

DEGREE OF
BARRISTER-AT-LAW
THE HONORABLE SOCIETY OF KING'S INNS

ENTRANCE EXAMINATION

**IRISH
CONSTITUTIONAL
LAW**

2024

DATE: 13 August 2024

TIME: 3 hours

EXAMINER Mr T John O'Dowd UCD

EXTERNAL EXAMINER | The Hon Mr Justice Gerard Hogan

INSTRUCTIONS

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

This paper is 6 pages long including the cover sheet.

Relevant provisions of the Constitution of Ireland are attached.

CONSTITUTIONAL LAW

Q1 | COMPULSORY QUESTION

50 MARKS

Conor is a Garda sergeant. At two o'clock in the morning, while on patrol in Dublin city centre, he finds a young woman, Karen, lying in an alley behind a night club. Karen is shouting and roaring, is in an agitated and confused condition and seems to have trouble standing because of a leg wound, which is bleeding profusely. Conor asks Karen to explain what has happened to her, but he is not satisfied with what he considers to be her incoherent and confused response. In his view, this is an appropriate situation for him to exercise the power that he believes is given to any member of An Garda Síochána who is on duty within the Dublin Metropolitan Area (but not anywhere else in the State) by section 27 of the Dublin Police Act 1842.

27. It shall be lawful for any constable belonging to the Dublin police to take into custody without a warrant all loose, idle, and disorderly persons whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanor, or breach of the peace, and all persons whom he shall find between sunset and the hour of eight in the morning lying or loitering in any highway, yard, or other place, and not giving a satisfactory account of themselves.

As Conor is leading Karen to a nearby Garda station, she breaks away from him and tries to run off. He easily catches up with her and, in order to subdue her, he bangs her head against a brick wall several times. Karen then speaks excitedly and profusely, admitting to being in possession of controlled drugs for the purpose of supplying them to others. Conor conducts a brief search of her clothes and finds the drugs that Karen has admitted possessing for the purpose of supplying to others. He also finds her mobile phone and takes possession of it, as evidence, along with the drugs.

On Karen's arrival at the Garda station, the member of the Garda Síochána in charge of the station decides that there are reasonable grounds for believing that her detention under section 4 of the Criminal Justice Act 1984 is necessary for the proper investigation of the drugs offence which she previously admitted to Conor that she had committed. Karen is interviewed several times, with her solicitor present, but she makes no further admissions. She is then released without charge and a file is sent to the Director of Public Prosecutions.

Advise Karen. Does she have good grounds for claiming that section 27 of the 1842 Act, or any relevant part of it, is inconsistent with the Constitution because it is impermissibly vague, or it is unconstitutionally discriminatory, or both? If she succeeds in a challenge to section 27 or to any relevant part of it, (a) what is the likelihood that will this lead to any incriminating evidence obtained being found to be inadmissible against her in a subsequent criminal trial and (b) what other form of redress against the State and its agents – for breach of constitutional rights - might she be entitled to obtain? (50 marks)

CONSTITUTIONAL LAW

Q2

25 MARKS

Jessica is a professional journalist employed by The Bugle newspaper. Ballymagash Holdings plc proposes to build three twelve-storey apartment blocks next to an existing housing estate, whose residents bitterly oppose this. The county council within whose functional area Ballymagash is located grants planning permission for the development. Jessica gets a tip-off from a council official, whose identity she knows but who does not wish to be publicly identified, claiming that Ballymagash Holdings plc has used its business contacts to help the former head of the council's planning department get a very lucrative job with a third party. The Bugle publishes a story based on this tip off. Ballymagash Holdings plc sues Jessica (but not her editor or The Bugle itself) for defamation and seeks an order for her to make discovery of any documents in her possession or power relating to any matter in question in the case, such as any prior communications she may have had with third parties that related to the publication for which she is being sued. It also seeks non-party discovery by the county council, relating to any documents in its possession or power that might help identify Jessica's source. Advise Ballymagash Holdings plc as to whether the Constitution may be the basis for Jessica or the county council to avoid, in whole or in part, having to make the discovery sought. (25 marks)

CONSTITUTIONAL LAW

Q3

25 MARKS

Joe, an employee of a semi-state company, recently died just before reaching retirement age. He was a member of the company's superannuation scheme, which is jointly funded by employee and employer contributions. An Act of the Oireachtas obliged the company to propose such a scheme, which had to be confirmed by an order made by the relevant Minister, with any modifications as he thought proper. Under the Act, the scheme "shall have the force of law in the form in which it was confirmed". This also applies to subsequent amending schemes, including the current one, proposed by the company and confirmed by the Minister.

Liam (aged 9) is Joe's surviving dependent child. Under the scheme, if Joe leaves no surviving spouse Liam gets a pension of one-third the amount of the pension Joe would have received on retirement ("Joe's pension"). If Joe has a surviving spouse then that person gets half, and Liam one-sixth, of Joe's pension. Liam is entitled to his pension until he reaches 16 years of age or, if still in fulltime education, 21 years of age and it shall be payable to such persons and in such manner as the trustees of the scheme may designate. The spouses' and children's pensions both cease upon the remarriage or co-habitation of the surviving spouse (if there is

one) but may be revived by the trustees when the marriage or co-habitation has come to an end or where they feel there are compassionate grounds for the payment of the pensions.

Síle is Liam's mother. Síle and Joe were never married (to each other or to anyone else) and were never anyone's civil partner. At Joe's death, they had been living together for ten years as a couple in an intimate and committed relationship. The scheme defines "surviving spouse" as "the widow or widower or surviving civil partner of a deceased member". The trustees inform Síle that she is not entitled to any pension but that Liam is entitled to one-third of Joe's pension, which the trustees propose to pay to Síle on his behalf. Advise Síle as to whether she is constitutionally entitled to claim the same pension as Joe's widow would have received and on the same terms. (25 marks)

CONSTITUTIONAL LAW

Q4

25 MARKS

The Imperial Hotel, Ballymagash is a complete ruin and an imminent danger to the public and to neighbouring properties. The county council in whose functional area Ballymagash is located serves a notice under section 11 of the Derelict Sites Act 1990, on Ballymagash Hotels Ltd, the hotel's owner. As section 6(1)(c) of the Act expressly permits, the council serves the notice by sending it by post in a prepaid registered letter, addressed to Ballymagash Hotels at the address of its registered office. Because section 6(1) states that "[a]ny notice required to be given or served on a person under this Act shall be addressed to the person concerned and shall be given or served on him in one of the following ways" the council feels no need also to adopt an alternative form of service which would have involved "affixing [the notice] in a conspicuous position on or near such land" (section 6(1)(d)). The notice sent by post directs Ballymagash Hotels to demolish the hotel and to level the site, in order to prevent the land on which it stands from continuing to be a derelict site. Ballymagash Hotels neither makes any representations as to why the notice should be revoked or amended, within the fourteen days allowed for it to do so, nor does it ever comply with the notice, which the Act requires it to do.

Behemoth Bank plc has a first mortgage in respect of the property. It never receives any notice of what the council proposes to do and it never has an opportunity to make any representations in relation to this. Between the service of the notice on Ballymagash Hotels (which never communicates it to Behemoth Bank) and the expiry of the subsequent fourteen day period, the bank forecloses on the mortgage and enters into possession. However, because of the absence of any site notice, it is still totally unaware of what the council proposes to do. After fourteen days have elapsed from service of the notice, contractors engaged by the council enter the property and demolish the hotel. Under section 11(5) of the Act, the council is entitled to recover, as a simple contract debt in any court of competent jurisdiction, from Ballymagash Hotels any expenses arising from the carrying out of the notice. Behemoth Bank is aggrieved that it lost the opportunity to undertake, or cause the owner to undertake, at the bank's expense, any remedial work on this historic structure and that, as a result, the value of its

security has been significantly diminished by the council's actions. Advise Behemoth Bank as to whether the Constitution gives it any basis to seek redress from the county council or from the State. (25 marks)

CONSTITUTIONAL LAW

Q5

25 MARKS

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

- (a) '5.4 ... [A] more appropriate characterisation of those rights which have been identified in the jurisprudence of the Irish courts, even though not expressly referred to in the text of the Constitution, may be to describe such rights as "derived rights". Such a re-characterisation would not mean that any of the rights described as unenumerated rights in the jurisprudence would no longer be recognised. The term "unenumerated rights" is not inaccurate for it describes rights which are not expressly referred to in the text of the Constitution itself.

'5.5 ... [T]he term "derived rights" [may] more accurately reflect[.] the true nature of those rights which do not find expression in the text of the Constitution itself but may, nonetheless, be accepted as being recognised by the Constitution by virtue of representing aspects of rights positively identified in that text as interpreted in accordance with the terms of the Constitution as a whole or deriving from the values either expressly referred to or inherent in the structure of the Constitution." *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 [5.4]-[5.5].

Why has the Supreme Court come to favour the adjective "derived" rather the "unenumerated" in order to characterise rights that are not expressly and specifically stated in the Constitution? Does anything turn on this dichotomy, or is it merely a distinction without a difference? (25 marks)

or

- (b) What has been the long term impact of *Buckley v. Attorney General* [1950] IR 67 ("the *Sinn Féin Funds* case") so far as the safeguarding of judicial independence and the interpretation of Article 34.1 is concerned? (25 marks)

or

- (c) " ... [C]ase law in this and other jurisdictions has identified a number of principles themselves consistent with the constitution and the legal order it contemplates, which control the potentially seismic collateral effects of a finding of unconstitutionality and limit

the occasions on which such a remedy must be granted to those where it is truly required. All of this is consistent not just with the obligation under Article 15.4.2° to limit any finding of constitutionality to the precise area and aspect of inconsistency, but also to the understanding of the Constitution as creating a functioning legal order.” *Heneghan v Minister for Housing, Planning & Local Government (No 2)* [2023] IESC 18 [10].

Describe and critically discuss the manner in which the Supreme Court has developed and refined the jurisdiction of the High Court, Court of Appeal and Supreme Court itself to make declarations that postpone or otherwise qualify the actual legal effect of a court’s finding that a statutory provision is unconstitutional. (25 marks)

or

- (d) “The judicial record in respect of the interpretation and application of the Article 40.1 equality guarantee has, on the whole, been disappointing.”

Do you agree with this statement? Support your answer with reference to decided cases. (25 marks)

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 26

This Article applies to any Bill passed or deemed to have been passed by both Houses of the Oireachtas other than a Money Bill, or a Bill expressed to be a Bill containing a proposal to amend the Constitution, or a Bill the time for the consideration of which by Seanad Éireann shall have been abridged under Article 24 of this Constitution.

1 1° The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.

2° Every such reference shall be made not later than the seventh day after the date on which such Bill shall have been presented by the Taoiseach to the President for his signature.

3° The President shall not sign any Bill the subject of a reference to the Supreme Court under this Article pending the pronouncement of the decision of the Court.

2 1° The Supreme Court consisting of not less than five judges shall consider every question referred to it by the President under this Article for a decision, and, having heard arguments

by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference.

2° The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.

3 1° In every case in which the Supreme Court decides that any provision of a Bill the subject of a reference to the Supreme Court under this Article is repugnant to this Constitution or to any provision thereof, the President shall decline to sign such Bill.

2° If, in the case of a Bill to which Article 27 of this Constitution applies, a petition has been addressed to the President under that Article, that Article shall be complied with.

3° In every other case the President shall sign the Bill as soon as may be after the date on which the decision of the Supreme Court shall have been pronounced.

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 29

1 Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.

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.