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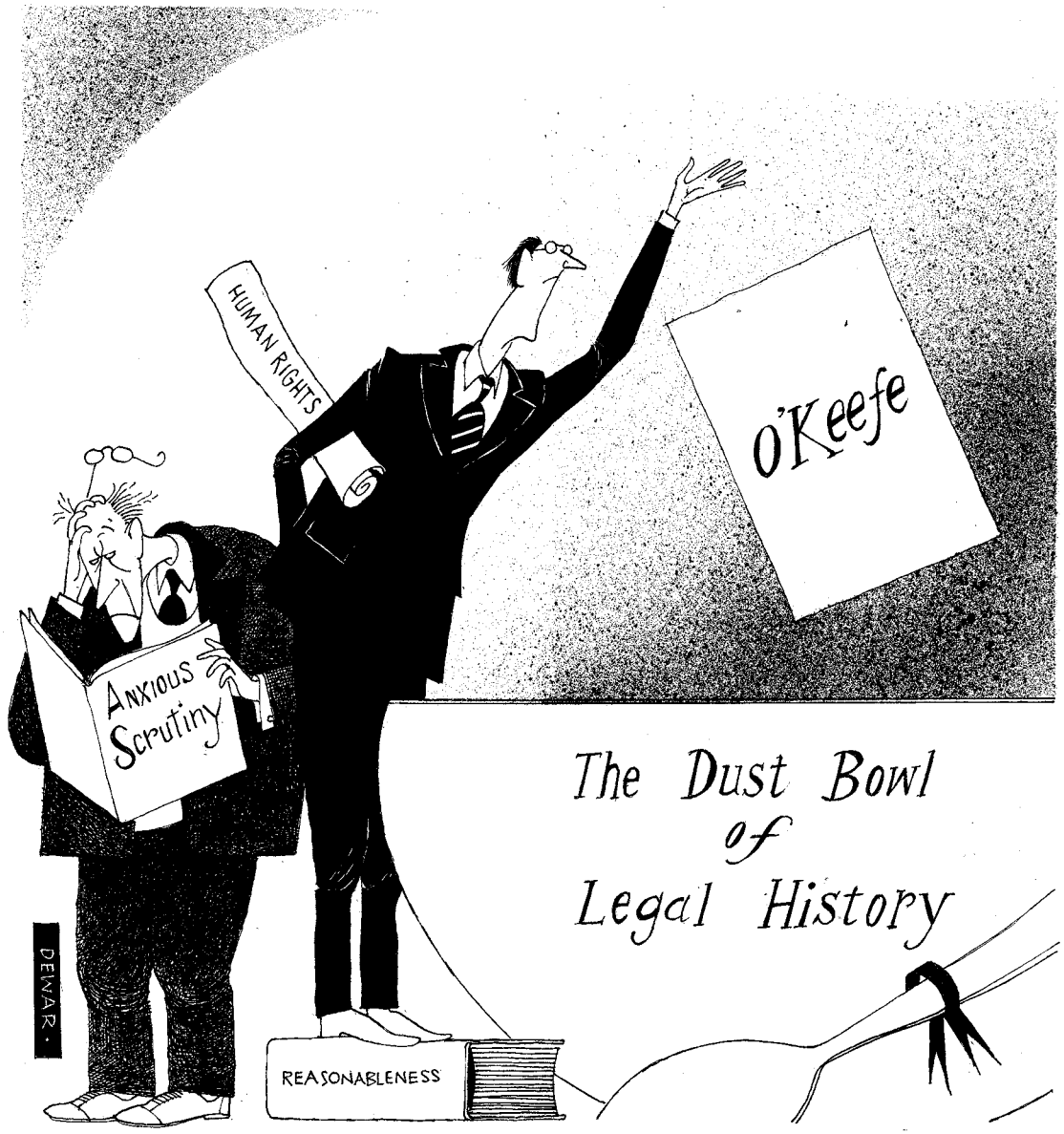


In this issue

Employment Law in Ireland

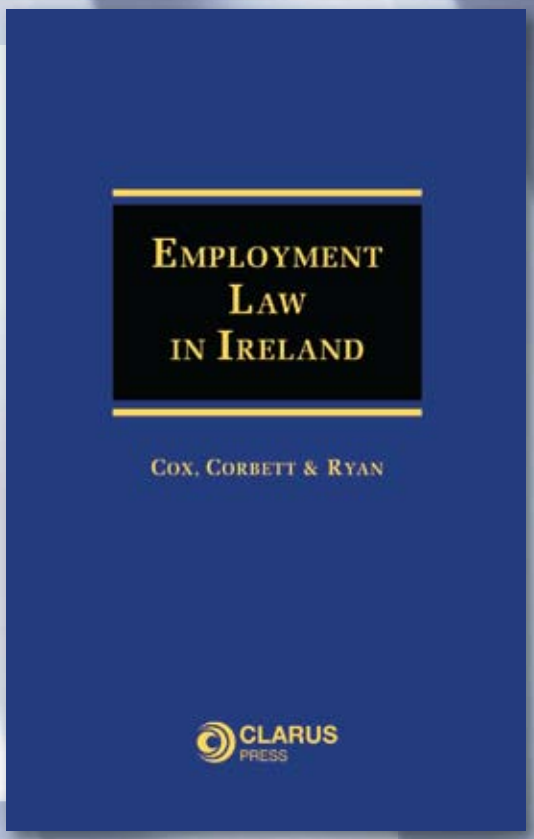
Neville Cox, Val Corbett and Des Ryan

Employment Law in Ireland is a new book which provides a comprehensive account of this increasingly complex area of law.

Employment law is a rapidly expanding and increasingly important aspect of Irish legal practice. Significantly influenced and informed by developments at European Union level and by various Constitutional imperatives, it is composed not only of a complex body of legislation and case law, but also of determinations from specialist tribunals such as the Labour Court, the Employment Appeals Tribunal and the Equality Tribunal.

In this book the authors draw together the various strands and sources of employment law, as it applies in Ireland, into a coherent framework. All aspects of employment law are considered, ranging from the legal concerns that apply before an employment contract is entered into, to the various entitlements and obligations of employer and employee while the contract is ongoing, to the relevant legal framework governing the circumstances in which an employment relationship is terminated.

Employment Law in Ireland is aimed at legal practitioners who specialise in employment and related areas of law, students, HR managers, trade union members and any one interested in employment law.



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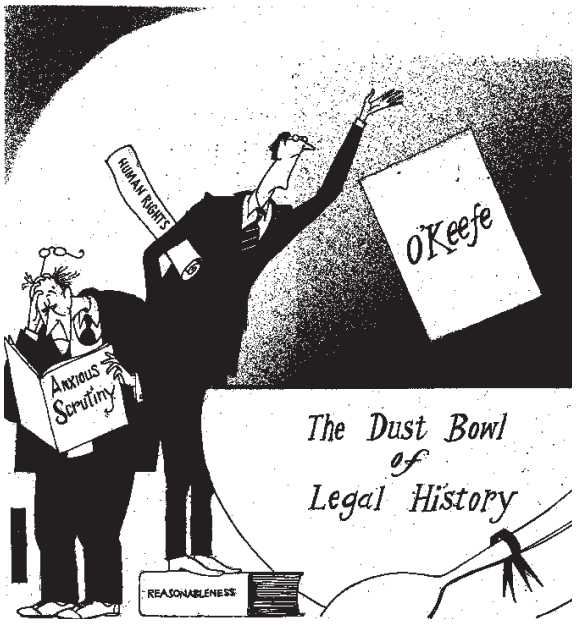


The Restrictive Doctrine of Administrative Unreasonableness: Time for O'Keefe to Go?

By David Langwallner,
Dean of Law,
Griffith College Dublin.

> "To be reviewable [as] irrational, it is not sufficient that a decision-maker goes wrong or even hopelessly and fundamentally wrong: he must have gone completely and inexplicably mad."[1]

> "A rainbow of possibilities with the intensity of review varying depending on the context and other factors."[2]

Introduction

The purpose of this paper is to examine the ambit of the doctrine of administrative unreasonableness in Irish Law and to ask the question whether the interpretation of reasonableness provides an appropriate standard of review in a democracy ostensibly committed to human rights protection. The paper will also address the bifurcation between reasonableness and merits based review and assess whether merits based review has been unfairly discounted by the Irish Judiciary particularly in claims involving human rights issues.

In this context I will analyse the much discussed doctrine of "anxious scrutiny" the status of which has not yet been resolved in this jurisdiction by the Supreme Court[3] and has led to a battery of contradictory High Court statements.[4] In particular I shall examine how the courts of the United Kingdom have embraced such a test and how *anxious scrutiny* best understood involves and invokes merits based review.

I will then in tandem analyse the doctrine of proportionality and how the jurisprudence of the Convention has in effect scuppered traditional reasonableness in UK Law. In particular I will demonstrate how proportionality imported into UK jurisprudence has changed the contours of reasonableness and indeed the contours of UK administrative law. Proportionality as an additional ground of judicial review which we now have to endorse, to be convention compliant involves both, in my view, merits based review *and* an assessment by the reviewing court as to whether a human right has been violated. Thus it goes one crucial step further than even *anxious scrutiny*.

Further, I shall seek to demonstrate how other jurisdictions have grappled with the thorny, recondite and inter-linked problems of reasonableness, proportionality and judicial review. In particular, welcome guidance will be derived from recent developments in Canadian Jurisprudence on reasonableness where the Canadian courts do not embrace an *O'Keefe*[5] test but have a more nuanced and balanced understanding of review based on correctness and reasonableness and that even their test of reasonableness differs from *O'Keefe.* However, much depends on context and an *O'Keefe* type test may be appropriate in a residuum of Canadian cases especially where there is a privative clause,[6] but if there is no defined special expertise of the reviewed body or the reviewed body goes beyond reasonable responses then the Canadian court will intervene. Further, it will also be demonstrated how New Zealand administrative law adopts a variable system of review, as, in substance, do the South Africans and recently India has begun to embrace the concept of proportionality. Only Australia is recognisably like us.[7]

The overarching position will be for a comparative common law enquiry as to the scope of reasonableness and whether comparatively Irish law is deficient in its protection.

The paper will in substance argue that a modified form of merits based review within the rubric of reasonableness and a superadded examination as to whether a human rights claim is violated is both correct and warranted by our obligations under the Convention and that in simple terms the test adumbrated in *O'Keefe v An Board Pleanála* should simply be discarded to the dustbowl of legal history as far as human rights claims are concerned. The question of its appropriateness for other forms of judicial review that do not warrant human rights considerations will also be considered although not the central focus of this paper. It will be argued that *O'Keefe* outside of human rights claims should live on in an attenuated sense of the terms as one of a portfolio or sliding scale of reasonableness review albeit at the fringes where a greater degree of deference is required.[8]

The Traditional Doctrine of Reasonableness

The locus classicus for reasonableness is the judgment of Lord Green MR where in *Associated Picture Houses Limited v Wednesbury Corporation*[9] the judge opined that:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which ought not to have been taken into account or conversely have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that although the local authority has kept within the four corners of the matter which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no local authority could ever have come to it. In such a case, I think the court can interfere."

Earlier in his judgment Lord Greene MR cited the example of the "red haired teacher dismissed because she had red hair" as an example of where a reasonableness infraction may be found. Thus from the outset the barrier has been set very high.

The Irish courts have taken a strict view of what has been termed *Wednesbury* unreasonableness. They are markedly reluctant to engage in what is termed merits based review or to overturn an administrative decision simply because they disagree with it or merely on the ground that on the facts they would have reached a different conclusion.

In order to succeed on reasonableness the applicant would have to satisfy the test laid down in *The State (Keegan) v Stardust Victims Compensation Tribunal*[10]:

> "The decision sought to be impugned must be so unreasonable that no reasonable decision maker could ever have come to it."

Further, and crucially in accordance with the unsparing logic of *O'Keeffe v An Bord Pleanála*[11] an applicant must demonstrate that a decision is fundamentally at variance with reason and common sense; that the decision is indefensible for being in the teeth of plain reason and common sense; and that the decision-maker has flagrantly rejected reason or disregarded fundamental reason or common sense in reaching his decision.

It does seem otiose to say that the courts in Ireland will therefore not interfere with a decision of an administrative decision-maker merely on the grounds that they disagree with it. Thus in terms of *O'Keefe* they will not interfere if they are satisfied that, on the facts as established they would have raised different inferences and conclusions nor if they are satisfied that the case against the decision is stronger than the case for the decision.

However, a decision will be set aside if, as aforementioned, it is "indefensible for being in the teeth of plain reason and common sense."[12]

The high point or low point of the test was put in an even more extreme form in *O'Keefe* where the courts indicated that they will accord a high degree of deference to a body which has expertise in the area of planning but would not interfere unless: "The decision making authority had before it no relevant material which would support its decision."[13]

The most dramatic statement on the application of the test is by O'Sullivan J in A*er Rianta cpt v Commissioner for Aviation Regulation*[14] which is worth quoting in full to illustrate how far the traditional position of the Irish Courts is hostile to merits based review and provides an impoverished understanding of reasonableness. O'Sullivan J concluded thus:

> "To be reviewable [as] irrational, it is not sufficient that a decision-maker goes wrong or even hopelessly and fundamentally wrong: he must have gone completely and inexplicably mad; taken leave of his senses and come to an absurd conclusion. It is only when this last situation arises or something akin to it that a court will review the decision for irrationality."

In short at its highest the Irish courts will only review a decision of a tribunal or lower court or other body on reasonableness criteria if the decision-maker goes "inexplicably mad".

Such a conclusion invites perforce the assessment of whether the approach of the Irish courts is rational.[15]

The United Kingdom and the European Court of Human Rights: Proportionality and Anxious Scrutiny

This traditional *Wednesbury* approach approach was summed up in 1982 in *R. v The Chief Constable of North Wales ex parte Evans*, where the Court said that judicial review

> "… is concerned not with the decision but the decision-making process … judicial Review as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."[16]

Further, Lord Diplock in *Council of Civil Service Unions*[17] in 1984 in setting out set out the three accepted grounds for granting judicial review, namely "illegality", "irrationality" and "procedural impropriety". A decision could thus be overturned for "irrationality" or "unreasonableness" but the opening was very narrow indeed. Lord Diplock defined it as "a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."[18]

However, *Wednesbury* itself has been heavily criticised. Lord Cooke after describing *Wednesbury* as "apparently briefly-considered", referred to its famous proclamation as a "tautologous formula" representing an undesirable "admonitory circumlocution."[19]

Instead the learned judge preferred the simple test "whether the decision in question was one which a reasonable authority could reach." Lord Cooke also took the view that European concepts of proportionality would produce the same result as the application of English principles of reasonableness though whether this conclusion is overly sanguine will be examined.[20]

Crucially, In the earlier case of *R v Ministry of Defence; Ex p. Smith*[21] the Court of Appeal (Bingham MR, Henry and Thorpe LJJ) accepted two propositions in re-defining reasonableness in the light of human rights principles that:

1. The test of unreasonableness was whether "the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker."
2. Secondly, because any human rights context was important,

> "[t]he more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable…"

The question in that case was whether possessing a homosexual orientation could justify dismissal from the armed forces. The Court decided, reluctantly, and partly because the policy was supported by Parliament, that the practice could not be determined to have the requisite degree of unreasonableness.

It might be noted that *Smith* as well as dealing with reasonableness invoked the doctrine of anxious scrutiny or intense review as it has been alternately termed though not finding on the facts that employing anxious scrutiny there had been a violation.[22] In substance the inquiry is that in examining human rights claims on reasonableness criteria the courts should do so with anxious scrutiny.[23]

Anxious scrutiny has had a somewhat chequered history in Ireland. An interesting illustration as to judicial perplexity is provided in *V.Z. v Minister for Justice*[24] where McGuinness J opined:

> "I have a certain difficulty in the interpretation of the phrases used by the English courts in the cases to which we have been referred – "anxious scrutiny", "heightened scrutiny" and similar phrases. From a humane point of

view it is clear that any court will most carefully consider a case where basic human rights are in question. But from the point of view of the law, how does one define the difference between, say, "scrutiny", "careful scrutiny", "heightened scrutiny", or "anxious scrutiny"? Can it mean than in a case where the decision-making process is subject to "anxious scrutiny" the standard of unreasonableness or irrationality is to be lowered? Surely not. Yet it is otherwise difficult to elucidate the legal significance of the phrase."

Nonetheless, the case law in the United Kingdom seems tolerably clear as to its meaning. The courts have opined that anxious scrutiny connotes the following:

(i) The court must be satisfied that the respondent has addressed the correct questions or issues and given the appropriate anxious scrutiny to them.
(ii) In a reading of the reviewable decision the court must be able to identify proper and adequate reasons for the decision which deal with the substantial questions in issue in an intelligible way.
(iii) The decision maker must give anxious scrutiny to all the material before him/her.[25]

Further, it might be added that the European Court has accepted that the process of judicial review, under which decisions of this kind are indeed given the most anxious scrutiny, is capable of providing an effective remedy under the Convention: *Vilvarajah v United Kingdom*[26]; *TI v United Kingdom*.[27] Conversely it might be added that strict *Wednesbury* unreasonableness that has been determined not to comply can comply with the Convention in some instances.[28]

The aforementioned case of *Smith* went to the ECHR where the European Court dealt with the twin issues of Article 8 and proportionality.[29] The European Court passed over the English doctrine of reasonableness, apparently finding it to be unsatisfactory,[30] and applied the European doctrine of proportionality.[31] It upheld the claim and awarded damages. Rejecting the approach of the Court of Appeal and applying the principle that an interference with a human right protected by Art 8 will be acceptable only if the interference "answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued", the Court found a breach of Art 8 to be made out in that:

"the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention."

Proportionality was subsequently endorsed in the UK. For example in *In R (Daly) v Secretary of State for the Home Department*[32] Lord Steyn in a passage that has become classical opined:

"The contours of the principle of proportionality are familiar. *In de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

The learned judge also clearly indicated that the new test required:

"The reviewing court to assess the balance which the decision maker has struck, not merely whether it was within the range of rational or reasonable decisions."

He added that this "may require attention to be directed to the relative weight accorded to interests and considerations".

Thus quite apart from anxious scrutiny the United Kingdom in convention compliance has moved well beyond *O'Keefe* in human rights claims.

Further, in assessing proportionality the courts have indicated that proportionality requires a greater "intensity of review".[33] The doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

Thus, even the heightened scrutiny test developed in *Smith* is not necessarily sufficient for the protection of human rights. This is particularly so in that proportionality, in addition to requiring a consideration of the weight and balance of interests and considerations also requires the court to examine whether the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and whether the interference was really proportionate to the legitimate aim being pursued.

However, there is one substantial qualification. Along with the concept of proportionality in the United Kingdom goes a margin of discretion, frequently referred to as deference or, perhaps more aptly, latitude. This has been conveniently encapsulated in a passage in Lester and Pannick, *Human Rights Law and Practice*[34] quoted with approval by Lord Steyn in *Brown v Stott*[35]:

"Just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are some circumstances in which the legislature and the executive are better placed to perform those functions."

It is also clear that other courts and tribunals are given latitude, which recognises that the Court does not become the primary decision-maker on matters of policy, judgment and discretion, so that public authorities should be left with room

to make legitimate choices. The width of the latitude (and the intensity of review which it dictates) can change, depending on the context and circumstances. In other words, proportionality is a "flexi-principle". The latitude connotes the degree of deference by court to public body.[36]

Thus deference is not absent but depends on context and circumstances. It might be noted that the degree of deference given in human rights cases is for the aforementioned reasons limited.

These points have been also been mentioned in recent UK case law. Thus in *Baiai v The Home Secretary*[37] in 2006, Silber J in the High Court summarised with approval the test that Lord Steyn had set out in *Daly*. In *Huang v The Home Secretary*[38] in 2005 Lord Justice Laws indicated that: "In the new [post Human Rights Act] world the decision maker is obliged to accord decisive weight to the requirements of pressing social need and proportionality." Effectively, in this new world, which we of course are part of, the reviewing court must assess whether the decision maker has fulfilled the test of proportionality. Proportionality is thus now an added ground for judicial review.

The facts and resolution of the aforementioned *Baiai* case show how the United Kingdom courts use proportionality in judicial review of human rights claims in a matrix of facts relevant to this jurisdiction.[39] The case concerned a provision of UK asylum law that required non-EEA nationals who did not have a right to residence in the UK to obtain the permission of the Home Secretary in order to get married.[40] The purpose of the scheme was to prevent so called marriages of convenience that were aimed at securing leave to remain in the UK. The applicants challenged the provision on the basis that it was in breach of Article 12 of the ECHR protecting the right to marry.

Judge Silber in the High Court found that the objective of the legislation in question was legitimate and was sufficiently important to justify limiting a fundamental right (the right to marry). However, he then went on to hold that the particular measure taken was not rationally connected to this objective because it affects *all* marriages of persons subject to immigration control, not just those known or reasonably suspected to be marriages of convenience. He also held that in its width and breadth, the measure was disproportionate to the legitimate aim sought to be achieved.

The Court of Appeal upheld the High Court decision, saying:

> "In the light of the Convention jurisprudence, the Secretary of State can only interfere with the exercise of Article 12 rights in cases that involve, or very likely involve, sham marriages entered into with the object of improving the immigration status of one of the parties. To be proportionate, a scheme to achieve that end must either properly investigate individual cases, or at least show that it has come close to isolating cases that very likely fall into the target category. It must also show that the marriages targeted do indeed make substantial inroads into the enforcement of immigration control … the scheme in issue in this case does not pass that test."[41]

Another recent illustration is *R (Begum) v Denbigh High School*,[42] which concerned a Moslem schoolgirl who was refused permission to wear a jilbab. The applicant had challenged the decision both on the grounds that it had infringed her rights under the Convention and also that the school had not properly followed the procedures for making such decisions. Lord Bingham opined that:

> "The focus at Strasbourg is not and never has been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the Applicant's Convention rights have been violated."[43]

Thus reasonableness in human rights cases is no longer a sufficient or appropriate test in Europe or in the United Kingdom. The test is whether a right is violated.

In fact the death watch for *Wednesbury* unreasonableness is gathering pace. The Court of Appeal addressed the matter directly in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence*[44] and recognised the mounting push to replace *Wednesbury* unreasonableness with proportionality. The court opined that:

> "The strictness of the Wednesbury test has been relaxed in recent years." and "It is moving closer to proportionality and in some cases it is not possible to see the daylight between the two tests."

The court did however concede albeit with some reluctance that it was "not for this court to perform its burial rites."[45]

It might be added that this view of Dyson LJ for the court is at variance with the view of Lord Steyn's in *Daly* that anxious scrutiny was not identical with proportionality.

In conclusion it might be noted that the end of *Wednesbury* in the United Kingdom is not confined to human rights claims. As Craig[46] points to the assessment of reasonableness in a range of planning and industrial relations case being closer to whether the courts believed the exercise was unreasonable in the simple sense.

Conclusions from the United Kingdom

The United Kingdom has maintained reasonableness but restructured and amplified on it. First, the test is whether the decision maker was acting within a range of reasonable responses thus at least permitting a merits based review and much will depend on the nature and expertise of the tribunal but second and crucially as far as human rights and asylum matters are concerned unreasonableness must now be read with the added requirement that the public bodies decision must be looked at with anxious scrutiny and that despite the inability of some Irish judges to recognise what anxious scrutiny means it seems very clear to me. It is an investigation into whether there were proper and adequate reasons given for the decision and whether the reasons proffered for the decision were intelligible and all material was examined. That is merits based review quite simply where the UK courts will substitute their own opinion if the reasons proffered in a human rights context were suitably inadequate. This quite simply is merits based review however variable is application may be on particular facts.

But that is not all the UK courts have had to recognise that anxious scrutiny is not enough and that as a consequence of decisions of the European Court of Human Rights proportionality must be invoked as an additional ground for judicial review and what is this elusive proportionality?

Quite simply it involves an assessment of the weight and balance of the reasons proffered which is again merits based review and also whether there was a pressing social need or

a question of national security or public order justifying the decision. Above all the focus of proportionality is different. It is focusing not on *Wednesbury* reasonableness but on the simple question of whether the human rights of the individual are violated.

It does not need mentioning that whether we adopt anxious scrutiny or not, the interpretative obligation under section 3 of the European Convention on Human Rights Act 2003 will require Irish courts to adopt proportionality and proportionality. Firstly, it entails an assessment of the weight and balance of the reasons. This is a merits based review. Secondly it considers whether the public body violated human rights.

Whichever way you look at it, *O'Keefe* as far as human rights claims are involved should be confined to the dustbin of legal history and is doomed. The decent thing would be to over-turn it as far as human rights claims are concerned as soon as possible before it does more damage.[47] However, such observations do not encompass the support from other jurisdictions to which we now turn.

Dunsmuir[48]: All Change on Reasonableness in Canada

Until recently the Canadians had a tri-partite theory of judicial review. In essence, a decision was reviewable if it was either:

(i) Incorrect — the correctness standard;
(ii) Unreasonable;
(iii) Patently unreasonable.

The recent *Dunsmuir*[49] case has changed that test to embrace now only a twofold test of correctness and reasonableness but what do these labels mean?

In essence a decision was reviewed and is still reviewed in Canada on correctness criteria where no deference is shown to the reviewed body. A decision is reviewed on reasonableness where a mid level of deference is shown and a decision is reviewed on patent unreasonableness where a high level of deference is shown.

Iacobucci J, writing for the Canadian Supreme Court in *Law Society of New Brunswick v Ryan*[50] clarified the distinction between patent unreasonableness and unreasonableness as follows:

> "[A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" … A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.[51]
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing"[52] … Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did."

However, in practice the courts found these distinctions to be unworkable as both tests focused:

> "On the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported"[53]

The un-workability issues were also put thus by a learned Canadian commentator:

> "[T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality."[54]

Thus the court jettisoned the unworkable dual standard and replaced it with one standard of reasonableness defined thus:

> "Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[55]

This of course still leaves the question as to when this revamped theory of reasonableness applies instead of the aforementioned correctness criteria. The court concluded that deference is shown and reasonableness applied where:

(i) There is a privative clause which as aforementioned is a statutory direction from Parliament or a legislature indicating the need for deference.
(ii) A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

Other judges in the court, though in broad agreement, expanded on the nature of this new revamped unreasonableness and pointed out it may be a variable test. Thus:

> "The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be

made is more narrowly circumscribed. … In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material."[56]

However, in contrast, crucially, a correctness standard still applies where there is a question of law that is of central importance to the legal system and outside the specialised area of expertise of the administrative decision maker.

The final opinion in the case of Deschamps J is worth mentioning in that it draws a distinction between deference on law, deference on fact and deference on mixed questions of fact and law. As far as deference on law is concerned the opinions suggest where there is legal error there is no deference.[57] As far as deference on fact is concerned there is, in contrast, complete deference. How about mixed questions of fact and law then? The conclusion of the opinion is startling:

"When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court."[58]

Conclusions from Canada

Cross jurisdictional sampling and the drawing of lessons from another jurisdiction is a worthwhile but dangerous exercise. Dangerous particularly so in administrative and public law in that institutional structures vary so and doctrinal considerations also differ. For example, we do not have a privative clause as such. Nonetheless, it is possible in my view to extract the following of relevance to the present issue from the Canadian discussion:

(i) The old test in Canada of patent unreasonableness is in effect *O'Keefe* at its worst and the Canadians have abandoned it partially though retaining it as part a sliding scale of reasonableness. Thus *O'Keefe* is one option but one option only.

(ii) The new variable reasonableness standard will focus on whether there is a range of potentially acceptable outcomes which are defensible in terms of the facts and the laws. This is in my view, a form of merits based review. Where the outcome is unacceptable then the court will substitute its opinion as to the correct outcome but of course the level of defence will vary and a crucial question threading itself through the judgment is the question of expertise. A court will defer more in a situation where it does not have the requisite degree of expertise. Transplanting this to an Irish context in planning matters there should be more deference but in asylum and human rights matters there is no expertise deficit in a high court. It might be added that expertise in my view is central to the whole question of merits based review and inextricably linked with it.

Thus in my view the Irish High Court are just as competent to assess an asylum issue as the Minister for Justice or the Refugee Appeal Tribunal. They do not suffer from an expertise deficit in this respect nor conversely are Ministers, Civil Servants or Tribunals more competent. Further, if as some might maintain a body such as the RAT is a repository of specialist information which the High court does not possess two points arise. First the High Court is a constitutional court and asylum cases raise constitutional points and the weighing of constitutional and convention rights which the High Court is well equipped to deal with. Second the specialised nature inherent in tribunals such as the RAT can often lead to the development of "institutional mindsets" in tribunal members which The High Court is obligated to correct and off set.

However, in *Camara v Minister for Justice, Equality and Law Reform*,[59] the judgment in *O'Keefe* was extended to the Refugee Appeals Tribunal on[60] the basis that it was a body with particular experience and expertise as it dealt on a daily basis with the assessment of claims for refugee status. Further, as Hogan argues, in disagreeing with *Camara*[61] such bodies are not entitled to unlimited deference and are not repositories of expertise such that they are entitled to such deference:

"It was, therefore, one thing for Kelly J. to comment in Camara that the Authority has experience of dealing with such applications and that appropriate weight must be given to this fact. Such an approach is quite unexceptionable. It is, however, quite another to say that members of the Authority (who are either distinguished professional lawyers or former judges) have the specialist expertise in dealing with such complex issues as the details of African politics or the prison conditions in obscure countries or whether, indeed, it is likely that a claimant was tortured or is likely to be tortured such as would merit according the decision-makers the heightened judicial deference which specialists enjoy."

3. Further and crucially, the Canadians have still maintained the correctness standard reserving for their consideration and displaying no deference where there is a question of central importance to the legal system. At given points in the judgment in *Dunsmuir* it is absolutely clear that the courts take correctness as including constitutional questions. For example at Para 58:

Correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the Constitution Act, 1867: *Westcoast Energy Inc. v Canada (National Energy Board)*, [1998] 1 S.C.R. 322. Such questions, *as well as other constitutional issues*, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers' Compensation Board) v Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; Mullan, *Administrative Law*, at p. 60. (Emphasis Added)

Deference of any sort is simply inappropriate in cognisable constitutional issues and this of course also impacts on our asylum and human rights law. There is also the piquant observation of Deschamps J of crucial importance to asylum matters and worth re-emphasising that:

"When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court."[62]

Answering the question another way there is no doubt that a Canadian court would look at *O'Keefe* and its successors as an insufficient analytical tool to deal with the complexity and variability of review.

South Africa: Reasonableness Constitutionally Enshrined

In South Africa reasonableness has been enshrined in section 33 of the Final Constitution 1996 and in the Promotion of Justice Act section 6 where it is defined as "so unreasonable that no reasonable person could have so exercised the power or performed the function."

The interpretation of this utterance has recently been considered in *Bato Star Fishing v Minister for the Environment*.[63]

The court cited Lord Cook's aforementioned critique of *Wednesbury* in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*[64] and then continued that

> "Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."[65]

The court then outlined a definition of reasonableness:

> "What will constitute a reasonable decision will depend on the circumstances of each case, … Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected."[66]

The court indicated that it would show an expert decision maker a degree of deference and respect. In analysing the degree of deference the court indicated that the decision maker may take into account equilibrium of factors but:

> "This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."[67]

The court concluded that:

> "Which equilibrium is the best in the circumstances is left to the decision-maker. The court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances."[68]

South Africa also is far from *O'Keefe* — a world apart.

India Embraces Proportionality in Certain Instances

In recent cases in the Indian Supreme Court reliance has been placed on the judgment of Steyn J in *R (Daly) v Secretary of State for the Home Department In Commissioner of Police v Syed Hussain*.[69] The court indicated that unreasonableness was giving way to proportionality in certain cases and in *Indian Airlines v Prabha D Kannan*[70] the court indicated in considering the scope of judicial review as far as outsourcing of the sovereign activities by the state.

> "This court has been expanding the scope of judicial review. It included the misdirection in law, posing a wrong question or irrelevant question and failure to consider relevant questions. … Doctrine of unreasonableness has now given way to doctrine of proportionality."

New Zealand: Goodbye Wednesbury, Hello Layers of Review

Although *Wednesbury* unreasonableness was endorsed as recently as 1996 in New Zealand in *Wellington City Council v Woolworths New Zealand Ltd No. 2*[71] in the Supreme Court. Since then there has been a gradual but pervasive whittling away of it by appeal and high court judges arguing in substance for a variable system of review.[72] The New Zealand Court of appeal suggested in *Pharmaceutical Management Agency Ltd v Roussell*[73] a less restrictive approach embracing the US "hard look" doctrine was appropriate in human rights cases. This view was also endorsed by Hammond J in *New Zealand Public Service Association Inc v Hamilton City Council*[74] where the court indicated it would have a hard look at the logical and factual choices made by agencies and interfere for inadequacy. Hammond J reverted to the same themes in *Discount Brands v Northcote Mainstreet*[75] where he indicated that the depth of review varied with context and argued for a *hard look* or what he termed *"Super Wednesbury."* The judge concluded that:

> "At least where important … interests are at stake (for instance in human rights cases) so called Wednesbury review should be abandoned and the depth of review altered to (at least) a less deferential reasonableness inquiry."[76]

Baragwanath J sought to articulate a variable system of review in a series of cases employing such terms as "hard look" and "anxious scrutiny" and presented a three tiered system of review: lower, intermediate and higher[77] In *Progressive Enterprises v North Shore City Council*[78] the judge expanded upon and clarified his hierarchy:

(i) The court forming its own factual conclusion on matters of precedent fact
(ii) A judgement of proportionality including in some cases a less restricted approach or hard look.
(iii) Three Conventional *Wednesbury* tests of progressively decreased intensity including logical fallacy, the less intense intermediate *Wednesbury* with the so outrageous in its defiance of logic standard and the most deferential *Super Wednesbury* requiring a pattern of perversity bad faith or misconduct.[79]

In the most detailed treatment of the issue the judgment off Wild J in *Wolf v Minister for Immigration*[80] A sliding scale of review was endorsed[81] The judge opined in endorsing the sliding scale that:

> "I consider the time has come to state — or really to clarify- that the tests as laid down *in GCHQ and Woolworth* respectively are not, or should no longer be, the invariable or universal test of unreasonableness applied in New Zealand public law".[82]

Other judgments have followed suits and other language added to the lexicon of review. For example "the less tolerant eye" standard. In any event a variable intensity of review is now a commonplace feature of New Zealand judicial review. In Knight's words:

> "A sliding scale of reasonableness has replaced the previously all embracing *Wednesbury* standard."[83]

Life in That Old O'Keefe Still: Australia[84]

They do things differently in far off Australia. The Australian jurisprudence in all fairness and in the interests of reasonableness sees little or no interest in expanding on traditional reasonableness and has adopted a very strict understanding of same even in human rights cases. Thus in *Minister for Immigration and Multicultural Affairs v Eshetu,*[85] an Ethiopian national applied for a protection visa under the Migration Act 1958. The core issue was whether or not the respondent could be accorded refugee status on the basis of anti government activity for which some others had been killed. The Minister rejected his application and a review of that decision by the Refugee Review Tribunal was not successful. The respondent sought review of the Tribunal's decision in the Australian High Court arguing that it had reached a decision that was so unreasonable that no reasonable authority could have come to it.

The High Court in upholding the tribunal prescribed very limited boundaries for unreasonableness insisting that it is to be used only in the most extreme of circumstances. Gleeson CJ and McHugh J in particular emphasised that when using unreasonableness a court must exercise caution as it must be vigilant to examine only the legality of an impugned decision. Unreasonableness must not be used as a guise under which courts seek to exercise review of the merits of a decision. Thus they expressly reject merits based review and opined that:

> "Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as "illogical" or "unreasonable" or even "so unreasonable that no reasonable person could adopt it." If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence."[86]

The court elaborated that in order to satisfy the unreasonableness test there must indeed be something more than mere divergence of opinion. There must be something overwhelming and what does overwhelming in fact mean? In order to establish that something is overwhelming the evidence needs to definitively indicate only one possible conclusion and not be supportive of alternative conclusions. In the case that was not demonstrated as there was some probative material and some logical support for the Tribunal's conclusions. It was not for the courts to progress beyond this and express disagreement and then criticise the decision as unreasonable.

Further, the court indicated that:

> "Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as 'illogical' or 'unreasonable' or even 'so unreasonable that no reasonable person could adopt it.' If these are merely emphatic ways of saying that the reasoning is wrong, then they have no particular legal consequence".[87]

And also noted that:

> "…the fact that a decision involves an error of law does not mean that it is unreasonable."[88]

And finally.

> "…an unreasonable decision is one for which no logical basis can be discerned."[89]

This conclusion was reinforced in *Minister for Immigration and Multicultural Affairs v Betkhoshabeh*[90] where the court indicated that there was a difference between reviewing questions of law and interfering with questions of fact. The role of a court is to maintain legality. It must not transgress into the merits of a decision. The court applied *Eshetu* and stated that that unreasonableness cannot be used simply because there is disagreement with someone else's reasoning. Again, the court looked at whether or not the evidence was supportive of only one conclusion.

Finally, in *Re Minister for Immigration and Multicultural Affairs*; *Ex p. Applicant S20/2002*[91] the court opined that:

> "As was pointed out in *Minister for Immigration and Multicultural Affairs v Eshetu*, to describe reasoning as illogical, or unreasonable, or irrational, may merely be an emphatic way of expressing disagreement with it. If it is suggested that there is a legal consequence, it may be necessary to be more precise as to the nature and quality of the error attributed to the decision-maker, and to identify the legal principle or statutory provision that attracts the suggested consequence."

McHugh and Gummow JJ further confined the unreasonableness principle to the exercise of statutory discretions. It did not apply to fact-finding. Kirby J appears to have accepted this limitation.

In *Attorney-Gereral (NSW) v Quin* Brennan J noted that "*Wednesbury* unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power."

In short, *O'Keefe* in all but name.

A political rationale for the approach adopted was mentioned in another case.

> "We must again stress the limited nature of judicial review on the ground of unreasonableness. That ground is not available as a vehicle to obtain the judgment of the court on matters that in the end are not concerned with the legality of a decision but with contested views about its wisdom or substantive fairness – judgments about matters of that nature are to be made elsewhere by the community and its political representatives; the concern of the court is only with the legality of decisions."[92]

It might be noted that Australia has a divergence with respect to the doctrine of proportionality. Proportionality has been recognised in Australia in some cases. The High Court has used it to determine the validity of subordinate legislation

South Australia v Tanner.[93] Deane J, referring to it tentatively and associated it with grounds for judicial review in *Australian Broadcasting Tribunal v Bond.*[94] Spigelman CJ recognised the relevance of proportionality to reasonableness but Spigelman CJ stated that it was not a separate ground of review.[95] Moreover, proportionality seems to be envisaged as indicia for determining if there has been unreasonableness in the *Wednesbury* sense rather than as a separate ground of review.

Others have been less favourable to its existence at all.[96] Further, recently Justice Gray Downes has doubted its application in an Australian context:

> "However, I think that a number of factors point against the likelihood of its adoption as a separate ground. First, it seems to be associated with a broadening of the grounds of review which is an approach that has not been adopted in Australia. Secondly, its adoption in the United Kingdom is closely associated with its geographical and judicial proximity (at least on questions of human rights) with Europe. Thirdly, Australia has a sophisticated system of merits review of administrative decisions which has been in place for more than 20 years and the need to expand judicial review is not a present concern."[97]

Conclusions

I have tried to construct a complete common law understanding of the state of *Wednesbury* unreasonableness and in particular its application to human rights claims and the conclusion is stark and, for a judicial conservative, unappealing. Apart from the hold-out states of Australia and Ireland, the rest of the common law world is qualifying *Wednesbury* unreasonableness. Moreover, a pure *O'Keefe* test is at best only one part of a review test in most other common law jurisdictions and that is just in terms of the common law. The Convention simply mandates and necessitates a change in *O'Keefe* certainly as far as human rights claims are concerned and its replacement with both anxious scrutiny and proportionality.

In particular the following points need to be made.

(i) *O'Keefe* is inapplicable in human rights case and either anxious scrutiny or intense review or hard look or whatever epithet is used is required. Such in fact is what the Convention, at least, requires.

(ii) This more intense form of review will of necessity involve an examination of the quality, of reasons proffered by the decision maker and this is also convention required. Merits based review has to be part of our domestic law.

(iii) Even embracing anxious scrutiny the superadded doctrine of proportionality requires something in addition to intensity of review to comply with the Convention. For the Convention proportionality inquiry is different. The simple question is: Has there been a breach of the right in question? This question also entails an examination of the weight and balance of the reasons proffered which is again merits based review and also whether there was a pressing social need or a question of national security or public order justifying the decision.

(iv) Even outside of human rights cases the convention requires an examination of reasons. This point was made recently by Garret Simon in the context of reviewing Irish and Convention planning cases that:

> "The grounds on which judicial review are available under Irish law are so limited that it must be doubtful whether the requirement under Art.6(1) for subsequent control by a judicial body that has "full jurisdiction" is met. The grounds of review under Irish law are much more limited than those available on a statutory appeal to the High Court under the relevant English legislation. For example, in Bryan the ECtHR emphasised that even findings of fact by the inspector were subject to review in certain circumstances. Regrettably, the test under Irish law—as formulated in O'Keeffe—effectively forecloses review on this basis. Scannell suggests that the "extraordinary high thresholds" set for those seeking to challenge the unreasonableness of administrative decisions must surely compromise the potential of judicial review to ensure respect for Convention rights."[98]

(v) *O'Keefe* at its highest if we look at it comparatively is at the extremities of reasonableness review at the fringes of review. This paper has shown that what is crucial in the evolving case law of the common law world is a portfolio of options. That review is relative and modified in terms of context, circumstances and expertise and that there is a sliding scale of review or layers of review. A greater degree of deference is shown where the court doubts its expertise or large scale issues of policy are demonstrated (as in non justiciable issues) and so on. Thus *O'Keefe* has its place at the fringes of reasonableness where a greater degree of curial deference lies but it does not have central application in reasonableness review.

O'Keefe is bad law as far as human rights cases are concerned and should be over-turned. It is not in compliance with our obligations under the Convention and it is inappropriate as a sole ground for assessing reasonableness.

The paper began with a quotation and question. Is *O' Keefe* mad? The answer surely is maybe not mad but mad certainly if it is the sole determinant for assessing reasonableness.

Endnotes

1. O' Sullivan J in A*er Rianta cpt v Commissioner for Aviation Regulation* Unreported, High Court, O'Sullivan J., 16 January 2003 at p 48.
2. Taggert: *Administrative Law* [2006] NZLR 75 at 85. The learned author seeks a sliding scale and spectrum of reasonableness review that encompasses the following:
   (a) Correctness review;
   (b) Anxious scrutiny;
   (c) Proportionality or hard look doctrine;
   (d) Reasonableness simpliciter;
   (e) Logical fallaciousness;
   (f) Outrageous or patent unreasonableness;
   (g) Bad faith, fraud or corruption;
   (h) Non justiciability.

   Many of these concepts will be addressed in this paper but just to note that it seems tolerably clear that the present state of Irish law primarily dogmatically adheres to the limited spectrum of (f) to (g).
3. The issue of the test applicable is the subject of an appeal to the Supreme Court, leave in that regard having been granted by Gilligan J in *Meadows v Minister for Justice & Ors*. On 19 November 2003 my understanding of the matters is that it is before the Supreme Court this term. It might be noted that in *Zgnatev v Minister for Justice* [2002] 2 IR 135 whilst applying the conventional *O'Keefe* test the Supreme Court accepted that the courts should approach the case with *anxious scrutiny*. More recently four judges out of seven in *Lobe v Minister for Justice*

(Supreme Court, 23 January 2003) either doubted the suitability of the usual test or reserved their position in this regard

4. For example Clarke J in *Gashi v Minister for Justice, Equality and Law Reform* (High Court, 3rd December 2004) was clearly in favour whereas Hanna J in *Cosma v the Minister for Justice Equality and Law Reform,* Decision of Hanna J of 15 February 2006 clearly not. In this case the learned judge applied *O'Keefe* and was reluctant to embrace anxious scrutiny or engage in a form of what he termed second guessing or hybrid appeal/review of the decision of the Minister:

   The judge opined that:

   "Alleged threats to life and limb must, perforce, invite the most careful scrutiny. But this does not mean that the court must lay aside the standard of review, in the absence of the Convention forming part of our domestic law and embark upon some hybrid appeal/review. That this process may evolve otherwise remains to be seen as the impact of the Convention on our domestic law becomes bedded down."

5. *O'Keefe v An Board Pleanála*[1993] 1 IR 39.
6. A statutory direction from Parliament or a legislature indicating the need for deference.
7. Though not the US where a "*hard look theory*" analogous to anxious scrutiny has been embraced.
8. It should be noted that the relevance of EU Law for *O'Keefe* is also worth mentioning though not a central focus of this paper. In for example *Sweetman v An Bord Pleanala*, Unreported, High Court, 26 April 2007 in the context of analysing Directive 85/337/EEC as inserted by Article 7 of Directive 2003/35/EC. The court noted that the Directive required that the review procedure under the directive has to enable the applicant to challenge the substantive or procedural legality of decisions and this impacted on *O'Keefe*. In the relevant part of his judgement Clarke J made the point that to deal with the requirements of the directive Irish law on reasonableness would have to be modified in this context in a planning matter to embrace anxious scrutiny.

   It might also be noted that in general terms Clark J also noted that *O'Keefe* only arises where all relevant matters have been taken into consideration and no irrelevant matters have been taken into consideration. The judge concluded that:

   "The limitations inherent in the *O'Keefe* irrationality test, therefore, only arise in circumstances where all, but only, those matters properly considered were taken into account and where the decision maker comes to a judgment based on all of those matters. It is in those circumstances that the court, by reason of the doctrine of deference, does not attempt to second guess the judgment of the person or body concerned provided that there was material for coming to that decision. In particular the court does not attempt to re-assess the weight to be attached to relevant factors."

9. [1948] 1KB 223.
10. [1986] IR 642.
11. [1993] 1 IR 39.
12. Henchy J in *Keegan.*
13. It must be stressed that the quality of the evidence is irrelevant. It does not have to be abundant or plentiful or clear and irrefutable in supporting a conclusion; Further it can be contradictory and conflicting see *MA Ryan & Sons Ltd. v An Bord Pleanála*, unreported, High Court, Peart J, 6 February 2003; *Lord Ballyedmond v Commission for Energy Regulation* [2006] IEHC 206; unreported, Clarke J, 22 June 2006. Thus any scintilla or scrap of evidence will do.
14. Unreported, High Court, O'Sullivan J, 16 January 2003.
15. A final point worth noting and dealt with by Garrett Simon in his excellent piece is that *O'Keefe* and subsequent cases show that quite apart from the restrictive nature of unreasonableness the court will be satisfied with even the scantiest of reasons for their decision provided by the reviewed body:

   "The statutory duty to give reasons could be discharged by a combination of the reason(s) given for the decision and the reasons given for the imposition of conditions to the planning permission, together with the terms of the conditions. What was to be looked at was what an intelligent person who had taken part in the appeal or had been appraised of the broad issues that had arisen in it would understand from the decision, the conditions and the reasons.

   Subsequent judgments have eroded the duty to give reasons further. In particular, it seems that not only is the decision-maker to be permitted to construct a statement of reasons piecemeal from the various parts of its decision, it can, in fact, point to extraneous documents as containing the reasons for its decision."

   Simmons: Merits-based Review, Unreasonableness and *O'Keefe v An Bord Pleanala*. Bar Conference Paper 2007.The learned author also notes how this departs from the logic of earlier decisions which "would make available the necessary procedural weapons in order to allow an applicant to pursue his or her challenge".

   Simmons at Page 5.

   The learned author goes on to make the point that *O'Keefe* has stifled judicial review in that:

   "First, the threshold to be reached before a court will intervene and set aside a decision on the merits is simply too high. Secondly, by relieving public authorities of any meaningful duty to give reasons, the Supreme Court created a pincer movement whereby an applicant must attempt to show that an administrative decision is irrational, yet is denied access to the one route by which this might be demonstrated, i.e. a clear statement of the reasons for the decision."

16. [1982] 1WCR 1155.
17. *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 375.
18. *ibid* . Which is of course *O'Keefe.*
19. *R v Chief Constable of Sussex; Ex Parte International Trader's Ferry Ltd* [1999] 2 AC 418 at 452.
20. It might be added that in their classic article Jowell and Lester: *Beyond Wednesbury: Substantive Principles of Administrative Law*: [1988] PL 368 the learned authors describe *Wednesbury* unreasonableness as "*unsatisfactory*" "*Inadequate*" "*unrealistic*" and in an echo of Lord Cooke "*tautologous*" The polemics of the law reviews abound in a dazzling array of different adjectives.
21. [1996] QB 517.
22. Bingham MR also spoke of a "sliding scale of review. "In discussing reasonableness and anxious scrutiny. In *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 at 849 Laws LJ spoke of "a sliding scale of review." where "the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required."
23. The meaning of which will be examined post.
24. [2002] 2 IR 135 at p 158.
25. See in particular *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] 1 AC 514, 531,
26. [1991] 14 EHRR 248, 292, Para 126.
27. [2000] INLR 211, 233.
28. For example *Smith*. Recently in *Tsfayo v United Kingdom* Application No. 60860100, 14 November 2006. The ECtHR held that judicial review was inadequate in the circumstances, in that the High Court did not have jurisdiction to rehear the evidence or substitute its own views as to credibility. Thus, in the view of the ECtHR, there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute, and, accordingly, there was a violation of Art.6.

   Simons at Page 15 where other ECtHR planning cases are analysed highlighting the inadequacy of judicial review.

29. *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. The UK Court had not dealt with Article 8 as the case was litigated prior to the incorporation of the Convention.
30. And thus the Irish law of reasonableness is *ad extenso* even more unsatisfactory it might be argued.
31. The adoption of a proportionality test for the validity of administrative action first emerged in Germany in the 1870's. The German word is *Verhaltnismassigkeit* which literally means "relativity". Three tests are applied, only one of which involves proportionality:

   The administrative measure proposed must be suitable for the purpose;

   The administrative measure must be necessary;

   The administrative measure must not be disproportionate.

   Proportionality emerged in French Law in the 1970's. The principle was applied by the Conseil d'Ètat in 1972 in *Ville de Dieppe* [1972] CE 8. To strike down the conversion of a road to a pedestrian precinct. The measure was disproportionate to the need. The principle is now well entrenched in French law where it is associated with a concept of gross error in fact finding and is often explained by reference to a balance or balance sheet (le bilan).

   It might be added it was Lord Diplock who first alluded to the introduction of proportionality into English law in the CCSU case where he referred to the grounds of review as irrationality, illegality and procedural impropriety and then went on to foresee the adoption into English law of the principle of proportionality

32. [2001] 2 AC 532.
33. It might be noted how the language blends proportionality with anxious scrutiny. Though as we shall see proportionality it might be argued goes beyond anxious scrutiny.
34. Lester & Pannick, 2nd edition (2004) at Para 3.20.
35. [2003] 1 AC 681 at 710-11.
36. See particularly the observations of Lord Carswell in *Tweed v Parades Commission for Northern Ireland (Northern Ireland)* [2007] 2 WLR 1.
37. *Baiai & Others v Secretary of State for the Home Department* [2006] EWHC 823.
38. *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105.
39. *Secretary of State for the Home Department v Baiai & Others* [2007] EWCA Civ 478; 1 WLR 693.
40. Sounds familiar! Of course Mr. Lenihan sought to do the same in this jurisdiction.
41. At Para 58.
42. Though on the facts there was no violation given the interpretation of the Article 9 with respect to the

    wearing of religious garments by The European Court.

43. [2003] QB 1397.
44. [2003] QB 1397.
45. At Para 34.
46. PP Craig, *Administrative Law* (5th Ed, Sweet and Maxwell, London, 2003).
47. It does have some validity as part of a sliding scale of review for non human rights issues as we shall argue.
48. *Dunsmuir v New Brunswick*, 2008 SCC 9. I do not propose to deal with the employment law contracts issue that are the facts of Dunsmuir and peculiarly Canadian in their resolution just to extract the general principles.
49. *Op. Cit* 14.
50. [2003] 1 S.C.R. 247, 2003 SCC 20
51. Professor Bryden has indicated that patent unreasonableness encompasses the following:
    (a) Bad faith
    (b) A decision that is based on a premise which is unquestionably incorrect
    (c) Serious flaws in the decisions logical underpinnings
    (d) A failure by the decision make to observe the limits of its institutional role for example attempting to amend legislative rules rather than interpret them
    (e) Arguably a decision which is inconsistent with the policy and objective of the statute
    (f) An interpretation that is obviously inconsistent with accepted principles of interpretation.

Bryden: Understanding the standard of review in Administrative Law (2005) 54 Uni New Brun LJ 75.

52. The learned judge expanded that the criteria of "significant searching and testing" involved an examination of the reasons given by the tribunal to examine whether any of the reasons were tenable under probing examination and the tenable court would not interfere even if the tenable explanation was one it did not find compelling.
53. *Dunsmuir* at Par 41 Joint Opinion of Bastarche and Lebel.
54. See D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p 25.
55. At Para 47.
56. Binnie J at 140.
57. The Irish Courts also sanction full blown review with no deference where a question of law is involved *Lambert v An t¡rd Chl·raitheoir* [1995] 2 IR 372.
58. At 164.
59. Unreported, High Court, Kelly J, 26 July 2000.
60. *O'Keefe* was also applied utilised in conjunction with anxious scrutiny (the meaning of which the judge doubted) in *Cosma v Minister for Justice Equality and Law Reform* in the context of not reviewing a decision of the Minister to deport someone where there were 2 psychiatric reports that there was a risk of suicide. The argument was that the Minister had unreasonably failed to weigh Constitutional and Convention protections of the right to life.

    "In this case I am of the view that one should not depart from the *Wednesbury* principles as applied by the Supreme Court, inter alia, in *O'Keefe v An Bord Pleanála* [1993] 1 IR 39. It is the appropriate test to apply to the process of consideration engaged in by the Minister. We must ask did the Minister consider everything he should? Has he come to a conclusion wholly unwarranted by the evidence both oral and documentary? Is the conclusion he arrived at in refusing leave to remain within the jurisdiction rational on its face?

    However much a court may agree or disagree with the decision which a Minister makes it is not part of the court's function to substitute its decision for that of the Minister. Even applying the most careful scrutiny to what transpired leading to the confirmation of the Applicant's deportation I am not satisfied that the Applicant has demonstrated any defect or shortcoming in the decision making process detrimental to the Applicant's legal or constitutional rights."
61. G. Hogan, "Judicial review, the doctrine of reasonableness and the immigration process" (2001) 6 *Bar Review* 329.
62. At Para 164.
63. [2004] 2 ACC 15.
64. At page 4.
65. At Para 44.
66. At Para 45.
67. At Para 48.
68. At Para 49.
69. (2006) 3 SCC 173.
70. (2006) 10 SCC 1.
71. [1996] 2 NZLR 537.
72. I am indebted for the following cases to the exhaustive survey of Knight: A Murky Methodology: Standards of Review in Administrative Law. 6 New Zealand Journal for Public and International Law (2008) at 117.
73. [1998] NZAR 58.
74. [1997] 1 NZLR 30.
75. [2004] 3 NZLR 619.
76. At Para 49.
77. *Tupou v Removal Review Authority* [2001] NZAR 696.
78. [2006] NZRMA 72.
79. See Knight at 129.
80. [2004] NZAR 414.
81. Though not proportionality which the learned judge disagrees with.
82. At Para 47.
83. At 133.
84. In this brief survey I am indebted to Sidebotham: Judicial Review: Is There Still a Role for Unreasonableness: *Murdoch University Electronic Journal of Law*. Vol. 8 Number 1 (March 2001) and Reasonableness, Proportionality and Merits Review: The Honourable Justice Garry Downes, Paper delivered to the New South Wales Young Lawyers Public Law CLE Seminar on 24 September 2008.
85. (1999) 162 ALR 577.
86. At 587.
87. At 626
88. *ibid*, 640 per Kirby and Gaudron JJ.
89. *id.*
90. (1999) FCA 980.
91. (2003) 198 ALR 59.
92. *City of Botany Bay Council v Minister for Transport and Regional Development* (1999) 58 ALD 628, 637 per Black CJ, Lee and Weinberg JJ.
93. (1989) 166 CLR 161
94. (1990) 170 CLR 321 AT 367.
95. *Bruce v Cole* (1998) 95 NSWLR 163 at 185.
96. See Anthony Mason: The Scope of Judicial Review (2001) 31 AIOL forum 21 at 38.
97. Downes refers to merits based review in Australia but that as I read it is a reference to Australian administrative tribunals and not courts.
98. Y. Scannell, *Environmental and Land Use Law* (Thomson Round Hall, Dublin, 2005), para.13-95.

Disciplining Judges: The Special Position of District Court Judges

Laura Cahillane[1]

The only type of discipline provided for under the Constitution is removal.[2] So theoretically, if a judge at Supreme, High or Circuit Court level in Ireland misbehaves, the only punishment available is to remove him/her from office. However, various provisions have been introduced since the beginning of the last century in order to provide some system for disciplining District Court judges. The first provision was introduced as part of the Courts of Justice Act, 1924.[3]

The 1924 Act

The modern Irish Courts system was established by this Act, which was necessitated following the enactment of the Constitution of Saorstát Éireann in 1922. The Judiciary Committee, which was chaired by Lord Glenavy, was established in order to give recommendations on constructing a new court system, or more specifically, the Committee was charged with the recommendation of "a system of judiciary and an administration of law and justice according to the dictates of our own needs and after a pattern of our own designing."[4] In addition to its chairman, the committee also comprised eleven other members.[5] We do not have much information on their sources or reasons for their recommendations, as when the Report was submitted some four months after its appointment on the 27th January 1923, it consisted of just 16 pages setting out the frame for the new court structure. It was said that as the Report was unanimous, it "[w]as not thought … necessary to set out the reasons upon which our recommendations [were] based."[6] The Report recommended the establishment of a District Court, Circuit Court, High Court, Court of Appeal and Supreme Court of Appeal, to exercise both civil and criminal jurisdiction. These Courts are the early forms of the Courts we have today, in fact the differences are mostly inconsequential. One of the most significant changes from the pre-Independence model in the Act was the establishment of the District Courts.[7]

Although we have an Act which is sufficient in detail, we cannot be clear on the motivation or reasoning behind any of the sections because of the lack of detail in the Report of the Judiciary Committee. However, provision was made in the 1924 Act for a disciplinary procedure specifically aimed at judges of the District Court, in section 73[8] which states:

> "No Justice of the District Court shall be removable from office save for incapacity or physical or mental infirmity or misbehaviour in office or misconduct, which shall be certified under the hands of the Attorney-General and the Chief Justice. It shall be the duty of the Attorney-General and the Chief Justice to give such certificate in case they are satisfied that such incapacity or infirmity exists or that any such misbehaviour or misconduct has taken place. No such certificate shall be questioned or made the subject of proceedings in any Court."[9]

The first point of interest in the section is that there seems to be a distinction made between misbehaviour in office and misconduct whereas, in later sections they are presumed to be analogous. The implication is that misbehaviour in office relates specifically to conduct involving the exercise of the judicial function. Misconduct then seems to imply something which happens in the judge's capacity as a private citizen. The fact that they are aligned later on suggests they are considered equally serious. The fact that a distinction has been made, and that both types of misconduct are to be considered, is significant.

The second feature requiring consideration is the imposition on the Attorney General and the Chief Justice of the task of adjudicating on the conduct in question. We must therefore assume that complaints are to be directed to the office of the Attorney General or that of the Chief Justice. This is hardly practical. The lack of a sift-out system would make this option unfeasible. In addition, the section does not actually specify a process of removal. Section 39 of the 1924 Act also provided that Circuit Court judges hold the same tenure of judges of the superior courts but the same was not applied to District Court judges until the 1946 Act therefore, Article 68 of the Saorstát Constitution[10] did not apply to judges of the District Court. So under this procedure, the Attorney General and the Chief Justice must first decide if misbehaviour in office or misconduct has been committed and if they decide it has, there is no procedure in operation to remove the judge in question. Therefore, we can only arrive at the conclusion that removal from office in this instance, would have been a mere formality.[11]

This section however, is essentially a removal provision rather than a disciplinary one. Later sections provide for warnings or inquiries, whereas this section seems to be equivalent to Article 68 but aimed at District Court judges rather than judges of the higher courts. Rather than including District Court judges in the constitutional provision, it was obviously considered more convenient to have a similar but perhaps less formal procedure for the lower ranking judges.

The 1936 Act

A body was established in 1929 to consider the workings of the new Court system as established by the Courts Act of 1924 and make recommendations as to any changes which should be made. It was a Joint Oireachtas Committee chaired by Daniel Morrissey TD.[12] The recommendations of the Committee comprised mostly revision of arrangements for remittal or transfer of actions from the Circuit Court to the High Court and other such suggestions.[13] As a result of this report, the Courts of Justice Act was passed in 1936. The Committee made no findings on disciplinary proceedings or anything involving section 73 of the 1924 Act and so as such, the provisions of that Act had not been called into question. Nevertheless, section 73 of the 1924 Act was repealed by

section 3 and replaced by section 49 of the Courts of Justice Act 1936,[14] which does close some of the gaps previously identified. Section 49 states:

> "(1) The Chief Justice, the President of the High Court, and the Attorney-General shall constitute an advisory committee for the purposes of this section, and when acting as such committee shall have full power to inquire into and investigate in such manner as they think proper, whether by examination of witnesses or otherwise, any matters referred to them under this section or in regard to which they are authorised by this section to take action"

It goes on to provide that the Minister for Justice or any member of the committee may bring before the committee, matters relating to the fitness of a judge (regarding mental or physical health) or the conduct of a judge "whether in the execution of his office or otherwise".[15] If the committee decides the judge is unfit to hold office it must send a report to the Executive Council, who may give the judge an opportunity to resign before proceeding to remove him/her from office.

This does seem to be an improvement on the previous section in that it does not simply reconstitute the committee but also gives it new, specific powers of inquiry and investigation and thus goes further to ensure a fair procedure.

This section continues the distinction between acts committed by the judge in the execution of his office and "otherwise" although, the words misconduct and misbehaviour have now been replaced simply with "conduct". Neither section elaborated on what type of conduct outside of the judicial function would be considered such conduct as would merit investigation. This point obviously caused a lot of problems however, as it was the subject of much discussion in the Dáil. The Minister for Justice, Mr Ruttledge proposed various amendments to the draft section:

> "to delete the words 'grave misconduct' and substitute the words either 'misbehaviour in office or misconduct', and in line 11 to delete the word 'misconduct' and substitute the words 'misbehaviour in office or misconduct, as the case may be.'"[16]

He explained his reason for this:

> "The object of these amendments is to delete from Section 50[17] all references to the censuring of district justices. We had a great deal of criticism during the Committee Stage in regard to this matter and I have decided to delete all references to any censure of district justices and leave the position as suggested by the Deputies opposite."[18]

This proposal was well received in the Dáil. He then went on to propose an additional amendment, to delete section 50 (8):

> "This amendment has somewhat the same effect. It relates to what was regarded as an objectionable proposal, to inquire into the personal circumstances of the district justice. I explained what was behind that, what was suggested by some district justices as to the difficulty they had in dealing with cases in certain areas where they had married, and so on. Representations were made to us and, having considered the matter, we have decided to delete that particular provision."[19]

This amendment was also accepted.

This is interesting in that the Dáil made it clear they did not envisage a situation where the personal circumstances of a judge could be taken into account as a result of this section. However, the wording in the section is not unlike that of section 73 of the 1924 Act where it states an investigation can be carried out into the conduct of a District Court judge "whether in the execution of his office or otherwise". As previously asserted, the inclusion of the words "or otherwise" seem to imply that the conduct of a judge in his/her capacity as a private citizen could be taken into account. But that was what the Dáil were apparently seeking to avoid. Thus it seems somewhat anomalous to have included such a provision in the section.

The President of the High Court joins the Attorney General and the Chief Justice here in order to make up an advisory committee. The role of this committee is described in more detail here than the role of the previous equivalent and a huge discretion on their part is implied. If they decide misbehaviour in office or misconduct has occurred, they must then furnish the Executive Council with a report on the matter. The section is also instructive in that it advises the Executive Council to ask the judge to resign before initiating a process to remove the wayward judge from office.

Neither this section nor section 73 of the 1924 Act specified what should happen after the investigation or who should remove the judge, should that be deemed necessary. As already stated, District Court judges were not given the same tenure as judges of the Supreme or High Court until 1946. Therefore, the Article in both Constitutions on removal did not apply to them. The question must then be asked: how are they removed? Section 49 of the 1936 Act seems to give the power to the Executive Council and we can find confirmation of this in the Dáil and Seanad debates on the 1946 Act. The Minister for Justice at the time, Mr Boland, in his address to the Seanad on 11 July 1946 stated:

> "In regard to the tenure of office, the position at present is that, if there is any reason to dispense with a district justice, there is machinery by which the Chief Justice, the President of the High Court and the Attorney-General deal with any complaint about the justice and, if they think there is sufficient reason, they give a certificate and the Government—not the Dáil or Seanad— can remove the justice from office."[20]

It is inconceivable that this point did not come up in either the discussions of the 1924 or the 1936 Act. The District Court judges are essentially at the mercy of the Government but this is totally at odds with the principle of the separation of powers which is an integral part of Bunreacht na hEireann and also was part of the 1922 Constitution. It gives the power of removal to the one branch of the separation of powers that should never have it. It is crucial to the workings of our legal system and our system of government that the executive and the judiciary not interfere with each other. It is inevitable that the powers of the legislature and the judiciary will sometimes overlap but this is to be avoided where the executive is concerned.

The 1946 Act

The 1936 Act was in turn, repealed by section 4, schedule part 1 and replaced by section 21[21] of the Courts of Justice (District Court) Act 1946,[22] which states:

> "Whenever the Minister requests the Chief Justice to appoint a Judge to—
>
> (a) Investigate the condition of health, either physical or mental, of a Justice, or
>
> (b) to inquire into the conduct (whether in the execution of his office or otherwise) of a Justice, either generally or on a particular occasion. …
>
> (i) the Chief Justice shall appoint either a Judge of the Supreme Court or, with the consent of the President of the High Court, a Judge of the High Court to conduct the investigation or inquiry;
>
> (ii) the Judge so appointed may conduct the investigation or inquiry in such manner as he thinks proper, whether by examination of witnesses or otherwise, and in particular may conduct any proceedings in camera, and for this purpose shall have all such powers, rights and privileges as are vested in a Judge of the High Court on the occasion of an action;
>
> (iii) Upon conclusion of the investigation or inquiry, the said Judge shall report the result thereof to the Minister."

Under this Act, as well as provision of a new system of inquiry, District Court judges were also given the same tenure as judges of the High Court and Supreme Court.[23] A new disciplinary procedure was also added:

> "[I]n Section 20, the Minister for Justice is given power to request the Chief Justice to appoint a judge to make inquiry into the conduct or health of any particular justice. That is a very good idea. At present the only power to do that would be the power to appoint a tribunal of inquiry. We think that in a matter of inquiry into something about a district justice, the new arrangement is better."[24]

Deputies then questioned the Minister as to whether that was not already possible under the 1936 Act whereby the Chief Justice and the Attorney General could conduct an inquiry. But he elucidated:

> "No. Their power is to investigate a complaint sent to the Minister for Justice and to report and, if they report that the conduct of a justice was such as to merit dismissal or that his health was such as to render him incapable, the report will be considered by the Government, but they have no right or power to inquire into the conduct of any district justice and I am asking for that right in Section 20. I think it will be found very useful."[25]

Certain deputies however, were worried the new section was unduly restricting judicial independence. Deputy Cosgrave was particularly adamant on this point, calling for the deletion of the section because it negated independence.[26] A long debate followed this comment during which many points were discussed including the fact that what section 19 gives, section 20 seems to take away.[27] Many deputies also questioned the fact that judges of the District Courts should be subject to such an inquiry where there was none for any other rank of judge. There were also worries that once the report about the conduct of a judge was conducted, it could be "held over his head" and used to threaten him. Mr Boland, by way of response, stated that District Court judges had always been in a different position. He pointed out that the provision was an improvement to what had previously existed in that now, if the report should indicate misbehaviour, the judge could only be removed by a resolution of both Houses, whereas before, the government was empowered with this task.[28] He did not explain why one judge would be sufficient despite calls from the opposition that two or three judges would ensure fair procedure. He simply reiterated his claim that:

> "In the other case, a certificate from that committee was sufficient to enable the Government, without coming to the two Houses of the Oireachtas, to dismiss him. I think that is a very big improvement in the status and tenure of a district justice."[29]

In practical terms, District Court judges were in a better position after this Act because of the fact that they were removable only by a resolution of both Houses but the reasons proffered by the Minister for Justice to explain having a special position for District Court judges do not stand up. Just because historically, there had been a distinction, this does not mean that procedure cannot be modified to suit changing perceptions in society. At one time, District Court judges may have been looked upon as inferior to the other ranks of the judiciary but by 1946, they had become indispensable to the system of justice and proved themselves to be just as honourable as any other rank of judge. Nevertheless, the division continued.

The section also persists with the use of the words "the conduct (whether in the execution of his office or otherwise)". It is significant that following each repeal, this aspect was always retained. This suggests the legislators believe what happens in the judge's capacity as a private citizen necessarily affects his/her role as a judge. It is unfortunate however, that the law-makers neglected to specify the type of conduct which should lead to an investigation. The word "generally" seems to intimate a situation where a judge's overall performance might be investigated. The words "on a particular occasion" imply a mistake or possibly an offence.

The 1961 Act

Although the section in the 1946 Act is still law, some additional provisions were added in the Courts (Supplemental Provisions) Act 1961.[30] This Act essentially established the Courts system as underlined in Bunreacht na hEireann in 1937.[31] It was not until the case of *The State (Killian) v Minister for Justice*[32] that the need to establish the new system was highlighted. In this case, the order of a Circuit Court judge was challenged on the grounds that his appointment to the bench was in fact void.[33] Although the Supreme Court rejected the argument of the plaintiff, it was acknowledged that the words of Article 34 "contemplated the future fresh establishment of courts to replace those exercising jurisdiction

at the date of the Constitution's enactment …"[34] So it was finally realised that legislation would have to be drawn up in order to prevent similar claims in the future. It is incredible that it took 24 years and a Supreme Court case for the legislature to fulfil the constitutional requirement of a new system of courts for the country.

The new court system which was brought in, was to all intents and purposes, the same as the previous one. However, the legislature took the opportunity to introduce some minor changes. Specifically of interest to this subject is section 10(4) of the Act which provides:

> "Where the Chief Justice is of opinion that the conduct of a justice of the District Court has been such as to bring the administration of justice into disrepute, the Chief Justice may interview the justice privately and inform him of such opinion."[35]

Hilary Delany has noted that:

> "Section 10(4) vested a new type of supervisory jurisdiction over the district judges in the Chief Justice. … This was designed to deal with a type of case where the formal inquiry provided for in section 21 of the Courts of Justice (District Court) Act 1946 was neither necessary nor appropriate; the Government was of the view that this more formal procedure should only be set in train when the allegations against the judge would, if proved, make it necessary for the Minister for Justice to initiate the steps necessary to remove the judge from office. It was envisaged that this new procedure provided for in section 10(4) would be used where a district judge had conducted his court efficiently, yet in such a manner as to bring the administration of justice into disrepute …"[36]

This section caused a lot of controversy, both in the Dáil and the Seanad during the committee stages. The section was introduced, it was submitted, because the power given was traditionally implicit in the Office of the Chief Justice[37] and this section was merely giving it a statutory footing. The Minister for Justice, Mr Haughey described it as follows:

> "The bill is merely giving statutory recognition to a practice which has in fact operated on a few occasions in the past in accordance with which the Chief Justice, at the request of the Minister for Justice, interviewed a district justice privately about certain aspects of his conduct. In every case the intervention of the Chief Justice had beneficial results. The great advantage of this procedure is that it enables action to be taken in a case where a formal inquiry by a Supreme Court or High Court judge would be unduly cumbersome."[38]

However, many believed it to be an encroachment on the independence of District Court judges: "I do not think the power should be given. It is well known that the Chief Justice or other judges can interview justices and I do not think it should be included in this formal way."[39] It was also felt that having this section as well as the subsequent one, created too much confusion: "it seems to me we are overloading, going to excess of caution with regard to the District Court …"[40] Nevertheless, the section was passed and it was commented that it was "in the ease of the district justice"[41] to have such a procedure before the heavy-handed mechanism of removal be resorted to.

Even though this section is intended to be used essentially as a warning, it is in reality, derisory. There is no onus on the Chief Justice to conduct the interview nor are there any details of any possible sanctions. It is unclear what action is to be taken should the District Judge simply ignore the opinion of the Chief Justice or refuse to attend the interview and one would be inclined to agree with Mr Cole when he stated his belief that it "is just a pious wish."[42] However, although there is no obligation on the District Judge to attend, it would be in their his/her interests to do so. The alternative would only serve to facilitate his/her removal. Although because of the need to protect a judge's privacy we do not have any examples of when this procedure was actually used, we can presume that in practice, the procedure would be complied with.

In contrast, section 36 (2) of the same Act provides the following:

> "(2) (a) Where it appears to the President of the District Court that the conduct of a justice of the District Court is prejudicial to the prompt and efficient discharge of the business of that Court, he shall investigate the matter and may report the result of the investigation to the Minister.
>
> (b) In the course of an investigation under this subsection, the President shall consult the justice concerned."

This section is more satisfactory than the previous sections because it is much more specific. The President of the District Court is empowered to carry out an investigation into the conduct of a District Court judge if it interferes in any way with the proper running of the court. The section, unlike the others, does not mention conduct which may occur outside of the judicial function. However, if such conduct was prejudicial to the efficient discharge of the business of the Court, then perhaps it could come under the remit of the section. Although the section is more specific in terms of the investigation, it is still extremely vague on appropriate action to be taken following such an investigation. It is unclear whether the Minister must then propose a motion for the removal from office of the judge in question or whether some suitable punishment could be negotiated with the President of the District Court or the Chief Justice. Nevertheless, the section has achieved what was aimed for in that an intermediary form of discipline is available to judges of the District Court before recourse is had to the more serious procedures.

These sections, while not ideal, at least form the basis of a disciplinary framework. There is recourse for those who wish to complain about the conduct of a District Court judge, in the interests of justice and the judge in question has the right to be heard and the right to discussion before the more serious penalty of removing the judge from office, is taken. At least we can see that some attempt was made to provide some preliminary steps for when misbehaviour occurs. Where higher ranking judges are concerned, the only response to any type of misbehaviour is removal.[43] It is regrettable though, that since an effort was made to provide this system for judges of the District Court, that there was not more consideration given to questions such as the meaning of stated misbehaviour and mechanisms and process. What is really lacking in all of the sections is details of sanctions to which

recourse could be had should the behaviour be not so serious as to require removal but nevertheless, would necessitate punishment. Another problem with this situation is the fact that since the Constitution does not specifically mention District Court judges or even Circuit Court judges in regard to security of tenure, an ordinary statute could technically, change the removal procedure for these judges.[44] There have not been any additions or changes to these provisions in over 40 years now, perhaps a reform is due.[45]

Special Position?

The question must be asked as to why we have specific (but inadequate) provisions to cover misconduct of District Court judges but not for any other rank of judge? Was it thought that the higher ranking judges were so honourable they would not be capable of any misconduct? Or was it simply because at the time, there had not been any controversy concerning higher ranking judges? The fact that the District Court judge was the only one not covered by the Constitutional provision until 1946 indicates that the level of respect given to this type of judge was not quite comparable to that of the higher ranking judges. This would seem to stem from the history of the District Court judge. Before the 1924 Act, the District Court did not exist. It developed from the jurisdiction of "Petty Sessions", which was a court of local jurisdiction presided over by a "Justice of the Peace". These were not traditionally judges as such, but persons "learned in the law".[46] Delany has noted that "the system of unpaid magistrates, or justices, did not work satisfactorily in Ireland, for it was from time to time alleged that unsuitable persons were being appointed to the bench."[47]

Perhaps the fact that the District Court as we now know it, emanated from this system led to a certain amount of distrust of these courts and so it was considered necessary and acceptable to have specific provisions relating to their misconduct, where there were none for any other rank of judge. But that does not justify the lack of detail elsewhere. Some have suggested it is pure laziness in that Article 35.4.1 is exactly the same as its equivalent in the 1922 constitution which in turn was lifted from the Act of settlement in 1701, which gave statutory recognition to the practice in the 1680's under William III and Mary, whereby judges held their positions *quamdiu se bene gesserint* (according to good behaviour). That Act also fixed judge's salaries and provided that judges could be removed only by address of both houses of Parliament.[48]

During the Parliamentary debates on the 1961 Act, certain sections were accused of being insulting to District Court judges in that they were following the English tradition of lack of trust in Justices of the Peace:

> "We are going to a point of suggesting to the district justices that the Oireachtas looks upon them as an inferior type of judge. I think we are allowing ourselves to be influenced by some analogous procedure that obtains in Great Britain in respect of justices of the peace."[49]

However Mr. Haughey endeavored to explain the anomaly by saying:

> "The District Court is the court of the utmost importance to our people. It is for that reason we are making these provisions, not because we regard district justices to be inferior in any way to anybody. In fact, our view is exactly the opposite."[50]

Whatever the reason, it seems anomalous to have such provisions in place for one stratum of the judiciary and nothing for the others.

Procedure in Practice

In order to have a complete discussion on this topic it will now be necessary to consider the practical application of the legislation. The procedure provided for under the 1946 legislation has been used twice.

(i) The Case of Judge Lennon

On the 22 January 1957, five men were charged in the Dublin District Court with membership of an illegal organisation, failure to account for their movements and possession of incriminating documents. While hearing the evidence, District Justice Lennon stated that he would have to hear something of the evidence on the indictable charges so he could decide if they were such as that he could treat them summarily. In response, Mr Carrol from the Chief State Solicitors office handed in copies of Iris Oifigiuil, bringing in part V of the Offences against the State Act. Judge Lennon then responded cynically: "This proclamation does not end up with the words 'God Save the King?'"[51] To which Mr Carrol replied "Am I supposed to make any comment on that?" Judge Lennon went on to remark: "Yes I remember proclamations of this kind in regard to myself, and they always ended up with the phrase 'God Save the King'. This proclamation was made in the time of the Monarchy." As a result of these comments, Chief Justice Maguire was requested by the Minister for Justice, Mr Everett, to appoint a judge to conduct an inquiry, under section 21 of the 1946 Act, into the conduct of Judge Lennon. Justice Teevan was appointed and after having conducting his inquiry he concluded that the conduct of Judge Lennon was not such as to merit his removal from office. However, the Government disagreed and called for the resignation of the judge on the basis that if he did not resign, he would be removed. In response to questions by the Opposition, the new Minister for Justice, Mr Traynor commented on the situation as follows:

> "That the judge was of opinion that Mr. Ó Leannain's misbehaviour was not such as to warrant his removal from office is beside the point, since it does not rest with the judge appointed to hold an inquiry of the kind to decide whether or not the two Houses of the Oireachtas should be moved to take action as the result of his report, still less to determine, with respect to the misconduct of a justice, whether such misconduct amounts to misbehaviour warranting his removal from office as I am aware the judge himself fully realises. … It was not any function of the judge to report whether the justice's behaviour was such as to merit his removal or not. That was a matter to be decided by the Government."[52]

Judge Lennon opted to resign rather than go through the removal process and so the whole affair ended quietly.[53] It is interesting though that it was the view of the Government that it was not the place of the judge conducting the inquiry to adjudicate on whether the misconduct amounted to misbehaviour as to warrant removal. In the only other case of this kind, the case of Judge O'Buachalla, the investigating judge specifically stated his opinion that the conduct does not amount to such misbehaviour as to merit removal and this

was apparently never questioned by the Government or any body else. It seems sensible that the investigating judge would come to a conclusion on the point but it is proper that the final decision would not be left with him/her but rather to the legislature.

The second such inquiry was established in 2000 when Justice Francis D Murphy was appointed by the Chief Justice under section 21 of the Courts of Justice (District Court) Act 1946, to conduct an inquiry into the conduct of Judge Donnchadh O'Buachalla in relation to his handling of the licensing of a premises and in relation to the discharge of his judicial functions in cases involving two gardaí.

(ii) The Case of Judge O'Buachalla – The Facts[54]

Both cases centre around Catherine Nevin who, together with her husband Thomas, owned licensed premises in Wicklow called Jack White's Inn. Thomas Nevin was murdered on the 19th March, 1996. A year later his wife was charged with his murder. On the 11th April, 2000 she was convicted and she later appealed.[55] On 16th September 1996, Mrs Nevin had reapplied, through her solicitors: Lehane and Hogan, for a restaurant certificate, a general exemption order and a Sunday afternoon and St. Patrick's Day exemption order for the premises in her own name. These were granted without any objection from the Gardaí. Then on 15th October 1996, an application was made for the renewal of the publicans licence. She was informed that because of the death of one of the license holders, she would require a certificate of transfer from the District Court. Mrs Nevin's solicitor, Mr Lehane wrote a letter to the collector of Customs and Excise in May 1997 arguing that because Mr and Mrs Nevin were joint tenants, the certificate would not be necessary as she already had an interest in the licence since 1986. He contended that it was merely a matter of amending the records of the Revenue. He sent an additional copy of the letter to Mr William Sexton, Court Clerk for District 23 and then travelled to Gorey to seek a meeting with Judge O'Buachalla (who was an acquaintance of Mrs Nevin) to discuss the matter.

On the 13th June 1997, Judge O'Buachalla met with Mr Lehane to hear his argument and then consulted Mr Sexton as to whether the certificate was necessary. Mr Sexton determined that it was necessary. The judge decided it would be appropriate to obtain the view of the Revenue Commissioners. Mr Lehane proceeded to phone Mr Goodwin in the Collector's office and asked him whether it would be adequate to obtain an informal authorisation from a judge to delete Mr Nevin's name as opposed to applying for the formal transfer. Although the Revenue did not consent to accept such an authorisation, Mr Goodwin agreed to consider it. It appears Mr Lehane was now under the impression that an authorisation would be sufficient and when he drew up a draft document, he explained the situation to Judge O'Buachalla who signed the document.

Various other transactions took place between June and September 1997 and as a result of several misunderstandings, the situation became cloudy. Judge O'Buachalla confirmed to the Revenue that his authorisation was not an order of the Court, whereupon the Revenue decided this authorisation was not adequate. The renewal of the ancillary licences (granted on 16th September 1996) then came before Judge O'Buachalla on the 29th September 1997 but the meeting took place in his chambers and was attended by the parties and Inspector Finn from Gorey.[56] An application was then made not to transfer but to "regularise the licence". The order was made and signed by Judge O'Buachalla. The publican's licence was issued on the 29th September 1997 by the Customs and Exise Office and applications for ancillary licenses were then sought before Judge O'Buachalla. Inspector Finn was concerned as to the legality of the order, considering the Revenue, Court Clerks and his own Superintendent had expressed trepidation concerning the order. The advice of Mr Thomas M Morgan, barrister and acknowledged expert on licensing law was sought by the State Solicitor. He expressed the opinion that the failure to hear the applications in public was the only mistake but that it was a minor one and a mere technicality. This appeared to resolve the conflict.

However, there had been some media coverage of these proceedings at the time, and on conclusion of the murder trial, journalists sought to further explore the involvement of Judge O'Buachalla. In response to media pressure, the judge issued a statement on the 13th April 2000, which was both inaccurate and incomplete. He stated that the application was made in open court and that Inspector Finn attended all discussions. This only served to draw more attention on the Judge and he later accepted that the statement was "disjointed" and explained the anomalies saying that it had been prepared in a hurry.

(a) The Letter of Authorisation and the Hearing in Camera

In his report, Mr Justice Murphy firstly considered the appropriateness of the letter of authorisation and decided that Judge O'Buachalla had no power to issue the letter of authorization but that he had been led to believe that it had been requested by the Revenue and so the judge understood that he was merely helping to solve a procedural problem encountered by the Revenue. Murphy J determined that it was an error of judgment and not an abuse of power: "In my view he erred in acceding to that request but this was an error of judgment and not an abuse of the legal process."[57]

Then he considered the hearing in camera and decided that it should have been held in public. Judge O'Buachalla emphasized that there was nothing furtive about the hearing and quoted Mr Morgan's opinion that the failure was a minor mistake. However, Justice Murphy stated that he would hesitate to describe any failure to comply with the requirements of the Constitution as minor but he was satisfied that it was not a deliberate or conscious violation. He opined that although the hearing should have been held in open court, no injustice had been done. However, Justice Murphy criticises Judge O'Buachalla as follows:

> "The fact that the application was dealt with behind closed doors could in any case, and did in the present, give rise to a suspicion that some wrong doing was perpetrated. Such a suspicion could be damaging to the administration of justice and was, I am afraid, damaging to the reputation of the Judge involved.
>
> I am satisfied that no injustice whatever was done and that the failure to conduct the hearing in public was due to an error to which a number of people contributed but for which the Judge must accept ultimate responsibility. It is an oversight which he has every reason to regret."[58]

Although Mr Justice Murphy is very polite and very cautious to promote his view that the behaviour is not such as to warrant

removal, nevertheless this is serious criticism of a judge who is still hearing cases today. However, he is careful not to undermine Judge O'Buachalla to such an extent that it would damage his ability to conduct his duties in the future as a judge. This shows that the fear that accountability could damage the independence of the judiciary is always behind even minor disciplinary measures such as this. However, although lawyers and jurists might well be able to see through the temperate language of Mr Justice Murphy, in the eyes of the ordinary person this would not be considered a reprimand

(b) Bias

Finally he considered the question of bias because of previous acquaintanceship, which in the opinion of the media, was the core of the case. It was argued on behalf of the judge that neither the Gardaí nor the Revenue had objected on grounds of bias but Mr Justice Murphy decided that the absence of objection was not sufficient justification for proceeding with the matter and that Judge O'Buachalla was open to criticism for failing to rescue himself from the case. However, Murphy J concluded that Judge O'Buachalla was not actuated by bias; his order did not deprive any person of an interest nor give Mrs Nevin a benefit to which she would otherwise not have been entitled. He concluded that it was not an act of misconduct: "I believe that that failure of the Judge to disqualify himself from hearing the application in Wexford on the 29th September 1997 was an error of judgment and not an act of misconduct."[59]

Justice Murphy also had to consider the possibility of bias in relation to the alleged discrimination on the part of Judge O'Buachalla in regard to two members of An Garda Síochána against whom Mrs Nevin had made a series of complaints. The complaints were made between the 13th July, 1992 and 11th February, 1993 against Garda Murphy and Garda Whelan in relation to "corruption, perjury, sexual assault and other related activities" but the case never proceeded as the DPP decided against taking action. These gardaí later complained that they were being discriminated against by Judge O'Buachalla in that they believed he treated them with hostility, favoured the persons whom they prosecuted and that he had specifically discriminated against them in that they were not permitted to take the oath in the normal manner but instead had to repeat the words after the Court Clerk had recited them. As a result of a separate investigation, it was concluded that the manner in which Judge O'Buachalla dealt with the prosecutions was in keeping with the manner in which he and other members of the judiciary have dealt with similar cases, that there was nothing unusual in his decisions and that although the matter of the oath was inconsistent, he had done nothing wrong. The gardaí subsequently withdrew their complaints. Justice Murphy felt that because of this there could be no allegation as to misconduct in this respect.

Justice Murphy also indemnified Judge O'Buachalla as to his costs stating:

> "The irregularities, to which significance might not have been attached but for the friendship of the Judge with Mrs Nevin, gave rise to suspicions of misconduct which could not have been dispelled otherwise than by an inquiry conducted in public. The fact that the Judge contributed to those irregularities in the manner and to the extent referred to above is not a ground for penalizing him in costs."[60]

This report was then submitted to the Department of Justice and because of the findings, no further action was taken. We have to consider whether this was a satisfactory outcome. Although the actions of the judge in question might not have amounted to misconduct such as would require removal from office, he did exercise a power which he did not hold (to conduct a hearing in private contrary to the requirements of the Constitution) and fail to recuse himself from a case in which he was well acquainted with one of the parties. That, in the humble opinion of the author, is grounds for some sort of reprimand. This case really emphasises our lack of a system for lesser forms of punishment. It is surprising that there were no calls for legislation following this episode, considering the fact that the media were adamant Judge O'Buachalla should have been reprimanded.

In terms of procedure, the inquiry was carried out in public in the format of a court case where the parties involved gave evidence, which was adjudicated upon. A report was drawn up by Mr Justice Murphy which, after having been submitted to the Department of Justice, was then published by the Department. This procedure was deemed successful and it is submitted that it is adequate as a first step. However, in order to complete the procedure, if it is decided that the misconduct is not such as to warrant removal from office, there should be specific punishments available to the Oireachtas to impose on the judge in question.

In conclusion, it is submitted that providing for disciplinary provisions other than removal is essential in order to ensure justice, both to judges and those who might wish to discipline a judge. However, the disciplinary procedures in operation in this country are not sufficient; they are lacking in detail and need further consideration as to actual procedure. The reasons for having these provisions solely for judges of the District Court no longer stand up and so it is suggested that, in order to ensure fairness, procedures should be put in place for judges of all courts. Were the procedures clarified and provision for investigation (including a public hearing with the guarantee of fairness of procedure) and reprimand laid down in legislation, it is submitted that the situation would be considerably more satisfactory.

Endnotes

1. BCL (NUI), LL.M (NUI).
2. Article 35.4.1 Bunreacht na hÉireann.
3. Hereinafter referred to as the 1924 Act.
4. See description of the Judiciary Committee Report (1923) contained in the *Report of the Working Group on the Jurisdiction of the Courts* (2003), p 4, available at http://www.ireland.com/newspaper/special/2003/fennelly/chapter1.pdf.
5. Including the Attorney General: Hugh Kennedy, the Master of the Rolls: Charles A. O'Connor, four members of the Judiciary: Supreme Court Judges Cathaoir MacDaibhid and James Creed Meredith, County Court Judge Johnston and District Justice Lughaidh Breathnach, one member of the Inner Bar the President of the Dublin Chamber of Commerce: William Hewat, and three other lawyers: Timothy Sullivan KC, John O'Byrne BL, Patrick J Brady, solicitor, and Henry Murphy, former Crown Solicitor.
6. *Report of the Working Group on the Jurisdiction of the Courts*, p 4, See (n 3).
7. This was the first time a professional judiciary had been provided for at a lower level. See *Seanad Debates* vol 2, cols 408-409, (16 January, 1924).
8. In the D·il Debates the reference is made to s 75 but when the Act was passed the provision had been moved to s 73.
9. s 73, Courts of Justice 1924.
10. The removal provision, equivalent to 35.4.1 in present Constitution.
11. This type of removal was never, in fact, resorted to.

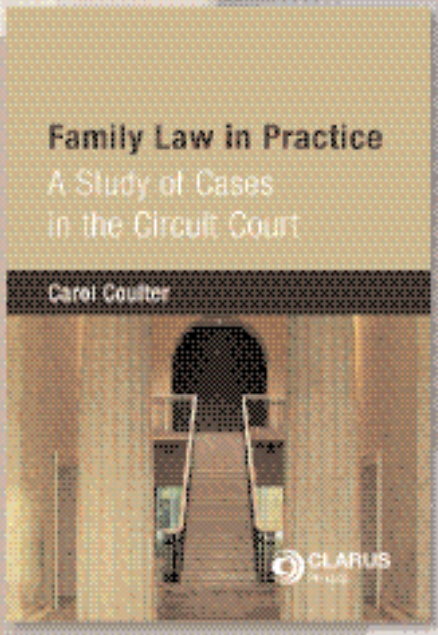
12. Other members included Deputies Beckett, Little, O'Higgins, Rice, Ruttledge and JT Wolfe, and Senators Brown, Comyn, Dowdall, Farren, Hooper, O'Rourke and Wilson.
13. See the *Report of the Joint Committee on the Courts of Justice Act 1924* (Dublin Stationary Office Dublin, 1930).
14. Hereinafter referred to as the 1936 Act.
15. s 49(3)(b) Courts of Justice Act 1936.
16. *Dáil Debates* vol 64, col 537 (18th November, 1936).
17. Now section 49.
18. *Dáil Debates* vol 64, col 537 (18th November, 1936).
19. *ibid* at col 538.
20. *Dáil Debates,* vol 32, col 633 (11 July, 1946). Unfortunately, Mr. Boland did not explain how this procedure would operate in practice and so since such a situation never in fact arose, it seems we will never know how such a system would have functioned.
21. In the debates this is referred to as s 20.
22. Hereinafter referred to as the 1946 Act.
23. For Minister for Justice Mr. Boland's explanation of the new procedure see *D·il Debates* vol 102, cols 171-172 (3 July, 1946).
24. *ibid* at col 172.
25. *ibid.*
26. *Dáil Debates* vol 102, col 176 (3 July 1946).
27. s 19 (now s 20) gives District Court judges security of tenure but it was argued that s 20(now s 21) effectively cancelled out s 19.
28. Although it appears that this was never actually used.
29. *Dáil Debates* vol 102, col 211 (3 July 1946).
30. Hereinafter referred to as the 1961 Act.
31. Article 34.1 of the Constitution
32. [1954] IR 207, (1956) ILTR 116.
33. J M Kelly *The Irish Constitution* (Butterworths, Dublin 2003) 4th ed at 2172.
34. *ibid* at 729.
35. The Courts (Supplemental Provisions) Act, s 10(4).
36. H Delany *The Courts Acts 1924-1991* (Round Hall Press, Dublin 1994) 149-150.
37. See Deputy Haughey's speech, *D·il Debates* vol 191, col 2046 (27 July, 1961).
38. *Seanad Debates,* vol 54, col 1859 (9 August, 1961). Unfortunately Mr. Haughey did not elaborate as to the alleged occasions when the practice operated in the past.
39. *Dáil Debates,* vol 191, col 2441 (2 August, 1961) (Deputy McGilligan).
40. *Dáil Debates,* vol 191, col 2045 (27 July, 1961) (Deputy McGilligan).
41. *Seanad Debates,* vol 54, col 1885 (9 August, 1961) (Mr Lenihan).
42. *Seanad Debates,* vol 54, col 1904 (9 August, 1961) (Mr Cole).
43. Although it is possible that informal discipline does exist.
44. See *Magee v Culligan* [1992] 1 IR 233, [1992] ILRM 186. See also Kelly *The Irish Constitution* (Butterwoth Dublin, 2003) at [6.4.34].
45. During the course of interviews with members of the judiciary, the sentiment was that all judges should be treated equally and that this should be reflected in the legislation.
46. V T H Delany *The Administration of Justice in Ireland* (Dublin Institute of Public Administration, 1975) at p 26 (First published in 1962).
47. *ibid*.
48. II Will. 3 c. 11.
49. *Dáil Debates,* vol 191, col 2050 (27 July, 1961) (Mr Dillon).
50. *Dáil Debates,* vol 191, col 2061 (27 July, 1961).
51. This quote and the ones that follow are taken from the *Irish Independent*, 23 January, 1957.
52. *Dáil Debates,* vol 162, col 567 (12 June, 1957).
53. *ibid* at cols 566-568 (12 June, 1957).
54. All of the information here is taken from the report written by Justice Francis D Murphy available at www.ireland.com/newspaper/special/2000/obuachalla.
55. She lost the appeal to the Supreme Court in March 2003.
56. By now the murder charge had been laid.
57. Report by Justice Murphy (n 53) p 11.
58. *ibid* at p 12.
59. *ibid*.
60. *ibid* at p 15.

Family Law in Practice: A Study of Cases in the Circuit Court

Dr Carol Coulter

Family Law in Practice: A Study of Cases in the Circuit Court is the first book to examine the workings of Irish family law in the Circuit Court. This work is based both on the author's research through attendance at court proceedings and empirical data from court files.

Family Law in Practice: A Study of Cases in the Circuit Court outlines trends relating to the likelihood of settlement, the issues most likely to be contentious and the outcomes in both settled and contested cases. Common assumptions about the family law system in the context of the facts are questioned and found to be sometimes misplaced. The identification of flaws in the family law system is highlighted as are recommendations for the future.



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Book Reviews

Family Law in Practice: A Study of Cases in the Circuit Court

Dr Carol Coulter,
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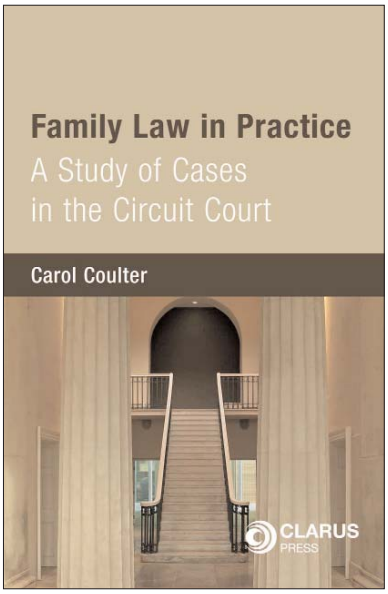

Prior to 2005 the *in camera* rule prevented widespread reporting of family law cases in this country. This precluded society and legal practitioners alike from getting a true insight into the workings of the Irish family courts. However, following an amendment to the law in 2004 Dr Carol Coulter embarked on a nationwide study of the operation of the Irish family law courts. In this book she compiles both the vast quantities of empirical data she gathered with her observations and insights into the manner in which family law cases are conducted and determined.

There is a relative paucity of reported judgments in family law cases in Ireland in comparison to other areas of law. Those judgments that are reported tend to emanate from the High Court, and indeed Supreme Court, but typically concern cases of ample resources and are often thought to have little relevance to the "everyday" case. The vast majority of judicial separations and divorces are determined in the Circuit Court as opposed to the High Court — 98 percent according to the *Court Services Annual Report 2008*. It is clear therefore that there is a wealth of jurisprudence to be tapped into from the Circuit Court. In her book Dr Coulter satisfies this hunger in respect of academics, sociologists and legal practitioners alike.

Each Circuit is individually assessed in terms of the nature of applications brought and indeed the applicants themselves. This is invaluable as those who have practiced law on various Circuits know that there are some subtle and some not so subtle differences in the approaches taken on different Circuits. Dr Coulter recognises this and formulates her conclusions accordingly.

Admittedly, however, one can only learn so much from empirical data. The defining feature of this text is Dr Coulter's commentary and analysis of some 34 real cases concerning various topics arising from 62 days spent in 19 different courts across all eight Circuits of the land. In essence, this is a well of case law from which practitioners and academics alike can better understand the system within which they operate. Dr Coulter's pioneering work in establishing the pilot project on the reporting of family law for the Courts Service was the genesis for this which has now resulted in the periodic publication of *Family Law Matters* by the Courts Service providing similar commentary and analysis of cases around the country. A true testament to this book and indeed the work of Dr Coulter is the continued interest which these periodicals attract.

The book concludes with a reflection on family law and the courts system. Dr Coulter includes an analysis of recent trends in family law such as mediation and collaborative law thus demonstrating the forever evolving nature of the area. In addition suggestions for change are made. Relying not only on her legal background but also her experience as a journalist and observer of social change Dr Coulter provides an enlightening and practical account for change. Often discussions involving changes to areas of law tend to focus on legal issues. However, this book recognises the fact that family law cannot be constrained to legal analysis alone, but social and political factors also play a role. The changes suggested span from those of an administrative nature in seeking to expedite cases, to the topical area of representation for children.

Dr Coulter has achieved something extraordinary in this text. She has opened up the operation of the family law courts to practitioners, litigants, and policy makers alike. Undoubtedly this text will be well thumbed through in the coming years; that is until the next, already eagerly awaited, edition!

Reviewed by Ross Aylward LL.B.(Dub); M.Litt(Dub); Dip.Arb; Attorney-at-Law; Barrister-at-Law.

The Licensed Trade: A User's Handbook

Constance Cassidy SC & Michael McGrath,
Clarus Press, (Dublin, 2008)
ISBN: 978-1-905536-18-4
Paperback €23

Licensing is a substantial and complex area of law for practitioners and licensees alike, with legislation stretching back to 1833. While the area is not without valuable practical guides for practitioners, it is safe to say that there has never been a useful reference guide for the busy trader, addressing the main issues facing them, up until now.

The highly experienced Constance Cassidy SC and Michael McGrath have united with Clarus Press to create a comprehensive and easy to use guide which successfully addresses the main issues facing licensees on a day to day basis. Over the last number of years, the Oireachtas has

introduced a number of amendments to the licensing code but perhaps the most significant piece of legislation is the Intoxicating Liquor Act, 2008. The implications of the Act for licensees, particularly in relation to the trading hours of off-licences and supermarkets, are explained in clear and understandable terms.

Part one of the book entitled "Management of a Licensed Premises", details the general trading hours for the various types of license holders such as publicans, hoteliers, theatre licensees, nightclub owners and those who operate off-licence premises, supermarkets and convenience stores. This section also contains extremely useful chapters in relation to the smoking ban, under-age persons on licensed premises and the right of licensees to refuse entry and the equality legislation. The authors have not only provided clear and concise information on the provisions of the licensing legislation but also highlighted other relevant legislation which licensees must be compliant with in the running of any licensed premises.

Part two of the book details the different types of licenses and their renewal, transfer and sale. This section is particularly informative and well laid out and provides important information on the various documents required to renew the different types of licenses with the Revenue Commissioners. Of particular note is chapter nine, which addresses the leasing of licensed premises by a licensee. Increasingly, practitioners are dealing with queries from the owners of licensed premises regarding the revival of their licenses. This is usually due to the tenant's failure to obtain a tax clearance certificate and therefore renew the licence. This chapter provides practical and important information to the owner of the licensed premises regarding the need to insist on the production of a tax clearance certificate well in advance of the licensing year with the aim of avoiding an application to the Circuit Court to revive the licence.

Part three is the final section of the book and addresses offences under the licensing code. Chapter fifteen examines endorsements and provides a comprehensive list of endorsable offences. In addition, it outlines the effect of an endorsement on a licence. Chapter sixteen introduces the reader to the temporary closure order and again provides a detailed list of offences to which a temporary closure order applies.

Constance Cassidy and Michael McGrath have successfully taken a notoriously complex area of law and produced a clear, comprehensive and understandable guide to the licensed trade in Ireland. A well written, easy to use and up-to-date text, *The Licensed Trade: A User's Guide* is a must have for anyone working in the licensing trade.

Reviewed by Louise Kelly, B.Corp., (NUI), LL.B. (NUI), Solr.

Human Rights and Policing in Ireland: Law, Policy and Practice

Dermot PJ Walsh,
(Clarus Press, Dublin, 2009)
ISBN: 978-1-905536-23-8
Hard Back €185;
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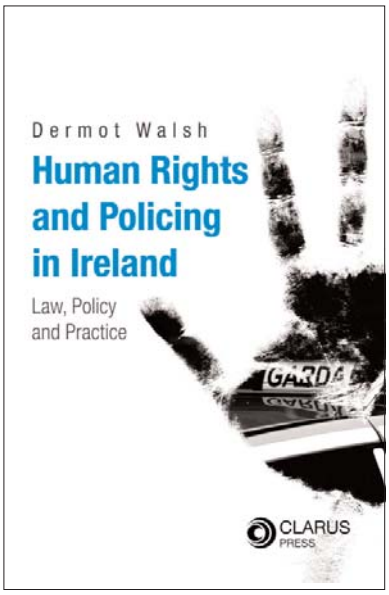


In the Preface of Professor Walsh's latest work he notes that the book resulted from a commission from the Irish Human Rights Commission to produce a comprehensive report on An Garda SÌochána's compliance with human rights standards. The fact that the task itself was a colossal undertaking is reflected in the content and size of this book. However, by the time one reaches the concluding part of the book, it is perfectly evident that Professor Walsh achieved what he set out to do — comprehensively review the human rights compliance of our police service.

The book is divided into four parts. The first part provides an incredibly thorough discussion of the general human rights standards, which police forces are expected to adhere to in using their powers. Specific emphasis is laid on the provisions of the European Convention on Human Rights as the only legal document which is directly enforceable in Irish courts, however Professor Walsh also addresses international and domestic human rights standards in relation to a range of police powers. Analysis and criticism of the formulation, implementation and monitoring of human rights compliant policies within the Gardaì is also included in this part of the book. Part I will undoubtedly be of enormous use to both legal practitioners working in this area, students researching such aspects of human rights and the GardaÌ themselves.

Part two contains a review and analysis of failings on the part of the Garda SÌochána regarding human rights standards and for the most part follows the same headings as discussed in Part 1 of the text. Professor Walsh draws on a number of sources in carrying out this review (sources which he first evaluates). While he is very critical of the Gardaì in relation to these failings, he does point out that the purpose of such criticism is to ensure that such failings are identified and rectified and not an indication of how policing is carried out in Ireland in general.

Part 3 moves on to the reforms that are currently being implemented in response to the failings of the Gardaì discussed in the previous section. The reforms are again presented using the relevant headings discussed in Parts 1 and 2. As Professor Walsh notes in the final part of the book, while reforms have been introduced in light of both the Morris and Barr Tribunals and, more specifically, the Ionann

report, it must now be considered whether such reforms adequately address the implementation of human rights within the police service and whether such reforms will be implemented by the individual Garda. It is too soon to be able to answer these questions however, in light of the meticulous review presented by Professor Walsh in this text, I have no doubt that he will be leading the way in reviewing the implementation of these reforms and, indeed, in suggesting new and innovative reforms to ensure Ireland's police service is at the forefront of modern and human rights compliant policing.

Reviewed by Ciara Fitzgerald, Law Lecturer, Griffith College, Dublin

Practice and Procedure in Preliminary References to Europe: *30 Years of Article 234 EC Caselaw from the Irish Courts*

By Dr Elaine Fahey
Published by Firstlaw
ISBN: 978 1 904480 57 0
Hard Back €75

Article 234 of the EC Treaty codifies a mechanism by which a point of Community law may be referred to the European Court of Justice when an issue as to its correct interpretation arises before a national court or tribunal. The "preliminary reference procedure" operates as a juridical nexus between the ECJ and national courts, promoting uniformity in the interpretation and application of Community law. Key Community law doctrines such as supremacy and direct effect have been formulated by the ECJ in the context of preliminary reference dialogue.

In Part 1 of her work the author examines the case law in which interpretive issues touching on EC law have arisen. Adopting a thematic approach to her exposition, the author structures her material to delineate identified sub-topics of analysis which include: the areas of law in which references arise, the nature of the dialogue between Irish Courts and the ECJ, the incidence of community law in the Irish courts and the contexts in which national courts determine an issue of EC law without addressing the applicability of a preliminary reference.

In the opening chapters the author considers patterns in, and specific features of, preliminary references. Only 44 references to the ECG have been made by the Irish judiciary in the thirty year period examined by the author. Compared to other small-sized EU states, Irish courts make up only half, or in some cases, a third of the number of references made by these states. Surprisingly, the Irish judiciary has a very poor record on the issue of referring questions of its own motion to the ECJ, the vast majority of references being initiated by the parties.

In analysing the statistics in respect of courts engaging in preliminary reference dialogue, the author notes that the High Court has made an overall proportion of references greater than any other court. However, in the aftermath of the Supreme Court's trenchant criticism of Carroll J in *SPUC v Grogan* for referring a question of interpretation of Community law to the ECJ, the number of preliminary references declined. Whether the rebuke was a causative trigger in the downward trend in preliminary references is, as the author points out, a matter of speculation. The Supreme Court has made twelve references to the ECJ in the thirty year period examined by the author. Only one reference has been made by a District Court Judge in the same period. By contrast, the Circuit Court has referred questions at the rate of one to two per decade.

In a chapter entitled, "The Operation of Article 234(3)"[1] the author considers the important decision of *Lyckeskog* in which the Court of Justice ruled that a national court whose decisions can be challenged before a national supreme court only if the latter declares the appeal to be admissible is not a court against whose decisions there is no judicial remedy. The decision has important implications for Ireland in the context of the interaction of Article 234(3) with Article 34.4.4° of the Constitution which empowers the Oireachtas to limit by legislation the appellate jurisdiction of the Supreme Court from decisions of the High Court. Emphasing an important difference between statutory limitations on the right to appeal and *Lyckeskog* — statutes typically grant leave in exceptional circumstances whereas under *Lyckeskog* leave is an issue within the discretion of the court — the author teases out the complex issues raised by the decision.

In the second part of the book, the author examines the role the Article 234 preliminary reference procedure has played in fostering European legal integration. Examining the various conceptual models advanced by social scientists and legal theorists to explain the integrative role of Article 234, the author concludes that, from an Irish perspective, "European legal integration has not been absolutely driven by the Article 234 EC process." The prevailing theories are, she argues, overly speculative and deficient in corroborating empirical data to explain the complex dynamics at work in the Irish context.

Practice and Procedure in Preliminary References to Europe is the author's doctoral thesis. The user-friendly format — a series of short chapters dealing with a specific aspect of the Article 234 procedure — does not in any way detract from the scholarly nature of the work. The book is a multi-faceted delineation of the author's chosen subject of research in which she drives forward her exposition exhibiting qualities of scholarship, conceptual sophistication and craftsmanship. The author's capacity to engage with disciplines other than law and to integrate their insights into advancing deeper understanding of the themes she explores enhances the value of the work. A legal practitioner will find this work a useful tool in understanding the operation of the Article 234 preliminary reference procedure in the Irish courts and the role it has played in fostering European legal integration.

Reviewed by Joan Donnelly

Endnotes

1. Article 234 (3) imposes an obligation on national courts of final appeal to refer matters of EU law to the ECJ where issues as to their correct interpretation arise.

Website Review

The Supreme Court Website

www.supremecourt.ie

Recently, a dedicated website for the Supreme Court of Ireland was launched. This website is independent of the general "courts.ie" website and aims to make the public more aware of the composition of the Court and its general functions. It also houses some features and information which should be useful for law students and the legal community alike.

On entering the site, the user is greeted with seven options: "About the Court"; "Members of the Court"; "Judgments"; "Supreme Court Office"; "The Legal System"; "Bibliography" and "Links". All of these options are fully navigable in either English or Irish and there is a large portion of the site information available through French and German as well, which should be of particular use to law and language students.

The user's options are intended to provide a simple method of navigating one's way through the information on the site and indeed they do. Each option links to a page with further options clearly set out. For example, if the user selected the option of "Members of the Court", this would bring one to a page offering links to biographies of the current members of the Court and information on the role of the Chief Justice as titular head of the judiciary and President of the Supreme Court. Interestingly, the site also provides biographies on all previous Chief Justices and a list of all former members of the Court.

Importantly from a practitioner's and legal researcher's perspective, the website provides a search engine for Supreme Court judgments. While this information is available from other sources, this does not detract from the usefulness of this page. This page also provides direct links to the latest judgments handed down by the Court, which are often added to the Supreme Court website before they appear on the Courts Service website and, more significantly, to all Article 26 References which are not readily accessible on the general courts.ie website.

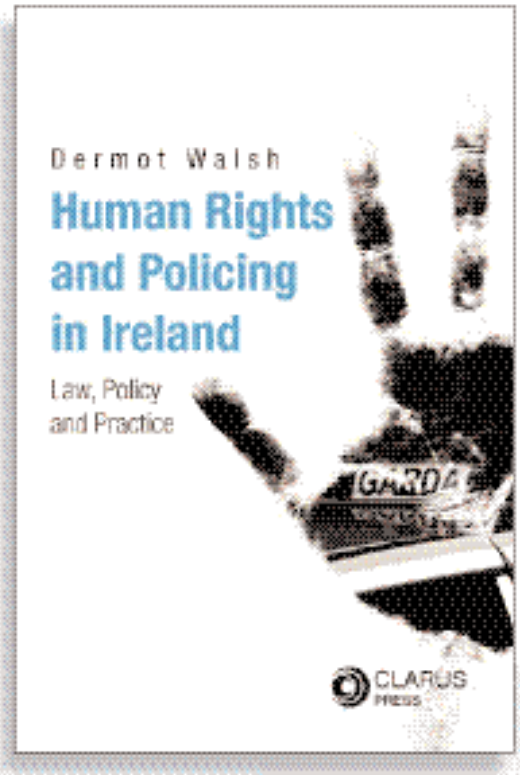
In addition to these helpful and functional features, the website provides practical and general information on the Irish Legal System This information is presented in an accessible manner and addresses matters such as the Constitution (a link to a PDF of the text is provided), the Separation of Powers, fundamental rights, the EU and the general structure of the court system in Ireland. It also includes a very informative section on the jurisdiction and composition of the court. Links to a number of external useful sites are also provided.

Without doubt, our Supreme Court should have a dedicated website and this is a positive start. The site is very easily navigated and provides a good introduction to the highest court of the land. Some possibly useful additions to the site would be the Legal Diary for the Supreme Court and a link to the Rules of the Superior Courts. Although there is a link to the courts.ie website on the new Supreme Court website where this information is contained, having the information readily available on the current site could improve its overall functionality.

Reviewed by Ciara Fitzgerald,
Lecturer in Law, Griffith College, Dublin

Human Rights and Policing in Ireland: Law, Policy and Practice

by Professor Dermot Walsh



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Format:
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About the Author

Professor Dermot Walsh, Law School, University of Limerick is the author of Juvenile Justice and Criminal Procedure.

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Events

The Criminalisation of Cartels

Venue: ISEL Competition Law Forum, Dublin
Date: Tuesday, 6 October 2009 http://tinyurl.com/isel74000 (Information provided by the UCC's Irish Law Page)

The Rome I Regulation On The Law Applicable To Contractual Obligations: Implications For International Commercial Litigation

Venue: Trinity College Dublin
Date: Friday, 9 October 2009 (4:00 – 6:30 pm) and Saturday, 10 October 2009 (9:15 – 4:00 pm)
For further details: http://www.tcd.ie/Law/Events/RomeI Regulation.php

The European Evidence Warrant: The Acquisition and Admissibility of Foreign Evidence

Venue: Dublin – Organised by ICEL with the Academy of European Law, Germany (ERA)
Date: Fri.-Sat, 9–10 October 2009 http://www.icel.ie/events_ forthcoming.htm (Information provided by the UCC's Irish Law Page)

Judicial Activism Under the Indian Constitution

Venue: Trinity College Dublin
Date: Wednesday, 14 October 2009
For further details: http://www.tcd.ie/Law/Events/Chief JusticeofIndia.php

Representing the Aggrieved Employee

Guest: The Honourable Mr. Justice Frank Clarke
Venue: Dublin
Date: 17th October 2009
For further Information contact Lisa Hegarty: email: legalcpd@gcd.ie

International Conference on Budget Decisions and Economic and Social Rights

Venue: Project by the Human Rights Centre, School of Law, Queen's University Belfast.
Date: Sat.-Sun.14–15 November 2009: http://tinyurl.com/ qubnov09 (Information provided by the UCC's Irish Law Page)

Damages in Personal Injury Cases Conference 2009

Venue: The Law Library, Distillery Building, 145–151 Church Street, Dublin 7
Date: Saturday, 28th November 2009.
For further details: http://www.roundhall.ie/

Police Governance and Accountability: Developments, Challenges and Outlook

Venue: University of Limerick, Ireland
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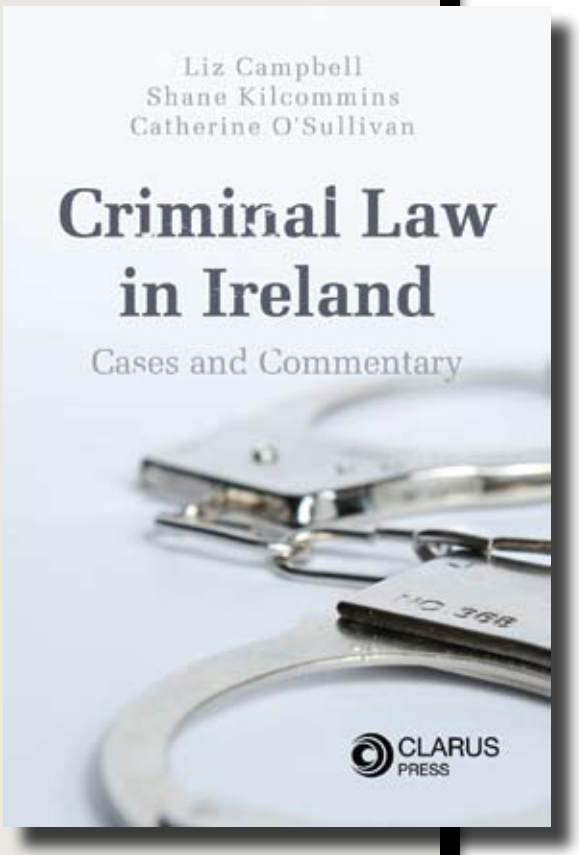

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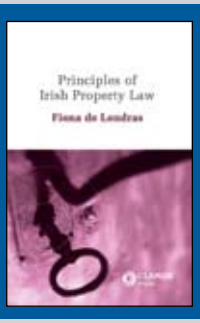

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