



Georgetown University Law Center  
**Scholarship @ GEORGETOWN LAW**

---

2020


## New Media, Free Expression, and the Offences Against the State Acts

Laura K. Donohue

This paper can be downloaded free of charge from:  
<https://scholarship.law.georgetown.edu/facpub/2248>

---

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.  
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [European Law Commons](#), [Human Rights Law Commons](#), [International Law Commons](#), [Internet Law Commons](#), [Legislation Commons](#), and the [National Security Law Commons](#)

# NEW MEDIA, FREE EXPRESSION, AND THE OFFENCES AGAINST THE STATE ACTS

Prof. Laura K. Donohue, J.D., Ph.D.

## I. INTRODUCTION\*

Social media has swept the globe. As of October 2019, Facebook reported 2.414 billion active users worldwide.<sup>1</sup> YouTube, WhatsApp, and Instagram were not far behind, with 2 billion, 1.6 billion, and 1 billion users respectively.<sup>2</sup> Ireland has ridden the wave: 3.2 million people (66% of the population) use social media for an average of nearly two hours per day.<sup>3</sup> By 2022, the number of domestic Facebook users is expected to reach 2.92 million.<sup>4</sup> Forty-one percent of the population uses Instagram (65% daily); 30% uses Twitter (40% daily), and another 30% uses LinkedIn.<sup>5</sup>

Social media is no longer a college dorm room project to ascertain who is hot (or not). It has taken off, and it has done so in ways that have transformed the nature of what is being done online. Networking companies like Facebook have been joined by apps that provide product and service reviews, such as Yelp, TripAdvisor, and Amazon Spark. Microbloggers extend beyond Twitter to companies like Plurk, 4Chan, and its notorious legacy 8Chan. Photosharing marks not just Instagram, but popular alternatives like Imgur, Snapchat, and Pinterest. Music and videos can be shared through not just YouTube but Periscope, Vimeo, TikTok, Facecast and other sites. Other sectors within social media aggregate news and facilitate discussion, such as Reddit and Quora. Still others focus on the peer-to-peer sharing economy, like Rover or AirBnB.

Over the past decade these and other sites have transformed the nature of what happens in the online world. Beyond mere communication, social media creates a common, lived experience. It filters information through emotion. It democratizes influence. And it creates an entirely new power structure that can be manipulated in ways that have profound consequences.

The deleterious impact of new media on the social fabric matters. Scholars have begun to write at length about the increases in stress and alienation that result; rising levels of depression and suicide that stem from online dependence and replacing analogical experience with electronic interaction; and escalating levels of anxiety that find root in the validation expectation of the 'like' function.<sup>6</sup> Re-posting indicates emotion, and study after study has

---

\* I am indebted to Professor Fergal Davis and Professor Mark Coen for their invitation to be part of this volume, and to all of the symposium participants for a lively exchange at the Sutherland School of Law, Dublin. I also am grateful to Georgetown Law Research Librarian Jeremy McCabe, J.D., for his assistance in obtaining many of the materials used in this chapter.

<sup>1</sup> Simon Kemp, 'Digital 2019: Q4 Global Digital Statshot' (*DataReportal*, 23 October 2019) slide 24 <https://datareportal.com/reports/digital-2019-q4-global-digital-statshot>. See also 'Most Popular Social Networks Worldwide as of January 2020, Ranked by Number of Active Users' (*Statista*, 25 January 2020) [www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/](http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/).

<sup>2</sup> *ibid.*

<sup>3</sup> Simon Kemp, 'Digital 2019: Ireland' (*DataReportal* 31 January 2019) slides 19 and 31 <https://datareportal.com/reports/digital-2019-ireland>.

<sup>4</sup> S. O'Dea, 'Forecast of the Facebook User Penetration Rate in Ireland from 2015-2022' (*Statista*, July 2017), [www.statista.com/statistics/566781/predicted-facebook-user-penetration-rate-ireland/](http://www.statista.com/statistics/566781/predicted-facebook-user-penetration-rate-ireland/). See also Karen Twomey, 'Social Media Stats Ireland 2019' (*Communications Hub* 12 August 2019) <http://communicationshub.ie/blog/2019/08/12/social-media-statistics-ireland-2019/>.

<sup>5</sup> *ibid.*

<sup>6</sup> See, eg, Cal Newport, *Digital Minimalism: Choosing a Focused Life in a Noisy World* (New York, Portfolio/Penguin 2019); Jean M Twenge et al, 'Increases in Depressive Symptoms, Suicide-Related Outcomes,

found that of all emotions, fear and anger transfer most readily online.<sup>7</sup> Confronted by situations that go against individuals' principles, passion's only outlet may be a vehement tirade—which itself then gets picked up and re-posted, along with more emotional content, driving society ever to extremes.

There are also significant political risks that accompany this new genre, which are magnified by the ways in which social networks can be manipulated. Hostile actors can use the platforms to deepen political schisms, to promote certain candidates, and, as demonstrated by the recent Cambridge Analytica debacle, to swing elections.<sup>8</sup> Simultaneously, terrorist organisations can use online platforms to recruit fighters—a method via which ISIS has managed to convince 30,000 foreign fighters to join their cause.<sup>9</sup> The Islamic State opened franchises from Libya to Bangladesh, even as lone wolves, inspired by online postings, sprung up from Paris to San Bernadino.

In Ireland, since 1939, the Offences Against the State Act (OAS) has served as the primary vehicle for confronting political violence. How effective is it in light of new media and the novel types of threats that it poses? Terrorist recruitment is just the tip of the iceberg. Social networking sites allow for targeted and global fundraising, international direction and control, anonymous power structures, and access to critical expertise. The platform can create the oceans within which extreme ideologies can prosper—and it can do so, targeting individuals likely to be sympathetic to the cause, 24 hours a day, seven days a week, *ad infinitum*. It is an alternative reality, subject to factual manipulation and direction—a problem exacerbated by the risk of so-called deep fakes: autonomously-generated content that makes it appear that people acted, or that certain circumstances occurred, which never did.<sup>10</sup>

In November 2019 the Irish Government approved new regulations for social media platforms.<sup>11</sup> To ensure election integrity, the new measure targets political advertising and tries to ensure that voters have access to accurate information.<sup>12</sup> These provisions do not address the myriad further political risks posed by new media. This chapter, accordingly, focuses on ways in which the Offences Against the State Act (OAS) and related laws have historically treated free expression as a prelude to understanding how and whether the existing provisions are adequate for the types of challenges brought by new media.

## II. THE FIRES OF IRISH REPUBLICANISM

---

and Suicide Rates Among U.S. Adolescents After 2010 and Links to Increased New Media Screen Time' (2018) 6 *Clinical Psychological Science* 3; Heather Clelland Woods and Holly Scott, '#Sleepyteens: Social Media Use in Adolescence Is Associated with Poor Sleep Quality, Anxiety, Depression and Low Self-Esteem' (2016) 51 *Journal of Adolescence* 41; Hugues Sampasa-Kanyinga and Rosamund F. Lewis, 'Frequent Use of Social Networking Sites Is Associated with Poor Psychological Functioning among Children and Adolescents' (2015) 18 *Cyberpsychology, Behavior, and Social Networking*; Jesse Fox and Jennifer J. Moreland, 'The Dark Side of Social Networking Sites: An Exploration of the Relational and Psychological Stressors Associated with Facebook Use and Affordances' (2015) 45 *Computers in Human Behavior* 168; Jon D Elhai et al, 'Fear of Missing Out, Need for Touch, Anxiety and Depression Are Related to Problematic Smartphone Use' (2016) 63 *Computers in Human Behavior* 509.

<sup>7</sup> PW Singer and Emerson T Brooking, *Like War: The Weaponization of Social Media* (Boston, Houghton Mifflin Harcourt 2018).

<sup>8</sup> Carole Cadwalladr, 'Fresh Cambridge Analytica Leak 'Shows Global Manipulation Is Out of Control'' *The Guardian* (London, 4 January 2020) [www.theguardian.com/uk-news/2020/jan/04/cambridge-analytica-data-leak-global-election-manipulation](http://www.theguardian.com/uk-news/2020/jan/04/cambridge-analytica-data-leak-global-election-manipulation).

<sup>9</sup> Singer & Brooking, *Like War* (2018) (n 7).

<sup>10</sup> Bobby Chesney and Danielle Keats Citron, 'Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security' (2019) 107 *California Law Review* 1753.

<sup>11</sup> Harry McGee, 'New Legislation will Regulate Political Advertising on Social Media' *Irish Times* (Dublin, 5 November 2019) <https://www.irishtimes.com/news/politics/new-legislation-to-regulate-political-advertising-on-social-media-1.4073609>.

<sup>12</sup> *ibid.*

Like the Irish Free State Constitution, the Treasonable Offences Act, and Public Safety Acts, was forged in the fires of Irish Republicanism. These laws contained numerous provisions that restricted speech, press, broadcast, and publication. The 1937 Constitution cemented many of their elements into the structure of the state, creating an environment within which the 1939 OAS could later expand. This section outlines the evolution of measures in these instruments that most directly impacted free expression.

## A. Legal Framing Prior to the Offences Against the State Act

The 1922 Free State Constitution explicitly protected free expression, outside of a narrow exception for public morality.<sup>13</sup> Nevertheless, the Government almost immediately mounted an aggressive anti-Republican counterterrorist campaign targeting oral and written words that encouraged or facilitated criminal acts, violence, or the overthrow of the state, or that masqued evidence necessary for prosecution. In 1937, these measures became folded into the new Constitution, bringing with them a general orientation against anti-Treaty Republicanism.

### 1. The 1925 Treasonable Offences Act

In May 1923, the Irish Civil War ended with Éamon de Valera and Frank Aiken's call for the end of the armed struggle.<sup>14</sup> But violent skirmishes, punctuated by hunger strikes rejecting the imprisonment of anti-Treatyites, continued.<sup>15</sup> High unemployment and food shortages further exacerbated civil, social, and political tension. Cuman na nGaedheal, which came into power in the August 1923 election, took steps to protect the fledgling state, amongst which were restrictions on speech.

Under the Treasonable Offences Act of 1925, it became an offence to conspire with or to incite others to attempt to overthrow the government of Saorstát Eireann.<sup>16</sup> Associated treasonable documents could be recovered based on an oath made to a District Court by the

---

<sup>13</sup> Constitution of the Irish Free State 1922, Art. 9 ('The right of free expression of opinion as well as the right to assemble peaceably and without arms, and to form associations or unions is guaranteed for purposes not opposed to public morality.') See also Censorship of Publications Act 1929, ss 6, 17 and 2 (empowering the Minister for Justice to refer books and periodicals considered indecent or obscene, or advocating 'the unnatural prevention of conception or the procurement of abortion or miscarriage' to a Censorship of Publications Board for review and potential prohibition; amending the Indecent Advertisements Act 1889, to include advertisements related to sexually transmitted diseases and medical conditions related to the sexual organs; and prohibiting import, possession, or sale of indecent pictures (defined as 'suggestive of, or inciting to sexual immorality or unnatural vice or likely in any other similar way to corrupt or deprave'); Censorship of Publications Act 1946 (establishing a Censorship of Publications Board and Appeal Board; empowering customs officers to detain books at the border and forward them to the board; creating a more general review power of periodicals determined to have consistently had indecent or obscene materials or advocating contraception of abortion or devoting 'an unduly large proportion of space to the publication of matter relating to crime'.); Censorship of Films Act 1923 (prohibiting the showing of films deemed to be indecent, obscene, or blasphemous, or contrary to public morality). For further discussion of censorship in Ireland for reasons of public morality see Kevin Rockett, *Irish Film Censorship: A Cultural Journey from Silent Cinema to Internet Pornography* (Dublin, Four Courts Press 2004).

<sup>14</sup> On 24 May, Aiken directed the anti-Treaty troops to give up their arms; that same day, de Valera issued a message to the 'Soldiers of the Republic, Legion of the Rearguard', in which he called for an end to the fighting. Discussed and reprinted in Sean McMahon, *Rebel Ireland: Easter Rising to Civil War* (Cork, Mercier Press 2001) ('Soldiers of the Republic. Legion of the Rearguard: The Republic can no longer be defended successfully by your arms. Further sacrifice of life would now be in vain and the continuance of the struggle in arms unwise in the national interest and prejudicial to the future of our cause. Military victory must be allowed to rest for the moment with those who have destroyed the Republic. Other means must be sought to safeguard the nation's right'.)

<sup>15</sup> But see *R (O'Brien) v Military Governor, North Dublin Union* [1924] 1 IR 32 (according the release of prisoners on 31 July 1923 owing to an absence of a state of war as the legal end of the Civil War).

<sup>16</sup> Treasonable Offences Act 1925, s 1(c), (e).

Gárda Síochána stating that there were reasonable grounds to suspect the location of such material.<sup>17</sup> The statute forbade the administration or taking of any oath pledging to commit, promote, or conceal the commission of any crime.<sup>18</sup> It also was illegal to *refuse* to speak when requested for information about any crime or breach of the peace.<sup>19</sup>

While the anti-treason legislation was used to prosecute members of the Irish Republican Army (IRA), it proved problematic in light of the level of sympathy accorded to Anti-Treatyites—former comrades at arms, joined in common cause. During the 1916 Easter Rising, moreover, the treason laws had been used by the Crown against insurgents.<sup>20</sup> The measures adopted in 1925, moreover, derived from British measures repeatedly used by the Crown against the Irish.<sup>21</sup> Parts of these laws were designed rather more for conviction than for ensuring, as a precursor to conviction, evidence of personal guilt. Under the 1848 Treason Felony Act, for instance, it was not necessary to demonstrate that an individual had themselves engaged in treasonous activity; instead, it was sufficient to demonstrate that an individual was a member of an organisation having treason as its object, and that some overt act had been done by the organisation in furtherance of the end.<sup>22</sup> The reasoning for adopting this approach was rooted in concerns about juror intimidation, but the result was a statutory framework that appeared to be rigged for conviction.

The re-enactment of parts of the Treason Felony Act 1848 into the 1925 statute did little to demonstrate a break with the past.<sup>23</sup> Consequently, the measures did not assume center stage, and the emphasis for dealing with the violence shifted to the public safety acts and, thence, to the 1939 Offences Against the State Act.

## 2. The 1923-31 Public Safety Acts and Article 2A

The 1923 Public Safety Act was born of Civil War. It provided broad powers of detention and internment.<sup>24</sup> Punishments ranged from the seizure of property to flogging, imprisonment, and death.<sup>25</sup> When the legislation expired, two provisions took its place, both of which implicated speech. But by far the most expansive public safety restrictions on free expression came in 1931 with the insertion of Article 2A into the constitution.

---

<sup>17</sup> *ibid* s 10(1). See also *ibid* s 10(4), defining ‘treasonable document’ as ‘any document which relates, directly or indirectly, to the commission of any Act’ within the statute deemed to be treason, a felony, or a misdemeanor).

<sup>18</sup> *ibid* s 9(1)(a).

<sup>19</sup> *ibid* s 9(1)(c)-(d).

<sup>20</sup> Michael Head, *Crimes against the State: from Treason to Terrorism* (Farnham, Ashgate 2011) 99.

<sup>21</sup> See Treason Act 1795 (36 Geo 3 c 7) (Eng); Treason Act 1817 (57 Geo 3 c 6) (Eng); Treason Felony Act 1848 (11 & 12 Vict c 12) (Eng);

<sup>22</sup> *R v Meaney* [1867] 15 WR 1082, [1867] IR 1 CL 500, [1867] 10 Cox CC 506.

<sup>23</sup> Compare Treasonable Offences Act 1925, s 3(1) (making it illegal to attempt ‘by force of arms or other violent means to overawe or intimidate in any way either the Governor-General or the Executive Council or any member thereof or any other minister duly appointed under and in accordance with the Constitution, or the Oireachtas or either House thereof, or any lawful court or any judge of any such court with a view to influencing their or his actions’) and Treason Felony Act 1848 (11 & 12 Vict. c 12) s 3 (Eng) (saying if any person attempted to ‘levy War against Her Majesty, Her Heirs or Successors, within any Part of the United Kingdom, in order by Force or Constraint to compel Her or Them to change Her or Their Measures or Counsels, or in order to put any Force or Constraint upon or in order to intimidate or overawe both Houses or either House of Parliament ... [or] shall express, utter, or declare, by publishing any Printing or Writing, or by open and advised Speaking, or by any overt Act or Deed, every Person so offending shall be guilty of Felony’).

<sup>24</sup> Public Safety (Emergency Powers) Act 1923.

<sup>25</sup> *ibid*. See also Public Safety (Emergency Powers) (No 2) Act 1923; Barry Vaughan and Shane Kilcommins, *Terrorism, Rights and the Rule of Law: Negotiating Justice in Ireland* (Cullompton, Willan Publishing 2008) 70 (writing, ‘While the inchoate government had successfully stifled opposing forces, its victory raised some awkward and unanswered questions. How sustained was Ireland’s commitment to liberal democratic values given that when faced with a crisis, it resorted to emergency powers that cut across any notion of the rule of law?’)

The 1924 Public Safety Act contained within its auspices powers of entry, search, seizure, as well as arrest, for individuals suspected of inciting others to overthrow the Government or to neglect their official duties.<sup>26</sup> In April 1924, a second act made it illegal to induce or to attempt to induce a member of Saorstát Eireann to refuse to discharge his duty.<sup>27</sup> These provisions meant that challenging individuals for taking part in lawful government activity could result in imprisonment.

In 1926, an additional public safety act made allowance for the proclamation of a public emergency during which the Executive Minister could assume extraordinary powers related to arrest and detention.<sup>28</sup> These powers were premised in part on the foregoing crimes of incitement and inducement, as well as those detailed in the 1925 Treasonable Offences Act.<sup>29</sup>

The Civil War ended in the early 1920s. Within a decade, violence propagated by the IRA, Fianna Eireann, Cumann na mBan, Saor Eire, and the communist revolutionary groups proliferated. Cumann na nGaedheal, under W.T. Cosgrave's leadership, responded by swiftly ushering a new public safety statute through the Oireachtas, which would result in a new provision, Article 2A, being added to the Irish Free State Constitution.<sup>30</sup> In the Dáil, Cosgrave promoted it as a way to safeguard the rights of the people.

Under the Constitution there is full and untrammelled liberty for any person to advocate and recommend to his fellow-citizens, openly by speech and writing, the adoption of any political programme whatsoever, even the adoption of different forms of Government and to put his programme into operation as soon as he has induced a majority of the citizens to support it in the polling booths.<sup>31</sup>

For Cosgrave, it was precisely *because* of the protection of rights that violent agitation was unnecessary and, therefore, a legitimate target of new state measures.<sup>32</sup>

The Minister for Defence, Desmond FitzGerald, made a more philosophical point, asking 'Why have we a Constitution at all? Why have we a Government? Why have we a State?'<sup>33</sup> To his mind, 'we have a Government and a State because we were made to live in society that man, being subject to the performance of evil, requires to be controlled by law.'<sup>34</sup> The fact that the measures were coercive did not make them any different from the Egg Grading Act or the Live Stock Bill. They were simply being directed at a serious threat:

There is a tendency to evil in everybody, and in every community there is a certain number of people in whom the criminal instinct overcomes the instinct for good. This

---

<sup>26</sup> Public Safety (Powers of Arrest and Detention) Temporary Act of 1924, sch ss (1)-(2).

<sup>27</sup> Public Safety (Punishment of Offences) Temporary Act 1924.

<sup>28</sup> Public Safety (Emergency Powers) Act 1926, sch ss (1), (2), and (14). Legislation passed by the Parliament of Northern Ireland paralleled this statute. See Emergency Powers Act (NI) 1926 (16 & 17 Geo 5 c 8) (empowering the Governor of Northern Ireland to declare a state of emergency).

<sup>29</sup> Public Safety (Emergency Powers) Act of 1926, schs ss (1), (2) and (14).

<sup>30</sup> Constitution (Amendment No 17) Act 1931. See also *Ryan and Others (The State) v Lennon and Others* [1935] IR 170 (HC), 69 ILTR 125 (determining that the Oireachtas did not act *ultra vires* in passing the legislation). Cosgrave set two days in the Dáil and a day and a half in the Seanad for the bill to go through all of its stages. William T. Cosgrave, Dáil Deb 14 October 1931, vol 40, col 29; Tomas O'Connell (Labour Party), Dáil Deb 14 October 1931, vol 40, col 61. Constitution of the Irish Free State 1922, Art. 50 provided an eight year grace period for the Oireachtas to amend the constitution without returning to the people for a referendum. The Oireachtas subsequently amended that article to extend the time period, with the result that from 1922 to 1937, the constitution could be amended by statute, which it was, on 27 occasions. For further discussion, see generally Gerard Hogan, *The Origins of the Irish Constitution, 1928-1941* (Dublin, Royal Irish Academy 2012) 4-8.

<sup>31</sup> William T. Cosgrave, Dáil Deb 14 October 1931, vol 40, col 31.

<sup>32</sup> *ibid.*

<sup>33</sup> Desmond FitzGerald, Dáil Deb 14 October 1931, vol 40, col 69.

<sup>34</sup> *ibid.*

Bill has become necessary because although admittedly the people who have a tendency to crime in this country are a very small minority, they are organised and their method is the method of arms and intimidation.<sup>35</sup>

To prevent violence, the Government would have to augment its power. Failure to do so would result in the dissolution of the state.<sup>36</sup>

Fianna Fáil and Labour strongly objected to the speed with which the measures were introduced and the breadth of the powers being adopted.<sup>37</sup> Eamon de Valera put the point bluntly:

[T]he Executive is not proceeding on the right lines. We do not believe there is any immediate urgency, and that we should get time to discuss matters properly and to get calmly down to them and see what element of truth there is in the anxiety spread abroad. ... [T]he Executive is going along blindly in the course it laid out for itself when it started on its present regime.<sup>38</sup>

For Fianna Fáil, the statute's impact could hardly be ignored: 'The Constitution', Seán Lemass argued, 'may be the most glorious Constitution in the world, but it will be a dead letter before Friday evening if the Minister and his Party get their way'.<sup>39</sup> The exceptions carved out in the act would abrogate constitutional rights. Lemass called out Cosgrave on the inherent contradiction in stating that because rights were secure, they could be suspended to prevent violence:

Did anyone ever hear such logic before? In order to safeguard the rights of the people we are going to take their rights away! What are the rights of the people? The right of free speech, the right of free assembly, [and] freedom of the Press.<sup>40</sup>

Article 2A did have a profound effect on constitutional rights. The primary goal of the measure was to establish an emergency court and to give it extraordinary powers to deal with threats to the state. To accomplish this aim, it empowered the Executive Council to declare a state of emergency (which resulted in the suspension of certain constitutional provisions); introduced new security measures; created a Special Powers Tribunal to try civilians for political crimes; adopted extraordinary arrest powers; and provided for proscription.<sup>41</sup>

---

<sup>35</sup> *ibid* col 70.

<sup>36</sup> *ibid* col 78 ('I think every Deputy ... realises ... the necessity of having power and force, gun-work if necessary, in order to put down the propaganda of crime and the commission of crime, and to put down a whole organisation whose methods will destroy the moral principles of the youth of this country and will consequently destroy the Irish nation').

<sup>37</sup> See, eg, Eamon de Valera, *Dáil Deb* 14 October 1931, vol 40, col 58 ('We have no belief whatever in this solution when dealing with the political situation. If there are drastic measures taken, I have no doubt whatever they will drive it more underground.');

Tomas O'Connell (Labour Party), *Dáil Deb* 14 October 1931, vol 40, col 62 ('It is procedure of this kind that makes a farce of Parliamentary institutions and makes people have no respect whatsoever for them. ... It would be far more honest, in my opinion, if the Government set up a dictatorship pure and simple and told us all to go about our business and that they would run the affairs of the country.')

<sup>38</sup> *ibid* col 61.

<sup>39</sup> Seán Lemass, *Dáil Deb* 14 October 1931, vol 40, col 81.

<sup>40</sup> *ibid* cols 85-86. For a direct response to Lemass, see Minister for Justice, James Fitzgerald-Kenney, *Dáil Deb* 14 October 1931, vol 40, col 110 ('We are told we are tearing up the Constitution. I pointed out that we are not. ... Because the Deputies opposite are absolutely steeped in British tradition they think that a departure from the Constitution or the refusal of free speech at all times is a denial of liberty. In England when the liberties of the majority of people were threatened by a minority the people did not allow their Constitution or the principles of the constitution to ride roughshod over their common sense.')

<sup>41</sup> Constitution (Amendment No 17) Act 1931. See also Constitution (Operation of Article 2A) Order 1931, SR&O 1931/72 (bringing in the provision).

Freedom of expression did not escape the net. The statute outlawed treasonable or seditious documents, defined in terms of unlawful associations.<sup>42</sup> To be an unlawful association, the entity in question (and those involved), did not actually have to be known by a particular name. The group merely had to meet certain criteria, amongst which was promoting, encouraging, or advocating (a) any act of a treasonable or seditious character, (b) the commission of any offence, (c) the obstruction of justice; or (d) non-payment of taxes.<sup>43</sup>

Under the act, it became illegal to possess any documents relating to associations furthering any of those aims.<sup>44</sup> The burden was on the person on whose property or person such documents were found to demonstrate to the satisfaction of the Court (or the Special Tribunal) either that he did not know that the material was in his possession (or on his land or premises), or was unaware of the nature of the contents.<sup>45</sup> Otherwise, mere possession was sufficient to demonstrate membership in an unlawful organisation.<sup>46</sup>

The statute made further inroads into free expression. It prohibited printing, publishing, selling, or distributing ‘any book, newspaper, magazine, periodical, pamphlet, leaflet, circular, or other document’ on behalf of unlawful associations, *regardless of their content*.<sup>47</sup> What this meant was that the material itself did not have to be seditious or treasonous. It merely had to be made available at the behest of an unlawful organisation. ‘Print’ was construed broadly to mean any mode of representing or reproducing words in visible form—including, for instance, merely copying other writing longhand.<sup>48</sup> So any notes made at a meeting, any letters or invitations sent by members of the group, or any announcements of planned events, regardless of their focus, were included. The statute, in addition, gave the Special Tribunal the power to declare any periodical seditious and to order the *Gárda Síochána* to search for and to seize it.<sup>49</sup>

Treasonable or seditious documents also became a trigger for extraordinary powers of stop, search, and arrest.<sup>50</sup> The mere statement by any member of the *Gárda Síochána* that he suspected an individual to be carrying treasonable or seditious documents was treated as ‘conclusive and final evidence, incapable of being rebutted or questioned by cross-examination’ as a rationale for arrest.<sup>51</sup> Simultaneously, for search of the home, the presence of treasonous documents became sufficient predicate under the reasonableness determination.<sup>52</sup> Any documents seized under Article 2A, moreover, could be destroyed.<sup>53</sup>

Fianna Fáil, which had bitterly opposed the statute, ended the emergency when it came to power in 1932 leaving the *Gardaí* with ordinary criminal law authorities to counter the IRA.<sup>54</sup> The suspension of parts II-V of Article 2A, however, did not revoke the Constitution (Amendment No 17) Act of 1931, leaving the underlying powers in place. Following almost nightly confrontations between the Blueshirts and the IRA, in 1933 Éamon de Valera re-

---

<sup>42</sup> Constitution (Amendment No 17) Act 1931, sch (3)(1); Constitution of the Irish Free State Art. 2A(3)(1) (‘the expression “treasonable or seditious documents” includes any documents relating to or concerned with or issued or emanating from or appearing to issue or emanate from an unlawful association.’).

<sup>43</sup> Constitution of the Irish Free State Art 2A(3)(1), (19)(1)(a)-(f).

<sup>44</sup> *ibid* Art 2A(21).

<sup>45</sup> *ibid*.

<sup>46</sup> *ibid* Art 2A(22)(1).

<sup>47</sup> See *ibid* Art 2A(23)(1)-(2).

<sup>48</sup> See *ibid* Art 2A(23)(3).

<sup>49</sup> *ibid* Art 2A(26).

<sup>50</sup> *ibid* Art 2A(29)(1).

<sup>51</sup> *ibid* Art 2A(29)(2).

<sup>52</sup> *ibid* Art 2A(30)(1).

<sup>53</sup> *ibid* Art 2A(32).

<sup>54</sup> Constitution (Suspension of Article 2A) Order 1932, SR&O 1932/11 (suspending Parts II-V of Article 2A as authorised under Article 2A(1)(3)).



activated Article 2A and introduced a ban on the Blueshirts.<sup>55</sup> Three years later, he extended a similar ban to the IRA.<sup>56</sup>

Fianna Fáil's about-face was not lost on the courts. Justice Fitgibbon observed in 1935 that Article 2A,

appears to have received the almost unanimous support of the Oireachtas for we have been told that those of our legislators by whom it was opposed most vehemently as unconstitutional and oppressive, when it was first introduced, have since completely changed their opinions, and now accord it their unqualified approval.<sup>57</sup>

### 3. The 1937 Irish Constitution

In 1934, Fianna Fáil began to prepare a new constitution. Foremost in the Constitution Committee's mind was the concentration of power embodied in Article 2A.<sup>58</sup> The drafters sought out a new way to counter political violence, embracing the potential establishment of special criminal courts that would be better able to withstand judge and juror intimidation. Following intense debate and multiple amendments, in 1937 the new constitution passed by national plebiscite, coming into force that December.

Bunreacht na hÉireann repealed Section 2A, placing more restrictions on the use of emergency powers, even as it conditioned the right of free expression.<sup>59</sup> It borrowed the speech clause from the earlier constitution and divided it into three sections. The document augmented prior concerns about public morality with the assurance that freedoms not be used to undermine the state—in essence, constitutionalising the exceptions established in the public safety acts.<sup>60</sup>

The new speech clause established '[t]he right of the citizens to express freely their convictions and opinions', while simultaneously placing controls on the radio, press, and film industry to ensure that communication not be used to undermine public order or morality, or the authority of the state.<sup>61</sup> The document incorporated the 1925 Treasonable Offences Act as well, prohibiting, '[t]he publication or utterance of seditious' (as well as indecent) matter.<sup>62</sup>

---

<sup>55</sup> Constitution (Operation of Article 2A) Order 1933, SR&O 1933/91 (bringing into force Parts II-V of Article 2A as authorised under Article 2A(1)(2)); Constitution (Declaration of Unlawful Association) Order 1933, SR&O 1933/95 (banning the National Guard (another name for the Blueshirts) under Article 2A(19)(2)); Constitution (Declaration of Unlawful Association) (No 2) Order 1933, SR&O 1933/189 (banning the Blue Shirts under Article 2A(19)(2)). For a broadcast of de Valera announcing the ban on the National Guard/Blue Shirts, see 'Blueshirts Proclaimed Unlawful 1933' (*RTE*) [www.rte.ie/archives/2013/0822/469576-blueshirts-proclaimed-unlawful-1933/](http://www.rte.ie/archives/2013/0822/469576-blueshirts-proclaimed-unlawful-1933/) accessed 19 February 2020.

<sup>56</sup> Constitution (Declaration of Unlawful Association) Order 1936, SR&O 1936/172 (banning the Irish Republican Army / IRA / Oglaiigh na hÉireann under Article 2A(19)(2)).

<sup>57</sup> *Ryan and Others (The State) v Lennon and Others* [1935] IR 170 (HC) 235, quoted in Hogan, *Origins* (n 30) 12.

<sup>58</sup> Donal K Coffey, *Drafting the Irish Constitution 1935-1937: Transnational Influences in Interwar Europe* (Cham, Palgrave Macmillan 2018) 188 (noting that the 1934 constitution committee recommended the replacement of Article 2A with ordinary legislation); *ibid* 193 (noting that the draft of 18 May 1935 provided that 'extraordinary courts shall not be established, save only ...' and elaboration in the draft of 19 October 1936 (putting the power to create extraordinary courts in the hands of the Oireachtas)). See also Gerard Hogan, 'The Constitution Review Committee of 1934' in Fionán Ó Muircheartaigh (ed), *Ireland in the Coming Times: Essays to Celebrate T.K. Whitaker's 80 Years* (Dublin, Institute of Public Administration 1997).

<sup>59</sup> Constitution of Ireland (Bunreacht na hÉireann) 1937.

<sup>60</sup> Compare above n 13 and Constitution of Ireland 1937, Art 40.6.1°i-iii.

<sup>61</sup> Constitution of Ireland 1937, Art 40.6.1°i ('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'.)

<sup>62</sup> *ibid*.

The 1937 constitution similarly separated out the right of assembly, allowing for peaceable congregation absent munitions, even as it empowered the Government to prevent or control meetings ‘calculated to cause a breach of the peace or to be a danger or nuisance to the general public.’<sup>63</sup> Like the speech provisions, the change reflected the Article 2A approach, with unlawful associations premised on the marshalling of force against the government.<sup>64</sup> It weighed the exception to the right against the communal interest in protecting the state. The constitution forbade laws regulating associations from discriminating based on political, religious, or class distinctions.<sup>65</sup> Nevertheless, treasonous, anti-constitutional associations could not rely on Article 40 for protection.

Since Article 2A of the prior constitution had not explicitly been continued, the new document superseded the earlier provisions. Article 40 thus functioned to fold in press and publication elements as a basis for considerations related to speech and the associative rights. Despite the incorporation of elements of the Treasonable Offences Act into the new constitution, the 1925 statute, as well as the 1926 Public Safety (Emergency Powers) Act remained in place.

## B. The Offences Against the State Act

In 1939, the Oireachtas passed the OAS in an atmosphere of heightened global political tension.<sup>66</sup> Totalitarianism gripped Germany as Adolph Hitler and the Third Reich in the mid-1930s abolished the office of the President and enacted increasingly aggressive domestic laws.<sup>67</sup> In 1938 the country invaded and annexed Austria and, the following year, laid claim to parts of Czechoslovakia—before beginning to amass soldiers on the Polish border. The same year, fascist leader Benito Mussolini, having established an authoritarian regime in Italy, invaded Albania. In Spain, a coup by right-wing military leaders in 1936 led to Civil War between anarchists and republicans loyal to the Second Spanish Republic, and the militaristic, nationalist movement. Following the assassination of Prime Minister Inukai Tsuyoshi in 1932, in Japan the military similarly gained control and moved the country to a more aggressive posture: in 1937 Japan invaded mainland China, leading to the occupation of Beijing and then the capital, Nanjing. From east to west, democracies were being threatened and toppled.

Concerns about the international backdrop wove their way into debates over the Offences Against the State Act.<sup>68</sup> In some ways, this made the restrictions on freedom of expression more palatable, as the issue was how to protect the *democratic structure* of the state itself—not, more narrowly, whether to incorporate the six counties or respond to those willing to use violence to do so. Nevertheless, the immediate rationale offered by the Government for

---

<sup>63</sup> *ibid* Art 40.6.1°.ii.

<sup>64</sup> See *ibid* Art 40.6.1°.iii.

<sup>65</sup> *ibid* Art 40.6.2°.

<sup>66</sup> Offences Against the State Act 1939 (OAS 1939).

<sup>67</sup> See, eg, Law for the Prevention of Offspring with Hereditary Diseases (*Gesetz zur Verhütung erbkranken Nachwuchses*) s 1, 1933 RGBI I, 529 (creating a Genetic Health Court (*Erbgesundheitsgericht*) and mandating forced sterilisation for persons with certain physical and mental disabilities or chronic alcoholism); Law against Dangerous Habitual Criminals and on Measures for Security and Improvement (*Gesetz über die gefährliche Gewohnheitsverbrecher und über Massregeln zur Sicherung und Besserung*), 1933 RGBI I, 995 (providing for indefinite detention, *inter alia*) [RGBI 1933 I 995]; Law on Treason, 1934 RGBI I, 341 (Ger) (making most activities of opposition groups punishable by death); Treachery Act of 1934 (*Heimtücke-gesetz*), 1934 RGBI I, 1269; Law for the Protection of German Blood and Honour, 1935 RGBI I, 1146 (Ger) (creating an offence of ‘race defilement’); Law on Alteration of Family and Personal Names, 1938 RGBI I, 9 (Ger); (requiring Jews with non-Jewish first name to adopt additional names (‘Israel’ for men, ‘Sara’ for women)); Ordinance Concerning the Passports of Jews, 1938 RGBI I, 1342 (Ger) (declaration of invalidity of all German passports held by Jews).

<sup>68</sup> The situation on the continent also played a role in the adoption of the First Amendment of the Constitution Act 1939, which amended the definition of ‘time of war’ in Article 28.3.3° to include a situation in which Europe was at war, while Ireland was technically at peace. See Hogan, *Origins* (n 30) ch 13.

enacting new, extraordinary measures, found its traditional root: Republicanism. In an effort to tighten the government's control, the new measures augmented Constitutional restrictions on speech, publication, and association.

### 1. Broader Context and Supporting Arguments

In 1939, the specter of WWII hung over debates in the Oireachtas. In the Seanad Professor Helena Concannon explained,

It is because ours is a democratic State—and most of us wish it to remain such—that the Government we have chosen for ourselves must be provided by us with the powers necessary to protect the State, to defend its authority, and to carry out the duties and functions with which we have charged it. The most important of these is to maintain public order ... We have had too many examples in recent years of the dangers to democratic governments if they are left defenceless and if they have not those necessary powers.<sup>69</sup>

More than just the Republican threat to government was at stake.<sup>70</sup> The Fianna Fáil leader in Seanad Éireann, Seanadóir William Quirke, underscored the importance of restricting freedom to protect democracy itself.<sup>71</sup> A senior member of the IRA in County Tipperary during the War of Independence, Quirke was well familiar with the Republican challenge. But the situation had changed. Looked at in this light, the proposed measures did not alter the nature or structure of the government. Instead, they placed restrictions on certain freedoms—restrictions embraced by the Constitution itself.

Members of Dáil Éireann similarly recognised the new kind of threat. James Matthew Dillon, a member of the Dáil for 39 years, contended that the particular threat posed by totalitarianism could not be ignored:

I do not close my eyes to the fact that we are not living in the Victorian age and that the types of dangers that democracy has to face to-day are quite different from the types that it had to face in the 19th century.<sup>72</sup>

He continued:

[I]n recent years, the technique of potential tyranny has completely changed. Certain ... persons, observing the inherent weaknesses in any political system, such as democracy, that cherishes individual liberty, made up their minds that the way to destroy democratic government was to exploit those inherent weaknesses, and instead of seeking to overthrow the Constitution, they seek to use the very privileges conferred

---

<sup>69</sup> Professor Helena Concannon, Seanad Deb 3 May 1939, vol 22, col 1540.

<sup>70</sup> *ibid* col 1539-40, stating, 'I hold strongly to the belief that no greater disaster could befall our people at this tremendously critical moment of their history—of the world's history—than to have a defenceless and an unstable government at the mercy of any group with arms in their hands who might, relying simply on the "right" conferred by those arms, without reference to the people and trampling on democracy, usurp the functions of Government, flout the authority of the State the people themselves have set up, and even take it on themselves to declare war on other States, whether the Irish people wanted it or not'.

<sup>71</sup> See, eg, William Quirke, Seanad Deb 4 May 1939, vol 22, col 1557 ('It has been suggested that this measure is in itself undemocratic. I say that it may appear undemocratic to some people, but it may be necessary, and is necessary at times, for a Government to appear undemocratic in order to preserve democracy for the people. I believe that the Government would be shirking their responsibility as a Government if they did not take the measures that they believed were necessary to protect the independence of this State'.)

<sup>72</sup> James Matthew Dillon, Dáil Deb 3 March 1939, vol 74, col 1440.

by the Constitution for the purpose of destroying the Constitution itself. That is a danger that every democratic Government has to face at the present time, and they have to face it not only on one side; they have to face it from the left and from the right.<sup>73</sup>

Dillon worried that those challenging democracy were banking on its inherent weakness and that the protection of individual rights would ultimately lead to the downfall of the government. He warned, 'while democracy is shivering on the brink [authoritarians] can give democracy the felon's blow, destroy it and grab power and after they have grabbed power then proceed to subjugate the people. In every case in Europe recently in which liberty has been overthrown you will find it has been overthrown by an infinitesimal minority'.<sup>74</sup>

Although many members of the Oireachtas either assumed or argued that global tension required that the state adopt extraordinary measures, the government cited the IRA's resumption of the campaign across the water, and the continued challenge mounted by individuals claiming to carry on the republican legacy, as justification.<sup>75</sup> Just two months prior to the introduction of the OAS, the IRA had resumed a bombing campaign in Britain. Such was the reason provided by the Minister of Justice, Patrick Rutledge, during the First Reading, for the necessity of the new measures.<sup>76</sup> Numerous members opposed this rationale, citing the absence of sufficient evidence that such a campaign was underway.<sup>77</sup> Members raised the

---

<sup>73</sup> *ibid* cols 1440-41.

<sup>74</sup> *ibid* col 1441.

<sup>75</sup> See Seán Goulding, Seanad Deb 4 May 1939, vol 22, col 1551 ('I take it that in normal times the average citizen need not worry his head about the Bill. But we may not be living in normal times always. The times are not quite normal all over Europe to-day. You have so-called ideologies—strange ideologies—worshipped by quite a number of people; and in this country we have probably some people who believe in one or other of those ideologies. In the event of those people endeavouring to upset a democratic State such as ours is and endeavouring to force these new ideologies on the people of this country, these extraordinary powers would be necessary'); William Davin, Dáil Deb 7 March 1939, vol 74, col 1565 ('I am of opinion that the real reasons for the introduction of this measure have not been given to the House. I recognise, as do many other Deputies, that the Taoiseach is a very cute and longheaded politician, that he probably sees the possibility of a world war—perhaps in the near future—and the possibility of this country being dragged into that war at the tail of Great Britain, whether we like it or not. In such circumstances, he probably foresees the necessity for having in his possession repressive powers of this kind'.)

<sup>76</sup> Patrick Joseph Rutledge, Dáil Deb 8 Feb 1939, vol 74, col 90 ('As Deputies are aware, a proclamation was issued, on 8th December last, by a certain body which purported to hand over what it maintained it held, that is, certain Government functions. It described itself as a Government and it purported, under that proclamation, to hand over to the Irish Republican Army, as they call it, those functions of Government. That is a position which the Government is not going to tolerate'.) See also William Quirke, Seanad Deb 4 May 1939, vol 22, col 1554-55.

<sup>77</sup> See, eg, John McLoughlin, Seanad Deb 3 May 1939, vol 22, col 1526 ('If I had evidence that there was a dangerous conspiracy against the exercise of governmental authority by the people of this State, I would vote for this Bill, as I voted for similar Bills previously; but no such evidence has been adduced by the Minister for Justice of the existence in this State of any such conspiracy'); Patrick Hogan, Seanad Deb 3 May 1939, vol 22, col 1534 ('What is the great need for giving power to suppress all organisations?'); William Davin, Dáil Deb 7 March 1939, vol 74, col 1564 ('The Labour Party are opposing this Bill because they believe that, in the first instance, there is no need for it and, in the second instance, because it is depriving citizens of rights and liberties which the Government have no right to filch from them in the present normal conditions. No case whatsoever has been put forward for the passage of this measure so far as the internal state of the country is concerned'); William Davin, Dáil Deb 3 March 1939, vol 74, col 1476 ('It has not been definitely stated that these two Bills have any connection with the activities which have taken place recently in Great Britain'); General Seán MacEoin, Dáil Deb 7 March 1939, vol 74, cols 1565-66 ('I oppose this measure because the Minister has not, in my opinion, treated the House fairly. He has not seen fit to take this House into his confidence and tell us why the measure has been introduced at this particular time. ... This particular Bill is brought in at a time when there is comparative peace. At least as far as we can see, nothing is happening with which the ordinary law, if enforced, could not deal'); Patrick Belton, Dáil Deb 3 March 1939, vol 74, col 1459 ('The case has not been made for this Bill and I do not believe that it has been introduced at the right time. Either there is a need for it or there is not. If there is a need for it, tell us the need.');

Captain Patrick Giles, Dáil Deb 2 March 1939, vol 74, col 1356-57 ('I

danger of normalising extraordinary powers at a time of relative peace.<sup>78</sup> Without such evidence, it was hard to justify the restrictions on freedom of expression and freedom of the press.<sup>79</sup> General Seán MacEoin went further, doubting that a sub-constitutional instrument could deprive citizens of their foundational rights.<sup>80</sup> Fine Gael politician (and future Attorney General) Patrick McGilligan quoted the First Amendment of the U.S. Constitution, noting its longevity:

A great people, a mixture of people gathered in from all Europe, have that as their Constitution and for 150 years they have retained it. The Taoiseach never compared that with what he has put into this Bill here. We have a series of Articles in our Constitution which state fundamental principles and rights. It has stated them with so many reservations that the rights and liberties have almost disappeared. The law may change, and if it does change the fundamental rights under the Constitution are gone.<sup>81</sup>

McGilligan despaired of the impact of the OAS on speech:

I take it for granted that there is acceptance in this House of certain fundamental rights that the people ought to have guaranteed to them, liberty under certain heads. Matters affecting conscience are not dealt with at all. There are [] others. ... that there should be freedom of the Press, and freedom to speak one's thoughts.<sup>82</sup>

The OAS would violate these rights.<sup>83</sup>

Foremost in the minds of those opposed to the measures was the concern that the powers would be abused.<sup>84</sup> The same objections had been brought forward during passage of the notorious 1931 Public Safety Act, with guarantees being given that such would not be the case. Nevertheless, the authorities had been abused: '[W]e found that the people who introduced that measure and sponsored it and succeeded in getting it passed were the very people who were penalised afterwards by the Act.'<sup>85</sup> Backbenchers observed that while Fianna Fáil might be in power now, in the future, they could become subject to a different government wielding the proposed measures against them. The provisions, moreover, could be used against ordinary working people. Members hearkened back to the 1819 Peterloo massacre in Manchester, in which 18 ordinary working people had been killed and more than 650 injured when the cavalry was ordered to break up 60,000 protesters who had gathered seeking political reform. In the

---

believe, myself, that this false and panicky legislation is being brought in because a few bombs were let off in England. ... we should let England alone to look after her own affairs just in the same way as we have called upon her to let us alone to look after our affairs.');

ibid col 1358 ('We are told ... that this Bill must be brought in, that there is immediate danger. I travel all over the country ... and I have met no Deputy yet who said there is danger, or even a semblance of danger'.)

<sup>78</sup> See, eg, Seán Brodrick, Dáil Deb 2 March 1939, vol 74, col 1375 (adding, 'I am not convinced of the necessity for this Bill at present'.)

<sup>79</sup> See, eg, Mr Hogan's concern 'that it gives to too great power to the Government to suppress organisations [and] to control the Press'. Patrick Hogan, Seanad Deb 3 May 1939, vol 22, cols 1536-37.

<sup>80</sup> General Seán MacEoin, Dáil Deb 7 March 1939, vol 74, col 1566 ('[T]here is enshrined in the Constitution the liberty of the citizen, a very fine doctrine; the sacredness of the home, a very fine doctrine; the liberty of the Press, a very fine doctrine. All are guaranteed. Freedom of meeting is guaranteed. But, having done all that, we bring in a measure, to be made an ordinary Statute of the Oireachtas, reducing all those things that are guaranteed under the Constitution'.)

<sup>81</sup> Patrick McGilligan, Dáil Deb 2 March 1939, vol 74, cols 1399-1400.

<sup>82</sup> ibid col 1400.

<sup>83</sup> See ibid.

<sup>84</sup> See, eg, Patrick Cogan, Dáil Deb 2 March 1939, vol 74, col, 1300 ('[W]e are placing extraordinary powers in the hands of the Government to suppress organisations and to interfere with the liberty of the Press and the citizens generally. It is our duty to make sure that these powers will not be abused'.)

<sup>85</sup> ibid.

Seanad, Cumann na nGaedheal politician John McLoughlin made dire predictions, quoting Shelley: ‘I met Murder on the way,/He wore the mask of Castlereagh,/ Very smooth he looked, yet grim./ Seven bloodhounds followed him.’<sup>86</sup>

Despite such misgivings, the OAS passed. It might have been that international concerns loomed large; but the language continued to be redolent of the anti-Treaty challenges to the state. The restrictions on freedom of expression, in particular, targeted Republican activities.

## 2. Impact of the 1939 OAS on Speech, Expression, and the Associative Rights

The 1939 OAS had immediate implications for freedom of expression. The statute made it illegal to advocate the usurpation or unlawful exercise of government functions (s 6); to obstruct government functions, legislative, executive, or judicial (s 7); to incite or encourage any State employee to refuse, neglect or omit to perform his duty, or to be negligent or insubordinate in its performance; or to advocate or encourage the doing of any such thing (s 9). Each of these measures represented a response to past challenges mounted by Republicans. It went on to create new strictures to deal with printed matter.

### a. *Prohibitions on Publication and Possession Thereof*

The statute prohibited printing, publishing, selling, or distributing incriminating documents—which meant everything from books, newspapers, magazines, and publications, to pamphlets, circulars, or advertisements.<sup>87</sup> Like Section 2A, the *content* of the speech or material did not matter. Instead, it understood incriminating documents as anything issued by or ‘emanating from an unlawful organisation’, as well as any document ‘appearing to aid or abet any such organisation’.<sup>88</sup> The statute similarly forbade treasonable, as well as seditious documents, the latter being understood in particularly broad terms—ie,

- (a) a document consisting of or containing matter calculated or tending to undermine the public order or the authority of the State, and
- (b) a document which alleges, implies, or suggests or is calculated to suggest that the government functioning under the Constitution is not the lawful government of the State or that there is in existence in the State any body or organisation not functioning under the Constitution which is entitled to be recognised as being the government of the country, and
- (c) a document which alleges, implies, or suggests or is calculated to suggest that the military forces maintained under the Constitution are not the lawful military forces of the State, or that there is in existence in the State a body or organisation not established and maintained by virtue of the Constitution which is entitled to be recognised as a military force, and
- (d) a document in which words, abbreviations, or symbols referable to a military body are used in referring to an unlawful organisation.<sup>89</sup>

In other words, the OAS forbade any effort to undermine the legitimacy of the Irish government *as a political entity*. Despite the backdrop of the war, it did not draw attention to what *form* that government ought to take (eg, an autocracy, an oligarchy, a democracy, or a republic). It similarly forbade documents related to paramilitary organisations as an *alternative*

---

<sup>86</sup> John McLoughlin, Seanad Deb 3 May 1939, vol 22, col 1531. See also Dáil Deb 2 March 1939, vol 74 (kicking the difficult questions related to free speech to later discussions).

<sup>87</sup> Offences Against the State Act 1939 (OAS 1939), s 2.

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

to the existing military—again, a provision directly linked to the Republican challenge of being the appropriate heir to the fight for an independent Ireland.

The statute went on to make it illegal to send or to publish any incriminating, treasonous, or seditious document.<sup>90</sup> The penalties ranged from a fine and imprisonment to forfeiture of printing machinery.<sup>91</sup> The law exempted official government documents from the reach of the law.<sup>92</sup> During passage of the law, parliamentarians expressed alarm at the potential use of the measure to stifle political dissent.<sup>93</sup> As a matter of reporting, even if the ‘truth’ could still be published, the risk was that political objections to government action might not escape. The government swept aside these objections.

With the international political tension in mind, some politicians raised concern about the threat potentially posed by foreign control or manipulation of Ireland.<sup>94</sup> The risk was that foreign interference might prevent peaceful negotiations of contentious matters.<sup>95</sup> For them, the backdrop was not just Republicanism, but social and economic freedom, and the battle against ‘chaos and anarchy’.<sup>96</sup>

Nevertheless, consideration of any changes remained closely tied to Republicanism. The Government responded, first, by suggesting that the penetration of Ireland by foreign publications was already covered by the existing distribution provisions.<sup>97</sup> This explanation did not satisfy the Irish press, which conveyed its concern about the section creating unfair competition. Should Irish newspapers be prohibited, ‘foreign newspapers coming from England or the Six Counties or anywhere else could have black headlines in regard to those matters, and might, thereby, be in a position to carry on unfair competition against the Irish newspapers here’.<sup>98</sup>

The Seanad, accordingly, brought in an additional provision targeting foreign newspapers.<sup>99</sup> The measure provided for the Minister of Justice to order any foreign publications to be denied entry, as well as seized and destroyed within domestic bounds.<sup>100</sup> The decision of when (and whether) to ever lift the order lay entirely in the Minister’s hands.<sup>101</sup> Introducing the measure in Dáil Éireann, the Minister for Justice, Patrick Joseph Ruttledge, explained, ‘This amendment is necessitated by the fact that in the case of certain newspapers circulating in this country the printers and publishers are outside the jurisdiction of the State’. He added an additional concern: to avoid putting distributors in the position of censoring material.<sup>102</sup>

The 1939 OAS further outlawed mere possession of incriminating, treasonable, or seditious documents.<sup>103</sup> The burden was on the defendant to demonstrate either that he did not know that he was in possession of the document, or that he did not know the nature of the contents of the document.<sup>104</sup> Where publishers found themselves in possession of such material and the Garda Síochána requested it, they had the option of either turning it over to

---

<sup>90</sup> *ibid* s 10(2)-(3).

<sup>91</sup> *ibid* s 10(3).

<sup>92</sup> *ibid* s 10(5).

<sup>93</sup> See, eg, William Davin and Richard Corish, *Dáil Deb* 7 March 1939, vol 74, cols 1562-63.

<sup>94</sup> See, eg, Frank Aiken, Minister for Defence, *Dáil Deb* 3 March 1939, vol 74, cols 1436-37.

<sup>95</sup> *ibid* col 1437.

<sup>96</sup> *ibid* col 1439.

<sup>97</sup> See, eg, Desmond Fitzgerald, *Seanad Deb* 31 May 1939, vol 22, col 1624 (asking if the Minister of Justice ‘will have a means of dealing with the circulation and dissemination of papers printed outside this country whose purpose is, and contents are, hostile to the wellbeing of this country?’).

<sup>98</sup> William Quirke, *Seanad Deb* 17 May 1939, vol 22, col 1594.

<sup>99</sup> The measure was adopted as Amendment 2 in the Seanad. See OAS 1939, s 11.

<sup>100</sup> *ibid* s 11(1).

<sup>101</sup> *ibid* s 11(2).

<sup>102</sup> Patrick Joseph Ruttledge, *Dáil Deb* 6 June 1939, vol 76, col 581.

<sup>103</sup> OAS 1939, s 12(1).

<sup>104</sup> *ibid* s 12(3).

the police or destroying the document.<sup>105</sup> The clause (Amendment 3 in the Senead), had been put forward at the request of Dublin newspapers to ensure the continued protection of their sources.<sup>106</sup> To ensure that the relevant information be available, during the Committee stage, the government added a provision to require printers to retain copies of the documents, as well as particulars of the person for whom the work was done, for six months following publication.<sup>107</sup> Such information had to be produced for the *Gárda Síochána*.<sup>108</sup> In turn, with a few exceptions, publishers became required to put their name and address on every document.<sup>109</sup>

### 3. Evolution of OAS

The 1939 OAS underwent four amendments, three of which are relevant to speech and expression.<sup>110</sup> Like the initial provisions, the language of the amendments was tied to the historical Republican challenge.

The first change, the 1940 Offences Against the State (Amendment) Act expanded the government's power to determine what statements could be deemed to undermine public order.<sup>111</sup> It contained a provision that empowered a Minister of State to order the arrest and detention of anyone 'engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or the security of the State'.<sup>112</sup> Reminiscent of the 1922 Special Powers Act provision granting the Northern Ireland Prime Minister the power 'to take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order', designation in the Republic could be based entirely on speech, expression, or associations considered by the Minister to be a threat.<sup>113</sup>

History has not treated this provision kindly. In 1998, the Committee to Review the Offences Against the State Act raised significant concern about the measure:

[I]t is difficult to avoid the conclusion that taken at its most extreme, [the 1940 Act] enables every Minister of State to take out of public circulation any individual whom he or she considers to pose a significant threat to public order. Against this background, one must therefore regard the 1940 Act as constituting a draconian interference with fundamental rights to liberty, due process, freedom of expression and freedom of association. The majority considers that the powers in question are inconsistent with

---

<sup>105</sup> *ibid* s 12(5).

<sup>106</sup> Patrick Joseph Rutledge, *Dáil Deb* 6 June 1939, vol 76, cols 581-82 ('It is intended to cover the case of a newspaper which innocently receives a treasonable document. The newspapers feel that they would have to observe a certain amount of secrecy, and they do not want to give away their correspondent. If they destroy the seditious document in the presence of a Guard that is a good defence in any prosecution that might be brought against them.')

<sup>107</sup> OAS 1939, s 13(1)(b). See also Patrick Joseph Rutledge, *Seanad Deb* 31 May 1939, vol 22, col 1624-25 (inserting s 13(1)(a)-(c)).

<sup>108</sup> OAS 1939, s 13(1)(c).

<sup>109</sup> OAS 1939, s 14(1). For the most part, the exceptions related to formal government documents. See *ibid* s 14(3)(c). For a good discussion of how these provisions were used to control news of the war, expression of opinions, see Donal Ó Drisceoil, *Censorship in Ireland 1939-45: Neutrality Politics and Society* (Cork, Cork University Press 1996).

<sup>110</sup> Offences Against the State (Amendment) Act 1940 (OASA 1940), Offences Against the State (Amendment) Act 1972 (OASA 1972), [Offences Against the State (Amendment) Act 1985 (nothing on speech/press/publication; focused on banks)], and Offences Against the State (Amendment) Act 1998 (OASA 1998).

<sup>111</sup> See OASA 1940.

<sup>112</sup> *ibid* s 4.

<sup>113</sup> Civil Authorities (Special Powers) Act (Northern Ireland) 1922, s 1(1).



the basic tenets of democracy and the rule of law, and it is inappropriate that a liberal democracy should retain them on its statute book in the twenty-first century.<sup>114</sup>

The next relevant alteration to the OAS came in 1972, when the Oireachtas added a clause that allowed for membership in an unlawful organisation to be predicated upon *any* oral or written statement.<sup>115</sup> The law also outlawed any oral or written statement, or meeting, that interfered with the ‘course of justice’, understood by statute to mean, anything intended, or likely (directly or indirectly) ‘to influence any court, person or authority’ concerned in criminal proceedings—including as a party or witness—the conduct or outcome of such proceedings.<sup>116</sup> The statute amended the definition of ‘document’ in section 2 of the 1939 OAS to take account of different media. It expanded the measure to incorporate any map, plan, graph, or drawing; photograph; digital media; and film, microfilm, or tape.<sup>117</sup>

Following the Omagh bombing of 15 August 1998, the Oireachtas further amended the OAS.<sup>118</sup> Like its predecessors, the legislation viewed speech through an unlawful organisation lens. The law waived the right to silence for individuals accused of being a member of a proscribed entity.<sup>119</sup> Not only could an inference of guilt be drawn from silence when accused of membership, but failure to provide a full account of one’s ‘movements, actions, activities, or associations during any specified period’, could be treated as corroboration of evidence related to the offence of being a member of such groups.<sup>120</sup> The new law amended the prior definition of conduct to include failure to deny published reports of membership.<sup>121</sup> The amendments also impacted freedom of expression by making it unlawful to collect, record or possess information that would be useful for unlawful organisations to engage in a serious offence.<sup>122</sup> The burden lay on the defendant to demonstrate that they were not collecting the information for the purpose of it being used in the commission of a serious offence.<sup>123</sup>

### C. Emergency Powers Act

An additional legislative instrument targeted violent political challenge and, relatedly, freedom of expression. On 2 September 1939 the Irish government declared a state of emergency in response to the outbreak of the war. The following day, the Oireachtas introduced the Emergency Powers Act, giving the government the power to make by order, ‘such provisions as are, in the opinion of the Government, necessary or expedient for securing the public safety or the preservation of the State, or for the maintenance of public order, or for the provision and control of supplies and services essential to the life of the community’.<sup>124</sup>

In regard to restrictions on speech, the law empowered the Minister to ‘authorise and provide for the censorship, restriction, control, or partial or complete suspension of communication by means of all or one or more of the services maintained or controlled by the

---

<sup>114</sup> Committee to Review the Offences against the State Acts 1939 to 1998, *Report of the Committee to Review the Offences Against the State Acts, 1939 – 1998 and Related Matters* (Dublin, Stationary Office 2002) para 5.67.

<sup>115</sup> OASA 1972, s 3(1)(a).

<sup>116</sup> *ibid* s 4(1).

<sup>117</sup> *ibid* s 5(a)-(d).

<sup>118</sup> OASA 1998. See also Martin Melaugh, ‘Main Events Surrounding the Bomb in Omagh’ (*CAIN Web Service*) <https://cain.ulster.ac.uk/events/omagh/events.htm> accessed 20 February 2020; Shawn Pogatchnik, ‘British, Irish Present Planned Anti-Terror Laws to Parliaments’ (*Associated Press*, Sept. 1, 1998), cited in Stacey Carrara Friends, ‘An Effective Way to Deal with Terrorism? Britain and Ireland Restrict the Right to Silence’ (1999) 23 *Suffolk Transnational Law Rev.* 227, 227 fn 1.

<sup>119</sup> OASA 1998, s 2(1).

<sup>120</sup> *ibid* s 2(4)(a).

<sup>121</sup> *ibid*, s 4 (amending OASA 1972, s 3).

<sup>122</sup> OASA 1998, s 8(1).

<sup>123</sup> *ibid* s 8(2).

<sup>124</sup> Emergency Powers Act 1939, s 2(1).

Minister for Posts and Telegraphs or by any other means, whether public or private, specified or indicated in such emergency order'.<sup>125</sup> Such orders could contain 'all such incidental or ancillary provisions as shall appear to the Government to be necessary or expedient for giving full effect to any provision inserted in such emergency order'.<sup>126</sup> The underlying rationale was that the government could use the state organs of communications to head off challenges to the state. The order could be revoked at any time by the Government.<sup>127</sup> The statute also empowered the government to make provision for 'preserving and safeguarding the secrecy of official documents and information', 'controlling the publication of official information', prohibiting the spread of 'subversive statements and propaganda', and controlling and censoring 'newspapers and periodicals'.<sup>128</sup>

The Irish Constitution, as aforementioned, provided a qualified guarantee of free expression (ie, excepting efforts to undermine public order or morality, or matter considered blasphemous, seditious, or indecent) in 'normal' times, but not 'in time of war or armed rebellion'.<sup>129</sup> Coincident with passage of the 1939 Emergency Powers Act, the Dáil amended the definition of the latter to include 'a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State'.<sup>130</sup>

The wartime (emergency) censorship regime operated 1939-45.<sup>131</sup> During that time, the government implemented numerous articles targeting postal and telegraph censorship.<sup>132</sup> Other orders focused on press censorship.<sup>133</sup> Of equal importance in *preventing* publication of certain matters, the censor undertook to *promote* certain themes. In September 1939, for instance, the Legal Advisor commented on the proposed Emergency Powers (No. 5) Order that Irish newspapers 'be generally informed' about the Government's neutrality policy, such as it being "the only logical policy for Ireland which neither lost nor gained by the Peace Treaties, 1919"; 'the only decent attitude for a Christian country like this to adopt at the present time', and carrying a much lesser cost than 'the cost of war'.<sup>134</sup> The government sought further to shape public opinion by having 'Irish newspaper editors...convey to the public...the fact that this is not a "world war" like that of 1914-1918', with a list of countries declaring their neutrality prominently published daily.<sup>135</sup> The advisor sought to have the press point out the 'incidental "horrors of war"' and to eliminate 'the "atrocities" stories'.<sup>136</sup>

The Emergency Powers Act also provided for amendment of the Censorship of Films Acts 1923 and 1930, to give the censor the authority to reject a film on the grounds that it would be 'prejudicial to the maintenance of law and order or to the preservation of the State or would be likely to lead to a breach of the peace or to cause offence to the people of a friendly foreign

---

<sup>125</sup> *ibid* s 2(2)(h).

<sup>126</sup> *ibid* s 2(4).

<sup>127</sup> *ibid* s 3(h).

<sup>128</sup> *ibid* s 3(i).

<sup>129</sup> *Bunreacht na hÉireann* (1937), Article 40.6.1°(i).

<sup>130</sup> *ibid*. Article 28.3.3°.

<sup>131</sup> For an excellent discussion of how wartime censorship operated see Donal Ó Drisceoil, *Censorship in Ireland 1939-1945: Neutrality, Politics and Society* (Cork, Cork University Press, 1996).

<sup>132</sup> See eg, Emergency Powers (Censorship of Postal Packets) Order 1939, Emergency Powers (Censorship of Postal Packets) (No. 1) Order 1939, Emergency Powers (Restriction on the Conveyance of Informative Articles Order 1939, Emergency Powers (Telegraph Cable Companies) Order 1939, and Emergency Powers (Wireless Telegraphy Apparatus) Order 1939,

<sup>133</sup> See eg Emergency Powers (No. 5) Order 1939, Emergency Powers (No. 36) Order 1940, Emergency Powers (No. 67) Order 1941, and Emergency Powers (No. 151) Order 1942.

<sup>134</sup> Memorandum on the Emergency Powers (No. 5) Order 1939 from Michael Rynne to Joseph P. Walshe (Dublin) (Copy) (Secret), 15 September 1939, <https://www.difp.ie/docs/1939/Emergency-Powers/3024.htm>.

<sup>135</sup> *ibid*.

<sup>136</sup> *ibid*.

nation'.<sup>137</sup> The government issued a new order to allow the government to revoke prior approvals of films, where circumstances had changed and their availability was no longer desirable.<sup>138</sup> Like the government's efforts to shape the stories carried by newspapers, the emergency film provisions allowed for newsreels to be tightly controlled.<sup>139</sup> For the most part, the censor focused on matters directly linked to World War II.<sup>140</sup>

It was not until 1942 that the government assumed the emergency power to censor the printing or publication of books, pamphlets, or leaflets.<sup>141</sup> Prior to that time, it had focused more narrowly on newspapers—leading to a tense relationship between journalists and the government.<sup>142</sup>

In April 1946, the Minister for Finance, Frank Aiken, informed the Dáil that the Government had made 7,846 Emergency Powers Orders (and amendments thereto), of which 522 had been primary orders.<sup>143</sup> The censorship provisions in particular were used extensively to protect Irish neutrality.<sup>144</sup> In September 1946, the statute formally lapsed.<sup>145</sup>

### III. BROADCAST AND FILM RESTRICTIONS

While there is significant coverage in the secondary literature of ways in which the right to silence has been impacted by the OAS, there is rather less discussion how OAS provisions specifically targeting expression and association have affected individual rights.<sup>146</sup> One reason for this may be because there is an alternative, and in many ways more visible, framework: statutes that openly regulate broadcasts, films, and publications.<sup>147</sup> From the founding of the Irish Free State until the end of the 20th century, the government made extensive use of these

---

<sup>137</sup> Emergency Powers Order 1939, Article 52.

<sup>138</sup> Emergency Powers (No. 6) Order 1939.

<sup>139</sup> See Donal Ó Drisceoil, *Censorship in Ireland 1939-1945: Neutrality, Politics and Society* (Cork, Cork University Press, 1996), pp. 31-35.

<sup>140</sup> *ibid.*, pp. 30-51.

<sup>141</sup> Emergency Powers (No. 151) Order 1942.

<sup>142</sup> See Donal Ó Drisceoil, *Censorship in Ireland 1939-1945: Neutrality, Politics and Society* (Cork, Cork University Press, 1996), pp. 159-187.

<sup>143</sup> Frank Aiken, Dáil Deb 11 April 1946, vol 100, col 1766.

<sup>144</sup> See generally Tony Gray, *The Lost Years: The Emergency in Ireland 1939-45* (London, Little, Brown 1997).

<sup>145</sup> Emergency Powers (Continuance and Amendment) Act 1945.

<sup>146</sup> See, eg, Liz Heffernan, 'Evidence and National Security: Belief Evidence in the Irish Special Criminal Court' (2009) 15 *European Public Law* 65 (examining the admission as evidence at terrorist trials of the statement of a senior police officer as to his or her belief that the accused is guilty); Yvonne Marie Daly, 'Is Silence Golden? The Legislative and Judicial Treatment of Pre-Trial Silence in Ireland' (2009) 31 *Dublin University Law Journal* 35 (2009) (analysing the evolution of alterations to the right to silence); Liz Campbell, 'Reconfiguring the Pre-Trial and Trial Processes in Ireland in the Fight against Organised Crime' (2008) 12 *International Journal of Evidence & Proof* 208 (discussing, inter alia, the erosion of the right to silence); Caitriona Harte, 'The Offence of Membership of an Unlawful Organisation and the Evidential Provisions Relating to It, under the Offences Against the State Acts, 1939-1998' (2010) 17 *Irish Student Law Review* 51 (assessing provisions related to membership of unlawful organisations, with particular emphasis on the reverse onus of proof, inference from silence, and admissibility of statements of belief as evidence); Stacey Carrara Friends, 'An Effective Way to Deal with Terrorism? Britain and Ireland Restrict the Right to Silence' (1999) 23 *Suffolk Transnational Law Review* 227 (focusing on OASA 1998, including waiving the right to silence in that it allows courts to draw inference from remaining silent, such as corroborating a senior police officer claim that suspect belongs to a terrorist organisation); Vaughan and Kilcommins, *Terrorism* (2008) (n 25) 124 (noting that in *Heaney v Ireland*, 'the Irish Supreme Court held that the right to silence is but a corollary to the right to freedom of expression under article 40 of the Constitution. If the latter right could be qualified, so too could the former. Aside from finding a constitutional locus for the right to silence in a weaker, more "collective" rights domain, thereby permitting its abrogation on a wider basis, the Supreme Court went on to note that where a person was "totally innocent of any wrongdoing ... it would require a strong attachment to one's apparent constitutional rights not to give such an account when asked pursuant to statutory requirement".')

<sup>147</sup> For thoughtful treatment of censorship in Ireland during the period in question, see PETER MARTIN, *CENSORSHIP IN THE TWO IRELANDS: 1922-39* (Dublin, Irish Academic Press 2006).

provisions. The provisions most salient for responding to paramilitary challenge were those related to broadcasting, although some of the film restrictions also captured political challenge. The censorship of publications, however, largely centered on preventing indecent or obscene material, or matters related to obtaining an abortion, from entering the public domain.

## A. Broadcast Bans

Various laws regulate broadcasting in Ireland.<sup>148</sup> The structure itself provides a level of control of political speech that stops short of outright censorship. Civil servants failing to adhere to the government line can simply be fired. The government has used this power to control messaging related to Republican challenge. In the 1970s, for example, a Radió Telefís Éireann (RTÉ) Authority defending a program that criticised the government's handling of Northern Ireland was dismissed, as was a journalist who refused to provide the identity of an interviewee.<sup>149</sup>

The law also provides for prohibition of material sympathetic to paramilitary aims. Section 31 of the Broadcasting Act allows the Minister to direct the broadcast authority 'to refrain from broadcasting any particular matter or matter of any particular class' that 'would be likely to promote, or incite to, crime or would tend to undermine the authority of the State'.<sup>150</sup> This authority has been used to target violent, mainly Republican organisations, as well as political parties linked to the armed struggle.

In 1971, Gerry Collins, the Fianna Fáil Minister for Posts and Telegraphs, issued a Section 31 order directing RTÉ not to broadcast, 'any matter that could be calculated to promote the aims or activities of any organisation which engages in, promotes, encourages or advocates the attaining of any particular objectives by violent means'.<sup>151</sup>

Five years later, Labour Minister for Posts and Telegraphs, Conor Cruise O'Brien, strengthened the underlying statute and issued an order to prevent Sinn Féin and the Provisional IRA from being able to communicate through television and radio. The statutory amendment prohibited RTÉ from transmitting 'anything which may reasonably be regarded as being likely to promote, or incite to, crime or as tending to undermine the authority of the State'.<sup>152</sup> The new order forbade RTÉ from carrying any interview, or report of an interview, with a spokesperson for the IRA/Oglaigh na hÉireann; Provisional Sinn Féin; and any Northern Ireland organisation proscribed by the British government under the Northern Ireland (Emergency Provisions) Act 1973.<sup>153</sup> The government extended these orders in 12 month increments, periodically expanding the list of organisations associated with violence in Northern Ireland.<sup>154</sup> While predominantly Republican, Loyalist organisations also came within the prohibition. In 1983, for instance, the order included a ban not just on the IRA and Sinn Féin, but also the Irish National Liberation Army and the Ulster Defence Association.<sup>155</sup>

Radió Teilfís Éireann took a rather conservative view of the broadcast ban and erred on the side of censorship, leading to a number of legal challenges. In 1982, the Supreme Court

---

<sup>148</sup>See, eg, Broadcasting Authority Act 1960 (BAA 1960); Broadcasting Authority (Amendment) Act 1976 (BAAA 1976), Radio and Television Act 1988, Broadcasting Act 1990, Broadcasting Authority (Amendment) Act 1993, and Broadcasting Act 2001.

<sup>149</sup> Peter Feeney, 'Censorship and RTE' (1984) 8[2] *The Crane Bag* 61, 64.

<sup>150</sup> BAAA 1976, s 16.

<sup>151</sup> Gerry Collins, *Dáil Deb* 4 November 1971, vol 256, col 1361.

<sup>152</sup> BAAA 1976, s 3 (inserting s 18(1A) into the BAA 1960).

<sup>153</sup> Broadcasting Authority Act 1960 (Section 31) Order 1977, SI 1977/7.

<sup>154</sup> See, eg, Broadcasting Authority Act 1960 (Section 31) Order 1978, SI 1978/10 (banning broadcast for 12 months of IRA, Sinn Fein, UDA, EPA entities); Broadcasting Authority Act, 1960 (Section 31) Order 1983, SI 1983/17; Broadcasting Authority Act 1960 (Section 31) Order 1987, SI 1987/13; Broadcasting Authority Act 1960 (Section 31) Order 1989, SI 1989/3.

<sup>155</sup> Broadcasting Authority Act 1960 (Section 31) Order 1983, SI 1983/17.

upheld the broadcasting authority act and its progeny.<sup>156</sup> But in 1993, the Supreme Court unanimously upheld a High Court decision ruling that an individual cannot be silenced solely based on membership of Sinn Féin.<sup>157</sup> Justice O’Flaherty explained that an individual speaking on an anonymous topic on the airwaves, even if a member of a proscribed group, was not outside the constitutional guarantee of freedom of expression.<sup>158</sup> That same year, though, the court ducked when RTÉ refused to accept a radio advertisement by Gerry Adams, President of Sinn Féin, based on the Section 31 order.<sup>159</sup> For the court, while an ordinary member of Sinn Féin might be protected under the Constitution, Adams was too closely associated with the core aims of the organization—leaving the ultimate decision on the matter up to RTÉ.<sup>160</sup>

In 1988 the British government followed a parallel approach, preventing the voices of members of any of the proscribed organisations from being carried on the airwaves.<sup>161</sup> The Government forbade the British Broadcasting Corporation (BBC) and the Independent Broadcasting Authority from transmitting ‘any words spoken, whether in the course of an interview or discussion or otherwise.’<sup>162</sup> The Home Office followed the orders with a letter to the BBC clarifying that the prohibition only applied to direct statements from members of the proscribed groups.<sup>163</sup> Douglas Hurd defended the measures in Parliament: ‘Those who live by the bomb and the gun and those who support them cannot in all circumstances be accorded the same rights as the rest of the population’.<sup>164</sup>

The media in Northern Ireland notoriously got around the British ban by using an actor’s voice in the place of Republican speakers. A similar situation never arose in the south, as the Irish prohibition did not allow word-for-word broadcasts.

In 1991, an effort by several journalists and producers, and two trade unions subject to broadcast bans, argued in the European Commission of Human Rights that the prohibition violated their rights under Article 10 of the Convention.<sup>165</sup> They asserted professional harm and the failure of Section 31 to meet the requisite ‘prescribed by law’ language in Article 10 s 2.<sup>166</sup> The Commission agreed that the order issued under Section 31 interfered with the applicants’ right to receive and impart ideas or information, but it rejected the claim that the law fell outside the prescribed limits.<sup>167</sup> As to whether such restrictions were ‘necessary in a democratic society,’ the Commission noted the difficulty of striking the right balance:

In a situation where politically motivated violence poses a constant threat to the lives and security of the population and where advocates of this violence seek access to the mass media for publicity purposes, it is particularly difficult to strike a fair balance between the requirements of protecting freedom of information and the imperatives of

---

<sup>156</sup> See *The State (Lynch) v Cooney* [1982] IR 337 (SC) (O’Higgins CJ, holding the use of media to advocate overthrow of the state fell outside Constitutional protections).

<sup>157</sup> See *O’Toole v. RTE (No 2)*, [1993] ILRM 458 (SC).

<sup>158</sup> *ibid* (O’Flaherty, J) 467-68. See also *ibid* (Finlay, CJ) 464-65.

<sup>159</sup> *Brandon Book Publishers Limited v RTE* [1993] ILRM 806.

<sup>160</sup> *ibid* (Carney, J).

<sup>161</sup> Two orders accomplished the ban: the first to the British Broadcasting Corporation (BBC) and the other to the Independent Broadcasting Authority (IBA). See Notice under Clause 13(4) of the BBC License and Agreement to the BBC and under section 29(3) of the Broadcasting Act 1981 (UK) to the Independent Broadcasting Authority, 19 October 1988; HC Deb 19 October 1988, vol 138, cols 893-903;

<sup>162</sup> *ibid*.

<sup>163</sup> Stefan Sottiaux, *Terrorism and the Limitation of Rights: the ECHR and the US Constitution*, at 132.

<sup>164</sup> See also HC Deb 2 November 1988, vol 139, cols 1073.

<sup>165</sup> *Purcell and Others v Ireland*, (1991) 70 DR 262.

<sup>166</sup> *ibid* at 269-75.

<sup>167</sup> *ibid* at 277.

protecting the State and the public against armed conspiracies seeking to overthrow the democratic order which guarantees this freedom and other human rights.<sup>168</sup>

On the whole, the Irish provisions were compatible with Article 10 s 2.<sup>169</sup> The purpose of the provision was not to stop the media, but to restrict the ability of those involved in terrorism from pursuing their cause.<sup>170</sup> The Commission recognized that, relative to print media, broadcast media had considerably more power: “Their impact,” the Commission wrote, “is more intimate than that of the print media, and the possibilities for the broadcaster to correct, qualify, interpret or comment on any statement made on radio or television are limited in comparison with those available to journalists in the press.”<sup>171</sup> Live broadcast, moreover, ran the risk of being used to carry out real-time operations—something that print reporters could avoid by screening the material conveyed.<sup>172</sup>

In 1994, Michael D Higgins, the Irish Minister for Arts, Culture and the Gaeltacht did not seek renewal of the broadcast ban under Section 31.<sup>173</sup> In 2001 the Oireachtas repealed the underlying provisions.<sup>174</sup>

## B. Censorship of Films

Irish law also provides broadly for the censorship of film, advertisements, video, and DVD recordings.<sup>175</sup> The first such law, the Censorship of Films Act of 1923, created the office of the Official Censor of Films, as well as an appeals board.<sup>176</sup> Two years later, the Oireachtas added advertisements to the material that could be prohibited or restricted.<sup>177</sup> In 1930 the law expanded to include vocal and other sounds.<sup>178</sup> For forty years, the law stood unchanged until amended to allow films to be re-submitted seven years after their publication had been denied.<sup>179</sup> Some forms of modern media became part of the censorship framework in 1989, with the addition of video and DVD recordings.<sup>180</sup>

From the 1920s until the 1980s, the government made extensive use of these provisions. According to the Irish Film Censors’ Records, the board banned more than 2,500 films and cut over 11,000 more.<sup>181</sup> Even prominent stars and films, and work by well-known directors, such as Humphrey Bogart and Lauren Bacall in *The Big Sleep* (1946); Stanley Kubrick’s *Clockwork Orange* (1971); *Monty Python’s Life of Brian* (1979); *Monty Python’s The*

---

<sup>168</sup> *ibid* at 279. See also Stefan Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the U.S. Constitution*.

<sup>169</sup> *ibid*.

<sup>170</sup> *ibid*.

<sup>171</sup> *ibid* at 279-80.

<sup>172</sup> *ibid*.

<sup>173</sup> Michael D Higgins, *Dáil Deb* 1 February 1994 vol 438, cols 226-27.

<sup>174</sup> Broadcasting Authority Act 1960, s 31(1), as amended by Broadcasting Authority (Amendment) Act 1976, s. 16, repealed by Broadcasting Act 2001, s 3.

<sup>175</sup> See, eg, Censorship of Films Act 1923, Censorship of Films (Amendment) Act 1925, Censorship of Films (Amendment) Act 1930, Video Recordings Act 1989, and Blasphemy (Abolition of Offences and Related Matters) Act 2019.

<sup>176</sup> Censorship of Films Act 1923.

<sup>177</sup> Censorship of Films (Amendment) Act 1925.

<sup>178</sup> Censorship of Films (Amendment) Act 1930.

<sup>179</sup> Censorship of Films (Amendment) Act 1970.

<sup>180</sup> Video Recordings Act 1989. See also Censorship of Films (Amendment) Act 1992 (empowering the Minister to appoint assistant censors).

<sup>181</sup> ‘Irish Film Censors’ Records 1923-38’ (*Trinity College Dublin*) [www.tcd.ie/irishfilm/censor/](http://www.tcd.ie/irishfilm/censor/) accessed 25 February 2020. In 1998 more than 100 volumes of the censorship records were deposited at the National Archives, many of which are now available online. See *ibid*.

*Meaning of Life* (1983); and Oliver Stone's *Natural Born Killers* (1994) failed to pass the morality test.<sup>182</sup>

Although the board rejected most films on religious and moral grounds, some fell under the knife because of the level of violence or the manner in which they portrayed crime. In 1932, for instance, the Censorship Board rejected *Scarface*, a film loosely based on Al Capone's syndicate. Despite considering the film 'anti-gangster propaganda', that portrayed the law as 'triumphant', censors determined that, ultimately it pandered to sensationalism: 'If this propaganda is justifiable where will it stop? Similar realism might offered for say – the white slave traffic – or other social evils'.<sup>183</sup> When the producers submitted the film for reconsideration two decades later, the censors did not waiver. They explained, 'This picture of the underworld is gangsterdom at its worst. Its features are violence, brutality, murders and loose women. Certificate refused'.<sup>184</sup>

The board rejected other films because of the political ideology they espoused. For instance, *One Day in Soviet Russia*, a 1941 Russian documentary portraying snapshots of life in the Soviet Union on 24 August 1940, fell outside acceptable bounds.<sup>185</sup> Other films effectively banned by the government, like the 1968 film *Rocky Road to Dublin*, directly challenged the legitimacy of the state.

In 2008, the Irish Film Censor's Office was re-cast as the Irish Film Classification Office (*Oifig Aicmithe Scannán na hÉireann*). The office now rates films according to their appropriateness for different age levels and only occasionally prohibits certain films on the grounds that they are indecent or obscene.

### C. Censorship of Publications

Various laws provide for censorship of the written word.<sup>186</sup> In 1929 the Oireachtas established a Censorship of Publications Board to consider complaints referred to them regarding indecent or obscene materials, or anything advocating 'the unnatural prevention of conception or the procurement of abortion or miscarriage'.<sup>187</sup> Like films, periodicals also could be prohibited where they provided an undue amount of attention to crime.<sup>188</sup> In 1946 the Oireachtas amended the statute to provide for a Publications Appeal Board.<sup>189</sup> Just over twenty years later, the Oireachtas set a 12 year limit to banned works.<sup>190</sup> At the same time, the Censorship of Publications Board retained the authority to make a further prohibition order in relation to the publication.<sup>191</sup>

---

<sup>182</sup> See 'The Land of Saints, Scholars and Censorship' (*Independent.ie*, 31 July 2012) <https://www.independent.ie/lifestyle/the-land-of-saints-scholars-and-censorship-26882364.html>; Irish Central Staff, 'Top Ten Movies Banned in Ireland' (*Irish Central*, 11 May 2017) <https://www.irishcentral.com/roots/top-ten-movies-banned-in-ireland-124842519-237396851>.

<sup>183</sup> 'Irish Film Censors' Records, *Scarface* (*Trinity College Dublin*) [www.tcd.ie/irishfilm/censor/show.php?fid=4765](http://www.tcd.ie/irishfilm/censor/show.php?fid=4765) accessed 25 February 2020.

<sup>184</sup> *ibid*.

<sup>185</sup> 'Irish Film Censors' Records, *One Day in Soviet Russia* (*Trinity College Dublin*) [www.tcd.ie/irishfilm/censor/show.php?fid=5949](http://www.tcd.ie/irishfilm/censor/show.php?fid=5949) accessed 25 February 2020.

<sup>186</sup> See, eg, Censorship of Publications Act 1929, Censorship of Publications Act 1946, Censorship of Publications Act 1967, Health (Family Planning) Act 1979, Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995, Health (Regulation of Termination of Pregnancy) Act 2018.

<sup>187</sup> *ibid* ss 3, 6(1).

<sup>188</sup> See 'Censorship of Publications Acts, 1929 to 1967, Register of Prohibited Publications' (Censorship of Publications Act, 1929 to 1967) (*Justice.ie*, 31 December 2016), [www.justice.ie/en/JELR/Register\\_of\\_Prohibited\\_Publications\\_2016.pdf/Files/Register\\_of\\_Prohibited\\_Publications\\_2016.pdf](http://www.justice.ie/en/JELR/Register_of_Prohibited_Publications_2016.pdf/Files/Register_of_Prohibited_Publications_2016.pdf).

<sup>189</sup> Censorship of Publications Act 1946.

<sup>190</sup> Censorship of Publications Act 1967, s 2(1).

<sup>191</sup> *ibid* s 3.

Like the films that fell outside the approved standards, most of the censored works raised concern about obscenity and immoral behavior.<sup>192</sup> Some provided information about abortion.<sup>193</sup> Others depicted gruesome attacks.<sup>194</sup> A minority of the banned publications, such as *News of the World* (prohibited in 1930) had a political bent.<sup>195</sup>

Overall, the number of new prohibition orders steadily declined from the 1990s onward. Nevertheless, as of 2012, 274 books and periodicals were still banned.<sup>196</sup> In 2003, 9 periodicals were banned.<sup>197</sup> In 2016, for the first time in 18 years, the board banned a book on grounds of obscenity.<sup>198</sup>

#### IV. NEW MEDIA, NEW THREATS

The world has changed, and the Irish state now faces threats considerably different than those it contemplated in 1939. One of the most critical issues right now—for Ireland and its allies—is countering significant threats posed by social media, societal manipulation, and interference in Western democratic institutions.<sup>199</sup> There are myriad aspects of new media that deserve attention—an enterprise that goes beyond this chapter. Before concluding, however, it is important to note some of the most difficult areas that do not fit easily into the OAS: the development of extremist ideologies, terrorist recruitment, and the promotion of acts of terrorism. Lurking in the shadows are concerns about how efforts to address these challenges may impact not just freedom of expression, but Ireland’s international commitments.

##### A. Extremist Ideology and Terrorist Recruitment

As noted at this beginning of this chapter, one of the most serious societal consequences of increasing dependence on social media is the way in which it alienates individuals and increases levels of depression and anxiety. The structure—algorithms that preference similar views and trending material, the swift proliferation of emotionally-imbued information, and the ‘like’ function—privileges extreme emotions. Of these, fear and anger fly most swiftly through the networks. Sophisticated algorithms pre-select what material users see, with the result that individuals become not just more entrenched in their world views, but more extreme. Ideas that previously one might not have even voiced suddenly are brought within the realm of possibility. The fact that *other people* are articulating the ideas, particularly when an algorithm feeds *multiple* such articulations in to an individual’s feed, creates a skewed world view: ie, that such ideas are mainstream, when in fact, they are not. The situation

---

<sup>192</sup> See, eg, prohibitions on *Pin-Up* (1959), *Man’s Conquest* (1960), *Playgirl* (1974), *For Men Only* (1959), and *Climax* (1975). Censorship of Publications Act, 1929 to 1967 (n 188).

<sup>193</sup> See, eg, prohibitions on *Abortion: Right or Wrong?* (1942), *Abortion: Our Struggle for Control* (1983), and *The Complete Guide to Sex* (1990). Censorship of Publications Act, 1929 to 1967 (n 188).

<sup>194</sup> See, eg, prohibitions on *Murder Mysteries* (1939), *Crime Detective* (1951), *Complete Detective Cases* (1952), and *True Crime Cases* (1951). Censorship of Publications Act, 1929 to 1967 (n 188).

<sup>195</sup> See Censorship of Publications Act, 1929 to 1967 (n 188).

<sup>196</sup> Christine Bohan, ‘Censored: The 274 Books and Magazines Still Banned in Ireland Today’ (*TheJournal.ie*, 21 May 2012) [www.thejournal.ie/censored-the-274-books-and-magazines-still-banned-in-ireland-today-455034-May2012/](http://www.thejournal.ie/censored-the-274-books-and-magazines-still-banned-in-ireland-today-455034-May2012/).

<sup>197</sup> Censorship of Publications, Charles Flanagan, Dáil Deb 1 February 2018, vol 964.

<sup>198</sup> *ibid*; [2016] *Iris Oifigiúil* 388 [10]; Bohan, Censored (2012) (n 196); Wayne O’Connor, ‘Censor Bans First Publication in Ireland in 18 Years’ (*Independent.ie*, 12 March 2016) [www.independent.ie/entertainment/books/book-news/censor-bans-first-publication-in-ireland-in-18-years-34533300.html](http://www.independent.ie/entertainment/books/book-news/censor-bans-first-publication-in-ireland-in-18-years-34533300.html).

<sup>199</sup> For a discussion of ‘disinformation’, that is, intentionally incorrect information, versus, ‘misinformation’ and ‘mal-information’, see Alice E Marwick, ‘Why Do People Share Fake News? A Sociotechnical Model of Media Effects’ (2018) 2 *Georgetown Law Technology Review* 474 <https://georgetownlawtechreview.org/why-do-people-share-fake-news-a-sociotechnical-model-of-media-effects/GLTR-07-2018/>.



becomes even more pronounced when botnets amplify specific messages, making it *seem* like they are ‘trending’ news, when they are not.

The situation is ripe for organisations committed to violence to create greater sympathy for their cause and to recruit potential members. Because of the global nature of new media, they can do it from half a world away—anonously. This is a very different situation than that which the Irish state has historically confronted.

Consider the role of social media as a recruitment platform. It runs 24 hours a day, seven days a week, and it is individualised. As one commentator has observed, it ‘allows terrorists to reach out to their target audiences and virtually ‘knock on their doors’—in contrast to older models of websites in which terrorists had to wait for visitors to come to them’.<sup>200</sup> The targets, moreover, can be hand-chosen, based on factors identifying individuals potentially sympathetic to the cause. This is essentially how new media advertising works: pre-selecting certain criteria, such as certain types of past news articles that users have ‘liked’, the list of followers or friends, or membership in certain social media clusters (eg, groups, chats, or hashtags), and then using that information to approach the individuals; to manipulate users with a significant power base in the network to take certain steps which, in turn is emulated by others in the group; or to design individually-targeted advertisements. The prioritization of information based on user preferences makes it easier to identify potential members.

Recent estimates suggest this is how ISIS has used new media to recruit more than 16,000 foreign fighters.<sup>201</sup> Global recruitment to a cause may motivate people to travel outside the country to fight. As a domestic matter, new media may help to radicalise individuals and motivate them to become engaged in violence.<sup>202</sup> This is not the same thing as prohibiting violent *depictions* from circulating—one of the targets of decades of restrictions placed on films and publications. It is using messaging to generate increasingly extreme views.

Because of the massive amounts of data now available on individuals, the process can be highly individualised and hard to detect. A group may seek out disenfranchised or disaffected people by tweeting, retweeting, or using popular hashtags related to divisive current events. By creating an online micro-community around the targeted recruit, the individual begins to develop a sense of comradeship and belonging. The micro-community can then nudge the person to become increasingly isolated from others, before shifting the conversation to private social media platforms that have encryption, such as WhatsApp, Kik, or Telegram.

What does the 1939 OAS and its progeny have to say about this kind of challenge? As discussed above, the statute makes it unlawful to distribute treasonable, seditious, or incriminating documents, or to contribute such materials to any newspaper or periodical.<sup>203</sup> But these provisions grow from Republicanism. Numerous kinds of violent challenges exist that have no bearing whatsoever on the overthrow of the Irish government. Material related to their operations falls outside the definition of treason.

The definitions provided for the second type of material, seditious documents, also narrowly contemplate Republican paramilitary violence.<sup>204</sup> The real question is whether new media postings related to extremist organisations could be understood as material emanating

---

<sup>200</sup> Gabriel Weimann, ‘New Terrorism and New Media’ (Wilson Center Commons Lab, 2014) 3 [www.wilsoncenter.org/sites/default/files/media/documents/publication/STIP\\_140501\\_new\\_terrorism\\_F.pdf](http://www.wilsoncenter.org/sites/default/files/media/documents/publication/STIP_140501_new_terrorism_F.pdf).

<sup>201</sup> Susan Klein and Crystal Flinn, ‘Social Media Compliance Programs and the War against Terrorism’ (2017) 8 *Harvard National Security Journal* 53, 65.

<sup>202</sup> *ibid.*

<sup>203</sup> OAS 1939, s 10(1)-(2).

<sup>204</sup> See *ibid* s 2(a) (including documents containing material calculated ‘to undermine the public order or the authority of the State’); *ibid* s 2(b) (including documents suggesting ‘that the government functioning under the Constitution is not the lawful government of the State’); *ibid* s 2(c) (including documents that allege, imply, or suggest ‘that the military forces maintained under the Constitution are not the lawful military forces of the State’); *ibid* s 2(d) (including documents ‘in which words, abbreviations, or symbols referable to a military body are used in referring to an unlawful organisation’).

from an unlawful organisation or ‘calculated to promote the formation’ of one.<sup>205</sup> Unlike Section 31 of the Broadcast Act, under the OAS such associations do not have to be known by distinctive names in order to be unlawful.<sup>206</sup>

For the target being recruited, it may be difficult to consider a comment on existing news stories as material ‘calculated to promote the formation’ of an unlawful organisation. Much of what is said online in open fora amounts to little more than a rant. Giving voice to frustration is not the same as calling for individuals to create an organisation.

There are further problems with applying these provisions to the new media environment. First, *is* social media the equivalent of a newspaper? A strong argument could be mounted that it is a form of communication—not journalism. It is merely individuals stating their views. Posting is *not* the same as publishing. Individuals online may operate *qua* individuals. They may limit their communications to limited numbers of ‘friends’. They are not subject to government regulation as a particular industry. They are simply citizens offering their thoughts or views—or circulating ideas or information.

Second, the type of material that may lead to online terrorist recruitment does not have to stem from or be directly related to unlawful organisations. They may simply be news articles reporting on actions taken by the government. Or perhaps they may highlight a growing social or economic concern. Nor do they have to emphasize obstructing government or interfering with the military—issues historically relevant to Republicanism, but not consistent with contemporary challenges.<sup>207</sup> Nor is the effort to surround civilians with micro-communities the same thing as organising a meeting at which treasonous documents could be found. Instead, discussions may center on historical injustices, or future economic concerns linked to Brexit and the European Union. When the aim is recruitment, the matters being pursued do not have to be directly linked to any violence whatsoever. They do not have to contemplate the overthrow of the state or sedition.

Third, material proliferates, quite literally, at the speed of light. So as soon as a comment is posted, it almost immediately may be picked up and re-posted by hundreds, or even thousands of people—making the prosecution of all of those involved in the circulation of such material preposterous.<sup>208</sup> Nor can such material, in any way, be ‘given up’ to the *Gárda Síochána*.<sup>209</sup> Even erasing it online will fail to eradicate it from online caches. These are not documents that can be ‘seized’ or ‘destroyed’.<sup>210</sup>

Fourth, the law makes it unlawful to possess certain documents.<sup>211</sup> But the way new media works, users do not have control over material on their accounts. For one, sophisticated algorithms pick material for their feed. For another, those purchasing ads get access to the user without the user’s permission. Where a user employs a particular hashtag, any number of comments may be generated on the same topics. There is not necessarily a causal relationship.

Fifth, and finally, anonymity online may make it almost impossible to ascertain who is posting the materials. In fact, it could be *bots* creating and putting information online. Clearly, the government is not going to prosecute a computer program. All of this, moreover, can be done in *absentia*. That is, those pulling the strings will be nowhere near the country. A newspaper can be stopped at the border. Global communications systems cannot.

---

<sup>205</sup> OAS 1939, s 2.

<sup>206</sup> *ibid*.

<sup>207</sup> See *ibid* s 6(1).

<sup>208</sup> See *ibid* s 10(3) (‘Every person who shall contravene either of the foregoing sub-sections of this section shall be guilty of an offence under this sub-section and shall be liable on summary conviction’.)

<sup>209</sup> *ibid* s 10(4).

<sup>210</sup> See *ibid* s 11(a) (authorizing members of the *Gárda Síochána* ‘to seize and destroy’ treasonous, seditious, or incriminating documents); *ibid* s 12(4) (directing persons to turn over all copies of treasonous material, when requested, to the *Gárda Síochána*).

<sup>211</sup> *ibid* s 12.

## B. Heightened Impact of Terrorist Incidents

In 1974, Brian Jenkins famously observed, ‘Terrorism is theater’.<sup>212</sup> If an entity gets enough attention, it doesn’t matter how powerful it is. The goal is to ensure that what the organisation does is *seen*. By publicizing violence, entities can create fear in others and thus manipulate the political process. At some level, if an entity gets enough attention, it doesn’t matter how large or powerful it is. The ability to capture attention itself is power.

New media has already become a platform for those engaged in violence to magnify the impact of their actions. In 2014, for instance, ISIS branded their offensive #AllEyesOnISIS to ensure that the world was watching. Far from hiding, the insurgency sought global attention.

Unlike in the past, where violent organisations have been dependent on the news media (which could be regulated), with the new platforms, they can convey their *own* messages. They control the narrative in a way that they have not historically been able to. They can communicate with their target audience directly. And the more extreme the actions are, the more emotion they generate, ensuring that the news moves even more swiftly through online communications. So organisations can *harness the power of others*—including, most especially, ordinary citizens—to get their message across.

4chan and its progeny is instructive. 4chan is an English language imageboard modeled on Japanese imageboards [(ie, Futaba channel (2 channel)]. Launched in 2003, it was initially focused on manga and anime. As it migrated to English, the site became known for its protections for speech. It quickly became linked to a number of Internet subcultures, like Anonymous, the alt-right, and Project Chanology. In 2013, users frustrated with what restrictions 4chan did have launched 8Chan.

When Brenton Tarrant, a white supremacist, went on a rampage in Christchurch, New Zealand, killing 51 people at a mosque, he announced that he was going to do it via 8Chan.<sup>213</sup> He then broadcast the shooting on Facebook Live, YouTube, Twitter, and Instagram.<sup>214</sup> During the attack, Tarrant shouted, ‘Remember, lads, subscribe to PewDiePie’—a reference to an anti-Semitic YouTube channel with 89 million followers—the highest number on YouTube.<sup>215</sup> The anti-immigrant manifesto itself picked up language from the troll community online, suggesting that the act itself was inspired from online associations.<sup>216</sup>

Such incidents point to an underlying concern: the platform is built for speed, which means that posts fly around the globe. It would be very hard for Ireland to use the OAS or even its other broadcast and publication provisions to prevent the dissemination of similar photos, video, and content. Unlike the broadcast media, which is tightly controlled, the Irish government controls neither global social media platforms nor every user worldwide. The alternative legal structure, moreover, on which the government has depended to restrict the publicity afforded to terrorist organisations, Section 31 of the Broadcast Act, is premised on government control of what is broadcast and on the prior identification of paramilitary organisations. It is virtually impossible to do this globally.

---

<sup>212</sup> Brian M Jenkins, ‘International Terrorism: A New Kind of Warfare’ (P-5261, RAND Corporation, 1974) 4 [www.rand.org/content/dam/rand/pubs/papers/2008/P5261.pdf](http://www.rand.org/content/dam/rand/pubs/papers/2008/P5261.pdf).

<sup>213</sup> See Associated Press, ‘Death Toll from Christchurch Mosque Attack Grows to 51 After Turkish Man Dies’ (*NBC News*, 2 May 2019) [www.nbcnews.com/news/world/death-toll-christchurch-mosque-attacks-grows-51-after-turkish-man-n1001476](http://www.nbcnews.com/news/world/death-toll-christchurch-mosque-attacks-grows-51-after-turkish-man-n1001476); Elizabeth Lopatto, ‘The Mass Shooting in New Zealand Was Designed to Spread on Social Media’ (*The Verge*, 15 March 2019) [www.theverge.com/2019/3/15/18266859/new-zealand-shooting-video-social-media-manipulation](http://www.theverge.com/2019/3/15/18266859/new-zealand-shooting-video-social-media-manipulation).

<sup>214</sup> Lopatto, Mass Shooting (2019) (n 213).

<sup>215</sup> *ibid*; ‘Social Media’s Role in Mosque Attack’ (*CBS News*, 15 March 2019)

[www.cbsnews.com/video/disturbing-role-of-social-media-in-new-zealand-mosque-shooting/](http://www.cbsnews.com/video/disturbing-role-of-social-media-in-new-zealand-mosque-shooting/) (Social Media’s Role (2019)).

<sup>216</sup> Social Media’s Role (2019) (n 215).

Notably, organisations can use social media not just to promote their own actions and ‘brand’, but to undermine the opponent’s narrative.<sup>217</sup> This can become particularly insidious when paired with false information, much less deep fakes.

## VI. Concluding Remarks

One potential response to the lack of coverage in the OAS for the types of threats emanating from new media that the state is and will be facing in the future is to simply try to amend the statute going forward. Significant concerns related to freedom of expression, democracy, and the ubiquity of new media, however, create a barrier. Beyond this, it is not at all clear that Ireland *could* take such actions and still meet its international legal obligations.

International Law requires that Ireland observe right to freedom of expression and dissemination of opinion. Under Article 10 of the European Convention of Human Rights (ECHR), this right includes the freedom not just to hold opinions, but ‘to receive and impart information and ideas without interference by public authority and regardless of frontiers’.<sup>218</sup> The convention recognises that states can license broadcast, television, or cinema enterprises and, (assumedly) by extension, new media. It protects restrictions ‘necessary in a democratic society’, introduced ‘in the interests of national security’, or adopted to prevent ‘disorder or crime’.<sup>219</sup> But how far such provisions can go into impacting the creation of online communities may well trigger claims under Article 11, which protects the right of peaceable assembly and association.<sup>220</sup>

In 2010, the ECHR considered a case in which Turkish magazine editors had been convicted for publishing statements made by members of illegal Marxist-Leninist organisations.<sup>221</sup> The Court rejected the country’s effort to criminalize publication of statements by terrorist organisations, without any consideration for the broader context. They reasoned that should identity be sufficient to preclude speech, Article 10 would fail to afford sufficient protection. Since the statements in question did not threaten or perpetuate violence, the national security justification for restriction expression was insufficient to overcome the protections in Article 10. *Lynch) v Cooney* aside, the cases raises question as to whether, under the Convention, Ireland *could* prohibit individuals from using social media purely on the basis of their identity.

Like the ECHR, the Universal Declaration of Human Rights protects the right of freedom of opinion and expression: ‘this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’.<sup>222</sup> The International Covenant on Civil and Political Rights (ICCPR) similarly guarantees:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>223</sup>

---

<sup>217</sup> Mark Borkowski, ‘Isis and the Propaganda War: How the Social-Savvy Extremist Are Dominating the Headlines’ (*The Drum*, 25 June 2014) [www.thedrum.com/opinion/2014/06/25/isis-and-propaganda-war-how-social-savvy-extremists-are-qdominating-headlines](http://www.thedrum.com/opinion/2014/06/25/isis-and-propaganda-war-how-social-savvy-extremists-are-qdominating-headlines).

<sup>218</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950) 213 UNTS 221, art 10.

<sup>219</sup> *ibid* art 8.

<sup>220</sup> *ibid* art 11.

<sup>221</sup> *Gözel and Özer v Turkey* App nos 43453/04 and 31098/05 (ECtHR, 6 July 2010).

<sup>222</sup> Universal Declaration of Human Rights (UDHR) (1948), UN Doc A/810 (1948) 71, art 19.

<sup>223</sup> International Covenant on Civil and Political Rights (ICCPR) (1966) 999 UNTS 171, art 19.

While some limits can be enacted for national security, public order, or moral considerations, the General Comment on the provision underscores the importance of freedom of opinion and expression to self-realisation and democratic governance:

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.<sup>224</sup>

Human rights relies heavily on freedom of expression.<sup>225</sup>

Under the ICCPR, freedom of opinion is further protected by other articles and central to the enjoyment of other rights, such as the right to vote.<sup>226</sup> It is so central that even in an emergency, states party cannot derogate from it.<sup>227</sup> Under the convention, all branches of the state are required to respect it.<sup>228</sup> No discrimination is allowed: 'All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion'.<sup>229</sup>

Not only do these instruments appear to protect individuals who post online, but freedom of expression also includes the right to obtain information—including, specifically, online.<sup>230</sup> Means of expression include books, newspapers,<sup>231</sup> pamphlets,<sup>232</sup> posters, banners,<sup>233</sup> dress and legal submissions.<sup>234</sup> And they include *all* forms of audio-visual as well as electronic and internet-based modes of expression.<sup>235</sup> As Frank La Rue explained:

Although Internet access is not yet recognized as a right in international human rights law, States have a positive obligation to create an enabling environment so that all individuals can exercise their right to freedom of opinion and expression. This includes putting in place a concrete and effective policy and the political will to ensure universal access to the Internet'.<sup>236</sup>

---

<sup>224</sup> Human Rights Committee General Comment 34 (General Comment 34), CCPR/C/GC/34 (2011) para 2 (citing communication No 1173/2003, *Benhadj v Algeria*, Views adopted on 20 July 2007; No 628/1995, *Park v Republic of Korea*, Views adopted on 5 July 1996).

<sup>225</sup> General Comment 34 para 3.

<sup>226</sup> See, eg, ICCPR arts 18, 25, 27 (freedom of expression integral to enjoyment of other rights (eg, assembly, association, right to vote)).

<sup>227</sup> General Comment 34, para 9; *ibid* para 5 fn 3 ('See the Committee's general comment No 29 (2001) on derogation during a state of emergency, para. 13, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No 40*, vol. I (A/56/40 (Vol I)), annex VI'.)

<sup>228</sup> General Comment 34, para 7.

<sup>229</sup> *ibid* para 9.

<sup>230</sup> *ibid* para 11 ('Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20'.)

<sup>231</sup> *ibid* para 12 (citing communication No 1341/2005, *Zundel v Canada*, Views adopted on 20 March 2007).

<sup>232</sup> General Comment 34 (citing communication No 1009/2001, *Shchetoko et al v Belarus*, Views adopted on 11 July 2006).

<sup>233</sup> General Comment 34 (citing communication No 412/1990, *Kivenmaa v Finland*, Views adopted on 31 March 1994).

<sup>234</sup> General Comment 34 (citing communication No 1189/2003, *Fernando v Sri Lanka*).

<sup>235</sup> General Comment 34, para 12 (emphasis added).

<sup>236</sup> 'Freedom of Expression Everywhere, Including Cyberspace, Office of the High Commissioner' (*UN Human Rights, Office of the High Commissioner*, 4 November 2011) [www.ohchr.org/EN/NewsEvents/Pages/Freedomofexpressioneverywhere.aspx](http://www.ohchr.org/EN/NewsEvents/Pages/Freedomofexpressioneverywhere.aspx).

Under the ICCPR, the protection of media and freedom of expression online is particularly important—not least because freedom of the press is integral to other rights: ‘A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society’.<sup>237</sup> Without a free press, and the ability freely ‘to comment on public issues without censorship or restraint,’ the right to vote has been compromised.<sup>238</sup> ‘The public also has a corresponding right to receive media output’.<sup>239</sup> This includes the right of the media to be able to produce *and to receive* information.<sup>240</sup> The advent of social media, if anything, underscores the importance of protecting the right:

There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.<sup>241</sup>

To ensure this, the ICCPR requires that any statutes related to treason, sedition, or public order, must be drawn as narrowly as possible.<sup>242</sup> The problem with the challenge posed by new media is that the threats to the state may present in very different form—one for which a broad approach may be the only solution. In adopting it, however, the risk presents that the state will fail to fulfill its international obligation to protect free expression.

---

<sup>237</sup> General Comment 34, para 13 (citing communication No 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005).

<sup>238</sup> General Comment 34 (citing the Committee’s general comment No 25, CCPR/C/GC/25 (1996) on article 25 (Participation in public affairs and the right to vote) para 25).

<sup>239</sup> General Comment 34, para 13 (citing communication No 1334/2004, *Mavlonov and Sa’di v Uzbekistan*).

<sup>240</sup> General Comment 34, para 13 (citing communication No 633/95, *Gauthier v Canada*).

<sup>241</sup> General Comment 34, para 15.

<sup>242</sup> See *ibid* paras 21, 29-31; Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Concluding Observations of the Human Rights Committee Hong Kong Special Administrative Region (HKSAR), CCPR/C/HKG/CO/2 (2006).