Transparency in Judicial Decision Making

An Irish Perspective

Peter Charleton, judge of the Supreme Court

The Istanbul Declaration on Transparency in the Judicial Process, done at Ankara in 2018, is a document of the highest importance. Strengthening, as it does, the heart of systems which separate out the powers of legislation and executive from judicial processes, it stresses the independence of court proceedings as a check on the power of government and as a guarantee that the citizen will always have an unbiased forum to which to turn. Judges are a last resort. Without us, there is no power that cannot be trammelled by an over enthusiastic government. In times of crisis, the judiciary act as a stabilising force. On so many occasions in the past, where national crises, the judiciary as a body removed from the pressures that might trammel civil liberties, remains a potential bulwark of objectivity. We promote the rule of law. This principle says that no matter what happens, those guaranteed rights, those who have obligations and those who seek the freedom that our various constitutions promulgate, will have substance given to what otherwise might be empty declarations.

In Western systems, as far back as 1215, this was recognised in Magna Carta and since then written constitutions have guaranteed the right for a prisoner to approach the High Court and to claim illegal detention. In that way, no matter what the turmoil of political battle, it will only be through valid means that government can prosecute its enemies and only then on the basis of existing laws and a substantial body of proof.

Introduction

Revered as a "diamond' in a democracy",[1] an independent and accountable judiciary is an integral component of a fair and just society. Today, in accordance with the Istanbul Declaration, we can add to this standard the requirement of transparency, which is a concept that covers many elements of justice system. On this requirement for transparency, the Irish Supreme Court has asserted that:

> Transparency in the administration of justice is part of the democratic system. Citizens are entitled to scrutinise and, it follows, comment on or respectfully criticise the decisions of the judicial branch of government. They also have a basic entitlement to know that judges are behaving properly.[2]

Some say that to have respect, you have to earn respect. It would seem that the Irish courts are widely respected, and in a way that is not surprising. According to the oath of office, judges in Ireland are required to sign up to the highest standards of independence and judicial integrity. Sometimes, that can merely be a shibboleth; a phrase promulgated for distribution as part of deception. However, in 2014 a survey carried out by the European Commission ranked Ireland

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[1] Susan Denham, "The Diamond in a Democracy: An Independent, Accountable Judiciary" (2001) 5 The Judicial Review 31

[2] *MARA (Nigeria) v Minister for Justice* [2014] IESC 71, at [21].

the second highest in Europe for perceived judicial independence.[3] Others may have issues. Recently, a decision of the Irish High Court queried the reliability of another European Union system. Whether that is right or wrong, the judge sought guidance from the CJEU as to whether she was permitted to refuse to extradite a Polish national accused of drugs offences to Poland, where she had assessed that "there is a real risk connected with a lack of independence of the courts of Poland, on account of systemic or generalised deficiencies, of the fundamental right to a fair trial being breached."[4] In due course we will see what the answer is or whether the comment of this judge was right or wrong.

Role of the judiciary in Bunreacht na hÉireann

The Irish Constitution provides at Article 34.1 that "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and save in such special and limited cases as may be prescribed by law, shall be administered in public." Similarly, the Istanbul Declaration in Principle 1 describes this as a "fundamental requirement in a democratic society." What is being overseen by public access and media scrutiny is no less than an almost legislative power since in systems based on precedent, case law can be developed into new areas.

As is the case in most common law jurisdictions, some are of the perception that the Irish courts in effect have the power to 'make law.' This renders the judiciary in such jurisdictions significantly more powerful and influential than their civil law counterparts. With a supreme court, as in the United States of America, having the power to declare abortion legal, strike down the Roosevelt economic policy and authorise same-sex marriage, scrutiny and criticism of such a fundamental law generating organ is critical. This phenomenon can be extreme. In our system, there is a lot more restraint as was recently elucidated by the Supreme Court:

> If it is correct to say that a decision of the court can make law – and it can be said it does so not least because a decision of a Superior Court binds everyone in a similar position unless and until altered by legislation, the decision of the People in referendum, or subsequent judicial decision – then it is equally important to recognise that courts make law in a way which is significantly different from the manner in which legislation is made by the Oireachtas. Courts may only decide cases brought before them by parties. The parties must themselves have a legitimate interest, grounded in the facts, in the resolution of their dispute. A court cannot itself initiate a legal issue, still less issue of its own accord a generally binding statement of law. Furthermore, a court may only decide (in the sense of giving a binding determination) those legal issues which are *necessary* and *essential* to resolve the legal dispute between the parties. While courts may and do say other things in the course of a judgment which may be of benefit both in the development of the law and in the assistance of the resolution of future disputes, it is only that portion of the judgment that contains what is considered to be essential and necessary for the actual decision in the case which can be said to be binding on subsequent courts.[5]

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[3] Laura Cahillane, "Ireland's System for Disciplining and Removing Judges" (2015) 38(1) Irish Juris (ns) 55, at 55.
[4] *Minister for Justice and Equality v Celmer (no 4)* [2018] IEHC, at [44].
[5] *M v Minister for Justice & Equality* [2018] IESC 14, at [10.24].

One of the core duties of the judiciary is to uphold the provisions of the Irish Constitution. As Murray CJ notes, "the courts are required to act as custodians of the Constitution and as such, to act as a check on the actions of the other two arms of government and to ensure that they act in accordance with the rule of law, respect individual constitutionally protected rights and observe the provisions of the Constitution."[6] This means that the Courts have the power to strike down legislation enacted by the Oireachtas as unconstitutional, a power that does not exist in the United Kingdom on account of the doctrine of parliamentary sovereignty. A particularly dramatic example of this power was seen in the Court of Appeal decision of *Bederev v Ireland,*[7] later reversed by the Supreme Court,[8] where the legislation declaring a number of substances illegal was struck down as in breach of the non-delegation of legislative functions doctrine. Courts, after all, make mistakes

Independence of the judiciary

A fundamental tenet of the Irish Legal System is that the judiciary is independent. The Istanbul Declaration recognises this even in the preamble. Writing extra-judicially, former Chief Justice Denham explains this idea:

> The concept of the independence of the judge exists so that he or she may fulfil his or her duties freely. The concept exists to guard the impartiality of the judge, to protect the judge from interference… Both the institutional judiciary and the individual judiciary are independent… The independence of the judiciary is for the benefit of the community, not the judges. It is a duty not a privilege for a judge.[9]

The independence of the judiciary is especially important in light of their function in upholding the provisions of the Constitution. In France, there are administrative courts and civil courts entirely separate from each other. This can be a recipe for being sent from one court to another. There are perhaps advantages to a unitary system. Unlike in many civil law jurisdictions, there is only one legal order in Ireland so all legal proceedings are dealt with by a single hierarchy of Courts. O'Donnell J has argued that this fact means that the judicial independence standard is upheld across all courts regardless of the magnitude of the legal issue that comes before it, and in fact ensures that the Courts are better equipped to evaluate questions of Constitutionality. As he puts it:

> The independence of the judiciary in the Constitutional area is facilitated by the fact that constitutional issues are dealt with by the same courts which deal with private law issues of contract, tort, and property, and also with public law issues such as crime, and latterly, review of administrative action… the technique of explaining why a particular issue amounts to a breach of contract, a tort, or why a piece of evidence is admissible or not is a valuable discipline to bring to bear on constitutional issues.[10]

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[6] *Curtin v Clerk of Dáil Éireann* [2006] IESC 14, at [94].
[7] *Bederev v Ireland* [2015] IECA 38.
[8] *Bederev v Ireland* [2016] IESC 34.
[9] Susan Denham, "The Diamond in a Democracy: An Independent, Accountable Judiciary" (2001) 5 The Judicial Review 31, at 58.
[10] Donal O'Donnell, "Some Reflections on the Independence of the Judiciary" (2016) 19 Trinity College Law Review 5, at 14.

Of course it can be hard to see judges as independent if all are 'party people', which could be seen as a guarantee that they might toe the government line. So, appointment of the right people is key, thus the Istanbul Declaration in Principle 13 calls for basic principles to be adhered to.

Appointment of judges in Ireland

A key consideration of the integrity and independence of a judiciary thus necessarily includes an examination of the manner in which judges are appointed to the bench. Article 35 of Bunreacht na hÉireann stipulates that "the judges of the Supreme Court, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President." Article 13.9 of the Constitution clarifies that this is not an act of complete judicial discretion, but must be done 'only on advice of the government.' Finlay P has noted that the appointment of judges is an act "requiring the President's intervention for its effectiveness in law, but in fact it is the decision and act of the executive."[11] Indeed, O'Donnell J notes the argument that, in effect, these provisions of the Constitution prohibit an independent appointment process as this presidential function cannot be delegated.[12]

In our system, unlike in Roman law based jurisdictions, there is no judges' college. You become a judge in your mid-40s to mid-50s, having spent a life in practice. In that way, you become known as safe, as sound or as dangerous to appoint. Although the Government's power remains formally unaffected since the enactment of the Constitution, it must be noted that the Court and Court Officers Acts 1995-2002 prescribe important procedures that must be followed and mean that the Government must have regard to the recommendations of the Judicial Appointments Board before appointing a person to judicial office. All judges must make a formal application and no one is eligible unless their career path, publications and competence have been independently assessed. Only then can their names go forward to government. As in many jurisdictions, there has recently been discussion of amending the way in which judges are appointed in Ireland, making that independent scrutiny even more stringent, but it remains to be seen whether any significant change to the current regime will be brought about.

Removal from judicial office

Of course, there must be a disciplinary process. Under the Istanbul Declaration in Principle 15, that should be "vested in an independent body". As this recognises, perhaps equally as important as the way in which judges are appointed is the way in which they can be removed from office. Essentially, you are not independent if tomorrow, a ministry or a government can decide that they don't like your decisions and pension you off. Our constitution recognises that in quite an extreme way.

Article 35.4.1 provides that "A judge of the Supreme Court, the Court of Appeal or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal." That guarantee applies by legislation to judges of the Circuit Court and District Court. To date, no judge has been removed pursuant to this article, although it has been considered in a few notable instances. Of course, there have been problems. In what is known as the 'Sheedy Affair', the Chief Justice found that a Supreme Court judge had for the best of reasons, but nonetheless,

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[11] *The State (Walshe) v Murphy* [1981] IR 275.
[12] Donal O'Donnell, "Some Reflections on the Independence of the Judiciary" (2016) 19 Trinity College Law Review 5, at 26.

improperly, intervened in a case. A judge of the Circuit Court had also mishandled the case. Having concluded in his report that the judges' interventions were "damaging to the administration of justice",[13] the Government was considering removing the judges under Art 35.4.1° as the behaviour contained in the Chief Justice's report amounted to misbehaviour under that provision of the Constitution. However, before any action could be taken, both judges resigned.

The most significant problem in this area was the arrest of a judge for obscenity offences. This was later reported as *Curtin v Clerk of Dáil Éireann*.[14] Following the acquittal of a Circuit Court judge on a very serious offence, public concern prompted both Houses of the Oireachtas to adopt a new procedure to allow investigations into judicial conduct. Both houses established a joint selection committee to take evidence in relation to the applicant's conduct. Effectively, this was an investigation and reporting body. The committee ordered the applicant to produce his computer for examination, one seized by police but later ruled inadmissible in court thus collapsing the prosecution against him, and the judge then sought judicial review. On appeal to the Supreme Court, Murray CJ noted that given the brevity of Article 35.4.1, it was necessary to consider its constitutional context.[15] He identified three elements of particular relevance: the function and standing of the judiciary in the Constitutional scheme, the express power conferred on the Oireachtas and the obligation to respect principles of fairness and justice in the exercise of that power.[16] Ultimately, the Court concluded that the actions of the Houses of the Oireachtas were not clearly in disregard of the Constitution and that the committee was entitled to organise materials and evidence into a manageable form. The Court did not interpret the expression "stated misbehaviour or incapacity", but it is apparent from the judgment that accessing adult pornography does not come within this standard, however accessing child pornography most certainly does.[17]

Ultimately, the situation was ended when Judge Curtin voluntarily resigned on a pension.[18] Despite this, the judgment remains the most comprehensive analysis of this provision of the Constitution to date.

Disciplining of judges

Another contentious issue is that of reprimanding and disciplining judges. Again, Principle 15 of the Istanbul Declaration refers by requiring "transparency in the disciplinary process" by "an independent body" and that the "decision should be published". Of course, if these principles are not adhered to, it could be a case of: we don't like her, so let's ditch her. Due to the nature of the judicial function, the establishment of any disciplinary procedure must be handled with caution. As O'Donnell J puts it:

> it should not be forgotten that the courts are full of unhappy litigants. At one level, it is the task of the court to make at least one party unhappy. It is also the case that some people who come before the courts have an interest in delay, obstruction, obfuscation or simply causing trouble. There are also legitimate concerns about the impact of any

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[13] Hogan & Whyte, *JM Kellly: The Irish Constitution* (2003, 4th edn, Tottel Publishing), at 1008.
[14] *Curtin v Clerk of Dáil Éireann* [2006] IESC 14.
[15] *Curtin v Clerk of Dáil Éireann* [2006] IESC 14, at [80].
[16] Oran Doyle, *Constitutional Law: Text Cases and Materials* (2008, Clarus Press) at 379.
[17] Laura Cahillane, "Ireland's System for Disciplining and Removing Judges" (2015) 38(1) Irish Juris (ns) 55, at 58.
[18] See Laura Cahillane, "Judicial Discipline: Where Do We Stand? A Consideration of the Curtin Case" (2009) 27 Irish Law Times 26.

> public criticism or reprimand on the capacity of a judge to continue to carry out his or her function, and the cost that such a procedure could involve, particularly where the complaint is dismissed as ill-founded. [19]

A number of scholars have also identified conceptual difficulties with the notion of imposing sanctions on judges. Cahillane remarks that "it could be argued that imposing a legal sanction on a judge effectively takes away her independence and means that members of the public will not have the same respect for the judge."[20] There have been very few instances where the need to discipline a member of the judiciary has arisen. One example occurred in 2013 on foot of allegations that a family court judge had an improper approach to a family law case that had come before him.[21] A joint investigation was conducted by the President of the High Court and the President of the Circuit Court it was decided that no wrongdoing had occurred. Some may have wished for procedures other than those followed.[22] It should also be remembered by the sceptical that a judge is as much entitled to be presumed innocent until stated misbehaviour is actually proven.

At present, the provisions of the Irish constitution do not provide a remedy for judicial behaviour that warrants a sanction of lesser magnitude than removal from the bench. One proposed solution to this is the establishment of a judicial council. It is important to note from the outset that the scope of this council will be much greater than the disciplining of judges. Defined disciplinary procedures will, however, be undoubtedly one of its key functions. In 2000, a high-level group of members of the judiciary, headed by Keane CJ, recommended the establishment of such a council with a significant disciplinary function.[23] Calls for the establishment of this body have been echoed by former Denham CJ and her successor Clarke CJ. In 2017 the Judicial Council Bill was proposed. This bill envisages the establishment of a judicial conduct committee, which will consider all complaints relating to judges and have the power to act on them.[24] Complaints would be made to registrars within three months of the alleged misconduct, who then will determine whether the complaint is admissible or not.[25] The judicial conduct committee would then investigate the matter and propose an appropriate course of action.[26] One area of particular controversy surrounding the bill has been the proposal that the identities of judges who have been the subject of disciplinary proceedings will not be made public knowledge.[27]

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[19] Donal O'Donnell, "Some Reflections on the Independence of the Judiciary" (2016) 19 Trinity College Law Review 5, at 34.
[20] Laura Cahillane, "Ireland's System for Disciplining and Removing Judges" (2015) 38(1) Irish Juris (ns) 55, at 68.
[21] "A quite improper ruling on the judiciary" *The Irish Examiner* (6 November 2013) <<https://www.irishexaminer.com/viewpoints/analysis/a-quite-improper-ruling-on-the-judiciary-248603.html>> (accessed 4 October 2018).
[22] Laura Cahillane, "Ireland's System for Disciplining and Removing Judges" (2015) 38(1) Irish Juris (ns) 55, at 56.
[23] Eugene Moloney, "Watchdog needed to oversee judiciary" *The Irish Independent* (26 January 2001) <<https://www.independent.ie/irish-news/watchdog-needed-to-oversee-judiciary-26100495.html>> (accessed 4 October 2018).
[24] Judicial Council Bill (Bill 70 of 2017), ss 30-36.
[25] Judicial Council Bill (Bill 70 of 2017), ss 37-40.
[26] Judicial Council Bill (Bill 70 of 2017), ss 51-67.
[27] Fiona Gartland, "Judges not named if censured under proposed judicial council bill" *The Irish Times* (26 August 2017) <<https://www.irishtimes.com/news/crime-and-law/judges-not-named-if-censured-under-proposed-judicial-council-bill-1.3198571>> (accessed 4 October 2018).

Education of judges in Ireland

Judicial training and development is key in ensuring that the highest standard of judicial determination is reached. As aforementioned, the judicial council will alter the way in which judicial training is developed and delivered. The Bill provides that among the functions of the Council is the "continuing education of the judges"[28] and it envisages the creation of a judicial studies committee to achieve this end.[29] At present, judicial education is facilitated by the Committee for Judicial Studies, which was established pursuant to the enactment of section 19 of the Courts and Courts Officers Act, 1995. The Committee has very limited financial resources and its training is often limited to the organisation of one day annual conferences. In addition, judges are often sent to other jurisdictions to receive specialised training, often in areas such as mediation and family law.

It is especially important that judges are well trained with regard to issues involving sentencing, and indeed a transparent sentencing regime is integral to a fair justice system. At present, there is no sentencing body or council in Ireland, and the judiciary has a large discretion subject to the relatively broad parameters imposed by legislation. Sentencing in Ireland has been noted as very individualised, with sentences taking account of the facts of each case and the personal circumstances of the offender.[30] The Irish Law Reform Commission has recommended the introduction of sentencing guidelines in Ireland,[31] and many have called for the introduction of a sentencing council.[32] The guidelines produced by the Sentencing Council in the UK can be useful to Irish judges, and indeed some judges have attended training sessions in Scotland on judging generally.

In 2012, the Judicial Research Office, directed by a Supreme Court judge, established as one of its priorities to gather information as to sentencing in serious cases. In a prior Central Criminal Court decision, Charleton J and his judicial assistant had examined and classified dozens of rape sentences to establish the sentencing response garnered by different circumstances. An initiative was then set up to replicate the success of this judgment, and resulted in the production of a number of detailed sentencing analyses. There is now data on sentencing practices in relation to matters such as manslaughter, robbery, burglary, drug dealing, dangerous driving and tiger kidnapping, and other issues. These have introduced a new level of transparency, and fairly painlessly and non-prescriptively at that.

The Irish judiciary also participates in many conferences and networks with judges from other jurisdictions. An example of this is the 'Comité franco-britanno-irlandais de cooperation judiciaire' which unites judges from Ireland, France and the UK in the discussion and analysis of issues in both private and public law, with particular emphasis on differing practices within each jurisdiction.

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[28] Judicial Council Bill (Bill 70 of 2017), s7.
[29] Judicial Council Bill (Bill 70 of 2017), s 17.
[30] Paul Hughes, "A Proposed Sentencing Council for Ireland" (2015) 25(3) Irish Criminal Law Journal 65, at 77.
[31] Law Reform Commission, *Report on Mandatory Sentencing* (LRC 108-2013), at 67.
[32] See, for example, Paul Hughes, "A Proposed Sentencing Council for Ireland" (2015) 25(3) Irish Criminal Law Journal 65.

Publicity and the courts

The philosopher Jeremy Bentham is credited with remarking that "publicity is the very soul of justice. It keeps the judge, while trying, under trial."[33] This is key to the Istanbul Declaration as are the provision of media facilities. As in the majority of jurisdictions, the requirement that justice not only be done but also be seen to be done is a fundamental principle of the Irish justice system, and is enshrined in Article 34 of the Constitution. The principle also comprises a requirement that details of court proceedings not be withheld from the public, stemming from the freedom of expression of "organs of public opinion" enshrined in Article 40.6.1°.[34] One notable way in which the Irish courts have recently sought to increase the possibility for spectators to see justice being administered is through holdings sittings of the Supreme Court in Limerick, in the southwest of Ireland and in Cork in the south. It has also been announced that the Supreme Court will sit in Galway in the west of Ireland next Spring.[35]

This requirement has received much judicial attention, and some comments warrant mention. In *Re R Ltd,* Walsh J held that

> … the actual presence of the public is never necessary, but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the courts are open should themselves have any particular interest in the cases or that they should have business in the courts, Justice is administered in public on behalf of all the inhabitants of the State.[36]

Other notable comments include those of Hamilton CJ, who has observed that

> Justice is best served in an open court where the judicial process can be scrutinised. In a democratic society, justice must not only be done, but be seen to be done. Only in this way, can respect for the rule of law and public confidence in the administration of justice, so essential to the workings of a democratic state, be maintained.[37]

More recently, Charleton J has remarked that

> The courts are obliged to maintain open doors. Attendance by the public can be notional, in the sense that the court admits all comers subject to the proper running of any hearing, but experience indicates that it is rarely merely only a theoretical exercise. Members of the public can and do attend in court, witnesses from each side and their family members will be present and the press, radio, and television, take a professional interest in litigation, while reporting only on a fraction of cases.[38]

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[33] Jeremy Bentham, "Bentham's Draught for the Organisation of Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the Same," (1790).
[34] Ailbhe O'Neill, "Open Justice Revisited – *Gilchrist and Rogers v Sunday Newspapers Ltd,*" presented at the Irish Supreme Court Review Conference on the 6th of October 2018.
[35] Mary Carolan, "Apple Athenry data centre goes to Supreme Court" *The Irish Times* (2 May 2018) <<https://www.irishtimes.com/business/technology/apple-athenry-data-centre-appeal-goes-to-supreme-court-1.3481513>> (accessed 4 October 2018).
[36] *Re R Ltd* [1989] IR 126, at [134].
[37] *Irish Times Ltd v Ireland* [1998] 1 IR 359, at [382].
[38] *MARA (Nigeria) v Minister for Justice* [2014] IESC 71, at [17].

Recently, the Supreme Court has handed down *Gilchrist and Rogers v Sunday Newspapers,*[39] which marks a more flexible approach in Ireland in this area than the *R* case. In this case, the Supreme Court held that a departure from the requirement to conduct proceedings in public was permissible in light of the public interest in protecting the Witness Protection Programme. The following passage from O'Donnell J's judgment merits reproduction:

> Since any departure from the rule of hearing in public is an exception which must be strictly justified, it is in my view necessary to consider the matter incrementally and to ask whether any lesser steps would meet any legitimate interests involved. That may involve considerations of anonymising witnesses or orders that witnesses may not be photographed or identified in any way, or whether any part of the hearing may be conducted in public, or whether it is possible in respect of any hearing in private, that a redacted transcript of proceedings can be released to the media… Nothing more should be permitted than is demonstrated to be necessary to avoid the damage to the public interest involved.[40]

The Court then proceeded to set out guidelines for any departure from Article 34.1. O'Neill welcomes this decision. She remarks that "by departing from what was described as the "overcorrection" in *Re R Ltd,* the Court has indicated to lower courts that they should be more receptive to applications to depart from public hearings. While O'Donnell J was careful to emphasise that such orders are not available for the asking, much will depend on how lower courts interpret this signalling from the Supreme Court."[41] This decision has been interpreted in two further decisions. In *Medical Council v TM,*[42] Kelly P held that there was a power under common law to hear applications under the Medical Practitioners Act 2007 otherwise than in public, provided that the conditions laid out in *Gilchrist* were met. In addition, the Court of Appeal took a more restricted approach of *Gilchrist,* with Hogan J holding that reporting restrictions could only be imposed by statute law or "(exceptionally) the exercise of the inherent power of the Court where this is necessary to protect a constitutional right,"[43] citing *Gilchrist* and other cases.

Of course, in some cases it is not desirable to allow a trial to proceed in circumstances that allow open access to the public. So some exceptions to this general principle have been recognised. A number of trials are conducted *in camera* for a variety of reasons, most commonly to protect the identity of parties involved with litigation. This concept is usually associated with family law proceedings. In Ireland, a number of statutory provisions provide for the holding of proceedings in the domain of family law *in camera*.[44] The constitutionality of this practice is a source of debate – the leading text on Irish Constitutional law pronounces that the statutory provisions for the mandatory holding of family law cases in camera "go significantly further than is necessary to protect this public interest and, accordingly, constitute a disproportionate – and, accordingly,

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[39] *Gilchrist and Rogers v Sunday Newspapers* [2017] IESC 18.
[40] *Gilchrist and Rogers v Sunday Newspapers* [2017] IESC 18, at [44].
[41] Ailbhe O'Neill, 'Open Justice Revisited – *Gilchrist and Rogers v Sunday Newspapers Ltd,'* presented at the Irish Supreme Court Review Conference on the 6th of October 2018, at 11.
[42] *Medical Council v TM* [2017] IEHC 548.
[43] *Hampshire County Council v CE and NE* [2018] IECA 154.
[44] See Hogan & Whyte, *JM Kellly: The Irish Constitution* (2003, 4th edn, Tottel Publishing), at 741-2.

unconstitutional – interference with the constitutional requirement that justice be administered in public."[45]

In 2004, section 40 (3)of the Civil Liability and Courts Act 2004 (later amended by section 5 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013) took steps towards a relaxation of the *in camera* rule. This provision allows for solicitors and barristers, as well as other persons as approved by the Minister for Justice, to attend family proceedings on the strict condition that the anonymity of the parties involved is protected in any documentation or correspondence that results from their attendance. The categories of persons permitted to attend by the Minister include family mediators, persons engaged in family law research, and persons engaged by the Courts Service to prepare court reports of proceedings.[46] The rationale of this approach is succinctly explained in *MARA (Nigeria) v Minister for Justice.* Here, Charleton J proposed that "any restriction [on the requirement for hearings to be held in public] should be as limited as the protection of these rights necessarily demands; targeting particular pieces of testimony rather than an entire hearing, unless this is necessary, and favouring restrictions on anonymity over a completely closed hearing, unless this is essential."[47]

There have been other circumstances in which legislation has identified a need for proceedings to be held *in camera.* These include the protection of business secrets and confidential information[48] and proceedings involving professional discipline.[49] There are also a number of exceptions in the field of criminal law. Section 20(3) and (4) of the Criminal Justice Act 1951 empowers a court to exclude the general public from any hearing which is 'in the opinion of the court of an indecent or obscene nature.' In addition, section 6 of the Criminal Law (Rape) Act 1981 requires the judge in all trials of sexual offences to exclude all persons except officers of the court from the hearing, but requires that the verdict be pronounced in public.

Anonymising of parties to proceedings

A subsection of the area of publicity and the courts is that of the anonymising of parties to proceedings, particularly where the proceedings are of a sensitive or delicate nature. This is particularly topical at present in light of the recent announcement the CJEU, from the 1st of July 2018 onwards, will replace the names of natural persons with initials, and any elements likely to identify the individuals involved are to be removed from judgments.[50] As we will see, the Irish approach is slowly warming to this idea, but is still very far removed from practices in other EU jurisdictions. Unfortunately, you end up with a kind of alphabet soup and no case can be remembered.

The Irish Courts have long been unwilling to allow for replacing the identies of parties with initials or pseudonyms. In *The Claimant v Board of St James' Hospital*[51], an application for an order to issue a plenary summons and serve a statement of claim without disclosing the names and

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[45] [45] Hogan & Whyte, *JM Kellly: The Irish Constitution* (2003, 4th edn, Tottel Publishing),, at 744.
[46] Anne Egan, "The In Camera Rule: A Barrier to Transparency or a Necessity in Irish Family Law?" (2012) 15(3) Irish Journal of Family Law 59, at 62.
[47] *MARA (Nigeria) v Minister for Justice* [2014] IESC 71, at [26].
[48] See, for example, s 212(9) of the Companies Act 2014; s 134 of the Bankruptcy Act 1988
[49] See, for example, s 44(2) of the Nurses Act 1985; s 51(2) of the Medical Practitioners Act 1978; s 47(2) of the Teaching Council Act 2001.
[50] <<https://uk.practicallaw.thomsonreuters.com/w-015 5507?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1>> (accessed 4 October 2018).
[51] *The Claimain v Board of Saint James' Hospital* (10 May 1989, unreported), HC, Hamilton P.

addresses of the plaintiffs, who had contracted HIV as a result of using infected blood products supplied to them, was rejected by Hamilton P, who held that there was nothing in the law or the rules of court that could justify such a departure from the requirement that justice be administered in public.[52] A similar approach can be seen in *Roe v Blood Transfusion Service Board,*[53] where Laffoy J refused to allow a claimant who had used infected blood products and been infected with Hepatitis C to use an assumed name. These cases show a preference on the part of the courts for the preservation of the public administration of justice to the private interests and wishes of parties.[54] Indeed, the requirement to administer justice in public has also been recognised as superior to an applicant's right to a good name: in *Re Ansbacher (Cayman Ltd)*[55]*,* McCracken J held that "it is often said that justice must not only be done, but must also be seen to be done, and if this involves innocent parties being brought before the Courts in either civil or criminal proceedings, and wrongly accused, that is unfortunate, but is essential for the protection of the entire judicial system."[56]

Recently, the Supreme Court has softened its position through the case of *Gilchrist and Rogers v Sunday Newspapers Ltd.*[57] O'Donnell J commented that the *In Re R Ltd* has been unfortunately interpreted as imposing "an almost blanket rule which precluded even minor adjustments of the obligation such as permitting a litigant to use a pseudonym, or initial, or direct that the parties not be identified."[58] He advocated an approach that sees a departure from the principle of open justice as an exception, and notes that courts should instead "consider steps short of a hearing *in camera* such as directing that the parties are not identified."[59]

As a final observation on this issue, it is worth remarking that super-injunctions do not appear to be a regular feature within the Irish legal system. Although, by their very definition, there can be no data on the issuing of super-injunctions, their usage is certainly not as frequent as in the UK and other jurisdictions, that jurisdiction has recently stepped back from them, further highlighting the commitment of the Irish Courts to administering justice in public.

The press and the judiciary

The media are essential in informing the public of how the courts system operates and of the decisions handed down by the judiciary. Principle 1 of the Istanbul Declaration of course recognises this in a concrete way. In this era of 'fake news' and dissemination of news through social media and other technological outlets, the access of media to the courts and their responsibility to the public to inform them of judicial matters is under constant scrutiny. This requirement took on a constitutional dimension in *Irish Times Ltd v Murphy* where the Supreme Court held that Article 34.1 was not respected in proceedings where there was an order prohibiting the media from contemporaneous reporting of the proceedings. Keane J held that the essence of Article 34.1 "would be eroded almost to vanishing point if the public had to

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[52] Ailbhe O'Neill, 'Open Justice Revisited – *Gilchrist and Rogers v Sunday Newspapers Ltd,'* presented at the Irish Supreme Court Review Conference on the 6th of October 2018, at 3.
[53] *Roe v Blood Transfusion Service Board* [1996] 3 IR 67.
[54] Ailbhe O'Neill, 'Open Justice Revisited – *Gilchrist and Rogers v Sunday Newspapers Ltd,'* presented at the Irish Supreme Court Review Conference on the 6th of October 2018, at 3.
[55] *Re Ansbacher (Cayman) Ltd* [2002] 2 IR 517.
[56] *Re Ansbacher (Cayman) Ltd* [2002] 2 IR 517.
[57] *Gilchrist and Rogers v Sunday Newspapers Ltd.* [2017] IESC 18
[58] *Gilchrist and Rogers v Sunday Newspapers Ltd.* [2017] IESC 18, at [37].
[59] *Gilchrist and Rogers v Sunday Newspapers Ltd.* [2017] IESC 18, at [39].

depend on the account which might be transmitted to them by such people as happened to gain admission to the court room for the trial in question."[60]

The place of the media within the framework as defined by Article 34.1 of the Constitution was considered by Charleton J in *MARA (Nigeria) v Minister for Justice*. He stated that:

> It follows that Article 34.1 requires that proceedings in court be open to the public and this entails the attendance of print and broadcast media as part of the scrutiny which judicial conduct and judicial decisions are subject to in a democratic society. The media are entitled to issue, and perform a public service in circulating, fair and accurate reports of litigation.[61]

Recently, as part of the Data Protection Act 2018, journalists are entitled to clear and uncontested access to court documents as laid out in new guidelines from the Courts Service of Ireland, which have been effective since 1 August 2018.[62] This is in contrast to the previous position, whereby only interested parties were entitled to access all documents. On these new guidelines, the Chief Executive of Court Service stated that:

> The changes are a transparent measure to support the role of an independent courts system in our democracy, while respecting both the restrictions which apply to certain categories of court proceedings, and the control which a court exercises over proceedings before it.[63]

There is also an ongoing debate as to whether television cameras should be permitted into Irish courtrooms. The most commonly cited reason for refusing the broadcasting of proceedings is the potential for unfair pre-trial publicity, with the Supreme Court asserting in *D v DPP* that "on the hierarchy of Constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute."[64] In 2017, however, cameras were permitted into the Supreme Court for the first time to film the delivery of judgments, with the Chief Justice expressing hope that this would lead to a wider filming of court proceedings in the future.[65] In realm of tribunals, the Disclosures Tribunal was first in February 2017 to allow the filming of the judge's opening address pleading for the public's help in the solution of the matters of public moment referred for judicial decision.

Case management and efficiency of proceedings

A further salient element that we will consider is case management. At present, there are many issues surrounding the costly nature of taking proceedings in Ireland – indeed, Ireland is now listed at the third most expensive country in the world in which to litigate globally.[66] Possibly, the

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[60] *Irish Times Ltd v Murphy* [1998] 1 IR 359, at 409.
[61] *MARA (Nigeria) v Minister for Justice* [2014] IESC 71, at [29].
[62] Peter Murtagh, "'New measures to aid 'justice being administered in public' *The Irish Times* (28 July 2018) <<https://www.irishtimes.com/news/crime-and-law/new-measures-to-aid-justice-being-administered-in-public-1.3579589>> (accessed 4 October 2018).
[63] Peter Murtagh, "'New measures to aid 'justice being administered in public' *The Irish Times* (28 July 2018) <<https://www.irishtimes.com/news/crime-and-law/new-measures-to-aid-justice-being-administered-in-public-1.3579589>> (accessed 4 October 2018).
[64] *D v DPP* [1994] 2 IR 465 (Denham J).
[65] "Supreme Court proceedings to be broadcast for the first time" *RTE News* (23 October 2017) <<https://www.rte.ie/news/courts/2017/1023/914644-courts-cameras/>> (accessed 4 October 2018).
[66] Peter Charleton, "Case Management: Fairness for the Litigant, Justice for the Parties", Speech delivered to the Munster Bar in Cork City, March 2015.

situation is worse since proceedings may take longer. Since the 1980s, litigation in Ireland has become significantly lengthier and more costly, owing in part to increased European legislation, a dramatic increase in the frequency of lay litigants, and changes in the way that counsel may approach a case, such as more thorough examination of witnesses.[67] An important call for change can be read in the Supreme Court judgement of *Talbot v Hermitage Golf Club*, where the Chief Justice suggested that the laissez-faire approach to litigation prevalent in Ireland could be in breach of Article 6 of the ECHR, and that a litigant's rights had to be considered 'in the context of the other demands on court time.'[68] This case also lays out guidelines as to how much time should be spent on a case.

Principle 2 of the Istanbul Declaration states that "court users are entitled to timely and efficient services" and also to "the highest standards of ethical conduct, professionalism and accountability from court personell."

Charleton J advocates interpreting *Talbot* as permitting the first stage of judicial case management, and advises reform of the Rules of the Superiors Courts to improve efficiency in litigation, which will make Ireland a much more attractive destination in which to do business.[69] This call for change has been heeded in part, as two pieces of legislation enacted in 2016 amending the rules of court have gone some way towards abating this problem.[70] The Rules of the Superior Courts now give judges the power to set strict time tables and present the parties with directions to identify issues and reach trial stage sooner, as well as ordering staged hearing in an effort to make proceedings less cumbersome.[71] The rules promise to reduce delays and cost, and improve the conduct of trials, but further inspiration from procedures in the UK (where the length of time from lodging of papers to release of judgement stands at 437 days as opposed to 650 in Ireland) could still be sought. The commercial court in Ireland does even better with 90% of cases completed well within 365 days.

A particular area of concern is in relation to inefficiency and costliness surrounding expert witnesses. Charleton J discusses the potential consequences of this inefficiency in relation to one case that came before him:

> This trial lasted 58 days: 6 days for submissions and the rest for testimony; expert evidence being the vast majority of it. Another case on pyrite heave ran before the Commercial Court for 159 days and then settled. Counsel proofed this case very carefully. They cannot be faulted, but must rather be praised. Calling several experts on the one topic, however, may be an issue that will require the trial judge to be involved in directing appropriate proofs, a step beyond case management, if delay and expense are not to be allowed to potentially defeat the right of access to the court guaranteed in Bunreacht na hEireann.[72]

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[67] Peter Charleton and Saoirse Molloy, "Case Management: Fairness for Litigants, Justice for the Parties" (2015) 20(3) The Bar Review 59, at 60.
[68] *Talbot v Hermitage Golf Club* [2014] IESC 57, at [47].
[69] Peter Charleton and Saoirse Molloy, "Case Management: Fairness for Litigants, Justice for the Parties" (2015) 20(3) The Bar Review 59.
[70] The Rules of the Superior Courts (Conduct of Trials) 2016 (SI 254 of 2016); the Rules of the Superior Courts (Chancery and Non-Jury actions and Other Designated Proceedings: Pre-Trial Procedures) 2016 (SI 255 of 2016)
[71] See <<https://www.mccannfitzgerald.com/uploads/7104-Litigation_Update_-_New_Rules_to_Improve_Litigation_and_Cut_Delay_1.pdf>> (accessed 4 October 2018)
[72] *James Elliott Construction Limited v. Irish Asphalt Limited* [2011] IEHC 1.

The new rules of court mentioned above also goes some way towards creating a fairer playing field for expert testimonies. It requires parties to disclose written summaries of the evidence of those that they intend to call, and discourages unnecessary expert evidence. Unless there are special circumstances, the rules provide that each party may only have one expert in a particular field on a particular issue. It also allows for a practice that is known as 'hot-tubbing' whereby both parties' experts meet before the trial to try and narrow or agree on disputed issues relating to their expertise in the case.[73] Charleton J describes how this process operates:

> This was developed in Australia. Its efficacy depends on there being only one expert on each side for each issue. An expert will give a presentation; no examination in chief. Her or his opposite number will give a presentation; no examination in chief. Or, the expert statements can be taken as read. Before the experts are sworn, they have to produce the dreaded joint statement about what are the fundamentals, what is agreed, what is in dispute. When the experts have been in the hot tub, then with the leave of the judge, certain questions may be asked or issues addressed by counsel; cross examination, in other words, but limited and focused.[74]

Legal and procedural certainty

In ensuring a wide and transparent access to justice, it is important that the state of the law and the procedures that litigants must follow to take proceedings is clear and easily ascertainable. The principle of legal certainty has been identified as "one of the fundamental aspects of the rule of law" by the European Court of Human Rights.[75] The European Commission for Democracy through Law has identified the following functions of the principle of legal certainty:

> … it helps in ensuring peace and order in a society and contributes to legal efficiency by allowing individuals to have sufficient knowledge of the law so as to be able to comply with it. It also provides the individual with a means whereby he or she can measure whether there has been arbitrariness in the exercise of state power. It helps individuals in organising their lives by enabling them to make long-term plans and formulate legitimate expectations.[76]

Professor Takis Tridimas explains this concept in a general fashion:

> The principle of legal certainty expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly. The affinity of the principle with the rule of law is evident. In Black Clawson Ltd v. Papierwerke AG, Lord Diplock stated that 'the acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it {[1975] AC 591 at 638}'. … The principle acquires particular importance in economic law. Economic and commercial life is based on advance planning so that clear and precise legal provisions reduce transaction costs and promote efficient business.

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[73] See <<https://www.mccannfitzgerald.com/uploads/7104-Litigation_Update_-_New_Rules_to_Improve_Litigation_and_Cut_Delay_1.pdf>> (accessed 4 October 2018)
[74] Peter Charleton, "Case Management: Fairness for the Litigant, Justice for the Parties," Speech delivered to the Munster Bar in Cork City, March 2015.
[75] European Court of Human Rights, case of Zasurtsev v. Russia, no. 67051/01, 27 April 2006, paragraph 48.
[76] <<https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)014-e>>, at 7.

> Legal certainty may thus be seen as contributing to the production of economically consistent results.[77]

Recently, the Irish Supreme Court has discussed this concept on two occasions. In *Blehein v Minister for Health,* Charleton J remarked that "the principle of the pursuit of "true social order" as a declared aim of the Constitution in the Preamble, places certainty of law at the heart of the legal system."[78] In *M v Minister for Justice,* the Supreme Court explained how the Irish legal system balances certainty and flexibility of the law:

> The fact that it is only the central reasoning leading to the particular decision (in Latin the *ratio decidendi*) which forms a binding part of the court's decision having effect beyond the individual case is of course, a familiar part of the principle of *stare decisis* which itself is an essential part of the common law system of law. The fact that a *ratio* is binding provides the element of certainty and predictability: the limitation of the binding nature of a decision to the *ratio* provides some necessary flexibility.[79]

Judicial remuneration

The way in which judges are remunerated has fundamental implications for the integrity and independence of the judiciary. In respecting the doctrine of the separation of powers, it is imperative that the decisions of judges cannot be manipulated by either financial rewards or punishment stemming from the government or private parties. According to the original wording of the Constitution, Article 35.5° stated that "the remuneration of a judge shall not be reduced during his continuance in office." This article was considered by the Supreme Court in the case of *O'Byrne v Minister for Finance,*[80] where the widow of a Supreme Court Justice argued that the paying of tax by her husband was contrary to this provision. The Supreme Court rejected this argument. Maguire CJ held that "the purpose of this article is to safeguard the independence of judges. To require a judge to pay taxes on his income on the same basis as other citizens and thus to contribute to the expenses of government cannot be said to be an attack on his independence."[81] Kingsmill Moore J added that "if the object of the constitutional provision is to safeguard the independence of the Judiciary from pressure or interference by the Executive, this object is attained so long as the tax is not used to discriminate against the judges as such."[82] However, judges remuneration could not be reduced in any other circumstances, even in instances of cuts to the pay of all other public sector workers.

Following much public unrest over this position in the wake of the 2008 financial crisis, the 29th Amendment to the Constitution was passed by referendum in 2011. This amended Article 35.5° to the following:

> 5 1° The remuneration of judges shall not be reduced during their continuance in office save in accordance with this section.

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[77] Takis Tridimas, *Principles of EC Law* (1999, Oxford University Press), 163.
[78] *Blehein v Minister for Health* [2018] IESC 40, at [12].
[79] *M v Minister for Justice* [2018] IESC 14, at [10.25].
[80] *O'Byrne v Minister for Finance* [1959] IR 1
[81] *O'Byrne v Minister for Finance* [1959] IR 1, at [38].
[82] *O'Byrne v Minister for Finance* [1959] IR 1, at [73].

> 2° The remuneration of judges is subject to the imposition of taxes, levies or other charges that are imposed by law on persons generally or persons belonging to a particular class.
>
> 3° Where, before or after the enactment of this section, reductions have been or are made by law to the remuneration of persons belonging to classes of persons whose remuneration is paid out of public money and such law states that those reductions are in the public interest, provision may also be made by law to make proportionate reductions to the remuneration of judges.

In essence, the provision now allows the government to reduce judges' pay in line with reductions imposed on others paid from the public purse. Some have criticised this amendment, with Kelly noting that 'the lack of specificity in the provision results in a failure to protect against the possibility of an unscrupulous government using reductions as a means of undermining judicial independence.'[83] However, the amendment is largely unchallenged and is not widely regarded as an affront to the integrity of the judiciary.

We also must consider the importance of remuneration in attracting top legal talent to the bench. Becoming a member of the judiciary is the pinnacle of the legal profession, and it is important that it is financially viable for leading lawyers to accept a posting. As Winston Churchill once remarked "the Bench must be the dominant attraction to the legal profession… heavily will our society pay if it cannot command the finest characters and the best legal brains which we can produce."[84]

With that in mind, it's good that we're all here together to support the bedrock on which our powers are effective and at the same time are subject to public scrutiny!

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[83] Clare Elizabeth Kelly, "Ireland and Judicial (In)dependence in light of the Twenty-Ninth Amendment to the Constitution" (2015) 18 Trinity College Law Review 15, at 19.

[84] Robert Rhodes James (ed.), *Winston S Churchil: His Complete Speeches, 1897-1963* (vol 8, 1974, Chelsea House Publishers), at 8548.