Strasbourg, 20 October 2004
CCS 2004/07

CDL-JU(2004)052 rev.
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with

THE CONSTITUTIONAL COURT OF BELARUS

International Scientific and Practical Conference

"Constitutional control and development of a social state ruled by law"
Minsk, 9 - 10 September 2004

FREEDOM OF EXPRESSION AS SEEN FROM IRELAND

Report

by
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FREEDOM OF EXPRESSION AS SEEN FROM IRELAND

The report which I am giving today deals only with freedom of expression in Ireland - although with reference also to the European Convention on Human Rights. However, I have given particular attention to those aspects of the subject which are of special relevance to Belarus, especially during the coming weeks leading to the national elections and the referendum.

Freedom of expression in Ireland is guaranteed by the Constitution, which was enacted by the People and says

> "The State guarantees liberty for the exercise, subject to public order and morality, [of] the right of the citizens to express freely their convictions and opinions.
>
> The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.
>
> The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law": *Article 40.6.1*

The wording of this guarantee reflects the thinking of the era in which it was formulated - 1937 - and probably would have been approved by the political leaders of most European countries at the time and accepted by their citizens, just as it was accepted by the Irish public, who approved the Constitution in a national referendum.

Nowadays, however, in a world where the balance between the citizen and the State has altered, distrust of politicians is widespread, and the emphasis is on the rights of the individual as against the power of the State, some of this wording would be criticised by liberal commentators if it were to be offered to a referendum today. They would be uneasy about the references to the education of public opinion, the undermining of the authority of the State, and the utterance of seditious matter, all of which they would see as paternalistic and giving dangerous powers to the State - as if the Constitution were offering freedom of expression with one hand and taking it away with the other hand.

However, such fears have not been justified in actual practice in Ireland. This has been due to the pre-eminent position which the higher courts occupy under the Constitution, which gives them the right to invalidate legislation, whether proposed or enacted, and to nullify decisions of the Executive which the courts consider to be repugnant to the Constitution. Thus, it is the judges, not Parliament or the Government, which make the final decisions on the meaning and extent of freedom of expression in Ireland.

The constitutional provision speaks of the citizens' right to express "convictions and opinions" and (unlike Article 10 of the European Convention on Human Rights and Freedoms) does not mention information. However the Irish courts have interpreted the constitutional guarantee as extending to facts and information, on the ground that a right of the media to comment on the news but not to report the news itself would be only a hollow

freedom. Similarly the courts have interpreted the words "organs of public opinion such as the radio, the press, the cinema" as covering TV also.

A significant - and unexpected - decision by the Supreme Court on the right to freedom of expression occurred in 1995. The Government was submitting a proposed amendment of the Constitution to referendum (amendments can only be made by the People and not by parliament alone). The Government, following previous practice, decided to spend £500,000 on a campaign to persuade the public to vote "Yes" to its proposal to delete from the Constitution the bar on the granting of divorce. The Supreme Court (which in Ireland has the functions of a constitutional court as well as being the court of final appeal) held that

> "The right to express opinions incorporates the corollary right that in the democratic process of free elections, public money should not be used to fund one side of an electoral process, whether it be a referendum or a general election, to the detriment of the other side of the argument": *McKenna (No. 2)* (1995) IR10.

As a result of that case an independent commission, presided over by a judge, has been established which produces advertisements and sends booklets to every elector setting out impartially the arguments for and against any proposed constitutional amendment.

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As one might expect, it is the restrictions on freedom of expression which are of most interest to lawyers. Two of these restrictions have been imposed by legislation which is designed to protect another constitutional right, the right to life. The first (*1993*) makes it a criminal offence to counsel another person to commit, or attempt to commit, suicide.

The second (*1995*) imposes conditions on the right, expressly recognised in the Constitution, to provide information about abortion services which are lawfully available outside the State.

(The constitutional protection of the right to life includes an express acknowledgement of "the right to life of the unborn ...with due regard to the equal right to life of the mother" : *Article 40.3.3*. This difficult provision (which was inserted in the Constitution by way of an amendment following prolonged and bitter public debate) has been interpreted by the Supreme Court as permitting abortions to be carried out within the State only where a continuance of the pregnancy would constitute "a real and substantial risk to the life of the mother". The Supreme Court also held that although the threat of suicide by the mother is included in a risk to her life, a risk to her health is not enough to justify an abortion in the State.)

The Constitution makes the right to freedom of expression "subject to public order". This provision - which might appear to provide an open door to abuse by the Executive -has in fact been invoked only rarely. The existence for many decades of the IRA, sometimes completely dormant for years at a time, at other times violently active, has resulted in the enactment of much legislation designed to suppress the activities of unlawful organisations.

The current legislation is a series of laws, commencing in 1939 when the threat of war between Britain and Germany caused the IRA to decide that Britain's difficulty was their opportunity and they started a campaign of bombing in English cities, as well as intensifying their attacks on the Irish police. Some of these laws - called the Offences Against the State Acts -are expressed in draconian terms, although in practice many of their provisions are no

longer enforced. One example is the offence under the 1939 Act of publishing or distributing a document which is issued, or appears to be issued, by an unlawful organisation, or publishing a document which contains matters calculated or tending to undermine public order or the authority of the State. In practice, newspapers freely publish many statements by the IRA, claiming or denying responsibility for some terrorist crime, and no one has been prosecuted for very many years.

As for the prohibition on publishing matter undermining public order or the authority of the State, I believe that the absence of prosecutions is due to the general acceptance that there is a risk that the courts might declare these provisions to be invalid as being contrary to the constitutional right to freedom of expression, and that in any event they would be unlikely to be willing to convict the publisher. This is so even though criticism of the Government and Parliament is published by the media in extremely harsh language, almost daily.

And of course, there is no question of a newspaper or other publication needing to have official permission or having to register with any State authority; and the idea of a newspaper or periodical being banned for any administrative or political reason is quite unknown in Ireland.

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The arrival of television, with its powerful ability to influence people, resulted in the enactment by Parliament of special legislation. The Broadcasting Authority Act, 1960 provided that where the Minister for Posts and Telegraphs was of opinion that the broadcasting of any particular matter, or any matter of a particular class, would be likely to incite to crime or would undermine the authority of the State, he could issue a written Order prohibiting TV or radio from broadcasting the matter. The Order would last for 12 months (though it could be renewed), it had to be laid before Parliament after it was made, and Parliament could annul it if it wished.

In 1982 the Minister made such an Order, prohibiting the making of election broadcasts by the IRA or by Sinn Fein. (Sinn Fein, is the political wing of the IRA.) Sinn Fein challenged the Minister's Order as being unconstitutional: *The State (Lynch) -v- Cooney (1982)* I.R.337.

The Supreme Court, reversing the decision of the High Court, held that the use of the media for the purpose of advocating support for organisations which seek by violence to overthrow the State is a use which is prohibited by *Article 40* of the Constitution, and it is the duty of the State to intervene to prevent broadcasts which are aimed at such a result or which would be likely to have the effect of inciting to crime or endangering the authority of the State.

The Supreme Court then proceeded to examine the factual basis for the Minister's opinion, namely, the statements and record of Sinn Fein, including words and actions indicating an intention to subvert the State. Having done so, it concluded that the evidence fully justified the Minister's opinion that a broadcast on behalf of or inviting support for Sinn Fein would have been likely to promote or incite to crime or would have tended to undermine the authority of the State.

In the view of the court it was abundantly clear that the Minister was not only justified in forming the opinion that he formed but also that he could not have formed any other.

At first sight the wording of this legislation is so broad that it might appear to be open to abuse by an Executive which wished, for example, to suppress legitimate criticism of its actions. However, the Supreme Court made it clear that the Minister's power was not as wide, unfettered or sweeping as the applicant claimed. The opinion formed by the Minister must be *bona fide* and factually sustainable and not unreasonable. Any control that went beyond this would be unconstitutional and the court would quash the Minister's Order.

In rejecting the challenge to the legislation which gave the Minister this power, the Supreme Court repeated an important principle which, in a very far-reaching judgment, it had established in an earlier case, namely, that where Parliament has by a law conferred a power upon a Minister, there is a presumption that Parliament intended that the Minister will exercise his power only in a manner which is not contrary to the Constitution: *East Donegal Co-Operative -v- the Attorney General* (1970) I.R. 317. It is this principle which has on many occasions enabled the courts to quash decisions of the executive authorities which had been based on legislation that appeared to give absolute discretion to the authorities.

Throughout the years 1977 to 1994 successive Ministers made Orders prohibiting television or radio broadcasts of *inter alia* interviews with spokesmen for Sinn Fein or broadcasts inviting support for that organisation. The TV station, in applying that prohibition, instructed its staff not to interview any member of Sinn Fein, irrespective of the subject matter. This instruction was successfully challenged in the courts by members of staff when the station, in reporting on an industrial dispute, refused to broadcast interviews with the spokesman for the strikers because he was also a member of Sinn Fein. The Supreme Court held that the instruction was an unauthorised addition by the station to the Minister's Order, not a method of implementing it: *O'Toole -v- R.T.E.* (1993) ILRM 458.

There still remains a different provision in law which prohibits the broadcasting of "anything which may reasonably be regarded as likely to promote or incite to crime or as tending to undermine the authority of the State". This prohibition has never given rise to litigation or controversy.

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Another legal challenge to the ban on the broadcasting of interviews with spokesmen for the IRA or Sinn Fein was brought before the European Commission of Human Rights by a group of radio and TV journalists. They claimed that the ban was in breach of Article 10 of the ECHR because it was an unjustifiable interference with freedom of expression and a serious infringement of their right in a democratic society to impart information to the public and an infringement of the public's right to receive information. The journalists said that the ban stopped them giving a balanced account of many events in Northern Ireland as they occurred, and stopped them interviewing Sinn Fein public representatives or election candidates. For example, they could not interview Gerry Adams, the Sinn Fein M.P. and were confined to interviewing the candidate he had defeated.

The Irish Government contended that the journalists' application was inadmissible because they had not first exhausted their domestic remedies before bringing their case to Strasbourg, as required by Article 26 of the Convention. The Commission rejected this contention and accepted the journalists' argument that it would be a pointless exercise for them to bring this case to the Irish courts because the Supreme Court had already decided the question in the largely identical case of *Cooney* (supra). The Commission pointed out that the rule of

exhaustion of domestic remedies requires only the use of remedies which are capable of providing redress.

The Commission found that the ban on Sinn Fein satisfied the requirement in Article 10 of a "legitimate aim" because Sinn Feinn condoned the terrorist activities of the IRA and was closely associated with that organisation; the ban did not apply to reporting its activities but only to the use of the broadcast media for the purpose of advocating support for organisations which seek to undermine, by violence and other illegal means, the constitutional order and fundamental rights and freedoms.

As for the requirement in Article 10 of the Convention that the ban be "necessary in a democratic society" , the jurisprudence of the European Court of Human Rights has held that 'necessary' implies the existence of a pressing social need and that the Contracting States have a certain margin of appreciation in assessing whether such a need exists, but that this goes hand in hand with a European supervision. Therefore the Commission's sole task is to examine whether the reasons underlying the Minister's Order are relevant and sufficient under Article 10.2 - i.e. whether he had convincing reasons for assuming the existence of a pressing social need for imposing the ban. The Commission held that the purpose of the restriction was to ensure that spokesmen of the IRA and Sinn Fein do not use the opportunity of live interviews and other broadcasts to promote illegal activities which aim at undermining the constitutional order of the State and do not have the possibility of using the media as a platform for advocating their cause, encouraging support for their organisations and conveying the impression of their legitimacy.

Accordingly, given the limited scope of the restrictions and the overriding interests they were designed to protect, the Commission found that they could reasonably be considered "necessary in a democratic society", and, by a majority, it declared the journalists' application inadmissible: *Purcell -v- Ireland*, application no. 15404/89.

However, time passed, the IRA declared a ceasefire, Sinn Fein became respectable, peace talks began and in 1994 the Minister's Order lapsed and was not renewed, and in 2001 the law itself was repealed by Parliament.

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Another restriction imposed by legislation on radio and TV is the prohibition of broadcasting any advertisement "which is directed towards any religious or political end or has any relation to any industrial dispute". In obedience to this law the Broadcasting Commission banned a radio advertisement for the public showing of a video about Christ. The constitutionality of this ban was challenged. The Supreme Court held that the ban did affect the plaintiff's right of freedom of speech but that it was justifiable in the interests of the common good.

The court said that all three kinds of banned advertisement relate to matters which have proved extremely divisive in Irish society in the past, and Parliament was entitled to take the view that the citizens would resent having advertisements relating to these topics broadcast into their homes, and that such advertisements, if permitted, might lead to unrest. Moreover, Parliament might have thought that, in relation to matters of such sensitivity, rich men should not be able to buy access to the airwaves to the detriment of their poorer rivals. The court upheld the ban: *Murphy -v- Independent Radio & TV Commission* (1999)1 IR 12.

This decision has been criticised by academic writers and others as being unduly paternalistic and as failing to strike the proper balance between freedom of expression and the common good. However, it may be noted that some other states (e.g., Greece, Switzerland and Portugal) have similar laws, and when the case went to Strasbourg the European Court of Human Rights unanimously held that there was no violation of Article 10 of the Convention and that the ban was a legitimate restriction on the applicant's freedom of expression: *Murphy -v- Ireland* Application No. 44179/98.

The court held that the Contracting States have a wide margin of appreciation when regulating expression in relation to matters likely to offend personal convictions in the sphere of morals and religion. It noted that the ban only applied to radio and TV, not to the printed media, and that the applicant was entitled to participate in radio and TV programmes on religious matters and to have church services broadcast.

The other parts of the ban - those relating to political advertisements and industrial dispute advertisements - have never been challenged in Ireland.

The ban on political advertisements has been considered by the European Court of Human Rights in the case of *VgT Verein gegen Tierfabriken -v- Switzerland,* Application No. 24699/94. There the court held that a ban on political advertising could be justified by the need to prevent powerful financial groups from gaining undue influence over commercial radio and TV stations, thereby undermining the fundamental role of freedom of expression in a democratic society. (However, as the applicants in this case were not a powerful financial organisation, this ground did not justify a ban on their advertisement relating to the rights of animals, and accordingly there was a violation of Article 10 of the Convention.)

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There are other statutory restrictions on freedom of expression in Ireland which are found in most counties in one form or another and for that reason it is unnecessary to go into any detail about them. Examples are the publication of obscene matter; encouraging another person to commit crime or to commit suicide; the sending of threatening letters; words or writings which are intended, or likely, to stir up hatred on account of race, colour, nationality, religion, etc.

This last example is a new law. Until quite recently the Republic of Ireland was a remarkably homogeneous society - almost entirely white and Roman Catholic. Now a new reputation for prosperity has attracted a large number of immigrants from different countries in Europe, Africa and Asia. No great social problems have arisen as yet. (Experience in other countries, such as Britain and France, seems to suggest that problems tend to arise more often in the case of the generation born in the host country of immigrant parents, and in Ireland it is too early for that.) Whether criminal sanctions such as our new law are likely to increase good relations between different races or nationalities is a question much debated among commentators. In any event, there have been very few prosecutions, all of them in the lowest courts, and there has been no scrutiny of this law by the High Court or Supreme Court.

Such laws can also incidentally raise the sometimes difficult question of distinguishing between statements of fact and statements of opinion. There has been no relevant jurisprudence in Ireland on this, but an interesting German case sought to deal with it. In the *Holocaust Denial* Case (1994) the German Constitutional Court held that Article 5 (1) of the Basic Law only protected statements of fact to the extent that they were the foundations for

opinions and that it did not protect a deliberate, demonstrably untrue representation of fact. Accordingly, a stipulation that denial of the Holocaust not be permitted at a public meeting was held to be compatible with the Basic Law.

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In the sphere of the courts there are also statutory restrictions on the publication of certain reports of court proceedings. (Although the Constitution states that justice shall be administered in public, it also recognises the possibility of exceptions in "special and limited cases prescribed by law": *Article 34.1*). Examples are prohibitions of the publication of the names of young offenders, or adult victims of sexual crimes, and reports of family court proceedings. This latter prohibition has recently been the subject of criticism, and the law may be modified. Although motivated by a desire to protect the family life of the parties, it has been suggested that it has had the undesirable effect of preventing public scrutiny of decisions made in, for example, child custody cases by judges who are neither specially trained for, nor very interested in, this difficult type of work. (It is suggested that in an excessively high proportion of cases they - especially if they are men - tend to award custody to the mother rather than the father.)

Of greater significance than these statutory provisions is the powerful concept of contempt of court which, in Ireland as in other common law countries (although less in the USA) is frequently invoked against organs of the media either by the court itself or by a party to court proceedings. Sometimes this sanction is occasioned by published criticism of a judge which goes beyond the limits which the judge is prepared to tolerate (for this is one area of law where the maxim *nemo judex in causa sua* does not prevail). Those limits are necessarily subjective and are therefore quite ill-defined. A leading decision of the High Court stated that criticism of the courts was permitted which was "free, full, severe but respectful". (One may ask what advice is a lawyer to give to an editor who wishes to publish a criticism of a judge which is disrespectful but mild?). Since a person found guilty of contempt of court can be fined heavily and, if necessary, sent to prison until he is willing to apologise in court to the judge, it is difficult not to feel sympathy for the commentator who said that the displeasure of the judges is as unavoidable and unpredictable as an Act of God.

A much more common form of contempt of court is the publication of matter which obstructs, or tends to obstruct, the proper conduct of judicial proceedings. An obvious example is the publication of facts or statements of opinion which would prejudice a jury which is hearing, or about to hear, a criminal case, such as details of previous convictions or assertions of the guilt of the accused person. Until recent years Irish newspapers tended to be conservative and sober in tone. Various developments have altered this situation, such as increased competition, especially from English tabloid newspapers with lower ethical standards, and recognition of the fact that lurid accounts of criminal cases sell newspapers. TV, with its desire for immediate news reporting and comment, and shortage of time for reflection, has added to the problem. The result is a tension - one might say a conflict - between the right of the media to give information to the public and the right of the individual to a trial which is based on the evidence and the law rather than on the writings of journalists.

Article 10(2) of the European Convention on Human Rights expressly authorises restrictions on the right to freedom of expression which are prescribed by law and are necessary in a democratic society for maintaining the authority and impartiality of the judiciary.

In Ireland the Supreme Court has held that judges have an inherent power to restrict press reporting of criminal cases in order to vindicate the right to a fair trial which is guaranteed by the Constitution ("No person shall be tried on any criminal charge save in due course of law": *Article 38*). However, such a restriction can only be justified where contemporaneous reporting of the case would pose a real risk of an unfair trial, and where the damage caused by such reporting could not be remedied by the trial judge giving appropriate directions to the jury: *The Irish Times - v - Ireland* (1998) 1 IR 359.

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Like other human rights, the right to freedom of expression is qualified by certain conditions imposed in the interests of justice and a harmonious society, and this is recognised by national constitutions and by the European Convention on Human Rights. Ultimately, in every country the citizen who seeks to avail of these rights depends upon the wisdom and independence of mind of the judiciary.

Matthew Russell

Dublin September 2004