

**DEGREE OF  
BARRISTER-AT-LAW**

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**ENTRANCE EXAMINATION**

**IRISH  
CONSTITUTIONAL LAW**

**August 2021**

**DATE** | Monday, 16 August 2021

**TIME** | 3.5 hours

**EXAMINER** | T. John O'Dowd (UCD)

**EXTERNAL EXAMINER** | Mr Conleth Bradley SC

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**Instructions**

A candidate must answer **Question 1** (50% of marks) and **TWO** other questions (each 25% of marks).

This paper is 7 pages long including the cover sheet. The Questions are on pages 2 to 7

Relevant Provisions of the Constitution of Ireland are at pages 8 to 14

# IRISH CONSTITUTIONAL LAW

## Q1 | COMPULSORY QUESTION

**50 MARKS**

The object of the Health Service Executive (HSE) is “to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public” (Health Act 2004 s 7(1)); it “shall, to the extent practicable, further its object” (s 7(2)) and it “shall manage and shall deliver, or arrange to be delivered on its behalf, health and personal social services” (s 7(4)). The HSE may compulsorily acquire land under Part VIII of the Health Act, 1947, without any express limitation on the purpose for which it does so. (Health Act, 1947 s 78) The compensation payable to the owner of the land acquired is determined by arbitration under the Acquisition of Land (Assessment of Compensation) Act, 1919; that is, broadly speaking, by the market value of the land and by the disturbance caused to the owner. The HSE must apply to the Minister for Health to have any such compulsory acquisition order confirmed and the Minister, having caused an inquiry to be held into any objections to confirmation of the order (other than those that relate only to compensation), may refuse to confirm it, confirm it or confirm it with modifications (s 83). A person affected by a compulsory acquisition order may apply to the High Court for its complete or partial annulment, and the High Court may annul the whole of the order or a part of it, if it is satisfied that the order or that part of it was made in excess of or was otherwise not authorised by the powers conferred by the Act or that the applicant or any other person has been substantially prejudiced by any failure to comply with the Act (s 85).

*St Damien’s Hospital for Tropical Diseases* is on the outskirts of *Ballymagash*. It is mainly focused on research and teaching in the field of tropical medicine, contributing to prevention, diagnosis and treatment of diseases (including HIV) in tropical countries; dealing with travel-related infections in Ireland is only a minor part of its work. The hospital was for many years under the management of a Roman Catholic religious order, but in 2010 responsibility for the institution and ownership of the land on which it sits were transferred to a charitable trust, independent of the order, one of whose prime purposes is nevertheless carrying on the hospital’s activities in a way consistent with Roman Catholic principles, values and ethos. The Government has decided that the hospital (which is mainly funded by the Irish taxpayer) should be taken into public ownership, as should the land on which it is located. The main reason for doing so is to better integrate the hospital’s work into Irish national policy in relation to overseas development. Based on that Government decision, the Minister for Health has

directed the Board of the HSE that the land on which *St Damien's Hospital for Tropical Diseases* sits should be compulsorily acquired, if the trustees refuse to sell it to the State and to surrender responsibility for the operation of the hospital to the HSE. Advise the trustees as to whether the Constitution might prevent the HSE from acting on the direction given by the Minister.

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## Q2

**25 MARKS**

According to an anonymous 999 call a car was on fire by the side of a country lane, 10km from *Ballymagash*. When firefighters reached the scene, they found a car ablaze and *Mark* nearby, in a very distressed and agitated state, with a broken leg. The firefighters began to tackle the blaze. *Mark* protested, saying that it was his car and he wanted it to be let burn out. The fire fighters replied that it is their job to put out fires. After the firefighters brought the fire under control, Gardaí arrived and the firefighters told them of *Mark's* unusual behaviour. A Garda picked through items from inside the car, retrieved earlier by firefighters, and she found a duffle bag containing a handgun and what seem to be bundles of €100 notes. She told *Mark* that she was arresting him on suspicion of “unlawful possession” of the items she found, which she pointed at, and then she asked him to explain what they were doing in the car. *Mark* stayed silent. He was brought to *Ballymagash* Garda station and detained under section 30 of the Offences Against the State Act, 1939. On being told of his right to consult a lawyer, *Mark* asked the member in charge to contact a Dublin solicitor, who could not attend in person for at least an hour. The Gardaí quickly established that *Mark* does own the car and that the money is counterfeit. Before his first interview, *Mark* was given ten minutes to consult his solicitor by phone. During the interview, the Gardaí again asked *Mark* to account for the presence of the gun and the money, now known to be counterfeit. He stayed silent. *Mark's* solicitor arrived at the station and was given fifteen minutes to speak with him. During a second interview, with his solicitor present, *Mark* was not asked to account for the presence of any items in his car. A file has been sent to the Director of Public Prosecutions, with a view to *Mark* being prosecuted for unlawful possession of a firearm and for having custody or control of counterfeit currency. Advise *Mark* as to whether the Constitution will be of use to him in countering such charges.

# IRISH CONSTITUTIONAL LAW

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## Q3

**25 MARKS**

In 2010 *Abdul* and his wife *Mariam* moved to Ireland from their home country (where polygamy is lawful), leaving behind *Abdul's* other, childless, wife, whom he later divorced. In 2011 *Mariam* gave birth to twins, *Asma* and *Mikhail*. *Mariam* died in 2015 and *Abdul* has been a single parent to the twins ever since. One of his main concerns for *Asma* and *Mikhail's* welfare is that they are growing up in a country where homosexual behaviour and lifestyles are not merely tolerated but publicly endorsed and celebrated. He worries that *Asma* and *Mikhail* might come to believe that they are lesbian, gay or bisexual and live their lives accordingly, which to him would be an abomination. That is his main reason for planning to move back permanently to his home country with his children. *Mariam's* brother *Musa*, who also lives in Ireland, has a very close relationship with his niece and nephew, who think of him as virtually a second father. *Musa* disagrees with *Abdul's* views about *Asma* and *Mikhail's* prospective welfare growing up in Ireland and thinks bringing them back to *Abdul's* home country would be entirely wrong, given the educational, economic and social opportunities they would lose as a result. Advise *Musa* whether the Constitution will assist any effort to prevent *Abdul* going ahead with his plan to move his children back to his home country.

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## Q4

**25 MARKS**

*Frank* was convicted of engaging in an act of buggery with a child under the age of 17 years, contrary to section 3 of the Criminal Law (Sexual Offences) Act 2006 (as substituted by the Criminal Law (Sexual Offences) Act 2017 s 17). It is a defence to that charge “for the defendant to prove that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years” (s 3(3)). In this regard “the court shall consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the said age” (s 3(4)). “The standard of proof required to prove that the defendant was reasonably mistaken that the child had attained the age of 17 years shall be that applicable to civil proceedings” (s 3(5)). During his trial in the Circuit Court, *Frank's* counsel

protested, in the absence of the jury, against the requirement that his client should have to prove a reasonable mistake and the judge noted this protest. *Frank* testified that he had believed that the child was 17 and to the circumstances alleged to make this reasonable. The jury convicted *Frank* and he was sentenced to two-and-a-half years in prison. *Frank's* appeal against conviction and sentence is pending before the Court of Appeal. *Frank* was convicted of engaging in an act of buggery with *Albertine*, who arrived unaccompanied in the State three years ago, claiming to be 14 years of age, and applied for international protection. If *Albertine's* claim about her age is correct, she would have been 15 at the time of the offence. After *Frank* was convicted and sentenced, the Minister for Justice decided (a decision the International Protection Appeals Tribunal subsequently upheld) that *Albertine* is neither a refugee nor entitled to subsidiary protection, partly on the ground that she misrepresented her age and that she is really in her mid-20s. *Albertine* is facing deportation as a result. The Director of Public Prosecutions has considered the evidence on which the Minister and the Tribunal based their findings, but remains of the view that it is more likely than not that *Albertine* was 15 at the time of the offence. *Frank* passed on to the Gardaí an anonymous tip he received that *Albertine* contradicted part of her testimony at his trial, in an interview (recorded after *Frank* was convicted but as yet unbroadcast) with *Carol*, a journalist. *Carol* has refused to answer any questions from the Gardaí on the matter; they are not pursuing this line of inquiry. Advise *Frank* as to whether the Constitution gives a basis to attack his conviction.

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## Q5

**25 MARKS**

Answer **either** (a) **or** (b) **or** (c) below, **but not more than one of them**. Answer by reference to decided cases, **which need not include those cited in the question**.

- (a). “The essential task is to determine whether the Oireachtas had failed to comply with its constitutional duty as sole legislator. Any gauge must be seen as one derived from the words of Article 15.2.1<sup>o</sup> itself. An identification of principles and policies cannot, therefore, be seen as a form of free-standing vantage-point permitting a court to engage in what might be seen as a critique of the essential substance or policy, in a political sense, of what the Oireachtas chooses to provide for in legislation. Absent a violation of the Constitution, for a court to criticise such underlying policy would necessarily offend against the fundamental principle of separation of powers identified throughout the framework of the Constitution, but rooted in Article 5 ...”

McMenamin J in *NECI v Labour Court* [2021] IESC 36 (18 June 2021) para 57.

Discuss how the principles and policies test has been developed by the Superior Courts since the judgment of O'Higgins CJ in *City View Press Ltd v An Chomhairle Oiliúna* [1980] IR 381, 399. (25 marks)

or

- (b). "[T]he Constitution and the case law make it clear that, while closely related, there are critical distinctions between: (i) administrative adjudication required to be carried out in accordance with fair procedures; (ii) the administration of justice by a judge under Article 34; and (iii) the exercise of limited functions and powers of a judicial nature under Article 37, each of which has different legal consequences. In this case, we are required to locate the jurisdiction exercised by adjudication officers and the Labour Court under the 2015 Act within that classification. We cannot avoid that task." O'Donnell J in *Zalewski v Adjudication Officer* [2021] IESC 24 (6 April 2021) para 127.

Do you consider that the case law, as it now stands, distinguishes between those three situations in a satisfactory manner? (25 marks)

or

- (c). "While the doctrine of equality mandated by Article 40.1 of the Constitution seems held between polarities of those aspects of the human personality which must not be discriminated against and a wider doctrine apparently requiring all similar situations to be treated equally, the express wording focusing on the attributes of shared humanity has not been abrogated by referendum of the people: 'All citizens shall, as human persons, be held equal before the law.' Hence, a reading of the case law, while emphasising human personality as a touchstone, has moved outside the confinement of personal attributes and into a search for comparators and why apparently equal situations do not call for uniform treatment. There is no imperative discoverable from any case decided by this Court whereby all situations must be resolved in law into homogeneity. One situation of non-homogeneity may be unconstitutional unless treatment is underpinned by practical reasons that do not seek to discriminate on an unfair basis that draws from prejudice or the differentiation of people on the basis of their essential attributes.' Charleton J in *Braney v Special Criminal Court* [2021] IESC 7 (12 February 2021) para 35.

The prevailing understanding of the aspects of Article 40.1 discussed here seems to have changed significantly in the last twenty-five years. Has the Supreme Court yet given a clear and useful statement of what the section is now understood to mean in this regard?

# Relevant Provisions of the Constitution of Ireland

## Article 5

Ireland is a sovereign, independent, democratic state.

## Article 6

1 All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

2 These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.

## Article 15

2 1° The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

2° Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures.

## Article 28

2 The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.

4 1° The Government shall be responsible to Dáil Éireann.

2° The Government shall meet and act as a collective authority, and shall be collectively responsible for the Departments of State administered by the members of the Government.



## Article 34

1 Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

2 The Courts shall comprise:

- i Courts of First Instance;
- ii a Court of Appeal; and
- iii a Court of Final Appeal.

3 1° The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.

2° Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court, the Court of Appeal or the Supreme Court.

3° No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26.

4° The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law.

## Article 37

1 Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.

## Article 38

1 No person shall be tried on any criminal charge save in due course of law.

## Articles 40-44

### FUNDAMENTAL RIGHTS

#### PERSONAL RIGHTS

##### ARTICLE 40

1 All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

2 1° Titles of nobility shall not be conferred by the State.

2° No title of nobility or of honour may be accepted by any citizen except with the prior approval of the Government.

3 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

3° Provision may be made by law for the regulation of termination of pregnancy.

4 1° No citizen shall be deprived of his personal liberty save in accordance with law.

2° Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law.

3° Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this Constitution, the High Court shall refer the question of the validity of such law to the Court of Appeal by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court

shall fix until the Court of Appeal has determined the question so referred to it.

4° The High Court before which the body of a person alleged to be unlawfully detained is to be produced in pursuance of an order in that behalf made under this section shall, if the President of the High Court or, if he is not available, the senior judge of that Court who is available so directs in respect of any particular case, consist of three judges and shall, in every other case, consist of one judge only.

5° Nothing in this section, however, shall be invoked to prohibit, control, or interfere with any act of the Defence Forces during the existence of a state of war or armed rebellion.

6° Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.

5 The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.

6 1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –

i 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 seditious or indecent matter is an offence which shall be punishable in accordance with law.

ii The right of the citizens to assemble peaceably and without arms. Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.

iii The right of the citizens to form associations and unions. Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.

2° Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.

## **THE FAMILY**

### **ARTICLE 41**

1 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing

inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –

- i there is no reasonable prospect of a reconciliation between the spouses,
- ii such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- iii any further conditions prescribed by law are complied with.

3° Provision may be made by law for the recognition under the law of the State of a dissolution of marriage granted under the civil law of another state.

4 Marriage may be contracted in accordance with law by two persons without distinction as to their sex.

## **EDUCATION**

### **ARTICLE 42**

1 The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2 Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4 The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational

facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

## **CHILDREN**

### **ARTICLE 42A**

1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4 1° Provision shall be made by law that in the resolution of all proceedings—

i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

ii concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

## **PRIVATE PROPERTY**

### **ARTICLE 43**

1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

## **RELIGION**

### **ARTICLE 44**

1 The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.

2 1° Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

2° The State guarantees not to endow any religion.

3° The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.

4° Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

5° Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.

6° The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.