

05 Keeping track of the law in Ireland during the COVID-19 Pandemic

David Kenny

COVID-19 changed the world and the Irish State. To respond to the pandemic, Ireland gave unprecedented power to the government to impose the most sweeping restrictions on personal freedom in the history of the State. Though this was essential, the vast scope of these powers gave similarly vast potential for misuse. With the support of the College's COVID Response Fund, I set up the COVID-19 Law and Human Rights Observatory, together with colleagues in the Trinity Law School, to keep track of the (constantly changing) law. We started a blog and prepared research reports to highlight major legal issues.

The Observatory raised concerns about parliamentary oversight, and insufficient democratic review of both the use of the power to make COVID regulations and the extension of the extraordinary legal powers given to government. We also highlighted significant issues around the rule of law: there was severe lack of clarity in government communication regarding what was law and what was merely public advice. This came into sharp relief in the enforcement of a criminal prohibition on holding religious services, when, in our view, no such prohibition actually existed in law. Far from mere technicalities, these basic issues of accountability and rule of law

compliance go to the heart of a just legal system. Even if we agree that the measures adopted were necessary, the manner in which they were adopted and enforced leaves much to be desired.

As well as raising these matters in blog posts and the media, I gave evidence to the Special Oireachtas Committee on COVID-19 Response, and many of the Observatory's recommendations were adopted in that Committee's final report. Three Observatory colleagues and I wrote a comprehensive report about the human rights and equality implications of the pandemic measures for the Irish Human Rights and Equality Commissions. Published in early 2021, this Report makes detailed recommendations about how better legal measures – with increased accountability, oversight, and care for rights compliance – could be adopted in future.

The role of legal advisors in governance

Alongside this, I have undertaken novel research on the role of government legal advisors in constitutional law. These advisors – such as the Attorney General in Ireland, and the US Office of Legal Council – are massively influential in our system of governance, but underexplored in comparative constitutional law. They often operate in a highly opaque manner, and it is hard to know their true influence on our systems of government. In a series of articles in the leading international journals in my field, I have begun to explore this question with comparative analysis of legal advisors in the US, the UK, Ireland, Canada and Japan. I consider how these legal advisors affect constitutionalism, politics, and the separation of powers, and argue for the much greater academic and political scrutiny of these bodies.



David Kenny is a graduate of Trinity College Dublin, Harvard Law School, and the King's Inns. He joined Trinity as an Assistant Professor of Law in 2012, and is now an Associate Professor and Fellow. He is an alumnus of the US State Department's Fulbright programme, and a recipient of the Provost's Award for Excellence in Teaching in 2015. His research focuses on comparative constitutional law, and he has recent publications in the *International Journal of Constitutional Law* (ICON), *Public Law*, and the *American Journal of Comparative Law*. Contact: david.kenny@tcd.ie

BELOW – *Ireland's Emergency Powers During the Covid-19 Pandemic* – Conor Casey, Oran Doyle, David Kenny and Donna Lyons.

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