## The Europeanisation of the Higher Courts in Ireland and Scotland

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**Very Preliminary Paper**

The discussion paper below sets out the preliminary stages of a project we are working on examining EU Law in the Irish courts. The first stage of the project is an analysis of the cases over the last 10 years (1.1.2009 - 31.12.2018) with an expectation over the medium term of more substantive and doctrinal analysis of how EU Law is applied by the courts.

The project emerges from a preliminary study undertaken by Maher (2018) in Carolan’s edited book on the Irish Courts as part of the wider IPA series on the branches of government of the Irish State. This in turn built on Fahey’s work (2007, 2010) on EU law in the Irish courts, with a particular emphasis on preliminary rulings. Two themes emerged from Maher’s study: that there is an expotential growth in EU Law before the higher courts, partly due to environmental law and also due to European Arrest Warrant case law and that while much of the work is mundane, cases of EU-wide significance may emerge thorugh the Irish courts. Barry Roger had undertaken a statistical analysis of EU Law in the Scottish courts over forty years (2017). Fortuitously he approached us to see if we would undertake a parallel study. This is the focus for this work.

The aim is to publish a co-authored paper on EU Law in the Irish and Scottish courts and subsueqnelty an article that will look more closely at the Irish courts on their own. A further article may emerge addressing constitutional issues that would be targetted at an itnernaitonal journal.

The outline below sets out the methodology thus far. At the moment we are undertaking coding before moving onto SPSS (programme that allows for statistical analysis following coding).

**Hypothesis**

To explore the extent to which the national courts are being Europeanised as a result of the increasing volume, and significance, of cases where EU law is raised and applied within domestic legal systems.

**Hypothesis Explored**

The concept of Europeanisation arises because of the question: how does European integration impact on the domestic law and politics of EU member states? It is a contested concept (Kassim, 2000, p. 235) with some analysis focussing on how centralised institutions are being developed and embedded in the EU. Hence Cowles & Caporaso and Risse (2001:3) define Europeanisation as ‘the emergence and development, at European level, of distinct structures of governance’. Our interest though is on the domestic level. Here Saurugger’s (2014) discussion of Europeanisation - casual and explanatory factors for understanding the incremental transformation and functional changes in national policies and laws – is useful. This process is viewed by her as a circular and dynamic process, not a linear one, operating on the meso (national) and macro (EU) levels. (The EU influencing national policy and laws, and the Member States similarly influencing EU policy and laws).

Snyder (2000) notes that Europeanisation has led both to the partial convergence of Member States, while conversely also resulting in new divergences between national legal systems. The work of Conant (2001) is of particular interest to us in this regard. Conant observes that there is substantial cross-national and subnational divergence in the degree to which national courts participate in the EU legal system. Conant’s work suggesting that integration between national courts and the CJEU is consistent with variations in MS’s institutional structures. National judiciaries in her view are a source of fragmentation for the EU legal system, as courts engage EU law at different rates and inconsistently invoke EU legal norms.

In considering how best to construct the methodology for this project, we first considered the purpose of the data being collected as

1. To outline, discuss, analyse and compare case-law where EU law arises in the higher courts in Scotland and Ireland over a ten-year period.
2. To examine Irish case law where the Courts actively engaged with, and considered, EU law and the jurisprudence of the CJEU.
3. To examine the extent to which these national courts are being Europeanised as a result of the increasing volume, and significance, of EU law.
4. To consider the extent to which Europeanisation may have led both to the partial convergence, and conversely new divergences, between national legal systems and the application of EU Law within the domestic sphere. (Particularly with a focus on differences in domestic judicial interpretation of EU law)

These provided the framework when considering the search parameters for the first stage of the research project.

The aim in this leg of the project was to capture ‘relevant’ cases from the Irish Superior Courts. Defining relevant and irrelevant was challenging, but qualifying cases had to outline, discuss, and analyse EU law. i.e. there had to be judicial engagement with the EU legal issue(s). Finally, the size of the dataset collected would need to be manageable for this study with regard to the size and volume of the data to be collected.

**Database Selection**

We identified the search engine(s) that would be used to generate the data and consider how each database’s search engine functioned. A number of databases were considered. However, it was ultimately determined that Bailii would be the primary resource utilised. Bailii provides a highly reliable and consistent service, with access to a comprehensive database of case law from the Irish Superior Courts ensuring easy replicability by other researchers. Bailii also has the added benefit of being open access to everyone, ensuring ease of access to the same resources by other researchers. Bailii can be accessed via; <https://www.bailii.org/>

The use of Bailii was supplemented via the use of other resources, in particular, a Justis search was utilised throughout the data gathering stage of the project. Justis provides case summaries which assist in assessing the relevance of cases to the project. Justis also lists keywords and legal instruments relevant to each case, again assisting in categorising them qualitatively.

Justis was used for the purposes of this project, however Justis is being decommissioned as a standalone search engine by March 2019 and integrated with JustCite into a single platform, JustisOne, which can be accessed via <https://app.justis.com/>. Justis is a paid for platform but it is widely accessible via third level education institutions via their library services.

**Analysis of Baili Search**

In assessing how best to formulate the search, and what words & phrases should, or shouldn’t be, used in the process, consideration was first given to how Bailii’s search engine functions by studying the information guide available online.

* Bailii uses stemming, meaning words are automatically stemmed to find related words. E.g. Searching for discrimination will also search for discriminatory and discriminated discriminate.
* When searching for phrases double quotation marks must be used. E.g. ‘statutory right’ would have to be entered as “statutory right”.
* ‘AND’ is used to find search terms together. i.e. to find ‘Customary’ and ‘Right’ it would need to be entered as ‘Customary AND Right’.
* Bailii uses term connectors. Boolean connectors include ‘and’, ‘or’ & ‘not’. Proximity connectors would include the word ‘near’.
* Nesting is represented by brackets and is used when there are multiple connectors to resolve the ambiguity. For example, searching for *‘(terminate) OR (dismiss) AND “statutory right” AND wages’* would require the words ‘terminate’ or ‘dismiss’ to be in the same document as the phrase ‘statutory right’ and the word ‘wage’ or ‘wages’.
* Bailii advises users not to utilise common words when searching unless they are enclosed in double quotes.

**Application of Bailii Search to the list of possible search terms**

Having studied Bailii’s search engine, I considered how best to search for cases related to the brief given for this project as the Europeanisation of national courts, specifically where domestic legal institutions actively engage in discussion and/or assessment of EU. A number of words/phrases were excluded from the search;

* ‘Europe’ was excluded as it was too general a term and would widen the search to include references to the continent of Europe, the Council of Europe
* Words with similar effects, such as commission, recommendations, etc, were also excluded.
* A number of phrases were excluded, for example, the ‘Nice Treaty’ and ‘Maastricht Treaty’, as they could result in the inclusion of the word treaty stemming from other international instruments. While the inclusion of such phrases in double quotation marks could counterbalance this, it could also potentially result in our search becoming too specific, potentially limiting results dramatically.
* Citation prefixes for EU case law were considered as a search term. However, they were ultimately excluded. The inclusion of the prefix ‘C-‘ for decisions of the CJEU, or ‘T’ the General Court were found to widen the search to include all words beginning with ‘C’ or ‘T’. This would result in a dramatic increase in the search results.

Based on the above considerations the list of words was narrowed down to the following;

EU, ecj, cjeu, egc, European Union, court of justice, general court, court of first instance

**Justification for the selection of these words/phrases**

The European Union as an entity

* European Union and its abbreviation of EU were included in the search. European Union was included to find explicit references to the Union as an entity in its own right. However, when European Union was entered as one word ( e.g; … OR European Union OR… ) search results dropped slightly. For this reason, European Union was entered as e.g.; ‘… OR European OR Union…’. This increased results slightly but didn’t compromise the search’s integrity.
* EU was chosen due to its flexibility when applied to Bailii’s search engine. Entering EU would search for multiple terms and phrases that include ‘eu’ such as; European, European Union, European Parliament, European Commission, European Law or EU Law, Euro area, Court of Justice of the European Union, etc. This had the downside of also searching for phrases such as the European Convention. The effect of this would, however, be limited by the construction of the search, EU being a term to be found with other European Union related terms, therefore limiting this effect to a minimum.

**Search Design - The Court of Justice of the European Union**

* We wanted to capture instances where the Irish Court outlined, discussed or analysed European Law. Hence abbreviations of ‘ECJ’ & ‘CJEU’ were added to the search. These are commonly used by legal professionals, including the Irish Courts when referring to the Court of Justice.
* The abbreviations for the Court were entered in double quotation marks.
* The full name of the court was not included as this could complicate the search and result in increased or decreased results. (The fewer variables at play the better)
* The phrase ‘court of justice’ was included in the search as a limiting factor and to identify cases which were more specifically related to our requirements of cases where the Irish Courts engaged with the jurisprudence of the European Court.

**The final search appeared as follows for the CJEU;**

 *(eu OR ecj OR cjeu OR european OR union) AND ("court of justice")*

**Search explained;**

* Searching for eu, ecj, cjeu & European union within the first set of brackets would specify to the search engine that these terms had to be within the results, in conjunction with the phrase within the second set of brackets.
* By placing ‘OR’ between each of the terms in the set of brackets the search engine would understand that these words or phrases are interchangeable.
* Searching for ‘court of justice within the second set of brackets would specify to the search engine that this phrase had to be found in the results.
* By placing the phrase relating to the court, and the set of terms relating to the EU and the European Court in brackets and connecting them using the word ‘AND’, the search engine would understand that the phrase in the second set of brackets had to be found in conjunction with at least one word in the first set of brackets. i.e. the brackets created units of words or phrases to be found with the alternative unit.
* If one unit received a result in the search, the result would be included in the final list of results if another word from the alternative unit occurred in the same result.
	+ i.e. If ‘Court of Justice’ was found in one case, that case would only be included if a word from the second list was also found in the same case. Otherwise, it would be discounted by the search engine.

A total of 889 cases were identified by Bailii following this search.

**Search Design – The European General Court**

* A search was also carried out lookig for cases relating to the European General Court.
* Again, we wanted to capture instances where the Irish Court outlined, discussed or analysed European Law so the abbreviation ‘egc’ in the search as it is commonly used by legal professionals when referring to the European General Court was included.
* The abbreviation for the Court was entered in double quotation marks.
* The official name of the Court, the European General Court, was included in this instance as it did not appear to complicate the search results or increase/decrease our search results significantly.
* Siminarly, the former name of the European General Court, the Court of First Instance as it was known prior to the implementaiton of the Lisbon Treaty, as this would capture cases which occurred prior to 2009. (2008 - 2018 being period of study)

**The final search appeared as follows for the General Court**

*(eu OR "egc" OR european OR union) AND ("general court" OR "court of first instance")*

**Search explained**

* Searching for eu, “egc” & European Union within the first set of brackets would specify to the search engine that these terms had to be within the results, in conjunction with the phrase within the second set of brackets.
* By placing ‘OR’ between each of the terms in the set of brackets the search engine would understand that these words or phrases are interchangeable.
* Searching for ‘general court’ and ‘court of first instance’ within the second set of brackets would specify to the search engine that this phrase had to be found in the results.
* By placing the phrase relating to the court, and the set of terms relating to the EU and the European Court, in brackets and connecting them using the word ‘AND’, the search engine would understand that the phrase in the second set of brackets had to be found in conjunction with at least one word in the first set of brackets. i.e. the brackets created units of words or phrases to be found with the alternative unit.
* It was considered possible that the inclusion of the phrase ‘court of first instance’ could result in the mistaken inclusion of unrelated case law (i.e. Where the court of first instance was a lower court within the domestic legal system, e.g. a District Court). However, this would be cancelled out by the terms in the first set of brackets which needed to be found in conjunction with the phrase ‘court of first instance’.
* If one unit received a result in the search, the result would be included in the final list of results if another word from the alternative unit occurred in the same result.
	+ i.e. If ‘Court of Justice’ was found in one case, that case would only be included if a word from the second list was also found in the same case. Otherwise, it would be discounted by the search engine.

A total of 203 cases were identified by Bailii following this search.

**Evaluation of search results**

Each case was reviewed individually. Firstly each case was skim read, reviewing the summaries (where available) and the terms highlighted by Bailii indicated the reason a case had been returned by the search engine. A check was also done to ensure that each case had not been returned in error by Bailii. For example, in some instances the words EU or European would find results relating only to the European Court of Human Rights. Such cases were discounted.

Note: cases relating to decisions of the Information Commissioner, Data Protection Commissioner and the Competition and Consumer Protection Commission and other adjudicative bodies were not included as they do not form constituent parts of the Irish Superior Courts Structure.

Following this, when satisfied that the case did relate to an issue of EU law, the case was assessed to determine the exact issue(s) present in the proceedings. Following this, the case was checked against the Justis search, or another search engine such as Westlaw or Lexis, to confirm the primary issues arising in the individual case, therefore, ensuring that interpretation of the case was correct. Following this, if still unsure as to the exact issue(s) of the case, a general web search using Google for the case in question either by name, or by neutral citation, would be used in particular in relation to asylum cases. Sites such as the Bar of Ireland, the Law Society of Ireland, Asylum Rights Ireland, European Database of Asylum Law, European Migration Network, reports of the Attorney General, and other government bodies were consulted, as were legal blogs, Court reports from various news websites such as the Irish Times.

A textual analysis was also conducted of each case using the Ctrl+F function to find terms such as EU, directive, regulation, Court of Justice, court citations for the CJEU such as ‘C-‘ or E.C.R., any terms that might relate to EU law were used to zone in on the EU law specific issue in the individual case. I also checked each case to find Article 267 references to the CJEU.

Cases that raised EU law issues were recorded in an excel database. This database had two worksheets: the first worksheet contained cases where there was substantial engagement by the Irish Courts with EU law and case law. The second contained cases were EU law/case law was at issue, but there was not the same level of engagement with EU law and the jurisprudence of the European Court as in the former set of cases. Cases in each of these spreadsheets were grouped by Court; High Court, Court of Appeal, Central Criminal Court, or the Supreme Court. The following information was recorded for each case; the neutral citation, the case name, the main legal issue(s) in the case, and whether a preliminary reference was made to the CJEU or not.

**Conclusion**

Following evaluation, the research thus far has given us 760 cases for the ECJ and 23 from the General Court search. This suggests there are about 80 cases a year in the Supreme Court, Courts of Appeal and the High Court, with an increasing number over time. The coding draws on the coding used by Roger in his 2017 study to allow for comparison. Following a recent meeting, this starting position is being refined e.g. the public law/private law divide is less clearly articulated in the Irish common law system. We are considering how to address the binary code of relevant/irrelevant at the moment. Preliminary references and judicial review on the other hand are straightforward. The Scottish study does not address the European Arrest Warrant and for the comparative paper we will not include those cases but have collected the data and will be including them in the Irish paper that will follow. At the moment, the research does not differentiate chains of cases but the intention is to address this at a later stage in the project.

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