human Rights Act 2003 in to the domestic legal sphere has enhanced the construction of the right to political speech, notwithstanding its limited remedies[152]. Even though Ireland already had a written statement of the right to political speech, the judgments of Fennelly J. in both *Mahon v. Keena*[153] and *Mahon v. Post Publications*[154] significantly relied upon the provisions of Article 10 and barely mentions the applicable norms of common law or, indeed, the Constitution. It must be accepted that these cases were predominantly centred on the concept of journalistic privilege, which was an alien concept to the provisions of the Constitution. However, the willingness to place such heavy reliance on Article 10 shows how the gaps in the original constitutional construction for political speech can be enhanced by the Convention. Fennelly J in both

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[145] Law Reform Commission, *The Report on the Civil Law of Defamation*, <http://www.lawreform.ie/_fileupload/Reports/rDefamation.htm accessed 06/09/2012> Accessed 08 July 2013, 114

[146] *ibid*

[147] [2012] IEHC 211

[148] *ibid* paragraph 21

[149] *ibid* paragraph 24

[150] *ibid* paragraph 23

[151] *ibid* paragraph 22

[152] See section 2.6.2.2 for an examination of the impact of the incorporation of the European Convention on Human Rights into domestic law. See section 2.6.4.2 for a consideration of the relevant legal principles concerning Article 10 and political speech rights in the Convention system.

[153] *Mahon v. Keena* [2010] 1 IR 336

[154] *Mahon v. Post Publications* [2007] IESC 15

Mahon cases implies that Article 40.6.1 (i) is receptive soil for Article 10 analysis[155].

In *Mahon v. Post Publication*, Fennelly J. in considering the right to freedom of expression took a cursory note of the *Paperlink*[156] and *Murphy*[157] in order to elucidate the constitutional provisions, but went straight to an analysis of Article 10. Fennelly J. clearly stated that the 'area must now be considered in light of the European Convention on Human Rights Act 2003'[158]. The learned judge also compared the Irish proportionality approach to be 'closely comparable to that adopted by the European Court of Human Rights when interpreting the Convention'[159]. Echoing the provisions and prohibitions of the US First Amendment framework, Fennelly J. also references the concept of strict scrutiny and the prohibition of prior restraint which forms part of the United Kingdom jurisprudence[160].

A comparative approach based on the provisions of Article 10 of the European Convention on Human Rights, amongst other comparative jurisprudence, was also attempted in *Hunter v. Duckworth*[161] on the grounds of qualified privilege. However, *Mahon v. Keena*[162] was to ground its judgment on Article 10 to the extent that the application of the Convention comprised of seven pages of the judgment. The learned judge also sought to compare the relevant law of the United States to the case at hand. In a heavy reliance on the provisions of Article 10 and on similar facts *Mahon v. Post Publications*, Fennelly J. reiterated the importance of the press and the grounding of a right to journalistic privilege as part of the protections for political speech in the Convention and therefore expanded the provision of this privilege to the Irish jurisdiction.

2.1.1.3 The Right to Disseminate Information

Commentators now consider that it is clear from judgments concerning Article 40.6.1 (i)[163] that the provisions of the article also include a right to the dissemination of information as intrinsic in the right to express opinions[164]. This is based on the judgments of both Costello

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[155] Indeed, there are pre-incorporation cases which made the same point, if more weakly; see *The State (DPP) v Walsh* [1981] IR 412, 440 (Henchy J); *Desmond v Glackin (No 1)* [1992] 2 ILRM 490 (O'Hanlon J); *Wong v Minister for Justice* [1994] 1 IR 223 (Denham J).

[156] *Attorney General v. Paperlink* [1984] 1 ILRM 1

[157] *Murphy v. Independent Television and Radio Commission* [1999] 1 IR 12

[158] *Mahon v. Post Publications* [2007] IESC 15, paragraph 46

[159] *Mahon v. Post Publications* [2007] IESC 15, paragraph 54. Compare to the approach of the United Kingdom post – incorporation in section 2.6.2.2, the comparable standard of scrutiny in the US in section 2.6.3.1 and the standard throughout the ECtHR judgements in 2.6.4.1

[160] See sections 2.6.3.1 and 2.6.2.1 respectively

[161] *Hunter v. Gerald Duckworth & Co Ltd. & Anor* [2003] IEHC 81

[162] *Mahon v. Keena* [2010] 1 IR 336

[163] See in particular Barrington J's judgment in *Irish Times v Ireland* [1998] 1 IR 359 discussed in section 2.6.1.1 of this thesis, Carroll J's judgment in *Brandon Books* [1993] ILRM 806 in section 3.4.3 and Fennelly J's judgment in *Mahon v Post Publications* [2007] IESC 15, discussed in section 2.6.1.2. which all touch on the issue of the right to disseminate information and discussed in this section.

[164] See further Hogan and Whyte *op. cit.* 1726

J.[165] and Keane J.[166] in some of the landmark cases which interpreted the provisions of article 40.6.1.

The right to information was construed in the case of *The Attorney General (The Society for the Protection of Unborn Children Ireland Limited) v. Open Door Counselling Limited and Dublin Wellwoman Centre Limited*[167]. The primary issue in the case was the provisions of information regarding abortion service, which was available in England yet the procedure was repugnant to the Constitution under Article 40.3.3[168] as constituted at the time of the action[169]. This action was taken before the X[170] case and the constitutional amendments that took place after the case. The judgment of Finlay CJ touched on the idea of an implied right to the dissemination of information contained in the wording of Article 40.6.1. Commenting on Law Reform Commission Report, Finlay CJ cited the following excerpt:

> It was further suggested that the right to receive and give information which, it was alleged, existed and was material to this case was, though not expressly granted, impliedly referred to or involved in the right of citizens to express freely their convictions and opinions provided by Article 40, s. 6, sub-s. 1 of the Constitution, since, it was claimed, the right to express freely convictions and opinions may, under some circumstances, involve as an ancillary right the right to obtain information. I am satisfied that no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child[171]

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[165] Specifically Costello J. in *Attorney General v. Paperlink* [1984] ILRM 373, *Kearney v. Minister for Justice* [1986] IR 116, [1978] ILRM 52. Even though the *Paperlink* case, refers to the right to communicate without reference to a political speech argument. For example whether A can communicate with B by giving B information (letters, a broadcast, etc), not with whether A can communicate by getting information from B. However, it is arguable that a right to information might be derived from Art 40.3 by analogy with these cases, or as a necessary corollary of the right in these cases. Taking these cases in line with the argument surrounding a tenuous right to official information it may be possible to constitutionally ground an argument to recognise a right to political information, especially when the argument surrounding the interpretation of Article 6.1 is incorporated.

[166] Specifically Keane J. in *Oblique Financial Services v. The Promise Productions Co Ltd* [1994] 1 ILRM 74, *O'Laoire v. The Medical Council* (27 January 1995) High Court, Unreported, *Carrigaline Community Television Broadcasting Co Ltd v. The Minister for Transport Energy and Communications (No. 2)* [1997] 1 ILRM 241 and *Society for the Protection of the Unborn Child (Ireland) Ltd v. Grogan (No.5)* [1998] 4 IR 343

[167] *The Attorney General (The Society for the Protection of Unborn Children Ireland Limited) v. Open Door Counselling Limited and Dublin Wellwoman Centre Limited* [1988] 1 IR 593

[168] The text of Article 40.3.3 was amended to allow for a right to information regarding abortion procedures which could be accessed abroad as the Fourteenth Amendment to the Constitution in 1992.

[169] See now the Protection of Life During Pregnancy Act 2013

[170] *The Attorney General v. X* [1992] 1 I.R. 1

[171] *A.G. (S.P.U.C.) v. Open Door Counselling Ltd.* [1988] 1 IR 593 at 625

This ground of appeal was defeated as the nature of the information being sought for the procurement of an abortion in the State was to go against the right to life of the unborn child. The judgment of Denham J. in *Society for the Protection of the Unborn Child v. Grogan (No.5)*[172] considered the general right to information. From *A.G. (S.P.U.C.) v. Open Door Counselling Ltd*[173] case, it had been established that there was no right to information for a purpose contrary to the Constitution.

> It is illogical and incorrect to analyse the situation and determine that there can be no information given to or received by a party to actions that may include situations where the actions are lawful. ... To deny a right under the Constitution to information on the basis that another constitutional right exists, without any attempt at harmonising the rights, is to fall into error.[174]

In the case law discussed above, the right of the unborn child, as framed in Article 40.3.3, is in competition with the right to life of the mother. The broader argument, which is investigated in this thesis, concerns the competing claims of the citizens and the Government in relation to policy information. The power held by the Government to govern is through the citizen, yet to protect this form of rule there may be legitimate issues which need to be shielded from the citizen. Therefore, the balance, which must be achieved between the sentiments of the constitutional framing of Government and the reality of power, is a delicate one. This can only be achieved with a harmonious interpretation of the roles and powers of both the Government and citizens.

2.1.1.4 The Right to Official Information?

Following on from the use of the unenumerated right as a means for the right to the liberal use of freedom of expression, adding in the possibility of a right to the dissemination of information in Article 40.6.1, is there a constitutional right to official information? The education of the public opinion needs access to information in order act as the final arbiters of national policy. Regarding the restriction of information, Mason J. in *Commonwealth of Australia v. John Fairfax and Sons Ltd*[175] stated:

> It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.[176]

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[172] [1998] 4 IR 3

[173] [1988] IR 593

[174] [1998] 4 IR 3, 374

[175] *Commonwealth of Australia v. John Fairfax and Sons Ltd* (1980) 147 CLR 39 cited by Carroll J in *Attorney General for England and Wales v. Brandon Books* [1987] ILRM 135, [1986] 1 IR 597

[176] (1980) 147 C.L.R. 39,51-52 as cited by Carroll J in *Attorney General for England and Wales v. Brandon Books* [1986] 1 IR 597, 601

The right of citizens to be informed about the dealings of their government is, in fact, not a new movement in political or legal reform. There is a developing acceptance of a legal right of citizens to be consulted where decisions are being taken by public bodies. Extending this right so that it covers Government decisions and policies would be a logical extension of this argument[177]. Comparing the Irish right to that envisaged in international treaties such as the United Nations Declaration on Human Rights and the International Conventant on Civil and Political Rights [178] demonstrates that the parallel right to access information is absent. The silence concerning the information element of the right as framed has led to the courts implying a right to information into the Constitution. The right to access government information could be considered a two- fold right.

The ability to use such an implied right to aid the citizens right to access official information from the Constitution is not yet considered to be an unenumerated right. In *Cullen v. Toibín*[179], a right to communicate and receive information was read from the provisions of Article 40.6.1. In the case, McCarthy J. states that the courts must be "vigilant to protect the citizen who has the right to be informed". Even though the case was in regard to an injunction to stop the publication of details regarding a murder and its possibility to prejudice a future appeal, the obiter comments could be used as a future basis to extend the total effect of the right to freedom of expression to bring into line with the rights included in the international documents[180] and the provisions of the European Convention on Human Rights[181].

In *O'Brien v. Mirror Group Newspapers Ltd*[182] Denham J . in her dissent did imply the right to information into the wording of the constitutional guarantee when making a comparison between right to freedom of expression envisaged in the terms of Article 40.6.1 (i) and a comparative analysis to the freedoms incorporated into Article 10 of the European Convention on Humans Rights. Denham J. stated that both require a balance and issues such as 'information, communications and the freedom of expression are a matter of importance in a democracy and is of public interest'[183]. *Cornec v. Morrice & Ors*[184] has re-visited the issue of the dissemnination of information and public debate. The case concerned a company law issue in the jurisdiction of Colorado but the plaintiffs wished to examine the sources of Irish journalism on the issue. In the judgment of Hogan J. the importance of the

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[177] Réne Resonstock, 'Consultation in Public Administration' (2004) 11 (9) Commercial Law Practitioner 231 and Simone Chambers, 'Behind Closed Doors: Publicity, Secrecy and the Quality of Deliberation' (2004) 12 (4) Journal of Political Philosophy 389

[178] See further section 2.6.5

[179] *Cullen v. Toibín* [1984] ILRM 577, 581

[180] See section 2.6.5

[181] See further Jennifer Kavanagh, 'Freedom of Information as a Human Right?' < http://humanrights.ie/civil-liberties/freedom-of-information-as-a-human-right/ > Accessed 27 January 2014

[182] *O'Brien v. Mirror Group Newspapers Ltd* [2001] 1 IR 1

[183] *ibid*

[184] *Cornec v. Morrice & Ors* [2012] IEHC 376

right to information was important to exercise the constitutional rights envisaged in Article 40.6.1 (i). The learned judge stated that 'these constitutional fundamentals have been overlooked at times, in part possibly because the syntax and drafting of this particular clause is (uncharacteristically) awkward given that the critical proviso is somewhat obscured by being placed within a subordinate clause'[185]. Therefore there is a gathering momentum behind the argument that there is an implied right for citizen to access official information which has developed from *Cullen* to *Cornec*.

It could be argued that this jurisprudential evolution has more to do with the implications of the European Convention on Human Rights protections into the spirit of the Constitution in order to provide for a basic commonality in freedom of expression protection as opposed to a broadening of protection in the Constitution in its own right. Furthermore, as the provisions of the Convention have been incorporated into Irish domestic law, there is a further argument to including such a right into the constitutional structure of political speech in Ireland[186].

2.1.1.5 Summary

The obvious inconsistencies in the sourcing of the right to freedom of expression should be treated with concern. The creation of a multi-track system for speech rights means that the nature of the speech must firstly be considered for the application of the correct speech protections. The use of Article 40.6.1 (i) for political speech and the use of 40.3 for liberal speech rights means that two separate forms of speech protection have been created. This is not to mean that the framers and the interpreters of the Constitution placed freedom of expression with a higher regard than any other right, but that a *lassiez faire* attitude to such an important protection may have been taken. This resulted in a clear statement of political speech rights from Article 40.6.1(i) and the right to communicate left to interpretation from the Constitution.

There is also an argument to be made that the Courts' interpretation of freedom of expression has focused on the micro level of the argument; where to ground the right in particular circumstances. This could explain the development of the liberal speech right from *Paperlink* to the quick fix solution as advocated in *Murphy*. The macro level analysis which is required as to the purpose of the speech right in the Constitution has developed at a lethargic rate in comparison to the former. There is a scarcity of judgments which directly refer to the citizen's policy rights as stated in Article 6.1 in relation to the interpretation of the political speech rights protection as stated in 40.6.1. It is only in recent times that the connection has been made in the judgment of Hogan J. in *Doherty v. Referendum Commission*[187] and this is to be commended.

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[185] *ibid* paragraph 42

[186] See section 2.6.4.3

[187] [2012] IEHC 211 paragraphs 21 and 24

On consideration of the right to freedom of expression in Ireland, the landscape could be summed up as one of confusion. There is not enough clarity over the delineation of rights between the citizens and the press, the point of convergence of protection between constitutional sources and the absence of information as part of the right to freedom of expression. The lacuna between political speech and the right to communicate has also created the situation where a citizen must scrabble around in the dark world of shaky unenumerated rights in order to find some persuasive precedent to attempt to ground a case which will allow for the right to official information to be firmly established in the Constitution. Steps have been taken in recent jurisprudence to clear up this anomaly and created a more useful right to freedom of expression to include a right to information and level the origin of rights between the Constitution and the human rights norms demonstrated in the European convention.

2.1.2 United Kingdom

The inclusion of the right to freedom of expression in the United Kingdom is considered necessary for inclusion in this discussion for three reasons. The first reason is that the parliamentary and executive structures of the Irish State have been modelled on the system of executive and legislative administration in the United Kingdom. The second reason is the influence of decisions from the United Kingdom, in the Irish legal system. The common law relationship between both jurisdictions means that the jurisdiction with the greatest persuasive influence over the development of Irish Law is English common law precedents. Finally, the United Kingdom has also dealt with the influence of European Convention on Human Rights Law in a similar manner to Ireland. Both jurisdictions have passed domestic legislation to give effect to the Convention commitments.

The right to freedom of expression in the United Kingdom has seen two major periods of development; pre and post the Human Rights Act. Before the Human Rights Act, the right to freedom of expression was delineated by case law under the unwritten constitutional tradition of the United Kingdom resulting in a right that was obscure and hard to pin down. After the Human Rights Act, the concept of freedom of expression found its basis in the jurisprudence of the European Convention.

The evolution of freedom of expression could be viewed as the evolution of the power dynamic between the state and the citizen. Perhaps the first statement in the English tradition of a right to freedom of expression is Article 9 of the Bill of Rights, 1689, where parliamentarians were afforded protection for the statements in Parliament.

The major commentators on this area of law in the United Kingdom are Barendt, and Robertson and Nicol. On the point of freedom of expression for political speech, Barendt states that it is 'immune from restriction because it is a dialogue between members of the electorate and between governors and governed, and is, therefore, conducive, rather

inimical, to the operation of a constitutional democracy'.[188] Robertson and Nicol describe the role of freedom of expression in the United Kingdom context as a 'cultural assumption rather than a constitutional right'[189]. Or as stated by McGonagle 'freedom of speech is only a common- law principle'[190]. Yet they also cite the definition of freedom of the press used by the Royal Commission on the Press which defines freedom of the press as 'that degree from restricting which is essential ...to advance the public interest by publishing the facts and opinions without which a democratic electorate cannot take responsible judgments.'[191]

2.1.2.1 Common Law Principles before the Human Rights Act

Freedom of expression in the United Kingdom grew in the common law tradition from precedent as a form of civil liberty. Freedom of expression is considered to be one of the most important liberties as it affects the right of the citizen to engage in the political process. Case law established that freedom of expression only existed where common law rules did not restrict it. For example in the great case of *Entick v. Carrington*[192] where it was stated that the English common law perceived a right as part of a residual liberty to exercise rights, that was the freedom to do anything that is not expressly prohibited. This has caused two of the leading experts in this area to state that 'English Law has traditionally taken little or no notice of freedom of speech'[193]. The interpretation of 'rights' in the United Kingdom is more a case of residual individual rights against a system of parliamentary sovereignty.

This point was alluded to by Lord Scarman in the case of *Secretary of State for Defence v. Guardian Newspapers Ltd*[194] where the notion of constitutional rights in an unwritten constitutional tradition was "strange". The talk of such rights was the direction in which constitutional law in Britain was moving before the enactment of the Human Rights Act. As there was no clear statement of the law relating to freedom of expression at the time, the cases and themes emerging needed to be analysed to produce a framework of the 'right' in the United Kingdom context. Robertson and Nicol approach the key themes as trial by jury, open justice, the rule against prior restraint and freedom from government interference[195]. For the purpose of this study the themes of prior restraint and freedom from government interference are the most cogent. Prior Restraint was defined by Blackstone as follows

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[188] Eric Barendt, *Freedom of Speech*, (2nd edn, Oxford University Press, 2005) 156

[189] Geoffrey Robertson and Andrew Nicol, *Media Law*, (5th edn, Penguin, 2008) 1

[190] McGonagle, *Media Law* (2nd edn, Thomson Roundhall, 2003) 70

[191] Final Report of the Royal Commission of the Press as cited by Geoffrey Robertson and Andrew Nicol, *Media Law, op. cit.*, 1

[192] *Entick v. Carrington* (1795) 19 St Tr 1030 and (1799) 2 Wils KB 275. This was also reflected in the judgment of *Irish Times v. Ireland* [1998] 1 IR 359, 404 where Barrington J. stated that 'This position is totally different from the position in a common law century where the citizen is entitled to say anything he wished as long as it is not illegal

[193] E Barendt, 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998' (2009) 84 Indiana Law Journal 851, 851

[194] *Secretary of State for Defence v. Guardian Newspapers Ltd* [1985] AC 339, 361

[195] Geoffrey Robertson and Andrew Nicol, *Media Law op. cit.* 7- 44

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints on publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity[196].

In the totality of cases dealing with political expression, there was an emphasis placed on the democratic utility of speech and the scope of the freedom. Barendt stated that such debate in Britain, and other liberal democracies, was more concerned with the scope of the freedom as opposed to the merits of protecting freedom of expression[197]. In *McCartan Turkington Breen v. Times Newspapers*[198], the role of freedom of expression in the English system conjoined with its democratic utility was discussed. Lord Bingham of Cornhill made a direct link between the right to freedom of expression and the nature of participatory democracy as follows

> The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.[199]

This interlinks with a corollary right to be informed of political events. Developments in the area of regulating political advertising and its consequent restriction on freedom of expression in both *R (on the application of the Pro Life Alliance) v. BBC* and *Animal Defenders International v. Secretary of State for Culture Media and Sport*[200] left much to be desired[201]. They have demonstrated unwillingness for extending restrictions on political speech to cover broadcast media in spite of the political and social utility in fostering a participatory democracy[202].

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[196] William Blackstone, *Commentaries on the Laws of England* (1765, Book IV) 151-2 as cited in Geoffrey Robertson and Andrew Nicol, *op. cit.* 23

[197] See Eric Barendt, Freedom of Expression, *op cit.* 1

[198] *McCartan Turkington Breen v. Times Newspapers* [2001] 2 AC 277

[199] *ibid* 290-291

[200] *R (on the application of the Pro Life Alliance) v. BBC and Animal Defenders International v. Secretary of State for Culture Media and Sport* [2008] UKHL15, [2008] 2 WLR 781 *Animal Defenders International v. United Kingdom* Application Number 48876/08 (ECtHR, 22 April 2013) and section 3.2 regarding Content Based Restrictions for a further discussion. Recently the ECtHR has followed the jurisprudence of the English Courts as will be discussed in section 2.6.4.2

[201] See section 2.6.4.3

[202] Sarah Sackman, 'Debating 'Democracy' and the Ban on Political Advertising' (2009) 72(3)

In *R v. Secretary of State for the Home Department*[203], Lord Bingham of Cornhill laid down the underlying principles of freedom of expression as follows

> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market': *Abrams v United States* (1919) 250 US 616, 630, per Holmes J (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country[204].

This excerpt sets out the four main categories borrowed by Barendt in the assessment of the reasons for protecting speech[205]. Such a categorisation and their applicability to political speech are with merit. The main argument for this section is that the four main categories underpin, in the United Kingdom, why speech is a liberty which should be protected and only restricted where the social utility of restriction outweigh any possible harm in its regulation. Indeed the courts have recognised that these common law considerations continue to be of crucial importance, even after the incorporation of the Convention in the 1998 Human Rights Act. For example in the open justice case of *R (on the application of Guardian News and Media Ltd.) v. City of Westminster Magistrates' Court*[206], Toulson LJ held on the basis of common law principles and not on the provisions of Article 10 as follows:

> The Strasbourg jurisprudence may be seen as leading in the same direction, but it is not entirely clear cut because this is not a case in which the court can be said to have had a monopoly of information (as it did in *Tarsasag* and *Kennedi*), so as to justify regarding the court's refusal of access as tantamount to censorship. There is significance in the question whether the refusal of access to the Guardian amounted to covert censorship, because there is force

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[203] *R v. Secretary of State for the Home Department* [2000] 2 AC 115 and section 3.2 regarding Content Based Restrictions for a further discussion

[204] [2000] 2 AC 115, 126

[205] Barendt op.cit. 6-23 also see Henry G. Schermers alternative categorisation of speech rights as speech methods. Henry G. Schermer 'Freedom of Expression' in Liz Heffernan (ed.) Human Rights: A European Perspective (Roundhall, 1994) 203

[206] *R (on the application of Guardian News and Media Ltd.) v. City of Westminster Magistrates' Court* [2013] QB 618, EWCA Civ 420 (03 April 2012)

in the argument that article 10 is essentially a protection of freedom of speech and not freedom of information (*Leander*), although in exceptional cases infringement of the latter may be regarded as a covert form of infringement of the former. Some of the observations by the Strasbourg court may be said to support the reasoning behind my decision, but I base the decision on the common law and not on Article 10[207].

2.1.2.2 *The Incorporation of the Convention Provisions in the Human Rights Act*

The introduction of the Human Rights Act in 1998 was a turning point in the recognition of human rights at a domestic level in the United Kingdom. It made the free speech protections in Article 10 part of the everyday law and in a clear form that did not require translation from the common law principles of an unwritten constitutional protection. Under the provisions of Section 1 of the Human Rights Act 1998, the convention rights include Article 10 dealing with freedom of expression[208] and are to have effect in the United Kingdom subject to any designated derogation or reservation.

The judiciary were proactive in incorporating the right into the common law before its incorporation in the *Reynolds* case. The Reynolds case concerned an action for libel damages by the former Irish Taoiseach Albert Reynolds against the Sunday Times newspapers for an article in its English edition which claimed that he had mislead the Dáil and had omitted Reynold's explaination of the events which was contained in the Irish edition of the Sunday Times. The case was important in the development of defamation laws especially, in relation to fair comment and the application of qualified privilege to the media. It also marked the inclusion of the jurisprudence of the European Convention of Human Rights into English law prior to the adoption of the Huamn Rights Act 1998. It has been argued by Barendt that the incorporation of the Human Rights Act has not had the radical change in jurisprudence as predicted. This can be seen especially in the *Prolife Alliance* case and later in the *ADI* case[209]. Nevertheless, Barendt contends that there has been a real impact on political and parliamentary debate[210]. However, the major development with regard to political speech rights is the standard of adjudication in political speech cases. The standard of scrutiny which was applied was that of reasonableness whereas the revised standard of proportionality allows for a more refined balancing of rights when questions surrounding speech protection comes before the courts.

In the pre-Convention period, the standard was that of reasonableness as set down in the

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[207] Paragraph 89 [2012] EWCA Civ 420 and also see section 2.6.4.2 for a consideration of the cases cited in the above excerpt.

[208] For a thorough assessment of the provisions of Article 10 see Section 2.6.4 below

[209] *R (on the application of the Pro Life Alliance) v. BBC* [2003] UKHL 23, [2004] 1 A.C. 185 and for a further consideration of these issues and cases see section 3.5.3

[210] Eric Barendt, 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998' 2009 Vol. 84 *Indiana Law Journal* 851, 886

Wednesbury case[211] where irrationality was more important than the proportionality of the restriction. This approach has been criticised as it leads to uncertainty for the assessment of rights

> '...the crucial disadvantage of indeterminacy of judicial policy, in so far as the courts would seem to be concerned with an empirical examination of the justice of an administrative decision rather than with the application of an indispensable norm which regulates the exercise of discretionary public power.'[212]

This form of assessment was used in *R. v. Secretary of State for Home Department, Ex parte Brind and Others*[213] in relation to the assessment of speech rights where the 'dubbing' of politicians was permissible to prevent terrorism in the UK equivalent of the section 31 broadcasting bans in Ireland[214].

On the other hand, the post-Convention period has been marked by the measurement of the restriction by reference to the proportionality and extent of the restriction. This is measured against the to the aim pursued in the legislation at issue. This new means of interpretation by virtue of the domestication of European Convention norms could be viewed as a positive[215]. The argument here is that instead of depending on the vagaries and interpretations of previous decisions, there is a definitive list of rights and restrictions which apply to the exercise of the right as opposed to the pre-Convention system as described in *Entick*.

The idea of civil liberties being the residual individual rights which were permitted after all other prohibitions were considered has now been removed and a strong basis of codified rights has been put in place in the form of the Human Rights Act. Furthermore, the rate of change and response to Strasbourg decisions has been settled in the case of *R. v. Special Adjudicator ex parte Ullah*[216] where it was stated that it is 'the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'[217].

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[211] *Associated Provincial Picture Houses, LD. v. Wednesbury Corporation* [1945] 1 K.B. 223

[212] G.L Peiris, 'Wednesbury Unreasonableness: The Expanding Canvass' (1987) 46 (1) Cambridge Law Journal, 53 and from an Irish perspective see further Hilary Delaney and Catherine Donnelly, 'Irish Supreme Court inches towards proportionality review' 2011 Public Law 9, 11. With regard to proportionality in free speech cases, also see Rachel Joyce, 'A New Approach to Freedom of Expression?' (2002) 1 Hibernian Law Journal 85, 89

[213] *R. v. Secretary of State for Home Department, Ex parte Brind and Others* [1991] 1 AC 696

[214] See section 3.1.2 for a further consideration of this case.

[215] Also see section 2.6.1.2 for the Irish experience of the impact of incorporation of the European Convention on Human Rights and the right to political speech.

[216] [2004] UKHL 26

[217] [2004] UKHL 26 paragraph 20

In *Kennedy v. The Charity Commission*[218] the discussion of rights to information was discussed both in terms of the UK Common Law but also the European Convention on Human Rights. In the case, Kennedy sought documents from the Charity Commission and other public bodies in relation to three inquries by the Commission in relation to the 'Mariam Appeal' that was founded by George Galloway when he was a Member of Parliament. The Charity Commission denied the request under s. 32(2) of the UK Freedom of Information Act 2000 as the documents were gathered under a public interest duty to investigate. The UK Supreme Court addressed the issues of the exemption under s.32 (2) and whether Article 10 of the Convention imposes a positive duty of disclosure on public authorities. On the construction of the s.32 (2) exemption, Lord Mance was of the opinion that the exemption lasted until the documents became historical documents[219] and as such, the public interest test would not apply[220]. Lord Sumption aslo added in the context of the right to information under the Convention that

> The more authoritative of these decisions, and the ones more consonant with the scheme and language of the Convention, are authority for the proposition that article 10 recognises a right in the citizen not to be impeded by the state in the exercise of such right of access to information as he may already have under domestic law. It does not itself create such a right of access. However if (contrary to my view) there is a Convention right to receive information from public authorities which would not otherwise be available, no decision of the European Court of Human Rights suggests that it can be absolute or exercisable irrespective of the public interest[221].

However, the dissent of Lord Wilson traces the development of the right to information under Article 10 ECHR through to the current circumstances in the present case and finds that there is a right to such information sought by the appeallant in the present case[222]. Lord Carnwath Was of the view that the approach taken by the majority was too narrow and therefore also dissented[223].

Like the US jurisdiction in *Susan B. Anthony List v. Driehaus*[224], the English courts have also had to grapple with marrying the protection of political speech with the concept of the political lie[225]. *Watkins v. Woolas*[226], concerned false statement of fact about a rivial candidate,

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[218] [2014] UKSC 20

[219] [2014] UKSC 20, paragraph 34

[220] The UK public interest test is contained in s. 2 (2) b Freedom of Information Act 2000 UK and see [2014] UKSC 20, paragraph 41

[221] [2014] UKSC 20, paragraph 154

[222] [2014] UKSC 20, paragraphs 180 - 189

[223] [2014] UKSC 20, paragraph 230

[224] 573 U.S. ___ (2014)

[225] See section 2.6.3 which outlines the approach of the US jurisdiction. Also see also *Walsh v. The Newsgroup Newspapers Ltd* [2012] IEHC 353 for the affect of false allegations on the

Robert Watkins who was standing for the Liberal Democratic Party, in three election addresses sent to voters. The defendant Philip Woolas, who was standing for the Labour Party and was the incumbent candidate, approved these documents in their final form and took personal responsilbity for the statements. Under s. 106 of the Representation of the People Act 1983 there is a prohibition against making false statements in relation to a candidate's personal character or conduct and it is considered to be an illegal practice[227]. The allegations against Watkins were summerised in the judgments of Teare J. and Griffith Williams J. as follows

(i) The statement in the Examiner that the Respondent had attempted to woo the vote, that is, that he had attempted to seek the electoral support, of Muslims who advocated violence

(ii) The statement in the Labour Rose that the Petitioner had refused to condemn extremists who advocated violence against the Respondent.

(iii) The statement in the election address that the Petitioner had reneged on his promise to live in the constituency.[228]

The central point for consideration was the compatibility of s. 106 with the protection for freedom of expression contained in Article 10 of the European Convention on Human Rights. Teare J. and Griffith Williams J. believed that the essential question in this regard was whether 'it is necessary and proportionate to penalise this speech in a democratic society by avoiding the election and disqualifying the Respondent from standing for election to Parliament for three years'[229]. They stated that in order to be compliant with the provisions of Article 10 that the charge of illegal practice under s.106 could only be used in clear cases. The judges decided that if the charge only related to the third allegation above then the use of s.106 would contravene the principles of Article 10. However when taken in totality with all the allegations above, the use of s.106 was compatible and therefore it was 'necessary and proportionate' to penalise the speech in question[230].

2.1.2.3 *What can Ireland learn from the United Kingdom?*

If the analysis were only to focus on the traditions of the Constutions, Ireland having a written Constitution and the UK having an unwritten one, then this would only be a simplistic comparison to make. It would also belie the fact that the evolution of the right in the United Kingdom shaped the expectations of the right in the early state. Also UK cases

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defence of qualified privilege in the Irish jurisdiction.

[226] [2010] EWHC 2702

[227] There is no parallel provision in Irish Law as the Electoral Act 1992 only covers misleading statements as to the process of voting (s. 152) and not misleading statements of the character or personal conduct of a candidate. However, it is arguable that such issues would be caught under the operation of the Defamation Act 2009.

[228] [2010] EWHC 2702 paragraph 207

[229] [2010] EWHC 2702 paragraph 47

[230] [2010] EWHC 2702 paragraph 209

acted as a persuasive source in the development of Irish jurisprudence on freedom of expression in Ireland[231]. The incorporation of the European Convention on Human Rights into the domestic legal landscape has resulted in a defined right and effective legal protection in England. The Irish attempts have resulted in a continued reliance on the interpretation of the constitutional framework of freedom of expression and an inefficient system of convention rights incorporation.

Barendt categorises the debate on freedom of expression in England as one of scope as opposed to merits. When compared to the Irish legal landscape, this tension is not as apparent due to the constitutional footing of a stated right to freedom of expression. Undoubtedly, the Irish judiciary have focused on the microanalysis of the right with regard to the placement of the vagaries of freedom of expression. However, this has been to the detriment of the macro analysis of the citizens, speech and democracy. Yet, there is no debate on the accepted merits of speech or utility. The scope of the Irish protection is still in train with the recent move to incorporate an Article 6.1 analysis into the speech framework[232]. Furthermore, the benefits of a written constitution can be seen in the Irish approach as it clearly states the rights of the citizen as opposed to the approach here where the intricacies of an important political right are to be teased out of the behemoth that is the common law system.

The system has seen welcome change in the incorporation of the European Convention on Human Rights into the domestic legal sphere. This does lend a peculiar problem to the Irish interpretation of freedom of expression. With the close affinity of both legal systems, there is a worry that the common law rationale of freedom of expression on a post-Convention case may combine with the scope and merits debate to interfere with the Irish constitutional right, which though imperfect, may be muddled by the misapplication of such a debate to a delineated Irish right.

2.1.3 United States

The right to freedom of expression in the United States is found in the First Amendment of the United States Constitution. This amendment is held up to be the paradigm of protection for free speech and states that 'Congress shall make no law ... abridging the freedom of speech, or of the press'[233]. This would seem clear cut. Once the cosmetic interpretation of equating the First Amendment with an absolutist approach towards protection is discarded and one considers the nuances of the abridgement clause, then the layers of speech protection become apparent.

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[231] See for example the judgment in *Gerry Hunter and Hugh Callaghan v. Gerald Duckworth and Company Limited and Louis Blom Cooper QC* (unreported judgement delivered 31 July 2003)

[232] See Hogan J.'s judgment in *Doherty* as discussed in Section 2.6.1.2

[233] Cornell University Law School, Legal Information Initiative , <http://www.law.cornell.edu/constitution/first_amendment> Accessed 01/06/2010

The seemingly clear-cut protection for freedom of expression in the United States in the First Amendment did not create a *prima facie* absolute right. Instead, the ideals behind the construct of the First Amendment were stated in *New York Times v. United States*[234] as follows:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfil its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government[235].

As stated in *Whitney v. California*[236], the construction of the First Amendment protection does not:

> ... confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom[237].

Yet in the same case, Brandeis J. went on to state the historical reason for such a protection.

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law - the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution

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[234] *New York Times v. United States* (1971) 403 U.S. 713

[235] *ibid* 717

[236] *Whitney v. California* 274 U.S. 357 (1927)

[237] *Whitney v. California* 274 U.S. 357, 372 Furthermore, the dissenting opinion of Justice Black in *Koingsberg v. State Bar* 366 U.S. 36 (1961) was to champion the ideal that the protections of the First Amendment constituted absolute protections.

so that free speech and assembly should be guaranteed[238].

The political nature of the First Amendment and its role in the political life of the United States can be further emphasised considering that it amounted to the constitutional footing for political parties[239]. In addition, the interpretation of the First Amendment and its correlation with the use of campaign finances for political advertising functions means that political communications and funding are governed by the jurisprudence of this amendment[240].

The Meiklejohn[241] approach was not to find favour with the United States' Supreme Court in *New York Times v. Sullivan*[242]. Nevertheless, the Court has repeatedly reaffirmed that

> The constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office. [243]

This principle was most recently affirmed in *Susan B. Anthony List v. Driehaus*[244], in which the Court had to consider the question of whether a 'political lie'[245] attracted First Amendment protection. An Ohio 'pro-choice' group claimed that Mr Driehaus had voted for 'taxpayer funded abortion', and he complained that this infringed a state law which prohibited certain 'false statements' – in particular, false statements regarding election candidates – during a political campaign. He lost the election and withdrew the complaint. However, the group appealed to the Supreme Court on the grounds that the Ohio rule 'chilled' their political speech rights: the law had been enforced in the past, and they intended to make similar statements in future elections. After considering litigation technicalities regarding jurisdiction, the Court applied *Monitor Patriot Co. v. Roy*[246] and held that such rules unconstitutionally stifled the expression of those who were engaged in the political process. Therefore, the width of protection for political speech issues in the jurisprudence of the

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[238] *ibid* 375-376

[239] Mark Tushnet, *The Constitution of the United States: A Contextual Analysis* (Hart Publishing, 2009) 4. See also the further debate regarding this issue in section 3.1.3 on the legal regulation of political funding and advertising. The effect of the First Amendment on political funding is illustrated by the cases of *Buckley v. Valeo* 424 U.S. 1 (1976) and *Citizens United v. Federal Elections Commission* 000 U.S. 08-205 (2010). This position has since been broadened in the recent judgment of *McCutcheon v. Federal Elections Commission* 572 US __ (2014).

[240] See Further Jennifer Kavanagh 'Advocacy Groups, Political Speech and Offshore Money' < http://humanrights.ie/civil-liberties/advocacy-groups-political-speech-and-offshore-money/> Accessed 27th January 2014

[241] See section 2.2

[242] *New York Times v. Sullivan* 376 US 254 (1964)

[243] *Monitor Patriot Co. v. Roy 401* U.S. 265 (1971), 272

[244] *Susan B. Anthony List v. Driehaus* 573 U. S. ____ (2014)

[245] Also see 2.6.2.2 for the incorporation of the political lie jurisprudence into the UK jurisdiction in *Watkins v. Woolas* [2010] EWHC 2702 . See also *Walsh v. The Newsgroup Newspapers Ltd* [2012] IEHC 353 for the affect of false allegations on the defence of qualified privilege in the Irish jurisdiction.

[246] *401* U.S. 265, 272 (1971)

First Amendment is as broad as possible demonstrating the high value which is placed on political speech in the US. This due to its role in the political process; especially the electoral process.

2.1.3.1 The Development of the First Amendment

Some of the major United States cases place the development of the First Amendment into the context of the historical development of the Nation. For example in *Thornhill v. Alabama*[247], the Court held:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times[248].

The First Amendment was a reaction to the Sedition Act 1789 and the infamous Zenger prosecution[249]. Peter Zenger was merely a publisher that printed content that attacked the royal governor of New York, William Cosby. He was still charged with Seditious Libel under the 1789 Act. This was the only time where the government came directly into conflict with the people in trying to restrict speech directly. Zenger was eventually acquitted yet the public discourse surrounding the trial created the intellectual climate in which the First Amendment developed. Furthermore, like Ireland, the birth of the American nation was preceded by a violent struggle with England. The values and traditions of the United Kingdom common law system, to a certain extent, were carried over with the newly independent state but with a Bill of Rights which sought to enumerate the rights of citizens in line with the common good.

The literal interpretation of the First Amendment could be taken as a blanket protection for speech restricting Congress from placing any regulation on speech. Even though the text of the First Amendment may create an impression that the constitutional order of the United States would not permit any restriction of speech in an absolutist sense, the interpretation has brought the protection of speech rights into a framework of Judicial Review known as strict scrutiny. The key phrase in the First Amendment is 'abridgement'. In order to assess the speech in question a level of scrutiny is applied to the speech with political speech

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[247] *Thornhill v. Alabama* 310 US 88 (1940)

[248] *ibid* 101-102

[249] See further Daniel A. Farber, *The First Amendment* (3rd edn, Foundation Press, 2010), 4 also Stephen M. Feldman *Free Expression and Democracy in America: A History* (University of Chicago Press, 2008), 11 -12 and also see the discussion on the Sedition Act Controversy in section 3.1.2.1 and Stone, Geoffrey R., *Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism* (W.W. Norton, 2004) 43 - 44

granted the highest level. This could be viewed as a form of proportionality to the aim of the speech in question. In addition, the Meiklejohn argument surrounding the interpretation of the First Amendment has been rejected. In *Roth v. United States* the court stated that it was not created to cover every utterance and that the focus of protection was on speech which had a social and political aim[250].

In *Roth v. United States*[251], the issue of protected forms of speech was considered. The judgment of Brennan J. held that obscenity was not part of the protected forms of speech as considered.[252].

> All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests[253].

Regarding the degree of applicable scrutiny, the Court holds itself in an important role to make sure that any impediments on the exercise of speech are employed strictly.

> The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests[254].

In the domain of obscenity, the court was mindful of the use of such a restriction but the court must still balance the right to freedom of expression carefully to allow for a strict level of scrutiny[255]. On a similar point, in *Cantwell v. Connecticut*[256], the Court stated that

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbour. To persuade others to his own point of view, the pleader, as we

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[250] The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people *Roth v. United States* 354 U.S. 476 (1957), 477

[251] 354 U.S. 476, 484

[252] *ibid* 482

[253] *ibid* 485

[254] *ibid* 489

[255] Even though the ECtHR does not involve itself in the consideration of different levels of scrutiny on the basis of the content and nature of the communication in question, the ECtHR is still somewhat guided by the vagaries of each case as illustrated in section 2.6.4.2

[256] *Cantwell v. Connecticut* 310 U.S. 296 (1940)

> know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy[257].

The early jurisprudence on this issue focused firstly on the *bona fides* of the Sedition Act 1978[258] and the case law in connection with the Espionage Act 1917 such as *Whitney*[259], and the involvement of the United States in World War One. This significantly shaped the jurisprudence in connection with the national security of the state and the permissible restrictions on disloyal speech that sought to 'attack the justice of the cause ... and...[undermine] the spirit of loyalty'[260]. Restriction of speech can occur either by direct criminal prohibition by abridgement of speech and commentators question whether the abridgement of speech which can chill or self-censor the speaker deserves the same level of judicial scrutiny[261]. Therefore the early case law was concerned with the limits of liberty entailed in a constitutional article which placed an outright prohibition on the restriction of freedom of expression yet protected the citizens from speech which sought to create a 'clear and present danger'[262] to its citizens. Even thought the US jurisdiction is generally hallmarked by the differential standards of review or scrutiny, it does allow for a context-sensitive analysis, unlike Ireland, where a lot of that is masked by references to proportionality especially since the incorporation of the European Convention on Human Rights to the domestic sphere[263].

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[257] *ibid* 310

[258] See also Anthony Lewis, Freedom for the Thought That We Hate: A Biography of the First Amendment 9 (Basic Books, 2007) 11-21 and Stephen M. Feldman *Free Expression and Democracy in America: A History* (University of Chicago Press, 2008), 70-100

[259] *Whitney v. California* 274 U.D. 357 (1927)

[260] *Shaffer v. US* 225 F. 886 (9th Cir. 1919) as cited by Pamela S. Karlan, Mark V. Tushnett, Louis M. Seidman, Geoffrey R. Stone and Cass R. Sustein, *Constitutional Law* (5th edn. New York, 2005) 1061-1062. However, this judgment was overturned on appeal. *Cf. Masses Publishing Co. v. Patten* 244 F. 535 and the celebrated case of *Shenck v. US 249* U.S. 47 (1919) which was discussed in section 2.6.3.1

[261] Pamela S. Karlan, Mark V. Tushnett, Louis M. Seidman, Geoffrey R. Stone and Cass R. Sustein, *op. cit.* 1099

[262] 'Clear and present danger' is the first explicit example of a scrutiny test, and contains the seeds of the modern strict scrutiny test. It was also the degree of scrutiny afforded to speech which could be restrained under direct criminal prohibition under *Schenck v. US* 249 US 47. In this case Justice Holmes created the 'clear and present danger' test in the following terms: The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and danger that they will bring about the substantive evils that Congress has a right to prevent. See section 3.1.2 for a more detailed discussion.

[263] See section 2.6.1.2

2.1.3.2 *Political Speech*

In spite of this jurisprudential argument regarding the absolutist approach by Meiklejohn[264], the argument was not followed in the judgment of Brennan J. in *New York Times v. Sullivan*[265]. This celebrated case was a final repudiation of the Sedition Act[266] and a liberalisation of speech rights concerning criticism of Government and its officials. In the case, the New York Times was sued for libel by a government official in Alabama related to the civil rights protests in the south of the United States.

Mr Justice Brennan stated that the commercial nature of the statements in question did not reduce the level of protection applicable[267]. In fact, the nature of the communication was in the public interest as it

> ...communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern[268].

Reaffirming the judgments of *Whitney* and *Roth*, the necessary 'breathing space' for public statements was discussed in the context of defamation. Therefore, the court held that for public officials to bring a case for defamation, unlike the original circumstance in the case, proof of actual malice must be shown. Holding that the law in the state of Alabama is inconsistent with the First Amendment, the judgment of the original court was reversed. The main reason was to protect the good faith critic of government and this was at the very centre of 'the constitutionally protected area of free expression'[269].

In Mr. Justice Brennan's piece on the judgment in the Harvard Law Review[270], the reasons from diverting from Meiklejohn's assessment of the First Amendment were considered[271]. There must be some way to restrict speech which fulfils no social and political purpose and the degree of scrutiny restricts an 'across the board application[272]. Brennan acknowledges that there is a danger that the tests formulated in the scrutiny of speech may be 'employed

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[264] Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) 1961 The Supreme Court Review 245

[265] 376 US 254

[266] William J. Brennan, 'The Supreme Court and the Meiklejohn Interpretation of the First Amendment' (1965) 79 Harvard Law Review 15

[267] *ibid* 226

[268] *ibid* 227

[269] *ibid* 293

[270] William J. Brennan, 'The Supreme Court and the Meiklejohn Interpretation of the First Amendment' (1965) 79 Harvard Law Review 1

[271] Sir John Laws, 'Meiklejohn, The First Amendment and Free Speech in English Law' in Ian Loveland (ed.) *Importing the First Amendment* (Hart Publishing, 1998) 123. Also see section 2.2

[272] *ibid* 11

more generally to sustain government regulation of speech'[273]. Yet, Brennan states that Meiklejohn had no issue with non-content based restrictions[274]. In *New York Times v. Sullivan*, the statements in question related to a governance issue which related to Meiklejohn's thesis. In disposing of the absolute approach, Brennan states that some speech will be restricted in some contexts[275]. This is especially true of instances where there is no redeeming social value attached to the speech[276]. Therefore it could be summarised that the *New York Times v. Sullivan* case was the pinnacle of evolution for content-based restriction of speech rights where the speech in question has no redeeming social value.

In *New York Times v. United States*[277] the notion of the rule against prior restraint, as laid down by Blackstone and discussed above[278], also finds favour in the jurisprudence of the First Amendment. The nature of news publication was addressed by the court and the majority found that the withholding of news reporting as a form of prior restraint would 'make a shambles of the First Amendment'[279] and Mr. Justice Black criticised some of his judicial colleagues for agreeing with such a proposition.

2.1.3.3 Lessons for the Irish Practice of Freedom of Expression

At the outset, it must be acknowledged that the persuasive value of United States Supreme Court judgments for the interpretation of Irish constitutional law on freedom of expression has not been particularly high. There is a tendency to interpret the Irish Constitution within its own context and if outside influences are used they are mainly the jurisprudence of the English courts at common law and European Court on Human Rights judgments which will be considered first. If the area of constitutional expression of free speech jurisprudence were to be considered, then the influence of the First Amendment is important[280].

There is a commonality between the protections of each jurisdiction studied so far. The first shared jurisprudence is that of content-based restriction. In each jurisdiction so far, the content and social utility of the speech in question has been given great weight in consideration. If the speech relates to political information or communications then the

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[273] *ibid*

[274] *ibid* 13

[275] *ibid* 5 *Cf.* fn 15 and David M. O'Brien, Congress shall make no law: The First Amendment, Unprotected Expression and the US Supreme Court (Rowman & Littlefield, 2010) 13

[276] *ibid* 6

[277] 403 US 713

[278] Daniel A. Farber, *The First Amendment* (3rd Edition, Foundation Press, 2013) 45

[279] *ibid* 715

[280] Regarding the broadening of scope for legal sources in relation to Irish law, Geoghegan J in Supreme Court made the following observation 'In cases, therefore, involving pure common law, unmodified by either the Constitution or Irish statute law, it would seem to me to be particularly important that considerable respect be paid to any consensus that may have emerged in these common law jurisdictions without in any way surrendering the right to disagree.' *Kennedy v. Law Society* [2005] 3 IR 228, 262 and [2005] IESC 23. Also see Murray CJ 'Judicial Cosmopolitanism' (2008) 2 Judicial Studies Institute Journal 1 and 'New England School of Law Commencement Address' (2006-2007) 41 New England Law Review 247

courts are more likely to intervene. Furthermore, there is recognition that political speech is unique in its quality of timeliness. This is seen in the restrictions and undesirability of prior restraint in all the jurisdictions, especially in the precedents and prohibitions on prior restraint in the United States and the United Kingdom.

The United States has been far faster in reading in the political nature of speech rights in a constitution than comparative jurisdictions. The quality of the consideration and nature of incorporation is far greater than the majority of engagement in Ireland. The similar evolution of the democratic and political structures of both Ireland and the United States should mean that there is a greater degree of influence on the direction of Irish law. This is not the case but the developments in the European Court of Human Rights and the possible influence of the United States speech abridgement categorisation means that the First Amendment may end up influencing Irish law in a more implicit manner.

2.1.4 European Convention on Human Rights

The European Convention on Human Rights has a detailed article dealing, first, with the right to freedom of expression within the Convention system, and second, with the legitimate restrictions that may be placed on the right. The Convention is now directly effective in Ireland with the passage of the European Convention on Human Rights Act 2003; therefore breaches of the Convention may be litigated in Irish Courts. Furthermore, this makes the study of this Convention essential to setting out the broad right to freedom of expression in the Irish context.

The protection of the right to freedom of expression can be found in Article 10[281]. The right is constructed in terms of "expression", "opinions" and "information". This is unlike either the First Amendment, which refers only to "speech", or Article 40.6.1, which refers only to "convictions" and "opinions". Of course, as the US experience has long shown, and as Irish experience is increasingly showing, the text is only the starting-point; just as important are the philosophies of and attitudes to freedom of expression which the various courts bring to their respective texts. The right does not make specific reference to its place within the democratic relationship of governance but it could be argued that the inclusion of the phrase 'without interference by public authorities', also protects against the use of disproportionate legal responses to political speech issues. The restrictions listed in Article 10.2[282] focus on the duties and responsibilities of freedom of expression and allow for

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[281] Article 10.1: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C90149 16D7A/0/ ENG_CONV.pdf> accessed 08 August 2011

[282] Article 10.2: The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial

restrictions necessary in democratic society. These restrictions include grounds which may be used in the censoring or restriction of political expression. The phrase, 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society', allows for flexibility and scope for discretion by the judges of the European Court of Human Rights (hereinafter referred to as the ECtHR). It also allows for cultural differences to be incorporated in the precedents of the Court. Even though there is the one standard of scrutiny, being proportionality, different kinds of restriction or justifications are applied differently[283]. For instance in *Murphy* it allowed, for the history of religious violence to be taken into consideration regarding the Irish ban on religious advertising on broadcast media which borrowed heavily from the judgment of the Irish Supreme Court[284].

2.1.4.1 Development of Article 10 Rights

The first major case to interpret the provisions of Article 10 was *Handyside v. UK*[285]. The case concerned the publication of sex education book known as 'The Little Red Schoolbook' which the United Kingdom authorities deemed to be obscene and banned under the provisions of the Obscene Publications Act, 1959 and Obscene Publications Act 1964 [286]. The applicant alleged that his right to freedom of expression under Article 10 was infringed. Even though the considerations of the Court were directed to the alleged obscene nature of the publication, the court did discuss the meaning of a democratic society pursuant to the interpretation of the article. In this regard the court stated that:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. ... it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued[287].

Therefore we can gather from this excerpt that the protection for freedom of expression as

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integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ ENG_CONV.pdf> accessed 08 August 2011

[283] See the consideration of the levels of scrutiny in the US jurisdiction in section 2.6.3.1

[284] *Murphy v. Ireland* (2004) 38 EHRR 13 and *Murphy v. IRTC* [1999] 1 IR 12

[285] *Handyside v. UK* Application no. 5493/72 Judgment (ECtHR, 7 December 1976)

[286] *ibid* paragraph 14, 15

[287] *ibid* page 18

envisaged by the court will protect expression and the communication of idea which are both well received and condemned. This is the essence of free expression in a democratic state. The ability to voice opinions is not predicated on the criticism or support that they receive but what they add to the propagation of informed debate in a society. This trend can be seen throughout the jurisprudence of the ECtHR. Hence, any penalty that is imposed by a contracting state on an applicant's expression will be scrutinised by the Court as to its proportionality to any harm resulting from such speech For example, in *Lingnes v. Austria*[288], the court held that the punishment of imprisonment was not proportionate to the crime of libel.

2.1.4.2 Political Speech Rights under Article 10

The political speech rights considerations of the Court of Human Rights have acted as a watchdog on the activities of states which seek disproportionally to protect the workings of the state and its politician from negative comment. Most of the relevant case law relates to defamation proceedings in which the applicants seek to rely on Article 10 to demonstrate that the speech in question was necessary for the communication of information and ideas related to political discourse or to the conduct of those exercising political or government authority. The focus of the court's deliberations in such cases is the extent to which such speech is necessary in a democratic society. With regard to political speech rights in *Lingnes*, the court stated that it must consider if the interference by the use of criminal sanctions for defamation were 'proportionate to the legitimate aim pursued'[289]. Regarding the applicant's occupation as a political journalist the court, emphasising the point made in *Handyside*, stated that

> Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest[290].

This is a crucial step in the consideration of political speech rights as it shows that the public interest is an essential consideration in the development of political speech jurisprudence. It also acknowledges the role played by information - especially political information - in the conduct of a democratic society and establishes the necessary protections at Convention level for such information. In *Társaság A Szabadságjogokért v Hungary*, the court specifically referenced the media as acting as 'society's watchdogs' in 'public debate on matters of

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[288] *Lingnes v. Austria* Application no. 9815/82 (Judgment 8 July 1986) for a full examination of the impact of Lingnes on the interpretation of political speech rights in the ECHR see Gavan Millar 'Whither the Spirit of Lingens' 2009 (3) European Human Rights Law Review 277

[289] Dirk Voorhoof, 'European Court of Human Rights Case of *Sdruženi Jihočeské Matky v. Czech Republic*' (IRIS Legal Observations of the European Audiovisual Observatory) < http://merlin.obs.coe.int/iris/2006/9/article1.en.html> accessed 17 April 2013, 13

[290] *ibid* 13

legitimate public concern'[291]. The Court went on to emphasise the role of the press in imparting information and creating conditions of open debate:

> Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society, which prevails throughout the Convention[292].

In *Barfod v. Denmark*[293] it was held that the provisions of Article 10 allow for a person to criticise government or those acting with government authority once the allegation are backed up with facts. This is probably as liberal a speech right as could be operated in a democratic society. People have their right to a reputation, yet if their capacity relates to state governance they can be the subjects of criticism. Persons have a right to an opinion, but the levying of factual allegations must be accompanied by evidence.

Oberschlick v. Austria[294] related to a private criminal prosecution for defamation against the applicant. The applicant was convicted of defamation in the regional court with the payment of a fine or a custodial sentence in default. He was found guilty as he could not establish the truth of the allegation presented in the magazine of which he was editor. This judgment was then upheld by the court of appeal in Austria. Therefore the case was brought before the European Court of Human Rights. With regard to the alleged violation of Article 10, the court reaffirmed the role of the press to impart information and ideas on political issues[295]. The court pays particular emphasis to what is considered the 'limits of acceptable criticism' especially regarding a 'politician acting in his public capacity than a private individual'[296]. Moreover, this point was further emphasised in the restatement of the *Handyside* principles in the following manner:

> This is underlined by the wording of Article 10 where the public's right to receive information and ideas is expressly mentioned. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention[297]

Echoing the sentiments of *Lingnes*, *Oberschlick* has a resonance to the judgment the United States Supreme Court in *New York Times v. Sullivan*[298]. The nature of the complainant, their

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[291] *Társaság A Szabadságjogokért v Hungary* Application No. 37374/05 (ECtHR, 14 July 2009) 7

[292] *ibid*

[293] *Barfod v. Denmark* Application No. 11508/85 (ECtHR, 22 February 1989)

[294] *Oberschlick v. Austria* Application No. 11662/85 (ECtHR, 23 May 1991)

[295] *ibid* 20

[296] *ibid* 20

[297] This point was also referenced in *Írfan Temel and Others v. Turkey* Application No. 36458/02 (ECtHR, 03 June 2009) referencing the 'shock and disturb' formulation of speech protection.

[298] (1971) 403 U.S. 713. *Cf* section 2.6.3 where the US jurisprudence regarding the first

societal role, and nature of the speech are taken into account when considering a defamation case. The court further states that 'the requirements of that protection have to be weighed against the interests of open discussion of political issues'[299]. In the application of Article 10 to the case the court had to measure if the article in question 'contributed to a public debate on a political question of general importance'[300]. The court stated that he did not 'exceed the limits of freedom of expression' and that the interference with the applicant's Article 10 rights in such a manner was in violation the Convention. This was due to the publication of truthful facts with the addition of value judgments on that basis[301]. Furthermore, the court cannot prove the truth of a value judgement.

In *Thorgerison v. Iceland*[302], the court was asked to consider defamation proceedings against an Icelandic journalist who was critical of police brutality. The Icelandic Government submitted that the matter raised by the applicant in his article could not come under the heading of public interest and so be protected as political discussion unlike the *Lingnes*, *Barfod* and *Oberschlick* cases. The submissions of the Icelandic Government stated that political discussion 'denoted direct or indirect participation by citizens in the decision-making process in a democratic society'[303]. Furthermore, those that claim a breach of freedom of expression must have exercised their own rights in a 'manner consistent with democratic principles'[304]. This could be viewed as trying to create a principle of mutuality and fair dealing with freedom of expression as akin to that of Equity.

The court reiterated that the press plays an important role in the communication of matters in the public interest. Furthermore, it is 'incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'[305]. The conclusion of the Court was that there was a violation of Article 10.

In *Társaság A Szabadságjogokért v Hungary*[306], the Court considered the provisions of Article 10 in relation to political reporting and stated that the law cannot 'allow arbitrary restrictions which may become a form of indirect censorship should the authorities create

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amendment and its application to the theory of speech and democracy will be considered.

[299] *Oberschlick v. Austria* Application No. 11662/85 (ECtHR, 23 May 1991) paragraph 21

[300] *ibid* 22

[301] *ibid* 23

[302] *Thorgerison v. Iceland* Application No. 13778/88 (ECtHR, 25 June 1992)

[303] *ibid* 22

[304] *ibid* 23

[305] *ibid* 25 and reiterating the judgment of the court in *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59 and as discussed above

[306] Application No. 37374/05 (ECtHR, 14 July 2009). The reasoning in this case was approved of and followed in *Youth Initiative for Human Rights v. Serbia* Application Number 48135/06 (ECtHR, 25 September, 2013)

obstacles to gathering information'[307]. By the authorities placing an administrative interference upon the access to information, the Court held that there was an interference to the applicant's rights under Article 10. In this case, the role of the press was stated in similar terms to the previously examined cases, however, the court was willing to extend the protections beyond the traditional categorisation of the press.

> The function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can there be said to have been an essential element of informed public debate. The Court has repeatedly recognised civil society's important contribution to the discussion of public affairs...it may therefore be characterised, like the press, as a social watchdog[308].

In *Castells v. Spain*[309], the court considered the nature of acceptable criticism against a state:

> The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system, the actions or omissions of the Government must be subject to the scrutiny not only of the legislative and judicial authorities but also of the press and public opinion[310].

This gives further weight to the argument that the jurisprudence of the European Court of Human Rights on issues in the public interest and relating to those carrying out the functions of government is influenced by the provisions of the First Amendment[311]. For example, the constant referral by the Court to the social utility of speech finds resonance with the cases on the First Amendment discussed in the United States section. The Spanish Supreme Court held that the evidence Mr. Castells wished to use to prove his allegations was inadmissible, as the defence of truth 'could not be pleaded in respect of insults directed at the institutions of the nation'[312]. The court held that the arguments put forward by the Spanish Government on this point were not convincing. It further held that such interference was not necessary and there was a violation of Article 10.

In *Surek v. Turkey*[313] the court had to consider the prevention of terrorism and national

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[307] *ibid* 7

[308] *ibid*

[309] *Castells v. Spain* Application Number 11798/85 (ECtHR, 23 April 1992)

[310] ibid 19 Also see *Otegi Mondragon v. Spain* Application Number 2034/07 (ECtHR, 15 March 2011) and *Herri Batasuna v Spain* Application Number 25803/04(ECtHR June 30, 2009) and Case Commentary in the European Human Rights Law Review. 2009 (6) E.H.R.L.R 817

[311] For a further discussion on this issue see section 2.6.3

[312] *ibid* 20

[313] *Surek v. Turkey* Application No. 26682/95 (ECtHR, 8 July 1999)

security, as opposed to the applicant's right to freedom of expression. The Government argued that the letters published 'threatened territorial integrity and the unity of the nation, public order and national security'[314]. The court took the security issues in southeast Turkey into consideration in their judgment. At the time, separatist elements in the area 'had recourse to methods which rely on the use of violence'[315]. Furthermore, in addition to an active security situation in the south east of Turkey, the court took the nature and lenience of the penalty into consideration[316]. The court held that there was no breach of the provisions of Article 10 as the restrictions taken were proportionate to the aims pursued[317]. In *Feret v. Belgium*[318], the broad limits for those involved in politics regarding political speech rights were found not to cover statements leading to racial hatred. The Court did recognise that political speech protection was important for elected representatives but it was 'crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance'[319].

However, the dissenting judgments did reference the immediacy required for political speech to be restricted. Echoing similar US jurisprudence on the 'clear and present danger doctrine', the dissenting judges argued that the leaflets were 'in essence part of a sharp political debate during election time'[320]. Adding that 'in the domain of freedom of political debate, hate speech should only be considered as necessary in a democratic society in cases of direct incitement to violence or discriminatory acts'[321].

Vereinigung Bildender Künstler v. Austria[322] concerned the court's determination on artistic expression and public debate within the terms of Article 10. The assessment of the European Court of Human Rights in this instance focused on the terms of the injunction which interfered with freedom of expression as they were forbidden from exhibiting the painting elsewhere. The court stated that 'those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society'[323]. The court found that the depiction was satirical stating that satire is 'a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate'[324]. Therefore, in balancing all the rights cited in this case and the situation at hand, the court decided that

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[314] *ibid* 23
[315] ibid
[316] *ibid* 27
[317] *ibid* 27
[318] *Feret v. Belgium* Application No. 15615/07 (ECtHR, 16 July 2009)
[319] Dirk Voorhoof, 'European Court of Human Rights: Case of Féret v. Belgium' (IRIS Legal Observations of the European Audiovisual Observatory) < http://merlin.obs.coe.int/iris/2009/8/article1.en.html> accessed 30 April 2014
[320] *ibid*
[321] *ibid*
[322] *Vereinigung Bildender Künstler v. Austria* Application No. 68354/01 (ECtHR, 25 January 2007)
[323] *ibid* 7
[324] *ibid* 9

there was a violation of Article 10.

2.1.4.3 Right to Information under Article 10

In the Court's own publication on the provisions and case law of Article 10, the right to access information is one of the smaller sections to be considered[325]. In this publication four cases are referred to over a time period of 1987 – 1998 and none of the four established that a violation of a personal right to information under Article 10 had been proven[326]. The Commission[327] stated in *Bader*[328] that Article 10 did not 'guarantee individuals the right to be informed by public authorities about matters of public interest in a specific way'[329].

In *Sdruženi Jihočeské Matky v. Czech Republic*[330], the court was asked to consider a refusal to release environmental information regarding the construction of a nuclear power plant by the Czech Government. The court held that technical information regarding such a development was not in the public interest and the publication of such information could be regarded as a threat to national security[331]. The court did recognise that Article 10 may be applied where information in the public interest is denied by a National Authority. And, in *Társaság A Szabadságjogokért v Hungary*[332] the Court reiterated that it has 'consistently recognised that the public has a right to receive information of general interest'[333].

In the case of *Observer and Guardian v. The United Kingdom*[334], the issue before the European Court of Human Rights was the alleged violation of the applicants' freedom of expression and whether the injunction amounted to an unreasonable interference with their rights in a

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[325] Council of Europe, *Freedom of Expression in Europe: Case Law concerning Article 10 of the European Convention on Human Rights – Human Rights Files No. 18* (Council of Europe Publishing, 2007)

[326] *ibid*, 17 - 18 see the cases of *Leander v. Sweden*, judgment of 26 March 1987, Series A No. 116, *Gaskin v. the United Kingdom*, judgment of 7 July 1989, Series A No. 160, *Guerra and others v. Italy*, judgment of 19 February 1998, Reports 1998-I, *Roche v. the United Kingdom* [GC], No. 32555/96, judgment of 19 October 2005, Reports 2005-X.

[327] *ibid*, 18 as citied in the publications consideration of the cases of *Bader v. Austria* Application No. 26633/95 (ECtHR, 15 May 1996), *E. Nurminen and others v. Finland*, No. 27881/95 (ECtHR, 26 February 1999)

[328] *Bader v. Austria* Application No. 26633/95 (ECtHR, 15 May 1996)

[329] *ibid*, 76-77 the case related to matters ancillary to Austria's accession to the European Union. The applicants cases was deemed to be manifestly unfounded at Commission level so therefore the Commission did not expand on the issues relating to citizen information regarding political proceedings.

[330] *Sdruženi Jihočeské Matky v. Czech Republic'* Application No. 19101/03 (ECtHR, 10 July 2006) as the original judgment is only available in French see Dirk Voorhoof, 'European Court of Human Rights Case of *Sdruženi Jihočeské Matky v. Czech Republic'* (IRIS Legal Observations of the European Audiovisual Observatory) < http://merlin.obs.coe.int/iris/2006/9/article1.en.html> accessed 17 April 2013.

[331] *ibid*

[332] *Társaság A Szabadságjogokért v Hungary* Application No. 37374/05 (ECtHR, 14 July 2009)

[333] *ibid* 7

[334] *Observer and Guardian v. The United Kingdom* Application Number 13585/88 (ECtHR, 26 November 1991)

democratic society. This case releated to the publication of memoirs by an ex-MI5 officer and it came to be known colloquially as the Spycatcher case. The court had to balance right to freedom of expression against the restriction to preserve national security. On mentioning the general principles in this area, the court hastened to add the following statement on the role of the press in a democratic society

> Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog"[335].

In considering the imposition of the injunction, the court was careful to state that the Convention does not prohibit prior restraint[336] but such available remedies must be applied with 'careful scrutiny' as 'news is a perishable commodity' and any delay in publication 'may well deprive it of all its value and interest'[337]. The court assessed the totality of the complained injunction period in sections which correspond to the growing publication of the details restrained by the injunction placed on the applicants. The court contended that after the 30th July 1987, the injunction was no longer necessary yet it continued in force. The judgment placed a considerable amount of emphasis on the perishable nature of news. In this case, the Court stated that the contents of the book amounted to a 'matter of legitimate public concern'[338]. This right is still subject to the restrictions as contained under Article 10.2 and if the information requested falls under these grounds then the ECtHR may not be able to grant assistance.

The European Court of Human Rights has also considered a negative right to information, or a corollary right to restrict access to information[339]. In *Gillberg v. Sweden*[340] research data on private individuals was deemed to be subject to Article 10 conditions even though the applicant tried to assert a form of privilege akin to journalistic and legal privilege. The court held that as the material was held by a public institution that the provisions of the Article were applicable.

It is also of interest to note that the domestic application of Article 10 through the UK Human Rights Act was assessed by Lord Wilson, who though in dissent of the majority

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[335] *ibid* 26

[336] For a detailed consideration of prior restraint and English law, see section 2.6.1.1 in this section that details its application and effect on the United Kingdom free speech landscape.

[337] *ibid* 26

[338] *ibid* 31

[339] See section 2.6.1.3 for parallels to the Irish constitutional corollary information right

[340] *Gillberg v. Sweden* Application No. 41723/06 (ECtHR, 3 April 2012)

verdict did hold that there was a right to information emanating from Article 10 in the *Kennedy v. Charities Commission*[341] case.

2.1.4.4 Application to Ireland?

There are three key themes which become apparent from the discussion of the jurisprudence of the European Court of Human Rights on the developing theory of freedom of expression under Article 10. In its interpretation and application of Article 10, the Court's case-law has helped to draw a reasonably clear line between an acceptable interference with speech justifiable on the basis of an iterated legitimate aim, on the one hand, and, on the other, an unacceptable interference which goes beyond what is necessary in a democratic society.

The first theme is the position of government in free speech. It is quite clear that the Government must understand its position and be prepared to accept more criticism than would be allowed for a private citizen. The second theme related to the press. The judgments above make it clear that the court has a special protection for the role of the press as conveyers of information especially in relation to government policy. The court will protect this role as far as is permissible in a democratic society.

Balancing the proportionality of the restriction complained of is the aim which is pursued under the jurisprudence of the Convention. It does not, under any circumstances, create an absolute protection for freedom of expression. In fact, no system of law creates an absolute position with regard to free speech. Even with the construction of the First Amendment in the United States, no absolute right is created but a system of scrutiny is established.

The sentiments expressed in *Handyside* with regard to the equal protection of expression and information has not, until recently, become part of the interpretation of Article 40.6.1(i). The provisions of the European Convention on Human Rights was always regarded as a last ditch attempt of legal modernisation in Ireland. Since the application of the Convention to the Irish rights framework with the European Convention on Human Rights Act 2003, the provisions of Article 10 has developed as an interpreative tool to enhance the understanding of Article 40.6.1(i). However, it must also be remembered that the declaration of incompatibility form of redress under section 5 does not equate to the declaration of unconstitutionality which is available under judicial review of Irish legislation against the Constitution.

Speech which is critical of government is bestowed with a higher protection than other forms of speech. This is due to the importance of protected political speech as part of the pillars of democracy. This is illustrated by Brennan J.'s decision in *New York Times v. Sullivan*[342] which accepted that the government and public officials may come under strong

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[341] [2014] UKSC 20

[342] 'debate on public issues should be uninhibited, robust and wide open, and it may well

attack in the exercise of their duties but this was required for debate on public issues. Furthermore the judgment in *Handyside v. UK*[343] extends the protections of Article 10 to ideas that shock and disturb as freedom of expression and holds this value out as one of the main characteristics of a democratic society.

It should also be noted with th incorporation of the European Convention on Human Rights in the 2003 Act, that there are a number of limitations apart from the available remdies as demonstrated in the case of *McD v L*[344] where Fennelly J. stated that 'The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence'[345] and that 'the Act of 2003 does not provide an open-ended mechanism for our courts to outpace Strasbourg'[346] Also *O'Donnell v Dublin City Council*[347] considered the provisions of the 2003 Act on the issue of socio-economic rights, in particular in relation to housing and Traveller Accomodation. Laffoy J. held that in an a action based on the provisions of the 2003 Act, the only appropriate remedy was damages[348]. In the Supreme Court judgment, MacMenamin, echoing the judgment of Murray C.J. in *JMcD v. PL*, held as follows:

> The ECHR may only become part of domestic law through what he described as the "*narrow portal*" of Article 29.6 of the Constitution; and then only to the extent determined by the Oireachtas and subject to the Constitution itself. The Convention does not in itself provide a remedy at national level to victims whose rights may have been breached by reference to the provisions of the Convention[349]

Therefore for the purposes of this discussion, even though the ECHR may be a means of expanding the scope of Irish Constitutional rights, it cannot jump forward in the evolution of Article 10 in isolation from the developments in Strasbourg.

2.1.5 International Protections for Freedom of Expression

Freedom of expression and in particular freedom of political expression or political speech rights are recognised as part of the rights that forms part of the pillars of respect for human rights, free press and democracy. The UN Charter of Human Rights at Article 19[350]

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include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials' *New York Times v. Sullivan* 376 U.S. 254, 270. See further *Terminiello v. Chicago* 337 U.S. 1 (1949) and see *Mikovich v Lorain Journal* 497 US 1 (1990)

[343] Application no. 5493/72 (1976) ECtHR 5

[344] [2009] IESC 81

[345] *Mc D v. L* [2009] IESC 81 Judgment of Fennelly J. paragraph 104

[346] *Mc D v. L* [2009] IESC 81Judgment *of Fennelly J.* paragraph 105

[347] [2007] IEHC 204

[348] *O'Donnell v Dublin City Council* [2007] IEHC 204

[349] *O'Donnell v Dublin City Council* [2015] IESC 28 paragraph 78 citing Murray C.J. in *JMcD v. PL* [2010] 2 IR 199

[350]Everyone has the right to freedom of opinion and expression; this right includes freedom to

specifically protects the right to freedom of expression[351]. A similar, but more detailed right, is to be found in the International Covenant on Civil and Political Rights in Article 19[352] (hereinafter referred to as the ICCPR) whereby the freedom to hold opinions is protected and the right to receive information is stated but there is a restriction where national security and public order is at issue. This construction of the right to freedom of expression was once of the first global agreements to create a basic protection for speech. The Charter was passed in 1948 and was a direct reaction to the human rights violations which took place during the Second World War[353].

The ICCPR is one of the primary sources of International law regarding human rights. Within this Covenant, adopted in 1967, the right to freedom of expression is stated. The first optional protocol allows for a citizen to file a complaint against a state which has contravened their rights under this Covenant[354]. Both statements place a great emphasis on the ability of citizens to express their opinions without interference. Both the right to express opinions and the right to information are placed equal in the context of the drafting of the right.

There are parallels between the construction of these clauses and Article 10 of the European Convention on Human Rights. The UN Declaration does not consider the grounds of restraining expression. It could be regarded as a mission statement for the protection of expression and leaves the details to the ICCPR restatement of the essential nature of free expression to the democratic well being of a state and its citizens. It is within the ICCPR that we find a broad based statement of free expression with the conception of restrictions which may be placed on its exercise for the health of a democracy. Such statements are of low persuasive value as the international rights framework in Ireland only binds the Irish Government in its external activities with other states, not the relationship

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hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.< http://www.un.org/en/documents/udhr/index.shtml - a10> accessed 08/08/2011

[351] Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

[352] Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals. International Convention on Civil and Political Rights <http://www2.ohchr.org/english/law/ccpr.htm> Accessed 08 August 2011

[353] United Nations, *The Universal Declaration of Human Rights: History of the Document*, <http://www.un.org/en/documents/udhr/history.shtml> Accessed 14 April 2013

[354] Michael Hass, *International Human Rights* (Routledge, 2008) 100

between the Irish State and its citizens pursuant to the effect of Article 29.3. Yet the examination of such international statements is required to assess the level of protection granted by the state in comparison with the international best practice models.

1.10 Political Speech Rights and Democracy

The preceding section has set out the nature of politics in Ireland, and the evolution of both democracy and political speech rights in Ireland. It has also looked at the parallel development of political speech rights in the UK, US and through the jurisprudence of the European Court of Human Rights. This section will now look at the impact of the development of politics on the shaping and reason for political speech rights.

The right to freedom of expression has been shaped by the legal connotation of freedom of expression and its role in the promotion and preservation of democracy. The concept of the public interest has had a major impact on freedom of expression. The traditional reasoning for allowing for greater speech rights in connection with politics was stated by Brennan J. in the judgment in *New York Times v. Sullivan*[355] and later adapted by Barendt[356]. The categorisation was, in a way, a filter for the vast amount of philosophical literature available for the interpretation of speech rights and democracy. A number of arguments both jurisprudential and philosophical justifying free speech revolve around four main areas: the impact of speech in democracy, citizen participation in a democracy, the role of public reasoning and truth in government[357]. The impact of philosophy on the balancing of political speech rights stems from the role of a citizen in representative democracy such as Ireland.

Democracy is government by the people. This incorporates the ability of people to inform and discuss policy. Therefore freedom of expression is the primary human right for the propagation and maintenance of a democratic state. Two main themes emerge from the literature on free speech and democracy: political equality, the promotion of legitimate government and the public interest. These two themes will be set out as the framework for examining the social utlity of political speech rights[358].

One of the core considerations of political speech is the restriction of such speech. Any restriction placed on such speech should be for transparent, consistent and legitimate grounds. The contention of this thesis is that political speech and its interpretation are essential to the propagation and protection of democracy. Therefore any restriction placed on political speech undermines the utility of such speech, thereby damaging democracy.

The right to freedom of expression in political matters is crucial, not only in terms of traditional speech critical of the government, but also in the broadcast, receipt, and

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[355] 376 US 254

[356] Barendt *op. cit.* 154

[357] Barendt *op. cit.* 6

[358] See sections 2.7.1 and 2.7.2 for the development of the themes and section 6.1 and 6.2 for the analysis of themes in relation to both the direct and indirect restirctions.

assimilation of such information in a contemporary society. This in turn has changed expectations of the citizen and therefore the current framework of the four main concerns of political speech borrowed by Barendt from the US jurisprudence, and set out above[359]. In particular this framework misses the essential points of speech as a foundation of democracy where the right acts as a means of accountability, oversight and critique. Therefore, although the framework as set out by Barendt is useful for a purely philosophical framework. Nevertheless, for the more focussed argument regarding policy access, it is advantageous to combine this framework with the concerns of accountability, oversight and critique.

The balance of political speech rights should be in favour of the electorate or citizens. Without the right to challenge, a government that is democratic may turn tyrannical. Therefore the prevention of tyranny should be the most pressing concern of a democracy and of the constitutional instruments upon which it is founded. As stated by Brennan J. in *New York Times v. Sullivan*

> ...we consider this case against the background of a profound national commitment to the principle that debate on public issue should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials...[360]

Therefore the expression of political ideas is necessary for the effective running of a democracy. But any criticism of government policy can be seen as an attempt to undermine the state as it is questioning the rationale for the state taking a particular course of action. Political speech is held in an elevated position above all other forms of speech. The general argument is that a free press is essential to the workings of a democratic society. The Report of the Constitutional Law Review group cited the following extract from the German *Lüth*[361] case with approval:

> The basic right to freedom of opinion is the most immediate expression of the human personality in society and, as such, is one of the noblest of human rights... it is absolutely basic to a liberal-democratic order because it alone makes possible the constant intellectual exchange and the contest among opinions that form the lifeblood of such an order; it is the matrix the indispensable condition of nearly every other form of freedom.[362]

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[359] *ibid*

[360] 376 US 254, 270 (1964) as discussed in Barendt p. 154 *op.cit.* 18

[361] *Lüth* 7 Berf GE 198 (157) as quoted in the Constitutional Law Reform Group Report 1997. Also see Jacob Bomhoff, Lüth's '50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing' (2008) 90 (2) German Law Journal 121

[362] Constitution Review Group, The Report of the Constitutional Law Review Group (Government Publications Office, 1996)

Political discourse has a special status as free political speech encourages a well-informed politically sophisticated electorate to be able to challenge and engage with government. This is considered by Barendt to be the most accessible of the main four theories[363] and is best underlined by the judgment Brandeis J. in *Whitney v. California*[364].

Restrictions on speech affect the flow of policy information to the citizens. This is very important in the Irish context due to the application of Article 6.1 and Article 40.6.1 (i). The Irish Constitution specifically mentions the role of the citizen in the debate of policy taking the reading of Article 40.6.1 (i), which expressly recognises the discussion of government policy. This express formulation is not present in the phrasing of the European Convention on Human Rights. Therefore Ireland is in a unique position for the study of the constitutional position of political speech, especially with the conjunction of access to policy information. The harmonious interpretation of Article 6.1 and Article 40.6.1 (i) of the Constitution, which is necessary to give full and proper effect to the philosophy and jurisprudence of greater citizen engagement, has only begun to evolve[365]. For the early part of the interpretation of Article 40.6.1, the placement of the particular speech right was the primary question facing the court. The incorporation of citizen rights and democracy has only started to frame the interpretation of that Article[366].

The following section will set out the two main themes, which will be used to analyse the content and class restrictions in section two. The class and content restrictions will be set out in the following section and the measurement of these restrictions against the core themes will be conducted later in section three.

2.1.6 The Public Interest in Political Debate

The public interest has been addressed mainly in the contexts of defamation and breach of confidence. The concept of the public interest has often been aligned with public policy, but there is a significant differentiation between the two concepts, which will be examined towards the end of this section.

The political speech guarantee in Article 40.6.1(i) which directly references the 'rightful liberty of expression' in terms of the criticism of government policy information would arguably infer the need to access such policy information in order to criticise – in a constructive and worthwhile manner – the decisions and policy platforms upon which such decisions are based. In *Irish Times v. Ireland*[367] the Supreme Court not only clarified that

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[363] Barendt *op. cit.* 6

[364] 274 US 357, 375 – 8 (1927) as discussed in Barendt *op. cit.* 18 and see below.

[365] See the discussion in section 2.7.3.2 in particular the impact of *Doherty v. Referendum Commission* [2012] IEHC 211

[366] See section 2.6.1.1 regarding the interpretation of speech rights in Ireland especially the discussion of Barrington J in *Murphy* and Hogan J in *Doherty v. Referendum Commission* [2012] IEHC 211

[367] [1998] 1 IR 359, [1998] 2 ILRM 161

Article 40.6.1 (i) protects the dissemination of information as well as the expression of convictions but also seemed to insist that there must be some public interest in the dissemination of such information[368]. This point was made very clear by Barrington J. in acknowledging that the right allowed the media to report the news and, importantly, to comment upon the news.

The values and commitments which are encapsulated in the constitutional framework with regard to political speech rights reflect the need to expose citizens to a wide variety of views and to provide them with enough information to hold the government to account. This is one of the main jurisprudential arguments justifying and underpinning higher protection for political expression which serves democracy without endangering national security. Hence, Barendt aruges that, in the interests of maintaining a healthy democracy, almost all aspects of freedom of expression should be protected, since any form of temporary regulation may have many unwelcome consequences, including political unrest and the undermining of the acceptability of other laws.[369] The current climate is symptomatic of the emerging tension between citizen and government. People now feel the need to be engaged in policy not just the subject of policy; to be part of decisions belonging to them not just supplicant. This need is frustrated by an archaic system of information access and gathering which is incompatible with their ability to access information in other areas of their lives.

Turning towards the United States, Meiklejohn argues that the primary purpose of the first amendment is to protect the right of all citizens to understand political issues in order to participate effectively in a working democracy. In a judgment formally concurring with the majority, Brandeis J., in *Whitney v. California*[370] illustrated the philosophical background of the First Amendment in terms akin to the argument of Mill, though very much glossed with notions of democratic participation:

> ...freedom to think as you will and to speak as you thin are indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile;...that public discussion is a political duty; and that this should be a fundamental principle of the America government[371]. Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of

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[368] Restrictions discussed in *Aughney v. Ireland* [1989] ILRM 87, *Castells v. Spain* (1992) EHRR 445, *Commonwealth of Australia v. John Fairfax & Sons Ltd* (1980) 147 CLR 39 *Cf.* Hogan & Whyte, *op. cit.* 1727

[369] Eric Barendt, Freedom of Expression, *op cit.* 165

[370] (1927) 274 U. S. 357

[371] (1927) 274 U. S. 357 at 375

> punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law - the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed[372].

This idea was also used by Learned Hand J. in *United States v. Associated Press*[373]

> The First Amendment presupposes that right conclusions are more likely to gather out of a multitude of tongues, than through any kind or authoritative selection. To many, this is, and always will be, follow; but we have staked upon it our all[374].

The effect of self-censorship in connection with the discussion of matter of public interest due to the fear of litigation is known as a chilling effect. This issue first received judicial scrutiny in the case of *New York Times v. Sullivan*[375]. As stated by Brennan J. in his defence of unfettered debate in the public interest:

> Erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive'...the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive... [376]

Hence, the general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by decisions of the United States Supreme Court. The constitutional safeguard has been well discussed in many cases such as *Roth*[377], *Stromberg*[378], and *Bridges*[379]. The courts should be less prepared to countenance abridgments

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[372] *ibid* 375-376

[373] *United States v. Associated Press* (1943) 52 F. Supp. 362

[374] *ibid* 372

[375] (1964) 376 US 225

[376] *ibid* 278 – 9. This point is also echoed in the case of *Mahon v. Keena* [2010] 1 IR 336 which dealt with journalistic protection in the public interest.

[377] The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States* 354 U.S. 476, 484.

[378] 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of

of political and social discussion than restrictions on other forms of expression. In other words, the courts should be less in favour of restricting speech when it relates to political matters as opposed to other matters[380].

At the heart of the debate on the protection of politial speech is the concern to protect speech that is plainly in the public interest. Of course, so as not to chill debate, the range of protected speech is very broadly conceived; but, nevertheless, at its core sits the notion of the public interest. The Oxford Dictionary of Politics defines public interest in their capacity as members of the public and the aggregation of the individual interest of the persons affected by a policy or action under consideration[381]. The public interest, as a legal concept for protecting freedom of expression, has been addressed mainly in the contexts of defamation and breach of confidence.

Defamation has been locked in a perpetual struggle with the public interest. On the one hand, the public interest should rest with the maintenance of a persons reputation. Yet, on the other hand, there is also a public interest in exposing iniquity in a persons conduct. Due to this clash between the public interest and the central tenets of defamation, this has been the most fruitful source of pronouncements on the nature and use of the public interest to justify freedom of expression especially on political matters. The central idea is that the free flow of information in the public interest is more important than the damage to a person's reputation. A similar view is taken in privacy cases[382].

The idea of the public interest is gradually pervading the legislative realm as well. Legislation such as Freedom of Information Acts 1997 – 2014 and the Protected Disclosures Act 2014use the nature of the public interest as their *rasion d'étre*, adding to the notion of the public interest being a legitimate ground to protect freedom of expression. Reform of defamation by means of the Defamation Act 2009 has allowed for a greater liberalisation of media regulations that allow for greater investigation of the conduct of a public individual[383]. Jurisdictions differ on the application of the public interest. On the one hand, Ireland and the United Kingdom have focused on balancing the public interest in publishing. On the other hand, US law bases its equivalent protection on the role of the individual. After *New*

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our constitutional system.' *Stromberg v. California* 283 U.S. 359, 369.

[379] '[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions' *Bridges v. California*, 314 U.S. 252, 270

[380] For example *Brandenburg v Ohio* 395 UD 444 (1969) regarding advocacy of political violence); *Texas v Johnson* 491 US 387 (1989) regarding flag buring as political protest and the sequel *US v Eichman* 496 US 310 (1990); and finally *Citizens United v. Federal Elections Commission* 558 U.S. ___ (2010) (political advertising).

[381] Oxford Concise Dictionary of Politics 441-442

[382] In Ireland, the best defamation example is probably O'Caoimh J's judgment in *Hunter v Duckworth* [2003] IEHC 8, and the best privacy example is probably Clarke J's judgment in the Leas Cross case *Cogley v RTÉ* [2005] 2 ILRM 529

[383] Such as the defence of Fair and Reasonable Protection of a Matter in the Public Interest as contained in section 26 Defamation Act 2009

York Times v. Sullivan[384], the criterion employed is based on the standing of the indvidual in the public eye; this is the public figure doctrine. it could be argued that, after *Lingens*, the european convention approach amounts to a *de facto* public figure doctrine.

The notion and concept of the public interest are notoriously hard to define, and legislation dealing with the public interest traditionally shies away from creation of an express definition. the fear from the perspective of the legislature is that the creation of a closed list of concerns which seeks to enumerate and define the public interest, may unwittingly exclude legitimate interests and create situations where the letter of the definitio may in practice undermine the spirit of the legislation. therefore, we are left to pick out the broad concept from relevant case law. hence, although statutory intervention has developed the law in some respects, nevertheless in many instances the courts have been ahead of the legislature in liberalising the public interest in speech.–Lord Denning MR in *London Artists v. Littler*[385] made the first broad statement on the role of the public interest and speech.

> Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment[386].

The incorporation of the European Convention on Human Rights into English law jurisdiction by virtue of the Human Rights Act 1998 was to have a liberalising effect on the law of defamation. However, the courts in england were willing to ground integrate European Convention on Human rRghts norms into the English common law system even before the Act was promulgated into law. In *Reynolds v. Sunday Times Newspapers*[387], where the House of Lords was willing to read a public interest defence into English domestic law[388]. The principle was further refined in *Jameel and Another v Wall Street Journal Europe Sprl* [389]. The first Irish case to acknowledge the existence of the public interest in the release of information was *Leech v. Independent Newspapers (Ireland) Ltd* [390]. Here Chartlon J. had to decide on the issue of a public interest defence in line with the established defence of qualified privilege. The principles were adapted from the United Kingdom case of *Reynolds v. Sunday Times Newspapers*[391] where Chartlon J. summed up the *Reynolds* privilege as follows

> The public have an interest in many matters, as opposed merely to being interested in matters. Being interested in matters, it seems to me, would refer

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[384] 376 US 254 (1964

[385] *London Artists v. Littler* [1969] 2 QB 375

[386] *ibid*, 391

[387] *Reynolds v. Sunday Times Newspapers* [2002] 2 AC 127

[388] See Section 2.6.2.1

[389] *Jameel and Another v Wall Street Journal Europe Sprl* [2005] QB 904, [2006] 4 All ER 1279

[390] *Leech v. Independent Newspapers (Ireland) Ltd* [2007] IEHC 223

[391] [2002] 2 AC 127

> to matters, which are merely titillating, salacious, or gossipy. Matters which are of public interest, on the other hand, have to be matters which affect the public in terms of the governance of the country, their safety, their security, and their right to judge their public representatives fairly on the basis of real information[392].

In the opinion of Charlton J. the test of qualified privilege had been swept away by the development of a public interest test citing the headnote of *Jameel*[393] as authority. Adapting the ten–step test of *Reynolds* to Irish conditions; Chartlon J. held that regard must be had to the establishment of the public interest in the story, the use of fair and accurate reporting and the practical reality of reporting.

This defence, subsequently incorporated in the Defamation Act 2009, applies to a statement published in good faith, in the course of the discussion of a subject of public interest[394]. The manner and extent of the publication did not exceed what was reasonably sufficient and it was fair and reasonable to publish the statement. The court will take a number of factors into account in the application of the public interest defence[395].

Furthermore, the applicants argued that the procedural rules regarding the award of an injunction were inequitable in the situation. They argued that

> in a case of this kind, those principles were unduly advantageous to the plaintiff since he had to establish only that he had an arguable case and that the balance of convenience lay in favour of injunctive relief; in their submission, a stricter test of necessity had to be applied when it was a question of restricting publication by the press on a matter of considerable public interest[396].

There is logic to this assertion. The plaintiff in such an application has only to show that there is an arguable case. There is no consideration taken as to the nature and timeliness of the information[397]. Unfortunately, the matter is now governed by s 33 of the Defamation Act 2009, from which such considerations are also entirely absent.

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[392] [2007] IEHC 223

[393] [2005] QB 904, [2006] 4 All ER 1279

[394] The defence of fair and reasonable publication on a matter of public interest is found in s.26 Defamation Act 2009

[395] Such as the link between the statement and the performance of public duties, the seriousness of allegations, the context and content including language used, the distinction drawn between suspicions, allegations and facts, nature of the circumstances involved, reference to codes of conduct, representations of the claimant's perspective, attempts made to reflect claimant's side and attempts and means used to verify allegations

[396] *ibid* 28

[397] However, the time issues have been taken into account in cases such as *Mahon v. Post Publications* [2007] IESC 15

The influence of the Convention on the law in the United Kingdom cannot be underestimated. Since the passage of the Human Rights Act 1998, the provisions of Article 10 has become the standard protection for freedom of expression. Unlike the United States, article 10 contains restrictions on the right and the courts must therefore undertake a balancing act in speech cases in general, and in defamation cases in particular. Nevertheless, the applciation of article 10 has made the law in this area clearer than the previous common law situation. The focus is on the expansion of qualified privilege as opposed to an outright liberalisation of free speech. The *Reynolds* decision was prior to the incorporation of the European Convention on Human Rights into domestic United Kingdom law. The decision anticipated the changes to the law, and they were confirmed and refined in the post-incorporation case of *Jameel*. The *Reynolds* defence of fair and reasonable publication and the *Jameel* doctrine of responsible journalism on a matters of public interest do not yet embrace the United States public figure doctrine, though they do reflect the direct impact of ECHR protections. The analysis in *Reynolds* and *Jameel* focussed on the role of the press to act as bloodhounds and watchdogs in relation to public and political life . The arguments for freedom of expression at issue here stem mainly from democracy and any curtailment on this right affects the position of the citizen. The liberalisation of defamation has stemmed from a growing perception of the press as an institution capable of fighting governmental overreach and corruption.

The common law duty to preserve confidential information has traditionally focused on the areas of commercial secrecy in both employment and non-employment situations[398]. The extension to cover personal private information[399], now generating a right to privacy[400] is a relatively recent development. Moreover, the protection of confidential information in government policy information context was a largely unlitigated area until the last third of the twentieth century, with most cases before that resorting to executive privilege actions or the release of information under freedom of information regimes. But as governments have sought to assert their interests in keeping information confidential, the courts have balanced this against a public interest in access to and disclosure of information. There are more overwhelming reasons for the jurisprudence in this area to allow for access to information than in the traditional areas of commercial sensitivity and personal information.

Nevertheless, even in those contexts, the public interest in the disclosure of the information plays an important analytical role. The idea of the general population receiving information in the public interest in a situation where there is a public policy requirement for keeping such information confidential was considered in the case of *National Irish Bank Limited and National Irish Bank Financial Services Limited v. Radio Telefís Éireann*[401]. Here the defendant

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[398] *House of Spring Gardens v Point Blank* [1984] IR 611

[399] *Argyll v Argyll* [1967] CH 302

[400] *Douglas v. Hello* [2005] EWCA Civ 595, *Campbell v. MGN* [2004] UKHL 22, *Google v. Vidal-Hall* [2015] EWCA Civ 311

[401] *National Irish Bank Limited and National Irish Bank Financial Services Limited v. Radio Telefís*

broadcasters wished to publicise the names of persons who held 'bogus' non-resident accounts for the purposes of evading Deposit Retention Tax that would normally be levied on deposit accounts belonging to Irish resident account holders. The evasion scheme meant that such Irish resident account holders were encourage to state their address as outside of Ireland to evade payment of this tax[402]. The Court found that the release of this confidential information was in in the public interest. Moreover, where, as here, the plaintiffs say that they are entitled to prevent the use by the defendant of confidential information, another legal principle, sometimes called the 'iniquity' defence is relevant[403].

> The authorities to which I have already referred and which, I am satisfied, should be followed in this jurisdiction, make it clear that where someone is in possession of confidential information establishing that serious misconduct has taken place or is contemplated, the courts should not prevent disclosure to persons who have a proper interest in receiving information.
>
> Under the provisions of the English freedom of information legislation, the balancing of the public information and the public interest is mentioned. 'Where the information is subject to a qualified exemption, the duty to disclose does not apply if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'[404].

The modern English authorities have proceeded on the basis that such a defence, based as it is on the public interest in the prevention of wrongdoing, extends not merely to cases of criminal or fraudulent misconduct, but also to other wrongs or misdeeds, whether already committed or in contemplation. This was so held by the Court of Appeal in *Initial Services*

Éireann [1998] 2 IR 456

[402] The technicalities and legalities of the scheme itself are discussed in the judgment of Keane J at [1998] 2 456 at 480

[403] The judgment in this case relied on *Annesley v. Earl of Anglesea* [1743] 17 State Trials 1139, 1223 – 1246 'no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare.' It also relied on Wood V.C. in *Gartside v. Outram* [1857] 26 L.J. Ch. 113, 114 'But there are exceptions to this confidence, or perhaps, rather only nominally, and not really exceptions. The true doctrine is, that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention of your part: such a confidence cannot exist.'

[404] Section 2(2)(b) Freedom of Information Act 2000

The Attorney General's veto on disclosure of the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions Information Commissioner's Report to Parliament, <http://www.official-documents.gov.uk/document/hc1012/hc18/1860/1860.pdf> Accessed 12 September 2012

Ltd. v. Putterill[405]. A series of cases in that jurisdiction also established that the defence of "public interest" was the preferred description of the iniquity principle where public safety was in jeopardy[406]. The English authorities indicated that the appropriate approach was for the courts to engage in a balancing exercise, described as follows by Lord Goff in *Attorney General. v. Guardian Newspapers (No. 2)*[407]

> ...although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure[408].

That approach has attracted some criticism in Australia. In *S.K. & F. Ltd. v. Department of Community Services*[409], Gummow J. referred to the above approach and stated that balancing the public interest should not be made with reference to political or social forces. Those misgivings may have been prompted by a wide ranging formulation of the principle by Denning M.R. in *Woodward v. Hutchins*[410], where he defined it as 'a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth ... the public should not be misled.'[411]That approach was developed further by Sir John Donaldson M.R. in *Francome v. Mirror Group*[412], where the plaintiff sought to restrain the publication of information as it was suggested to be a breach of the Jockey Club rules. The Master of the Rolls that that in this case

> "The media, to use a term which comprises not only the newspapers, but also television and radio, are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy, and in campaigning for reform and propagating the views of minorities, they perform an invaluable function. However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest. Usually these interests march hand in hand, but not always. In the instant case, pending a trial, it is impossible to

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[405] *Initial Services Ltd. v. Putterill* [1968] 1 Q.B. 296

[406] *Cf. Hubbard v. Vosper* [1972] 2 Q.B. 84, *Beloff v. Pressdram Ltd.* [1973] 1 All E.R. 241; *Lion Laboratories Ltd. v. Evans* [1985] Q.B. 526; and *Schering Chemicals Ltd. v. Falkman* [1982] Q.B. 1.

[407] *Attorney General. v. Guardian Newspapers (No. 2)* [1990] 1 AC 109

[408] [1990] 1 A.C. 109, 482

[409] *S.K. & F. Ltd. v. Department of Community Services* [1990] F.S.R. 617

[410] *Woodward v. Hutchins* [1977] 1 W.L.R. 760

[411] [1977] 1 W.L.R. 760, 764

[412] *Francome v. Mirror Group* [1984] 1 W.L.R. 892

> see what public interest would be served by publishing the contents of the tape which would not equally be served by giving them to the police or to the Jockey Club. Any wider publication could only serve the interests of the Daily Mirror[413].

Public policy is a rather tenuous concept, subject to the change in societal and political change, and has had a chequered relationship with the law. For example, in *Enderby Town Football Club Ltd v The Football Association Ltd and another*[414], Denning MR. stated that:

> All these are cases where the judges have decided, avowedly or not, according to what is best for the public good. I know that over 300 years ago Hobart CJ said that 'public policy is an unruly horse'. It has often been repeated since. So unruly is the horse, it is said, that no judge should ever try to mount it, lest it run away with him. I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice[415].

Worth a sentence or two drawing your public interest consideraitons together, and perhaps worth a sentence going further, giving it constitutional status in article 40.6.1(i)? After all, the education of public opinion is a grave matter of the common good, that reference to the comon good could easily be infused with public interest notions, or common law and equitable and statutory notionsof the public interest could be reinforced by that reference to the common good?

2.1.7 Political Equality

Political equality, in terms of political science, holds that it is 'a basic goal of democracy, and the degree of political equality is therefore an important indicator of democratic quality'[416]. Freedom of expression is an important tool in discovering truth[417]. A government can be confident in its policies when the populous is given the full information in order to test the policies in the court of public opinion. In the United States framework of speech regulation, Post explains the idea of political equality in the following statement:

> The equality of status of ideas within public discourse follows directly from the equality of political status of citizens who attempt to make the government responsive to their views [418].

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[413] *ibid* 898

[414] *Enderby Town Football Club Ltd v The Football Association Ltd and another* [1971] 1 All ER 215

[415] *ibid* 219

[416] Arend Lijphard, *Thinking About Democracy: Power Sharing and Majority Rule in Theory and in Practice* (Routledge, 2008)

[417] *Cf.* 'Of Liberty of Though and Discussion' in John Stuart Mill, *On Liberty and Other Essays,* (Oxford University Press, Oxford, 1991)

[418] Robert Post, 'Participatory Democracy and Free Speech', Vol. 97:3 Virginia Law Review, 477,

It is arguable that these ideas of Post find resonsance in judgment of Denham J. in *McKenna v. An Taoiseach (No. 2)*[419] as follows:

> The Constitution envisaged a government where in there is a separation of power between the legislative, executive and judicial organs of government. They operate a system of checks and balances on each other. All three are subject to the Constitution, which recognises that the fundamental power rests in the people. The Constitution envisages a true democracy: the rule of the People[420].

Both excerpts talk of the role of the people juxtaposed with the role of the Government. A true democracy as described by Denham J. is one where the government is responsive to the view of the citizen as stated by Post.

This idea of political equality between the speech of the State and the citizen was to be referred to again in the referendum cases[421]. A succinct formulation of the role of the citizen in the regulation of legitimate governance combined with political equality was proffered as follows by Hogan J. in *Doherty v. Referendum Commission*[422].

> The Constitution trusts in the power of argument and debate and reasoned discussion and, again, the informed citizenry of which I spoke, who will discharge their civic responsibility to inform themselves in their own interests, that of their neighbours and that of their country[423].

First, in *McKenna*, Hamilton CJ held:

> As the guardians of the Constitution and in taking a direct role in Government either by amending the Constitution or by refusing to amend, the people by virtue of the democratic nature of the State enshrined in the Constitution are entitled to be permitted to reach their decision free from unauthorised interference by any of the organs of State that they, the People, have created by the enactment of the Constitution.

Furthermore, Hamilton CJ and Barrington and Denham JJ all made sweeping references to

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484-485

[419] *McKenna v. An Taoiseach (No.2)* [1995] 2 IR 10

[420] *ibid* 51

[421] See 3.2.3 for a full examination of the free speech referendum cases.

[422] *Doherty v. Referendum Commission* [2012] IEHC 211

[423] *ibid* paragraph 24

democracy and sovereignty *Hanafin v Minister for the Environment*[424] and *Coughlan v Broadcasting Complaints Commission*[425]. Moreover, Denham J's approach in *Hanafin* was adopted by Herbert J in *Redmond v Minister for the Environment*[426]. And Denham CJ herself reinforced this approach *McCrystal v Minister for Children and Youth Affairs*[427], where she expressly approved of the citizens' "right to a democratic process ... protected by the *McKenna* principles". Indeed, all four judgments in *McCrystal* quoted extensively from *McKenna*, and approved the understanding of the central role of citizens in democratic decision-making which emerges from the judgments of the majority in that latter case.

Second, in *McKenna*, all four members of the majority held that the constitutional right at issue, which was breached by the government's partisan political advertising, was the citizen's right to an equal franchise[428]. In *O'Donovan v Attorney General*[429], Budd J held that a democratic state is one where "all citizens have equal political rights", where "the notion of equality in political matters is to be maintained" and where "equality of voting power and representation" is to be observed[430].Hence, in *McKenna*, Denham J expressly cited *O'Donovan* in support of the proposition that

> The citizen has the right to be treated equally. This includes the concept that in the democratic process, including referenda, neither side of an issue will be favoured, treated unequally, by the government.

And this was echoed in the judgments of the other three members of the majority. For example, Hamilton CJ held that intentional partisan government expenditure "infringes the concept of equality which is fundamental to the democratic nature of the State". Blayney J held that "people are entitled to be treated equally" and he found that "the Government ha[d] not held the scales equally" in the referendum campaign. For O'Flaherty J, partisan government expenditure "breaches the equality rights of the citizen enshrined in the

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[424] [1996] 2 IR 321, [1996] 2 ILRM 61 [1996] IESC 6 (12 June 1996)

[425] [2000] 3 IR 1, [2000] IESC 44 (26 January 2000)

[426] [2006] 3 IR 1, [2004] IEHC 24 (13 February 2004) [63]

[427] [2012] IESC 53, first in the initial *per curiam* (08 November 2012) and then in the later reasons for judgment (11 December 2012)

[428] See further Oran Doyle, Constitutional Equality Law, (Thomson Roundhall, 2004) 173 – 176 for a broader examination of equality in the political process

[429] [1961] IR 114

[430] It is definitely worth noting that the decision in *O'Donovan* has been approved and followed on many subsequent occasions, both before and after *McKenna* (eg, *In re Art 26 of the Constitution and the Electoral (Amendment) Bill, 1961* [1961] 1 IR 169; *McMahon v Attorney General* [1972] IR 69; *O'Malley v An Taoiseach* [1990] ILRM 461; *Redmond v Minister for the Environment* [2001] 4 IR 61, [2001] IEHC 128 (31 July 2001); *Kelly v Minister for the Environment* [2002] IEHC 38 (16 May 2002); [2002] 4 IR 191, [2003] 2 ILRM 81, [2002] IESC 73 (29 November 2002); *King v Minister for the Environment* [2003] IEHC 119 (19 December 2003); *Murphy v Minister For Environment* [2008] 3 IR 438, [2007] IEHC 185 (07 June 2007); *Quigley v Minister for Education* [2012] IEHC 414 (14 February 2012); *Doherty v The Referendum Commission* [2012] IEHC 211 (06 June 2012)

Constitution as well as having the effect of putting the voting rights of one class of citizen ... above those of another class of citizen". These sentiments are all approved in *McCrytal*. For example, Denham CJ approved the line from Hamilton CJ's judgment in *McKenna* quoted earlier in this paragraph and expressly approved a "right to equality" in this context; Fennelly J held that the basic principle underlying *McKenna* "is that of equal treatment" of voters; and O'Donnell J held that *McKenna* 'involved the application of broad principles derived from the structure and underlying theory of the Constitution, indeed some of its most fundamental concepts such as fairness and equality'[431].

However, one issue needs to be resolved with the role of the citizen and their part of legitimate governance. The nature of the citizen in terms of Article 6.1 has to be defined. It could be argued that this article promotes the citizen as a member of the state or on the other hand, the citizen may relate to a collective of rational agents. Either way, the citizen can be looked on as an individual even though one of many possessing a unique and individual contribution to the construction of democracy. The idea of the individual's role in democracy was also echoed in Carolan, where through the interpretation of Kantian theory on the role of the citizen in a democracy, the act of voting was only a means of gathering a preference rather than a moral act of the greater nature of democracy[432]. Therefore this reinforces the point regarding the overall contribution to democracy which should be made by citizens rather than a periodic engagment with elections as a mere nod to democratic participation.

Another issue that must be addressed with the use of political equality as a means to regulate the State is the theory of the marketplace of ideas. Even though these arguments would appear to tread into the remit of the pursuit of truth, it is still felt that they have an application to equality. The reason is that political equality requires access to truth as much as a right to disseminate information. It is a variant on an idea originally put forward by Mill, and it has been shaped by the judgment of Holmes J. in *Abrams v. U.S.* as follows

> But when men have realized that the time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get

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[431] Arguably, considering the interpretation of the concerns of political equality in the interpretation of the First Amendment in the US which were accepted in *Buckley v Valeo* 424 U.S. 1 (1976) but rejected in *Citizens United v. Federal Elections Commission* 558 U.S. ___ (2010) that the *McKenna (No. 2)* [1995] 2 IR 10 to *McCrystal v. Minister for Children and Youth Affairs* [2012] IESC 53 approval of the concept means that Irish law is in a much better position than US law is in this respect.

[432] Eoin Carolan, The New Separation of Powers: A Theory for the Modern State (Oxford University Press, 2009) 98 also see Eoin Carolan 'Towards a varifocal model of the separation of powers' http://www.jus.uio.no/english/research/news-and-events/events/conferences/ 2014/wccl-cmdc/wccl/papers/ws15/w15-carolan.pdf> Accessed 27 June 2014

> itself accepted in the competition of the marker, and that the truth is the only ground upon which their wishes safely can be carried out[433].

The marketplace of ideas theory is one of the reasons for judicial mistrust of any legislative measures to intervene in the freedom of expression. All marketplaces are subject to regulation and why should the marketplace of ideas not be free from similar regulation. Weinstein argues that the marketplace of ideas principle is not a core idea of the First Amendment, rather the idea of speech equality is more relevant.

> Aside from democracy, another popular candidate for a fundamental norm underlying the American free speech principle is the search for knowledge and "truth" in the marketplace of ideas. Although this rationale has long informed American free speech doctrine, it is surely not a core value. One serious problem with the marketplace-of-ideas rational is that the premise that completely unregulated market of idea will lead to discovery of the truth[434].

This would have ramifications for the regulation of broadcasting regulations on political speech[435]. Political equality, if expanded, could result in the prohibiting of such restrictions as they privilege the speech of the State over and above the other actors in democracy. Even though they may be involved in activities that may place the authority of the State in jeopardy, their contribution to the policies of the State is still as important as any other stakeholder in democracy. As stated by Barendt

> The peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and lively impression of true, produced by its collision with error[436].

There is an argument to be made that creating a black market of ideas, which are unfavourable to the government, creates an environment for such ideas to fester creating

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[433] 250 US 616, 630 – 1 (1919) as discussed in Barendt, *Freedom of Speech, op. cit.* 11

[434] James Weinstein, 'Participatory Democracy as the Central Value of an American Free Speech Doctrine, Vol. 97:3 *Virginia Law Review Journal*, 491, 502. This argument could also be used in Ireland as a means of regulating speech and can be used as a counterpoint to the free speech and funding cases as in *Buckley v. Valeo* 424 US 1 (1976) and *Citizens United v. Federal Elections Commission* No. 08-205 (2010) and the later case of *McCutcheon*. See further. Jennifer Kavanagh, 'Advocacy Groups, Political Speech and Offshore Money' (Human Rights in Ireland, 25 January 2013) http://humanrights.ie/civil-liberties/advocacy-groups-political-speech-and-offshore-money/ accessed 23 June 2013

[435] Especially the old common law crime of seditious libel and the Section 31 orders that were used in the State during the period of the Troubles. This will be discussed in section 3.1.2

[436] John Stuart Mill, *op cit,* 21

suspicion and tension within the state. This therefore creates a situation which may pose a national security risk by rejecting the ideas and expression that were deemed a clear and present danger to the state in the first place.

This feature emerges clearly Barendt's claim that it would be wrong to prohibit even false speech, because in the absence of opposition the ability to defend true and valuable beliefs will decline[437]. This may be correct, but a government worried that inflammatory speech may provoke disorder is surely entitled to elevate immediate public order considerations over the long – term intellectual development of the man on the Clapham omnibus[438]. In addition with this, the truth is not to be equated with certainty and the fact that there are better and worse arguments in political and moral discourse are enough to substantiate Mill's conclusion that the prohibition of such discussion by the government is wrong on the truth argument[439]. Even though these arguments reference specifically in relation to the persuit of truth, such truth cannot be persued unless there is political equality references as part of the regulation of speech.

2.1.8 The Social Utility of Articles 6.1 and 40.6.1 in Democracy

Barrington J, in reference to the role of the media in a democracy such as Ireland's, emphasised the role of the media in the debate of matter of national importance such as referendums

> The second respondents can help to ensure that the people are well informed by upholding 'the democratic values enshrined in the Constitution, especially those relating to the rightful liberty of expression'. It can do this by allowing equal access to the airwaves by those who favour and by those who oppose the referendum proposal and also by ensuring equal access to *ad hoc* groups which oppose it[440].

Emphasising the role of persuasion and speech in a democracy, Barrington J went on to state that 'a distinguishing feature of a democratic society is that political leadership rests, not on power, but on persuasion'[441]. The social utility of political speech rights in this regard is undeniable due to the application of Article 6.1. For citizens to make such decisions they have require access to policy and the ability to freely criticise the proposals put before them. Therefore, the free speech guarantees comprising of Article 40.6.1 (i) are indispensable in such a situation. In order to educate public opinion, the 'ability to criticise government policy' is essential so as the citizens can act in final appeal as envisaged in Article 6.1.

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[437] Also see the recent judgment in *Susan B. Anthony List v. Driehaus* 573 U. S. ____ (2014)
[438] Barendt, *op cit.* 9
[439] *ibid* 10
[440] Barrington J in *Coughlan v. Broadcasting Complaints Commission* [2000] 3 IR 1, 44
[441] ibid

From a harmonious reading of the Irish Constitution, there seems to be a mismatch between Article 6.1, which sets out the role of the citizen as central to questions of national policy[442], and constitutional practice regarding the organs of State. Even though Article 40.6.1(i) gives citizens a right to criticise Government policy, many hurdles have been placed in the way of the citizen in seeking to access and criticise Government policy[443]. Central to this discussion is the Irish constitutional protection of freedom of expression, which provides that the citizens will be granted the 'right to freely express their convictions and opinions', and which emphasises that, even though restrictions will be placed on the right, the State shall 'preserve their rightful liberty of expression, including criticism of Government policy'[444]. This noble undertaking is constrained though by the Government placing their own speech on a pedestal, yet restricting the right of the citizen to access government policy in order to exercise their constitutional right to criticize such policy.

The interplay between all of these groups identifies the strains on political speech regulation. The precise nature of the relationship between the media, the government and the citizens, particularly in the Irish context, represents a sort of inconvenient puzzle. This is due to the ability of the media to serve both the will of the government and the citizen at the same time while also being mindful of its power. This is acknowledged by the specific mention of the organs of public opinion in the text of Article 40.6.1 (i). The role of a media in the effective running of a democracy cannot be underestimated. As a conduit of policy information to the citizen, their protection from restriction is even given special mention as part of the construction of Article 40.6.1 (i). In fact, the statement of their position as 'educators of the public opinion' should be regarded as a categorical assurance of their role within the new Ireland that was to be encapsulated in the provisions of Bunreacht na hÉireann 1937. The fact remains that the citizen is only grudginly mentioned in the context of the right "to express freely their conviction and opinions"; whereas there is clear statement of the power of the media, in particular in the context of the inability of the state to restrict their freedom of expression that included criticism of Government policy. This could be argued to be an extra assurance of their freedom as they could possibly be the first to be affected by a dictatorial regime as opposed to the individual citizen[445]. In *Irish Times v. Ireland* Barrington J stated that Article 40.6.1 (i) is unique in conferring liberties and rights upon the 'organs of public opinion'.

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[442] The text of Article 6.1 states '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. An example of this 'final appeal' could be viewed as referrals of legislation to the people by the President under the provisions of Article 27

[443] See section 4.6 for a further discussion of the impediments

[444] Article 40.6.1 (i)

[445] This is also important when one considers the international political environment into which the new constitution of Ireland entered in the late 1930's with dictatorial rule spreading across Europe

> "Organs" are not capable of having rights so this reference must be taken to mean a reference to those persons whether natural or artificial (such as the applicants in the present action) who control the organs of public opinion. These rights must include the right to report the news as well as the right to comment on it. A constitutional right, which protected the right to comment on the news but not the right to report it, would appear to me to be nonsense. It therefore appears to me that the right of the citizens "to express freely their convictions and opinions" guaranteed by Article 40 of the Constitution is a right to communicate facts as well as a right to comment on them. It appears to me also that when the European Convention on Human Rights states that the right to freedom of expression is to include "freedom . . . to receive and impart information" it is merely making explicit something that is already implicit in Article 40.6.1 of our Constitution[446].

The issue of the media, or organs of public opinion to give them their constitutionally mandated title, is the fact that they are protected by rights more usually associated with humans while acting as bodies corporate. This was an issue in *Attorney General v. Paperlink*[447] where the court was able to find the constitutional right to communicate ~~as~~ attached to the directors[448]. As stated by the *Report on the Civil Law of Defamation*:

> Costello J said that the act of communication was the exercise of such a basic human faculty that a right to communicate must inhere in the citizen by virtue of his human personality and must be guaranteed by the Constitution[449].

As the rights in question were those of the directors and not of paperlink as Paperlink the company was a corporate entity, the jurisprudence of constitutional rights vesting in corporate bodies has not been litigated before the courts in the context of freedom of expression. The provisions of the Defamation Act 2009 have extended confirmed that the right to a good name applies to corporate bodies, so the jurisprudence may be changing on this point[450]. In concluding on the point, the Law Reform Commission stated that the term 'citizens in' the context of Article 40.6.1 (i). did 'not include corporate bodies' but the 'the point would appear to matter little in practice, for an action may be brought on behalf of a company by its shareholders relying on their personal rights.'[451]

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[446] [1998] 1 IR 359, 404-405

[447] [1984] ILRM 373

[448] Aslo refer to the discussion at section 2.6.1.3

[449] Law Reform Commission, *The Report on the Civil Law of Defamation,* <http://www.lawreform.ie/_fileupload/Reports/rDefamation.htm > Accessed 06 September 2012, 120

[450] See section 12 of the Defamation Act 2009 <http://www.irishstatutebook.ie/2009/en/act/pub/0031/sec0012.html#sec12> Accessed 07 September 2012

[451] Law Reform Commission, *Report on the Civil Law of Defamation,*

Turning to the role of the media and its categorisation as the organs of public opinion, a literal construction of article 40.6.1 (i) could result in an interpretation of the article as -an unbalanced protection of freedom of expression which discriminates against the role of the citizen, entitled to opinions and convictions only, and favours the media which has specific protections[452]. The law reform commission set out three options as to why the citizen is mentioned in connection with convictions and opinions whilst the media is mentioned in connection with the education of public opinion:

> First, it might be that the special reference suggests that wider protection should be given to media organs. Second, it might be that the special reference merely emphasises that media organs are included in the free expression guarantee. Third, it might be that the special reference suggests that less protection should be given to media organs[453].

In the view of the commission, the purpose of the clause was to limit the boundaries of free expression not to widen them[454]. They rejected the third option, that there may be a wider freedom of expression for the media, due to their role as the 'organs of public opinion'. In their consideration of this section, they stated that

> ...At no time was the distinction between citizens and the media adverted to: rather media organs were discussed because it was felt that such entities had a greater capacity for influencing public opinion. If a distinction was being drawn at all, it was that the influential nature of such organs required that their rights be carefully circumscribed[455].

They felt that the real problem with the interpretation of the Article lay in the proper interpretation of the 'organs of public opinion'. It seems from the research of the Commission that the clause 'requires the State (by its laws) to be especially vigilant in respect of organs of public opinion to ensure that they do not abuse their freedom of expression in any of the specified ways' and this was due to the accepted 'persuasive influence of the media organs'[456].

The commission are probably correct to exclude the third option. Article 40.6.1 allows the citizen to exploit the media as the conduit of information and therefore seems to grant-the media greater powers than the individual citizen. However, if the citizen is regarded as an

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<http://www.lawreform.ie/_fileupload/Reports/rDefamation.htm> Accessed 06 September 2012 120

[452] Also see the discussion of *Cornec v. Morrice & Ors* [2012] IEHC 376 in section 2.6.1.5

[453] *ibid* 118

[454] *ibid* 114

[455] *ibid* 115

[456] *ibid* 118

individual actor in democracy, then granting exclusive and privileged access to a non-natural legal person raises questions of compatibility with the equality guarantee in article 40.1 of the constitution. However, this does not resolve the choice between the first and second options – that is to say, the choice between narrower rights for the media or rights equivalent to those afforded to citizens. As a matter of principle, the first option should also be rejected, and the second adopted.

McCartan Turkington Breen v. Times Newspapers[457] developed the interpretation of the role of the media from the UK perspective, here the issue of press conferences and access to information was considered. In the speech of Lord Bingham of Cornhill, the role of the media in connection with their role in policy and participative democracy was set out as follows

> In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.[458]

Therefore, applying this precedent to the interpretation of article 40.6.1 (i) in creating political speech rights, the protection of media rights are essential to the very ability of citizens to carry out their role pursuant to Article 6.1. Any restriction which is placed on the media or citizens undermines the powerful role of citizens and, in fact, undermines the very principles of popular sovereignty on which the Irish Constitution is based. This sovereignty has been acknowledged by the founders of the Irish State and the judiciary in the cases discussed above[459]. Even though the adaptation of Westminster and Whitehall rules to the administration of Executive business, as discussed above[460], is hindering the role

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[457] [2001] 2 AC 277

[458] Speech of Lord Bingham of Cornhill in *McCartan Turkington Breen v. Times Newspapers* [2001] 2 AC 277, 290 – 291. Also see Mahon v. Post Publications [2007] IESC 15 in section 2.6.1.2

[459] See section 2.4

[460] Also see the discussion in section 4.6

of the citizen, the courts cannot uphold the continuance of such rules if they were to be challenged, bearing in mind the first principles of the Irish Constitutional environment.

2.1.8.1 Judicial Interpretation of the Role of the Citizen

The constitutional interpretation of the citizen via Article 6.1 has rested between the realms of political theory and secondary judicial argument. Pursuant to *McKenna v. An Taoiseach (No.2)*[461], *Coughlan v. Broadcasting Complaints Commission*[462] and *Doherty v. Referendum Commission*[463], the recent consideration of the role has been interpreted as a postscript to solidify the boundaries of the organs of government regarding referendum communications. Yet, the constitutional phrasing pursuant to Article 6.1 has clearly placed the citizen at the heart of policy formation. The representatives, as elected by the citizens, have traditionally been viewed as their agents in democracy with periodic elections[464]. Some of these representatives go on to form part of the executive, with the judiciary appointed by the executive. In a small democracy such as Ireland, such close links are questionable yet this is the best way found from a comparative analysis with other states[465].

The original judicial consideration of the role of the citizen in Irish democracy was to arise in the case of *Crotty v. Attorney General*[466]. In the High Court, Barrington J tried to balance the constitutional provisions relating to the State in Article 1, the role of the citizen in Article 6, and the role of the legislature in Article 15, along with international relations pursuant to Article 29.4.1. The learned judge stated that these provisions combined, represented the general framework of the institutions pursuant to Article 5 of the Constitution[467]. Regarding the consideration of 'final appeal' in article 6, Barrington J. held that the Constitution only laid down three methods, general elections under Article 16, Article 27 referral and general referendum to amend the provisions of the Constitution[468], adding that 'no citizen has a constitutional right to obtain a referendum'[469]. This cannot be gainsaid, as there are no direct democracy provisions in the Irish Constitution, notwithstanding comments in subsequent judgments[470]. Moreover, the amount of information under which the mechanisms of 'final appeal' are to be conducted, has only developed of late. In the referendum cases but this has been viewed more as a speech

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[461] [1995] 2 IR 10

[462] [2000] 3 IR 1

[463] [2012] IEHC 211 and also see Section 5.3

[464] See the discussion in section 2.4

[465] See further the discussion in section 4.2. This recalls Churchill's aphorism that "democracy is the worst form of Goverment except for all those other forms that have been tried from time to time" (see Hansard, House of Commons, 11 Novem-ber 1947).

[466] *Crotty v. Attorney General* [1987] IR 713

[467] '...sovereign, independent, democratic state.' [1987] IR 713, 727

[468] [1987] IR 713, 745

[469] *ibid*

[470] See the discussion of the judicial intepreation of the constitutional provisions relating to the construct of Irish democracy in section 2.2

restriction on the executive as opposed to information right of the citizen[471]. In the Supreme Court, the issue of Article 6.1 and the role of the citizen were raised by Walsh J., who referred to Budd J. in *Boland v. An Taoiseach*[472], and held that the 'essential nature of sovereignty is the right to say yes or to say no'[473]. The ability to say yes or no in a manner of responsibly carrying out a citizen's role of 'final arbiter' is predicated on the ability to access and discuss relevant information. Regarding the issue at hand and the implementation of Article 6.1, Walsh J. stated that treaty changes contemplated fettered the power of the state to act in international affairs. Therefore

> to acquire the power to do so would, in my opinion, require recourse to the people "whose right it is" in the words of Article 6 "...in final appeal, to decide all questions of national policy, according to the requirements of the common good." In the last analysis it is the people themselves who are the guardians of the Constitution[474].

In the judgment of Henchy J., the provisions of Article 6.1 are also cited as a means of preventing the proposed government action at hand. The learned judge stated in this regard that

> It follows that the common good of the Irish people is the ultimate standard by which the constitutional validity of the conduct of foreign affairs by the Government is to be judge. In this and in a number of other respects throughout the Constitution the central position of the common good of the Irish people is stressed as one of the most fundamental characteristics of Ireland as a sovereign, independent, democratic state[475].

In the determination of such issue and seeking relief for fundamental rights, Murray J. in *Sinnott v. Minister for Education* stated that 'the obligation to ensure that the constitutional duty of the State is fulfilled lies in the first instance with the relevant organs of government referred to in Article 6 of the Constitution'[476]. In the same case, Denham J. held that the Constitution is 'is a constitution of the people expressing principles for its society. It sets the norms for the community. It is a document for the people of Ireland, not an economy or a commercial company'[477].

Murphy v. Attorney General[478] revolved around the issue of the taxation of married couples. Regarding of the relationship between the people and the legislature, Henchy J. stated the

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[471] See section 2.6.1
[472] *Boland v. An Taoiseach* [1974] IR 338, 366
[473] [1987] IR 713, 745
[474] [1987] IR 713, 783 - 784
[475] [1987] IR 713, 787
[476] [2001] 2 IR 545, 682
[477] [2001] 2 IR 545, 664
[478] *Murphy v. Attorney General* [1982] IR 241

following

> The delegation by the people to the Oireachtas of the legislative power is not only limited (as) its enactments must conform to the express and implied requirements of the Constitution; it is also subject to the reserved right to the people to amend by referendum that delegation[479].

The nature of the role was further expanded in *Re Article 26 and the Electoral Amendment Bill 1983*[480]. In this case, the provisions of the Electoral Amendment Bill to extend franchise for Dáil elections to British citizens who were ordinarily resident in a constituency and over the age of 18. O'Higgins CJ stated

> There can be little doubt that 'the people' here referred to are the people of Ireland by, and for, whom the Constitution was enacted. In short, this Article [*ie,* Article 6] proclaims that it is the Irish people who are the rulers of Ireland and that from them, under God, all power of government derive and that by them the rulers are designated and national policy decided[481].

The Supreme Court decided that the Bill before them was unconstitutional due to the interpretation of the word 'people'[482] from whom all powers derive and who have the right to decide all questions of national policy. This was so notwithstanding the use of the word *pobal* in the Irish text of other Articles of the Constitution with a meaning more equivalent to 'public' or 'general'[483]. Since only citizens could elect members to the Dáil under Article 16, to expand franchise pursuant to the Bill was unconstitutional. The Bill was then sent to the People as the Ninth Amendment to the Constitution Act 1984 and was duly approved.
In *Russell v. Fanning*[484], the issue of the ability of citizens to decide national policy under Article 6.1 was raised in a case regarding extradition warrants issued for the plaintiff. The warrants related to his delivery to Northern Ireland to serve 20 years imprisonment for criminal offences carried out while a member of the IRA. The plaintiff claimed that the offences were political, regarding questions of national policy, and therefore immune from the provisions section 50 of the Extradition Act 1965. Finlay CJ summed up the policy argument using Article 6.1. as follows[485]

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[479] [1982] IR 241, 309
[480] *Re Article 26 and the Electoral Amendment Bill 1983* [1984] IR 268
[481] [1984] IR 268, 275
[482] [1984] IR 268, 275 - 276
[483] [1984] IR 268, 276
[484] *Russell v. Fanning* [1988] IR 505
[485] Hogan and Whyte consider this reference to be problematic as the cite Article 29.5.2 which states that the Dáil can only control the Government in the ratification of international instruments where public funds are at issue and the power to incorporate international instruments is gifted to the Oireachtas as opposed to the Dáil under the provisions of Article 29.6. Gerard Hogan and Gerry Whyte, *J.M. Kelly: The Irish Constitution, op. cit.* 106. Furthermore, the precedent of *Crotty v. An Taoisech* [1987] IR 713 may also be cited as

> The Constitution and in particular Article 6, ss.1 and 2 make it clear that, subject to the provisions of the Constitution, decisions as to the method by which the national territory is to be re-integrated are matter for the Government subject to the control of Dáil Éireann, and that the carrying out of those decisions is exercisable only by or on the authority of the organs of State established by the Constitution. Any person or group of persons is, of course, entitled to advocate a particular policy of re-integration, whether that is or is not consistent with existing government policy from time to time. For a person or group of persons, however, to take over or seek to take over the carrying out of the policy of re-integration decided upon himself or themselves without the authority of the organs of State established by the Constitution is to subvert the constitution and usurp the functions of government[486].

Hederman J. stated that the provisions of Article 6.1 should be considered as follows

> Article 6 of the Constitution is the article which sets out the divisions of powers of government between the executive, the legislature and the judiciary and declares that all power of the government derive 'under God, from the People, whose right it is to designate the rulers of the State and, in final appeal, to divide all questions of national policy, according to the requirements of the common good.' It goes on to provide that "these powers of government are exercisable only by or on the authority of the organs of State established by this Constitution[487].

2.1.8.2 Role of the Citizen and State in Fundamental Rights

In the judgment of Ó Dálaigh CJ in *The State (Quinn) v. Ryan*[488], the role of the courts in the protection of the fundamental rights of the citizen was set out as follows

> It was not the intention of the Constitution in guaranteeing the fundamental

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further weight against this idea as the judgment was clear on the parameters of international agreements and the power of the State on this issue. Also see Nineteenth Amendment of the Constitution Act 1998 which revised the historically problematic issue of Articles 2 and 3 of the Constitution as part of the Good Friday Agreement which changed the boundaries of the State and the mechanism for any possible re-integration.

[486] [1988] IR 505, 530

[487] [1988] IR 505, 537. The dissents in *Russell v. Fanning* and the subsequent endorsements of these dissents by Walsh J. in *Finucane v. McMahon* [1990] 1 IR 165 are of interest as they give an alternative view to the above statements. McCarthy J. in *Russell v. Fanning*, looked at the idea of dissent and the nature of government policy in his consideration of the application of Article 6. In *Finucane v. McMahon* on a similar issue regarding extradition.

[488] *The State (Quinn) v. Ryan* [1965] IR 70

> rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and the courts were the custodians of these rights. As a necessary corollary it follows that no–one can with impunity set these rights or nought or circumvent them, and that the courts' powers in this regard are as ample as the defence of the Constitution requires[489].

Any assessment of the argument to give citizens a right to the dissemination of government policy information pursuant to articles 40.6.1(i) and 6.1., must centre on the ability of citizens to make meaningful use of their right to criticise government policy and this is consequent on accessing such policies in the first instance. In general, this right will always be sought against an organ of government and the judiciary will have to be astute, in the language of Ó Dálaigh CJ, to ensure that these rights are not set at nought or circumvented.

The question of justice is apparent where citizens seek damages from the state ~~for the~~ to remedy the breach of a constitutional right. On the one hand, damages are available where the state infringes traditional rights of the civil or political kind[490]. As Costello P observed in *W v. Ireland (No.2)*[491]

> In this country there exists a large and complex body of laws which regulate the exercise and enjoyment of these basic rights, protect them against attack and provides compensation for their wrongful infringement ...

Hence, for example, in both *Kennedy v Ireland* [1987] IR 587 and *Hanahoe v. Hussey* [1998] 3 IR 69[492], the courts awarded damages against the state for breach of the plaintiffs' constitutionally protected right to privacy. The availability of damages for infringement of constitutional rights is a powerful example of the extent to which the courts will go to provide remedies for such infringements.

On the one hand, damages are unavailable where the state infringes rights of the economic, social and cultural kind, where, by virture of the doctrine of the separation of powers, the legislature and the government are better placed to make policy decisions relating to

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[489] [1965] IR 70, 122; also see *Byrne v. Ireland*, [1972] IR 241, 281 (Walsh J), and *Howard v. Commissoner of Public Works (No.1)* [1994] 1 IR 101, 160 where Denham J describes the separation of powers as the 'kernel of the democratic state set up under the Constitution'. Also note the use of this same quotation by Hardiman J. in *Sinnott v. Minister for Education* [2001] 2 IR 545, 708 but restricting such relief to the granting of an order of *habeus corpus*.

[490] Damages are also available where a third party infringes a plaintiff's constituitonal rights; see, eg, *Educational Company v. Fitzpatrick* [1961] IR 345; *Meskell v CIE* [1973] IR 132; and see in particular *Conway v INTO* [1991] 2 IR 305 (exemplary damages).

[491] [1997] 2 IR 141

[492] Compare *Herrity v Associated Newspapers* [2009] 1 IR 316

allocation of resources. In *O'Reilly v. Limerick Corporation*[493] this principle was detailed by Costello J. In principle the role of the Executive and Legislature is to distribute the wealth of the state according to the common good. The decision regarding the common good would be deemed to be delegated to public representatives elected to the Oireachtas and thereby appointed to the Executive. It is for this reason that the litigation of a single citizen to question such allocation is deemed a clash between the judiciary and the other organs of government.

> The State (against whom damages are sought) is the legal embodiment of the political community whose affairs are regulated by the Constitution. The powers of Government of the State are to be exercised by the organs of the State established by it. The sole and exclusive power of making laws for the State is vested in the Oireachtas; the executive power of the State is exercised by or on the authority of the Government; and justice is to be administered in courts established by law...The courts' constitutional function is to administer justice but I do not think that by exercising the suggested supervisory role it could be said that a court was administering justice as contemplated in the Constitution. Apart from the fact that members of the judiciary have no special qualification to undertake such a function, the manner in which justice is administered in the courts, that is on a case by case basis, make them a wholly inappropriate institution for the fulfilment of the suggested role[494].

The issue with the separation of powers with regard to policy information has been a diminution in the power of the citizen over the organs of government. Over time, the misapplication of precedents emphasising the application of parliamentary sovereignty over the constitutionally mandated popular sovereignty has changed the emphasis of the scheme of checks and balances from protecting the citizen to protecting the organs of government. It is not the argument of this thesis that the separation of powers goes outside the constitution and should be revoked. Rather, the argument is that the role of the citizen as stated in the constitution has to be reinterpreted to allow for the citizens the to act in their policy role rather than the privileging of policy information away from the citizen. As can be seen from the cases above dealing with the role of the citizen, the courts do emphasis the role of the citizen as stated in the Constitution. The interpretation of the balance of powers between the organs of government is therefore misconceived having regard to the absence of the consideration of the citizen as the focus of protection in the separation of powers.

Murphy v. Dublin Corporation[495] addresses the position of the Executive in relation to the

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

[494] [1989] ILRM 181, 194 – 195. The case is heavily criticised in G Whyte *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002).

[495] *Murphy v. Dublin Corporation* [1972] IR 215 also see section 3.2.2

separation of powers. Walsh J. stated that in such cases the separation of powers 'does not give paramountcy in all circumstances to any one of the organs exercising the powers of government over the other'[496].

In *Buckley and Others (Sinn Féin) v. Attorney General*[497] the often cited formulation of the doctrine of the separation of power for the Irish Constitutional context is stated

> The manifest object of [Article 6] was to recognise and ordain that, in the State, all powers of government should be exercised in accordance with the well-recognised principle of the distribution of powers between the legislative, executive and judicial organs of the State and to require that these powers should not be exercised otherwise. The subsequent articles are designed to carry into effect this distribution of powers[498].

In Re Haughey[499] the judgment of Ó Dálaigh CJ, the tripartite separation of powers was reaffirmed from *Buckley* above[500]. *Boland v. An Taoiseach*[501]concerned the interpretation of the international relations article of the Constitution and the power of the government to sign such agreements without recourse to the citizens by way of referendum. The particular agreement in question in this case was the Sunningdale agreement. In the Supreme Court, Fitzgerald C.J. stated that Article 6 of the Constitution established

> ...beyond question the separation of the executive, legislative and judicial powers of government... Consequently, in my opinion, the courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution[502].

In *Sinnott v. Attorney General*[503] debate focused on the judicial oversight of executive decisions relating to public expenditure. But the discussion for the purposes of this thesis will refer

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[496] [1972] IR 215, 234

[497] *Buckley and Others (Sinn Féin) v. Attorney General* [1950] IR 67

[498] [1950] IR 67, 81

[499] *In Re Haughey* [1971] IR 217

[500] 'The Constitution of Ireland is founded on the doctrine of the tripartite division of the powers of government – legislative, executive and judicial – as appears from an examination of Articles 6, 15, 28 and 34' [1971] IR 217, 250

[501] [1974] IR 338 and Budd J. at 366 where the role of the Judiciary in policy matters stating that the "Government is responsible to the Dáil which can support or oppose those policies and review them.' Also see Griffin J. at 369 which restated the principle laid down in *Buckley and Others (Sinn Fein) v. Attorney General* [1950] IR 67, 81 as discussed above.

[502] [1974] IR 338 , 361 – 362 This section was also cited with approval by Denham J. in *Sinnott v. Minister for Education* [2001] 2 IR 545, 659

[503] [2001] 2 IR 545, [2001] 12 JIC 1702

to the elucidation of the separation of powers. In the judgment of Denham J., the separation of powers was discussed as follows

> All powers of government derive from the people: Article 6.1. These powers are exercised by the organs of government established by the Constitution, being legislative, executive and judicial. The functions of government are divided between these three branches of government... In addition to recognising and applying the doctrine of the separation of powers it is important to afford respect to the decisions of each of the constitutional organs of State. It is from this basis that analysis of governmental decisions commences. ... However, I would not exclude the rare and exceptional case, where, to protect constitutional rights, the court may have a jurisdiction and even a duty to make a mandatory order[504].

Denham J went on to cite *Crotty v. An Taoiseach*[505], which laid down the activity and boundaries of the State and held that no one of the three organs is given a paramount place[506]. she quoted especially from the judgment of Walsh J. in *Murphy v. Dublin Corporation*

> As the legislative, executive, and judicial powers are all exercised under and on behalf of the State, the interest of State, as such, is always involved. The division of powers does not give paramountcy in all circumstances to any one of the organs exercising the powers of government over the other[507].

These statement were also followed by Denham J in *T.D. v. Minister for Education* [508]

> Fundamental powers of government are distributed between these three great organs of State. A separation of powers is described although it is not a strict division or distribution of power. It is not a doctrine applied rigidly in the Constitution. A framework for government is established which includes a functional separation of powers to independent organs of State. It is the separation and independence of the institutions which is important[509].

Denham J. regarded the operation and availability of judicial review and its impact on the

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[504] [2001] 2 IR 545, 635 also see Hardiman J. in *T.D. v. Minister for Education* [2001] 4 IR 259, 338 Under our Constitution, all political power in the State derives from the people. By Article 6, this general power is divided into the three major powers of government, the legislative, the executive and the judicial. These powers are separate and distinct in order to prevent any one power, or the individuals who hold it, from becoming dominant[504].

[505] Finlay C.J. in *Crotty v. An Taoiseach* [1987] I.R. 713, 772

[506] [2001] 2 IR 545, 655 - 656

[507] [1972] I.R. 215, 234

[508] *T.D. v. Minister for Education* [2001] 4 IR 259

[509] [2001] 4 IR 259, 299 Also see Denham J. in *Laurentiu v. Minister for Justice* [1994] 4 IR 26, [1999] 1 JIC 2203 where similar sentiments are expressed at 60

operation of democracy as important, as it represented a step away from the Westminster model of governance[510]. The judgment of Murray J. was based on an assessment of the first principles of the doctrine of the separation of powers especially the writings of Montesquieu[511] and considered the doctrine an 'essential and inherent part of the modern liberal democracy founded on the rule of law'[512]. Under the terms of the Constitution, Murray J. considered the application of the doctrine to flow from the respect of powers from each organ of state and the differentiation between policy matters and core constitutional functions[513].

> Adopting a policy or a programme and deciding to implement it is a core function of the Executive. It is not for the courts to decide policy or to implement it. It may determine whether such policy or actions to implement such policy are compatible with the law or the Constitution or fulfil obligations. That is not deciding policy[514].

In spite of this reference, the position of the people as subservient to the organs of government or supreme to the separation of powers was not resolved. It would follow that if the state is one based on popular sovereignty that the people would be supreme, their power delegated to the Oireachtas and therefore the people are to be served by the separation of powers. There has not yet been a clear elucidation of this role.

2.1.8.3 Communication and Information

The ability to expand Article 40.3.1 to encompass a secondary right to freedom of communication was probably an unintended consequence of having both a general right to 'defend and vindicate the personal rights of the citizen'[515] and a right to express freely

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[510] 'It was a sophisticated step taken by the people in 1937, to incorporate such a system of judicial review. Previously Ireland had been governed by the Westminster model – the simple parliamentary sovereignty – democratic majority system - where parliament was supreme and the courts did not have such power of constitutional judicial review.' Denham J. [2001] 4 IR 259, 312 also see section 3.2.2

[511] [2001] 4 IR 259, 329 in particular the following section 'When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise less the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner" He expressed the concern: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.' (*De l'Esprit des Lois*). Also see David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Roundhall Sweet and Maxwell, 1997) 2 – 7 for a discussion on the development of the concept of the doctrine of the separation of powers through history.

[512] [2001] 4 IR 259, 329

[513] [2001] 4 IR 259, 331

[514] [2001] 4 IR 259, 333 and echoed in Haridman J. in the same case [2001] 4 IR 259, 338

[515] Article 40.3.1

convictions and opinions[516]. In *Attorney General v. Paperlink*[517], the former provision containing the unenumerated rights was relied upon upon to fill a perceived lacuna by expanding Article 40.3 to encompass liberal speech rights.

Also when considering the gap between between freedom of expression and the right to communicate when it comes to political speech, both Fennelly J in *Mahon v Post Publications*[518], and McKechnie J in *Holland v Gov of Portlaoise Prison*[519] are instructive. In *Holland* it was held that the interference and censorship of mail for prisoners under the provisions of Rule 59 of the Prison Rules 1947[520] could be deemed to be an interference with a persons right to communicate. In this case, the plaintiff wished to communicate with journalists. In the consideration of whether to ground the application on the liberal communication rights in Aritcle 40.3 or in the political speech protections contained in Article 40.6.1(i), McKenchnie stated the following

> It, therefore, seems quite clear that depending on the circumstances of any particular case, a claimant or plaintiff may be able to rely, not only on Article 40.3 of the Constitution but also on Article 40.6.1. In the instant proceedings, it appears to me that, in all probability, the applicant can rely upon both sub-articles in furtherance of his claim. His attempts to communicate with R.T.É .involved apparently a mixture of fact, information, convictions and opinions and with the result that, by seeking to influence the media to bring to the attention of the public what he describes as a miscarriage of justice, he was undoubtedly, in a most direct way attempting to influence public opinion. Consequently, I believe that both sources of protection are available in principle to him.[521]

In *Mahon*, echoing the judgment of Barrington J. in *Murphy v. IRTC*[522], Fennelly J. makes the following statement

> Clearly, the Constitution, unequivocally guarantees both the right to express convictions and opinions and the right to communicate facts or information.

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[516] Article 40.6.1

[517] [1984] ILRM 373 also see Gerard McCormack, 'Constitutional Law – Monopoly Power in the High Court' (1984) 6 DULJ 144 where the method of interpretation used in finding such an unenumerated right was questioned stating that it was an 'open-ended approach' pressing the text of the constitution in to 'service in a subordinate capacity' and 'moulded to fit pre-conceived ideas.'[517] The preconceived ideas that McCormack takes umbrage with seem to be the interpretation of the unenumerated rights article in a natural fashion, thereby establishing that the liberal right to communicate is inherent in the human condition.

[518] [2007] IESC 15

[519] [2008] IEHC 208

[520] *Holland v Gov of Portlaoise Prison* [2008] IEHC 208, [2008] 2 IR 573, 578

[521] *Holland v Gov of Portlaoise Prison* [2008] IEHC 208, [2008] 2 IR 573, 590

[522] [1999] 1 IR 12

> These rights are inseparable. It matters little, at least for present purposes, which Article of the Constitution expresses the guarantee. The right of a free press to communicate information without let or restraint is intrinsic to a free and democratic society. The real issue is the extent to which and the grounds upon which restrictions on that right may be justified.[523]

There is a distincition between public and private speech as elucidated by Hogan J. in *Sullivan v Boylan*[524]. In this case the speech rights of one of the defendants, Mr Cartan, was contrasted to the situation in *Cornec v. Morrice*. As stated by Hogan J. ,free speech interests in communicating this particular information in this particular place and in this particular manner can be adjudged in the circumstances to be weak'[525]. Adding further to the distinction between Cornec and the case at hand, Hogan J. stated that

> The speech at issue in Cornec was accordingly squarely within the core protections afforded by Article 40.6.1 - dedicated as that speech was to the education of public opinion - and represented a type of speech to which - as is clear from the language of Article 40.6 itself- the Constitution ascribes a high value in protecting. For all the reasons I have just given, the same cannot be said of the speech at issue in the present case.[526]

This case was the first to establish that there was a general right to communicate in the Constitution which was separate to the right to express freely convictions and opinions in Article 40.6.1. This so-called liberal speech right was later to create a tension when both Articles were invoked in the protection of political speech.

This criticism of the developing jurisprudence may have led on to the steps taken by Barrington J. in *Murphy v. Independent Radio and Television Commission and the Attorney General*[527]. to delineate and subsume the differing categories of speech right into a jointly grounded right between Articles 40.3 and 40.6.1. Citing the judgments of both Costello J in *Paperlink*[528] and Keane J in *Oblique*[529], Barrington J held that the unenumerated right to communicate in article 40.3 is largely concerned with personal autonomy. By contrast, he held that the right to express freely convictions and opinions in Article 40.6.1(i) is largely concerned with democratic participation. In other words, he tied Article 40.3 to liberal theories of freedom of expression, and he tied article 40.6.1(i) to democratic or political theories of freedom of expression. He emphasised that neither right must be interpreted

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[523] *Mahon v. Post Productions Ltd* [2007] IESC 15 Paragraph 51 – 52
[524] *Sullivan v. Boylan & Ors* [2012] IEHC 389
[525] *Sullivan v. Boylan & Ors* [2012] IEHC 389 paragraph 28
[526] *Sullivan v. Boylan & Ors* [2012] IEHC 389 paragraph 29
[527] [1999] 1 IR 19
[528] *Attorney General v. Paperlink* op cit 11 and *Oblique v. The Promise Productions* [1994] 1 ILRM 74
[529] *Oblique Financial Services v. The Promise Productions Co Ltd* [1994] 1 ILRM 74

narrowly. Hence, in interpreting Costello J.'s development of the Article 40.3 right to communicate[530], Barrington J. stated that if such a right existed then 'it must include not only the right to communicate facts but also the right to communicate convictions, opinions and even feelings'[531]. On the other hand, he emphasised that the Article 40.6.1 right to express freely convictions and opinions 'is primarily concerned with the public statements of the citizen[532]'.

Morevover, in assessing the convergence between both rights, he acknowledged the complementary nature of the two rights, but he accepted that there may be some overlap between Article 40.3 and Article 40.6.1. As a consequence, he held that 'if this means that there is a certain overlapping between the right(s) ... so be it'[533], and he added that 'the overlap may result from the different philosophical systems from which the right derives.' [534]

The judgment in *Paperlink*, and its role as a catalyst for the discussion as to the liberal right to freedom of expression in the Irish Constitution has not been without its critics. The most vocal of criticism came from McDonald who stated that 'the guarantee does apply to both facts and opinions, as that distinction is usually understood' adding that 'any other interpretation carries a variety of risks, not least of which is the possibility that there may be different restrictions affecting the right to communicate and the liberty of expression'.[535]

The key jurisprudential argument is that the role text of the political speech article in Article 40.6.1 (i) does allow for a lacuna whereby convictions and opinions may be protected if they do not fall foul of the restrictions in Article 40.6.1 (i) but the right to pure expression itself – beyond the expression of convictions and opionions – is not expressly mentioned and may not be covered. Barrington J. in *Murphy v IRTC* and *Irish Times v. Ireland* recognised this lacuna, and extended the coverage of Article 40.6.1 (i) to reach *all* speech, and not just convictions and opinions[536]. But this is one of the contexts in which there is a potential overlap between Article 40.6.1 (i) and Article 40.3, which extends to the communication of facts, and even feelings. The constitutional protection for pure expression is best served under the provisions of Article 40.3.1 where it is given its true home as a personal right of a citizen. This incorporation by means of judicial interpretation only strengths the protection for freedom of expression in the Irish Constitutional framework.

Furthermore, when looking at the totality of speech rights - from political speech rights in

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[530] Both from *Paperlink* [1984] ILRM 373 and *Kearney v. Minister for Justice* [1986] I.R. 116, 118

[531] [1998] 1 IR 359, 405

[532] *ibid* 406

[533] [1999] 1 IR 19 at 25

[534] ibid

[535] Marc McDonald 'Defamation Reform: A Response to the LRC Report' (1992) ILT 270 and Tom Daly, 'Strengthening Irish democracy: a proposal to restore free speech to article 40.6.1(i) of the Constitution' (2009) 31 D.U.L.J., 228

[536] *Murphy v. IRTC* [1999] 1 IR 12 and *Irish Times v. Ireland [1998] 1 IR 359*

Article 40.6.1(i) to the unenumerated right to communicate in Article 40.3.1 – it could also be argued that the right of access to information could be considered a corollary right. For example, all of the civil and political rights which are found in article 40.6.1 (i) have associated colloraries: the right to association has a right to dissociation [537], and the right to speak in Article 40.6.1(i) has a right to stay silent[538]. Therefore it does not seem to be a giant jurisprudencial jump to say that the right to political speech in Article 40.6.1 (i) gives rise to a right of access to political infromation so as to be able to excericse the right to political speech. Again, if a right to communicate can be recognised as an unenumerated right contained in Article 40.3, it does not seem to be a giant jurisprudencial jump to say that a right of access to information can likewise be recognised as an unenumerated right contained in Article 40.3.

2.1.8.4 The Legitimacy of Court Intervention

The basic question here relates to the extent of courts' intervention to vindicate infringements of Article 6, especially when taken in conjunction with Article 40.61(i). In particular, the question arises as to whether the doctrine of separation of powers would preclude a remedy in many cases. It is clear that there is an imbalance between rhetoric and reality in this area. Even though the ideas encompassed in the term of the phraseology used in the Article 6.1, the courts have been rather conservative on the placing of the citizen at the heart of democracy. This can be contrasted to the judicial statements of that nature of Irish democracy as discussed in the section preceding this. Considering the judgments of *Boland v. An Taoiseach*[539], *Crotty v. An Taoiseach*[540] and *McKenna v. An Taoiseach (No.2)*[541] which have all been previously discussed, Denham J. in *TD v. Minister for Education*[542] stated that the court can intervene in the workings of the Executive in spite of the doctrine of separation of powers, which has already been described as a flexible distribution of powers in the following circumstances:

> These dicta clearly establish that
>
> 1. The courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions provided that it acts within the restraints imposed by the Constitution on the exercise of such powers.
>
> 2. If, however, the Government acts otherwise than in accordance with the provisions of the Constitution and in clear disregard thereof, the courts are not only entitled but obliged to intervene.

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[537] See further *National Union of Railwaymen v. Sullivan* [1947] IR 77 and also *Educational Company of Ireland v. Fitzpatrick* [1961] IR 345 on the point of interpreting the right to dissassociate from the constitutional right to association under Article 40.6.1 (iii)

[538] O'Flaherty J in *Heaney v Ireland* [1994] 2 ILRM 420

[539] [1974] IR 338

[540] [1987] IR 713

[541] [1995] 2 IR 10

[542] [2001] 4 IR 259

> 3. The courts are only entitled to intervene if the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution[543].

Denham J. cited the above with approval in *TD v. Minister for Education*[544] and added the following conclusion:

> Consequently, it has been determined in many cases that the courts are entitled to intervene if there has been a clear disregard by the Government of its powers and duties, under the Constitution. In fact, the courts have a duty to intervene in such circumstances. This arises because the courts are the guardians of the Constitution. The courts have the power and obligation to protect constitutional rights. This protection may be acknowledged and remedied after an event. However, the court also has jurisdiction to protect a person from an anticipated breach of a constitutional obligation[545].

The early case law on separation of powers in the Irish context focused on the limitations of power and the boundaries of each branch. The later cases of *Sinnott* and *TD*, though focused on hard cases, in spite of the maxim, still resulted in good law. Even though the judiciary was faced with issues of policy, the boundaries were retained to promote the common good in spite of individual harm.

The acknowledgement of citizens and their place within the separation of powers has yet to be properly explored. If the case law regarding the development of the concept of Irish constitutional democracy is compared to the lack of developments regarding the placement of the citizen[546], a vacuum is emerging in this regard. On consideration of the Irish theory of separation of powers, David Gwynn Morgan[547] stated that the pure theory 'has not been followed in any working constitution in the world and certainly not in Ireland'. Furthermore that the 'doctrine's main emphasis resides only in one of its provinces: the judicial power and organ'[548]. This is symptomatic of the Irish judiciary being held as the guardians of the Constitution for the people. With regard to political speech rights and access to information, the question here is not one of policy decision but it is the ability to act as the final arbiters of government policy. Considering that the Constitution specifically mentions the 'criticism of government policy' as an illegitimate aim of legislation, and the harmonious approach to Constitutional interpretation, there may be yet scope for such a right to be litigated against the Executive.

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[543] Hamilton CJ in *McKenna v. an Taoiseach (No.2)* [1995] 2 IR 10, 32

[544] [2001] 4 IR 259

[545] Denham J. in *TD v. Minister for Education* [2001] 4 IR 259, 301

[546] See section 3.2.3

[547] David Gywnn Morgan, *The Separation of Powers in the Irish Constitution* (Roundhall Sweet and Maxwell, 1997) 24

[548] *ibid* 31 - 32

1.11 The Reality of Political Speech Protection in Ireland

The exposition of the historical development of democracy in Ireland has shown that there is an inconsistency in the role of the citizen. In the idea of a representative democracy based in the Constitution's plebiscitary format, the flow of information to the citizen is a distinguishing factor. The original idealistic incarnation of the Irish State was one that rejected any form of British parliamentary or constitutional structure. This notion was quickly replaced by an adherence to the Westminster or Whitehall style of governance. When the Irish state gained full independence, this mode of governance was so entrenched that no review of the Organs of Government was undertaken to bring the citizen back into the centre of policy[549].

The speech metrics of the public interest and political equality were set out in brief[550]. The public interest has been shown to be a powerful tool in the release of information and the protection of communications. Even though most of the case law in this regard has focussed on the disclosure of an iniquity, there is still an argument to be made for the public interest to be included more widely in the consideration of the release of policy information. The final speech metric which was examined was the regulation of legitimate governance using political equality. This ground has evolved from the referendum cases of *McKenna (No.2)*[551] through to *Doherty*[552] and *McCrystal*[553]. The basic argument behind this ground is that the nature of the Constitutional guarantee to equality does not only refer to the treatment of the citizen but also to speech. Therefore, if the speech of one party, in the case law the State, is treated differently to the speech of the citizens; there is unequal treatment. This will be used as a ground for the examination of speech through the thesis as all parties to the democratic relationship must have an equal opportunity to be heard. This is especially relevant for the consideration of policy information; as, without such information, the speech of the restricted party will never carry the same weight as that of another, in this case the State. This area is more philosophical in its foundations. The central argument from the introduction to this theme is that freedom of political expression can act as a watchdog on the powers of Executive Government. Until the role of the citizen in full is read into the speech protections in Article 40.6.1 flowing from the role of the citizen in Article 6.1, such oversight will be restricted. Each ground has a use within the regulation of government and accessing policy information. These grounds are the foundation of the speech utility theory that will be used as the primary methodology for examining the appropriateness of Articles 6.1 and 40.6.1(i) to the propagation and evolution of democracy in Ireland[554].

The theoretical idea of free and open access to policy information does not hold when the

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[549] See section 2.4

[550] See section 2.7.3

[551] *McKenna v. An Taoiseach* (No.2) [1995] 2 IR 10

[552] *Doherty v. Referendum Commission* [2012] IEHC 211

[553] *McCrystal v. Minister for Children and Youth Affairs* [2012] IESC 53

[554] See section 4.1 for the measurement of these metrics against the direct and indirect restrictions to be discussed in the following section.

reality of the restrictions is considered. Even though the constitution places a central emphasis on the 'criticism of government policy' as part of the freedom of expression guarantee[555], the position of official information is neglected[556]. The constitution protections do not encompass information rights as enshrined in parallel human right documents. Therefore the clear statement of Dworkin has been subverted in itself by the particular influences on Irish democracy[557].

The overriding theme which emerges from all jurisdictions examined in the previous section is that the courts should be suspicious of speech restrictions that will impact on the democratic relationship between the citizens and the government. Therefore any restrictions, which are made to political speech rights, will and should always be subject to strict scrutiny, to borrow the phraseology of the United States Supreme Court[558]. The Irish jurisdiction diverges on the nature of the protection, concentrating on a placement of the speech right as opposed to its relationship to democracy, the right is protected. This has led to a delay in the application of the rationale for speech protection being interpreted into the free speech provisions until recent.

As discussed above, the Irish system of speech rights has the advantage, unlike the UK but similarly to the European Convention on Human Rights, of being neatly enumerated in Article 40.6.1(i). Undoubtedly, the confusion arising from *Paperlink*, of creating a second form of speech right has focus the attention of the judiciary on a different path. The judgment in *Paperlink* sent the judiciary down a path of creating a political right to expression in Article 40.6.1 (i) and a liberal right to communicate from Article 40.3. This is in spite of Article 40.6.1 (i) incorporating a right to express convictions and opinions which is in the very nature of communication. The judiciary has focused on a micro level analysis of a content-based protection for liberal speech rights. Yet they have not yet undertaken eschewed a macro level analysis of the role of speech in a modern democracy. Therefore the very reason for the creation of the right to expression in the Constitution has been eschewed for the majority of its legal existence. Furthermore, this had led to a scintilla of development regarding a right to information, having regard to the development of Article 40.6.1 in line with the content of Article 6.1 since *Doherty*[559].

This is perhaps due to contemporary social and legal conditions and the under-developed nature of judicial review. The rate of cases seeking to interpret the provisions of Article 40.6.1 (i), the different speech scenario questions which caused Article 40.3.1 to become involved and the development of such jurisprudence involving Article 6.1 has to be welcomed. This means that the true nature of political speech rights will increasingly

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[555] See section 2.6.1.2
[556] See section 2.6.1.3
[557] See section 2.1
[558] See section 2.6.3.2
[559] Also see the dicussion regarding the speech limits of the State in section 4.3

become interpreted in line with the rights of the citizens as envisaged in the constitution. This thesis has also looked at the nature of democracy envisaged by the founders of the state prior to independence, the nature of democracy in Ireland and its repercussions for the practice of political speech matters in the State[560].

Looking at the influence of other jurisdictions upon Ireland, it is clear that the ideas of participatory speech rights in the United States has filtered in to the jurisprudence of the Convention. There are obvious parallels emerging since the development of a body of precedent regarding the utility of political speech rights. This may mean that the jurisprudence of the First Amendment may become part of Irish law as it filters through the ECtHR into domestic decisions. This will also develop in the United Kingdom body of free speech precedents. This will hopefully divert the scope and merit debate as described by Barendt away from the Irish discussions which would add further layers of complexity to an already mis-focused debate in Ireland.

The next two sections of this thesis will examine, in detail, the content and class restrictions which act to restrict the right to political speech when seeking to criticise government policy. The themes of political equality and the public interest will be re-examined in section three in light of the information analysed in section two.

[560] See section 2.4

SECTION TWO

THE LIMITS OF POLITICAL SPEECH PROTECTION

'A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.'

James Madison[561]

[561] Letter to W.T. Barry (04 August 1822)

Section Two: The Limits of Political Speech Protection

The previous section has looked at the right to freedom of expression for political speech in the Irish context[562], but also comparatively with the United Kingdom[563], the United States[564] and the European Convention on Human Rights[565]. Section one also looked at the impact of political speech rights on the development and interpretation of democracy in Ireland. The final task completed in section one was the introduction of the thematic framework which will be used to analyse the speech restrictions which will be considered in this section[566].

This section seeks to expand on the rights review in the previous section and test the totality of the right to freedom of expression for political issues against the active restrictions on such speech. This section divides the restrictions into content and class. Content restrictions will regulate speech on the basis on the speech in question; on the other hand, class restrictions regulate speech not based on content of the communications but on its origin or source. Content restrictions are also classed as direct restrictions as these restrictions are directly applied to the statement or the speaker. Class restrictions are also considered as indirect restriction as these restrictions are based on the nature of the document or information irrespective of the content of the communication such as cabinet documents. Direct restrictions will be considered in chapter three. Indirect restrictions will be considered in chapter four.

The totality of the restrictions discussed will be analysed in section three where their individual and total effect on freedom of political expression will be considered in line with the rights considered in section one.

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[562] See section 2.6.1
[563] See section 2.6.2
[564] See section 2.6.3
[565] See section 2.6.4
[566] See section 2.7

3 Content Restrictions

Direct and overt restrictions on freedom of expression are used on a daily basis. They are classed as direct due to their grounding in legislation and overt as their application is clearly seen. The most common form of restrictions in this area emerges from the provisions of the Broadcasting Act 2009. The restrictions in this category cover the areas of national security restrictions, political advertising and balancing coverage to ensure the duty of impartiality is met pursuant to the Broadcasting Act. As these restrictions are set out in a legislative form, their legitimacy and effect against the provisions of Article 40.6.1(i) can be more clearly identified. However, the case law in this area has not tended to match the provisions of Article 40.6.1(i) against those of Article 6.1 when the discussion of government policy is restricted.

This section will look at the restrictions placed on political speech due to their content. Such speech can be placed on a continuum: from that which seeks to overthrow the authority of the state to that which seeks to challenge political consensus.

This thesis has already examined the legal right to freedom of expression and has considered the protection for political speech in line with the concepts of democracy and the role of the citizen[567]. The direct restrictions which will be examined here are those which restrict the flow of policy information and, in turn, inhibit both the citizen and the media in the 'education of public opinion'. The citizen is affected as it makes policy information and harder to access and criticise. The media, in particular broadcasters, are hindered as they must abide by the provisions of broadcasting legislation and cannot contain any criticism of government policy which citizens may seek to broadcast to reach a greater audience.

The reason for grouping all these restrictions together is the fact that the information is regulated based on its content. Therefore what needs to be assessed in such issues is the proportionality of the restrictions, not just to political speech in a general sense but also to the discussion of policy information. US case law is littered with examples where content-based restrictions upon speech are scrutinised[568]. This is common to the jurisdictions which are being examined in this thesis, and the approach taken by Ireland, United Kingdom, United States and the European Court on Human Rights have an unofficial equivalent understanding of such restrictions[569]. The method of application may differ slightly but their considerations of sedition and other content restrictions have a certain element of commonality.

Section one has already set out the importance of free speech in the propagation and

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[567] See section 2.5

[568] See section 2.6.3

[569] See section 2.6.4

protection of democracy[570]. This section has also analysed the role of the citizen in democracy. The framework for analysis of the public interest, legitimate governance and political equality has already been set out. The analysis of these themes against the provisions discussed here will be carried out in Section three where these content and context restrictions will be re-evaluated against the class restrictions at executive level and their impact on democracy will be assessed.

Therefore this section will seek to set out the relevant provisions of statute law which affects the speech of citizens on issues of government policy and assess the utility of such restrictions. This section will look at the specific regulations placed on broadcast media in the discussion of general policy issues. The broadcasting regulations of both Ireland and England share a common thread in this regard. These restrictions do not impact on newspapers. Both jurisdictions have legislation which precludes broadcasters from having unbalanced coverage of election and referendum issues, restrain political advertising, and prohibit speech which seeks to undermine the authority of the State. They also preclude the use of broadcasting media for the promotion of policy or allowing for paid advertisements directed to a political end. In this regard the European Court of Human Rights has also reviewed the respective legislation of both jurisdictions. However, the jurisprudence on this issue is completely different in the United States where any restriction the communication of a political or policy message is seen as a direct infringement of the provisions of the First Amendment.

1.12 Blocking access to the discussion of Government Policy

An overly zealous and deferential system of media regulation in a country can block the discussion of government policy. Essentially, the media must be able to balance both sides to 'educate public opinion'. Therefore imposing restrictions because of content must be transparent and objectively justifiable so as to allow for the greatest possible level of balanced debate and only restrict debate where such restrictions are objective, fair and with good cause.

It is clear that the Constitution places a great emphasis on the role of the media. In the construction of the constitutional protection it could be argued that the framers went too far in explaining the necessary protections for the role of the media. This led to a rather paternalistic and patriarchal view of the citizen and media relationship in 1937 which has arguable continued to today[571]. The role of the media has changed but the challenges for regulation remain. In this section, the conduit and forum role of the media in connection with policy will be examined.

1.13 Broadcasting and Political Speech

The discussion of matters of public importance and policy issues is predicated on a strong

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[570] See section 2.5

[571] See the discussion in section 2.6.1.4

media that will reach citizens. This is probably the motivation behind the structure of Article 40.6.1 (i), which especially mentions the role of the media in the propagation of democracy and affords them mention in the text of the right. As part of this section, the education of public opinion and the criticism of government policy are mentioned in relation to the media. However, through content restrictions the State is able to preclude the discussion of certain matters of policy by classifying the speech in question as either seditious or injurious to the maintenance of public order and the authority of the State on broadcast media. The legislation may also classify speech in the national broadcast media as directed towards a political end, which may very well include the discussion of government policy but is nevertheless restricted from general consumption. Such restrictions directly affect the flow of policy information in the state via the public interest watchdog of the media to the citizens who seek political equality in accessing policy information. This affects the legitimacy of governance in the country. The argument in this section is as follows; if the citizens are to act as the final arbiters of government policy as stated in Article 6.1 then they must have a clear means of accessing policy to exercise their political speech rights under Article 40.6.1 (i). Content-based restrictions that directly inhibit this flow are incompatible with a participative and plebiscitary democracy as mentioned in the case law.

With regard to constitutional protection, it could also be argued that there is a divergence in protection within the article. Citizens and the organs of public opinion are mentioned in different parts of the article. This could cause confusion whereby the right to convictions and opinions rest with citizens and the organs of public opinion are read in line with the remainder of the right[572]. Moreover this Article waters down the essential element of a public connection[573] between the citizens and the government and the need to foster and encourage this public connection for the validity and legitimacy of decisions carried out by the government on behalf of their electorate. The key issue is that even though Article 40.6.1 restrains the legislature from enacting legislation that restricts the ability of citizens to criticise government policy, then this is toothless if citizens are not given the corollary right to access the information. Such concerns have an immediate impact on any moves towards a system of participatory democracy whereby the citizens must feel that they have an ability to question and review any area of government policy without fear of retribution or chilling effect by their involvement.

1.14 Grounds for Content Restrictions

The two main for content restrictions affecting political speech in Ireland will be discussed and analysed in this section. The first ground is based on protecting the authority of the state. This restriction has evolved over time from seditious speech to the broadcasting restrictions during the Northern Irish Troubles known as 'Section 31 orders'. Even though

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[572] See also the discussion regarding the *Mahon* cases and the role of the media in public and political discourse in section 2.6.1.2

[573] See further Couldry, Livingstone and Markham (eds), *Media Consumption and Public Engagement* (Palgrave Macmillian, 2010) 10 - 12

the legal grounding of each restriction was framed from different sources, the objective was the same in that they both act as a means of moderating speech, which is directed at a political end. The second ground for consideration is political advertising. Both Ireland and England prohibit the broadcast of any advertisement directed at a political end. However the power to regulate political advertising is not mentioned in the Constitution and presumably could only be justified to the extent that it is necessary to maintain public order and morality. However, the balancing of speech on issues regarding political adversiting is the aim of the legislation but its scope needs to be investigate to see if it may inhibit the 'criticism of government policy' as expressly provided for as part of the rightful liberty of expression in the framing of Article 40.6.1(i).

1.15 Broadcasting Restrictions and the Authority of the State

The area of broadcasting is heavily regulated. In Ireland the relevant regulation is to be found in the Broadcasting Act 2009, which precludes any broadcast of matters that may incite crime or undermine the authority of the State[574], any advertisement directed at a political dispute[575] and ensures fair allocation to political parties when transmitting party political broadcasts[576].

Even though the Defamation Act 2009 removed the offence of seditious speech[577], the study of its effect on the Irish legal landscape still remains. Sedition is still considered to be a constitutional offence under Article 40.6.1 (i)[578]. It may still form part of the contemplation of judges in the interpretation of the freedom of expression guarantee. Moreover, as discussed in section 3.4 below, speech in the nature of seditious speech may still be actionable under the provisions of the Offences Against the State Acts[579], provisions of the Broadcasting Act 2009[580] and Public Order Offences[581].

Such speech protections are generally considered under the heading of national security measures. The aim of speech restrictions for the purposes of national security is to prevent the dissemination of speech that is designed to place the security of the state in jeopardy, either by means of seeking the overthrow of the government or destabilising public order. The use of such restrictions has a direct effect on the freedom to question government policy as such speech always has a political focus and therefore a high threshold must be passed before such speech is restricted. There have been specific broadcasting restrictions

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[574] Broadcasting Act 2009, Section 42 (2) (c)

[575] Section 41(4)

[576] Section 42(2)(e). Also see section 3.5 regarding broadcasting restrictions for political advertising.

[577] Section 35 Defamation Act 2009 'The common law offences of defamatory libel, seditious libel and obscene libel are abolished.'

[578] Even though the lack of implementing legislation makes its use as an offence moot.

[579] Sections 36 and 47 Offences Against the State Act 1987 and see *McElhinney v. Special Criminal Court and DPP* [1990] 1 IR 405

[580] Section 39(1)(d) Broadcasting Act 2009

[581] Section 6 Criminal Justice (Public Order) Act 1993

which have had the effect of stifling a full debate on government policy even though the speech was feared to challenge national security. A good example of this is the Section 31 speech restriction regime, which was in place in Ireland during "The Troubles" and is detailed later on in this section[582]. The concept of national security restriction encompasses the areas of Seditious Libel, Public Safety Legislation, Official Secrets rules and emergency provision such as the Offences Against the State Act in Ireland. Restrictions for the purposes of national security more commonly take the form of censorship where the material is not released, unauthorised release is subject to grave criminal law punishment, and discussion of such material in the national media is prohibited.

The main aim of restricting freedom of expression for national security has a two-fold effect. The first effect is to try to restrain the publication of information that may jeopardise national security or the authority of the state. The second effect is to punish the person responsible for the dissemination of such information. Censorship of the media for national security reasons was commonplace in the emerging Ireland of the 1920s. The first censor in Ireland for such matters, Piaras Béaslaí, a former editor of the Irish Volunteer Paper *An tÓglach*, was appointed by Michael Collins. Nevertheless, Collins himself complained that:

> The censorship was too strict for my liking. It is unquestionably a fact that the average reader of the newspaper discounts to an undue extent censored news, and in any case we have the situation so well in hand now from the public and military point of view that the newspapers themselves may be trusted to do what is right if only they are spoken to occasionally. If there is a rare instance of departure from the spirit in which we allow freedom of the press, then I think we should take such cases up separately[583].

However, Béaslaí was to be a diligent censor yet he was continually exasperated by the inability to censor British titles that were very popular within Ireland at the time'[584]. For example, he complained that 'it is useless to expect me to carry on my job as censor if English papers are allowed to circulate matters in Ireland which the Irish papers are prevented from publishing[585]. This was also to be a frustrating issue for the operation of national security restrictions and section 31 restrictions that will be discussed in the next section.

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[582] See Donal Ó Drisceoil, *Censorship in Ireland 1939 – 1945: Neutrality, Politics and Society* (Cork University Press, 1996) for a consideration of the restrictions placed on the media during the period of 'The Emergency'.

[583] NAI: Taoiseach: S 1394 as cited in John Horgan, *Irish Media: A Critical History Since 1922* (Routledge, 2001) 8 - 9

[584] Horgan, *op. cit.* 6 and Peter Martin, *Censorship in the Two Irelands* (Routledge, 2001) 1922-1939, 17

[585] Béalsaí to Adjutant General, 22 July 1922, National Library of Ireland, Béalsaí Papers, Ms. 33915 (5) as quoted in Peter Martin, *Censorship in the Two Irelands* 1922-1939, 17

Even in the Dáil Debates surrounding the 1937 Constitution, the issue of censorship was brought up. In the debate on the proposed Article 40.6.1, the wording concerning the rights of the media in the second paragraph dealing with the organs of public opinion 'was felt by some deputies to contain danger in that censorship of certain opinions might be possible and that the clause was kept, not because it as felt that this danger was not present, but because curtailment of certain opinions was seen as desirable'[586]. In the *Law Reform Consultation Paper on the Crime of Seditious Libel* it was stated that 'as an offence it has an unsavoury history of suppression of government criticism and has been used in a political muzzle'[587]. In Ireland, a mix of constitutional and legislative provisions governs these restrictions. In the United Kingdom, these restrictions are covered by statute and civil service conventions. In America, presidential privilege may be invoked to restrict the release of sensitive information. All jurisdictions allow for injunctions to be taken to prevent the release of such information.

3.1.1 Seditious Libel

Sedition was used against those who questioned the established order of a state. Nevertheless, where does such a practice stop being a genuine criticism of government policy and begin to undermine the authority of the state? The original reason for the restriction of political expression in the days of the common law offence of sedition was to protect the Crown, or later, the Government from criticism[588]. Since the original crime of sedition was focused on speech that was designed to jeopardise the authority of the state, it can be seen as an early example of a restriction on speech justified on grounds that resemble present-day national security concerns. In *Stephen's Digest of Criminal Law*[589] sedition was defined as:

> Any act done, or words spoken or written and published which (i) has or have a seditious tendency and (ii) is done or are spoken or written and spoke with a seditious intent. A person may be said to have a seditious intention if he has any of the following intentions, and acts or words may be said to have a seditious tendency if that have any the following tendencies: an intention to bring into hatred or contempt, or to excite disaffection against the person of, Her Majesty, her heirs or successors, or the government and the constitution of the United Kingdom, as by law established, or either House of Parliament or the administration of justice, or to excite Her Majesty's subjects to attempt,

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[586] Law Reform Commission, *Report on the Civil Law of Defamation,* <http://www.lawreform.ie/_fileupload/Reports/rDefamation.htm> Accessed 06 September 2012 114

[587] Law Reform Commission, *Consultation Paper on the Law of Criminal Libel,* <http://www.lawreform.ie/_fileupload/Reports/rCrimeofLibel.htm> Accessed 06 September 2012. Also see section 2.6.1.1

[588] *ibid*

[589] Stephen, *Digest of the Criminal Law*, (9 Ed.) Art. 114 as discussed in Robertson & McNicol, *op. cit.* 672

> otherwise than by lawful means, the alteration of any matter of Church and State by law established or to raise discontent or disaffection among Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of society[590].

Blackstone's Commentaries on the Laws of England stated that sedition was 'any speech 'that may tend to lessen [the king] in the esteem of his subjects, may weaken his government or may raise jealousies between him and his people'[591]. The Irish formulation of sedition contained in the Offences Against the State Act 1939, states that a seditious document is one which 'contains matter calculated...to undermine public order or the authority of the State'[592].

Historically the publication of such information was controlled by the common law offence of seditious libel. The time from the English Civil War to the mass enfranchisement of the population saw an ever shifting power struggle between the *status quo* and those who sought reform, precipitating the slow but profound move from absolute monarchy towards a recognisably modern system of representative and participatory democracy. However, inevitably, the authorities resisted such change, and the crime of sedition was the legal panacea to the fear of revolt. Casey states that this offence was used in the 18th and 19th centuries 'oppressively against those who questioned the established order[593]'. He adds that no one seemed to have been charged with sedition since the foundation of the State. Is this a historical hangover from independence or just a consequence of legislation taking the place of the common law offence? According to the Constitutional Law Reform Group, the latter proposition is the most likely answer. Moreover, notwithstanding the abolition of the common law offence of seditious libel[594], the essence of the offence is still alive in such legislation as the Offences Against the State, Acts 1939-1998. However, Hogan and Whyte state that, according to the Digests of Reported Decisions, there were no recorded prosecutions since 1919[595]. However, the main instance of such an event was dealt with under the provisions of the Offences against the State Act is the *O'Kelly*[596] case and this did not involve the use of the common law restriction on sedition nor did it involve the use of the s.31 order. In fact the *O'Kelly* case was more concerned with journalistic privilege. In 1972, he conducted an interview with Sean MacSíofáin who was, at the time of the interview, IRA chief of staff. Kevin O'Kelly was called as a witness for the prosecutionin the trial of MacSíofáin for membership of the IRA. O'Kelly refused to answer questions surrounding the broadcasted interview and was held in contempt of court.

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[590] *ibid*

[591] As quoted in fn. 15 by McGonagle, *Media Law* (2nd Edition, Thomson Roundhall, 2003) 338

[592] Section 10(1)

[593] James Casey, *Constitutional Law in Ireland* (3rd edn, Thomson Roundhall, 2000) 557-8

[594] Section 35 Defamation Act 2009

[595] Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution op. cit.* 1732 fn. 38

[596] *Re Kevin O'Kelly* (1978) 108 ILTR 97 and see section 3.4.3 for a full consideration

Such restrictions are encompassed in both the phrasing of Article 40.6.1 (i) and Article 10 of the European Convention on Human Rights. Before the domestic incorporation of the Convention, the section 31 restrictions was a logical conclusion of the limitation on political expression. Moreover, the promulgation of this restriction was due to a widespread fear of the publication of such material.

Protecting the government from all criticism is no longer a valid aspiration. There is no utility in the protection of the government against criticism if this is the only objective of the legislation in question. This aspiration today would be reminiscent of autocratic regimes of the past. The criticism of government policy, the administration of the country and criticism of the government in general are part of the cut and thrust of modern day life. It is one of the core principles of modern democracy that a person is able, allowed and indeed encouraged to be critical of government.

Criticism of government policy is expressly stated in Article 40.6.1 as part of a citizen's right to freedom of expression. The use of a person's right to freedom of expression will be curbed where it seeks to undermine 'public order', or 'morality', or the 'authority of the state'. With regard to sedition, it is 'public order' and the 'authority of the state' that are in jeopardy. Framing the meanings of these terms are the key questions when addressing the potential over-breadth or unconstitutionality of legislation restricting the expression of such information or opinions. Moreover, the last line of the article further provides 'the publication or utterance of...seditious.... matter is an offence that shall be punishable in accordance with law[597]" thereby further emphasising the restriction on such expression.

Nevertheless, such restrictions impede the free flow of information in a democratic society, by which those who wish to inform can inform, those who wish to receive information are able to receive it, and those who wish to criticise government policy as a consequence are free to do so. There is also a tension between the government's wish to protect the citizens from unrest and information that may cause such unrest. However, there is also a parallel right of the media to inform the citizens of information which they may wish to receive. Therefore in legislating for and regulating the media, two questions arise. First, is there a democratically mandated role to regulate and control the flow of information? Second, if so, what are the constitutionally permissible boundaries for such regulation and control, bearing in mind the construction of the right to freedom of expression in Article 40.6.1(i) and role of citizens in Article 6.1?

Hogan and Walker[598] point out that laws dealing with political violence in Ireland and the UK – such as the sedition laws at issue here – are 'necessary to preserve two

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[597] Article 40.6.1 Bunreacht na hÉireann

[598] Hogan & Walker, *Political Violence and the Law in Ireland* (Manchester University Press, 1989) 3

democratically constituted states'. However, they urge a move away from the terms 'terrorist' and 'terrorism', as they contend that such terms are value laden and that they have 'intentionally, pejorative overtones'. They prefer instead to use the term 'political violence'.

The subversion of the democratic process whether advocated or realised is a threat to the democratic order of any state and is a peril that is sought to be restrained by various legislative enactments at times of danger to the order of a state. Terrorism may also seek to affect the policy decisions of the state not just the existence of the state itself. However allowing such violence to override the mandate of the elected officials of the state who have been chosen by the citizens to represent their views pursuant to the theory of representative democracy is also a threat to the established governance system. Hogan and Walker state that there is a rational counter – strategy that is made up of two elements: prosecution of perpetrators: and social, economic and political changes. The law on sedition could be said to straddle the middle ground by seeking to prosecute the proponents of seditious statements and also politically by creating a chilling effect on those who may abuse their right to freedom of expression. However, much restriction is rational in theory, the application of it may be complex, as it is within the gift of the legislature to frame the legislation. Though, of course, it is ultimately within the power of the judicial system to review such statutes.

3.1.2 Removal of Sedition

In section three of the Law Reform Commission's Report on Criminal Libel[599] the commissioners drew particular attention to the then current state of the law regarding seditious libel and the need for reform. They stated that even though there were no reported cases of such libel since the foundation of the state, this did not equate to the law having no function. They added that such an offence was not one that would be expected to 'occur very often in a relatively settled society'[600]. In their consideration of the provisions of the Offences Against the State Act 1939 - 1998 and the Broadcasting Acts 1960 - 2009, they were of the opinion that the legislative offences were preferable to the common law of seditious libel, even though there was 'definitional[601]' issues with the legislation'. Their objections were due to the unsettled ambit of the offence and its possible conflict with the provisions of the constitutional right to freedom of expression, in particular the criticism of government policy. Moreover, they stated that

> As an offence, it has an unsavoury history of suppression of Government

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[599] Law Reform Commission, Report on the Criminal Law of Libel, <http://www.lawreform.ie/_fileupload/Reports/rCrimeofLibel.htm> Accessed 06 September 2012

[600] Law Reform Commission, *Report on the Criminal Law of Libel,* <http://www.lawreform.ie/_fileupload/Reports/rCrimeofLibel.htm> Accessed 06 September 2012 9

[601] ibid

criticism and has been used as a political muzzle.[602]

Therefore the abolition of seditious libel was recommended. This recommendation was followed in the Defamation Act 2009[603], however it remains as a toothless constitutional offence [604]. Sedition still remains as a constitutional offence along with the crime of blasphemy and indecency[605]. With the abolition of the common law crime of seditious libel, effect is given to the constitutional imperative that sedition be an offence by means of statutory provisions such as the Offences Against the State Acts, 1939-1998. Similarly, the criminal offence of using threatening, abusive or insulting words in a public place with intent to provoke a breach of the peace, under section 6 of the Criminal Justice (Public Order) Act, 1994, will catch many seditious statements. However, this provision would be ineffective if the sedition statement was made in private.

3.1.3 Political Censorship in Ireland and England

The 1960s and 1970s saw the passage of some of the most of the restrictive legislation in the history of the Irish State with regard to political expression with regard to certain actors during the Troubles. The original broadcasting restrictions found in the Broadcasting Authority Act 1960 later amended in 1976. The reaction of the Government of the day was to invoke the use of broadcasting restrictions under the provisions of s.31 of the Broadcasting Authority Act 1960. The effect of s. 31 was not to restrain the person who voiced the idea, gave the information or proffered the opinion but the effect was to restrict and censor the conduit of that speech: the broadcast media. The order prohibited members of listed groups from accessing broadcasting time. It was not that all speech on these issues was restricted, only interviews and statements from spokespersons from these listed group. Both the United Kingdom and Irish provisions based the list of restricted organisations on the list of proscribed organisations in schedule II of the Emergency Provisions Act 1973 (Northern Ireland)[606] which listed the IRA, Cumann na mBan, Fianna na hÉireann, Saor Eire,

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[602] *ibid*

[603] See section 35 Defamation Act 2009. See also Hogan & Walker, Political Violence and the Law in Ireland (Manchester University Press, 1989) who argued that the scope of sedition was unclear at the time. The Commission stated that there only appeared to be two applications under criminal libel in the history of the state being *Application of Gallagher*, unreported, Finlay P, judgment delivered 3rd July 1978, *Hilliard v Penfield Enterprise Ltd and Others*, [1990] 1 IR 138. Fn. 6 p. 3

[604] Section 35 Defamation Act 2009

[605] The Defamation Act 2009 abolished Seditious Libel in section 35. The constitutional crime of blasphemy persisted after abolition of the common law offence by section 35 of the Defamation Act 2009; but its removal from the constitution was recommended by the Constitutional Convention; see Constitutional Convention, 'Sixth Report of the Convention on the Constitution: The Removal of the Offence of Blasphemy from the Constitution' < https://www.constitution.ie/AttachmentDownload.ashx?mid=b96d3466-4987-e311-877e-005056a32ee4> Accessed 10 September 2014.

[606] In *R. v. Secretary of State for the Home Department, Ex parte Brind and Others* the judgment also included "2 The organisations referred to ... are (a) any organisation which is for the time being a proscribed organisation for the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978;

Sinn Fein and the UVF[607]. The Red Hand Commandos and the UFF were added in 1978[608] and the INLA and IPLO were later added in 1991[609]. The argument in this thesis is that the restrictions, though on the grounds of public order essentially, inhibited the robust debate of aspects of government policy. At the time, the violence in Northern Ireland was a central part of government policy both in Ireland and the United Kingdom.

There was an attempt made to extend the same restrcitions to the print media by virture of clause 3 of the Criminal Law Bill 1976 but it was dropped from the draft legislation. It is possible that the application of similar restrictions and its phrasing could have been deemed to be overbroad.

This section allowed the Minister to direct that certain matters could not be broadcast

> 31.—(1)The Minister may direct the Authority in writing to refrain from broadcasting any particular matter or matter of any particular class, and the Authority shall comply with the direction
>
> (2)The Minister may direct the Authority in writing to allocate broadcasting time for any announcements by or on behalf of any Minister of State in connection with the functions of that Minister of State, and the Authority shall comply with the direction[610].

Section 31 of the Broadcasting Authority Act 1960 provided that the State was able to restrict expression where the Minister considered it likely to promote, or incite to, crime. However, the section survived challenges in the Irish courts, as well as before the European Commission on Human Rights[611]. It was also used in a time of deepening distrust between the Government and RTÉ[612]. With reference to The Trobubles and the position of the Broadcaster, RTÉ stated in its 1972 Annual Report that

> The Authority acknowledges the special responsibilities of the national broad-

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and (b) Sinn Fein, Republican Sinn Fein and the Ulster Defence Association.

[607] Northern Ireland (Emergency Provisions) Act 1973 <http://www.legislation.gov.uk/ukpga/1973/53/schedule/2/enacted> Accessed 06 October 2011

[608] *ibid*

[609] *ibid*

[610] Section 31 Broadcasting Act 1960 and amended by the Broadcasting (Amendment) Act 1976 to include a provision where the order was to be renewed on an annual basis.

[611] See section 3.4.4 regarding *Purcell v. Ireland* Application No. 15404/89 and see the discussion regarding *State (Lynch) v. Cooney* [1982] IR 337, *O'Toole v RTÉ* [1993] ILRM 454 and *O'Toole v. RTÉ No.2* [1993] ILRM 458 and *Brandon Book Publishers v. RTÉ* [1993] ILRM 806 and *Brandon Book Publishers v. Independent Radio and Television Commission* Unreported, High Court, 29/10/1993"

[612] Gareth Ivory, 'RTÉ And The Coverage Of Northern Ireland On Television News Bulletins In The Early Years Of The Troubles' (2012) 13 Irish Communications Review 31

> casting service at all times. It would be contrary to its policy to permit broadcasting to be used for the advocacy of violence by any organisation as a mean of attaining particular aims. A distinction must be made between the obligations of the Authority in the field of reporting and analysis of activities and events that are an important feature of the national scene, and incidental publicity that may derive from the broadcasting treatment of such activities or events. The Authority is of the view that the national interest is best serviced by the provision of a comprehensive information service, and it made every effort to ensure that its broadcasting treatment of activities and events in the growing complexity of the Northern Ireland situation over the past three years was handled in a responsible manner[613]

The ablity of RTÉ to provide this 'comprehensive information' was effectively compromised by the inability to engage with members of proscribed orgnaisation in entering into robust debate on the policies and philosophy which underpinned their campaign of violence. The rationale for the restriction was set out succinetly by the Taoiseach of the day, Jack Lynch as follows

> it was not in the public interest that mem- bers of an illegal organisation should be permitted to use such a programme for publicising their activities. (Dáil Éireann debates, 24 June 1971).

There was a two-pronged approach taken in this section. Firstly the minster was able to stop the broadcasting authority[614]. On the other hand, ss.2 gave legislative power to a minster to direct the Broadcasting Authority to give over airtime to Ministerial Broadcasts. Even though it is hard to document each individual use of this directive[615], the ability of the Minister to request airtime on a national broadcaster when required and the ablility to remove cetain parties from entering into robust debate on issues of government policy is evidence of an uneven regulatory landscape. Furthermore, the provisions of s.31 in its original embodiment did not provide for any time limit on the order. This point was addressed in the Broadcasting Authority (Amendment) Act 1976 where s.16 provided for a time limit on such Ministerial Directions[616].

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[613] *ibid*, 36 - 37

[614] The Broadcasting Authority at this time solely referred to the governing body of Radio Telefís Éireann which was the sole broadcaster and the state broadcaster in Ireland.

[615] Apart from some infamous uses of the ministerial broadcast, such as the address from the former Taoiseach Charles Haughey in relation to the Budget of 1980 very few addresses are documented. RTÉ "We Are Living Beyond our Means' < http://www.rte.ie/archives/exhibitions/1333-memorable-budgets/1337-budget-1980/336279-a-ministerial-broadcast-by-an-taoiseach/> Accessed 31/07/2015

[616] 16.—The Principal Act is hereby amended by the substitution of the following subsections for subsection (1) of section 31:

"(1) Where the Minister is of the opinion that the broadcasting of a particular matter or any matter of a particular class would be likely to promote, or incite to, crime or would tend to

The first use of s.31, in 1971, was to prevent the broadcast of 'Seven Days', a current affairs programme that transmitted interviews with members of the IRA[617]. In 1972, the situation with regard to the wide ministerial power drew this comment from Mr. T.P. Hardiman[618].

> One could not have a self – governing people without having a fully- informed people, free to know, to discuss, to draw their information from media which were themselves free to report. Circulation of accurate information was the lifeblood of a democracy[619].

The narrow line between legitimate restriction and political censorship was central to debate at this time. Those affected by the restrictions contained in s.31 were quick to decry the moves as a form of political censorship[620]. However, the Government maintained that s.31 was critical to the defence of the authority of the state. In an interview with the British media, the then Minister for Post and Telegraphs Mr. Gerard Collins defended the measures under s.31 and denied acting as a censor.

> It was necessary to give this direction to the Broadcasting Authority, because "up to that, members of subversive organisations, enemies of our State, had been given platforms on Radio Telefis Éireann to propound their ideologies and doctrines, and were using it, I'm afraid, as a form of recruitment"[621].

The narrowness of this line was to come to a head in the events surrounding the Kevin

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undermine the authority of the State, he may by order direct the Authority to refrain from broadcasting the matter or any matter of the particular class, and the Authority shall comply with the order.

(1A) An order under subsection (1) of this section shall remain in force for such period not exceeding twelve months as is specified in the order and the period for which the order is to remain in force may be extended or further extended by an order made by the Minister or by a resolution passed by both Houses of the Oireachtas providing for its extension; provided that the period for which an order under the said subsection (1) is extended or further extended by an order or resolution under this subsection shall not exceed a period of twelve months.

(1B) Every order made by the Minister under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order is passed by either such House within the next twenty-one days on which that House has sat after the order is laid before it, the order shall be annulled accordingly but without prejudice to its validity prior to the annulment.".

[617] McGonagle, *Media Law in Ireland*, (2nd edn, Thomson Roundhall,2003) 343, White, 'Ministerial Orders and Court Challenges' in Corcoran & O'Brien (eds) *Political Censorship and the Democratic State: The Irish Broadcasting Ban* (Four Courts Press, 2005) 36

[618] Director – General of R.T.E. at the time of the introduction of s.31

[619] 'R.T.E. Hit by Northern Troubles, says Chief' *The Irish Times* (Dublin, Sept 13, 1972)

[620] 'Newspapers will also be Restricted – T.D.' *The Irish Times* (Dublin, Oct 2 1971)

[621] Minister Denies Acting as Censor: British TV Interview, *The Irish Times* (Dublin, Nov 27 1972)

O'Kelly affair. This was the first direct clash between the powers of the Minister and the Broadcasting Authority that was the governing body of RTÉ. In *Re Kevin O'Kelly*[622], though not directly referring to the provisions of s.31, underlined the philosophy of journalistic integrity and privilege. The case centred on a recording carried out by O'Kelly and a member of an illegal organisation. Pursuant to the Offences Against the State Act, the recording was entered into evidence in a case against Sean MacStiofain regarding his membership of an illegal organisation. Mr O'Kelly refused to answer as to the identity of the other person on the recording. Accordingly, due to his refusal to co-operate with the proceedings, Mr O'Kelly was held in contempt of court. *In Re O'Kelly* was primarily concerned with the sentence imposed, which was reduced to time served and a fine. However, Mr O'Kelly's claim of journalistic ethics was an important aspect of the pressure placed on journalists in the wake of the s.31 restrictions and the consequent environment that was created by the continuance of broadcasting restrictions[623].

However, the most important aspect of the *O'Kelly* situation was the ramification for his employer: the Broadcasting Authority. Due to the pressure placed on the Broadcasting Authority, a letter was written to the Minister for Posts and Telegraphs regarding their implementation of the Ministerial Direction. The Authority also capitulated on the point of journalistic integrity by stating that the 'editorial decisions (to broadcast O'Kelly's piece in the first place) showed defective judgement'[624]. Moreover, even with this attempt the Minister still sacked the Broadcasting Authority under the powers of s.6 Broadcasting Authority Act 1960[625]. The power contained in this provision was also criticised as showing the 'undesirability of letting ministers have vague powers in relation to freedom of expression'[626].

It could not be assessed how the information would have affected the public opinion of the day as it could not be accessed by the populace. The nearest that we can come to is the information in the survey that was carried out by Meehan and Horgan on the attitudes of the Dublin Population to Section 31[627]. The overriding message from the survey was that section 31 was unpopular and that the respondents felt that the restrictions should not

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[622] (1978) 108 ILTR 97

[623] However, there has been radical change in the application of journalistic privilege in Ireland which is demonstrated in *Mahon v. Keena* [2010] 1 IR 336, *Mahon v. Post Publications* [2007] IESC 15 and also *Jameel and Another v Wall Street Journal Europe Sprl* [2005] QB 904, [2006] 4 All ER 1279 in the UK. Also see sections 2.6.1.2 and 2.7.1

[624] Fisher, 'Getting Tough with RTÉ' in Corcoran & O'Brien (eds) *Political Censorship and the Democratic State: The Irish Broadcasting Ban* (Four Courts Press, 2005) 66

[625] *ibid*

[626] Kenny, 'Censorship, not "self – censorship"' in RTÉ' in Corcoran & O'Brien (eds) *Political Censorship and the Democratic State: The Irish Broadcasting Ban* (Four Courts Press, 2005) 76, Kenny 'Section 31 and the censorship of programmes' (1994) 12 ILT 50

[627] Niall Meehan & Jean Horgan, *Survey on Attitudes of Dublin Population to Section 31* (National Institute for Higher Education, 1987)

apply to sitting TDs[628].

The s.31 restrictions only affected the broadcast media in Ireland. At the time of the passing of the Broadcasting Authority Act 1960 and the Broadcasting Authority (Amendment) Act 1976 the only licensed broadcaster was the National Broadcaster: Radio Telefís Éireann. This was controlled by a state appointed Broadcast Authority. The restrictions did not affect the print media. There was an attempt to expand the restriction by virtue of clause 3 of the Criminal Law Bill 1976[629] which was removed at Committee Stage. It could have been argued that if the Bill were to be passed in that form, the restriction could have been overbroad.

The first challenge to section 31 came in the case of *The State (Lynch) v. Cooney*[630] where the plaintiff sought an order of the court to quash the broadcasting restriction that prevented election broadcasts by Sinn Féin under Section 31. In the High Court, O'Hanlon J. held that the order exceeded what was permissible under the Constitution. He stated that in the section as framed there were "insufficient safeguards" for the protection of this right. The Supreme Court held, on appeal, that the powers of the minister were exercised in conformity with the Constitution, and that the broadcast would be likely to promote, incite or tend to undermine the authority of the state. O'Higgins C.J. acknowledged that the right to freedom of expression cannot be curtailed on irrational or capricious grounds, and that the basis for any attempt of control, such as in the present case, must be for the overriding considerations of public order and morality. Moreover, he held that the exercise of this freedom cannot be used in order to undermine the authority of the State by those who seek to secure support for organisations which endeavour to put in jeopardy the authority of the state or to overthrow the state or its institutions. He also held that there is a duty on the state to intervene in such circumstances. He therefore held that the section was constitutional and that the Minister's order was valid.

The circumstances of this case were an echo of comments which were made by Eoghan Harris who was a producer in RTÉ. He stated that members of the Republican movement and subject to s.31 restrictions were, at the same time, members of the trade union movement. It would be impossible to implement the broadcasting restrictions as it would be impossible to know at what stage they are promoting the aims of an illegal organisation[631]. This comment was made in 1971 but the situation alluded to in the comment was to arise in 1993.

In *O'Toole v RTÉ*[632], the applicant was a union spokesperson who was interviewed by RTÉ in

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[628] *ibid* 9

[629] See further 'Newspapers will also be Restricted – T.D.' *The Irish Times* (Dublin, Oct 2 1971)

[630] *The State (Sean Lynch) v. Patrick Cooney & Attorney General* [1982] IR 337

[631] 'Newspapers will also be Restricted – T.D.' *The Irish Times* (Dublin, Oct 2, 1971)

[632] *O'Toole v RTÉ* [1993] ILRM 454

relation to an industrial dispute. However, as he was a member of Sinn Féin, RTÉ declined to broadcast the interviews on the grounds that it would contravene the ministerial order under Section 31. O'Toole[633] challenged this refusal, and O'Hanlon J. held that accessing the airwaves was a privilege not a right. However, he emphasised that singling people out because of their views and imposing a blanket ban on their ability to voice their opinions on an unrelated subject was unconstitutional, unless it could be justified on such grounds, and these were not present in this case. RTÉ appealed, and while the appeal was pending, they sought guidance on the best way to proceed pending the decision. In this application, O'Hanlon J accepted that two fundamental rights are in question; the right to freedom of expression and the right to protect the state; and, relying on *Paperlink*[634], he held that there was a potential deprivation of the right to communicate. However, he focused primarily on the potential danger to the state if the broadcast were allowed (especially if RTÉ's pending appeal were successful), and he held that they should not broadcast the interviews pending the appeal. The Supreme Court[635] held that the defendant broadcaster was entitled to take reasonable steps to prevent them from infringing the ministerial order. However, banning a person from speaking on any issue is tantamount to the broadcaster usurping the power of the Minister and extending the provisions of the order. The judgment of the court focused on the scope of the order to see whether the order was disproportionate to the constitutional guarantee for freedom of expression and the threat to national security that may be caused by allowing the interview with the plaintiff to be broadcast. The Court held that the main issue was whether a person should be treated equally with others when his views do not conflict with either the Constitution or the law. Therefore the Supreme Court held that the interviews should be broadcast.

The cases of *Brandon Book Publishers v. RTÉ*[636] and *Brandon Book Publishers v. Independent Radio and Television Commission*[637] fall for consideration not only under the provision of s.31 of the Broadcasting Authority Act 1960 but also in the area of political advertising. These cases concerned the placing of an advertisement on national radio to promote a book by Gerry Adams, the leader of Sinn Féin. It contained a collection of short stories and verse that were not connected with his role as leader of Sinn Féin. In the wake of the *O'Toole* Cases the plaintiff publishers were of the opinion that Gerry Adams should be allowed to voice the advertisement on radio however the defendants in both cases refused to air the advertisement. Carney J in the judgment of *Brandon Book Publishers v. RTÉ* felt that the greater expertise in this area rested with the national broadcaster. However he considered that as Gerry Adams was the public face of Sinn Féin, O'Toole could be distinguished. O'Toole was a general member and could arguably be distinguished from Adams, who was

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[633] *ibid*

[634] *Attorney General v. Paperlink* [1984] ILRM 373 established the unenumerated right of the liberal use of freedom of expression

[635] *O'Toole v. RTÉ No.2* [1993] ILRM 458

[636] *Brandon Book Publishers v. RTÉ* [1993] ILRM 806

[637] *Brandon Book Publishers v. Independent Radio and Television Commission* Unreported, High Court, 29/10/1993

held to be so connected with Sinn Féin that any broadcast on any topic by him would automatically be construed as support for the organisation. A similar judgment was handed down in the case of *Brandon Book Publishers v. Independent Radio and Television Commission.*

The analysis of the judgments from the first hearing of the issues surrounding freedom of expression and the legitimate restriction of the right highlights not the deficiency of judicial reasoning in this regard, but the absence of the consideration of a harmonious interpretation of the constitution which may have given a greater weight to the 'criticism of government policy' section in the rightful liberty of expression when taken with the aspirations of Article 6.1. In the context of the times and the political violence, the aim of the judgments may have been to restrict the parties that were engaged in such violence, but this need to restrict did not come to a full contemplation of what was engaged in a discussion of political speech. More importantly from the perspective of the thesis, the issues engaged in such circumstances with the dissemination of government policy information.

At this time the English Parliament had not enacted the Human Rights Act 1998. This Act means that UK courts must give due recognition to the tenets of the Convention when examining the breath of restrictions created by Parliament. Regarding the common law protections in the UK Jurisdiction, *Reynolds v. Times Newspapers Ltd*[638] referred to the fundamental rights of freedom of expression that were part of the UK Law but conceded that these rights would be further developed by the Human Rights Act 1998. The judgment was handed down before the Human Rights Act 1998 coming into effect[639]. However when the jurisprudence of the UK courts in relation to sedition or speech threatening the authority of the state is considered, the adoption of the Convention is a positive development for the Common Law[640]. The approach that was followed in England was similar to that of s.31. In fact, the judgment handed down by the Irish Supreme Court in *State (Lynch) v. Cooney*[641] was replicated by the House of Lords in *Brind*[642].

The use of blanket broadcasting restrictions in both countries is more evocative of a time of bombs and bullets. The continued existence and authority both of States had been placed in jeopardy by the Troubles in Northern Ireland[643]. As a consequence, the European Court of

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[638] [2001] 2 AC 127

[639] Hickman, *Public Law after the Human Rights Act* (Hart Publishing, 2010) 51 and also see section 2.6.2.1 and 2.6.2.2

[640] The jurisprudence of the English Courts in relation to such speech is further considered in section 3.4.4 relating to National Security issues.

[641] [1982] IR 337

[642] *R. v. Secretary of State for the Home Department, Ex parte Brind and Others* [1991] 1 AC 696

[643] The threat to the authority of the state was evidenced in an excerpt from An Phoblacht (5/11/81) as part of the judgment of O'Higgins C.J. in *State (Lynch) v. Cooney* [1982] IR 337 which quoted a statement at a Sinn Fein Ard Fhéis where a delegate stated 'Will anyone here object if, with a ballot paper in this hand, and an armalite in this hand, we take power in Ireland?'

Human Rights, in the challenge to the UK ban, succinctly stated its rationale[644].

The directions given to broadcasting authorities will not directly reduce the number of terrorist acts in Northern Ireland or in the United Kingdom, but ... they are intended to reduce the impact and influence of the advocates and supporters of such acts, and that they correspond to the need to prevent the giving of overt support for certain organisations[645].

The UK approach was centred on the restriction of the actual voices of members of listed organisations from being broadcast. The restriction, though preventing a member of a listed organisation from directly addressing the nation via the media, did allow for their message to be delivered to the public by means of an actor. The fear was that allowing such persons access to the broadcast media would create a survival mechanism from the 'oxygen of publicity' around their actions[646]. The equivalent broadcasting restrictions in the United Kingdom did not extend to elected representatives, election campaigns or parliamentary proceedings. Paragraph three of the licence agreement drawn up between the BBC and the Home Secretary of 2nd April, 1981 specifically excluded 'words spoken in Parliament and at elections' from the ambit of the restrictions[647]. Only the words that were spoken by a person were restricted. Therefore, it was possible to use footage of the person once their voice was not heard. These loopholes in the legislation led to the practice of actors dubbing over the voice of the member being interviewed[648].

In *R. v. Secretary of State for the Home Department, Ex parte Brind and Others*[649] the applicants were journalists who claimed that the restrictions exercise by the Home Secretary amounted to an 'interference with (the applicants') editorial judgment and was necessarily an unjustifiable restriction on the right to freedom of expression'[650].

The restrictions in the UK were based on two pieces of legislation. First, section 29(3) of

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[644] *Brind and Others v. UK* Application No. 18714/91 18 EHRR CD 76 Eur Comm HR

[645] Application No. 18714/91 also see Patrick Dillion-Malone 'Privacy and Media Law' in Ursula Kilkelly (ed) *ECHR and Irish Law* (Jordan's, 2004) 264 – 266 on the brief overview of freedom of expression and political violence.

[646] This was mentioned in the Judgment of Lord Donaldson M.R. in *R. v. Secretary of State for the Home Department, Ex parte Brind and Others* [1991] 1 AC 696, 723 thereby avoiding a *State (Lynch) v. Cooney* - style situation and consequent debates about whether the restriction in question affected the democratic process.

[647] Also McGonagle attributes the lifting of the ban for the duration of elections to the provisions of the Representation of the People Act but the terms of Paragraph Three of the above agreement would tend to cover such a state of affairs anyway. See further McGonagle (2003) fn. 51 and 346- 347, *R. v. Secretary of State for the Home Department, Ex parte Brind and Others, 08/02/1991* Times Law Reports 2

[648] See also the parody of such loopholes by the comedian Steve Coogan in the sketch show 'The Day Today' <https://www.youtube.com/watch?v=UOUeauLWEaE&noredirect=1> Accessed 03 July 2014

[649] 08/02/1991 Times Law Reports, [1991] 1 AC 696

[650] *ibid* 4

the Broadcasting Act 1981 entitles the Home Secretary to prohibit any broadcast at any time. This section is not limited to periods of emergency but the broadcaster is entitled to tell the public that it has received such an order to safeguard against political censorship[651] '... the secretary of state may ... by notice in writing require the (Independent Broadcast Authority) to refrain from broadcasting any matter or classes of matter specified in the notice...'[652]

Second, Clause 13(4) of the licence and agreement made between the BBC and the Home Secretary dated April 2, 1981, required the BBC and the IBA[653]

> To refrain from broadcasting any matter which consists of or includes any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where (a) the person speaking the words represents or purports to represent an organisation specified in paragraph 2 ... or (b) the words support or solicit or invite support for such an organisation...[654]

The applicants argued that the English courts did use the provisions of the Convention when assessing restrictions to ensure their conformity with the rights laid down in the Convention[655]. This was pleaded specifically in relation to the question of whether the restriction was proportionate in relation to the aim. However Robertson and Nicol, in their opinion, state that the ban was a pure infringement on the right to receive information[656]. They may be correct when basing their opinion purely on the provisions of Article 10, where the freedom to receive information is a counterpart right to the right to freedom of expression. However, the rights contained in Article 10 of the Convention did not form part of the UK's domestic law and, therefore, was a moot point before a court bound by the supremacy of the UK Parliament. However, the decision of the House of Lords was to dismiss the appeal and allow the restriction to stand as, in particular stated in the judgment of Lord Lowry, that the proportionality doctrine which was the key to testing the broadcasting restriction in the UK was not in fact in fact part of the common law'[657].

3.1.4 Article 10 and National Security Restrictions

Challenges to both bans failed in the European Commission on Human Rights, and never

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[651] Robertson & Nicol, *Media Law*, (5th edn, Penguin, 2008) 32

[652] 08/02/1991 Times Law Reports 1

[653] Now known as the Independent Television Commission

[654] 08/02/1991 Times Law Reports 1

[655] *R. v. Secretary of State for the Home Department, Ex parte Brind and Others* [1991] 1 AC 696, 705

[656] Robertson & Nicol (2008) *op. cit.* 32

[657] *R. v. Secretary of State for the Home Department, Ex parte Brind and Others* [1991] 1 AC 696, 767

reached Court. As to the Irish ban, in *Purcell v. Ireland*[658], Betty Purcell was an RTÉ producer who, with other applicants, challenged the validity of the s.31 orders, on the grounds they were contrary to the protection of freedom of expression under Article 10 of the European Convention on Human Rights. The applicants claimed that the order restricted their capacity as broadcasters to receive and impart information relating to the situation in Northern Ireland and also deterred them from making such programmes. They further claimed that by not lifting the orders during a general election, it interfered with the political process, as Sinn Féin who were subject of the order, were not able to engage through the broadcast media with the electorate.

At the admissibility hearing before the European Commission on Human Rights, the applicants argued that s.31 was an unjustifiable interference with a person's right in a democracy to impart and receive information. However, the applicants did concede that the principle of the order came within the legitimate aim of protecting national security. However, the practical effect of the order had exceeded this aim. The applicants further argued that due to the order not being lifted during the period of a general election that the provisions of article 3 of Protocol One were violated. This guarantees that elections will be held under conditions that 'will ensure the free expression of the opinion of the people in the choice of the legislature'[659].

The Commission found that the restrictions in the Irish context were invoked in order to prevent persons connected to terrorist organisations from using the broadcast media. There was a fear that broadcast media could be used as 'a platform for advocating their cause, encouraging support for their organisation and conveying the impression of their legitimacy'[660].

The Commission held that the interference was justified, as by allowing such restrictions, 'The Convention recognised the principle that no group or person has the right to pursue activities which aim at the destruction of any of the rights and freedom enshrined in it.'[661] The Commission stated that it was not its role to assess whether other measures would have been more appropriate than the current state of affairs before it. In considering whether such interference was necessary in a democratic society, the commission applied a margin of appreciation to the matters at hand, stating that:

> In a situation where a politically motivated violence poses a constant threat to the lives and security of the population and where the advocates of this violence seek access to the mass media for publicity purposes, it is particularly difficult to strike a fair balance between the requirements of protecting

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[658] *Purcell v. Ireland* Application No. 15404/89

[659] *ibid*

[660] *Purcell* summarised by the court in *Brind and Others v. UK* Application No. 18714/91

[661] *ibid* 15

> freedom of information and the imperatives of protecting the State and the public against armed conspiracies seeking to overthrow the democratic order which guarantees this freedom and other human rights[662].

The Commission conceded that in contemporary society the broadcast media have considerable power and influence. Nevertheless, the Commission considered that, whereas the constraints in question were merely an inconvenience, the measures as a whole were reasonably necessary. However, these restrictions affected every member of the electorate. The inability of the organs of public opinion to report all sides of a story of national importance meant that the electorate could not carry out the discussion of a matter of national and governmental policy effectively[663].

Brind and Others v. UK[664] followed on from the domestic challenge mentioned above[665]. In *Brind v. UK*[666], the applicants claimed that the UK's restrictions were not proportionate. The House of Lords had held that the restrictions were reasonable in when aseesed against the *Wednesbury*[667] test and declined to subject them to a separate proportionality test.

However in the admissibility hearing the Commission referred strongly to the proportionality of the ban to the legitimate aim of national security. The Commission agreed with the submission of the UK Government that the restrictions imposed in England were less onerous than those in *Purcell*[668] as they merely involved the 'dubbing' of voices rather than an outright ban on the speech in question. Hence as in Purcell before it, the Commission duly rejected the application.

The distinction between *Purcell* and *Brind* is logical. However the margin of appreciation given to both Governments seems over-deferential. Granted, there were merits to the approaches taken in order to protect national security but it was conceded in *Brind* that the approach would not save lives. However Roy Greenslade states that, in his opinion, the only achievement of the broadcasting ban was to 'delay the move away from militarism by republicans towards politics.'[669].

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[662] *ibid* 16 - 17

[663] See further Kevin Boyle 'Freedom of Expression and Democracy' in Liz Heffernan (ed.) *Human Rights: A European Perspective* (Roundhall, 2004) 210 where it is argued that teleological interpretation of the right by the Commission has some lapses which are effectively highlighted by the *Purcell* judgment.

[664] *Brind and Others v. UK* Application No. 18714/91 18 EHRR CD 76 Eur Comm HR

[665] *R. v. Secretary of State for the Home Department, Ex parte Brind and Others* [1991] 1 AC 696

[666] (1994) 77 DR 42

[667] This English test of proportionality was set out in the case of *Associated Provincial Picture Houses, LD. v. Wednesbury Corporation* [1945] 1 K.B. 223 and Pairis, *'Wednesbury Unreasonableness: The Expanding Canvas'* (1984) 46 Cambs. L.J. 53 for a further discussion of the *Wednesbury* Reasonableness principle in section 2.6.2.1

[668] *Purcell v. Ireland* Application No. 15404/89

[669] Corcoran & O'Brien (eds.) Political Censorship and the Democratic State: The Irish

Protecting the authority of the state by means of media restrictions may be a legitimate aim, but the breadth of such restrictions should not consequently stifle the debate of government policy. The spectrum of voices in the media should reflect the democratic mandate of the citizens and allow their representatives to voice their concerns to a mass audience. There may be instances where some groups seek to destabilise such a process and challenge its very existence but the democratic system should have enough flexibility to allow such speech to be dealt with in an open fashion and not hidden away.

3.1.5 Lapse of s.31

In 1987, a report was carried out by Meehan and Horgan into the public perception and attitudes towards the s.31 restrictions within the greater Dublin area[670]. The researchers listed several reasons for undertaking the research. The developing political situation in the domestic landscape and the disparity between British and Irish coverage was at issue. For example, in UK the voices could be dubbed then broadcast but in Ireland there was no such loophole. Moreover, many Irish homes could receive both UK and Irish broadcasts that highlighted the disparity between both systems of restriction[671]. They were also of the opinion that such restrictions on political expression need to be 'continually monitored and discussed'[672].

The survey found that 53% of the respondents did not agree with the application of s.31[673]. 78% of respondents wanted RTÉ to inform them if the provisions of s.31 affected a programme[674]. In addition, where a story affected those subject to s.31, 73% felt that they should be able to respond to that story[675]. Moreover, the existence of the s.31 restriction was well known with 62% of the sample being able to identify that there was a law restricting certain groups from the airwaves[676].

This survey was conducted after the case of *The State (Lynch) v. Cooney*[677] but before the resurgence of litigation on the issue following the *O'Toole v RTÉ*[678] cases. This awareness could not be attributed to the reportage of s.31 litigation but an actual awareness of the population that certain stakeholders in the discussion of government and public policy were not able to voice their opinions via the organs of public opinion. Moreover, radio and television could not carry out their constitutionally mandated task of educating public

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Broadcasting Ban (Four Courts Press, 2005) 13

[670] Meehan & Horgan, 'Survey on Attitudes of Dublin Population to Section 31 of the Broadcasting Act' (National Institute for Higher Education, Dublin, 1987)

[671] *ibid*, 6

[672] *ibid* 7

[673] *ibid* 9

[674] *ibid* 9

[675] *ibid*

[676] *ibid*

[677] *The State (Sean Lynch) v. Patrick Cooney & Attorney General* [1982] IR 337

[678] [1993] ILRM 454

opinion[679]. It is likely that the interest in the provisions was kindled by the poor showing of Sinn Fein in the General Election of 1987[680], and whether the restrictions of s.31 effected the democratic right of parties to communicate with voters via broadcast media.

The ministerial order for the s.31 restriction was renewed every January 19th since its introduction[681]. The order was allowed to lapse in 1994 when the then Minister for Arts, Culture and Heritage, Michael D. Higgins, did not renew the order. Furthermore, the non – renewal of the orders was also linked at the time to the Downing Street Declaration[682]. The restriction was eventually abolished in the Broadcasting Act 2001 when section 31 was repealed in the first schedule of the Act.

In Higgins' opinion, s. 31 was in contravention of the philosophical freedom that should be accorded to a broadcaster[683] in line with the freedom that comes from liberty and freedom of expression[684]. The restrictions also underlined a lack of trust in a broadcaster, in those who had the editorial control, and above all, in the public's capacity to discriminate[685]. The restrictions were a form of censorship not the protection of the state[686].

The revised primary legislation for broadcasting in Ireland is now contained in the Broadcasting Act 2009. As well as making changes to the regulatory structure for Irish broadcast media, the new Act also contains provisions which not only ensure balance but can also prevent the use of broadcast media to undermine the authority of the State. For example pursuant to s. 18[687] the broadcaster must be impartial in reporting of matters of public controversy but cannot refuse the transmission of political party broadcasts. However, the Broadcasting Act 2009 saw a restatement of provisions to protect the authority of the state. In section 39(1)(d)

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[679] The findings of the survey fell in line with the general opinions of an editorial in the Irish Law Times of the same year.

[680] Editorial, 'Section 31' (1987) 5 ILT 53

[681] Foley, 'Dilemma facing Higgins over renewal of broadcasting ban' *The Irish Times* (Dublin, 15 Jan 1993)

[682] Editorial, 'The Lifting of Section 31' (1994) 12 ILT 49

[683] Higgins, 'Culture, democracy and public service broadcasting' in Corcoran & O'Brien (eds) *Political Censorship and the Democratic State: The Irish Broadcasting Ban* (Four Courts Press, 2005) 140

[684] See further Clarke, 'Section 31 and Censorship: A Philosophical Perspective' (1994) 12 ILT 53 in particular the arguments regarding Utilitarianism and Freedom of Speech Theories.

[685] Higgins, 140 also compare to the argument allowing for the Leader of the BNP on BBC Question Time on 22 October 2009 http://news.bbc.co.uk/2/hi/uk_news/politics/8319596.stm (accessed 16/10/2009)

[686] *ibid*

[687] Section 18 of the Broadcasting Authority Act 2009 provides that 'It shall be the duty of the Authority to secure that, when it broadcasts any information, news or feature which relates to matters of public controversy or is the subject of current public debate, the information, news or feature is presented objectively and impartially and without any expression of the Authority's own views. (2) Nothing in this section shall prevent the Authority from transmitting political party broadcasts.'

> Every broadcaster shall ensure that anything which may reasonably be regarded as causing harm or offence or as being likely to promote, or incite to, crime or as tending to undermine the authority of the state, is not to be broadcast by the broadcaster[688].

This is a worrying section of the 2009 Act as this put the onus on the decision making process on the broadcaster. This was part of the issue with the old section 31 orders. Broadcasters are competent in the areas of making programmes but legal judgements are not within their competencies. Section 39(1)(d) is wider ranging than the original orders which specified the groups that were not allowed to access the airwaves whereas this provision is open ended. As with the previous attempt to extend the provision of section 31 to to the print media by virture of clause 3 of the Criminal Law Bill 1976 could have been deemed to be overbroad due to a similar phrasing. It is possible that a similar restriction for material, which could be regarded as causing 'harm or offense', could be similarly overbroad. Therfore this provision may be constitutionally quesitonable.

The current provision, in contrast to s.31, places the onus on the broadcaster for anything that may offend or endanger the authority of the state. There is no ministerial direction involved in the implementation of the new provision that could, in the future, lead to claims of broadcasters acting *ultra vires* and restricting expression on unreasonable grounds. The case law, from both England and Ireland, was based on restrictions that were grounded on a ministerial order. Furthermore, under section 122(4) of the Broadcasting Act 2009, in spite of the prohibition of political advertising, the Minister 'may direct a corporation to allocate broadcasting time for announcements for and on behalf of any Minister of the Government'[689]. Even though this is framed in terms of a major emergency, the definition of such an event is not included and, thereby could be argued to underlies the balance of access to the airwaves for political matters.

The net effect of both s.31 and the UK equivalent resulted in the restriction of information on important policies that affected the public. There was a significant issue, undoubtedly, with regard to the prevention of crime, the protection of national security and the authority of state. However, the almost paternalistic aim of preventing such disorder causes an overarching chilling effect on the democratic right to access government policy information in order to critique it.

The issue that faced the majority of citizens was the restriction of information on the situation in Northern Ireland. This situation was a key element of Government policy and the lack of information from all actors in the situation did not aid in the "education of public

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[688] Section 39(1)(d) Broadcasting Act 2009

[689] Section 122(4) Broadcasting Act 2009

opinion" and curtailed the exercise of the citizens' right to criticise government policy as it was hard to access the full spectrum of information on the situation. This was a major concern in the Irish situation as the restriction, as drafted, in s.31 had an effect on party political broadcasts unlike the UK versions of the broadcasting restrictions. One of the main points in a party political broadcast is the criticism of government policy and certain parties in the Irish political process were unable publicly to voice their criticism. Therefore they were denied their constitutional right. Furthermore, the importance of the currency of news has gone on to be recognised in cases such as *Leech v. Independent Newspapers*[690] where it was accepted that news was a perishable commodity[691] and had no issue with bearing this in mind in the context of his decision on publication.

Consideration of this area focused on the use of s.31 as a means to restrict terrorist speech however the effect of the restriction on the ability to discuss policy has been neglected in many academic studies of the time. The underlying philosophy of s.31 was to restrain the broadcaster from broadcasting the message to a large audience.

Access to mainstream media is an important part of being able to criticise government policy and stimulating debate. Any restrictions on this medium must withstand scrutiny. The form of censorship contained in s.31 was discriminatory as it did not have a balanced effect on the range of communication media as the restrictions only pertained to the broadcast media. Although, it seems that the culture of s.31 self-censorship crept into the print media. The International Federation of Journalists report referred to a s.31 mindset in print media even though the provisions did not effect newspapers[692]. The report also added that the 'most dangerous effect...was the creating of a general climate where (such restrictions) were accepted and defended'[693].bHowever the question that still remains is as follows; what did the citizens lose by the restriction of certain persons from the airwaves? As stated by Jonathan Dimbleby succinctly as follows

> How much better it would have been if the electorate were permitted to hear the weasel words, the half baked logic, the mealy – mouthed falsehoods of the terrorists; how much better to see them subjected to thorough cross – examination in the full and merciless glare of the television camera[694].

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[690] [2007] IEHC 223 and also see the discussion on the use of the public interest as a ground in political speech cases in section 2.7.1

[691] Also see Fennelly J. in *Mahon v. Post Publications* [2007] IESC 15 and Carroll J. in *Attorney General for England and Wales v. Brandon Books* [1987] ILRM 135, [1986] 1 IR 597

[692] Doornaer, M. & Larsen, H. (1987) Censoring the Troubles: an Irish Solution to and Irish Problem? Report of an IFI fact finding mission to Ireland, January 1987 as cited in Corcoran, 'Government, public broadcasting and the urge to censor in Corcoran & O'Brien (eds) *Political Censorship and the Democratic State: The Irish Broadcasting Ban* (Four Courts Press, 2005) 89- 91

[693] *ibid* 91

[694] Affidavit to court in *R. v. Secretary of State for the Home Department, ex parte Brind and Others* [1991] 1 AC 696, 758 - 759

The statement of Mr. Dimbleby is personally motivated; this is evident from the language used. However the general theme of the extract does show that due to the UK equivalent of s.31, the persons involved with the organisations covered by the ban were able to avoid accounting for their views and policies in a way that other politicians or public figures could not avoid.

Consequently, the effect of such broadcasting bans allowed certain groups and their spokespersons to avoid a critical engagement with their views for the citizens to hear[695]. In conclusion, it is clear from the above analysis of the provisions of s.31 and its consequent re-embodiments, the broadcasting restrictions did affect freedom of political expression and critical speech against the government. Whilst the aims of protecting national security and the authority of the state are legitimate, nevertheless the framing of the Irish provisions went beyond what was required. The UK version, thought comical in retrospect, did allow for the substance of the expression to be respected and broadcast.

1.16 Political Advertising

The area of political advertising is especially relevant to the discussion of government policy. Not only does it address the restrictions on citizens accessing mass media, in particular broadcast media, but it also tempers the ability of the government to put across uncontested accounts of its own policies. As stated previously, the alternating nature of political discourse strengthens the political integrity of decisions made in the name of citizens but also establishes legitimate governance and deliberation between the government and its citizens. Undoubtedly, such open policy discussions are in the public interest as it informs the citizens of government action on their behalf. The aims of restrictions in this area are to create balanced fora for the communication of political speech thereby maintaining transparency in systems of governance.

Broadcasting restrictions[696] and political advertising restrictions share one common thread; they reduce the plurality of voices on issues of public importance. Such restrictions reduce the quality and quantity of public debate and, moreover, stifle the 'education of public opinion'[697]. The legislation[698] affecting this area of political communications could increase

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[695] See further section 3.5.3 in particular *Murphy v. Ireland* Application No. 44179/98 Judgment (ECtHR, 03 December 2003)

[696] See section 3.4

[697] Article 40.6.1

[698] See Broadcasting Act 2009 section 41(3) Broadcasting Act 2009 which blocks any advertisement directed to a political end. Also see section 42(2) Broadcasting Act which stipulates balance in current affairs coverage and equality of time for the transmission of party political broadcasts. Furthermore, the Broadcasting Authority of Ireland publishes broadcasting codes to cover Referendums and elections such as Broadcasting Authority of Ireland, *Broadcasting Code on Referenda and Election Coverage* <http://www.bai.ie/wordpress/wp-content/uploads/20110913_RefElecCode_Eng.pdf > Accessed 30/05/2013. Also see the updated code for the European and Local Elections, Broadcasting Authority of Ireland

the potential for communications discrimination. This difference in treatment between print and broadcast media, and refered to as communication discrimination could arguably considered as a means of incentivising of government speech while placing speech from non - governmental actors in a weaker position.

In the consideration of Irish formulation of content restirctions on the basis of political advertising *Colgan v. Independent Radio and Television Commission* [699]is instructive. In this case the applicant wishes to place radio adverstiment on indepdent radio stations relating to abortion. Like in *Murphy*[700], the provisions of s.10(3) of the Radio and Television Act 1998 was used to prohibit the advertisement. Even though, under the provision of Article 40.3.3, the unborn child is placed in a special position, this did not translate to a special position for the communication of messages which sought to protect the unborn child and following the earlier decision in Murphy the legislation was found not to be repugnant to the Constitution.

For an informed electorate there must be a free flow of ideas both for and against the agenda or policy in question. The importance of this debate was succinctly stated by Lord Steyn in *R. v. Secretary of State for the Home Department (ex parte Simms)*[701] as previously discussed regarding its application to broadcasting restrictions.

> Freedom of speech is the lifeblood of democracy. The free flow of information and idea informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them[702].

Regarding the restriction of information, Mason J. held in *Commonwealth of Australia v. John Fairfax and Sons Ltd*[703] stated that

> It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action[704].

Guidelines in Respect of Coverage of Local and European Elections ,< http://www.bai.ie/wordpress/wp-content/uploads /201402_Rule27_ ElectGuide_English_vFinal.pdf> Accessed 19 May 2014

[699] [2000] 2 IR 490

[700] [1999] 1 IR 12 and also *Murphy v. Ireland* Application No. 44179/98 (EctHR, 03 December 2003)

[701] (1999) 2 AC 115,

[702] (1999) 2 AC 115, 126

[703] (1980) 147 CLR 39 cited by Carroll J in *Attorney General for England and Wales v. Brandon Books* [1987] ILRM 135, [1986] 1 IR 597

[704] (1980) 147 C.L.R. 39, 51-52 reference to page as cited by Carroll J in *Attorney General for England and Wales v. Brandon Books* [1986] 1 IR 597, 601

Applying this statement to political advertising, the relationship between the ability to access political information in a multitude of circumstances is of vital importance to a citizen's role in a democracy and political speech.

The ability to access ideas and information allows informed decision making and the restrictions on single issue broadcasting also affects a citizen's ability to influence policy and ideas. Moreover, this 'free flow' can be distorted if parties to a democracy are discriminated against when accessing airtime or with regard to political funding[705]. In *Bowman v. UK*[706], the nature of political speech at the time of elections is referred to in the following terms.

> Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are interrelated and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the 'conditions' necessary to ensure the free expression of the opinion of the people in the choice of the legislature'. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely[707].

When the spectrum of party political adverstiements is contrasted to broadcasting restrictions, the effect of the restriction is more nuanced. Broadcasting restrictions focus on speech which is directed at the authority of the state and the rationale for the restriction is the preservation of national security. Such restrictions are aimed soley at identifiable members of orgnaisations that have such a rationale as their core value. Political adversting seeks to create a more balanced field for the many voices which seek to influence and criticise an issue. However, both restrictions share a common characteristic of altering the plurality of voices on an issue and could therefore be considered a form of communications discrimination[708]. The core element of political advertising and its restriction is that it affects the flow of ideas and information regarding public policy and politics. This is similar to the effect of restrictions to protect national security[709].

3.1.6 Policy Coverage and Balance: Elections and Referendums

A fundamental question that has to be addressed is why the broadcast media are treated

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[705] See also section 2.6.4.2 regarding the Convention position on such political speech issues.

[706] *Bowman v. UK* (1998) 26 EHRR 1

[707] *ibid* paragraph 42

[708], 'Hear No Evil – See No Evil: Political Advertising in Ireland' (2011) 11 Journal of Public Affairs 93

[709] Issues relating to the discussion of ballot measures at the time of referendum will be addressed in the next section at 3.5.1 as the body of precedent in Ireland suggests that they are a form of speech restriction on the state as opposed to broadcasting restriction.

differently to print media.[710] One reason proffered in the literature is that engagement with broadcast media is passive[711]. This means that we do not need to engage actively with radio or television in order for the ideas or information to pervade our consciousness. The importance of the medium of television for news purposes was highlighted by figures from OFCOM stating that 2 out of 3 British adults use television as their main source of news[712] In contrast; print media requires active engagement by the reader in order to conceptualise and process the information.

The media is highly regulated at election time. The aim of such regulation is to give equal time to those contesting elections. This division of time has been the subject of constitutional litigation, legislation pursuant to the Broadcasting Act 2009, and broadcasting policy per the Public Service Broadcasting Charter and individual codes set out by the Broadcasting Authority of Ireland. In the United Kingdom, the regulation is set by the Communications Act 2003, OFCOM and individual broadcasters have developed codes in line with those issued by OFCOM. An emerging body of case law and guidelines has developed to ensure that balance is present in the debate of policy from all those contesting elections at the time of elections.

The current guidance in Ireland regarding elections and referendums is found in the Broadcasting Code on Referenda and Election Coverage[713] made pursuant to s.42 (1) of the Broadcasting Act. These codes are created to ensure that balance, impartiality and objectivity is employed in the production and editing of news and current affairs programmes during election or referendum time. Issues such as the moratorium on broadcasts for certain durations before the ballot and party political broadcasts are also covered.

The litigation in Ireland has focused on the balance aspect of the conduct of elections. The funding element of electoral parity has found favour as a speech argument in the United States[714], however in Ireland with the avoidance of paid television advertisements in election

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[710] The Internet did not play a role in the dissemination of information during The Troubles, as its usage only became a communications tool towards the end of the period.

[711] Couldry, Livingstone & Markham, *Media Consumption and Public Engagement* (Palgrave Macmillian, 2010), 32

[712] *ibid* 32 citing OFCOM, Current Affairs: Qualitative Audience Research, <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/CA_qual_presentation.pdf> Accessed 8 August 2013

[713] Broadcasting Authority of Ireland, *Broadcasting Code on Referenda and Election Coverage* <http://www.bai.ie/wordpress/wp-content/uploads/20110913_RefElecCode_Eng.pdf > Accessed 30/05/2013. Also see the updated code for the European and Local Elections, Broadcasting Authority of Ireland *Guidelines in Respect of Coverage of Local and European Elections* ,< http://www.bai.ie/wordpress/wp-content/uploads /201402_Rule27_ ElectGuide_English_vFinal.pdf> Accessed 19 May 2014

[714] *Buckley v. Valeo* (1976) 424 U.S. 1 (1976) and *Citizens United v. Federal Electoral Commission* (2010) No. 08-205 and Jennifer Kavanagh, 'Advocacy Groups, Political Speech and Offshore Money', http://humanrights.ie/civil-liberties/advocacy-groups-political-speech-and-offshore-

coverage, this argument has not spread, yet, across the Atlantic.

The first case to consider the issue of impartiality was *The State (Lynch) v. Cooney*[715]. This case concerned the attempts of Sínn Fein to place a party political broadcast on RTÉ in spite of the implementation of the section 31 broadcasting order[716]. Therefore, this case was more concerned with electoral broadcasts that may endanger public order and the authority of the state as opposed to equality and balance in broadcasting. Even though the High Court refused the judicial review of the Minister's order and was predominantly concerned with administrative law matters, the issue of permissibility was raised. This opened up the question of proportionality and legitimacy of such restriction. O'Hanlon J. warned that the exercise of such restrictive powers could exceed what is permissible to protect the authority of the State even in such 'an unmeritorious case'[717].

> ...there appears to me to contain insufficient safeguards for the constitutionally guaranteed right of freedom for the expression of convictions and opinions – with particular reference to the protection of freedom of the press and the radio, and now of television, from the control of the Executive[718].

Even thought the judgment in the Supreme Court did not address the balance required and highlighted by O'Hanlon J., the court did accede to the need to prevent the use of the broadcast media to subvert public order and the authority of the State. Therefore the order preventing the party political broadcast from the airwaves was upheld. O'Higgins CJ speaking for the court upheld the need to prevent the media for being used for securing or advocating support for such organisations. Henchy J. referenced the documented rhetoric at Sínn Fein conferences seeking the violent overthrow of the Irish Government[719]. Even though there was an allowance for deviation from s.18 (1) for the broadcast of party political broadcasts, this deviation did not amount to grounds to override the provisions of section 31[720].

Coughlan v. Broadcasting Complaints Commission[721] dealt with the role of a broadcaster in producing objective programming at the time of a referendum. This question arose from RTÉ's coverage of the divorce referendum. Even though simultaneous cases sought to

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money/ Accessed 31/05/2013. This position has since been broadened in the recent judgment of *McCutcheon v. Federal Elections Commission* 572 US __ (2014).

[715] [1982] IR 337

[716] See section 3.4.3

[717] *ibid* 356

[718] *ibid*

[719] *ibid* 365 quoting from An Phoblacht 5th November 'with a ballot paper in this hand, and an Armalite in this hand, we take power in Ireland.'

[720] *ibid* 382

[721] [2000] 3 IR 1

address the role and responsibility of the government in the conduct of referendums, this case was the sole case to focus on the role of the national broadcaster in interpreting the impartiality rules. The plaintiff argued that 42.5 minutes had been granted to the Yes side whereas 10 minutes was granted to the no side. RTÉ also allowed non-party groups to broadcast party political broadcasts.

The central issue in the case was achieving a balance between s 18(1) and s 18(2) of the Broadcasting Act 1960[722]. These sections referred to the attainment of balance in news broadcasts and the use of party political broadcasts. However, the issue for determination was whether impartiality impacted on all broadcasts or were party political broadcasts excluded. Pursuant to the majority of the Supreme Court, the individual parties were freed from such obligations but the respective broadcaster was still obliged to be balanced in the allocation of time. However, Barrington J. handed down a notable and logical dissenting judgment where the social function of party leaders was invoked. The applicant complained of uncontested slots for party political broadcasts during the divorce referendum by political parties[723]. The applicant contented that the role of the political party in Irish political communications was considerably altered on a matter of policy debate such as in a referendum. This was a complete counterpoint to the role played by a party in an election situation[724]. The High Court hearing of the action, Carney J. found that the treatment of the broadcast was unequal[725]. The first and second defendants, the Broadcasting Complaints Commission and Radio Telefís Éireann respectively, appealed the decision to the Supreme Court.

In the Supreme Court, the issues were re-examined. Hamilton CJ. spoke for the court and commented on the balance that was at issue between s.18(1) and (2). As Keane J. dealt with the administrative aspect of the appeal[726], Hamilton CJ. concentrated on the lawfulness of RTÉ's actions. Referring to Hamilton CJ.'s own judgment in *McKenna* and the judgment of Henchy J. in *State (Lynch) v. Cooney* as discussed above, Hamilton CJ. unusually criticises judgments of fellow judges that precede his interpretation of the law on the matter. Particular reference is made to that of Barrington J. who used the judgment of Henchy J. to establish the right to political equality in election communications. Hamilton CJ. stated that the selected use of the *State (Lynch) v. Cooney* judgment by Barrington J. created a wider ambit of constitutional permissibility for party political broadcasts than is necessary. Under Hamilton CJ.'s interpretation, such issues only related to the ability of the responsible broadcaster to broadcast such measures[727]. As Hamilton CJ. found that as there was no

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[722] A similar provision is found in Part Three detailing Broadcasters – Duties, Codes and Rules in s.39 and s.42 Broadcasting Act 2009

[723] The nature of a political party in Ireland was considered in *Loftus v. Attorney General* [1979] IR 221

[724] *Coughlan v. Broadcasting Complaints Commission* [2000] 3 IR 1, 5

[725] See section 5.3.2 for a further discussion of the role of equality in political advertising.

[726] *ibid* mentioned by Hamilton CJ at 21 and original statement by Keane J at 47

[727] *ibid* 25

balance between the viewpoints put forward, it was held that the transmission of ten broadcasts supporting the yes proposition was unconstitutional[728].

> Political parties undoubtedly have and are entitled to play an important role in the conduct of a referendum. There are many ways in which they can fulfil that role without recourse to a political party broadcast which can only be transmitted by the second respondent (RTÉ) in the course of a referendum campaign if they hold the balance equally between those who supported the referendum and those who oppose it[729].

Denham J. chose to focus on the aspects of direct democracy highlighted by the referendum process in analysing the constitutional questions raised in this case[730]. In a highly theoretical and philosophical discussion of the machinery of referendum in differentiating from an election, the impartiality and fairness of the debate is key[731]. Though in interpreting such fairness, Denham J. wisely stated that 'mathematical equality is not a requirement of constitutional fairness and equality[732]. Both Keane J. and Barron J. joined in dismissing the appeal.

The dissenting judgment was delivered by Barrington J. who was of the belief that political party broadcasts, besides ensuring that they do not place the authority of the state in jeopardy, should be free of any form of regulation. This includes whether they should be in favour or oppose policy measure for the sake of balance stating that

> Political party broadcasts are in a very different position. Of course they must not break the law or advocate the overthrow of the State. But apart from this the second respondent (RTÉ) is not entitled to concern itself with their content. The politicians are entitled to use all the arts of advocacy to persuade the citizens of the correctness of their proposals. ... it cannot interfere to negative the collective advice of the politicians to the electorate. The fact that all the political parties are agreed on a particular aspect of national policy may be a political fact of the utmost importance[733].

Quoting from the judgment of Henchy J. in *State (Ryan) v. Lennon*[734] regarding the justification for political parties, the argument of Barrington J. is far more realistic than the philosophical standpoint taken by Hamilton CJ. The construction of Article 40.6.1 (i)

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[728] *ibid* 26

[729] *ibid* furthermore, this position has now been clarified in legislation. Under s.39 (2) the allocation of time for party political broadcasts cannot give an unfair preference to any party.

[730] *ibid* 29 - 32

[731] *ibid* 31

[732] *ibid*

[733] *ibid* 39

[734] *The State (Ryan) v. Lennon* [1935] IR 170

regarding the criticism of government policy does not hold out any guarantee of equal criticism but simply allows for those that disagree or wish to criticise policy to be heard. Addressing the issue of the referendum itself, Barrington J. noted that the need for balance in a referendum is a separate issue from the application of proportionality in election situations. Stating that the 'citizens make up their own minds' in a referendum, holds this feature as a characteristic of direct democracy. Therefore it could be argued that in a referendum situation that the role of the political party are diminished[735]. However, the importance of the political party does play a role in the debate and conduct of such policy discussions. Considering the wider democratic implications of regulating and balancing speech regarding a referendum, Barrington J. made the following observations

> A distinguishing feature of a democratic society is that political leadership rests, not on power, but on persuasion. Likewise political authority rests on the consent of the electorate, It is right and appropriate that political leaders should use their authority and the arts of persuasion to lead the people towards the decision which their judgment tells them will best promote the common good[736].

In the end, Barrington J. was swayed by the judgment of Walsh J. in *The State (Nicolaou) v. An Bord Uchtála*[737] regarding the meaning of equality under the Constitution. From this it was held that some citizens are more equal that others especially party leaders. In order to put forward the same argument in a more democratic manner the social utility of political leaders and their role in the social utility of political speech and policy discussions could have been adduced and strengthen by reference to the text of Article 40.6.1.(i) In fact, Barrington J. does mention the social function of political leaders but the ability to bring in a social utility of political speech opportunity was missed.

In spite of this, there is a refreshing reality about allowing for speech to be broadcast which is reflected in the dicta of Denham J.'s 'mathematical equality' issue. There may be occasions such as with the recent Children's Referendum where discussion as a whole were reduced for the simple fact that it was difficult to find those that opposed the referendum and as a whole, discussion of the proposed amendment was reduced as a balance could not be achieved[738]. Even though the judgment of Hamilton CJ should be commended for a strict approach to ensuring balance, the reality of the Barrington J. judgment emphasises the need for balance but the realities which must also be addressed.

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[735] *ibid* 42

[736] *ibid* 44

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

[738] This could also be a reason for the lack of public discourse on the Court of Civil Appeal Referendum.

In *Madigan v. RTÉ*[739], judicial review was sought out the decision of RTÉ not to give the petitioner time to represent his views as an independent candidate for the Dublin area in the European elections. Kinlen J. in his High Court judgment referred to the judgments discussed above regarding proportionality in time devoted to candidates in allowing for proportional representation in broadcast time allowance. The petitioner's main complaint was that, as an independent candidate amongst a wide field of other independents and party candidates, the time allowed in proportion to others was not a fair and equal attempt to achieve the objects of the relevant legislation. The policy of referring to results of previous elections, as a means of achieving proportionality was first not applied[740] and second, misrepresented a fluid situation[741]. Mr. Tony Fahy, secretary of the elections steering group for RTÉ, stated that time was granted to registered political parties[742] with reference to the last available electoral result 'while at the same time being aware of the necessity and duty to afford coverage to smaller parties and independent candidates'[743]. In determining the proportionality to be applied and the merits of the petitioner's case, the learned judge did accept that the allowance of time to independent candidates was a situation that was constantly in flux. Applying Denham J.'s non-mathematical equality test in *Coughlan* above, Kinlen J approved this dictum by emphasising that fairness did not equal equality[744]. However, reminiscent to the approach taken by Carney J in *Brandon Books v. RTÉ* in relation to the knowledge of the competent broadcaster, Kinlen J. deferred to the RTÉ authority and their interpretation of the situation, stating that

> It is the duty of the RTÉ authority to give a fair and balance directive to be impartial without in any way intruding on the view of the authority itself... It is clear... that the approach of the authority is fluid and may change hourly in regard to all sorts of factors the authority sees relevant[745].

On considering the approach of both the High Court and the Supreme Court in these issues, the balance is based on a fair and proportionate assessment of support for the candidates involved. It is clear that the notion of mathematical equality is unobtainable in a situation such as election coverage. Support may change, policy emphasis may vary and there needs to be a recognition that the broadcaster needs to be free to react to such changes in the 'education of public opinion'. All without being stifled in reporting by legal calculations to reduce risk of litigation. Moreover, without this latitude to respond to the

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[739] *Madigan v. RTÉ* [1994] 2 ILRM 472

[740] *ibid* 476

[741] *ibid* 477

[742] The definition of what constitutes a political party has already been laid down in legislation, specifically the Electoral Act 1997 and interpreted in *Loftus v. Attorney General* [1979] IR 221

[743] *ibid* this point was also raised in Carroll J.'s judgment in *Green Party v. Telefís Éireann* [2003] 1 IR 558, 566 where mal fides would have to be demonstrated before any action could be commenced on the basis of disproportionate TV coverage for a party leaders speech.

[744] *ibid* 481

[745] *ibid*

fluid situation of election coverage, such provisions could creating a 'chilling effect' which would undermine the very role of 'educators of public opinion' as envisaged by Article 40.6.1 (i).

In the United Kingdom, in the case of *Prolife Alliance v. BBC*[746], the right to broadcast a party political broadcast was considered. The Prolife Alliance was a registered political party and wished to air a party political broadcast regarding their policies. It so happened that this party was a single-issue party on the issue of the right to life, therefore concerned with 'abortion, euthanasia, destructive embryo research and human cloning'[747]. The party put forward enough candidates in Wales to qualify for a party political broadcast slot. They gave a copy of their intended broadcast to the terrestrial broadcasters that operated in Wales for their consideration. However, the 'proposed PEB[748] would not comply with the relevant provisions of the BBC's Producers' Guidelines and the Programme Code of the Independent Television Commission in respect of matters of taste and decency'[749].

The main concern for adjudication in this issue was similar to the provision of the Irish Broadcasting Act 1960 and its application to political party broadcasts. In this instance, it is similar to *State (Lynch) v. Cooney*[750], where the reasons for political speech were accepted but the content of the broadcasts was for an object that is the subject of a legitimate restriction in freedom of expression. However, even in Barrington J's judgment in *Coughlan* which assessed Henchy J.'s argument in *State (Lynch) v. Cooney*, the rationale for restriction in political speech, especially at the time of elections has to be for the most outstanding reasons.

The judgment of Lord Justice Laws in the Court of Appeal in *Prolife Alliance* gets straight to the legitimacy of restriction at the time of elections. In analysing justified censorship, the provisions of the European Convention on Human Rights are referred to. However, Lord Justice Laws stated that if political speech freedoms were to be taken seriously then free expression must prevail unless the images are gratuitous or sensational[751]. Lord Justice Brown stated that questions of decency and taste are not absolute and the question should be based on the social need of such speech[752]. Referencing the notion of broadcasting being a means to 'serve an important public interest and educative function' Lord Justice Browne stated that the 'balance will fall to be struck in favour of the free communication of political aims and ideas'[753]. On an unanimous decision the Court of Appeal allowed the appeal and

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[746] *Prolife Alliance v. BBC* [2002] EWCA Civ 297

[747] *ibid* paragraph 4

[748] Party Election Broadcast

[749] *ibid* paragraph 9 this case is also comparable to the Irish case of *Colgan v. IRTC* [2000] 2 IR 490

[750] [1982] IR 337

[751] [2002] EWCA Civ 297 paragraphs 43 - 44

[752] *ibid* paragraph 56 - 57

[753] *ibid* paragraph 63. Further this line of argument is reminiscent of the Irish constitutional formulation and justification for media and free speech rights. See section 2.6.1.1

stated that the refusal to broadcast by the BBC and others was unlawful.

This decision was then appealed to the House of Lords[754] on the question of balancing the right to freedom of expression in election times and the restriction of expression on the grounds of morals, taste and decency. In a lengthy speech which examined the minutia of political speech and restriction, the outcome was not a favourable one for the Prolife Alliance. Lord Nicholls maintained the importance of political speech in a democracy[755]. The learned judge also summarised the two issues as he saw it in the case at hand. The issues were as follows: should party political broadcasts be subject to the same restrictions as other programmes and if they should, was the correct balance reached by the broadcaster[756]? The decision of the Court of Appeal was criticised by Lord Nicholls for neglecting the above issues. However, this did not resolve the open the issue of political speech and interference at the time of an election. It also neglected to address the grounds on which it would be permissible to override this important right. The direction that Lord Nicholl took at this juncture of the speech could arguably be said to set up legitimacy for the restriction of political speech in certain circumstances. In rejecting the appeal, Lord Nicholls was critical of the Court of Appeal and stated

> As it was, the Court of Appeal in effect carried out its own balancing exercise between the requirements of freedom of political speech and the protection of the public from being unduly distressed in their own homes. That was not a legitimate exercise for the courts in this case. Parliament has decided where the balance shall be held. The latter interest prevails over the former to the extent that the offensive material ban applies without distinction to all television programmes, including party broadcasts[757].

In Lord Hoffman's speech, the main issue was whether the standards of taste and decency could be applied to party election broadcasts such as the Prolife Alliance broadcasts[758]. Lord Hoffman's speech rested on the balance between the restriction in the domestic legislation and the construction of Article 10. Interestingly, the right to freedom of expression was considered to be a right 'not to be prevented from expression'[759]. This is a rather novel interpretation of a right which states that 'Everyone has the right to freedom of expression'. Such a construction of the right makes its exercise rather patronising and patriarchal. This may be a construction that is finding favour in the Human Rights Act 1998 interpretation of the European Convention on Human Rights, but such an interpretation is a conservative

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[754] *R v. BBC ex parte Prolife Alliance* [2003] UKHL 23

[755] *ibid* paragraph 6

[756] *ibid* paragraph 9

[757] *ibid* paragraph 16

[758] *ibid* paragraph 52

[759] This could be put forward as a resonance with the pre-convention period where rights were classified as civil liberties and the tension with the post-convention rights system. See section 2.6.2.1

interpretation of a liberal scheme of rights. In assessing the balance reach by the Court of Appeal, Lord Hoffman states that

> ...the Court of Appeal asked itself the wrong question. It treated the case as if it concerned the primary right not to be prevented from expressing one's political views and concluded that questions of taste and decency were not an adequate ground for censorship[760].

Again, this reliance of the 'prevention' aspect is a mistranslation of the jurisprudence of the European Court of Human Rights jurisprudence. The right is framed as a liberty to act, not a licence to act. It may be that the common law constitutional mind-set is creating a clash of rights philosophy. Therefore the idea that rights are the freedom to do what has been deemed permissible is unfortunately preserving the common law mind-set[761]. Further, the learned judge was of the opinion that there was no public interest in allowing for such broadcasts to be exempted from the criteria of taste and decency, stating that

> The Alliance had no human right to be invited to the party and it is not unreasonable for Parliament to provide that those invited should behave themselves.[762]

Regarding the issue of deference to the competence of the broadcaster as provided for in *Madigan* and *Brandon Books* in Ireland, Lord Hoffman stated that it is an issue that is justiciable by the courts[763] adding that a question of law must 'be decided by the courts'[764]. Lord Walker focused on the question of whether there existed an obligation for party broadcasts to adhere to the common standards of general programming or if the nature of the party broadcast granted immunity. Lord Walker was not concerned with the minutia of the interpretation of Article 10 in relation to political broadcasts[765]. On an application of the *Wednesbury* reasonableness principals, which is a significant divergence from the application of proportionality as used for Convention cases, the House of Lords found that the decision taken by the broadcaster was correct and allowed the appeal[766].

Lord Scott dissented from the judgments of Lords Nicholls, Hoffman, Millet and Walker.

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[760] *ibid*

[761] As put forward in *Entick v. Carrington* (1795) 19 St Tr 1029 and by Lord Scarman in the case of *Secretary of State for Defence v. Guardian Newspapers Ltd* [1985] AC 339, 361. The judgment was further criticised for this reason by Eric Barendt in 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998' (2009) 84 Indiana Law Journal 851, 858 and in Eric Barendt, 'Free Speech and Abortion', [2003] Public Law 580

[762] The idea of a right to access the airwaves also arose in *Coughlan* and *VgT* case in section 3.5.2-3.5.3

[763] *ibid* paragraphs 74 - 77

[764] *ibid* paragraph 75

[765] *ibid* paragraph 130

[766] *ibid* paragraph 144

The main point of divergence was on the interpretation of Article 10, not alone the faulty interpretation of Hoffman of the rights to freedom of expression as discussed above but on the imparting of information and ideas[767]. Lord Scott was of the opinion that the taste and decency argument was not protected by the provisions of Article 10 and therefore the policies and domestic legislation which included this ground were not in keeping with the provisions of the Convention and therefore the Human Rights Act[768].

3.1.7 Equality and Plurality of Voices in Policy Discussions

The issue of equality and plurality of voices on the media is especially important in the time of elections and referendums[769]. The power of television, which is subject to the majority of the rules, was stated by Keane J. in *Coughlan v. Broadcasting Complaints Commission* as follows

> It is obviously important that so powerful a broadcasting medium should fairly reflect, so far as is practicable, the wide diversity or interest and views which one would expect to find competing for attention in a truly pluralist and democratic society[770].

The issue of equality in relation to political advertising references the perceived discrimination when one side is given weight through greater media coverage and unbalanced official government publications. The ground has been raised in *McKenna v. An Taoiseach (No.2)* [771], *Doherty v. Referendum Commission* [772] and *Coughlan v. Broadcasting Complaints Commission*[773]. The equality issue is grounded in the provisions of Article 40.1 which states that 'All citizens shall, as human persons, be held equal before the law.' It is the opening salvo in the iteration of the personal rights of the citizen. It may be argued that this right is the prism through which all the other personal rights of the citizen, including political speech rights under Article 40.6.1 (i), are grounded.

In its application in political advertising cases, it means that all viewpoints that reflect the convictions and opinions of the citizens should be afforded an equal opportunity to be represented and heard when it comes to policy debates. No policy debate is more important than one which seeks to effect change in the Constitution and basic laws of the State.

In *McKenna (No.2)* [774], the issues raised by Denham J. emphasised the role of equality in the

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[767] *ibid* paragraph 86

[768] *ibid* paragraphs 89-92

[769] See further section 2.7.2 where political equality for in political speech cases was argued as a means of regulating legitimate governance. Also see section 2.6.2.1 and section 3.5.3 for a consideration of this case under the Convention system.

[770] [2000] 3 IR 1

[771] [1995] 2 IR 10

[772] [2012] IEHC 211

[773] [2000] 3 IR 1

[774] [1995] 2 IR 10,

conduct of referendums and at the very heart of the democratic relationship between the government and citizens. The idea of equality 'requires the organs of government ... to have due regards to the right of equality' and 'the citizen has the right to be treated equally'[775]. In an election context, this would include 'the concept that in the democratic process, including referenda, neither side of an issue will be favoured, treated unequally, by the government'[776].

Stating that there is no barrier to voting no in a referendum, the power of the media must be taken into account when it is seen to promote a specific outcome. This is further aggravated when the Government only funds, even if only partially, one side over the other[777]. Therefore on this ground alone, Denham J. pronounced that

> The spirit and concept of equality applied to the process of a referendum. There is a right to equal treatment in the political process. It is a breach of the concept and spirit of the constitutional right to equality for the Government to spend public monies in funding a campaign to advocate a specific result in a referendum[778].

This argument found further favour in *Coughlan v. Broadcasting Complaints Commission* where the equality argument was considered in the decision of the High Court and the Supreme Court. In the High Court decision, the application of this rule resulted in finding that allowing for more coverage of one side over another was unequally and breached the 'spirit of equality'[779]. Carney J. had no hesitation in deciding that the inequality in this regard amounted to an 'unconstitutional unfairness which would not have arisen had their starting point been to afford equality to each side'[780]. In the Supreme Court, Hamilton CJ stated that

> Political parties have no right, whether under the statute or under the Constitution, to be afforded the opportunity by the second respondent (RTÉ) to make political party broadcasts. It is purely a matter for the discretion of the second respondent as to whether or not they will transmit such broadcasts. In reaching the decision...the second respondent is obliged to...hold the scales equally between those who support and those who oppose the amendment[781].

Again Denham J. again raised the issue of equality. This was a further exploration of the idea of equality in referendum speech which was first developed in Denham J.'s own judgment in

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[775] *ibid* 52
[776] *ibid*
[777] *ibid*
[778] *ibid* 53
[779] *ibid* 13
[780] *ibid*
[781] *ibid*

McKenna (No.2). Even though, the role of the political party is important to democracy, the necessary emphasis will be different in electoral and referendum situations[782]. In this case, the Denham J. put forward the proposition that there is a balance in the views put forward and should be accommodated in the planning of news and current affairs in such times[783].

When considering the nature of the deliberations in a referendum situation, Barrington J. stated that if a broadcaster denied 'political parties access to the airwaves at a time when the people were deliberating on a major act of sovereignty' this action 'would be of doubtful legality'[784]. It could be argued that this statement hints at an arguable case of inequality in an argument hinged on equality. A citizen with constitutional rights could be placed in a weaker position to a political party. A political party does not have an express constitutional protection and its existence is only regonised by virtue of legislation, namely the Electoral Acts.

In *Doherty*[785], the dicta of Denham J. in *McKenna* was cited with approval by Hogan J. Hogan J. considered the principle of equality ensured the fair balance of arguments as cited in *McKenna* and *Coughlan* above. Hogan J. stated that

> In the referendum context, the value of all votes and each vote and the opinion of all citizens from the most humble to the most exalted are valued equally. It is in that context that, to aid political debate, the Commission was established by the Referendum Act of 1998[786].

If we draw the precedents together in this area it could be argued that the nature of the constitutional right to political speech shifts from a negative right to a positive one. It is accepted that political parties do not have an automatic right to the airwaves to promote their parties position on a matter. However, once a party is allowed to broadcast a party political message then the duty becomes a positive one on the respective broadcaster to allow for other viewpoint or parties to put forward their side on issues.

However, the issues of equality, fairness and balance on the debate of policy seem to be disregarded when the time for elections and referendums have passed[787]. Even though there

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[782] *ibid* 33

[783] *ibid* 32

[784] *ibid* 44 see also Daithi MacSithigh 'I'd tell you everything if you'd pick up that telephone": Political Expression and Data Protection' (2011) 2 EHRLR 166, 175 where it is argued that in order for political expression to be protected when contrasted to new media technology, in particular data protection concerns, that automated messages may become the norm in political campaigns and thereby the discussion of government policy.

[785] *Doherty v. Referendum Commission* [2012] IEHC 211

[786] *ibid* paragraph 25. The Referendum Commission was also suggested by Barrington J. in *Coughlan v. Broadcasting Complaints Commission* [2000] 3 IR 1, 44 where it was stated that 'It may also be appropriate for the government to establish a neutral commission to ensure that the case for and against the referendum proposal is fairly stated.

[787] Also See Oran Doyle, *Constitutional Equality Law*, (Thomson Roundhall, 2004) 173 - 176

may be issues of public concern and public policy at the forefront of the media, the fairness of putting both sides forward is blocked[788]. The Broadcasting Act 2009 specifically states that advertising directed towards a political aim is prohibited and broadcasters are only placed under a general duty of objectivity regarding news reporting[789]. Therefore, the right to freedom of expression can be blocked on a content basis when the context or national dialogue has moved away from election and referendum times.

However, this position may have altered with the Broadcasting Authority of Ireland finding that upheld a complaint against 'The Mooney Show' in August 2014 on the basis that a discussion of same-sex marriage should have had a balancing voice[790]. This was outside the time of a proposed referendum but the Authority still found against RTÉ. Even though the discussion was primarily a personal story, the fact that the discussion moved towards the legal and current affairs issues surround same-sex marriage recognition that the broadcaster was bound by its duties under the Broadcasting Act 2009 with regard to fairness and equality. Stating that

> ...the discussion of same-sex marriage constituted current affairs content on an issue that was of current public debate and controversy. While agreeing that a referendum campaign is not currently underway, as a matter of current affairs, the general requirements for fairness, objectivity and impartiality in current affairs set down in the Broadcasting Act and the BAI's code on news and current affairs were applicable.791

3.1.8 Article 10 and Political Advertising

Murphy v. Ireland[792], *VGT v. Switzerland* [793], *TV Vest AS & Rogaland Pensjonistparti v. Norway*[794] and the recent case of *Animal Defenders International v. UK*[795] highlight the varying positions

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[788] See Broadcasting Authority of Ireland 'Broadcasting Complaints August' <http://www.bai.ie/?ddownload=53028> Accessed 15 Sept 2014

[789] The relevant sections of the Broadcasting Act 2009 in this regard are s.39(1)(a) relating to objective and impartial broadcasting of news without any expression of the broadcaster's own views. Section 39(1)(b) also provides for fairness to all interests by allowing for opposing viewpoints to be heard in either one broadcast or series of broadcasts once they a proximate to each other in time. Furthermore, s. 39(5) broadcasts relating to Government policy which is subject to public controversy or debate will be presented in an objective manner.

[790] See Broadcasting Authority of Ireland 'Broadcasting Complaints August' <http://www.bai.ie/?ddownload=53028> Accessed 15 Sept 2014

[791] *ibid*

[792] *Murphy v. Ireland* Application No. 44179/98 Judgment (ECtHR, 03 December 2003)

[793] *VgT (Verein Gegen Tierfabricken) v. Switzerland* Application No. 24699/94 Judgment (ECtHR, 28 September 2001)

[794] *TV Vest AS & Rogaland Pensjonistparti v. Norway* Application no. 21132/05 Judgment (ECtHR, 11/03/2009)

[795] *Animal Defenders International v. UK* Application Number 48876/08 Judgment (ECtHR 22 April 2013)

which have been taken by the European Court of Human Rights in determining the provisions of Article 10 and the impact of political advertising concerns in media for non-election or non-referendum situations.

In these cases, the petitioners have felt that the reticence of their domestic judicial system has failed to read in true equality into the domestic protection for freedom of expression and has appealed to the European Court of Human Rights of the basis of a violation of Article 10[796]. However, in each of the three cases, the European Court of Human Rights has not engaged in the equality argument nor has it applied its own jurisprudence regarding the democratic role of speech[797].

Even though *Murphy v. Ireland*[798] was not a direct political speech case, the case revolved on the issue of religious advertising, it did highlight the Court's tendency to be overtly deferential to the domestic courts. In the jurisprudence of the court, the gravity of freedom of expression in religious speech may not be as important as political speech but the ramifications of its interpretation resonates with political speech cases. Relying on the Irish Government's submission regarding the particular religious sensitivities at play in Ireland[799], the court found no hesitation in ruling that the restriction in the Irish legislation[800] was necessary in a democratic society. However, there was a form of equality brought into consideration where the Court stated that it considered it to be reasonable to place such restrictions on religious advertising as the dominant religion could benefit and thereby creating an unequal playing field[801]. Even though the court could not find any unanimous standpoint on the issue as individual contracting states had varying rules, the Court nevertheless found that there was no breach of Article 10. The judgment can be criticised for not engaging in a proper scrutiny of the role of freedom of expression. The restriction in the Radio and Television Act 1988 may have been placed there for a good reasons initially, yet the analysis of the role of speech was poor and the historical reasoning applied was weak. The most worrying aspect of the judgment was the Court's acceptance of the State party's' argument without a fuller investigation of the realities. The Ireland of 2003 was a different place to the Ireland of the mid – 1960's to early 1990's which was characterised by political violence both North and South of the Border and some incidences in the UK. It also indicated an overt level of deference to Ireland on the justification of rules and the judicial reasoning behind the Supreme Court verdict.

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[796] For a full assessment of the depth and breath of Article 10 protection see section 2.6.4.2

[797] On this point also see Tom Lewis, 'Rights lost in translation? Fact-Insentistve Laws, the Human Rights Act and the United Kingdom's Ban on Political Advertising' (2007) EHRLR 663

[798] Application No. 44179/98 Judgment (ECtHR, 03 December 2003)

[799] *ibid* paragraph 71 - 73

[800] In this case, the Radio and Television Act 1988 prevented the broadcast of advertisements directed at religious ends.

[801] *ibid* paragraph 78

In *VgT (Verein Gegen Tierfabricken) v. Switzerland*[802] the right of access to the media was at issue along with the proportionality of restricting a political advertisement by the national broadcaster. The contested broadcast sought to act as a reply or counterpoint to the meat industry and were to highlight the deficenies of animal welfare in the meat industry[803]. The Commercial Television Company was sent a copy of the advertisement and they declined to broadcast it due to their opinion that it was of a 'clear political character'[804]. The Commercial Television Company did offer to meet VgT to explore alternative methods of production, which would raise the issue of animal welfare as a consumer issue but not in a political manner[805]. This offer was refused and VgT applied to the Independent Radio and Television Appeal Board which was passed on to the Federal Office of Communication as the broadcast at issue had had not yet reached the airwaves[806]. The Federal Office of Communication decided that commercial broadcasters were free to sell advertising factilities to whomever they wished[807]. The applicants then appealed to the Federal Department of Transport, Communications and Energy who agreed with the stance of the Federal Office of Communication and reiterated that 'the applicant association was not obliged to have its commercial broadcast over the channels of the company'[808]. The applicants then appealed through the domestic court framework in Switzerland. The Federal Court again agreed with the original decision and reaffirmed Switzerland's prohibition on paid political advertising, stating that

> It should prevent financially powerful groups from obtaining a competitive political advantage. In the interest of the democratic process it is designed to protect the formation of public opinion from undue commercial influence and to bring about a certain equality of opportunity among the different forces of society. The prohibition contributes towards the independence of the radio and television broadcasters in editorial matters, which could be endangered by powerful political advertising sponsors[809].

At the European Court of Human Rights, the first question to be addressed was whether the interference with the applicant's right to impart information and ideas had been curtailed in a manner prescribed by law. The applicant contened that the essence of the broadcast was to impart information. The fact that it may be followed up by political action

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[802] *VgT (Verein Gegen Tierfabricken) v. Switzerland* Application No. 24699/94 Judgment (ECtHR, 28 September 2001)

[803] *ibid* paragraphs 9 -10

[804] *ibid* paragraph 12

[805] *ibid*, paragraphs 12 - 15

[806] *ibid* paragraph 16

[807] This issue was also in question in *R v. BBC ex parte Prolife Alliance* [2003] UKHL 23 as discussed above and the interpretation of broadcast contractual freedom and political speech in Prolife Alliance was to turn on the judgment in this case.

[808] *ibid* paragraph 17

[809] *ibid* paragraph 21

did not necessarily equate to it being political advertising[810]. However, the Court stated that it was foreseeable in spite of this, albeit weak argument, that such a restriction was foreseeable. On the question of whether the restriction pursued a legitimate aim, the Court quickly came to the conclusion that the idea of political idea equality was being met by the prohibition of such political advertising and agreed with the assessment of the domestic court as cited above[811].

The final issue to be addressed by the Court was whether the restriction above was 'necessary in a democratic society'. The applicant asserted that the measure had not been proportionate, as they did not have any other means to impart the information that was the subject of the broadcast[812]. This was based on the ratings and reach of the broadcaster and segment involved[813]. Referring to the implementation of the margin of appreciation and the Court's supervisory, it determined that it would be able to rule on whether a restriction was necessary and compatible with Article 10[814]. The issue turned on the pressing social need of the information contained in the broadcast. The Court held that the intended broadcast fell outside of the purely commercial form of advertising therefore the broadcast was in the nature of being political and, consequently, a lower margin of appreciation was to be applied[815].

> Indeed, rather than abusing a competitive advantage, all the applicant association intended to do with its commercial was to participate in an on-going general debate on animal protection and the rearing of animals. The Court cannot exclude that a prohibition of "political advertising" may be compatible with the requirements of Article 10 of the Convention in certain situations[816].

However for such restrictions to be compatible with Article 10 the relevant State parties have to demonstrate relevant and sufficient grounds to prohibit such broadcasts[817]. In the opinion of the Court, the Swiss authorities did not meet this test and therefore the restriction was not 'necessary in a democratic society'[818].

On the issue of a right to access the airwaves, as relied on by Lord Hoffman in *R v. BBC ex*

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[810] *ibid* paragraph 50
[811] *ibid* paragraphs 59 - 62
[812] *ibid* paragraph 63
[813] *ibid*
[814] *ibid* paragraphs 67 - 68
[815] This lower margin of appreciation for political speech could be further evidence for the subliminal influence of the jurisprudence of the First Amendment influencing the application of Article 10 and see section 2.6.4.4
[816] *ibid* paragraph 75
[817] *ibid*
[818] *ibid*, paragraph 75, 76 - 79

parte Prolife Alliance[819], the Court did not make any firm order in any respect. The Court stated that it was not within its role to 'indicate which means a State should utilise in order to perform its obligations under the Convention'[820]. Therefore there was no real consideration of a right to access the airwaves. This further highlights the chasm between the dicta of Lord Hoffman on the issue of Article 10 and the interpretation of the respective restrictions on the right to freedom of expression.

In *TV Vest AS & Rogaland Pensjonistparti v. Norway*[821], the blanket ban on political advertisments TV was necessary in a democratic society. In this case, TV Vest was fined by the Norwegian broadcasting regulator, the Statens medieforvaltning (State Media Administration) for broadcasting a political advertisement by the Rogaland Pensjonistparti (the Rogaland Pensioners Party). This fine was upheld by the Norwegian Supreme Court, the Høyesterett. The reason for the judgment in the domestic court was summed up in the following excerpt:

> The prohibition of political advertising on television was not in any way aimed at restricting political speech or debate on questions of public interest. Its purpose was to guarantee political expression by ensuring fairness and equality, as well as preserving the quality of political debate. Such advertising would typically be conveyed without opposition, correction or filtering in the form of critical journalism and would have a distinctly partial objective. It would often paint a manufactured picture of the candidate and his political message, not unlike the tone or substance frequently found in propaganda in totalitarian regimes. The possibility of advertising on television would clearly benefit the wealthier and/or established interests in society. There was thus a need to avoid *de facto* discrimination, distorting democratic processes in favour of the wealthy and powerful.[822]

The court felt that the lack of consensus in European broadcasting regulation on this issue allowed for a greater discretion to be applied than would normally be permitted when

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[819] [2003] UKHL 23

[820] *VgT (Verein Gegen Tierfabricken) v. Switzerland* Application No. 24699/94 Judgment (ECtHR, 28 September 2001) paragraph 78

[821] *TV Vest AS & Rogaland Pensjonistparti v. Norway* Application no. 21132/05 Judgment (ECtHR, 11/03/2009) Notably following on from the Murphy litigation it is interesting to note that Ireland was a third party to this case and provided information relative to the Irish legislative framework prohibiting paid political advertisments. See paragraph 52

[822] *TV Vest AS & Rogaland Pensjonistparti v. Norway* Application no. 21132/05 Judgment (ECtHR, 11/03/2009) paragraph 43. This is a fear which is replicated in the rationale behind the prohibition on paid political advertisments across the EU. See Kevin Rafter's report on regulatory position on paid political advertising commissioned by the Broadcasting Authroity of Ireland in 2009. *Cf.* Kevin Rafter, *Political Advertising: The regulatory Position and the Public View* < http://www.bai.ie/wordpress/wp-content/uploads/political_advertising_report.pdf> *Accessed 31/07/2015*

assessing restrictions on political speech. The court took the arguments in the excerpt above but found that they did not comprise sufficient reasons to uphold a complete blanket ban[823]. As the Rogaland Pensioners Party were a small party that received hardly any coverage on Norwegian television, a paid advertisement was the only way that they could get their message across to the wider public[824]. The Court ultimately held that there was no reasonable relationship between the aim persued by the ban, the proportionality of the response and the necessity of such a prohibition in a democratic society[825]. In fact, on this point the Court expressly distinguished the judgment in this case from that in *Murphy*. The reason for distingushing the two situtations was due to the religious sensitivities in *Murphy* but this was not the case here

> ...where it was such sensitivities that led the Court to accept that the filtering by a public authority, on a case-by-case basis, of unacceptable or excessive religious advertising would be difficult to apply fairly, objectively and coherently, and that a blanket ban would generate less discomfort[826]

Accordingly the Court held that there was a violation of Article 10. It can be taken from the judgment that where the advertisement may be of a sensitive nature the Court is more willing to accept the rationale for restriction. However where the advertisement, whether religious or political, may be of a sensitive nature, then the Court is more open to entertaining the rationale for restriction.

In *Animal Defenders International v. UK*[827] the petitioners sought to air an advertisement on British terrestrial television, which sought to highlight the issue of primates in the entertainment industry. Permission to broadcast the advertisement was denied by the BBC and the petitioners were unsuccessful in their attempts to challenge the decision in the domestic courts[828]. Citing previous case law on the issue, including *Vgt* as discussed above, the Court reiterated a sort of strict scrutiny approach[829] for speech stating that 'there is little scope under Article 10.2 for restriction on debates on questions of public interest'[830]. Therefore, the issue of necessity in a democratic state was invoked from previous case law so the Court turned its attention to the proportionality of the restriction complained of.

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[823] *TV Vest AS & Rogaland Pensjonistparti v. Norway* Application no. 21132/05 Judgment (ECtHR, 11/03/2009) paragraph 71

[824] *ibid* paragraph 73

[825] *ibid* paragraph 71.

[826] *ibid* paragraph 75.

[827] *Animal Defenders International v. UK* Application Number 48876/08 Judgment (ECtHR 22 April 2013)

[828] *R (on the application of Animal Defenders International) v. Secretary for State for Culture, Media and Sport* [2008] UKHL 15

[829] Adopting the US first amendment phraseology and see section 2.6.3.2 for a consideration of this position. The jurisprudence of the ECtHR does implicitly borrow from that of the US see section 2.6.4.4. where this argument is made.

[830] *ibid* paragraph 102

However, all judgments in this case do reference the merits of ensuring equal access to the media for public interest, political and party political issues.

In the assessment of proportionality, the Court shows a high degree of deference to the British Authorities in the review of the prohibition on political advertising, referencing the Neill Report on Political Advertising and the debates both in the Parliament and the Courts on the issue. The Court stated that it

> attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process[831].

Referencing a similar argument to that which was unsuccessfully put forward by the Swiss authorities, the Court now finds favour with the British authorities[832]. The Court also cites the decision in *Murphy*, which was itself criticised for being overtly deferential to the will and reasoning of the domestic authorities. Continuing with this line of reasoning, the Court therefore finds that there was no breach of Article 10 in this case[833].

The stark contrast of the reasoning in *VgT* and *ADI* shows a worrying inconsistency in the jurisprudence of the Court. What seems like identical cases have resulted in divergent outcomes. The only reason for the divergence is in relation to the *realpolitik* of European Human Rights, the court stating that 'it is relevant to recall that there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision' referenced political impact of European Court decisions[834]. In spite of the obvious contradiction in the *VgT* and *ADI* cases, the political coldness of the British Government to the freedoms contained in the Convention may have been at issue when considering the impact of the *ADI* decision on the British jurisdiction.

Unusually in such cases reports, the *ADI* case does contain dissenting and concurring judgments. Judge Bratza gives the concurring opinion. Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano deliver the dissenting opinion. Judge Tulkens, joined by Judges Spielmann and LaFfranque, delivered a further dissenting opinion.

In the concurring opinion, Judge Bratza recognises the similarities between *VgT* and *ADI* but stated that the learned judge has doubts over the original judgment in *Vgt*[835]. This was due

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[831] *ibid* paragraph 116
[832] *ibid* paragraph 117
[833] *ibid* paragraph 125
[834] *ibid* paragraph 111
[835] Concurring Judgment of Judge Bratza, paragraph 7

to the lack of 'scrutiny of the question whether the reasons given for the legislation were such as to justify a general prohibition of 'political advertising'[836]. The learned judge considered the approach taken in *Murphy* to be the correct one adding to this that the margin of appreciation should not fluctuate depending on the category of speech involved[837]. In the joint dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano considerable weight is attached to the similarity of the *VgT* case to *ADI*. The judges state that

> We find it extremely difficult to understand this double standard within the context of a Convention whose minimum standards should be equally applicable throughout all the States parties to it.... In sum, the prohibition applied to the most protected form of expression (public interest speech), by one of the most important actors in the democratic process (an NGO) and on one of the most influential media (broadcasting)[838].

The legitimacy of broadcasting restraint for the purpose of democracy, a finding supported by the majority, was questioned as it is close to prior restraint and contradictory[839]. The very idea of such broadcasting restrictions was to the mind of the dissenting judges, a perceived inequality in the discussion of matter in the public interests.

> ...the general ban on 'political' advertisements appears to be an inappropriately assumed positive duty of the State to enable people to impart and receive information. It is based on the view that powerful groups will invariably hamper the receipt of information by a one-sided information overload. Promoting a right where it cannot be effective without additional State action is, according to our jurisprudence, appropriate, but is not a generally accepted primary ground for rights restriction.... It is one thing to level a pitch; it is another to lock the gates to the cricket field[840].

Judge Tulkens, joined by Judges Spielmann and LaFfranque, delivered a further dissenting opinion. Again they did not share the majority position, in this case due to the manner of deployment of the margin of appreciation[841]. The judges in this dissent took particular umbrage at the scope of the restriction[842]. The judges also made reference to the indiscriminate application of the ban and makes reference to the nature of the speech set

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[836] *ibid*

[837] *ibid* paragraphs 7 - 8

[838] Joint dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano paragraphs 1 - 2

[839] *ibid* paragraph 12 stating that 'there seems to be an inherent contradiction in a viable democracy safeguarded by broadcasting restrictions'

[840] ibid

[841] Dissenting opinion of Judge Tulkens, joined by Judges Spielmann and LaFfranque paragraph 4.

[842] *ibid* paragraph 12

out in the first dissenting judgment[843]. Therefore the ban was a 'disproportionate infringement' if Article 10 and the State authorities did not adduce enough evidence to demonstrate justification.

In the consideration of all the judgments put forward, there is a level of discomfort in the ability of the majority to disregard well thought out legal reasoning on Article 10 in the *VgT* case to a total change in jurisprudence as demonstrated in *ADI*. Even though the case law regarding speech equality is becoming settled in the Irish jurisdiction, the inconsitsancies in the European Court of Human Rights may act to unsettle the well-reasoned position of the Irish courts on political speech equality and political advertising. However, on a basic level the Court, when considering the issue of advertisments may, in essence, be undermining the very formulation of freedom of expression set down in *Handyside* 'where protection extends not only to 'information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population'. The cases discussed above arguably show thatthe Court may take a different view where there may be 'senstivities'.

1.17 Content Restrictions and the Social Utility of Political Speech

The most worrying criticism of all the cases before both the Irish courts and the European Court of Human Rights was the absence of any consideration of the right to criticise government policy. The constitutionally protected aim of the 'education of public opinion' on matters of national importance wilted in the face of any threat to the authority of the government and the protection of national security. Obstacles were placed in the way of journalists using the Northern situation as a means of addressing matters of policy. The Troubles and their associated government policy issues were a pressing issue to many citizens and engagement in this regard could not be undertaken as it was near to impossible to allow all actors in the arena to publicise their views.

Even in the admissibility hearing of *Brind*[844], before the European Court of Human Rights, the political speech rights argument from Article 10 was not engaged. The court plainly stated that 'the Commission is not required to determine this aspect of the case, as it finds that the application is in any event manifestly ill-founded'[845].

The free movement of thought and ideas surrounding government policy can be altered when broadcasting restrictions and political advertising regulation combine to stifle the criticism of government policy. It is without doubt that there were genuine issues underpinning the introduction of s.31 in Ireland. However its blanket approach at removing all speech rights from those subject to the restriction had a secondary effect of removing engaged parties from the legitimate criticism of government policy on the North.

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[843] *ibid*

[844] *Brind and Others v. U.K.* Application No. 18714/91

[845] *ibid*

The analysis runs from speech that challenges the authority of the state to speech that challenges the standpoint of a government policy. The force behind the message and the incitement varies in severity but the point is the same. Each form of speech has an issue with government policy of some form and the message seeks to criticise or incite action against the policy. Some of the incitement may be to arms; some may be to lobbying a parliamentary representative. The restriction of such speech in any form is a restriction on the ability of citizens to criticise government policy. Notwithstanding the harm that may be caused, there must be a degree of proportionality that is measurable against objective standards when the court upholds such restrictions. The aim of such restrictions must also be reasonable and not just to silencing dissent against the policies of a government.

The area has a common theme: the removal of voices which are seen to be outside the democratic process. Those who may seek to overthrow the state by armed means are easy to categorise as outside of the democratic process. However, those who use political advertisements to advocate for policy change may also believe themselves to be outside of the democratic process. Moreover, when the decisions are challenged they must be reviewable in an open and transparent manner[846].

Therefore any attempt at restricting speech purely on a contextual basis may miss the essence of Irish democracy. The provisions of Article 6.1 show the firm commitment of the Irish constitutional project to citizens being granted an important policy formulation role. The restriction of such expression by means of national security legislation, broadcasting restriction and political advertising regulations, in sum, impacts on the ability and scope of citizens to freely criticise government policy and impacts on the right of the citizen to receive information in order to exercise their ability to criticise such policy. It also fundamentally alters the idea of the marketplace of ideas and the true value of unfettered speech in a democracy. The approval of restrictions in circumstances above could be argued to work against the constitutional ideal of the 'education of public opinion. As stated in the dissenting judgments in *ADI*, 'A robust democracy is not helped by well-intentioned paternalism'[847].

The analysis of political speech rights does not stop here. It has now been shown that the idea of content-based restrictions is harmful. But at least, in this category, the restrictions must be proportionate and measurable against objective standards. The next form of restriction, which will be examined in this thesis, is the constitutional practice of the Irish state regarding policy information. This form of restriction lacks the safeguards that have

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[846] For an example of such concerns, see section 4.4.1.7 where the impact of review that is not open and transparent is considered in relation to National Security information.

[847] *Animal Defenders International v. UK* Application Number 48876/08 Judgment (ECtHR 22 April 2013) Joint dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano paragraph 14

been established by means of precedent. There is no objective and transparent means of review.

4 Class Restrictions

The restrictions which will be discussed in this section are not *prima facie* restrictions but their effect is arguably more detrimental to the discussion of government policy. These barriers restrict the knowledge of such policies and therefore reduce their exposure to discussion, notwithstanding that this may not be the primary reason for their restriction. The restrictions which would be catagories under this heading would include cabinet confidentiality rules, information restrictions due to the separation of powers and executive privileges. They are just as dangerous to the propagation of free expression as they tamper with the flow of information regarding government policy. Arguably they can also undermine the very same democracy which the constitution seeks to protect in a representative democracy. Considering the manner in which they are implemented, their proportionality and objectivity is harder to assess.

Class restrictions refer to the restriction of a document because of its class such as cabinet documents. The restriction is based on its nature rather than its content. The early part of this section[848] has analysed the restrictions placed on the dissemination of policy information and criticism due to the content of the message. These restrict the discussion and dissemination of criticism of government policy and therefore inhibit the 'education of public opinion' and effect the right to criticise government policy as a by-product. Such class restrictions are common with Cabinet documents, documents referring to national security at executive level and freedom of information requests. Even though in the examples analysed, there may be legitimate national security and public policy reasons, there is still a restriction on political speech. However, it could be argued that legislation grounding direct restrictions can be objectively measured and challenged.

With regard to class restrictions, the constitutional structure of state governance exacerbates the restriction on freedom of expression, especially in relation to the communication of policy. This section examines these impediments which undermine the very democratic principles on which the state is founded and erodes the very right it seeks to protect. It also has the effect of placing speech from the legislature and the executive in a higher category of protection. Such practices are known as Executive Secrecy and it stops the citizens from achieving the access to policy which should logically flow from the provisions of Article 6.1.

The concept of Executive Secrecy is a combination of constitutional provisions, legislative measures and civil service culture which has created a wide gap between the Government and the governed. As previously stated[849], there is a distinction to be made between 'operational' secrecy and overt secrecy. There is an argument for the use of cabinet confidentiality as a form of operational secrecy but the duration of secrecy and the culture

[848] See section 3.1

[849] See section 2.2

created by this degree of secrecy feeds into an overall argument that the level of executive secrecy goes beyond what is considered compaialbe with the dissemination of government policy information in an open and transparent democracy.

Citizens should arguably have more access to policy information when the provisions of Article 40.6.1 (i) are considered. This Article states that a citizen has a right to freedom of expression and in particular this 'rightful liberty of expression' includes 'criticism of government policy' when considering the restriction of the 'organs of public opinion': the media. The reality though is different and accessing such information is exceptionally restricted.

The Executive is the primary creator of government policy. Therefore the powers of the executive and its administrative powers act to restrict the flow of policy information. This lack of access in this regard is serious impediment to the exercise of Article 40.6.1(i) rights and impacts on the role of the citizen under Article 6.1. As the Executive is the central creator and legitimator of policy information and consequent legislation, its role in the discussion of Article 40.6.1 (i) is central to any examination of the restrictions to the criticism of government policy. Executive Secrecy is the effect of both constitutional and legislative provisions which restrict information regarding the workings of Government. The confidentiality of meetings of Government is found in Article 28.4.3. The Government as mentioned in the Constitution is more commonly known as the Cabinet. The joint action of the Official Secrets Act and the restrictions embodied in the Freedom of Information Acts also reinforces Executive Secrecy. The working environment of the Civil Service Employment regulations helps to foster a culture of secrecy which in turn helps to maintain Executive Secrecy. Even though are some arguments in favour of cabinet confidentialiy, such as allowing for space for private discussion, the focus of this analysis is not specifually on the merits of cabeint confidentiality but the lack of review in the courts for such decisions, the culture which permeates from such protection and the role of the citizen in the criticism of government policy which is undermined by secrecy.

This section will also look at the developing speech restrictions on the Executive and the class restrictions which can be used by the Executive to protect its own policy information from scrutiny. The emerging speech restrictions have developed from the *McKenna (No.2)*[850] judgment and will be argued here to have created a revitalised democratic relationship between the State and the citizen[851]. The reason for this is due to the parameters of the State being categorically set out and the nature of the citizen reinvigorated.

1.18 The Unintended Consequences of Separation of Powers

Even though the separation of powers was designed as a means of balancing the power and role of the organs of state, the inability to examine or criticise the workings of the

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[850] *McKenna v. An Taoiseach (No. 2)* [1995] 2 IR 10 and also see section 4.5

[851] See section 3.5.2

Executive as part of this balance has affected the exercise of Article 40.6.1 (i). The evolution of the privileges of the Executive in the Irish Constitution framework has resulted in an undeniable encroachment on the envisaged role of the citizen in Ireland. This is down to three key factors: the imputation of the British Cabinet Model on the Irish Executive[852], the culture of secrecy within the Executive[853] and finally, the undue deference shown by the Irish judiciary to the will of the Executive[854]. The final two arguments can be directly attributed to an interpretation of the separation of powers theory which is arguably over conservative when compared to the Irish democratic condition. This rigidity means it is inconstant with a theory of democracy envisaged in the broad interpretation of the Constitution and therefore unresponsive to the needs of judicial oversight to protect and promote democracy[855].

Not alone does the preservation of cabinet confidentiality impact on the ability of citizens to be informed of policy information but it also affects the ability of the Dáil to scrutinise legislation. As set out in the Seventh Progress Report on Parliament, the role of the Oireachtas[856] is to scrutinise legislation and 'encourage...the amendment of that legislation to reflect well-grounded concerns and views'[857]. The functions of the Oireachtas is to scrutinise and hold the Executive to account 'thereby balancing and checking its influence on citizens[858]. Even though many policy reasons have been put forward both by the Executive in the defence of its own position, but also accepted by the Courts without challenge, the essential critique of the retention of an over reaching protection for its own information impedes the running of democracy[859]. There are two main impediments; the protection does not allow for full scrutiny of the workings of Cabinet and the policy which is translated into legislation can never have a full examination if the rationale and information which generated said legislation cannot be analysed. This perversion of the role of checks and balances from the theory of separation of powers is to act to the detriment of the provisions of Article 6.1[860].

The powers of the Executive in the Irish framework have arguably gone beyond what was envisaged by the original construction of the separation of powers[861], with some commentators arguing that we take our 'executive-centeredness to extremes that are

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[852] See section 4.2

[853] See section 4.3

[854] See section 4.5.2 and 4.5.4

[855] Also see section 2.4 as a comparative between the original vision of democracy for the State and section 4.3 for a consideration of the current expression of Irish democracy

[856] The All- Party Committee on the Constitution, *Seventh Progress Report Parliament* (Stationary Office, 2002) 9

[857] *ibid*

[858] *ibid*

[859] See section 4.5.4

[860] However see section 2.2. Democracy and Political Speech which references some arguments in favour of cabinet confidentiality.

[861] See section 2.4

troubling in an established, modern democracy'[862]. The adherence to this doctrine has resulted in a stifling of the activities of the Legislature and in turn has affected the ability of the citizens to discuss the policies put forward to run the State. This has undoubtedly undermined the ability of the citizens to criticise this government policy and has restricted the 'education of public opinion' as aspired to under Article 40.6.1 (i) of the Constitution. This has resulted in a situation where the slavish adherence to the separation of powers doctrine is, in itself, retarding the effective implementation of the freedom of speech guarantees under Article 40.6.1 (i). The interpretation of the constitutional theory of separation of powers is undermining a constitutional freedom making a contradictory framework to protect rights which are eroded by its very theoretical inconsistency[863].

1.19 Lost in Translation: The influence of Whitehall Traditions

The concept of 'cabinet' as an organ of government developed in the Westminster style organisation of Governmental functions. This point was made by Farrell in his article on *Constitution and the Institutions of Government: Constitutional Theory and Political Practice*, stating that the cabinet model adapted for use in Ireland was directly inherited from the English system and was adopted in 1919 'without any serious examination of its appropriateness to local conditions'[864]. This is also a point that is taken up by Basil Chubb in The Constitution and Constitutional Change in Ireland stating that the 'British type cabinet system was to become firmly established as tentative moves towards parliamentary governance failed'[865].

The concept of Executive Secrecy is not only affecting the ability of citizens to seek out policy information but it is also jeopardising the workings of Parliament. Brian Farrell stated that 'it is this tradition of executive secrecy, buttressed by the doctrine of collective responsibility, which has done much to reduce the role of parliament from the powerful body envisaged in the Constitution'[866]. Indeed, it could be argued, the excessive reticence of the Irish governmental system to inherited British conventions in spite of Article 6.1 provisions, infringes Article 40.6.1 (i)'s guarantee of freedom to express convictions and opinions'[867].

Political speech rights and the consequent freedom to criticise government policy is essential in a representative democracy as it allows for the free flow of information about the political process, hence people are better equipped to decide the important issues of

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[862] Donncha O'Connell, Our Ford Cortina Constitution, June August 2011, Issue 14 Village Magazine, 49

[863] See Further Eoin Carolan, The Problems with the Theory of the Separation of Powers (January 1, 2009). Available at SSRN: http://ssrn.com/abstract=1889304 or http://dx.doi.org/10.2139/ssrn.1889304 <accessed 18 June 2013>

[864] Brian Farrell, 'The Constitution and the Institutions of Government: Constitutional Theory and Political Practice' Administration 35:4, 169

[865] Basil Chubb, The Constitution and Constitutional Change in Ireland, (Dublin, 1978) p. 10

[866] Brian Farrell, 'The Constitution and the Institutions of Government: Constitutional Theory and Political Practice' Administration 35:4, 169

[867] *ibid*

the day. The Constitution states, in relation to the protection of parliament, that the free flow of debate is to be protected. However, there is a certain inconsistency in the protection of executive information, the granting of privilege to those in the legislative chamber to allow for a full and free debate on policy and legislation, yet no ability for the citizens to access full policy information. The question which must be posed is whether democracy as rule by the many should privilege the organs of government. Thereby this privilege creates a higher status in democracy to those in power than to citizens who are referred to as the final arbiters of government policy. As politicians have parliamentary privilege for what they say in the course of their duties, there must be a corollary public privilege to criticise, to assert meaningful control over the political process, and the means to effect that control is the media.[868]

This section will discuss the impact of the adherence of the Irish system to the UK constitutional practice of separation of powers. This constitutional doctrine which enforces a theoretical and practical separation between the workings of the executive, legislature and the judiciary is meant to protect democracy by implementing a system of checks and balances. It must be pointed out at the outset that the Westminster system is that based on parliamentary sovereignty. Here the parliament is supreme and subjects[869] in a lower political position. However in the Irish framework, power derives from the people which mark out Ireland as a country with a system of popular sovereignty therefore in a higher position to the parliament.

As discussed earlier, the precedents upon which Irish Cabinet procedures were based was that of the English or Whitehall system[870]. In this system, the Parliament was sovereign and therefore Cabinet was protected. No means of citizen oversight was created to ensure that there was effective democratic supervision of the workings of Cabinet. This poses a particular problem for the Irish constitutional set up as Article 6.1 states that the citizens are to be the final arbiters of policy, yet they are kept in the dark about such policies. This is further highlighted when the guarantee for freedom of expression is considered as the State cannot suppress free expression on the grounds that such speech is criticising government policy[871].

The Constitution is silent as to the extent of executive powers and in *Haughey v. Moriarty*[872] Hamilton C.J. stated that the determination was to be carried out in a comparative fashion to those exercised in similar states. However the nature of this comparative determination to Britain and in particular the Executive norms of Whitehall, neglects to factor in the

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[868] McGonagle summarising the importance of *New York Times v. Sullivan* 376 U.S. 254 (1964) for critical speech against government McGonagle, *Media Law in Ireland* (Thomson Roundhall, 2003) 336

[869] In the UK citizens are referred to as subjects

[870] See section 2.4

[871] As discussed in detail in section 2.6.1

[872] *Haughey v. Moriarty* [1999] 3 IR 1

essential differentiation in the locus of power between such democracies; in the United Kingdom parliament is supreme; in Ireland the citizen is supreme. Furthermore, the judgment of Hederman J. in *Hamilton*[873], stated that

> During the course of the submissions made to this Court both parties used the words 'government' and 'cabinet' as if they were synonymous, they are not. The Constitution expressly establishes the government as the executive organ of the state. The term 'cabinet' does not exist in the Constitution.[874]

In spite of this judicial pronouncement on the meaning of the words and their use, the idea of the cabinet and its power in the hierarchy of institutional power still continues. In a further discussion of the meaning of the Cabinet and its evolution in Irish constitutional law, the following excerpt illuminates the position.

> The very origin of the word cabinet stems from private and secret meetings of British ministers with their sovereign in the early 18th century and certainly up to and including 1922, an important date in the present context, the term 'cabinet' by its very nature meant that its discussions were private and confidential. At that time confidentiality was an integral part of the British cabinet system. The cabinet comprised only the most important ministers, all being members of the Privy Council. The government in Britain was made up of members of the 'cabinet' and other government ministers who were not cabinet members. The British cabinet and the principles according to which it functioned including those of confidentiality and collective responsibility was governed by convention rather than the law. How such conventions and associated practices have since fared in fact or in law, is for obvious reasons irrelevant to the constitutional law of this country.[875]

However the 'obvious reasons' for irrelevancy are not discussed. Neither is the suitability of the translation of the British cabinet model to the Irish situation examined. This key issue with the locus of power between the British model and Irish is not addressed. In the dissenting judgment of McCarthy J. in *Hamilton*, reference is made to the nature of the Irish Constitution, the drafting of the Constitution and the unsuitability of reading in British conventions into the Governance of Ireland.

> If the drafters of the Constitution and the people enacting it had wanted to confer absolute confidentiality on government discussions, then, ... they could have said so in the Constitution. Look ... to the Constitutions of 1922 and 1937, to the Declaration of Independence in 1916, to the concept of a

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[873] *Attorney General v. Hamilton* [1993] ILRM 81
[874] *ibid* 10
[875] *ibid*

> sovereign, independent, democratic state; look not to the laws of England or the judgments of English courts, but to the words of the people's Constitution. If absolute confidentiality is not there expressed, then it does not exist. Whatever the intention of the framers of the Constitution or the public perception at the time, one can only look at the language used, not at what this or any other court may consider desirable or proper.[876]

It is only in recent times that the constitutional nature and context has been judicially considered. Hamilton J. in *McKenna (No. 2)* reaffirmed the constitutional nature of the government and the broader constitutional environment of the exercise of Executive power as follows

> The government is, however, a creature of the Constitution and cannot act free from the restraint to the Constitution. In the exercise of the executive power of the State it is subject to the provisions of the Constitution[877].

In the same case, this theme was picked up by Keane J.[878] reflecting on the inherited provisions of the structures of parliamentary democracy and invoking the dicta in *Crotty*[879] where it was stated that it is the citizen who are the guardians of the Constitution. Adding to the general theme of placing the rights of the Executive in the context of the citizen in *McKenna (No. 2)*, Denham J. added that

> The Constitution envisaged a government wherein there is a separation of powers between the legislative, executive and the judicial organs of government. They operate a system of checks and balances on each other. All three are subject to the Constitution, which recognised a true democracy: the rule of the People. This case is about the constitutional relationship of the People to their Government. [880]

1.20 Open Government, Transparency and Reform

Open government is a political movement from civil society and political science that argues for citizens to have a right to access government information for effective public oversight. It also includes the idea of greater public consultation on issues of national importance. This right should not measured by the release of information by the Government, but by the ability of the citizens to access information that they choose for themselves. The flow of information is a process that is essential to a health democracy and the guardianship of this flow has been placed in the hands of those that would seek to contain this flow to the

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[876] *ibid* 115 -116
[877] *McKenna v. An Taoiseach (No.2)* [1995] 2 IR 10, 38
[878] *ibid* 18
[879] [1987] 1 IR 713
[880] *ibid* 51

greatest extent: the Government[881]. Restricting this flow can temper the development of democracy and stifle informed discussion of Government Policy[882]. The Danks Report in New Zealand summed up the situation:

> The case for more openness in government is compelling. It rests on the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office; it also derives from concern for the interests of individuals. A no less important consideration is that the Government requires public understanding and support to get its policies carried out. This can come only from an informed public.[883]

The establishment of a citizen's right to enquire into the business of Government is part of the move towards open government but also requires giving sufficient rights to enforce this ideal. The source of power in the Irish Constitution is the people but open government looks for this power to be given in a practical form to the citizen. However, expecting informed debate on matters of government and policy without having the right to information as a corollary right to expression is akin to writing a debate without being allowed to use a library. Access to policy is a critical issue which must be addressed to allow for engaged and meaningful debate.

Open government, as concept, means more information on departmental websites and more engagement with the press to communicate policy messages to the citizens[884]. However the ability of the citizens to seek the information for themselves is being eroded. As stated, quite succinctly by Robert Hazell in evidence to the House of Commons Select Committee on Public Administration regarding the English Freedom of Information legislation

> The Government still does not fully understand the difference between Open Government and freedom of information. Open Government means the Government publishing information largely for its own purposes: information that the government thinks we need to know or might like to know. Freedom of information requires the Government to disclose information which we

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[881] Rourke, *Secrecy and Publicity: Dilemmas of Democracy* (John Hopkins Press, 1961), vii

[882] *ibid* 9

[883] Committee on Official Information, *Towards Open Government (Danks Report)*, New Zealand, 1980

[884] For a further expansion of the role of transparency in good policymaking see Christopher Hood and David Heald (eds.) *Transparency: The Key to Better Governance?* (The British Academy, 2009) in particular Andrea Prat, 'The More Closely We Are Watched, the Better We Behave?' in Christopher Hood and David Heald (eds.) *Transparency: The Key to Better Governance*? (The British Academy, 2009) *Cf.* Clive Lewis, 'Access to Information and Judicial Review' in Jack Beaston and Yvonne Cripps (eds.) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press, 2002) 290-292

decide for ourselves we want to know[885].

The theoretical concepts behind the move to open government shows a willingness at political level to open up the business of government to scrutiny but the practical effect of this change will not be felt unless there is concrete reform within the corridors of power. However, seeking the liberalisation of the flow of information with statements in a programme for government without implementing the requisite legislation and reviewing the provisions that are seen as overly burdensome could be viewed purely as a public relations move. Stieglitz states that there is a 'natural asymmetry of information between those who govern and those whom they are supposed to serve'[886]. This term, borrowed from economic theory, comes to the core of the imbalance in information rights between the governed and the government under the Irish constitutional framework when it comes to accessing official information and information regarding government policy. There is a disparity in power between the information which the Government possesses in relation to policy due to convention and the inability of citizen to access and criticse such information even though they have a constitutional right to criticise such policy.

Openness and transparency are parallel aims to increase information about the business of Government such as policy information and the decision making process involved in Government. However, the ideals have separate meanings. For instance, in terms of the European Union governance, Openness refers to the right of individuals to access information or documents where as transparency looks at decision-making process[887]. For the purposes of this paper the focus will be on transparency. Openness in these terms in Ireland is viewed under the provisions of the powers and restrictions contained in the Freedom of Information Acts 1997 – 2003 and the National Archives Act 1986. This paper will look at both Acts but solely in their relationship to the decision making process of Government: the Cabinet.

Transparency in Government is tempered with unbalanced restrictions that undermine and restrict the citizen's ability to access government policy. This in turn stifles engagement with policy and politics which would be considered a cornerstone of a transparent democracy. The policies of open government have been promoted whilst the autonomy of citizens to seek information has not developed. In fact, legislation in relation to freedom of information has been gradually eroded with hurdles placed in the way of those seeking information but executive privilege has been strengthened. The key issue is that even though Article 40.6.1 allows for citizens to criticise government policy then this right is toothless if citizens are

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[885] Session 1998-1999, Third Report, Freedom of Information Draft Bill, Vol. I, HMSO, London, July 1999.

[886] Stieglitz, 'Transparency in Government' in Islam, Djankov & McLiesh (ed.) The Right to Tell: The Role of Mass Media in Economic Development (World Bank, 2002)

[887] Tony Bunyan, Secrecy and Openness in the EU, European Dossier Series (London, 1999) 9

not given the corollary right to access the information[888].

The traditional passive relationship between the governed and the Government is transforming into an active relationship where people feel they have the right to information and access to what their Government is doing. However this has led to the institutional secrecy of the civil service being challenge by contemporary citizen engagement. Transparency International Report highlighted the role of transparency in the prevention of corruption[889]. The lack of clear protection for whistle-blowers especially in relation to the civil service was a cause for concern and the curtailment of FOI and imposition of steeper costs in relation to access official information was mentioned.[890] Also a fresh interpretation of the right to access official information and criticism of government policy could go some way to reducing or curbing the amount of influence selling or legal corruption that was mentioned as a specific problem for the Irish jurisdiction in the Transparency International Report[891]. The Constitution states that the people are the source of power and that they are the final arbiters of national policy decisions[892].

There is a clash between those seeking to restrict the information and those who wish to access this information. Those who seek to restrict the information generally base their arguments on grounds of public order and the effective running of the Government. A democratic government could quite legitimately claim that secrecy is a necessary component of Government[893]. Yet those who seek the release of the information as a means of holding the Government to account require rights to be put in place to use this as an effective tool. This section will argue that the form of civil service practice with the provision of information and reinforced by issues such as cabinet confidentiality and executive secrecy, though envisaged by the Constitution, actually undermine the exercise of a constitutional right.

The policies of open government have been pursued in successive Programmes for Government since 1992[894]. The general theme is to liberalise the flow of information between the government and the governed. This general move indicates an aspiration that the traditional culture of secrecy is no longer consistent with a modern democracy[895]. However the practical changes have not kept pace with the rhetoric. The aims have included a root and branch review of all legislative and administrative practices which seek

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[888] See section 2.6.1.3

[889] Transparency International, National Integrity Systems: Transparency Ireland Country Study Ireland 2009 (Transparency International, 2009) 17

[890] *ibid*

[891] *ibid*

[892] Article 6.1

[893] Rahul Sagar, 'Combating the Abuse of State Secrecy', (2007) 15 Journal of Political Philosophy 15:4 404, 405

[894] Maeve McDonagh "Access to Official Information in Ireland: Part One: Legal Constraint on Disclosure of Information" (1995) 13 ILT 182

[895] Also see section 4.5.3

to restrict the flow of information to the public. As part of this the Freedom of Information Act was introduced, the Official Secrets Act was reviewed, albeit, not reformed and the *Hamilton*[896] judgment on cabinet confidentiality was moderated by referendum[897]. Even though the rhetoric of such aspirational changes has not kept pace with actual legislative change, it does show an attempt to change the policies of Executive administration. The first programme for government was accelerated by the circumstances of the fall of the Fianna Fail/Labour Government in 1994, a new Government was formed between Fine Gael, Labour and Democratic Left, which in turn was to result in a new programme for Government. This document made direct mention of a 'clearer need for greater openness and accountability in Irish life'[898]. The programme for government for the current coalition of Fine Gael and Labour placed reform of Freedom of Information, Cabinet Confidentiality and the Official Secrets Act as part of its political reform programme[899]. However, to date only the Freedom of Information Act[900] has been amended with no movement on the other issues.

On analysis of the aims of open government, Freedom of Information legislation[901] was ring fenced into a less powerful legislative watchdog than was envisaged. The concerns regarding the Official Secrets Act were not addressed. The operation of Cabinet Confidentiality was clarified in a referendum[902]. However, the foundation rationale of Executive secrecy was never addressed.

1.21 The Speech Boundaries of the State

When the question of referendums[903] is considered in terms of political advertising, there are more important ramifications for the Executive when the case law is examined[904]. The case law regarding the limitations on speech of the Executive at the time of a referendum campaign has resulted in a speech restriction being placed on the Executive. Furthermore, the emerging case law on this issue has actually strengthened the democratic relationship

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[896] *Attorney General v. Hamilton* [1993] ILRM 81

[897] Also see section 4.5.4 where the impact of the public interest on cabinet information in the wake of *Attorney General v. Hamilton* [1993] ILRM 81 is considered.

[898] Department of an Taoiseach, *A Government of Renewal: Policy Agreement between Fine Gael, Labour and Democratic Left 1994 – 1997* (Dublin: Department of An Taoiseach, 1994) 35 also see Garry, J. (1995). 'The Demise of the Fianna Fáil/Labour 'Partnership' Government and the Rise of the 'Rainbow' Coalition'. Irish Political Studies, 192-199.

[899] Programme for Government between Fine Gael and Labour, *op. cit.* 2011 and see section 4.5.3 for a consideration of the Official Secrets Act 1963

[900] Freedom of Information Act 2014

[901] The original Freedom of Information Act 1997 was watered down with the introduction of the Freedom of Information (Amendment) Act 2003 and see section 4.5.1 for a general consideration of Freedom of Information legislation.

[902] See section 4.5.4

[903] Note regarding the use of the words referendums and referenda - the author is using referendums as the plural for unconnected plebiscites for changing the constitution whereas the use of referenda will be used as the plural for connected plebiscites to change the constitution on the same issue.

[904] See section 3.5 for a general consideration of political advertising as a content restriction.

and balance between the State and the citizens[905].

Not only does this argument cover Article 40.6.1 (i) regarding political speech and article 6.1 regarding the citizen, but the provisions of Articles 46 and 47 must also be scrutinised. These articles consider the role of the State in the holding of referendums as a means of amending the Constitution. Article 46.2 lays out the mechanisms for bringing a proposal to the people. Article 47 details the procedure for the holding of a referendum where the people by majority will make the decision as to whether to change the Constitution. The responsibility of the state is covered yet the boundaries of the state are not delineated. This lack of delineation was to cause the problems in the referendum cases as follows. The question must be posed as whether the interpretation of the role of the State is a speech restriction on the role of the state or fleshing out the borders of the State's permissible activities.

The creation of restrictions on the speech of the state in referendum campaigns could represent the beginnings of a sense of political equality between the restrictions on citizens as discussed in the previous section and the Executive. Normally the Executive has been subject to the creation of its own procedures and internal rules which have sought to restrain the flow of information. However, since the roundly and justifiably criticised judgment in *Hamilton*, the courts have been more willing to read in a democratic limitation into the powers of the Executive.

4.1.1 Setting the Limits

In *McKenna v. An Taoiseach (No.2)*[906] the question of state funded lobbying for a particular outcome in a constitutional referendum[907] came under question. The plaintiff sought to underline the permissible boundaries of the state on the holding of referendums. The plaintiff contened that the sole involvement of the State was in the mechanism for the running of a referendum; the lobbying and funding of resources for a particular outcome was beyond the constitutional parameters of State. At the outset of Keane J's judgment in the High Court, it was stated in summarising the plaintiffs position that

> Any use by the Government of public funds to secure an affirmative vote is... unwarranted, since under the Constitution the decision as to whether or not the Constitution should be amended is exclusively entrusted to the People. If

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[905] For a further discussion on the impact of Referendum cases on the direction of Irish democracy see Gavin Barrett, 'Taking the Direct Route – The Irish Supreme Court Decisions in *Crotty*, *Coughlan* and *McKenna (No.2)*' UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper 08/2009 and also Gretchen McMillan 'The Referendum, the Courts and Representative Democracy in Ireland' (1992) XL Political Studies 67 - 78

[906] [1995] 2 IR 10

[907] For a general consideration of the referendum process in Ireland see Maria Cahill, 'Ireland's Constitutional Amenability and Europe's Constitutional Ambition: the Lisbon Referendum in Context' 2008 (09) German Law Review 1191 and Bairbre O'Neill 'The Referendum Process in Ireland' 2000 (35) Irish Jurist 305

> public funds are to be lawfully expended for this matter... then the only basis on which it may be constitutionally done is if matching funds are made available to those opposing the amendment.[908]

Therefore the court reinforced the idea of balance in referendum communications and parity of funding, to allow for balanced voices in the debate of policy matters leading up to a referendum. In such cases, the court is balancing a tenuous line laid down by the constitutional practice of separation of powers, in that, the court is unable to direct the activities either of the Oireachtas as the legislator and the Cabinet as the Executive[909]. Still, the court is able to rule, not on the political convenience or expediency of such issues, but the overall effect on the preservation of democratic rule by the organs of the state.[910] The idea of political misconduct on the party of the Government was raised in the first *McKenna* case[911] and is symptomatic of such a delicate balance.

In the Supreme Court judgment Hamilton CJ spoke for the court. The learned judge stated that the Government was acting within its boundaries by giving factual information but it did not extend to giving information which was only to benefit one side, in this case the yes side[912]. Therefore the main question in this case was whether the expenditure of public money on the influence of public opinion was legitimate[913]. Even though the exact provisions of Article 6.1., were not referenced in the judgment of Hamilton CJ, the democratic nature of the State and the role of the citizens was highlighted. This was by reference to the following except from the case of *Crotty v. An Taoiseach*[914]

> As the guardians of the Constitution and in taking a direct role in government either by amending the Constitution or by refusing to amend, the People, by virtue of the democratic nature of the State enshrined in the Constitution, are entitled to be permitted to reach their decision free from unauthorised interference by any of the organs of the state that they, the people, have

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[908] *ibid* 15

[909] [1995] 2 IR 10, 15 where it was reported in the judgment of Keane J. that the argument defendants that the courts have no function in reviewing such expenditure: to attribute such a function to them, it is aid, is a clear infringement of the strict separation of the powers enjoined by the Constitution. The approach of the court on the political question was also criticised in and the formulation of justiciablity. Eoin Daly 'Residual Convention of the Irish Constitution: the incongruous example of collective responsibility' (2011) Public Law, 703, 723

[910] As inferred from the precedent of *Slattery v. An Taoiseach* [1993] 1 I.R. 286 and *Crotty v. An Taoiseach* [1987] IR 713

[911] *McKenna v. An Taoiseach (No.1)* [1995] 2 IR 1 and was decided by the persuasive precedent set in the US case of *Baker v. Carr* (1962) U.S. 186 were the determination of the role of the judiciary in a political question was found.

[912] *McKenna v. An Taoiseach (No.1)* [1995] 2 IR 1, 41

[913] *ibid*

[914] [1987] IR 713

created by the enactment of the Constitution[915].

Therefore the use of the public funds in the influence of public opinion was outside of the boundaries of the State as envisaged in the referendum process. It also acted as a speech restriction on the State as this judgment is used as the main ground for precluding the State from lobbying or canvassing for a particular result in subsequent referendum cases.

There were also interesting *obiter* points made by the other judges in the case. O'Flaherty J. looked at the reality of a Government remaining neutral in such an event, stating that the government 'is entitled to campaign for change and the individual members of the Government are either in their personal, party or ministerial capacity'[916]. However, in the learned judges estimation the expenditure of public funds on such a venture would breach equality rights, in that there may be discrimination between the votes of either side depending on the preferred governmental outcome. However, on a salient note, O'Flaherty J. went to the heart of the issue with the use of public funds as follows

> The public purse must not be expended to espouse a point of view which may be anathema to certain citizens who, of necessity, have contributed to it... I should think it bordering on the self-evident that in a democracy such as is enshrined in our Constitution (which is not exclusively a parliamentary democracy; it has element of a plebiscitary democracy) it is impermissible for the Government to spend public money in the course of a referendum campaign to benefit one side rather than the other.[917]

This statement should be commended for its brevity and directness. Even thought Hamilton CJ made a link between the democratic nature of the state and the expenditure of public funds on a particular result in a referendum campaign, this statement directly linked the nature of Irish democracy, the role of the citizen and the idea of public money being spent on a particular outcome. It is the essence of democracy, even with a touch of plebiscitary democracy, that citizen should be free to decide on matters of policy without unbalanced and biased information swaying their decision[918]. It does not preclude information being made available to make their decision but does not allow for one side of the debate to be

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[915] *McKenna v. An Taoiseach (No.1)* [1995] 2 IR 1, 43

[916] *ibid*

[917] *ibid*

[918] The lack of information in recent referendums especially in relation to the Judicial Pay referendum was the subject of criticism in Bláthna Ruane, 'Reflections on Procedural Rights in Irish Constitutional Referenda', (2012) 48 IJ 1, 1. This point was also raised in Maria Scott, 'The House that the Supreme Court Built: The Rulings in Coughlan and McKenna, the Lisbon Treaty and the Constitutional Referendum in Ireland' (2010) 9 Hibernian L.J. 219. For a general consideration of the referendum process in Ireland see Maria Cahill, 'Ireland's Constitutional Amenability and Europe's Constitutional Ambition: the Lisbon Referendum in Context' 2008 (09) German Law Review 1191 and Bairbre O'Neill 'The Referendum Process in Ireland' 2000 (35) Irish Jurist 305

privileged above the other.

The judgment of Denham J echoed the points of Hamilton CJ and O'Flaherty J., echoing the equality point by the latter judge. Regarding the right of equality under the Constitution and its application to the current case, Denham J. stated that the use of public funds and subsequent media coverage would 'treat unequally those citizens who hold the opposite view'[919]. Referring directly to freedom of expression, it was stated that

> The right to express opinions incorporates the corollary right that in the democratic process of free elections, public funds should not be used to fund one side of an electoral process, whether it be a referendum or a general election, to the detriment of the other side.[920]

Therefore, as a resounding conclusion, government funding in favour of a particular result in a referendum is not in keeping with the democratic traditions as laid down in the Constitution. The point was further re-examined in further referendum cases yet, the ratio in *McKenna (No.2)* still stands. The result of the case did not result in the referendum result being overturned[921] but did result in the boundaries of the State's role in referendums being clearly laid down[922].

In *Hanafin v. Minister for the Environment*[923] the issue of the expenditure of public money on promoting a particular result in a referendum was again before the courts in the wake of the *McKenna* decision. Even though the majority of the report and decisions deal with litigation matters and the right of appeal to the Supreme Court on foot of a referendum, the last Supreme Court report is the most relevant to the examination of effect of the *McKenna (No.2)* case. Speaking for the court Hamilton J. reflected on the context of individual actors in Government and indeed the Government itself from 'lending its authority to a particular viewpoint'[924].

> To my mind it would be unreal to attempt to draw a distinction between the attitude of the Government as the Government and the attitude propounded

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[919] *ibid* 52. This was further emphasis when quoting from Budd J in the High Court decision in *O'Donovan v. The Attorney General* [1961] IR 114, 137 where equality in a democratic state was also taken to include democratic quality

[920] *ibid*

[921] As examined in *Hanafin v. Minister for the Environment* [1996] 2 IR 321 see also *Coughlan v. Broadcasting Complaints Commission* [2000] 3 IR 1 on the issue of Broadcasting restrictions during the referendum process at 3.5.1 and 3.5.2

[922] *McKenna (No.2)* also resulted in the establishment of the Referendum Commission which was to be used as a means for publicising balanced information at times of referendums and allow the State to fund an information and awareness campaign about the proposals and conduct of the referendum.

[923] [1996] 2 IR 321

[924] [1996] 2 IR 321, 414

> by exactly the same persons in a non-governmental capacity. Such a distinction would move beyond the boundaries of the subtle into the rounds of the metaphysical... the provision of finances and the use of their authority as Government was constitutionally impermissible.

The only way in which the result of the divorce referendum could be overturned, which is the subject of *Hanafin* and *McKenna (No.2)*, was if a material defect was shown to the level that it vitiated the referendum and the will of the people[925]. This could be compared to a democratic contract of sorts between the Government and the citizens. The onus of establishing such a defect was on the petitioner[926]. When considering the issue of the constitutional wrongdoing as considered in *McKenna (No.2)*, the core issue of the use of public money was raised again. Hamilton CJ considered this expenditure as 'deliberate and conscious' adding that the campaign was designed to influence yet the Government was justified in considering that 'its actions were constitutional'[927].

Therefore those analysing the emerging trend from the referendum political speech cases are left with the resounding impression that the individual statements of members of government regarding a position on a referendum proposal is permissible. Therefore it is not a speech restriction. However, the court will consider the use of money as constitutionally impermissible. Therefore, it could be concluded that Government is entitled to campaign, yet the use of funds is not allowed[928].

In chronological terms, the case of *McCrystal v. The Minister for Children and Youth Affairs, the Government of Ireland and the Attorney General*[929] was the next case to implement the *McKenna* rules, as they became known. This case involved an analysis of the information booklet supplied to homes for the Children's referendum. Moreover, by this stage, these *McKenna* principles were backed up by the European Commission for Democracy through Law (Venice Commission), Code for Good Practice on Referendums[930]. The ruling of the court was delivered by Denham CJ. who held that extensive passages of the booklet and website breached the *McKenna* rules[931]. Furthermore, there was a 'misstatement...as to the effect of the Referendum'[932]. Therefore public money was spent in a manner that was not 'fair, equal or impartial'. Injunctive relief and redaction by the court of the offending material was not ordered as the respondents were assumed to cease publication and distribution of

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[925] *ibid* 427 and reiterated at 429
[926] *ibid*
[927] *ibid*
[928] As stated in Hanafin v. Minister for the Environment [1996] 2 IR 321, 428
[929] *McCrystal v. The Minister for Children and Youth Affairs, the Government of Ireland and the Attorney General* [2012] IESC 53
[930] *ibid* 2
[931] *ibid*
[932] *ibid*

the material[933].

4.1.2 Role of the Citizen

In *Doherty v. Referendum Commission*[934], the referendum on the European Fiscal Stability Treaty was at issue, in particular the statements of the Referendum Commission. In the judgment of Hogan J. in the High Court, the statements of the Commission were regarded as informative and intended for a large audience. Therefore the statements should not be 'parsed or analysed for the absolute accuracy of discussion or analysis' which would be expected from an authoritative text[935]. The Commission must also be given a 'wide freedom to communicate its message' to the general public[936]. In a wide-ranging judgment, the focus of this analysis will be on the role of the judiciary in the referendum process and the speech element of the judgment. In Hogan J.'s comments regarding the role of the judiciary, the comments of O'Flaherty *in McKenna (No.2)* regarding the nature of Irish democracy were echoed[937]. Thereby this judgment acknowledges both the role of the citizen and the need for robust debate on policy matters. Relating to the need for freedom of expression in such situations

> The Constitution trusts in the power of argument and debate and reasoned discussion and, again, the informed citizenry of which I spoke, who will discharge their civic responsibility to inform themselves in their own interests, that of their neighbours and that of their country.[938]

When deciding on the equality issue, Hogan J. approved the judgment of Denham J in *McKenna (No.2)* which stated that an imbalance in speech rights regarding a referendum proposal would lead to inequality to the votes of those who held the opposite stand point. When applying the speech argument to the role of the Referendum Commission in providing information, it was found that the Commission did not exceed its role[939]. Hogan J. reaffirmed the neutral position of the judiciary on the issue of the interpretation of such referendum cases, stating that 'it is a matter which is committed ultimately to the resolution by the people according to that fundamental theory of popular sovereignty'[940]. Though it

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[933] The subsequent appeal of the Jordan case *(Re. Referendum Act & re. Jordan and Jordan v. Minister for Children and Youth Affairs & ors* [2015] IESC 33) to the Supreme Court followed the line taken by the Supreme Court in the previous *Hanafin v. Minister for the Environment* [1996] 2 IR 321 case. Also the later case of *Walshe v. Ireland The Attorney General The Referendum Returning Officer and The Referendum Commission* [2015] IESCDET 37 in the wake of the marriage equality referendum continued the precedent establishing that the grounds for relief as a referendum petition under s. 43 of the Referendum Act 1993 represent a possible insurmountable hurdle for a petitioner to climb.

[934] [2012] IEHC 211

[935] *ibid* 1

[936] *ibid*

[937] *ibid* 6 -7 (paragraph 21 and 23)

[938] *ibid* 7 (paragraph 24)

[939] *ibid* 8 paragraph 30 and 16 paragraph 66

[940] *ibid* 16 (paragraph 67)

was added, *obiter*, that if the matter was a domestic legal issue it may be possible for the court to intervene if such a circumstance was to arise[941].

Since *McKenna (No.2)*, the Executive is constrained in the privileging of its own speech through funding one side over the other. There is a certain degree of balance in the privileging and use of speech rights by the actors in democracy has been created. This further strengthens the democratic relationship and reinforces the roles and responsibilities, especially of the citizen, in the Irish democratic framework.

1.22 Accessing Policy Information and the Culture of Secrecy[942]

In the Irish constitutional framework, the organs of government are set with specific roles in the creation of law and policy. The Cabinet, as the Executive, is charged with the creation of policy. The Oireachtas is vested with legislative power under Article 15.10 and the courts are charged with the judicial function. The Constitution states that the Government is responsible to the Dáil[943], yet in reality our system of governance is 'executive dominated[944]. Even though the creation of this system of administration has been argued to be inconsistent with the democratic principles of open government and citizen engagement[945] as alluded to in Article 6.1, the current system must be analysed for its role in restricting access to policy.

Within the Civil Service, employment circulars are signed which further create a divide between the level of citizen engagement invoked in Article 6.1 and the creation of a culture of executive secrecy[946]. The original provision was contained in Department of Finance Circular 21/32 as discussed by Maeve McDonagh[947]. The original circular preventing any disclosure of public interest information was contained in Circular 15/1979 on Official Secrecy and Integrity where Civil Servants were not allowed to make any communications

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[941] This point was also raised in Eugene Regan SC, 'Policing the Conduct of Referenda; Recent Case Law' (2013) 18 Irish Bar Review 1, 4-7

[942] An early draft of this section was published as a History and Policy Working Paper on History Hub run by the School of History and Archives UCD. Jennifer Kavanagh, 'Executive Secrecy and Access to Policy: Lessons from the Past in Irish Legal and Political History' Working Paper No. 7, 2012<http://historyhub.ie/wp-content/files_mf/1365197031Kavanagh_Jennifer__Working_Paper_No.pdf > accessed 12 June 2013

[943] Article 28.4.1

[944] Frank Litton, 'An Overview of the Irish System of Governance' in *Governing Ireland: From Cabinet Governance to Delegated Governance*. (Dublin: Institute of Public Administration, 2012)

[945] See sections 2.3 and 2.4

[946] Also see the concerns of the Toland Report where this culture of secrecy was criticised. Department of Justice and Equality, (2014) 'Report of the Independent Review Group on the Department of Justice and Equality' (Toland Report) <http://www.justice.ie/en/JELR/RptReviewGroupDeptJustice .pdf/Files/RptReviewGroupDeptJustice.pdf> Accessed 12 August 2014

[947] As cited in Maeve McDonagh 'Access to Official Information in Ireland: Part One: Legal Constraint on Disclosure of Information' (1995) 13 ILT 182

either directly or otherwise on matters which may come into their knowledge[948]. This also restricts any expression on matters of public interest[949]. However, this position was modified in line with the introduction of the Freedom of Information Act 1997 to allow for Civil Servants to make information available under the premise of the Act and in line with the spirit of the legislation without falling foul of a disciplinary offence[950]. These rules were reformed in Circular 09/2009 on Civil Servants and Political Activities which replaced the above provision. This reflects the amendments for the reform of freedom of information but also elaborates on the specific restrictions regarding the public interest and freedom of expression of Civil Servants. Under paragraph 13 a civil servant is not allowed to engage in public debate and under Paragraph 14

> Civil servants (other than those in exempted grades) must not speak on matter of local or national political controversy or express views on such matters in the media (including electronic media and the press) or in books, academic papers, articles or leaflets[951].

The Cabinet itself has been overprotective in protecting its own secrecy. On 18th December 1982, the Irish Times revealed that in order to protect Cabinet Confidentiality, 'phone taps' were conducted against a number of political journalists. The aim of this surveillance was to uncover a suspected mole within the Cabinet. The operation was conducted under the provisions of the Post Office Act 1908[952] where such monitoring could take place to protect

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[948] Section 4 Circular 15/1979

[949] Clause three states the following 'An Official shall not make any verbal statement in public (or which are liable to be published) and shall not contribute to newspapers or other publications any letters or articles, conveying information, comment or criticism on any matter of current public interest, or which concerns the political action or position of the Government or of any member or group of members of the Oireachtas.' However, the ECHR approach is somewhat moderated on this point from the judgments in *Vogt v. Germany* Application No. 17851/91 (ECtHR, 26 September 1995), *Ahmed and Others v. The United Kingdom* Application Number 65/1997/849/1056 (ECtHR, 2 September 1998) and *Hadjianastassiou v. Greece* Application Number 12945/87 (ECtHR, 16 December 1992) the balance should be strictly construed in favour of free speech unless some degree of deterrence was required.

[950] Circular 7/1998 where the classes of information requiring particular sensitivity were listed as information which may put the life or security of an individual in danger, information posing a serious threat to the security, defence or international relations of the state, information which may undermine the police or judicial process, developments relating to Northern Ireland or information posing a serious risk to the economic interests of the State. Policy information in general or information under the *Murphy* categorisation is not included.

[951] For a discussion of the British perspective on such Civil Servant regulations see F.F. Ridley 'Political Neutrality, The Duty of Silence and the Right to Publish in the Civil Service' 39 (4) Parliamentary Affairs 437 - 448

[952] The Act in question does not state that there is a power to tap telephones as they were not a common means of communication in 1908 but in probability the power to take such action would be inferred into the Act if the constitutionality of the section was to be judicially reviewed.

the authority of the State[953].The then Minister for Justice, Sean Doherty stated that it was his 'function and duty to ensure that the security of the State and the confidentiality of the Cabinet is maintained'[954]. Conor Cruise O'Brien stated 'Under the Doherty Doctrine of the security of the State, it is clearly justifiable to tap the telephones of political journalists, because this is a handy way of getting information which might be of advantage to the governing party and of its leader, and hence the State'[955].

The journalists involved, Geraldine Kennedy and Bruce Arnold, later made an application to the court to challenge the constitutionality of the action. In *Kennedy & Arnold v. Attorney General*[956] the 'deliberate, conscious and unjustified intrusion by the servants of the State' was an undemocratic attack on the rights of the citizen in order to maintain the democratic operation of the organs of state. The protection of the Executive is a legitimate action yet the use of such undemocratic means undermines the spirit of the Constitution itself. Moreover, the action was 'without any lawful justification... constituted an attack on their dignity and freedom as individuals and journalists and cannot be tolerated in a democratic society such as ours....(and) has been done by an organ of the state which is under a constitutional obligation to respect, vindicate and defend their rights'[957].

4.1.3 Facilitating Policy Access

Freedom of Information legislation gives a wide right to access information held by public bodies and a public body is under a duty to give reasonable assistance[958]. The regulations concerning the access to government documents are covered in the Freedom of Information Act and the National Archives Act. Moreover, a person who seeks information under the provisions of the Act does not need to show reason for seeking the information. Generally it is an international trend that sensitive information will remain outside the remit of Freedom of Information. Also, the aim of freedom of information legislation is to create a more open culture in national administration[959].

The initial 1997 Act was hailed as a welcome move towards increasing the accountability and transparency of government business in Ireland. However the steps that were taken in the 2003 amendment were retrograde to say the least. One of the most retrograde steps taken in the 2003 Act was the increase in time before cabinet documents could be released.

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[953] The division between the protection of national security and protecting executive secrecy has been blurred on occasion in Ireland. The case of *Kennedy & Arnold v. Attorney General* [1987] IR 587 is noted in constitutional law for the development of the unenumerated right to privacy under the provisions of Article 40.3. However, the breach of privacy in this case emanated from the tapping of telephones of political journalists.

[954] Murtagh, 'Duty to tap phones – Doherty' *The Irish Times* March 24, 1984

[955] O'Brien, 'A whole new tap-dance' *The Irish Times* March 27, 1984

[956] *Kennedy & Arnold v. Attorney General* [1987] IR 587

[957] [1987] IR 587, 594

[958] Section 6. 1 & 2 Part 2 Freedom of Information Act 1997

[959] Maeve McDonagh "Access to Official Information in Ireland: Part Two: Freedom of Information" (1995) 13 ILT 206, 210

Under the 1997 Act, there was a possibility for cabinet records to be released after five years subject to the general exclusions in the Act itself. However, in 2003 this time limit was pushed out to ten years. Even the legislative procedure surrounding the amendment was secretive. The general feeling is summed up well by McGonagle stating that 'the irony was that the Freedom of Information Act, the epitome of openness and transparency in government, was being curtailed by government in a process shrouded in secrecy'[960].

The issue of non – disclosure and non – production of documents has arisen in both *Murphy* and *Amborix* regarding national security issues. This idea is also referred to as the Mosaic effect in Freedom of Information. The current Freedom of Information Acts allow for non-disclosure and non – production of such documents. The Bill to reform this area also includes this protection. However, the invocation of such ground will be subject to a harm test. Yet, such a harm test will not apply to the production of policy documents. It is welcomed that the Freedom of Information Act 2014 has brought the time limit for cabinet and policy documents from 10 years to the original 5 years. The National Archives Act is not affected by this change.

The Freedom of Information Act 1997 was littered with exemptions but was a tentative step towards opening up the Government to external scrutiny. However, the Freedom of Information (Amendment) Act 2003 was to veil many government activities in a layer of restrictions and retractions within 5 years of its introduction. It would be hoped that the current bill before the Oireachtas would redress the deficiencies that hamstrung the Amendment Act. The most significant retraction is in the area of cabinet documents and national security. However on the issue of citizen access to information and the tenants of Article 6.1 this issue of 'information asymmetry' is a central concern.

Freedom of Information is concerned with the release of information about government business in the public interest. This could be information that is held regarding a person and may not come under the provisions of the Data Protection Acts and general information about the government. If the numerous programmes for Government seeking increased transparency were to be acted upon then it could promote a new culture of openness in Government and benefit citizens by involving them in the business of their own Government and thereby promote the 'education of the public good'[961] as set out as an aim in the Article guaranteeing freedom of expression as part of the fundamental rights in the Constitution. As stated by Bernard Manin

> In order that the governed may form their own opinions on political matters, it is necessary that they have access to political information, and this requires that government decisions are made public... if those in government make

[960] Marie McGonagle, *Media Law* (2nd Edition, Thomson Roundhall, 2003) 359

[961] Article 40.6.1 (i) and also see the consideration of open government in historical programmes for government in Ireland in section 4.3

> decisions in secret, the governed have only inadequate means of forming opinions on public matters.[962]

Freedoms of information rights are considered by some to be the hallmark of a true democracy[963]. It could be viewed as a right that allows for participation in the activities of Government policy making when compared to the drafting of the right to freedom of expression which only restricts the Government from passing legislation that could stifle the expression of criticism of Government policy. Freedom of information has to strike a delicate balance between the ability of person to access the information that they seek and the ability of governments to restrict access to such information in order to protect the privacy of other citizens and issues of a sensitive nature.

A certain degree of information restriction could be argued for. The balance that must be sought is between a level of restriction as opposed to secrecy that allows for the business of government to be conducted at the time yet still allows for an effective level of democratic oversight by the governed. Executive Secrecy has always been alleged to be more of a means to almost 'cover up' failures of government as opposed to giving a degree of flexibility to the Government in order to conduct the business of government.

The concept of the public interest is a hard concept to accurately define. In the 2002 Annual Report of the Office of the Information Commissioner, this issue was discussed. The concept of the public interest was not defined in the 1997 Act. However the report draws from the Queensland Freedom of Information Act 1992 which, apparently, heavily influenced the Irish enactment. In the Queensland enactment the public interest is not defined but general principles are laid down to help in its interpretation. Under section 5 the reasons for the enactment are given as follows:

> 5.(1) Parliament recognises that, in a free and democratic society—
> (a) the public interest is served by promoting open discussion of public affairs and enhancing government's accountability; and (b) the community should be kept informed of government's operations, including, in particular, the rules and practices followed by government in its dealings with members of the community; and (c) members of the community should have access to information held by government in relation to their personal affairs and should be given the ways to ensure that information of that kind is accurate, complete, up-to-date and not misleading.

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[962] Bernard Manin, *The Principals of Representative Government* (Cambridge, 1997) pp. 167 – 8 cited in Rahul Sagar, 'On Combating the Abuse of State Secrecy' (2007) 15 (4) *The Journal of Political Philosophy* 406

[963] Rhys Stubbs, 'Freedom of Information and Democracy in Australia and Beyond' (2008) 43:4 Australian Journal of Political Science 667, 667

In the Australian jurisdiction, the position of the cabinet documents is addressed under the provisions of Freedom of Information. In Australian Freedom of Information Act 1982 a difference is made between certain types of cabinet documents[964]. Raw documents on which the decisions are made are not covered[965]; while on the other hand, documents showing the dynamic of the meeting are covered[966]. Also documents presented at cabinet which only contain factual information are not exempt per se unless the documents in themselves would reveal a cabinet decision or deliberation if such decision or deliberation was not previously officially disclosed. When considering the concept of Freedom of Information and the consequence for the relationship between the governed and the Government, the Australian Senate Standing Committee on Legislation and Constitutional Affairs stated the following

> The accountability of the government to the electorate, and indeed to each individual elector, is the corner-stone of democracy, and unless people are provided with sufficient information accountability disappears... We believe that if people are adequately informed, and have access to information, this in turn will lead to an increasing level of public participation in the processes of policy making and government itself[967].

Generally it is an international trend that sensitive information will remain outside the remit of Freedom of Information. Also, the aim of freedom of information legislation is to create a more open culture in national administration[968] which corresponds to an decrease in time before cabinet documents could be released.

4.1.4 Restricting Policy Access

When the issue of cabinet confidentiality is discussed in terms of the blocking of policy information three concepts must be considered; the policy reasons for privilege, the review of information, and the philosophical issues surrounding confidentiality. In the use of cabinet confidentiality, the government has the legitimate reason that opening up cabinet discussions would allow for governance by public opinion. It would be argued that sensitive matters or unpopular decisions may not be implemented or given due consideration if there is total transparency. Alternatively, popular but long-term damaging policies may be supported. However, a glance through recent Irish political history would demonstrate that such issues did happen irrespective of the level of transparency accorded to discussions.

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[964] Maeve McDonagh, 'Access to Official Information in Ireland: Part Two: Freedom of Information', (1995) 13 ILT 206, 210

[965] Exempted under s. 34.1 Australian Freedom of Information Act 1982

[966] Opened for release under 34.2 Australian Freedom of Information Act 1982

[967] The Parliament of the Commonwealth of Australia, 'Freedom of Information: Report by the Senate Standing Committee on Legislation and Constitutional Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978 (Australian Government Publishing Service, 1979) pp 21-2

[968] Maeve McDonagh "Access to Official Information in Ireland: Part Two: Freedom of Information" (1995) 13 ILT 206, 210

The nature of the documents has been used as a reason for the privileging of executive information. Documents referred to in the *Murphy v. Dublin Corporation* judgment by Kenny J. as follows are generally regarded without investigation as matters which should be restricted.

> Minutes of Government meetings, documents relating to military and diplomatic matters, memoranda dealing with proposed meetings, documents relating to military and diplomatic matters, memoranda dealing with proposed legislation and letters between departments relating to policy formation are examples of the type of document the non-disclosure of which is necessary for the proper functioning of the State.[969]

Having particular regard to the classification of 'memoranda dealing with proposed legislation and letters between departments relating to policy formation' and its automatic restriction, runs contrary to the ideals contained in Article 6.1. Such information is envisaged by the citizens being the final arbiters of government policy. The class restriction in this category does not pay any regard to the content of the information. Rather the class is the determining issue here. Furthermore, such policy reasons are the reason for the development of the culture of secrecy with the Government departments and the Executive itself.

In *Attorney General v. Hamilton*[970], the High Court stated that if such powers were to be attributed to the Cabinet then surely the Constitution would not have remained silent. O'Hanlon J. in the High Court also invoked the idea of the Constitution as a prevention of tyranny, that such deference to the working of the Cabinet could result in a situation where unconscionable decisions could be taken in jeopardy of democracy if the judiciary did not retain some measure of oversight within the boundaries of the separation of powers.

However, in the Supreme Court, Finlay CJ suggested that the concept of cabinet confidentiality and the non-amenability of such statements to be put before a court or tribunal flowed from Article 28 regarding collective responsibility. In comparing parliamentary privilege to the statements of Ministers in Cabinet, the Chief Justice stated in a much criticised judgment that

> It would be a striking constitutional anomaly if any individual member of either House of the Oireachtas would enjoy an absolute immunity from suit in the courts for any statement made by him in the House under any circumstances whether relevant or not and even if motivated by malice, whereas a minister

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[969] [1972] IR 215, 226

[970] *Attorney General v. Hamilton* [1993] ILRM 81, 96

> of the government holding high office would in respect of a statement made in discussion at a government meeting be answerable to the courts and, if it were defamatory, would be obliged to rely on the doctrine of qualified privilege and a capacity to satisfy a jury of the absence of malice on his part.[971]

Adding to this, O'Flaherty J. in reversing the High Court judgment, cited from academic work stating that

> Collective cabinet responsibility is a fundamental principle underlying the operation of Irish government. It results in all ministers being obliged to support government actions and policies publicly regardless of their personal opinions or private feelings. Thus the cabinet is collectively responsible for public policy, and the policy programmes of individual ministers must complement it. Once a cabinet decision is taken, it reflects the decision of all the ministers, and a minister who is fundamentally opposed to the decision should, in theory, resign.[972]

McCarthy J. dissenting stated that the idea of parliamentary privilege and collective responsibility were two sides of the same coin. Stating that

> ...the Attorney General argues, the absence of similar provisions in respect of government meetings is clear support for the contention for confidentiality: because government discussions may not be disclosed, there is no need for the protection afforded to the Houses of the Oireachtas. This argument is ingenious but, in my view, not convincing. It is the automatic publicity — to those present in the chambers of each house during debate or to those who read the official publication and media reporting — that makes necessary the express privilege of the members of both houses; it is the necessity for freedom of debate that gives the non-amenability to the ordinary law of contempt of court. These considerations do not apply to government meetings. Why should freedom of discussion require an absolute constitutional right of confidentiality? It may well be that the interchange of views would result in defamatory statements being made but they are, clearly, made under qualified privilege; I see no reason why a minister making such an allegation if he is motivated by express malice should not be answerable to the person he defames. In theory, a member of the government might at a government meeting make an observation so scandalous of the courts as to amount to a contempt if it were published generally; to use such a possible instance as an argument here in my view is to trivialize the status of the

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[971] *ibid* 95

[972] *ibid* 126 citing Dooney and O'Toole: *Irish Government Today* (1992, Dublin; Gill and Macmillan) with approval

government.[973]

Such a policy argument was also relied on by the Constitutional Law Review Group in their assessment of Article 28. They considered that Cabinet Confidentiality was necessary for collective responsibility and an 'almost universal feature of government'[974]. The Group also stated that this confidentiality was 'essential to the Government's ability to 'plan and act cohesively' and the removal or the lifting of this confidentiality in certain circumstances could 'inhibit discussion and therefore the effectiveness of Government'[975].

The Executive has traditionally been in battle with the Judiciary on the correct body to review the classification of information from the executive. In *Murphy v. Corporation of Dublin*[976] it was held that the test of public interest information release should rest with the judiciary instead of the executive. The idea that the Executive should control the decisions on releasing its own information should be contrary to natural justice principles but the battle in this regard between the Executive and the Judiciary has continued. Kenny J. in *Murphy* in the High Court judgment laid down two general rules to be examined where the categorisation of information and the public interest is in question[977].

At the High Court hearing, the clash between the interpretation of statement regarding the placement of citizens at Article 6.1 and the role of the Executive in Article 28 was referred to but the argument did not develop. In the Supreme Court judgment, the role of the

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[973] *ibid* 110 - 111

[974] Article 28, Constitution Review Group, *Report of the Constitutional Law Reform Group* (Dublin: Government Publications Office, 1996)

[975] *ibid*

[976] [1972] IR 215 in fact the reliance on a comparison to absolute privilege is out of date when the reform of the Standing Orders of Debate is to be considered. See further Jennifer Kavanagh, 'Defamation in the Dáil: The Right of Reply for Citizens, the Use of Standing Order 59 and Parliamentary Reform', Irish Political Studies <http://www.tandfonline.com/doi/full/10.1080/07907184.2013.838223#.U0MQI151iVw> 15 October 2013

[977] *ibid* 226 stating that 'The Court should be guided by two general rules when exercising this discretion. The first ... is that there are certain classes of documents which ought not to be produced under any circumstances: in these cases the Court will not inspect them. Minutes of Government meetings, documents relating to military and diplomatic matters, memoranda dealing with proposed legislation and letters between departments relating to policy formation are examples of the type of document the non-disclosure of which is necessary for the proper functioning of the State. .... The second rule is that the claim to withhold production may be based either on the Minister's view that it is against the public interest to disclose a specified document which the Minister has considered or because it belongs to a class of document which, as a matter of policy, he thinks ought to be withheld...it would be injurious to the public interest to produce documents of the class to which those sought belonged.' Adding that 'When a Minister of the Government certifies that it would be against the public interest to disclose the contents of a specified document which he has considered, in my opinion the Court should accept his view unless (a) it is shown not to have been formed in good faith or (b) it is one which no reasonable Minister could take or (c) it is based on a misunderstanding of the issues in the case in which its production is sought.'

judiciary in the determination of such privilege issues was addressed. Walsh J. stated that the determination of the public interest was a matter to be adduced by the courts[978] and that the decision should only be determined by the courts[979]. With regard to the application of a class restriction to documents, Walsh J. stated that

> To grant or withhold the production of a document simply by reason of the class to which it belongs would be to regard all documents as being of equal importance notwithstanding that they may not be[980].

Therefore, the concept of the equity of class restrictions on a matter of policy information and the powers of the Executive was addressed clearly as far back as 1972. The position of the role of the judiciary in the determination of privilege on executive information was reaffirmed in *Ambiorix Ltd. v. Minister for the Environment*[981], where a similar issue of privilege was to be rejected by the Supreme Court. Finlay CJ discussed the use of a class restriction by government and the result of denying information to citizens in the following terms. If such restrictions were

> ...accepted as a general standard or proposition by the Court, then one of the consequences of so doing would be that the right of any individual citizen to challenge a decision made by the Government or by a Minister of the Government, on the basis that it was made without material which supported it or having regard to the consideration of material which was wholly relevant to it could never even be mounted[982].

Therefore, there were concerns that without the ability to access material pertaining to a decision affecting a citize; an injustice to democracy could transpire. At this stage, it was quite obvious to the Court in both *Murphy* and *Ambiorix* that the judicial scrutiny role of the Courts in the pursuit of democracy was essential to clipping the powers of the Executive to the minimum in order to preserve a proper interpretation of separation of powers and the preservation of democracy. The classification of documents, though proffered without any determination of their appropriateness to democracy and Article 6.1, was accepted and the court in *Ambiorix* reaffirmed that the documents sought could only be used for the proceedings at hand and any use beyond that mandate was contempt of court[983]. McCarthy J in *Ambiorix* made particular reference to the class restriction of documents, stating that

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[978] [1972] IR 215, 234

[979] *ibid*

[980] *ibid* 235. This trend is also being eschewed in the current phrasing of the Freedom of Information (Amendment) Bill 2013 where documents which were previously restricted under a class restriction are now being subjected to a content restriction such as national security documentation.

[981] *Ambiorix Ltd. v. Minister for the Environment* [1992] 1 IR 277

[982] *ibid* 285

[983] *ibid* 286

> In particular I reject the claim that documents may be withheld from production simply because they belong to a particular class[984].

However, this correct level of criticism regarding executive secrecy was to be replaced by undue deference to the will of the Executive in *Attorney General v. Hamilton*[985]. This case was to act as the catalyst for the 1997 referendum on cabinet confidentiality. The High Court held, correctly, that the Executive's wish for confidentiality was overridden where an issue of public interest and importance was at issue. The Attorney General stated that allowing for the court to intervene and allow for the doctrine of collective decision-making and confidentiality to be breached would affect the ability of the Executive to make decisions.

> It is submitted that such privilege is necessary to maintain the orderly working of government as the concept of collective responsibility would be inconsistent with a situation where the discussions preceding the making of decisions could be made public and the existence of dissenting views among the members of government could become generally known. It was further contended that the good and orderly working of government could not take place if discussions on matters of policy had to be conducted in the knowledge that the views expressed by the members of government could subsequently be made known to the world at large[986].

However, in rejecting this argument O'Hanlon J. made reference to the established precedents in *Murphy* and *Ambiorix*. Balancing the 'tug – of – war'[987] that arises in such cases, O'Hanlon J. stated that the decisions in the previous cases were made in the context of the totality of the Constitution and should be interpreted as such

> In my opinion, the concession of the absolute ban on disclosure at all times and under all circumstances of what has transpired at meetings of the government, such as is claimed by the Attorney General in these proceedings, would not have due regard to the public interest and to the rights of the individual as guaranteed by the Constitution. If it were intended that such absolute blanket of confidentiality should take effect, in contradistinction to

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[984] *ibid* 289

[985] [1993] ILRM 81 This particular *Hamilton* Case referred to Privilege and Cabinet Confidentiality. *Attorney General v. Hamilton (No.2)* [1993] 3 IR 227 referred to the non-amenability of Member of the Oireachtas for statements made in the Dáil. All cases were in pursuit of information that was central to the considerations of the 'Beef Tribunal' pertaining to matters in the Irish Beef Industry.

[986] [1993] ILRM 81, 85

[987] *ibid* 89 and almost as a precursor to Hamilton CJ, *McKenna v. An Taoiseach (No.2)* [1995] 2 IR 10, 38 where it is stated that The government is, however, a creature of the Constitution and cannot act free from the restraint to the Constitution. In the exercise of the executive power of the State it is subject to the provisions of the Constitution

> the legal situation prevailing in so many other democratic communities, then I would expect it to have been spelled out in clear terms in the Constitution.[988]

The judgment of O'Hanlon J. is to be commended for applying the theory of the separation of powers correctly on such an issue. It also, implicitly reflects the position of the citizen in issue of policy in line with Article 6.1 without expressly referring to the article itself. In this way, a matter of public interest and the activities of government carried out to investigate wrongdoing, in this case the Beef Tribunal, should have access to information to expose corruption or malfeasance of public office. In allowing the application, O'Hanlon J. referenced the judgments in *Murphy* and *Ambiorix* above, stating that the

> ...public interest in obtaining full disclosure of the matters which have to be enquired into is outweighed by the public interest involved in upholding a plea of confidentiality put forward as a ground why the question should not be admitted or any reply sought thereto.[989]

On appeal, the judgment of O'Hanlon J. was overturned in a overly deferential judgment by the Supreme Court. As stated by Finlay CJ

> ...claim for confidentiality of the contents and details of discussions at meetings of the government, ... is a valid claim. It extends to discussions and to their contents, but it does not, of course, extend to the decisions made and the documentary evidence of them, whether they are classified as formal or informal decisions. It is a constitutional right (that) goes to the fundamental machinery of government, and is...not capable of being waived by any individual member of a government, nor ... are the details and contents of discussions at meetings of the government capable of being made public ... by a decision of any succeeding government.[990]

Finlay CJ directly assesses the issues raised in Article 6.1 but arguably comes to an erroneous conclusion on the spirit of the Article. The learned judge uses the text of the Article to prevent the citizens from having access to the policy deliberations upon which they intended to act as final arbiters. Moreover, it is used as a means of bolstering cabinet confidentiality rather than as a means for granting increased information powers to the citizens and in this case a Tribunal set up by Dáil Éireann to inquire into alleged iniquities of the governance of the country. In distinguishing the judgments in *Murphy* and *Ambiorix,* Finlay CJ states that these cases only referred to the judiciary seeking to exercise judicial power and that 'no specific claim of a special confidentialy arose'[991]. With regard to the issue of

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[988] *ibid*
[989] *ibid*
[990] [1993] ILRM 81, 100
[991] *ibid* 98 -99

confidentiality and the power of the Dáil, Finlay CJ stated that if the Dáil is unhappy with the exercise of power, then they have the mandate to cease to support the policies of the cabinet[992]. However, such a consideration seems to be divorced from the *realpolitik* that the Dáil is controlled by the majority parties, these leaders of these parties nominate the members of the Cabinet and then the party members are controlled by a whip which enforces the passage of Cabinet mandated policies through the Oireachtas. Regarding the implication of confidentiality from the Constitution, Finlay CJ states that

> The implication of this confidentiality from the provisions of the Constitution to which I have referred is in my judgment amply justified by the practical impossibility of carrying on the fundamental functions of government in its absence. Since the sole issue raised before us in this appeal is whether such an absolute right of confidentiality exists, I am satisfied that the court cannot be concerned with either the relevance of the questions sought to be asked concerning discussions at government meetings, nor with any apparent breaches of such confidentiality which it is suggested have occurred in either documentary or oral evidence already afforded to the tribunal. These matters would only be relevant if an issue of qualified privilege or confidentiality had arisen.[993]

Both Hederman J and O'Flaherty J agreed with the judgment of Finlay CJ., Hederman J. based his decision on the historical background to the cabinet and the interrelationship between cabinet confidentially and collective responsibility. On the basis of separation of powers, the 'disclosure of the content of discussions which take place at government meetings the executive role of the government as envisaged by the Constitution would be undermined and perhaps even de-stabilised'[994]. The judgment of O'Flaherty J. focused on the sphere of influence of each organ of government under the Constitution. The learned judge did not invoke Article 6.1 and did not enter into a discussion of the adjudicatory role of the courts. In comparing and contrasting the amenability of a member of the Oireachtas and a member of the Cabinet, O'Flaherty J. held that in line with collective responsibility they do not leave cabinet as 'single emissaries to recount their endeavours to another power but rather to declare what they as the power have decided'[995].

McCarthy J. agreed with the High Court decision of O'Hanlon J. who considered the Irish text of the word 'responsible', 'freagrach', and stated that the Cabinet is answerable or accountable to the Dáil[996]. The use of the doctrine of collective responsibility is a parallel protection to the parliamentary privilege available to the Oireachtas members who meet in

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[992] *ibid* 99 -100
[993] *ibid* 100
[994] *ibid* 103
[995] *ibid* 126
[996] *ibid* 110

public. Therefore McCarthy J. questions why freedom of discussion required absolute confidentiality[997]. Regarding the ability of the court to review such statements, McCarthy J. cites *Murphy* and *Ambiorix* with approval considering the relevant circumstances to their cases, but states that the information in question in the case at hand does not relate to the administration of justice. Adding that the Tribunal in this instance will only report to the Dáil and will not impede future court findings in connection with the fundamental rights of the citizen and the exercise of the Tribunal's powers[998]. McCarthy J. concluded with a realistic and correct statement that no public interest privilege was being asserted, it was the responsibility of the Chairman of the Tribunal to determine the public interest in question. Concluding on the issue of the public interest in this case, McCarthy J made the following salient point

> There being no special circumstances such as I have instanced above touching on the discussions at government meetings, it seems to me that the interests of all concerned, the public generally, those making the allegations and those the targets of the allegations would be best served by not restricting the inquiry[999].

Egan J. declined to use any argument from Article 6.1 and dismissed the use of the British Cabinet model as a guide to interpreting the boundaries of executive power in Ireland. In a short judgment, Egan J. rejected any contention of Cabinet meetings being confidential but relied on the nature of collective decision making at Cabinet level.

> The tribunal is entitled to know that decisions were made by the government relevant to the matters it is investigating and, if a dispute arises regarding whether or not any particular decision was made, the tribunal is entitled to hear such evidence including, if necessary, evidence of the deliberations, for the purpose of finding out what decision was arrived at, but only for such purpose.[1000]

Hogan and Whyte, in their critique of the judgment, were supportive of a limited privilege which mirrored the previous judgments[1001]. They stated that a limited privilege with "the objective of maintaining government stability"[1002] would be more preferential to the system in *Hamilton*[1003] which to all intents and purposes created an absolutist approach. Article 28.4.3, which was inserted by referendum in the wake of the *Hamilton* judgment, provided the following

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[997] See above for the discussion of policy reasons for restricting access to information
[998] *ibid* 115
[999] *ibid* 117
[1000] *ibid* 128
[1001] Hogan and Whyte, *JM Kelly: The Irish Constitution*, op. cit. 462
[1002] *ibid* p. 462
[1003] *Attorney General v. Hamilton* [1993] ILRM 81

> 3° The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter –
> i in the interests of the administration of justice by a Court, or
> ii by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance.[1004]

In the consideration of Article 28 by the Constitutional Law Review Group, the implications of Hamilton were raised. The implications of *Hamilton* were only briefly discussed but the Group was happy to go with the public interest formulation as encapsulated by the referendum on the issue[1005]. However, the analysis of the use of confidentiality neglected to incisively analyse the doctrines which predicate executive rule and the appropriateness of their development. When considering the Australian rules[1006], as outlined above, the Group did mention that such confidentiality does not 'apply to Government decisions which are formally recorded'. The reason for this is that 'their communication to those concerned establishes them as items of public knowledge'[1007]. When this statement is considered, the Group offers no justification for this statement and may have ramifications for the information which may be available under the Freedom of Information Acts. With regard to the internal rules of Cabinet, the Department of the Taoiseach Cabinet Handbook emphasises the ability of the Courts to inspect documents which the Government asserts privilege over[1008]. This is in spite of the situation in the *Hamilton* verdict and the resulting referendum on the situation. Referring to the *Ambiorix* judgment, the advice to Ministers is as follows

> The Courts established (the *Ambiorix* case) in July, 1991, that no Government (or Cabinet) documents were privileged from disclosure in court proceeding merely on the account of their origin. Documents which the Government wanted to protect on grounds of executive privilege would have to be inspected by the Judge who would balance the need for secrecy against the interest of the litigant and the public in the administration of justice.

4.1.5 National Security Reasons

The Official Secret Act 1963 has been the subject of an Oireachtas Legislation and Security

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[1004] Article 28.4.3

[1005] Article 28, Constitution Review Group, *Report of the Constitutional Law Reform Group* (Dublin: Government Publications Office, 1996)

[1006] Discussed above

[1007] *ibid*

[1008] Department of the Taoiseach, *Cabinet Handbook* (Department of An Taoiseach, 2006) 9

Review which instructed the Government to reform, if not repeal, the Act as soon as possible due to constitutional impediments with the legislation. The rationale for the introduction of the legislation has swung from the possible leaking of exam papers to IRA activity[1009]. This lack of clear motivation has also been commented on by McGonagle[1010]. The main criticism of the Act is that it enables a culture of secrecy and the penalties listed in the Act create a chilling effect on any release of information in the public interest. Even though there have been few prosecutions under the Act the threat of legislative sanction on those subject to it is 'no less real as a result'[1011].

The legislation is framed with vague definitions and imprecise wording. For instance the definition of official information is framed so vaguely that it may comprise of any document or note that is or has been in the possession of a public office holder and is confidential. It is also an offence for any person to have in their possession any document containing any material that may be prejudicial to the safety of the state. The most worrying aspect of the legislation is the provision contained in s.3 whereby a certificate given by a Minister under his seal that any official code word or password or any sketch, plan, model, article, note, document or information specified or indicated in the certificate is secret or confidential shall be conclusive evidence of the fact so certified. This removes any power of arbitration on the issue from the courts[1012].

The Official Secrets Act 1961 was described as follows by Cook in 'Why we need open government in Ireland' in 1985. Stating that

> ...(a) small nation with a written constitution and a neutral standing in international affairs has virtually the same draconian powers of secrecy as a front – line NATO state with no written constitution[1013].

The only explanation for this rigorous approach could be the internal terrorist threat posed by the Northern Ireland situation but this was easily regulated by means of the comprehensive provisions against terrorism as encapsulated in the Offences Against the State Acts. The real issue from the provisions of the Official Secrets Act was the chilling effect on the release of Government Information in the Public Interest in a form of Whistle-

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[1009] 194 Dáil Debates Cols. 599-600, 603

[1010] McGonagle, *op.cit.* 353

[1011] McGonagle, *op. cit.* 354 For example instances of threatened prosecutions were levied at the Today Tonight Program on security at British Embassy and in 1993 Emily O'Reilly, the current Information Commissioner, published the Government's Draft Policy on the North. Even though the North was part of Government policy, the clash between the right of citizens to engage with policy and the wish of the Government to keep the material secret was sought through the Official Secrets Act.

[1012] This point which was also made by McDonagh 'Access to Official Information in Ireland: Part 1: Legal Constraint on Disclosure of Information '(1995) 13 ILT 182.

[1013] Seirbhís Phoibli, Vol 6. No.3 Mean Fomhair 1985, 23

blower capacity[1014].

The provisions of the Official Secrets Act were raised in 'A Government for Renewal' the Programme for Government for the Fine Gael, Labour and Democratic Left Rainbow Coalition in 1994. The programme stated that the Official Secrets Act and all other statutory provisions which restrict access to information would be reviewed on a regular basis by the Legislation and Security Committee in order to bring them in line with best international standard of public information provisions[1015]. The Government also pledged to act on these reports. No reform of the Act took place. There was no mitigation of the sections contained in other legislation during the lifetime of the Rainbow Coalition.

In 1997, a report was undertaken by the Select Committee on Legislation and Security on the reform of the Official Secrets Act 1963. In its report, the committee were of the opinion that the Act in its current form was widely attributed to the culture of secrecy in the Civil Service[1016]. The report also stated that in order to protect freedom of expression and 'in line with the requirements of good government' there should be the maximum possible freedom of access to public information'[1017]. The Committee also requested the repeal of this legislation as soon as possible. It recommended its replacement with specified criminal sanctions for espionage and the unauthorised disclosure of specific categories of information. The committee also recommended that the reform should also incorporate the provisions of the Freedom of Information Acts[1018]. The proposed categories of documents were i) security and defence of the state, ii) crime and criminal law enforcement, iii) protection of life and safety, and iv) disclosure of information for personal gain. The report also stated that release of other categories of documents should be a disciplinary offence, using the provisions of the criminal law only if someone knowingly released documents without authorisation with explicitly showing that they caused harm by the release of the document[1019].

However, the most important comment regarding the Act was regarding the constitutionality of the Official Secrets Act 1963. The committee stated that the 'Act may be unconstitutional as it is a blanket ban preserving secrecy at all costs'[1020] not just the situations that are provided for in the Constitution as legitimate grounds for the restriction. Also under the provisions of s.32 of the Freedom of Information Act 1997, a report must be

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[1014] The issue of whistle-blower protection in the Irish jurisdiction is another issue that is often promised but never acted upon issue in successive general elections.

[1015] 'A Government for Renewal' the Programme for Government for the Fine Gael, Labour and Democratic Left Paragraph 57 p35

[1016] Select Committee on Legislation and Security, *Report on the reform of the Official Secrets Act 1963*, (Government Publications Office, Dublin, 1997) 3

[1017] *ibid* 3

[1018] *ibid* 4

[1019] *ibid* 5

[1020] *ibid* 28

furnished to the Information Commissioner on the proposed reform of any statute or statutory instrument that prevents information from being disclosed. Under this provision a Joint Committee of the Houses of the Oireachtas must review the operation of all statutes which contain secrecy provisions in order to ascertain whether these provisions need to be amended, repealed or placed in a third schedule to the FOI Acts. According to the 2004 report of the Information Commissioner no report was received in 1999 and a number of departmental reports were outstanding in 2004.

The Freedom of Information Acts 1997 – 2003 were amdended in 2014. The purpose of the amendment as first signalled in the draft legislation[1021], saw the regressive reforms in the Amendment Bill of 2003 being revised to their original position in the 1997 Act. The amendment act also saw a liberaliseation in the flow of information regarding national security[1022]. The introduction of a harm test for is in line with the arguments put forward in this research. However, without the parallel reform of the Official Secrets Act 1963, the extent of this reform could be questioned.

Following on from this reform, the Department of Public Expenditure and Reform sponsored the introduction of the Protected Disclosures in the Public Interest Act 2014[1023]. The release of information in the public interest has been brought before the Irish courts in many cases and has resulted in information being released which otherwise may have been hidden from the public[1024]. Such information is required in the public interest. From the Offshore Accounts saga in National Irish Bank to the Leas Cross investigation[1025], the disclosure of information in the public interest is protected and encouraged under law. The main objective of the Act is to protect all workers in all sectors of the economy in disclosing wrongdoing and safeguard them from any victimisation. The Act, under head three, is designed to promote the disclosure of information in the public interest relating to unlawful conduct or misconduct by their employer. It also seeks to create a means of disclosing such information. It is also designed to protect information relating to criminal offences by their employer, failure to comply with legal obligations and the unlawful or corrupt use of public money. In the heads of the Bill, an employee cannot be penalised in any way. This is defined as anything that affects a worker to their detriment. This includes suspension or dismissal, demotion, unfair treatment or discrimination.

[1021] As discussed in section 4.5.1

[1022] Also see Jennifer Kavanagh, 'Freedom of Information and National Security: Where's the Harm in That?' in Tom Felle and Maura Ashead (ed.) Ireland and the Freedom of Information Act (Manchester Univeristy Press, 2015)

[1023] Government Reform Unit, *General Scheme of the Protected Disclosures in the Public Interest Bill 2012* (Department of Public Expenditure and Reform, 2012) < http://per.gov.ie/wp-content/uploads/Draft-Heads-Protected-Disclosure-in-the-Public-Interest-Bill-2012.pdf> accessed 16 July 2013

[1024] As discussed in 2.7.1

[1025] *Cogley v RTÉ* [2005] 2 ILRM 529, and *National Irish Bank v. RTÉ* [1998] 2 I.R. 465

4.1.6 Public Interest Privilege after Hamilton

The position of accessing such information in the wake of the *Hamilton*[1026] judgment and the Seventeenth Amendment of the Constitution has received little attention. In the case of *Irish Press Publications and Others v. Minister for Enterprise and Employment*[1027] the implications of the *Hamilton* decision were highlighted. In this case, the plaintiffs were suing for libel, negligence and wrongful interference with their constitutional right to a good name in the wake of the closure of the Irish Press. Amongst the items sought in discovery, the plaintiffs wish to access some Government documents dealing with the closure. The State sought to preclude the release of these documents as they claimed they were covered by cabinet confidentiality. In the consideration of the issues in the High Court, Carroll J. stated that as the range of documents covered both communications and documents prepared for cabinet, a number of considerations had to be made. Regarding one of the documents which was a communication from a private secretary, the umbrella term of cabinet confidentiality did not apply as it was the only ground pleaded. In relation to other documents sought, Carroll J. was cognisant of the administration of justice and unjust disadvantage as these were cabinet documents.

> In my view, the administration of justice would not be compromised in any way by upholding the defendant's claim to privilege on the grounds of cabinet confidentiality. I am satisfied that the plaintiffs would not be unjustly disadvantaged by allowing this claim for privilege[1028].

In *Minister for Education and Science v. Information Commissioner*[1029], McGovern J. in the High Court, was asked to interpret the provisions of s.28(1) regarding cabinet documents. The Information Commissioner sought documentation regarding the contribution of religious orders to the residential institutions redress scheme from a document which was prepared for cabinet. The Information Commissioner argued that the documents were prepared for the purposes of information and should therefore be subject to the provisions of the Freedom of Information Acts[1030]. Furthermore these documents were not used primarily for conducting the business of State. The High Court held that the document was prepared and created for the purpose of being submitted to government and allowing access to the document could have implications. These implications listed by McGovern J. were that documents containing ministerial advice could be disclosed; this could undermine Government confidence and would strike at the constitutionally enshrined doctrine of

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[1026] *Attorney General v. Hamilton* [1993] ILRM 81

[1027] *Irish Press Publications and Others v. Minister for Enterprise and Employment* [2002] 4 IR 110

[1028] [2002] 4 IR 110, 116 and referencing *Bula Mines v. Tara Mines Ltd (No.4)* [1991] 1 IR 217 regarding the duty of the defendant to list documents sought in discovery to allow the plaintiff to determine whether any claim for privilege is properly maintained.

[1029] *Minister for Education and Science v. Information Commissioner* [2009] 1 IR 588

[1030] This jurisprudential argument was probably spurred on by the influences of spirit of the New Zealand and Australian Freedom of Information regimes which have been incorporated in to the interpretation of the Irish rules as previously discussed.

collective responsibility. However, McGovern J. did add that the exemption of documents should only occur in exceptional circumstances as the public should not be deprived of information held by public bodies[1031].

1.23 Conclusion

The constitutional role of the citizen as envisaged under Article 6.1 as the final arbiters of government policy could be argued to be carried out by the nature of plebiscitary democracy as framed in *McKenna* and *Doherty*. However, the fact that the courts are willing to confine the privilege of executive speech indicates that access to policy and the ability to criticise such policy is a growing jurisprudential argument in Irish constitutional law. Therefore, the actions and limitations placed on the speech of the Executive are central to the consideration of the ability to educate public opinion and criticise government policy as stated in Article 40.6.1 (i). Even though the concept of the separation of powers was originally a means of curbing the unfettered power of a constituent part of the organs of government and allowing for democratic equality the position of the citizen has not been considered as a means of curbing power. The Irish democratic construct holds the citizen as key, yet the adherence to separation of powers is diminishing the role of the citizen in policymaking.

The policy arguments put forward to allow for Executive secrecy are rarely challenged by the judiciary when they are proffered as reasons for executive secrecy. As can be seen above, when they are invoked the only means of engagement with the argument is in the area of comparable privileges between member of the Oireachtas and member of Cabinet. The reasons and class categorisations are only referred to by a small number of judges but an investigation of their appropriateness is not carried out. This position is now enshrined into the Constitution in the wake of the constitutional amendment after *Hamilton*.

It is obvious from the case law that a degree of undue deference slipped into the jurisprudential considerations especially in *Hamilton*[1032]. The earlier cases, even though lacking in policy engagement, were prepared to reinforce the judicial role of the Courts when making determinations on the class of evidence. The separation of powers theory was intended to propagate and protect democracy by a system of checks and balances. However, the reality in Ireland has resulted in the curtailment of the role of the judiciary from the *Hamilton* judgment and where the Dáil is obstructed from its oversight role by by the same parties which control the Executive.

The absence of any consideration of the *realpolitik* in the binding judgments which now set the landscape for any sense of judicial oversight on the maintenance of democracy has resulted in a diminution of citizen oversight in a plebiscitary and representative democracy. The problem, from the view of the criticism of government policy, is that this practice tends

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[1031] [2009] 1 IR 588, 589

[1032] *Attorney General v. Hamilton* [1993] ILRM 81

to place government information out of the reach of the citizen. The restriction to access has many implications for the ability to scrutinise decision-making, the material that was used in the creation of decisions and the ability to hold those who make decisions to account.

Reducing the level of executive secrecy could help transform policy making in Ireland. Allowing greater scrutiny and transparency in policy formation would hopefully have two results; greater citizen participation and better legislation[1033]. Considering the concerns highlighted regarding the culture of secrecy within the Civil service and use of an inappropriate system of internal regulation when compared to the relative position of the citizen, the retention of Whitehall based rules do not aid in the process of opening up the Executive realm. As section two has considered the nature of the democratic relationship between the government and the citizens and the need for a greater transparency in government information, the review of the privileges of cabinet confidentiality shows that the indirect restrictions only serve to stifle debate.

Notwithstanding the need for transparency, there must be space given to members of government to make the decisions for the country. However, this degree of secrecy has implications for the legislative process and can, in effect, stifle the level of constructive debate that may be had in the chambers of the Parliament if the opposition cannot critique the information that was given to the cabinet. A comparative policy approach from Austrailia could be a means for reform in the Irish system. Providing for policy decisions and information to be given to citizens would allow for a greater degree of engagement yet allow for the intricacies of debate to be legitimately restricted. In this approach, the basic information given to cabinet in the form of reports would also be accessable to citizens without the intricacis of the debates open for consideration. Therefore the decisions, and their basis, would be clearer to all those involved in the democratic process. In turn, this would add to transparency and open government.

The only reform in the area which has been of some benefit to accessing policy is the Freedom of Information regime. Even though this was praised in 1997 with its initial introduction, the amendments in the 2003 Act which severely reduced the ability of citizens to access public interest information have been addressed, but not in totality, in the 2014 Act.

With regard to improvements in the legislative product from Government, allowing greater access to the process of Cabinet and legislation should allow for citizens with particular expertise and knowledge to criticise the work of Government in a positive fashion. As stated in a report by the Select Committee on Modernisation of the House of Commons on

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[1033] For example see Eoin O'Malley, 'The Apex of Government: Cabinet and Taoiseach in Operation' in O'Malley, E. & MacCarthaigh, M. (eds) Governing Ireland: From Cabinet Governance to Delegated Governance. (Institute of Public Administration, 2012) 59

reform of the Legislative Process

> A system which allows the individual or organisation who has spotted a way which a pending piece of legislation might affect them to bring this readily to the attention of the legislature is less likely to produce laws which are defective or redundant, or which lead to unintended (even unforeseen) consequences.[1034]

Instead of operating from a mind-set where a leak of information from Cabinet was tantamount to an invasion of the State, there is a lot to be gained from reforming the legislation and allowing a greater degree of citizen participation in the process of policy formation.

In essence, when the restrictions on the flow of official information are considered there is still a sizeable body of constitutional procedure and legislative provisions to undermine the attempts of a citizen to access information regarding policy or official information.
Brian Farrell, in his critique of the answerability of Ministers in the Dáil Chamber touches on a common theme of the general withholding of information and the remaining inviolability of executive secrecy[1035]. In fact Farrell goes further, stating

> It is this tradition of executive secrecy, buttressed by the doctrine of collective responsibility, which has done much to reduce the role of parliament from the powerful body envisaged in the Constitution. Indeed, it could be argued, the excessive reticence of the Irish governmental system infringes Article 40.6.1's guarantee of freedom to express convictions and opinions.[1036]

From an analysis of the restrictions in place that stifle and chill the dissemination of information relating to Government Policy there is a demonstrable imbalance which gives the Government the ability to restrict the flow of information. This imbalance is undermining the ability of the citizens to engage in policy debate. When the impact of Executive privilege on the flow of policy to citizens is considered, its impact, even though indirect and due to practice as opposed to legislative and content based restrictions, is as harmful if not more harmful to the education of public opinion and the ability to criticise government policy as set out in the Constitution.

[1034] Select Committee on Modernisation of the House of Commons, *The Legislative Process*, First Report of Session 2005 -6, HC 1097, p. 5

[1035] Farrell, 'The Constitution and the Institutions of Government: Constitutional Theory and Political Practice' (1987) 35:4 Administration 162, 168

[1036] *ibid* 169

SECTION THREE

AN EVEN HANDED JUSTICE?

'Our Constitution is called a democracy because power is in the hands not of a minority but the whole people'

Thucydides[1037]

[1037] Rex Warner (trans.), History of the Peloponnesian War (Penguin, 1972) 144-145

5 Section Three- An Even Handed Justice?

This thesis set out to address the role and influence of the citizen under the Irish constitutional framework in terms of contributing to the discussion and criticism of Government policy. The introduction set out the aims and objectives of this research. In order to address this objective, the following issues were considered; the interpretation of the right to freedom of expression, the role of the citizen as set out in the Constitution, the nature of democracy in Ireland and the restrictions on freedom of political expression. In term of the restriction, the following issues were considered; the direct restrictions placed on political communications by the Broadcasting Acts and the indirect restrictions placed on the flow of information by the Separation of Powers and the administration of executive government.

Section one critically analysed the provisions surrounding political speech in Ireland and the comparative influences that may affect the interpretation of the right in the future. This section also analysed the influence of democratic theory and politics on the use and development of the right. Section two examined the direct and indirect restrictions that affect the use and scope of what may be included in political speech. For the purposes of this research the assessment focused in particular the discussion and criticism of government policy.

This section will now examine the impact of both the direct and indirect restrictions on the ability of citizens to engage with government policy and thereby employ their constitutionally mandated political speech rights to act fully in their role 'in final appeal, to decide all questions of national policy'. This section will also contain the major conclusions of the thesis and the recommendations for future reform and research in the area.

This section will use the theoretical framework that was introduced at the end of section one as the primary basis for analysis[1038]. The headings, which were introduced in this section, are political equality and the public interest. This section will also consider the relative harm of direct and indirect restrictions, the legitimacy of such restriction and their net effect. It will also consider the reality of the protection and propagation of democracy due to practical freedom of expression and information available to citizens.

This section will question the totality of the restrictions discussed in section two and their impact on Irish democray through the ability to criticise government policy as stated in Article 40.6.1(i) and the role of citizens in Article 6.1. However, this is given scant expression through constitutional interpretation[1039]. The jurisprudence of the other

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[1038] See section 2.7

[1039] See section 2.5, 2.7.3.2 and 4.4.2 where the historical interpretation of democracy, the role of the citizen and the link between Article 6.1 and Article 40.6.1(i) has begun especially in *Doherty v. Referendum Commission* [2012] IEHC 211

countries examined does go further to link the citizen, speech and democracy but this had not been incorporated into the Irish jurisprudence[1040]. This is even in spite of an express constitutional link between the citizen and government policy.

1.24 Political Equality

The constitutional framing of the role of the citizen and the right to freedom of expression holds out the citizen as the source of power of the organs of government[1041]. In fact, if the nature of democracy in Ireland were to be examined, as in section one, the citizen is the core of the democratic nature of the Irish State. Ireland is described as a country with a representative democracy form of government[1042]. Not only does the literature reference the essence of both representative and participative democracy[1043], but also the Courts have categorised the democratic nature of the State as that of a 'plebiscitary democracy' in *Hanafin v. Minister for the Environment* [1044] and in *Coughlan v. Broadcasting Complaints Commission* [1045]. This was further added to in the judgment of Hogan J. in *Doherty v. Referendum Commission* [1046], where the nature of political equality in the speech of government was linked to the role of the citizen under Article 6.1. In fact, this thesis holds that between the *McKenna (No.2)* [1047] and *Doherty* [1048] judgments, that the greatest development between political speech rights and citizen equality have been made but the momentum needs to be continued to result in a true harmonious interpretation to grant the greatest social utility to political speech rights.

The development of the principle of political equality emerged from the referendum speech cases which restricted the powers of political expression of the Executive where public money was being used by the State to advocate a particular result in a referendum[1049]. These cases evolved from the *McKenna (No.2)* [1050] case where both O'Flaherty J. and Denham J. referred to the need for equality in the discussion of government policy. Their judgments referred to the sensitive time of communications in the lead up to a referendum where the citizens are exercising their right in an overt manner as the final arbiters of government policy. However, this section seeks to examine if the restrictions set out in section two as the direct and indirect restrictions adhere to this principle of democracy, as interpreted into the Constitution by virtue of these cases.

[1040] For example, see the case law discussed from the Convention system in section 2.6.4

[1041] Article 6.1

[1042] See the discussion regarding the development of democracy in Ireland in section 2.1. Also see the historical judicial interpretation of Irish constitutional democracy in section 2.4

[1043] *ibid*

[1044] See Hamilton CJ in *Hanafin v. Minister for the Environment* [1996] 2 IR 321, 422

[1045] [2000] 3 IR 1, 28

[1046] [2012] IEHC 211

[1047] *McKenna v. An Taoiseach (No.2)* [1995] 2 IR 10

[1048] *Doherty v. Referendum Commission* [2012] IEHC 211

[1049] See the discussion in section 2.7.2 regarding the need for equality and plurality in voices concerning political matters in the cases discussed, the point at issue related to balance in publications concerning elections and referenda

[1050] [1995] 2 IR 10

The essence of political equality is to accommodate, in so far as practicable, a plurality of voices to be heard on issues of national policy. As discussed, the Broadcasting Act[1051] places specific duties on broadcasters to ensure that the coverage of news and current affairs is carried out in an impartial and balanced fashion[1052]. This is especially true at times of elections. However, when broadcasting restrictions for the purposes of national security are considered, the achieving of such balance is generally precluded by law.

Turning first to the issue of the Section 31 broadcasting restrictions, the issue of political equality was not litigated. Furthermore, the constitutional provisions regarding freedom of expression emphasising the inability of government to restrict speech where its objective was the criticism of government policy were not litigated. The censorship of those subject to the orders meant that the criticism of government policy regarding Northern Ireland could not be carried out when certain members of listed organisations were involved. Indeed, many of those subject to the orders were involved in political violence which may have jeopardised the authority of the State. Notwithstanding this fact, they were also engaged in the criticism of Irish government policy.

The situation as highlighted in cases such as *O'Toole*[1053] and *Purcell*[1054] demonstrated the heavy-handed effect of applying broadcasting restrictions for this purpose without distinction as to their content. The aim of seeking a plurality of voices, the discussion and criticisms of government policy has been subverted by legislation in this regard. The ability of the government to activate such restrictions still rests on the statute books[1055]. This section contains no mechanism for applying discrimination to the category and content of the material to be discussed. Therefore, it is clear to state that lessons from the Section 31 orders have not been learned and the possibility of undermining the idea of political equality in the discussion of government policy still remains when national security issues are invoked.

When the area of political advertising is considered under the theme of political equality, the degree of inequality in this area comes into sharp focus. Not only does the Broadcasting Act 2009 contain a complete ban on such advertising, the latest judgments from the European Court of Human Rights signals that jurisprudence in this area is regressing to a very conservative standpoint[1056]. Unlike in the United States, both the United Kingdom and Ireland, as members of the European Convention on Human Rights, have strict regulations

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[1051] Broadcasting Act 2009 see sections 39(1) and 42 (1)

[1052] See the discussion in section 3.5.1

[1053] *O'Toole v. RTÉ (No.1)* [1993] ILRM 454 and *O'Toole v. RTÉ* (No.2) ILRM 458

[1054] *Purcell v. Ireland* Application Number 15404/89

[1055] Section 39(1)(d) Broadcasting Act 2009 as discussed in section 3.4.5 concerning the lapse of section 31 restriction but the retention of the power to restrict broadcast media if required in the future.

[1056] See section 2.6.4.2

on the restriction of political advertising. Both have common systems of regulation for party political broadcasts and party election broadcasts. However, these systems only regulate broadcasting time allowance for established political parties[1057]. The system completely discriminates against those who seek to influence, or perhaps in their eyes educate, public opinion on issues of national importance, perhaps even issues pertaining to government policy[1058]. In regard, to this area, political equality in the area of the criticism of government policy does not exist.

The next point of the analysis turns to the restrictions placed on the flow of government policy information by the constitutional impediments of the Executive and the administrative culture of this organ of government. The impediments here are created by the adherence to cabinet confidentiality, executive secrecy and the questionable nature of the inherited system of administration from the United Kingdom. These issues result in the privileging of government information and the culture of secrecy which has emanated from the Executive to protect such policy information. The Executive has sought to reform its privilege over such information through the Freedom of Information Acts 1997 – 2003 which has opened access to personal information and some information in the public interest[1059]. However, the idea of political equality has not yet effected the release of government policy information. Indeed the concept of political equality has emanated from the referendum cases[1060], which placed limitations on the speech rights of the Executive, the idea has not flowed through the remainder of Executive culture.

When applying the theme of political equality to the restrictions assessed, it is clear that this concept goes to the heart of the rationale for both Articles 6.1 and 40.6.1(i). The application of this concept to the referendum cases strengthens the relative roles of the State and the citizens in the conduct of referendum campaigns[1061]. It allows the citizen to access both sides of the debate and to act in their role as the final arbiters of government policy. Yet, the balancing of policy debates is an on-going process in a democracy. The need to promote political equality continues therefore the need to access balanced information is critical. The restrictions which have been identified and examined show that the principle does not extend to the regulation of political speech restriction in the broadcast media and its is certainly not adhered to regarding the flow of government policy information from the Executive itself.

1.25 Public Interest

Turning from the examination of political equality, the role of the public interest in the release of government policy information will now be examined. The essence of this argument is grounded in the role of the citizen as set out in Article 6.1 which states that

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[1057] See section 3.5.2
[1058] See section 2.6.4.2
[1059] See section 4.4
[1060] See section 3.5.1
[1061] See section 4.4.1

citizens are the final arbiters of government policy and the necessity of access to government policy information in order to criticise government policy as set out under Article 40.6.1(i).

This particular discussion will assess whether the concept of the public interest has been effectively enabled in freedom of expression jurisprudence in spite of the restrictions as presented. It will assess whether the restrictions, as set out, have hindered the public interest. It will also assess the nature of democracy, as interpreted from the Constitution by the courts and discussed in section two, and how its determination in freedom of expression has been used to further the public interest.

As previously analysed in section one, the nature of Irish democracy and the judicial interpretation of such has evolved in line with the State itself. The latest permutation of the representative concept of democracy as established by the Constitution has moved towards a hypothesis of democracy which is more engaged with active citizenry. The cases of *McKenna (No. 2), Coughlan* and *Doherty*[1062] emphasise the deliberative and participative nature of the constitutional interpretation of the role of the citizen. This has also been further interpreted to include the concept of Plebiscitary Democracy as indicated by the role of the citizen in the amendment of the Constitution by means of referendums[1063]. Furthermore, such interpretation finds a stronger resonance in the founding ideas of the State[1064].Therefore the level of information that the citizens are entitled to under the parameters of the public interest should comparatively increase.

As documented in the discussions of Executive and the constitutional impediments, the founding constitutional assertions did not include Westminster style cabinet administration[1065]. Therefore, the interpretation of such structures and their impact on the Irish constitutional democratic framework has created a situation where the citizens input into democracy, especially relating to the access and discussion of cabinet policy are considered, are not amenable to the full development of a suitable structure of governmental in accordance with the spirit of Bunreacht na hÉireann and previous constitutional documents and aspirations.

The courts have not yet had to examine in detail the jurispurdencial arguments linking the public interest and the role of the citizen regarding the in the release of cabinet documents

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[1062] *McKenna v. An Taoiseach (No.2)* [1995] 2 IR 10, *Coughlan v. Broadcasting Complaints Commission* [2000] 3 IR 1, *Doherty v. Referendum Commission* [2012] IEHC 211 and for a further discussion of these cases in relation to the regulation of referendum speech by Government see section 3.1.3.1

[1063] [1996] 1 IR 321

[1064] See the general discussion regarding the translation of the original conception of Irish democracy to the current system in section 2.4

[1065] See the discussion regarding the implications for the translation of Whitehall Administration to Merrion Street in Section 4.2

since the constitutional amendment[1066]. The precedents established in the cases before *Hamilton*[1067] were moving in the right direction to incorporate the role of the citizen in line with the popular sovereignty nature of the state[1068]. However, the judgment in *Hamilton* was more appropriate to a democracy founded on the principal of parliamentary sovereignty as employed in the United Kingdom. The incompatibility of this approach was never addressed in the literature but the adherence and acceptance of this situation was to result in the implied theory of separation of powers being solidified into a situation where an implied constitutional theory was to undermine a direct constitutional right. Essentially, the adherence to separation of powers is used to restrict the flow of government policy, thereby inhibiting the role of the citizen under Article 6.1 and restricting the ability to criticise government policy under Article 40.6.1(i).This was not addressed in the 17th Amendment to the Constitution and the *Irish Press*[1069] and *Minister for Education*[1070] cases have showed that, in spite of the Freedom of Information Acts, the judiciary is effectively hamstrung into a position where the original concept of democracy for the State is being undermined by an insidious adherence to an unsuitable administrative arraignment for the State[1071].

The precedent from *Irish Times v. Ireland*[1072] does create substantial grounds for allowing for the dissemination of information in the public interest. This is now copper-fastened with recent Irish judgments[1073]. The importance of the public interest has also been echoed in jurisprudence of the US Supreme Court and the writings on the First Amendment where the ability of the citizens to understand political issues is viewed as a public duty along with the discussion of such issues[1074]. There is some resonance in this debate with the concept of political equality. Therefore in light of this, where does the interpretation and definition of the public interest in political debate lie? As stated, the definition of the public interest is a

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[1066] See section 4.5.4 for a consideration of the public interest in the release of cabinet documents post the *Hamilton* case. Some cases have been heard but they arguably do not represent a jurisprudencial consideration of the arguments presented in this thesis.

[1067] [1993] IR 215

[1068] *Murphy v. Corporation of Dublin* [1972] IR 215, *Ambiorix Ltd. v. Minister for the Environment* [1992] 1 IR 277

[1069] *Irish Press Publications and Others v. Minister for Enterprise and Employment* [2002] 4 IR 110

[1070] *Minister for Education and Science v. Information Commissioner* [2009] 1 IR 588

[1071] See section 4.5.4

[1072] [1998] 1 IR 359, [1998] 2 ILRM 161, see the discussion in section 2.6.1.3

[1073] This point is apparent from the judgments in *Cogley v RTÉ* [2005] 2 ILRM 529, (The Leas Cross Nursing Home Cases), *National Irish Bank v. RTÉ* [1998] 2 I.R. 465, *Attorney General v. Guardian Newspapers Ltd.* [1987] 3 All E.R. 316, *Attorney General v. Times Newspapers* [1992] 1 A.C. 191, *The Observer and Guardian v. U.K.* (1991) 14 E.H.R.R. 153, Collectively known as the Spycatcher Cases and also see Jennifer Kavanagh, 'Executive Secrecy and Access to Policy: Lessons from the Past in Irish Legal and Political History'<http://historyhub.ie/wp-content/files_mf/ 1365197031 Kavanagh_Jennifer __Working_Paper_No.pdf> Accessed 15 July 2013

[1074] See section 2.6.3.2

difficult concept to define. However, the definition as proposed in *London Artists v. Littler*[1075] does illuminate the situation. As stated in the case

> Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.[1076]

Based on this statement, there is no greater issue to affect the people at large than the policy decisions that are taken on their behalf by their government. There is both a social utility in the dissemination and the discussion of such information. Furthermore, there is a genuine public interest in the release of such documents. However, when the restrictions discussed in section two, in particular the restrictions concerning the release of government policy section are considered, the public interest is not served by the current construction of the structure of the separation of powers. Therefore they remove the citizen from their place as the final arbiters of government, and moreover, cannot be said to be serving the public interest.

However, there are limited occasions where the public interest is served by not releasing such documents. Such occasions would be in line with the protection of national security, but they must only be applied for the most pressing of circumstances but never with the intention of suppressing the policy discussion. The information may be restricted yet the discussion of policy can never be justified. This is even clearer when the review mechanisms are considered. Without true independent review the reason for restriction can never be legitimised[1077]. For example, the implementation of national security legislation during 'The Troubles', was justified to protect the State, yet preventing those who had a stake in government policy from criticising such policy was not justified. The effect of Section 31 did not protect the State, it only prevented those affected by policy from criticising such policy on media which was supposed to ensure that the broadcast of news and current affairs was impartial. Furthermore, the current block on political advertising as set out in the Broadcasting Act 2009 and the conservative stance of the European Court of Human Rights on the issue does not aid in the discussion and dissemination of information on this point[1078].

Regarding the Executive, which is the central block on the dissemination of Government policy, the principles which underline its administration have already been demonstrated to

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[1075] [1969] 2 QB 375, see the discussion in section 2.7.1 regarding the public interest in political speech

[1076] [1969] 2 QB 375, 391

[1077] See section 4.5.3

[1078] See the discussion of the jurisprudence of the ECtHR on this issue in section 3.5.3 and the development of Article 10 regarding political speech in section 2.6.4

be unsuitable to the Irish situation[1079]. The rules regarding cabinet confidentiality are based on an incompatible system of sovereignty. The Official Secrets Act has already been highlighted as unconstitutional by another organ of Government, namely the Oireachtas Committee on Legislation and Security[1080]. The Freedom of Information legislation has gone some way to ease the privilege over Government information but has not progressed far enough to be compatible with the public interest and the nature of Irish democracy. The provisions affecting executive information and national security are clearly the most conservative element of the current legislation in force. The new Freedom of Information Act 2014 ameliorates the situation regarding national security yet; the provisions regarding the arguable right of citizens to access information to criticse government policy are not progressive enough[1081]. However, considering that the responsible department for Freedom of Information reform is also a section of the Executive, this caution can be explained.

On analysing this area, it is clear that there is tremendous scope for judicial intervention in expanding the nature of freedom of expression to give greater effect to the provisions of Article 6.1. This would therefore increase the applicability of the public interest doctrine to the workings of the Executive and the review of legislation which influences the right to freedom of expression.

1.26 Impact on Legitimate Democratic Governance in Ireland

The issue of legitimate governance is central to discussing the social utility of both Articles 6.1 and 40.6.1(i). In order for the governance of the State to be conducted in a legitimate fashion, according to the structure of the Irish Constitution, it must be ensured that there is equality in political speech and that the public interest in political debate is adhered to. The central idea for discussion in this section is the appropriate level of openness and transparency in the business of government. The ideas of such openness and transparency in the conduct of executive business have been previously considered[1082].

Even though this aspect of analysis predominantly affects the workings of the Executive, the role of policy discussion as conducted by the media as per the Broadcasting Acts must also be considered. The current block on political advertising as framed in the Broadcasting Acts and the current position of the European Court of Human Rights impacts on the ability of citizens to challenge and criticise government policy. Therefore it silences the ability of citizens to challenge aspects of government policy, therefore inhibiting policy discussion and acts as a barrier to ensuring legitimate governance.

Taking this discussion from the Executive perspective, the restrictions on the flow of government policy as considered above inhibits the ability of the citizen to access the decisions of Government and therefore makes the informed discussion of policy near

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[1079] See section 4.2

[1080] Report on Review of the Official Secrets Act 1963, 35-37 and see section 4.5.3.

[1081] See section 4.4.7

[1082] See section 4.2

impossible. In this respect, the provisions of Article 40.6.1 (i) are mere rhetoric. The reality is that accessing government policy, notwithstanding the provisions of Freedom of Information legislation, is highly restricted. It is common sense to argue that in order to criticise policy, one must have access to the policy to begin with. If speech is to be considered a process, the raw materials must be at the disposal of the citizens. Not only is this an issue for citizens but it also inhibits the ability of the opposition to effectively challenge and lay down relevant amendments and objections to legislation. The Executive, in this respect not only inhibits the citizens' rights under Article 40.6.1(i) to criticise government policy but restricts the workings of another organ of government: the legislature. Furthermore, if the citizen is not able to access policy to criticise it, then the ability to act as the final arbiter is considerably constrained.

Therefore the restrictions doe not allow for effective and legitimate governance in line with the first principles of the Constitution. This means paring back the use of constitutional practice to the original sovereignty of the state: the people[1083]. The practice of government has influenced the nature of the constitutional rights to the extent that the practice of government has subverted the original intentions of Irish democracy encapsulated in the Constitution. In the final analysis on this point, the Executive has almost rewritten the constitutional order and the hierarchy of the citizen over the government pursuant to Article 6.1 in order to privilege its own information, thereby undermining legitimate government.

1.27 Restrictions and Rights: Government by Discussion?

In the introduction a quote from Clement Atlee was used to convey the nature of the discussion on government policy and the perceived problems that may arise. This thesis has set out to demonstrate that in the Irish system, the restriction of such discussion has taken place with the citizens having an extremely curtailed right to freedom of expression due to the limits on accessing policy.

The main area of examination in this thesis was the right to freedom of expression, in particular the right to political speech. The research question sought to assess what level of access is granted to citizens to criticise government policy through the social utility of Articles 6.1 and 40.6.1 (i)[1084]. Both of these articles grant protection to criticise government policy and establish the role of the citizen in such debate. This section of the analysis will concentrate on the impact of the restrictions documented. Section two dealt with the direct and indirect restrictions that affected speech. This section also dealt with the restrictions placed on the communication of government policy which is required to both criticise such policy and educate public opinion so that citizens can act as the final arbiters of government policy pursuant to the provisions of Article 6.1.

[1083] See 5.4.1

[1084] See section 1.1

This section has already considered the issues of political equality, the public interest and the impact on legitimate democratic governance. This section will build on this analysis to see if the rhetoric of the interpretation of political speech rights in Ireland is in line with the reality of the speech protections afforded under the Irish Constitution. As set out above there are specific concerns with the Irish system of political speech restriction and protections. Therefore this section will now look at the impact of the above themes on the social utlity of political speech through Articles 6.1 and 40.6.1(i) in line with the current state of knowledge on the right to freedom of expression.

5.1.1 The Restriction of Freedom of Expression

For the majority of the time, the jurisprudential considerations grounding a theory of a constitutional right to freedom of expression had led a peaceful existence without little challenge in the courts[1085]. The major jurisprudential investigation was not to arise until the *Paperlink*[1086] case. Here the facts of *Paperlink* possibly added to the confusion regarding the placement of a right to communicate. The opening sentence in Article 40.6.1(i) refers explicitly to the right to express convictions and opinions which is analogous to the right to communicate. Therefore this micro level analysis regarding placement of the right may have contributed to a delay in assessing the macro level argument, specifically the democratic purpose of the right.

The right to freedom of expression is an area of evolving jurisprudence in Ireland in recent times. The right was first discussed in general terms and focused on the placement aspects of speech rights. The original discussion of the right did not challenge the democratic nature of Article 40.6.1 (i) and when the right was broadened, it was not interpreted through the prism of the role of the citizen and sought to establish a twin track system of speech rights. The judgment in *Paperlink*[1087] was to create the greatest challenge for the jurisprudence of speech rights in Ireland. The judgment of Geoghegan J. in *Murphy v. Independent Radio and Television and Radio Commission*[1088] was the most detrimental where the learned judge stated that the rights set down in Article 40.6.1(i) did not have any application to the private citizen[1089]. Even though the judgment in *Paperlink* inhibited the development of the right until resolution in *Murphy* where Barrington J. merged both the political speech right of Article 40.6.1(i) and the unenumerated right to communicate according to the interpretation of Article 40.3.1[1090]. Since then, the case law on the right to political speech, in particular the recent case law on Article 40.6.1(i) has undergone significant evolution. Starting with the judgment in *McKenna (No.2)* to the most recent case of *Doherty,* the role of the citizen

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[1085] Bar the early cases such as *The State (Sean Lynch) v. Patrick Cooney & Attorney General* [1982] IR 337

[1086] [1984] 1 ILRM 1

[1087] [1984] 1 ILRM 1

[1088] [1999] 1 IR 12

[1089] [1999] 1 IR 12, 17

[1090] *Murphy v. Independent Radio and Television Commission and the Attorney General* [1999] 1 IR 19 at 25

pursuant to Article 6.1 has incrementally shaped the right to freedom of expression in line with the social utility of both Articles on the protection and propagation of democracy in Ireland.

Moreover, the judicial confusion as created by the finding of a right to communicate under the provisions of the unenumerated rights article has created an unforeseen benefit to the jurisprudence on this issue. In the discussion of the unenumerated rights aspect of freedom of expression, it is possible that the right to official information may be bolstered by the already present right to information[1091].The case law in this area which emanated from the long running abortion issue in Ireland established that a citizen has the right to information. The article already contains the right to communication in *Paperlink* above, but merged together with the jurisprudence from *Cullen v. Toibín* [1092] to *Cornec v. Morrice & Ors*[1093]. These precedents may indicate the starting points for the development of a right of access to official information for citizens. This could then be deployed in litigation to bolster the provisions of Article 40.6.1(i). This would emphasis the social utility in accessing government information in pursuit of political equality, the public interest and legitimate governance.

However, this development has not yet been tested against the areas of restriction highlighted in this thesis. Section two focused on the impediments to the dissemination and the criticism of government policy. Turning first to the restrictions on broadcasting as discussed in section two, the right to freedom of expression for the purposes of political expression and the criticism of government policy was essentially overshadowed in the early years by the national security issues emerging from 'The Troubles'. Even though the provisions of the broadcasting restrictions in this respect were litigated[1094], the impact of such restrictions on the discussion and criticism of government policy were not litigated. Therefore the social utility of either the retention or the removal of the restriction was not subject to judicial scrutiny. For the sake of the development of the jurisprudence on the issue this was a regrettable action. Furthermore, it is probable that such an argument would not have swayed the bench in such a situation as the first step taken on the interpretation of the role of speech rights created a lacuna between the categories of speech rights. The reading in of the democratic and social utility of Article 40.6.1 (i) has only developed of late. When considering the Executive and separation of powers, the original cases on this point did not consider the impact of Article 40.6.1(i), instead the area of Cabinet Confidentiality was decided because of the theory itself and was affected by the application of unsuitable precedents based on parliamentary sovereignty to the Irish condition of popular sovereignty.

[1091] See 2.6.1.3
[1092] [1984] ILRM 577
[1093] [2012] IEHC 376
[1094] See 3.4.4

5.1.2 Proportionate and Objective?

When assessing the impact of political speech restrictions on the areas discussed above, there is a complete divergence between the direct restrictions and the indirect restrictions in terms of their reviewablity in court. As can been seen from section two, the direct restrictions have a legislative basis, predominantly the Broadcasting Acts and can thereby be tested in a proportionate and objective manner in judicial review against the provisions of the Constitution. Even though the legitimacy of some may be criticised are they better that the indirect restrictions which are not subject to the above tests[1095]. However, the basis for adjudication with cabinet procedure is questionable considering the application of the separation of powers doctrine to the reviewablity of Executive actions. Given the divergence of approach from pre – and post – Hamilton referendum approaches, it could be argued that the appiite and willingness for expansionist jurisprudence for judicial review in this area is probably limited. The only attempt to review the suitability of such information transpired in litigation where discovery was sought of cabinet documents with varying success as discussed[1096]. The litigation of cabinet confidentiality with the objective of seeking cabinet documents in order to criticise government policy has never, of itself, been a ground of litigation.

However in spite of the discussed limitations regarding judicial review, the issue of the framing of the clause, 'criticism of government policy', and the nature of the constitutional right has never been adequately settled. Therefore, the placing of the right in context with Article 6.1 may create a more beneficial situation in order to seek the dissemination and the criticism of policy. If the role of the citizen, as set out, is given the primacy that should be afforded to it in line with the spirit of the Constitution as opposed to its current practice, the issue of policy access is more pressing. Furthermore, if the current direction of evolving the relationship between speech and democracy is followed then there may be strong grounds for arguing for the right to disseminate policy information[1097]. If this judicial activism is combined with an unenumerated right to official information, it may create a paradigm shift in the nature of Article 40.6.1 (i) and Article 6.1 bringing in an actionable means of accessing policy. However, all these developments are dependent on the judiciary, the problem of conservative judges and deference to government is an issue.

As the Official Secrets Act and Freedom of Information legislation are reviewable in the same manner as the Broadcasting Act, there is a certain parallel with the concerns of objective and proportionate review. However, in this area, there are many decisions taken pursuant to the legislation that are not subject to review. For example in the Official Secrets Act, there is no means for independent review of Ministerial Certificates[1098]. With regard to the Freedom of Information Acts, the current system does not bring national security issues

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[1095] See section 4.4.1.6

[1096] See section 4.4

[1097] Also see the discussion on this point in section 2.6.1.2

[1098] See section 4.5.3

into the remit of the Act. The proposed amendment does bring in a harm test for the release of such sensitive information, but the determinations under this test cannot be appealed or reviewed by an independent assessor such as the Information Commissioner, as currently proposed[1099]. In terms of executive information, such restrictions are still based on a class consideration of the document as opposed to the content of the document. Such basis for determination is set for reform if the current reform of Freedom of Information is successfully promulgated into law with these provisions retained in their current format[1100].

In essence, any restriction on such information such ensure that they are proportionate, objective and open to independent adjudication. Therefore, any restriction that is held to be legitimate has been through a rigorous assessment of its effect on freedom of expression and thereby is only implemented where absolutely required. This form of strict scrutiny will ensure that as much information as possible is disseminated to the public and is in line with the evolving jurisprudence and social utility of Articles 6.1 and 40.6.1(i)

5.1.3 Realistic Level of Engagement

As demonstrated from the themes of political equality and the public interest, there are considerable deficiencies in the balancing of the restrictions on the dissemination and criticism of government policy. The analysis has then added the examination of the current framework for speech protections into the equation. This has shown that argument regarding the placing of the protection has restricted the development of the jurisprudence of this issue and its ability to include the role of the citizen and freedom of expression in its deliberations. In turn, the reviewablity of the restrictions diverges depending on the nature and source of the restriction in question. Regarding direct restriction, some constitutional aspects have failed to be litigated and with indirect restrictions the application of political speech has not been litigated. Furthermore indirect restrictions have no means of independent review for an assessment of their proportionality.

Therefore taking what was discussed in terms of the right to freedom of expression on matters of government policy, the link between the citizen and the structures of power needs to be informed and access information regarding government is key. On the basis of the discussion above, it can be stated that the reality of the speech protection available is not yet suitable for the conditions of democracy that are aspired to in the spirit of the Constitution. However, the evolution of the case law connecting the social utility of Article 6.1 and 40.6.1(i) may yet allow for a realistic level of citizen engagement to be created through the Constitution.

1.28 Power and Conflict

As the thematic interpretation has been set out in the latter stages of section one and the reality of political speech rights protection as has been analysed above, this section of

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[1099] See 4.5.1

[1100] See 4.5.2

analysis will take what has been considered above and apply it to the role of the citizen as set out in the Constitution. As stated, the themes of political equality and the public interest have been used to demonstrate the level of democratic speech protections in use. The case law and interpretation have been analysed to adduce the reality of speech protections for political speech in Ireland. However, this section will now examine the impact of these restrictions on the role of the citizen. The speech rights laid down in the Constitution are there for the purpose of allowing the citizen full input in the governance of the country. As stated in Article 6.1, the citizens are the final arbiters of government policy and this section will test the reality of this statement. The impact of this statement in line with freedom of expression has been previously analysed[1101]. However, this section will look at the impact of the operation of the theory of separation of powers on the constitutional right to freedom of expression and how their interplay affects the constitutional and democratic structure of the State.

Law is the result of politics. Law is the body of rules that legitimise the life of the citizen. The citizen's main connection with politics is their periodic participation in the democratic process to elect their representatives[1102]. It is a part of a great cyclical process that denotes a country as being civilised. No country will have a system of governance and politics that will result in every single citizen approving of their government. All citizens will have their own views and critiques of the way the government is running the affairs of State. However it is the mark of an evolved system of governance that it can deal with such criticism and deal with them in a manner that does not polarise or further inflame any problems. This is the role of a balance system of speech rights in a democracy. It allows for the citizen to air their problems with a government without fear of recrimination, it allows for all stakeholders to debate government policy openly and without fear.

Even though Article 6.1 outlines the schematics of the Irish system of democracy governance, the citizens as final arbiters of government power have been shown to rest at the end rather than the top of the system. The level of accessable information and the ability to engage in the discussion of policy, is lower than any organ of government. This has already been discussed[1103]. However, the implications for Irish democracy are an area that has not yet been fully investigated.

As discussed, the inheritance of a system of government which reflects parliamentary sovereignty is incompatible with the Irish system[1104]. Article 6.1 sets out the criteria of popular sovereignty, in that the citizens are placed as the source of power for the validity of the Irish democratic state. Yet, the case law on the hierarchy of government, especially with regard to Cabinet Confidentiality, has inadvertently subverted the democratic nature of the

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[1101] See 2.7.3
[1102] See 2.1
[1103] See section 4.5
[1104] See section 4.1

Constitution. It has in effect, placed the organs of government above the citizen. Therefore the case law and theory on this issue promote the objective of the organs of government instead of the citizen. Within the confines of the organs of government, the political science literature states that the Executive is the most powerful organ in the scheme of government[1105]. The Executive is also the organ of government responsible for the creation and restriction of government policy. As this thesis concerns the examination of the restriction of government policy, such power in one organ of government may be detrimental to democracy. Therefore, it is imperative that the powers of this organ are confined pursuant to the text of the Constitution and not interpreted in line with precedents that are incompatible with the Irish system of sovereignty. The most important consideration is that the citizen must be reinterpreted pursuant to Article 6.1 as the source of power and not the servant of power.

As introduced in the previous section, the increase in power of the Executive has corresponded with an inadequate linkage of the right to freedom of expression with the role of the citizen according to Article 6.1. As stated by Basil Chubb, constitutions 'define and delimit government' power and are an instrument 'by which Government itself can be controlled'[1106]. However, permitting of the Executive to gain such a powerful role, even in spite of the role of the citizen under Article 6.1, highlights problems not only with the traditions which have shaped its system of administration, but with the structures of democracy itself.

The problem with the current theory of Separation of Powers is not so much a defect in the entire system; rather there is a defect in the focus of the case law. As previously documented[1107] the original incarnation of this theory was designed for a system where the ultimate democratic power was vested in Parliament[1108]. This is wholly inconsistent with the Irish democratic framework as set out by virtue of the Constitution and discussed throughout this thesis. The Irish Constitution holds the citizen out as the most important actor in democracy. The version of the Separation of Powers, which was inherited into the Irish constitutional framework, was not appropriate for the Irish conditions. However, the theory in itself remains valid. The theory of Separation of Powers is there to prevent one of the organs of government from overruling the other organs. In this regard the aims of the theory are sound for the purpose of protecting democracy. The first principles of the theory are to protect the citizens. The original formulation was to ensure that the organs of government were regulated by a system of checks and balances.

[1105] Also see Shane Martin, 'Monitoring Irish Government' in in E. O'Malley, & M. MacCarthaigh (eds), *Governing Ireland: From Cabinet Governance to Delegated Governance* (Institute of Public Administration, Dublin) 152-172

[1106] Basil Chubb, *The Constitution and Constitutional Change in Ireland,* (Institute of Public Administration, Dublin, 1978) 1

[1107] See the discussion in section 4.2

[1108] See section 4.2

However, the current incarnation has not factored in the fact that the primary source of power is the citizens' and the citizens should be the focus of protection. For example in the *Hamilton*[1109] case, the aim of releasing the information requested was to investigate those that used their office to corrupt ends. The release of this information was sought to protect the citizen and their organs of government from being misused. Even though the judgment in the case was based on sound precedent, the judgment did not fully incorporate the role of the citizen. Therefore even though the public interest was litigated, the importance of the public interest as a means of promoting legitimate governance was not included in the reasoning.

The current formulation of the theory and as applied by the organs of the government does not hold the position of the citizens as final arbiters of government policy as a key consideration. It also serves to undermine the role of the Legislature: as stated by Brian Farrell, the 'internal processes of government itself reduces the law-making function of parliament'[1110]. For example, when legislation emanating from government policy is considered by the Legislature, the opposition has as little access as the citizen to the documentation from which decisions were made[1111] and have no access to the rationale behind the chosen policy. As a consequence, the lack of information and inability to access cabinet documents in any form is detrimental to both the legislature and the citizen. It also demonstrates how far the Executive has privileged its own information.

Furthermore, if it is accepted that the practice of the separation of powers has been interpreted into the provisions of the Constitution not from the wording of the Constitution itself but by having regard to parallel jurisdictions, the impact on the role of the citizen and the scope of political speech cannot be understated. This has resulted in a situation where the use of constitutional practice has distorted the original democratic aims of the state especially in relation to the role of the citizen. Additionally, in the case law where this 'inheritance' takes place, there is no intellectual engagement with the subtleties of the Irish democratic condition. The resulting situation has allowed for a constitutional practice to override an express constitutional right.

[1109] *Attorney General v. Hamilton* [1993] ILRM 81

[1110] Brian Farrell, 'The Constitution and the Institutions of Government: Constitutional Theory and Political Practice' (1987) 35 (4) Administration 162, 164

[1111] Unlike the Australian regime as discussed in section 4.5.1

6 Conclusion - The Social Utility of Political Speech Rights

1.29 Review of Material

The research question addressed in this thesis revolves around speech equality on political issues, in particular access to government policy information and the ability to criticise such policy[1112]. This thesis has not only looked at the Irish position but also it has comparatively assessed the right to political speech against other common law jurisdictions and the provisions of the European Convention on Human Rights. Even though there are a number of parallels and points of intersection, the Irish protection for political speech incorporates provisions which explicitly recognises the role of the citizen in the creation and arbitration of policy matters for the state.

The next aim of the thesis was to assess the theoretical underpinnings of the right to freedom of expression. This discussion was undertaken by an examination of the development of democracy in Ireland. The evolution of the State from the 1919 Constitution to the present Constitution was undertaken to show how the rights of the citizen regarding political expression and their role in the state has evolved[1113]. The requisite programmes for Government were also evaluated to demonstrate the changing and developing tensions between the role of the government requiring a need for reform and the promises to open up the business of government in line with transparency and accountability. The discussion then moved from a consideration of the role of the citizen to creating the framework for investigating the legitimacy of the speech restriction in operation currently in the jurisdiction.

The examination of the Irish right concluded that the interpretation of the provisions of Article 40.6.1 (i) neglected to include the role of the citizen under Article 6.1 until recently[1114]. This has undermined the social utility of these rights in a harmonious interpretation and has led to the jurisprudence focussing on a micro level interpretation of the placement of speech rights as opposed to macro level interpretation to encompass the democratic governance of the state.

The freedom to criticise government policy is subject to two contingencies: the ability to access policy information and the protection of freedom of expression to criticise such policies. This thesis has examined both sides of the expression criterion that is essential to the propagation of a working representative democracy. Therefore the main focus of the thesis was on the consideration of the indirect or class restrictions from executive practice and the direct or content restrictions which are placed on the media which tamper with

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[1112] See section 1.1 for the original statement of the research question

[1113] See section 2.4

[1114] See section 2.7.3

freedom to criticise government policy by affecting the flow of policy information. The previous chapter considered the balancing of rights and restrictions, and has assessed the social utility of speech rights in Ireland in comparison with the legitimacy of both the direct and indirect restrictions.

The next objective was to measure the interference to speech by content-based restrictions. Content-based restrictions, as discussed, range from the protection of the authority of the state and national security to the issue of political advertising. Such restrictions must have a legitimate aim and beobjectifably measurable. This does allow for a certain degree of transparency and predictability but it reduces the plurality of voices on an issue and therefore undermines the marketplace of ideas theory. As section two demonstrates, the restriction of dissenting voices is an unnervingly easy task. Most grounding legislation for the direct restrictions has a provision which favours government speech. For example, guaranteed airtime for government through the Broadcasting Act. This means that government policy can come to the foreground and dissenting voices remain in the background[1115]. In the area of government policy criticism, it is much harder for those who dissent to policy to have an equal voice to that of the government. This is true for all forms of speech which may be categorised under the umbrella term of content restrictions.

The next aim of the thesis was to assess the impact of cabinet and constitutional practice on the flow of policy information. Unlike the context restrictions as discussed above, these restrictions are not subject to the legal tests of objectivity and proportionality. These restrictions are based on the class of information rather than their content. Therefore important policy information, as envisaged in the provisions of Article 6.1 is completely restricted from the review of the citizen. Thereby restricting the role envisaged for the citizen under Article 6.1 and illustrates the influence of incompatible Executive structures to the Irish condition[1116]. The rules such as cabinet confidentiality were only inferred into the Constitution by Supreme Court relying on incompatible government practice from England and were not adopted with any thought as to the desirability or compatibility of the system of democracy adopted in the Irish state. The concept of cabinet confidentiality was then to become constitutionalised by means of an ill-conceived referendum. Even though Cabinet Confidentiality is now ingrained into the constitutional structure, other issues, which were incorporated in spite of popular sovereignty, still remain. Issues such as the Official Secrets Act 1963 and civil service culture, still remain in spite of questions surrounding their constitutionality. From this discussion, we can see that the application of such restrictions is probably more damaging to political speech rights as they do not allow for any form of

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[1115] This resonates with the democratic characterisations of Irish democracy which was set out in section 2.1 in particular authoritarianism, conformism, loyalty and anti-intellectualism which is being enforced, more than probably indirectly, by means of the regulating legislation for direct restrictions which is set out in section 3.4.4 where national security issues are considered.

[1116] See further section 4.2.1

review[1117]. Furthermore, this section set out to explore whether the use of the Separation of Powers as a means to promote democracy and stifle tyranny was in itself creating an undemocratic system of governance and inhibited the concept of the marketplace of ideas, thereby undermining express parts of the Constitution in favour of the implied.

In section three, the framework introduced at the end of section one was compared and contrasted to the restrictions discussed in section three. It was found that that current scheme of speech restriction is not compatible with the theory underpinning the democratic role of the citizen as set out in Article 6.1 of the Constitution which places the citizen at the core of the policy making process. The restrictions analysed also hindered the use of Article 40.6.1(i) in relation to the criticism of government policy and the education of public opinion. Furthermore, the use of both the direct form of restriction as in the Broadcasting Act 2009[1118] and the indirect restrictions pursuant to constitutional and executive practice inhibited the social utility of freedom regarding political speech. The indirect restrictions are arguably more incidous to the Irish conditions of democracy as they lack qualification or reviewablity.

It is accepted that there may be legitimate reasons for restriction of information for a period of time. However, the most insidious feature of executive restrictions is the inability to review the reasoning behind a restriction[1119]. The direct restrictions, though moderating the flow of policy discussion are more acceptable as they are subject to review before a court, thereby allowing for constitutional justice to be sought in such issues. The issue with indirect restriction by the Executive is the blanket restriction on material of a certain class compounded by the lack of impartial and independent means of review[1120]. This is not to say that all information restricted by the Executive is for undemocratic means. However, the lack of independent scrutiny would undermine any legitimacy for restriction and any democratic argument for information restriction.

1.30 Summary of Reform Proposed

Political speech rights need to be as liberal as possible in a representative democracy. Respecting that in certain instances there will be legitimate concerns for the restriction of information restrictions must be subject to review in an impartial manner. This ensures that

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[1117] See further section 4.4.1.6 and also see the discussion regarding the Toland Report. Department of Justice and Equality, (2014) 'Report of the Independent Review Group on the Department of Justice and Equality' (Toland Report) <http://www.justice.ie/en/JELR/RptReviewGroupDeptJustice .pdf/Files/RptReviewGroupDeptJustice.pdf> Accessed 12 August 2014

[1118] See also previous legislative enactments regulating broadcasting such as the Broadcasting Act 1960 and the Broadcasting (Amendment) Act 1973

[1119] See in particular the regulations regarding national security restrictions in section 4.5.3

[1120] The intention of the new Freedom of Information Bill to regard content rather than class as a means of release should be followed throughout the scheme of executive information regulation which would follow best practice internationally should be pursued in future legislative amendment. Also see section 4.5.3

the citizens can play their rightful role in the criticism of their government and their role in policy. However, as stated in the jurisprudence of the First Amendment, it cannot be a licence to destabilise the state which is supposed to be developed by the exercise of the same speech rights[1121]. However, restrictions that are put in place must stand up to strict scrutiny to assess that the restriction is framed in such a way that any restriction can be reviewed and used in the most appropriate a legitimate manner. Therefore, the reforms for both direct and indirect restrictions can be summarised as follows.

6.1.1 Direct Restrictions

The direct restrictions which were assessed in this thesis focused on broadcasting restrictions both for national security reasons and political advertising purposes. The central feature of both restrictions is that they can restrict the amount of debate on government policy issues that should be considered in the construction of the political speech right in the Irish constitution. As the rightful liberty of expression, as framed in Article 40.6.1 includes the criticism of government policy, any broadcasting restriction should be construed with this formulation. As seen in the discussion of the section 31, the issue of government criticism was not contemplated[1122]. Surprisingly, this issue was not considered from the perspective of the European Court of Human Rights, where the Convention has stronger information provisions than the Irish Constitution[1123]. The new Broadcasting legislation[1124] has watered down this provision but the threat of such restriction still remains if the Government is of the belief that such circumstances could arise again in the State[1125]. Therefore, for reform of the area, the value and social utility of such speech, thought seen to be undermining the authority of the state, still has a democratic value, as it would be criticising government policy. Regarding political advertising, the direction of the law here is more favourable as it considered political equality in the balancing of speech rights as opposed to the content of the communication. The only negative development in this area is the politicisation of the issue as opposed to the general principles of political communication. This can be seen in the recent decisions of the European Court of Human Rights in *ADI*[1126].

6.1.2 Indirect Restrictions

The indirect restrictions considered in this thesis are those that are placed in the way of policy communication from the Executive. The most important aspect of this work was included in the section where the evolution and inheritance of Whitehall procedures to the Irish administration of Executive Government were highlighted as inconsistent with the constitutional expression of democracy[1127]. Furthermore, the means of review for the

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[1121] See section 2.6.3.2
[1122] See section 3.4.3
[1123] See section 3.4.4
[1124] Broadcasting Act 2009
[1125] See section 39(1)(d) Broadcasting Act 2009
[1126] *Animal Defenders International v. United Kingdom* Application Number 48876/08 (ECtHR, 22 April 2013) and see section 3.5.3
[1127] See sections 2.4, 2.7 and 4.3.2

privileging of Executive information needs urgent review in order to remain consistent with both the constitutional role of the citizen, principles of natural justices and to adhere to governmental policy on the development of more openness and transparency within the policy formulation and debate process. However, the development of speech restriction on the Executive, such as the referendum speech cases, highlight the shifting moves by the judiciary to balance restrctions regarding political speech to encourage policy access and debate.

1.31 Original Contribution to the Field of Learning

Due to the adoption of the research methodology of the socio-legal research, this thesis has made an original contribution to the field of learning on the interaction between constitutional rights, the democratic process and freedom of expression[1128]. The major contribution is the analysis of the impact of the separation of powers to the exercise of the constitutional right to political speech. In a doctrinal methodology, the thesis would be limited to a black letter review approach. The socio-legal method has allowed for the relevant legal and administrative practices to be opened to further democratic theory concerns[1129]. This method of research has allowed for an investigation of the democratic impact on the restriction of political expression, policy information and criticism of government policy. The use of democratic and political theory as a means of aiding in the construction of the theoretical framework has allowed for a broader investigation of the role of political speech rights in the Irish jurisdiction. It has also allowed for a greater investigation of the role of the citizen in policy criticism and access than would have been possible if a purely doctrinal or black letter form of legal research was employed. The approach of socio-legal studies in this manner has also allowed for a practical assessment of the separation of powers and its limitations in the area of protecting and informing the citizens pursuant to their role under Article 6.1. Therefore this has allowed for the thesis to demonstrate the adherence to a concept that the constitutional theory to promote democracy may, in itself, be creating an undemocratic situation regarding the role and engagement of citizens in their own democracy. This has also allowed for the speech arguments to take on a greater scope from the examination of Article 40.6.1 (i). This has also added to the contribution of the thesis to the wider academic community.

1.32 The Social Utility of Political Speech and Democracy in Ireland

The various themes and restrictions discussed throughout this thesis were aimed at addressing the ability of both articles[1130] to protect and propagate democracy in Ireland. Essentially what use do they have in democracy and their social impact on citizen engagement in democracy? The importance of reviewing the provisions of the Constitution, case law, legislation and executive practice is to ensure that primary role of the citizen in the business of Government is adhered to. Furthermore this investigation examined

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[1128] See section 1.2

[1129] See section 1.2

[1130] Article 6.1 and 4o.6.1(i)

whether the first principles of democracy, as enshrined in the Constitution, are followed in so far as is practicable. Therefore drawing on the discussion from the introduction through to this section allows for this central question to be addressed at this stage.

The ability of a Government to protect and privilege their own position in the information system and the ability to stifle the expression of those who are critical of government has the capability to undermine and erode criticism of their policies. This can also be achieved by restrictions that inhibit citizens accessing government information and policy in order to be able to criticise such policy pursuant to their constitutional right.

The sometimes-overzealous protection of government policy has been to the detriment of the efficient oversight by the citizens. This also affects the transparency and accountability of government decisions. There is also a tension between legitimate restriction and undue secrecy. The restriction of Government policy information may be carried out for a legitimate reason. However, it may implicitly create a culture which is not conducive to accountability and open democratic engagement[1131]. Furthermore, the undue deference to the will of the executive and their need for secrecy does not reflect a changing relationship in the power structures of Irish governance. The accountability of a government to its people is based on the ability of the people to access information about their government. The ability to question a government without repercussion is a central tenet of a democratic system. The ability for others to inform the public about the operation of government and critique of their practices goes hand-in-hand with the operation of a democratic system. For example, it has been noted that using a more developed pre-parliamentary legislative scrutiny has improved the product of the legislative process.[1132] Open and transparent government means that the citizen must be able to see reasons for governmental decisions. Government policy protections as enshrined in the Irish Constitution mean that citizens must be able to access such information in order to be able to constructively criticise the decisions and policy platforms upon which such decisions are based.

The ideas of transparency and accountability and the reforms stated in the various programmes for government would go some way to improve the ability of the citizen to regulate the conduct of their governments. As stated in the provisions of Article 6.1, the citizen are the final arbiters of government policy, yet the restrictions on political expression as carried out by means of direct and indirect restrictions, do not enable the citizen to act in this role. Therefore, it must be ascertained whether this position is that of

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[1131] See section 4.3

[1132] House of Commons, Select Committee on Modernisation of the House of Commons, The Legislative Process, First Report of Session 2005 - 6 (Stationary Office, London, 2006) *Cf.* Alex Brasier, Susanna Kalitowski and Gamma Rosenblatt with Matt Korris, *Law in the Making: Influence and Change in the Legislative Process,* (Hansard Society, London, 2008) and Ruth Fox and Matt Korris, *Making Better Law: Reform of the Legislative Process from Policy to Act,* (Hansard Society, London, 2010)

constitutional rhetoric or a reality, which has not yet been fully realised, by judicial activism or citizen engagement.

Political speech is a process that should be utilised by the citizens in order to participate in the workings of democracy and increase the level of democratic scrutiny and oversight of the organs of government. The ability to access policy information in Ireland does not extend to a large enough audience for the process of government policy formation to be considered democratic. Policy shapes the governance of a democratic system. Democracy denotes the rule of the majority. In order for the views of the majority to be shaped the concerns of many must be given equal parity in the criticism of government policy. Therefore, in this cyclical fashion, policy is a concern of freedom of expression as the critique of such policy is central to the exercise of democracy.

The thematic discussion of addressing the above question was shaped from the areas of political equality and the public interest. The adherence to these thematic areas should ensure that the requisite level of government policy information is disseminated in order to protect and propagate democracy within the State. However there are two ways by which the discussion and dissemination may be inhibited; direct and indirect restriction.

In the area of executive government restrictions such as cabinet confidentiality, executive secrecy, Official Secrets Act 1963 and limitations on freedom of information legislation stifle the discussion and access to freedom of expression. The common law of libel was used to protect the authority of the state and national security. When used for reasons of national security it undermined the release of information when it may injure the safety of the state or its population. The area was shaped by the now repealed Seditious and Criminal Libel common law rules which influenced legislation such as the Offences Against the State Acts 1939 -1998[1133]. The regulations regarding broadcasting restrictions and political advertising unbalance the range of voices which can have equal access to the media in relation to the critique of government policy. Broadcasting restrictions such as section 31 of the Broadcasting Act 1960 and subsequent amendments fettered the pluralism of views that may be able to criticise government policy[1134]. When political advertising is looked at in situations of elections, referenda and non-election situations there is significant regulation imposed on access and airtime in relation to the discussion or criticism of government policy[1135]. However, the justification for political advertising regulation is much more benign than the restriction on other grounds.

When testing the social utility of Articles 6.1 and 40.6.1(i) three key impediments are found. The first impediment related to the misplaced examination of freedom of expression when the use of Article 40.3.1 entered into the free speech landscape of Irish jurisprudence.

[1133] See sections 3.4.1. and 3.4.2.
[1134] See section 3.4.3
[1135] See section 3.5.1.

During this time, the micro level consideration of the right and the vagaries of speech and communication failed to see the democratic import of the right to freedom of expression. It is only recently that this aspect of the right has begun to evolve[1136]. This is in spite of relative jurisdictions such as the United States and the United Kingdom recognising the importance of freedom of expression for the propagation and the promotion of democracy since the inception of the relative provisions in each jurisdiction[1137]. The incorporation of the provision and precedents of the European Convention on Human Rights into domestic law has probably aided in the revival of the democratic speech provisions and has finally allowed for the Constitution to resonate with the spirit and interpretation which was originally incorporated in to Bunreacht na hÉireann[1138].

This misplaced examination has probably added to the dilution of the role of the citizen in the face of the increasing power of the Executive under the incorporation of the traditions and administration of an incompatible system of sovereignty into the Irish constitutional framework[1139]. Not only does this elevated role of the Executive signal problems for the role of the citizen, but it also impacts on the ability of other organs of the Government, especially the Legislature, to act as check and balance on the powers of the other organs of Government. The theory of the separation of powers does have its benefits in distributing the relevant powers of Government. However, the role of the citizen needs to be re-established at the heart of Government and the source of Governmental power instead of the currently diluted position[1140].

The final key element of the examination of the role of Article 6.1 and 40.6.1(i) related to the developing jurisprudence of the plebiscitary and deliberative democracy which has emerged from a re-engagement with the actual text of the Constitution and the interpretation of the total impact of first, the right to freedom of political expression and second, the role of this right in line with the citizens acting as the final arbiters of government policy. This emerging consideration of the net effect of both articles on the propagation and promotion of democracy is the most promising. The re –evaluation of the original spirit of democracy as encompassed in the 1937 Constitution from its genesis from the original strive for independence can serve to allow for the adequate space to criticise the policies of government which are carried out in the name of the citizen but also serve to educate public opinion to create a more engaged citizen.

[1136] See section 2.7.3

[1137] See section 2.6.2.2 for a consideration of the UK and section 2.6.3.2 for a consideration of the US first amendment position

[1138] See section 2.6.4.2

[1139] See section 4.2

[1140] The theoretical construction of the Separation of Powers is now subject to a growing theoretical remodelling of late. See further Eoin Carolan 'Towards a varifocal model of the separation of powers' <http://www.jus.uio.no/english/research/news-and-events/events/conferences/ 2014/wccl-cmdc/wccl/papers/ws15/w15-carolan.pdf> Accessed 27 June 2014

1.33 Directions for Future Research

After concluding the research on this area there are still some areas for future research. The first area which could be considered is to expand the research to a consideration of the original speech and political philosophy on this topic to see if the current scheme of speech protections is compatible with those of the notable philosophers in the area. One of the limitations of this thesis is that the works of these philosophers could not be incorporated into the work due to space and time considerations. The research methodology of socio-legal studies using the prism of democratic theory to assess the adequacy of speech regulation in Irish democracy required that the emphasis of the theoretical study was focused on democratic theory as opposed to pure political philosophy. Furthermore, using this research as foundation for future research, a consideration of the workings of the organs of government in relation to policy creation and pre legislative scrutiny of bills could be carried out as a metric for the incorporation of citizen views in legislation and Government policy.

1.34 Conclusion

Therefore in the final analysis, this thesis has demonstrated that from a positive beginning of creating a unique and powerful speech right for citizens[1141] and a constitutionally enshrined position for citizens, the Irish constitutional framework has regressed. This was due to three main factors. First, the inheritance of the Westminster system of cabinet varied from the image of the citizens as the final arbiters of government policy[1142]. Rules, administrative practices and judicial interpretation focused on the retention and strengthening of a Cabinet system that was not suitable for the intricate differentiation of sovereignty which was created by the Irish State. The second reason is due to national security issues. The violent past, which coloured the development of the State until recent, shaped a system that protected its own information[1143]. This is clear from the broadcasting restrictions and national security regulations that stifled the discussion of government policy. The final reason is the deference of those that arbitrate on such disputes. In the first instance, when regulating pure speech issues the Courts have been focused on the placement of specific aspects of the right to freedom of expression[1144]. This has created a free speech debate that has focused on the nature of the speech in question instead of the role that is played by speech in a democracy. The second situation regards the level of undue deference that is displayed to the privileging of executive information. Since the *Hamilton* decision, the Courts have not protected the citizens when information is requested to fulfil their role under Article 6.1[1145]. The third instance is concerning Executive practice. The urgent need to revisit the issues of executive administration as outlined above also needs to allow for an independent method of certification for information which can be released in the public

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[1141] See sections 2.3 and 2.4

[1142] See section 4.3

[1143] See sections 3.4.3 and 4.6.4

[1144] See section 2.6.1.5

[1145] See section 4.5.4

interest[1146].

As stated in opening section of this conclusion, if meaningful reform is to be carried out in this area, the constitutional principle of the citizen sitting at the heart of democracy must be remembered. Some degree of restriction may be required to assure national security but such restrictions must be predictable and consistent with application carried out in an accountable, yet independent fashion. This also stands for executive reform. The executive needs to recall the sovereignty of the people. The power of the Executive is from the people not privilege against its people. Therefore, the position of the citizen in Irish policy can be improved. Moreover, the social utility of Article 6.1 and 40.6.1(i) is apparent but its power can be magnified to a greater extent.

[1146] See section 4.5.3

7 Bibliography

Journal Articles

Barendt, Eric. 'Free Speech and Abortion', 2003 Public Law 580

Barendt, Eric. 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998' (2009) 84 Indiana Law Journal 851

Barrett, Gavin. 'Taking the Direct Route – The Irish Supreme Court Decisions in Crotty, Coughlan and McKenna (No.2)' UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper 08/2009

Bomhoff, Jacob. 'Lüth's 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing' (2008) 90 (2) German Law Journal 121

Brennan, William J. 'The Supreme Court and the Meiklejohn Interpretation of the First Amendment' (1965) 79 Harvard Law Review 15

Bulsara, Hament. & Kissane, Bill. 'Arend Ljiphard and the Transformation of Irish Democracy' (2009) 32 (1) West European Politics 172

Carolan, Eoin. The Problems with the Theory of the Separation of Powers (January 1, 2009). Available at SSRN: http://ssrn.com/abstract=1889304 or http://dx.doi.org/10.2139/ssrn.1889304 <accessed 18 June 2013>

Cahill, Maria. 'Ireland's Constitutional Amenability and Europe's Constitutional Ambition: the Lisbon Referendum in Context' 2008 (09) German Law Review 1191

Chambers, Simone 'Behind Closed Doors: Publicity, Secrecy and the Quality of Deliberation' (2004) 12 (4) The Journal of Political Philosophy 389

Clarke, Desmond. 'Section 31 and Censorship: A Philosophical Perspective' (1994) 12 ILT 53

Collins, Neil. 'Parliamentary Democracy in Ireland', (2004) 57 (3) Parliamentary Affairs, 601

Collombier-Lakeman, Pauline. 'Ireland and the Empire: The Ambivalence of Irish Constitutional Nationalism', (2009) 104 Radical History Review 57

Daly, Eoin. 'Residual Convention of the Irish Constitution: the incongruous example of collective responsibility' (2011) Public Law 703

Delaney, Hilary. & Donnelly, Catherine. 'Irish Supreme Court inches towards proportionality review' 2011 Public Law 9

Editorial, 'Section 31' (1987) 5 ILT 53

Farrell, Brian. 'The Constitution and the Institutions of Government: Constitutional Theory and Political Practice'

(1987) 35 (4) Administration 162

Farrell, David M., O'Malley, Eoin and Suiter, Jane. 'Deliberative Democracy in Action Irish-style: The 2011 We the Citizens Pilot Citizens' Assembly' (2013) 28 (1) Irish Political Studies 99

Garry, John. The Demise of the Fianna Fáil/Labour 'Partnership' Government and the Rise of the 'Rainbow' Coalition. (1995) Irish Political Studies 192

Ivory, Gareth . 'RTÉ And The Coverage Of Northern Ireland On Television News Bulletins In The Early Years Of The Troubles' (2012) 13 Irish Communications Review 31

Joyce, Rachel .'A New Approach to Freedom of Expression?' (2002) 1 Hibernian Law Journal 85

Kavanagh, Jennifer. 'Defamation in the Dáil: The Right of Reply for Citizens, the Use of Standing Order 59 and Parliamentary Reform', Irish Political Studies <http://www.tandfonline.com/doi/full/10.1080/07907184.2013.838223#.U0MQl151iVw> 15 October 2013

Kenny, Colm. 'Section 31 and the censorship of programmes' (1994) 12 ILT 50

Bill Kissane, 'The Not-So-Amazing Case of Irish Democracy' (1995) 10 Irish Political Studies 43

Kissane, Bill. 'The Constitutional Revolution that Never Was: Democratic Radicalism and the Sinn Féin Movement' (2009) 104 Radical History Review 77

Laver, Michael. 'Ireland: Politics with Some Social Basis: An Interpretation based on Survey Data' (1986) 17 (3) The Economic and Social Review 193

Lewis, Tom. 'Rights lost in translation? Fact-Insentistve Laws, the Human Rights Act and the United Kingdom's Ban on Political Advertising' (2007) European Human Rights Law Review 663

MacSithigh, Daithí. 'I'd tell you everything if you'd pick up that telephone": Political Expression and Data Protection' (2011) 2 European Human Rights Law Review 166

McCormack, Gerard. 'Constitutional Law – Monopoly Power in the High Court' (1984) 6 Dublin University Law Review 144

McDonagh, Maeve. 'Access to Official Information in Ireland: Part One: Legal Constraint on Disclosure of Information' (1995) 13 Irish Law Times 182

McDonagh, Maeve. 'Access to Official Information in Ireland: Part Two: Freedom of Information' (1995) 13 Irish Law Times 206

McDonald, Marc. 'Defamation Reform: A Response to the LRC Report' (1992) Irish Law Times 270

McMillan, Gretchen. 'The Referendum, the Courts and Representative Democracy in Ireland' (1992) XL Political Studies 67

Meiklejohn, Alexander 'The First Amendment is an Absolute' (1961) The Supreme Court Review 245

Millar, Gavan. 'Whither the Spirit of Lingens' 2009 (3) European Human Rights Law Review 277

Mohr, Thomas. 'British Involvement in the Creation of the First Irish Constitution' (2008) 15 (1) Dublin University Law Journal 166

Norrie, Alan. 'From Critical to Socio-Legal Studies: Three Dialectics in Search of a Subject' (2000) 9 (1) Social and Legal Studies 85

Ó Tuama, Seamus. 'Revisiting the Irish Constitution and DeValera's Grand Vision' 2 (2) Irish Journal of Legal Studies 54

O'Cinnede, Colm. 'The People are the Masters – The Paradox of Constitutionalism and the Uncertain Statue of Popular Sovereignty within the Irish Constitutional Order' (2012) 2 Irish Jurist 249

O'Dell. Eoin. 'Reflections on a Revolution in Libel' (2012) 30 Irish Law Times 1

O'Neil, Bairbre. 'The Referendum Process in Ireland' 2000 (35) Irish Jurist 305

Peiris, G.L. 'Wednesbury Unreasonableness: The Expanding Canvass' (1987) 46 (1) Cambridge Law Journal, 53

Post, Robert. 'Participatory Democracy and Free Speech', Vol. 97:3 Virginia Law Review 477

Rafter, Kevin. 'Hear No Evil – See No Evil: Political Advertising in Ireland' (2011) 11 Journal of Public Affairs 93

Regan SC, Eugene. 'Policing the Conduct of Referenda; Recent Case Law' (2013) 18 Irish Bar Review 1

Resonstock, Réne. 'Consultation in Public Administration' (2004) 11 (9) Commercial Law Practitioner 231

Ruane, Bláthna. 'Reflections on Procedural Rights in Irish Constitutional Referenda', (2012) 48 Irish Jurist 1

Sackman, Sarah 'Debating 'Democracy' and the Ban on Political Advertising' (2009) 72(3) Modern Law Review 475

Sagar, Rahul, 'On Combating the Abuse of State Secrecy' (2007) 15 (4) The Journal of Political Philosophy 406

Scott, Maria. 'The House that the Supreme Court Built: The Rulings in Coughlan and McKenna, the Lisbon Treaty and the Constitutional Referendum in Ireland' (2010) 9 Hibernian Law Journal 219

Sinnott, Richard. 'Cleavages, parties and referendums: Relationships between representative and direct democracy in the Republic of Ireland' 41 (6) European Journal of Political Research 811

Stubbs, Rhys. 'Freedom of Information and Democracy in Australia and Beyond' (2008) 43:4 Australian Journal of Political Science 667

Weinstein, James. 'Participatory Democracy as the basis of an American Free Speech Doctrine: A Reply' (2011) 97 (3) Virginia Law Review 633

Books

Allan, T.R.S. Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism (Oxford: Clarendon Press, 1993)

Alexander, Larry. *Is there a Right to Freedom of Expression?* (Cambridge: Cambridge University Press, 2005)

Barendt, Eric. *Freedom of Speech 2nd edn* (Oxford: Oxford University Press, 2005)

Beaston , Jack. & Cripps, Yvonne. (eds.) Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams (Oxford: Oxford University Press, 2002)

Bogdanor, Vernon. *The New British Constitution* (Oxford: Hart Publishing, 2009)

Brasier, Alex. Kalitowski, Susanna. Rosenblatt, Gamma. & Korris, Matt. *Law in the Making: Influence and Change in the Legislative Process* (London: Hansard Society, 2008)

Byrne, Elaine A. *Political Corruption in Ireland 1922 – 2010: A Crooked Harp?* (Manchester: Manchester University Press, 2012)

Bunyan, Tony. Secrecy and Openness in the EU: European Dossier Series (London: Kogan Page, 1999)

Carolan, Eoin. The New Separation of Powers: A Theory for the Modern State (Oxford: Oxford University Press, 2009)

Casey, James. *Constitutional Law in Ireland 3rd edn* (Dublin: Roundhall, 2000)

Chubb, Basil. *The Constitution and Constitutional Change in Ireland* (Dublin: Institute of Public Administration, 1978)

Chubb, Basil. The Government and Politics of Ireland 3rd edn (London: Longman, 1992)

Coakley, John. & Gallagher, Michael (eds.) *Politics in the Republic of Ireland 5th edn* (Dublin: PSAI Press, 2010)

Corcoran. Mary P. & O'Brien, Mark. (eds) *Political Censorship and the Democratic State: The Irish Broadcasting Ban* (Dublin: Four Courts Press, 2005)

Couldry, Nick. Livingstone, Sonia. & Markham, Tim. (eds), *Media Consumption and Public Engagement* (Hampshire: Palgrave Macmillian, 2010)

Council of Europe, Freedom of Expression in Europe: Case Law concerning Article 10 of the European Convention on Human Rights – Human Rights Files No. 18 (Strasbourg: Council of Europe Publishing, 2007)

Doyle, Oran. Constitutional Law: Text, Cases and Materials (Dublin: Clarus Press, 2008)

Doyle, Oran. Constitutional Equality Law, (Dublin: Thomson Roundhall, 2004)

Emerson, Thomas. *The System of Freedom of Expression* (New York: Random House, 1970)

Farber, Daniel A. *The First Amendment 3rd edn* (New York: Foundation Press, 2010)

Farrell, Brian. Chairman or Chief: The Role of the Taoiseach in Irish Government (Dublin: Gill and MacMillian, 1971)

Feldman, Stephen M. *Free Expression and Democracy in America: A History* (Chicago: The University of Chicago Press, 2008)

Fisher, Desmond. 'Getting Tough with RTÉ' in Corcoran & O'Brien (eds) *Political Censorship and the Democratic State: The Irish Broadcasting Ban* (Dublin: Four Courts Press, 2005)

Fox, Ruth. Korris, Matt. Making Better Law: Reform of the Legislative Process from Policy to Act, (London: Hansard Society, 2010)

Gallagher, Michael, *The Irish Labour Party in Transition 1957-1982* (Dublin: Gill and Macmillian, 1982)

Goldsworthy, Jeffery. *Parliamentary Sovereignty: Contemporary Debates*, (Cambridge: Cambridge University Press, 2010)

Goldsworthy, Jeffery. *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press, 1999)

Gordon, Richard. Repairing British Politics: A Blueprint for Constitutional Change, (Oxford: Hart Publishing, 2010)

Hart, Chris. Doing a Literature Review: Releasing the Social Science Research Imagination (London: Sage Publications, 1998)

Hass, Michael, *International Human Rights* (Oxford: Routledge, 2008)

Heffernan, Liz. (ed.) *Human Rights: A European Perspective* (Dublin: Roundhall, 1994)

Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010)

Higgins, Michael D. 'Culture, democracy and public service broadcasting' in Corcoran & O'Brien (eds) *Political Censorship and the Democratic State: The Irish Broadcasting Ban* (Dublin: Four Courts Press, 2005)

Hogan, Gerald. *The Origins of the Irish Constitution 1928 - 1941*, (Dublin: Royal Irish Academy, 2012)

Hogan, Gerard & Walker, Clive. *Political Violence and the Law in Ireland* (Manchester: Manchester University Press, 1989)

Hogan, Gerard. Whyte, Gerry. *J.M. Kelly: The Irish Constitution 4th edn* (Dublin: Tottel, 2003)

Hood, Christopher, and Heald, David. (eds.) *Transparency: The Key to Better Governance?* (London: The British Academy, 2009)

Horgan, John. Irish Media: A Critical History Since 1922 (Oxford: Routledge, 2001)

Huntington, Samuel P. *The third wave: democratization in the late twentieth century*, (Oklahoma: University of Oklahoma Press 1993)

Jones, Clyve. (ed.) *A Short History of Parliament,* (Woodbridge: The Boydell Press, 2012)

Karlan, Pamela S., Tushnett, Mark V., Seidman, Stone, Geoffrey R., Sustein, Cass R. *Constitutional Law 5th edn.* (New York: Aspen 2005)

Kavanagh, Jennifer. 'Freedom of Information and National Security: Where's the Harm in That?' in Tom Felle and Maura Ashead (ed.) Ireland and the Freedom of Information Act (Manchester: Manchester Univeristy Press, 2015)

Kenny, Colm. 'Censorship, not "self – censorship"' in RTÉ' in Corcoran & O'Brien (eds) *Political Censorship and the Democratic State: The Irish Broadcasting Ban* (Dublin: Four Courts Press, 2005)

Kilkelly, Ursula. (ed.) *ECHR and Irish Law* (Bristol: Jordan's, 2004)

Kissane, Bill. *Explaining Irish Democracy* (Dublin: UCD Press, 2002)

Kissane, Bill. New Beginnings: Constitutionalism and Democracy in Modern Ireland (Dublin: UCD Press, 2011)

Laws, Sir John. Meiklejohn, 'The First Amendment and Free Speech in English Law' in Ian Loveland (ed.) *Importing the First Amendment* (Oxford: Hart Publishing, 1998)

Lewis, Anthony. Freedom for the Thought That We Hate: A Biography of the First Amendment (New York, Basic Books, 2007)

Litton, Frank. 'An Overview of the Irish System of Governance in Governing Ireland' in O'Malley, E. & MacCarthaigh, M. (eds) *Governing Ireland: From Cabinet Governance to Delegated Governance.* (Dublin: Institute of Public Administration, 2012)

Lijphard, Arend. *Thinking About Democracy: Power Sharing and Majority Rule in Theory and in Practice* (Oxford: Routledge, 2008)

Manin, Bernard. *The Principals of Representative Government* (Cambridge: Cambridge University Press, 1997)

Martin, Peter. *Censorship in the Two Irelands 1922 - 1939* (Dublin: Irish Academic Press, 2006)

Martin, Shane 'Monitoring Irish Government' in O'Malley, E. & MacCarthaigh, M. (eds) *Governing Ireland: From Cabinet Governance to Delegated Governance.* (Dublin: Institute of Public Administration, 2012)

McGonagle, Marie. 'Freedom of Expression and Information' in Quinn, Gerard. (ed.) *Irish Human Rights Yearbook*, (Dublin: Roundhall/Sweet and Maxwell, 1995)

McGonagle, Marie. *Media Law 2nd edn* (Dublin: Thomson Roundhall, 2003)

McLean, Ian & McMillian, Alistair. *The Concise Oxford Dictionary of Politics 3rd edn,* Oxford, Oxford University Press 2009)

Meehan, Níall. & Horgan, Jean. *Survey on Attitudes of Dublin Population to Section 31 of the Broadcasting Act* (Dublin: National Institute for Higher Education, 1987)

Alexander Meiklejohn, *Free Speech and its Relation to Self Government* (Harper & Brothers, 1948)

Mill, John Stuart. *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991)

Morgan, David Gwynn. *The Separation of Powers in the Irish Constitution* (Dublin: Roundhall Sweet and Maxwell, 1997)

Ó Drisceoil, Donal. Censorship in Ireland 1939 – 1945: Neutrality, Politics and Society (Cork: Cork University Press, 1996)

O'Brien, Mark. Corcoran, Mary P. Political Censorship and the Democratic State: The Irish Broadcasting Ban (Dublin: Four Courts Press, 2005)

O'Brien, David M. Congress shall make no law: The First Amendment, Unprotected Expression and the US Supreme Court (Maryland: Rowman & Littlefield, 2010)

O'Malley, Eoin. 'The Apex of Government: Cabinet and Taoiseach in Operation' in O'Malley, E. & MacCarthaigh, M. (eds) *Governing Ireland: From Cabinet Governance to Delegated Governance.* (Dublin: Institute of Public Administration, 2012)

Pierre, Jon. Peters, Guy B. *Governing Complex Societies: Trajectories and Scenarios* (London: Palgrave Macmillan, 2005)

Robertson, Geoffrey. Nicol, Andrew. *Media Law 5th edn*, (London: Penguin, 2008)

Rourke, Francis E. *Secrecy and Publicity: Dilemmas of Democracy* (Baltimore: John Hopkins Press, 1961)

Schmitt, David E. The Irony of Irish Democracy: The Impact of Political Culture on Administration and Democratic Political Development in Ireland (London: Lexington Books, 1973)

Schumpeter, Joseph A. *Capitalism, Socialism and Democracy 2nd edn*, (New York: Harper, 1947)

Select Committee on Modernisation of the House of Commons, *The Legislative Process: First Report of Session 2005 - 6* (London: House of Commons, 2006)

Sen, Amartya. *The Idea of Justice* (London: Allen Lane, 2009)

Stieglitz, 'Transparency in Government' in Islam, Djankov & McLiesh (ed.) *The Right to Tell: The Role of Mass Media in Economic Development* (Washington D.C: World Bank, 2002)

Stone, Geoffrey R., Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on

Terrorism (New York: W.W. Norton, 2004)

Sunstein, Cass R. *Democracy and Problem of Free Speech* (New York: The Free Press, 1993)

Transparency International, National Integrity Systems: Transparency Ireland Country Study Ireland 2009 (Berlin: Transparency International, 2009)

Tushnet, Mark. The Constitution of the United States: A Contextual Analysis (Oxford: Hart Publishing, 2009)

White, Alex. 'Ministerial Orders and Court Challenges' in Corcoran & O'Brien (eds) *Political Censorship and the Democratic State: The Irish Broadcasting Ban* (Four Courts Press, 2005)

Whyte, Gerry. Social Inclusion and the Legal System: Public Interest Law in Ireland (Dublin: IPA, 2002).

John Whyte, 'Ireland: Politics without social bases' in Rose, Richard.(ed.) 1974, *Electoral Behaviour: A Comparative Handbook*, (New York: Free Press, 1974

Programmes for Government

Department of an Taoiseach, A Government of Renewal: Policy Agreement between Fine Gael, Labour and Democratic Left 1994 – 1997 (Dublin: Department of An Taoiseach, 1994)

Department of an Taoiseach, *Programme for Government between Fine Gael and Labour 2011* (Dublin: Department of An Taoiseach, 2011)

Government Reports

Active Citizenship Office, Active Citizenship in Ireland: Progress Report 2007 – 2008 and Action Plan 2008 – 2009 (Dublin: Department of An Taoiseach, 2008)

Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions, *Information Commissioner's Report to Parliament,* <http://www.official-documents.gov.uk/document/hc1012/hc18/1860/1860.pdf> Accessed 12 September 2012

Committee on Official Information, *Towards Open Government - Danks Report*, (New Zealand: Stationary Office, 1980)

Constitution Review Group, *Report of the Constitutional Law Review Group* (Dublin: Government Publications Office, 1996)

Council of Europe, Freedom of Expression in Europe: Case Law concerning Article 10 of the European Convention on Human Rights – Human Rights Files No. 18 (Strasbourg: Council of Europe Publishing, 2007)

Department of Environment, Heritage and Local Government, *Executive Summary Green Paper on Stronger Local Democracy- Options for Change* (Dublin: Government Publications Office, 2008)

Department of the Taoiseach, *Cabinet Handbook* (Dublin: Department of An Taoiseach, 2006)

House of Commons, Select Committee on Modernisation of the House of Commons, The Legislative Process, First Report of Session 2005 - 6 (London: Stationary Office, 2006)

Select Committee on Legislation and Security, Report on the reform of the Official Secrets Act 1963, (Dublin: Government Publications Office, 1997)

Session 1998-1999, Third Report, Freedom of Information Draft Bill, Vol. I, (London: HMSO, 1999)

The Parliament of the Commonwealth of Australia, Freedom of Information: Report by the Senate Standing Committee on Legislation and Constitutional Affairs on the Freedom of Information Bill 1978, and aspects of the Archives Bill 1978 (Canberra: Australian Government Publishing Service, 1979)

Web Resources

Broadcasting Authority of Ireland, Broadcasting Code on Referenda and Election Coverage <http://www.bai.ie/wordpress/wp-content/uploads/20110913_RefElecCode_Eng.pdf > Accessed 30/05/2013

Broadcasting Authority of Ireland 'Broadcasting Complaints August' <http://www.bai.ie/?ddownload=53028> Accessed 15 Sept 2014

Brusis, Martin. & Siegmund, Jörg. Designing Sustainable Governance Indicators 2011: Criteria and Methodology, <http://www.sgi-network.org/pdf/SGI11_Criteria_Methodology_EN.pdf > Accessed 30 May 2012

Carolan, Eoin. 'Towards a varifocal model of the separation of powers' <http://www.jus.uio.no/english/research/news-and-events/events/conferences/ 2014/wccl-cmdc/wccl/papers/ws15/w15-carolan.pdf> Accessed 27 June 2014

Constitutional Convention, 'Sixth Report of the Convention on the Constitution: The Removal of the Offence of Blasphemy from the Constitution' < *https://www.constitution.ie/AttachmentDownload.ashx?mid=b96d3466-4987-e311-877e-005056a32ee4*> Accessed 10 September 2014

Department of Justice and Equality, (2014) 'Report of the Independent Review Group on the Department of Justice and Equality' (Toland Report) <http://www.justice.ie/en/JELR/RptReviewGroupDeptJustice .pdf/Files/RptReviewGroupDeptJustice.pdf> Accessed 12 August 2014

Kavanagh, Jennifer. 'Executive Secrecy and Access to Policy: Lessons from the Past in Irish Legal and Political History'<http://historyhub.ie/wp-content/files_mf/ 1365197031 Kavanagh_Jennifer

__Working_Paper_No.pdf> Accessed 15 July 2013

Kavanagh, Jennifer. Advocacy Groups, Political Speech and Offshore Money, http://humanrights.ie/civil-liberties/advocacy-groups-political-speech-and-offshore-money/ Accessed 31/05/2013

Law Reform Commission, Consultation Paper on the Law of Criminal Libel, <http://www.lawreform.ie/_fileupload/Reports/rCrimeofLibel.htm> Accessed 06 September 2012

Law Reform Commission, Report on the Civil Law of Defamation, <http://www.lawreform.ie/_fileupload/Reports/rDefamation.htm> Accessed 06 September 2012

OFCOM, Current Affairs: Qualitative Audience Research, <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/CA_qual_presentation.pdf> Accessed 8 August 2013

Rafter, Kevin, 'Political Advertising: The regulatory Position and the Public View' < http://www.bai.ie/wordpress/wp-content/uploads/political_advertising_report.pdf > Accessed 31/07/2015

RTÉ "We Are Living Beyond our Means' < http://www.rte.ie/archives/exhibitions/1333-memorable-budgets/1337-budget-1980/336279-a-ministerial-broadcast-by-an-taoiseach/> Accessed 31/07/2015

Rodrigues, Mark. Cabinet Confidentiality: Background Note (Canberra: Department of Parliamentary Services Parliament of Australia, 2010)

Sustainable Governance Indicators 2011, Quality of Democracy: Access to Information, <http://www.sgi-network.org/pdf/SGI11_Democracy_AccessToInformation.pdf> Accessed 30/05/2011

Voorhoof, Dirk. 'European Court of Human Rights Case of Sdruženi Jihočeské Matky v. Czech Republic' (IRIS Legal Observations of the European Audiovisual Observatory) < http://merlin.obs.coe.int/iris/2006/9/article1.en.html> accessed 17 April 2013.

Newspaper Articles

'Newspapers will also be Restricted – T.D.' The Irish Times (Dublin, Oct 2 1971)

'R.T.E. Hit by Northern Troubles, says Chief' The Irish Times (Dublin, Sept 13, 1972)

Foley, 'Dilemma facing Higgins over renewal of broadcasting ban' The Irish Times (Dublin, 15 Jan 1993)

Minister Denies Acting as Censor: British TV Interview, The Irish Times (Dublin, Nov 27 1972)

O'Brien, 'A whole new tap-dance' The Irish Times (Dublin, March 27, 1984)

O'Connell, Donncha. 'Our Ford Cortina Constitution' Village Magazine (Dublin, June August 2011, Issue 14)

Dworkin, Ronald. 'The Right to Ridicule' New York Review of Books, (New York, 23 March 2006)