

Culture, Trade and Cultural Trade:
citizens' communication rights in a
global market

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For the award of Doctor of Philosophy (Ph.D.)

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June 2003

Acknowledgements

I would like to thank those within the academic community that assisted the development of this thesis, in particular Dr. Stephen Gundle, Dr. Aphra Kerr, Dr. Anthony Cawley, the DCU library staff, the Computer Services staff, and Registry. Thanks for valuable support and encouragement go to Jacqueline MacCarthy, Mary Whelan, Irja Karjalainen, and Woofer. Prof. Paschal Preston supervised the work, and I wish to thank him and the School of Communications for helping to fund this research. I dedicate this thesis to all the saints and scholars in my family.

Culture, Trade and Cultural Trade: citizens' communication rights in a global market

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Abstract

This thesis addresses the concepts of rights and freedoms of citizens to cultural expression and democratic information in political and economic communities. It directly engages with the problematic of defending citizens' rights to communication as a cultural right and a social right. These arguments are founded in a fear of cultural imperialism, a defence of national cultures and an advocacy of cultural diversity within a "European culture". This author is confident that the notion of culture, and cultural objectives will be challenged repeatedly at every round of World Trade Organisation negotiations. This thesis takes the view that the annexation of audiovisual products and services is therefore a temporary solution.

This thesis prefers to address broadcasting policy and audiovisual services policy from a trade and human rights perspective. It argues that an awareness of human rights in 18th century Ireland developed firstly as a by-product of trade with America within the public sphere of market activity. Research suggests that issues of trade autonomy are key aspects of communities' demands for citizenship and a separate nationhood. It appears that in Ireland's case, ethnic cultural claims developed later. In adopting this premise, this thesis rejects the view that citizenship demands were predominantly linked with an Irish cultural nationalism. *This creed is often the rationale* behind the defence of 'cultural rights' in relation to media and public service broadcasting. I argue that human rights demands arising from restrictive market practices are voiced in the market and trading community but take on the mantle of a defence of cultural hegemony and a call for separateness in citizenship when in actuality, the basis of their demand for rights is autonomy and independence in commercial and trading policy.

This thesis examines the years 1982 – 2002 and the policy strategies of Ireland in relation to Audiovisual Services, and the EU Common Commercial policy that frames their input into multi-lateral trade rounds in the GATT / World Trade Organisation forum. This research addresses the options at Ireland's disposal in order to protect national autonomy over its audiovisual policy, and national citizens' rights to communication, knowledge and information.

Findings demonstrate that Ireland has made little effort to restrict market access to foreign market dominance in audiovisual product beyond the EU minimum. Irish governments regularly choose free trade over the protection of national rights, inevitably argued from a cultural basis. This is because, while television might be seen as politically and democratically important, it is not as economically important as the new media industries related to information technology that are beginning to replace agriculture as the mainstay of Ireland's economic trade.

This thesis concludes that as a small Member State in the European Union, the level of sovereignty that Ireland retains over its audiovisual policy diverges from popular convictions that posit EU member states retain national autonomy in the area of EU audiovisual policy.

Abbreviations

D/ ACG, Department of Arts, Culture and the Gaeltacht
D/ AHGI, Department of Arts, Heritage, Gaeltacht and the Islands
D/ENT-EMP, Department of Trade, Enterprise and Employment
D/ FA, Department of Foreign Affairs
D/ PE, Department of Public Enterprise
EBU, European Broadcasting Union
EI, Enterprise Ireland
FMI, Film Makers Ireland
FORFAS, The National Policy and Advisory Board for Enterprise, Trade, Science,
Technology and Innovation
GATT, General Agreement on Tariffs and Trade
IBEC, Irish Business and Employers' Confederation
IFPI, International Federation of the Phonographic Industry
ODTR, Office of the Director of Telecommunications
OECD, Organisation for Economic Co-operation and Development
UN CPC, United Nations Provisional Central Product Classification Code
WTO, World Trade Organisation

Codes for Interviewees

**Department of Communications (D/COMMS) or
Department of Tourism, Transport and Communication (D/TTC), or
Department of Arts, Culture & the Gaeltacht (D/ACG) or
Department of Arts, Heritage, Gaeltacht and the Islands (D/AHGI)**

1. Principal officer (PO) in Broadcasting division in D/COMMS, D/ACG, D/AHGI, 1984 – present)
2. Assistant Secretary, (1988 – present)
3. Assistant Principal, (1993 – 1997)
4. Principal officer (PO) in Broadcasting Division of D/ Communications, (1985 – 1991)

**Department of Tourism and Trade (D/ TT) or
Department of Enterprise, Trade and Employment (D/ENT-EMP) or
Forfas**

1. Chief Irish negotiator to GATT, Geneva 1980-1986. Currently assistant secretary, D/ENT-EMP)
2. Assistant Principal D/ENT-EMP, 1984 – present and GATT, Geneva (1984-1986)
3. Principal Officer in D/ ENT-EMP (1991 – present)
4. Services negotiator in D/ENT-EMP (1992 – 1997)
5. Irish negotiator on Services (2002 – present)
6. Principal Officer, EU / WTO Unit, D/TT (1995-1996)
7. Senior Trade Economist, Forfas

Department of Public Enterprise

1. Principal Officer, Telecommunications Regulation Division (current)

Other Interviewees

Mary Banotti MEP

Michael D. Higgins TD (Minister for Arts Culture Gaeltacht, 1993-1997)

Film Makers Ireland

Audiovisual Media, Enterprise Ireland

Informatics Director, Enterprise Ireland

Audiovisual Federation, Telecommunications Council, IBEC

EC DG Trade

EC DG Culture

World Trade Organisation, counsellors for Audiovisual, and E-commerce

US Mission to the EU / US Trade Representative, counsellors for Audiovisual and E-commerce

Introduction

0.1 Thesis Statement

This thesis addresses the issues of citizenship and the public sphere, and analyses Irish and European audiovisual policy from the perspective of *human rights in trade*.

The thesis operates on the premise that Ireland's audiovisual policy is affected by Ireland's trade policy. This in turn is shaped by the EU Common Commercial Policy that feeds into the negotiating forum of the World Trade Organisation (WTO) as regulated by the General Agreement on Trade in Services (GATS).

This thesis argues that although citizenship has tended to be associated with the parameters and cultural history of the nation state, 21st century citizenship within the European Union must move beyond dogmatic adherence to cultural rights and the defence of national culture on the occasions when audiovisual policy is contested within trade fora such as the WTO. The culture versus economic arguments surrounding media policy raised within inter-governmental institutions cause nothing more than impasse and damage international, particularly trans-Atlantic, relations.

I also challenge those who suggest that the EC's internal democratic structure allows for national sovereignty and control over national broadcasting matters (Ward 2001). For example, Ward argues that the European Commission has always emphasised that "the philosophy of public service broadcasting is something that lies outside the competition rules and the strict terms of the European treaty". Ward maintains that the European Commission always defers to the interpretation of public service broadcasting as given by the European Court of Justice in the context of the Treaty, and thus it aims to "circumvent any direct involvement in defining, either the remit of public service broadcasters or the nature of funding that these broadcasters receive"(2001:85). Fundamentally, Ward argues that "The Commission recognised it was the Member States who retained the prerogative to define a service of general interest and the functions and obligations which the particular service should pursue". (p88)

I posit rather that Ireland is not as autonomous vis a vis the European Commission in this policy sphere, as Ward would like to believe. In the absence of *national autonomy*, and rather with an increase in 'reactive' policy making within small EU member states like Ireland, Ward's thesis is, I argue, untenable. This means that the national government's willingness to protect its national culture is limited. Within these limits, in the case of Ireland, I argue that it could have, but did not, opt for greater protection of its national culture vis a vis the quantity of foreign imports broadcast. This researcher's position concurs with Hamelink (1995) and Corcoran (2001) who both suggest that the nation state has in recent times given away large amounts of power to transnational corporations and multi-national institutions, over which they have little control.

Put simply, one of the arguments of this thesis posits that while paying lipservice to the democratic needs of its citizens, overall Irish government policy in the last forty years has been to favour boosting trade as a primary and dominant policy, particularly with America. It will be shown how this tactic has historical roots in the 18th century trade of Ireland with the rebelling American colony, when ruled by colonial power Great Britain. This suggestion that trade is favoured over democratic rights appears to concur with Feintuck's (1999) concept of countries engaging in "competitive de-regulation". This is a modern situation where countries dash to attract international media business investment, and risk democratic values and norms for their citizens in the process.

'Competitive deregulation' according to Humphreys (1996, 1997a) quoted in Feintuck (1999) means, "running the risk of sacrificing national regulation for diversity and pluralism in favour of perceived economic benefits attaching to the growth of nationally based media empires" (Feintuck 1999:164). Feintuck says in this situation: countries and / or national governments "must engage in difficult cost / benefit analyses, considering the potential economic benefits of hosting major media players and setting these against ideals of pluralism and diversity in the domestic media."

However, this is not a new idea. Barbrook (1992) in his examination of Irish media policy since the inception of the Irish state, suggested that since the 1960s, Ireland has prioritized economic growth to stem emigration, over diversity and pluralism and cultural protectionism. Barbrook suggests that once the Irish economy was opened up to the outside world, foreign direct investment, and the open European market, protection

of national cultural identity took a back seat. He concludes "Because of European integration, the protection of the national culture has ceased to be a major aim of the broadcasting policies of the Southern Irish state". (p224)

This thesis also argues that an awareness for human rights, and the rights to separate nationhood arose first within the public sphere of the marketplace in Ireland's ports and trade fairs. This awareness of human rights – in the context of trade, trading rights, and a demand for independence from Britain in the sector of trade and commercial policy – was subsequently followed, this thesis argues, by a notion of cultural difference vis a vis Britain which led to the Act of Union 1800, and later a separate Irish nation in 1922. In adopting this position, this thesis therefore rejects the view that citizenship demands were always and first linked with an Irish cultural nationalism. This dogma is often the rationale behind the defence of 'cultural rights' in relation to media and broadcasting and public service broadcasting, as advocated by Corcoran (2001), Venturelli (1998) and MD Higgins (1995, 1999). Instead, this research provides evidence to support my hypothesis that trade shapes and determines the nature of citizenship.

While the claims for separate nationhood in the 19th century were often led by the arguments justifying a distinct and independent nation because of a distinct and separate culture, I argue that the basis of the demands for cultural sovereignty lay in the desire for commercial sovereignty with external traders. I argue that demands for separate culturally defined nations in the late 18th / early 19th centuries were couched in terms of cultural nationalism and cultural difference, yet were a thin disguise for real demands for independence in trade and commercial policy. Human rights in 18th century Ireland (vis a vis Great Britain) developed initially as a by-product of trade with America within the public sphere of port and market activity. This argument is developed in chapter four of the present thesis.

With reference to the present day, I present the case that while it might appear democratically and culturally desirable to safeguard national culture, and national cultural expression, evidence suggests that again, these are thinly disguised arguments for securing trade and commercial benefits for national industries. For a country without a strong national industrial base, Ireland – it is argued – effectively protects the trade rights of the foreign industries located here.

There exists a tendency towards defence of national audiovisual policy through an emotional or 'affective' defence of national culture against cultural imperialism and the effects of globalised trade. (See MD Higgins (1995), Corcoran (2001), O Tuathaigh (1984), O Tuathaigh, Gageby et al. (1979), Herbert Schiller (1969, 1998), the European Parliament (2000), UNESCO (1980), Council of Europe (2000), the European Federation of Film Directors, and other representatives of 'the cultural industries' in Europe for the presentation of the case against 'cultural imperialism'). This defence is often articulated as a defence of citizens' "cultural rights" in the public sphere. This thesis presents the case that the idea of "cultural rights" is bound up with the notion of a sovereign nation, nationhood and a national homogenous culture. This has roots in the 18th and 19th centuries, when nation states were in a process of evolution. The element of national citizenship was often taken to be illustrative of a cultural similarity in background or heritage or religion or custom. Citizens were culturally akin.

I challenge two aspects of this most frequently employed defence. Firstly I dispute the continued sovereign status of the nation state in the area of audiovisual policy, (particularly in the case of a small state with low inhabitant numbers such as Ireland, low levels of population being the key to voting weight within the European Union). Secondly, 'cultural rights' formerly referred to the members of a culturally similar group, that made up the members of the nation. Within the spread of multi-cultural societies throughout Europe – and Ireland is only just beginning this experience having taken first steps towards integrating culturally ethnic foreigners in recent economically buoyant years - the argument for cultural rights is unclear. Are the rights of that citizen protected because he is culturally similar, or culturally diverse? This thesis operates on the assumption that cultural defence of audiovisual services in the WTO will be routinely contested, because liberalisation of industries is a continual demand.

0.2 Purpose

In order to avoid this melee, I propose to defend human rights of the public sphere within trade rules. Therefore, this thesis proposes an alternative approach to media policy that is from the perspective of trade policy rather than cultural or social policy.

As an alternative solution to an uneasy status quo between the EU and more liberal members of the WTO, I make two suggestions. Firstly, I propose a *re-definition* of 'property' as information, knowledge, or those materials in whatever form that allow the formulation of independent opinion (books, press, TV, internet, radio.) Secondly, I propose that protection of citizens' rights to freedom of information, expression and communication should not be defended as part of a national cultural or social policy. Instead, these citizen's rights ought to be enforced as an aspect of trade and commercial policy, either nationally defined within the global marketplace, or globally enforced through a global institution with legal powers. It is this author's opinion that citizens' rights to freedoms of information, expression and communication would ideally be protected in a global trading marketplace as a form of individual trading rights to property. This approach differs considerably from that of Raboy (2002) and Hamelink (1995), who both maintain that the best way of re-aligning audiovisual policy which is being determined within the trade forum of the WTO is through the organisation and robust intervention by representatives of a global civil society in 'information society' discussions.

0.3 Topic

The topic of this thesis is citizenship, the public sphere, and human rights, and their relationship with trade in global markets.

The theme of citizen and citizenship will be addressed according to citizenship at the levels of national, European Union, post-national and global citizenship. It is of value to observe Ireland, as actor and representative of its national citizens within the EU decision-making forum. Within the greater arena of the WTO, it is the European Commission which negotiates on behalf of the EU member states and their citizens, once the Member States have agreed to a common negotiating position. Ireland inputs into this process, to a greater or lesser extent, depending on the individual personality of the Minister responsible.

The democratic public sphere is understood to cover all aspects of consultation of the public and public opinion, rights of the public sphere, and rights to expression or reception within that sphere. Raymond Williams (in Sparks 1993) made a distinction between the right to expression and the right to access the means of expression. For Williams, both the (negative) right to express, and the (positive) right to receive via government support need to be guaranteed in a 'truly democratic system of communication' (Williams quoted in Sparks 1993:81), though exactly how is left vague and unanswered by Williams. This distinction between the right to express and the right to receive continues to be a key issue in current discussion.

In addition, media theorists suggest highly nuanced versions of the right to access and participate in the public sphere, and the right to receive audiovisual content of certain types. While communication theorists emphasise either the right of access or the right to express, others focus on the rights to the provision of goods and services, interpreting certain forms of content as social goods, that should be guaranteed reception as part of a public service in the overall social policy of a government. The right to receive implies duties of the 'other' to supply and provide – whether that be governments of nation states, international organisations, or media corporations. Within the section (Chapter 3) detailing the issues of democratic communication and citizens' rights in the public sphere, this researcher examines the themes of equality / inequality; access / restricted access; inclusion / exclusion; and freedoms / liberties relating to expression and communication.

The question of markets, trade and marketplaces is the backdrop for the concepts and theories surrounding citizenship, the public sphere and human rights. Historically, I sketch the inter-related trade history of Ireland, Britain and America in the 18th and 19th centuries, and show the extent to which trading in the marketplace raised the issue of, and created the demand for human rights. Further, these rights gained such an importance within the trading marketplaces that they were respected and policed as 'trading rights'. Some of these protected fair pricing (of bread, for example), and a softening of unforgiving market rules, or the corruption of these by opportunistic traders.

This leads me to the main problematic of my research - the development of European citizenship and how this is affected by the global trade in audiovisual services. Audiovisual services are deemed *democratically* important, for political participation and ruling. They are also declared to be *socially* important because they are capable of contributing to social cohesion as well as *culturally* important because they express and reflect a cultural group.

What is an 'audiovisual service' and how is it defined? Audiovisual services are a disputed category of the UN Classification list (CPC), the standard definitional format used by the World Trade Organisation. There does not exist one common definition of 'audiovisual services'. While the WTO Secretariat uses the UN categorisation, they privately admit that audiovisual services within the WTO has a 'classification problem'. There is an implicit need for a revision of the category in light of technological advances, yet until then, each WTO member can define 'audiovisual services' in however traditional or futuristic manner it wishes.

Trade in audiovisual services in global marketplaces carries implications for everyone's ability to receive and express, information, news, analysis, and opinion necessary for involved citizenship of a national community or a community of EU member states (now augmented from 15 to 25 members on 16 April 2003 with the Declaration of Athens).

This thesis mainly relates to audiovisual 'television broadcasting' services, although arguments put forward in favour of 'cultural industries' also relate to film and television production, distribution and projection in cinemas. Irish national legislation avoids references that might imply Internet legislation.

0.4 The topic in relation to landmark and related studies

There are those who suggest citizenship is related to nationality (French Constitution, Herder, Hegel) or cultural similarity (Wolfe Tone, United Irishmen) or cultural heritage (Burke, Williams, Marshall) or political involvement (Aristotle, Habermas). I diverge

from the paradigm that suggests citizenship is to be regarded as national and cultural (and hence requires a strong national cultural public broadcasting service (e.g. Corcoran 2001).

My view is that citizenship may be conceptualised as post-national, as proposed by Hobsbawm (1992); Habermas (1995); Ferry (2000); Kearney (1997); Dahlgren (1995)); Garnham (1990); Closa (1996); Weiler (1995, 1997, 1999); Schlesinger (1997) and Murdock and Golding (1989) among others. Further, I relate to a European citizenship which is rooted in a shared political culture of the EC as proposed by Habermas (1995).

Other studies suggest citizenship is related primarily to the quality of communication between its members -see Habermas (1989), Murdock (1989), Garnham (1990), Habermas (1994), Closa (1996), Calabrese & Borchert (1996), Venturelli (1998a) and Ward (2001). They often conclude that any post-national EU citizenship will therefore require singular or plural democratic spheres. Landmark studies relating to the area of citizenship and the national or European public sphere include Habermas (1994). Recent related studies on the area of European Union citizenship and the EU public sphere pertinent to this study include those by Collins (1994), Kaitatzi - Whitlock (1996), Venturelli (1998a), and Ward (2001).

The conceptualisation of Irish citizenship was an issue that concerned Burke and Wolfe Tone in the late 18th century, while recent theorists considering the issues of Irish or Irish-European citizenship include Kearney (1988) and Higgins and Kiberd (2002). Kearney (1988) gives a useful expansion of his vision of a federal Europe of the Regions, but he does not touch on any aspect of media or broadcasting, and limits his focus to poetry and literature. This literary cultural focus is also to be found in Higgins and Kiberd (2002).

Citizenship and human rights was the concern of TH Marshall (1950). His work detailed the development of human rights – from political, to civil, to social. Others, particularly in the media communication field, advocate strengthening ‘cultural rights’ with relation to the public sphere (Venturelli 1998a, 1998b; Corcoran 2001) This researcher views this prospect as inherently problematic.

There are three reasons for this. Firstly, defending 'cultural rights' in the sphere of EU and WTO policy-broking is regarded as a risky and contentious battlefield, particularly when there is no commonly held definition of 'culture', nor for that matter, audiovisual services. Secondly, there is no common 'European culture' to defend, the notion remaining vague, undefined and contested. Thirdly, there has always been a faint disregard for the importance of cultural, social and economic rights in comparison for strongly asserted and protected civil and political rights, although some (Higgins) declare that all rights are indivisible and equal in importance. The danger inherent in defining media policy as 'cultural' is that of annexing it, literally and metaphorically in economic trade agreements.

Recent debate among theorists has diverged to defending another form of rights – 'communication rights'. The 'right to communicate' was defined as 'a new concept' by a UNESCO commission for the study of communication problems (Unesco / MacBride 1980). This was specified as providing "the right to be informed, the right to inform, the right to privacy, the right to participate in public communication - all elements of a new concept, the right to communicate" (Hamelink 1999:82). However, the concept had been raised years earlier by Jean d'Arcy (1969).

The UNESCO definition of the 'right to communicate' was allegedly based on Article 19 of the 1948 UN Declaration of Human Rights providing for Freedom of expression and opinion, and interpreted by UNESCO as the 'right to communicate' and the 'right to have access to communication channels'. (Hamelink 1999 detailing MacBride Report). Hamelink (1995, 1998, 1999) was among the first to pinpoint the WTO as the locus of communication policy, and has since prepared a new Draft Declaration on the right to communicate (March 2003) within the forum of the World Summit on the Information Society (WSIS) ongoing in Geneva. Raboy (1998) recommends a global framework for communications policy that is directed by civil society groups and NGOs involved in media and communication projects worldwide. Many such groups are presently involved with the CRIS Campaign for Communications Rights in the Information Society, in preparation for the Geneva WSIS summit due to take place in December 2003.

In relation to the relevant theorists – what previous attempts were made at what I am attempting?

This thesis examines Irish media policy in the international context, not Irish media policy in exclusively national and territorial terms. Barbrook (1992) suggests that the irrevocable moment of change for Ireland was its integration into the western economy.

"Once the economy was integrated within the Western European and global marketplace, the Catholic nationalist culture of Southern Ireland could no longer be protected from foreign 'pagan' influences." (1992:224).

He identifies this date as late 1960s / early 1970s with Ireland's integration into the EU community.

This thesis locates Irish media policy within the global context, and will examine not only what is traditionally recognised as 'media | communications policy', but more importantly, 'trade policy' and where it impacts on broadcasting – in the WTO trade category of 'audiovisual services'.

In the area of Irish broadcasting policy subjected to external influences, Horgan (2001), Barbrook (1992), Trappel (1991) and Brants & Siune (Siune and Truetzschler 1992) have all previously written on Ireland's particular broadcasting political and legislative landscape of peculiarities. A common conclusion is that Ireland is too 'small' in EU terms to exercise much diplomatic or political weight, and therefore is mainly in the position of 'reacting' to Brussels initiatives. Lake's theory (1988, quoted in Setser 1997) suggests that in trade negotiations, the measure of a nation's power is the size of its market for imports, and a closely related statistic, its share of total world trade.

The research evidence locates the axis of power in EU media policy making, not in Brussels as is usually assumed, but in Geneva, at the World Trade Organisation, and within the network of ambassadors and diplomats from the Member States attending critical and ill-reported meetings within the World Trade Organisation between WTO members, EC officials, and the Permanent Representatives of Member States posted in Geneva. EU and national media policy is driven by the trade in 'audiovisual services', one of the services for which the WTO sets regulation. This thesis clearly demonstrates

that the development of national audiovisual broadcasting policy has origins outside this State.

Authors who have previously addressed the specific issues of GATS and global trade in audiovisual services include Galperin (1999), Hindley (1999), Wheeler (2000), Freedman (2002), Raboy (2002) and Setser (1997).

Some of these studies examine the tension between EU and American ambitions for liberal free trade in the audiovisual sector. Many, however, have specific and exclusive reference to Canada, using the comparison of their particular North American Free Trade Agreement (NAFTA) with the USA. Both Raboy and Corcoran approach media issues from a Canadian perspective, where the input of public opinion in the formulation of Canadian broadcasting policy is enforced in statutes, and high quotas (60% for public service broadcasting channels) ensure secure support for the public service broadcaster.

While it is useful to draw comparisons between the Canadian example and the European battle vis a vis American exports in the audiovisual field, Canada struck an unusual and risk-laden agreement with the US, which is unlikely to be mimicked by the EU within the forum of the WTO.

Article 2005, Paragraph 1, of the US-Canadian Free Trade Agreement (1989), states that "cultural industries are exempt from the provisions of this agreement", although in the following paragraph of the same article, a party is allowed to take retaliatory measures "of equivalent commercial effect" in response to cultural protectionism policies. (Galperin 1999:631) While the US condemned Canada's cultural protectionism, Canada remarked that "if you agree to permit commercial retaliation against cultural subsidies, then you have agreed to define culture as a commodity" (Galperin 1999:631 citing Mosco, 1990:49).

This thesis clarifies the relationship between Ireland and the World Trade Organisation with a view to the foreign trade factors resulting from the strong location of foreign subsidiaries in this country, many – like Microsoft and IBM – American, and manufacturing, outsourcing and trading within the 'new' audiovisual services' industries. 'New' audiovisual services are viewed by American industry in particular to

include or overlap with telecommunications and software services, while traditional audiovisual producers do not take the view that there should exist a distinction between 'old' and 'new' audiovisual services.

Notwithstanding the authors who address the issues of trade in audiovisual services, it is more often approached as a political issue, and as such has been addressed by many political organisations such as the European Commission, European Parliament, Council of Europe, and WTO members' governments.

Many NGO organisations that petition the debate (such as European Audiovisual Observatory, European Broadcasting Union (EBU), and lobby groups for Europe's film industry) advocate a cautious treatment of cultural industries in GATS. The most frequently proposed suggestion by those is that audiovisual services or 'the cultural industries' should be excluded from WTO rules. (The distinction this author makes here with regard to these seemingly two diverse categories is a question of framing. Those arguing for the protection of broadcasting, film and other audiovisual information from a cultural position will often label these forms as the products of cultural industries such as the independent television and film production industries. These identical forms will find a tendency in this thesis to be referred to as audiovisual services, because this is the usual manner of referring to television programmes, films and videos within the European Communities Directorate for Culture, the department with responsibility for Broadcasting within the Irish government, and within the negotiations on GATS within the World Trade Organisation.) The argument is that the WTO should not be regulating trade in cultural services, particularly those with the potential to enhance democracy. This is the central tenet of the International Network for Cultural Diversity (2002). They argue that the WTO is not the proper arena to facilitate trade in cultural goods and services, and suggest that another forum should be established for this purpose, run by 'cultural' personnel not focused on liberalisation. This proposal, while supported in theory by many (Canada's Cultural Industries Sectoral Advisory Group on International Trade (SAGIT) for instance), is not, in practice, possible. WTO representatives confirmed to this author that since 1994 there was no possibility of extracting a sector of services from the GATT agreement. Therefore, there is no present possibility of negotiating trade in cultural goods and services in another forum. It could then be

concluded that solutions countering the free liberalisation of communications policy must be found and exercised within the current dominant trade environment.

0.5 Focus

The focus of this thesis is on the policies, strategies and action plans that were proposed, advised, recommended (but jettisoned) or adopted by the Irish government between the years 1982 – 2002. In particular, my interest lies in analysing the orientations and approaches taken by the Irish departments with responsibility for trade, enterprise, culture, communications, or *telecommunications* (these department titles changed frequently over the period under examination) in response to policy initiatives and proposals originating from the European Commission in Brussels (especially from the Directorate General Trade, Directorate General Competition, and Directorate General Culture).

This research initially proposed to assess the activities of the ‘government’ of Ireland. However, while undertaking primary research, it became clear that in certain departments, on certain issues, the opinion of the ‘government’ was reliant on one or two well-regarded individuals, often civil servants of long-standing. It could be posited that on occasion, critical policy courses of action were made by the civil servant with responsibility for the portfolio. This practice appears to be less in evidence in latter years, and more frequent in the early 1970s and 1980s. Nowadays, the opinion and advice of consultants on policy direction is more apparent. This may compensate for the tendency to lose in-house expertise gained by civil servants working in a single area over a long period when they are forcibly re-located every few years.

The policies I focus on cover the areas of international trade policy, audiovisual policy, television broadcasting policy (public service and digital terrestrial), and cultural policy in so far as it relates to broadcasting. The other type of policies analysed are those put in place to support the growing audiovisual industry both in Ireland and the EU, allowed under WTO regulations for cultural objectives. These include the means of providing indirect and direct support to the audiovisual industry sectors of production, distribution and exhibition using tax incentives, repayable loans, or the licence fee.

Specifically, this means that this thesis analyses policy determined by the WTO in co-decision with the European Commission and the Council of Ministers, and by the Irish government. The broad parameters of the study encompass WTO liberal trade rules relating to audiovisual services; EC DG Competition rules on 'State Aid' relating to public service broadcasters; EC Treaty declarations on culture and public service broadcasting and EC DG Culture and national support measures for the audiovisual industry, both European-wide and nationally-contained.

From the inception of GATS in 1995, the trade rules encompass 'commitments'; regulations on 'national treatment'; and 'exemptions' from national treatment. The keenest issues under discussion are the implications of free and liberal trade on the audiovisual industry, economy, and culture in European member states; the cultural objectives of the European audiovisual industry; and the support which that national or European industry receives that might be in direct opposition to free and fair trade. One of the pressing issues in the new Doha Round is the manner in which elements of the category of audiovisual services are technologically 'converging' onto e-commerce and telecommunications services. These services are subject to free and liberal trade.

The European Commission has no specific competence or remit to make policy for culture, although Treaty Declarations relating to the support of culture are expected to be taken into account in policy orientations. Therefore, while European political personalities profess the coherence and blossoming of a European cultural identity, this remains decisively an area of policy left to the member states. This is the status quo position as is currently put forward by the EU member states to the WTO.

On broadcasting and audiovisual issues, the EC regulates the European market in cross-border trade in audiovisual product and services through the EC Directive (1989) Television Without Frontiers. Within this Directive, Articles 4 and 5 specify a minimum of 50% European on-screen content (although participant countries given MEDIA Plus support within this European audiovisual sphere include Cyprus, Malta, Central and Eastern European countries, EFTA members, and Turkey).¹

However, these regulations are not policed by the EC. Broadcasting policy is another area where increasingly, matters of regulation or the adoption of more stringent rules is a matter for the member states. On this matter, I agree with Ward (2001). The quota system is identified by commercial broadcasters as an unfair restriction of access to the European market, and denounced by Ward as representing the key problem in the EC audiovisual regulation landscape. For commercial broadcasters, DG Competition and liberal WTO members such as USA, Japan, Brazil (all of whom have an interest in flooding the EU market with their native audiovisual products), the system of quotas, state aid for cultural objectives, the EC MEDIA finance programme and licence fee funding represent obstacles to fair trade, or non-tariff trade barriers.

In response to the liberal market orientation of DG Competition towards public service broadcasters² the EU member states and their supporters drafted and inserted a *Protocol to the Amsterdam Treaty on Public Service Broadcasting*. This was followed by a *Council Resolution on Public Service Broadcasting*. Ireland's input and response to the issue of public service broadcasting, and national responsibility for its policy relating to the definition, remit and funding of public service broadcasters using direct or indirect methods is explored in this thesis. For many European public service broadcasters, the democratic right of citizens to expression and reflection of their cultural identity was the key issue at stake in the funding dispute raised by DG Competition.

Irish Minister Higgins was a key figure in this European debate. In 1995, Higgins became minister for a new department of Culture, Arts and the Gaeltacht, and a more coherent and focused approach became identifiable on the value of broadcasting policy for cultural and national identity formation and for the objectives of nation-building and forming a cohesive identity. In the succeeding government, Minister for Arts, Gaeltacht Heritage and the Islands Sile De Valera was seen to grapple less decisively than her predecessor with the policy direction establishing digital terrestrial television services in Ireland. No explicit national policy saw the light of day, and the field was left open for an international operator of digital satellite services to gain first mover advantage in the new market (Sky).

Nonetheless, Minister De Valera's spirited defense of national autonomy with regard to the right of her department to determine the public service broadcasters' licence fee is deserving of study, as it represents one of her more active moments as minister. EU member states, in theory, maintain the right to fund, support and finance their audiovisual industries, in so far as it does not distort fair competition.

For Ireland, the issues relating to trade in audiovisual services became politically important from 1995 onwards. Up until then, audiovisual trade was not economically relevant. This thesis examines Ireland's trade policy from the early 1980s, when agricultural products were the principal industrial sector. According to Setser (1997), political scientists argue that "a nation's trade policy reflects the overall composition of social interests in the economy". Therefore, "If one understands which economic interests have gained economic strength (for example, domestic vs. international sector preferences) one knows which have gained political power and in turn how policy is likely to change". (1997:27)

In Ireland's case, agriculture was overtaken only in the last few years by software, pharmaceuticals and information technology services, and trade policy shifted to favour the import / export in those sectors. It is possible that this shift has already or will in the future damage the status of aid to audiovisual services as viewed by the present government.

0.6 Research Questions

This research seeks to find an alternative to 'cultural rights' and 'social rights' defence of communication rights. It aims to determine the nature of citizenship communication bonds between citizens in a pan-European political and economic community, that does not have a strong unified cultural identity; and in policy terms, seeks to integrate citizens' rights within the locus of the market sphere where audiovisual products and services are traded.

So, therefore this researcher addressed the present scenario, focusing on the national state of Ireland acting within the multi-national policymaking arena of the EU and as an actor within the global trading environment.

The following conceptual questions are related to the ideas and themes in previous and current work developed by authors on the concepts of *citizenship*, *citizen*, *identity*, and culture of a community or society. These ideas and arguments are fully developed in Chapters 1 and 2. In Chapter 3, concepts and ideas on the themes of rights – to equality, access, and rights to issues of communication are addressed.

Citizenship was the first issue that divided authors. Some took an exclusively national stance on the concept, while others looked to the burgeoning problem of pan-European citizenship, and what implications that had for a citizenship that took the form of something that was unlike the national type we are so accustomed to. Others employed a broader perspective, looking at the coming of an era when citizenship, and citizens would be globally connected and of one community or society.

The concept of citizen was similarly disputed. Theorists differed in the role and status of a citizen. Some said political and civic only, while others maintained that a citizen exercised a cultural part of a cultural community. A citizen could also merely play an economic part in the life of the community – and indeed, this was their original role when citizens were listed as tax-payers on the tax register of the economic community.

This argument develops further: to what then is a citizen attached? Is there any notion of identification with a political national state, leading perhaps to a sense of patriotic (political) destiny with that territory? Alternatively, or possibly in tandem, the identity of a citizen is developed according to the traditions and cultural customs of a community. This scenario could lead to the fervour of nationalism or a sense of ethnic superiority over other (different) cultures. Historically, cultural nationalistic identity – related to a distinct cultural hegemony - does not breed tolerance. The EU therefore faces a dilemma – in what way will it create bonds between its citizens – now in 25 countries, with 22 distinct languages, and each with its own sense of unique culture? Chapter 2 addresses the post-national and European citizenship debate.

In relation to the concepts introduced above, and one EU member state in particular, this project sought to examine the relationship between Ireland, its citizens, and the EU on a political and cultural level as displayed in policy discussions or proposals, and their outcomes.

Firstly, this research examined the conceptual origins of modern French, American and Irish citizenship, rights and liberties. Empirical investigation then sought to determine the similarities or differences in approaches towards citizenship rights evident in policy discussed at national Irish, and EU levels. In relation to the theme of cultural citizenship, and an identity of citizens with their country of heritage, this research aimed to identify how Irish 'cultural identity' is represented and framed in policy discussions both at the national sphere, and vis a vis 'other' diverse nations (and their cultures).

Working on the premise that the traditional roots of American citizenship were liberal and individual, while those European countries like France that were awakening from a feudal past embraced a protectionist social model of citizenship, the Irish model of citizenship is defined also as liberal. An examination of 18th and 19th century Irish history shows that Ireland's trade relations with America while under restrictive colonial rule by Great Britain played a key factor in the development of the Irish citizenship model. Consequently, it was interesting to attempt to identify how policy practices and proposals today and in the recent past relate to American (liberal individual), European / French (feudal protectionist), or Irish (liberal) traditions? For example, what conceptions of citizenship and theories were utilised by those in government, articulating on behalf of Irish citizens? Did differences exist between Ireland and other EU nations on policy? Or rather, were there similarities in their approaches? And if either of these situations were the case, is there a historical or conceptual rationale for this?

Also to be taken into consideration are regular changes in Irish government over the period under examination (1982-2002). It became clear that these effected radical diversity in approach, both towards the inter-governmental decision-making process, and towards what some regard as the State's duty to protect its citizens' rights. Conceptually, this research sought to identify the different citizenship models that successive governments employed. What were the main differences between the

principal policy models used by successive governments? (i.e. from Jim Mitchell to Sile de Valera). Empirically, the research aimed to identify the moments of change when Ireland's citizenship altered, or when the nature of the model of its citizenship metamorphosised – either through deliberate actions taken autonomously, or through the actions of other states or the EU.

If, as appears to be the case, that Ireland's citizenship is on occasion not determined through deliberate choice, what actions have been taken by Ireland to protect its citizens' rights, and how have these been articulated vis a vis other more powerful nations?

On the question of rights and the defence or protection of liberties, much depended on the type of community that those in power wished to see flourish. Again there is a distinction: on the one hand, a political and economic community that seeks to protect the political and economic rights of the individuals within that community. Alternatively, a political and culturally homogenous community will seek to protect the infringement of the political rights of those members belonging to an agreed cultural heritage. Opinion is divided as to whether citizenship is fundamentally political-cultural or political-economic.

Examination of Irish history led this researcher to view economic independence as the starting point for a separate Irish cultural nation. Therefore, concentrating on the key issue of independence in trade policy and its relevance for sovereign nation state citizenship, this research sought to discover the modern day relationship between Irish autonomy in trade and the protection of its citizens' human rights, and identify possible consequences for modern Irish citizenship. Empirically, research sought to determine the extent to which Ireland is independent in its trade policy, since gaining independence in foreign commercial policy from Great Britain in 1782.

Trade became a key issue in the development of this thesis, particularly because the present author became aware of the over-riding importance of trade negotiations for communication policies. The focus shifted from examination of Ireland in negotiations with the EU, towards Ireland and its trade interests, and their impact on national communication policies. Often, communication policies are classified as cultural policy

(although some authors suggest they should be classed as social policies). In either case, it is indisputable that trade policy impacts on communication policies – whether these are described as cultural, social, or audiovisual policy is dependent on the author. As a result, empirical research sought to determine the extent to which Ireland, ostensibly a nation state with a national culture, is autonomous in its policy decisions on trade, culture, and what is familiarly known as trade of cultural goods and services (i.e. the genre of cultural trade). From this, it is possible to assess the extent of Ireland's sovereignty in its cultural, social, commercial or audiovisual policy. Put simply, to what degree is Ireland sovereign over its *communications* policy?

Communication policy is a term often used but not defined by communication theorists. Hamelink suggests that communication is not about more and more information distribution, but rather 'social dialogue'. He uses the term 'communication societies' not 'information societies', and pinpointing the subsequent challenge as that of learning 'the art of the social dialogue'. What does this mean? Essentially, he espouses 'the art of conversation', or 'dialogical communication', which he defines as 'the capacity to listen, to be silent, to suspend judgement, to critically investigate our own assumptions, to ask reflexive questions and to be open to change'. In many societies, this is achieved through social interaction rather than information acquiring.

The MacBride Commission (UNESCO 1976) produced a series of recommendations, one of which focused on communication policies. In its dialogue on communication policies, the recommendation states: "Recognition of its (communication) potential warrants the formulation by all nations, and particularly developing countries, of comprehensive communication policies linked to overall social, cultural, economic and political goals. Such policies should be based on inter-ministerial and inter-disciplinary consultations with broad public participation. The object must be to utilise the unique capacities of each form of communication, from interpersonal and traditional to the most modern, to make men and societies aware of their rights, harmonise unity in diversity, and foster the growth of individuals and communities within the wider frame of national development in an interdependent world" (International Commission for the Study of Communication Problems, UNESCO 1980, Recommendations 28 and 29, p259-60 quoted in Golding and Harris 1999:75)

Hamelink notes that the recommendation advocates ‘comprehensive’ national communication policies, but this objective has largely not been implemented in the recommended way. In many countries it is possible to find “various forms of partial policy-making with relevance to communication. One may find such implicit communication policies in industrial policies, technology policies, or even cultural policies”. (ibid, 1999:75)

The over-riding impression is that communication policies are held by Hamelink to be a central part of public-policy making, and that in an era of commercial deregulation of the broadcasting and telecommunication sector, governments tended to withdraw from non-essential public policy-making and state monopolies of essential services (broadcasting monopolies that could restrict pluralism of information sources; public utilities like gas and electricity and telephone services). But for Hamelink, ‘communication policy is understood as public policy’. (ibid p75)

On the other hand, ‘cultural policy’ is differentiated from ‘communication policy’. Cultural policy (quoting MacBride Commission recommendations, p80) is viewed to encompass film, television and radio. National cultural policies according to MacBride “should foster cultural identity and creativity, and *involve the media in these tasks*. Such policies should also contain guide-lines for safeguarding national cultural development while promoting knowledge of other cultures. It is in relation to others that each culture enhances its own identity”. According to this, policy relating to broadcasting and film is classified as a cultural policy.

For the purposes of this thesis, communication policy is the umbrella term for policies, laws or regulations that are planned or enacted which may facilitate the art of two-way communication. In Ireland’s case, there are a number of departments that oversee various areas or instruments that can facilitate communication between national citizens, and internationally. For this reason, this research addresses aspects of policy that are within the remit of the government departments with responsibility for cultural, commercial, audiovisual or telecommunications policies. Those departments should naturally take into account Article 45 of the Irish Constitution (Directive Principles of Social Policy) in addition to the Article 40 to Freedom of expression.

Communication's relationship with citizenship is central to democracy, and citizens' democratic involvement. Following from a review of theorists on the public sphere, media and communication on "ideal" citizenship and associated rights and freedoms related to the public sphere, this research project sought to determine the relative importance of the public sphere and democratic rights to communication compared to other issues of governance for Irish policy makers. Since audiovisual services are increasingly a trade concern, this research aimed to determine the nature of trading rights, and in what ways trade in audiovisual products and services with American, EU, or foreign nations assisted or hindered the acquisition of Irish human rights. Empirical questions focused on enquiring how the nation protects its public broadcasting. A key question for this research then was what trade rights are in operation today and how do they protect national citizenship or national cultural identity?

On the issue of democratic participation and involvement by citizens or citizens' representatives, empirical questions addressed in this research centred on the seeking and use of public opinion by the Irish government. For example, what were the modes of consultation employed by the Irish government in devising audiovisual or broadcasting policy? *What form did public opinion take in inputting into the political public sphere?* And, in taking account of non-governmental advice, who were the main policy actors? In essence, this research sought to determine the extent of input by stakeholders in Irish civil society to secure communication rights under discussion by EU policymakers.

0.7 Findings and Conclusions

Conceptually, this thesis subscribes to citizenship which is a political and economic and civil status within a community, but this research does not subscribe to the requisite that that community is necessarily cultural and national.

This research suggests that surrounding the conceptual issues of citizenship and rights: Ireland's citizenship is anti-colonial, of an American vs. British model, rather than of the citizenship type of French-European extraction. This thesis also suggests that expression of nationalism and national citizenship in Ireland first surfaced as an awareness and demand for trading rights and autonomous trade policy.

The empirical research evidence brought to light in this thesis suggests that:

- (i) Ireland has limited sovereignty over its cultural policy for the promotion of a cultural and national aspect of citizenship, and it is not overall government priority.

As a Member State of the EU, Ireland operates ineffectual sovereignty over the audiovisual policy arena. The findings strongly undermine the supposition made by authors like Ward (2001) and Barbrook (1992) who argue that national member states retain sovereignty over the cultural / audiovisual arena. This researcher concludes that Ireland reacts to European Commission policy initiatives, although it has the potential to be a leader in the EU.

It would appear that in the case of making, developing and implementing policy on audiovisual services and their liberalisation, it is the Department of Enterprise, Trade and Employment that leads the way, closely aligned with the Department of Finance, with the Department of Arts, Heritage, Gaeltacht and the Islands being left trailing behind in negotiations and discussions revolving around 'cultural industries' and the trade liberalisation therein. The Department of Arts, Heritage, Gaeltacht and the Islands, when it takes a nominal and belated interest in affairs that are likely to affect its policies at the WTO level finds itself in the position of beating on the door of the Department of Enterprise, Trade and Employment in the attempt to be kept informed of any relevant developments. Too often, it appears, these pleas for information and integration in discussions fall on deaf ears. The Department of Public Enterprise also plays a forceful influence and sometimes, decisive role in the policy process, in particular with relation to the manner of legislating for digital television.

This research shows that the European Commission usually initiates policy changes or new policies, and request reaction from Member States and other bodies via public consultation. However, the D/AHGI publicly expressed reservations that initiative for audiovisual and related policy (for example, competition policy, trade policy) rests with the Commission, but off the record admitted that this is the situation. Kaitatzi - Whitlock (1996) argues that media regulation cannot be an exclusively national affair.

To mediate nationally would ignore both transfrontier broadcasts and the European Union 'audiovisual space'.

Research shows that Ireland can be influential in directing the agenda when the Commission is weak, especially whilst holding the tenure of presidency of the European Union. This has been the case in the past, illustrated for example by the Irish initiative to devise a protocol on public service broadcasting proposed by then Minister for Arts, Culture and the Gaeltacht, Michael D. Higgins.

When policy is debated in Ministerial Council meetings, there is often such a desire to reach consensus that Ireland hasn't often pushed an agenda for audiovisual, because it has other priorities that are more important to get deals on. (For example, agriculture and food interests take priority among the indigenous industries, and high-tech Information Communication Technology (ICT) are where trade interests predominantly lie amongst the foreign industrial companies located here). Ireland was described as being relatively 'small fry' in relation to other EU countries when debating EU proposals.

The national Irish stance on issues is also affected by the Weighting of Votes in the Council. As indicated by *civil servants within the Department of Public Enterprise*, Council can out-vote small states. Ireland would not be resolute about an issue, unless they were secure that firstly it was an issue of national importance, and secondly, they had the backing of other states. From a political perspective it doesn't happen very often. Council doesn't like to back a country into a corner. Everyone at Council meetings makes a huge effort to compromise. The over-riding rationale is, according to the Department of Public Enterprise, "If they're going to outvote us, we'll get the political kudos of agreement with other Member States". A predominant response within Irish government departments was the acknowledgement that EC Directives are largely the result of political horsetrading. Within the EU Council of Ministers, the over-riding motivation is to create consensus and reach agreement between members.

The department's of Arts, Heritage, Gaeltacht and the Islands' way of dealing with the European Commission (in relation to, for example, the EU Directive Television without

Frontiers) is to “forcefully express our national interests in the revision debate and make effective alliances with other Member States.” (D/AHGI 2, interview, Dublin)

As a member of the global multi-national trading system, Ireland’s economic development strategy has been based on ‘open’ economy and FDI flow. The success of this strategy, the Celtic Tiger, represented a changing industrial structure, structural composition of inward FDI, and included significant ICT investment, but not media or content based. However, in WTO negotiations until the present Doha Round, Ireland has consistently prioritised the negotiation of favourable agriculture and textiles deals over other economic sectors or social interests (and other high tech sectors). It remains to be seen whether this entrenched trend will be challenged by other modern sectoral interests of growing economic import in the next Doha Millenium Round. Audiovisual services (depending on the way this is re-interpreted at the next Round, as sought by the US, this could cover software, e-content, internet TV services and so on) could play a more prominent role in Ireland’s negotiating priorities in the future, but this has to be balanced with the sympathetic manner in which the Irish rural community is held by Government. For the Irish government, the agricultural interests represent a strong tie with Irish cultural heritage, a concern that will not be dismissed without grave consideration.

1998 Irish Trade policy statements are determined by expectations of and preparation for a neo-liberal global trade zone. In this preparatory phase, the department of Enterprise, Trade and Employment are looking forward to the ‘complete elimination of subsidies’. Ireland’s position with regard to future trade in ‘new audiovisual services’ reflects interests of large ICT firms and sectors, especially Microsoft and IBM. The first point of negotiation on the part of Ireland within WTO negotiations is in meetings in Geneva attended by the Irish Trade representative, posted from the department of Enterprise, Trade and Employment. Evidence suggests that in discussion groups on audiovisual services, the Irish trade representative put forward the proposal of IBM relating to the definition or re-definition of telecommunications and Internet services (software).

- (ii) Ireland is a non-actor in multi-lateral policy-making decisions relating to the ‘traditional’ audiovisual sector.

Ireland's input to the public sphere of decision making within the EU has potential, yet is limited to date. It was suggested by officials within the department of Arts, Heritage, Gaeltacht and the Islands that Irish policy has been reactive rather than pro-active to Brussels' innovations. Siune & Truetzshler (1992) confirm this claim. An exception to this pattern over the last two decades is the leading role played by former Minister Higgins during his position as Minister for Arts, Culture and the Gaeltacht.

- (iii) Competence of Ireland's funding for the state-assisted 'traditional' audiovisual industry is curtailed by the European Commission, DG Competition

Strong wishes expressed by the Irish department of Arts, Heritage, Gaeltacht and the Islands relating to the retention of 'exclusive' or 'sole' competency of public broadcasting funding policies, remits or financial aids were rejected by European Commission DG Competition. Thus the 1998 *Resolution on Public Service Broadcasting* made by Member States reiterates the 1997 *Protocol* annexed to the Amsterdam Treaty on public service broadcasting systems.

This finding is in direct opposition to claims made by Ward (2001) that firstly, the EC does not use a blanket application of competition policy to regulate audiovisual broadcasting policy; secondly, that Member States are not 'disempowered' in the television regulation sphere; and thirdly, that the EC does not involve itself in the definition or funding of national public service broadcasters.

The OECD favours audiovisual regulation by competition policy. In reports by the OECD (1996) in recent years it recommended that competition policy should play a greater role in the regulation of audiovisual content. However, the assurance of media pluralism, and plurality of information sources (Ward, 2001) is not an EU competency or objective as provided for in the Treaties. Successive studies on attempts at establishing a EC Directive on Pluralism in the media show that it has failed (Kaitatzi-Whitlock 1996).

Is Ireland a sovereign State over its national 'cultural' or 'audiovisual' policy ?

Ward (2001) suggests EU Member states are sovereign on broadcasting issues of national concern, apart from that which is governed by the EC authority in competition policy. This effectively covers everything, since the objective of the European Union is to operate a single EU market.

- (iv) The political public sphere by way of citizen input to political decision making is restricted

Despite the dominant 'national' focus of the Department of AHGI, the results of this examination illustrate that the level of interest shown by the Irish indigenous industry (independent producers, broadcasters, etc.) in negotiations surrounding the liberalisation of Audiovisual Services by the members of the World Trade Organization is to all intents and purposes, non-existent. The head of the Audiovisual Federation and the Telecoms Council at IBEC admitted that "GATS is not something that engages our members' imaginations". The members of IBEC's Audiovisual Federation comprise Irish-based members of the film and television industries.

Similarly, the Director of the singular audiovisual lobby in Ireland – Film Makers Ireland – regretted that resources were not available to cover or track GATS. Even in Forfas, the central advisory policy bureau for national industry development, there is no time for GATS (until the last minute), yet it does not warrant the allocation of a specialist on either WTO matters, or the Audiovisual Industry.

This research shows Irish citizens' input to public sphere of public policy making on the realm of international trade in information audiovisual services is virtually nil. Irish policy-makers do not go out of their way to seek public opinion input.

Kaitatzi-Whitlock (1996) agrees citizens' interests are ignored or not present. Habermas (1995) hopes for the possible emergence of pan-European spheres, but thinks citizens' democratic input is presently boxed into national, not European wide, units.

Public consultation on policy-making regarding the Irish public sphere and effects that trade of audiovisual products and services might have on it, is poor. GATS (WTO rules regulating services) has not been debated by the Oireachtas Committee on Foreign

Affairs, presumably because they are of the opinion that the issue is not of concern, or that the Government is handling it suitably.

According to a official from the Department of Public Enterprise, government policy these days is very much reliant on consultants reports, which are obviously required from time to time because the department faced with a policy issue often would not possess the required expertise. Consultants reports are the mantra of government these days. One department commissions one consultant report, another department commissions another *consultant report*, and then there might be a consultants' report commissioned to report on the first consultant's report.

The department of Arts, Heritage, Gaeltacht and the Islands has initiated consultations for feedback from non-governmental organisations only in the last seven or eight years. Prior to that, it was declared that consultations were 'not fashionable'. There was in addition no significant audiovisual industry in Ireland, and no strong lobby. Now, when the department wishes to consult (regarding, for example the hows and wherefores of the introduction of digital terrestrial television in Ireland), points of view and varied opinions are sought by the department from broadcasters RTE, TV3 and TG4; the Commission formerly known as IRTC, as well as Ireland's only film and television producers lobby, FilmMakers Ireland.

In comparison to the apparent French model of policy consultation, there is little or no public debate. Regarding European Union proposals and Green Papers, and WTO negotiations, the department receives comments and petitions in addition from broadcaster unions EBU and producers' unions FERA. RTE does not lobby at European Union level – they leave it to EBU, the European union of broadcasters, to do it for them.

The department of Enterprise, Trade and Employment consulted mainly industries during 2002, in association with the government agency Forfas. Specifically, the agency's research focused on the trade barriers currently experienced by industry and companies trading in a range of products and services. With the aim of consulting industries based in and operating out of Ireland, it is hoped that the Irish negotiation strategy for the next Doha Millennium trade round could be formulated. The industry

workshops identified as worthy of consultation were: Electronics & Engineering; Agri-Business; Chemicals and Pharmaceuticals; Computer Services & Software; Audiovisual Services industry and the Clothing & Textile sector. This research discovered that the feedback was poor. From 5000 letters sent out to companies by the end of 2001, only 25 companies replied, none of which were from the telecommunications or audiovisual sector.

In previous trade negotiations, other sectoral interests (namely, agriculture and textiles) above all were protected. A department official from the department of Public Enterprise suggested that Ireland (still) “does not have a huge strategic interest in Audiovisual or Broadcasting”. Ireland does however have a ‘huge strategic interest’ in trade in ‘Computer Services and Software’. A Forfas trade representative remarked that this sector represents an enormous market for growth for Ireland’s IT manufacturing base.

0.8 Research Methods

The principal methods employed were firstly, the gathering of documentation from a variety of Irish government departments concerned with policy strategies, regulation or support of audiovisual industries, and policy actions relating to trade in audiovisual services. The principal departments petitioned were the Departments of Arts, Heritage, Gaeltacht and the Islands; the Department of Enterprise, Trade and Employment (Market Access Unit, E-business Unit); the Department of Public Enterprise (Telecommunications Regulation unit), and the Department of Foreign Affairs (EU Affairs section).

Secondly, potential interviewees, i.e. key policy players, were identified through informal discussions with the main Irish government departments, and personal contacts within the European Union arena, as well as the examination of the Administration Yearbook for personnel from years past. It was intended that semi-structured interviews would involve the participation of a representative selection of those key actors currently and previously involved in the policy process during the past twenty years from Irish government, EU institutions (European Commission and European

Parliament), and World Trade Organisation counsellors and members' representatives. Additionally, interviews were sought with non-governmental lobby organisations that contributed the civic, public or industrial aspect to the policy debate. The research methods employed, and the problems encountered – and how these were overcome – are detailed fully in Appendix A of this thesis.

0.9 Thesis structure and chapter outlines

This thesis is structured into three parts, and subdivided into chapters. For the purposes of clarity and coherence, the structure allows for the inter-twining of conceptual issues and empirical evidence. This researcher takes the position that when complex conceptual issues, theories or ideas require lucidity, it is preferable to integrate at that point concrete evidence that points to an unequivocal conclusion. Therefore, the reader is alerted to a thesis structure that, on key occasions, allows real-life examples to follow on from complex philosophical concepts, for illustrative purposes.

Part one is a review of the literature, theories and concepts surrounding citizen, culture, the nation state, citizenship and the public sphere, and rights and liberties of communication.

Part two addresses the historical situation of the public spheres developing within Irish markets and fairs in the 18th century with the introduction of liberal principles. The thesis argues that demands for human rights first developed as a result of unfair trading impositions, and were economically founded. The central issue of 'trade autonomy' becomes the key to sovereign citizenship.

In *Part three* – the empirical research chapters – research on Irish trade policy in relation to audiovisual and broadcasting matters is detailed and assessed. This part of the thesis also details the manner of protecting human rights in the global marketplace using WTO trade rules.

Part One addresses the approaches towards culture, citizenship and communication. In Chapter 1, the research opens with a review of the literature and examines the dominant theories and concepts surrounding citizenship, culture and the nation state. Chapter 1 ends with a brief history of Ireland's approach towards media policy and the manner in

which the role of the media was shaped to assist the development of a national cultural psyche. The period of 1916 to the 1960s was a particularly heavily state-controlled era of nation building. Media, Irish and national were the dominant ethos.

At this stage too, the concepts and ideas surrounding European citizenship are introduced. In Chapter 2 this researcher prefers to align herself with a form of citizenship that is not yet fully conceptualised, a form of which is beyond the nation state. The current theorists' perspectives on post-national citizenship are reviewed. In this chapter too, the models of citizenship that focus on the political or civic nature of citizenship are discussed.

Chapter 3 introduces the arguments for citizens' rights to communication and the public sphere. Communication analysts who apply citizenship and rights criteria to the communication public sphere activity often focus on the issues of equality, access and inclusion. Citizenship in these terms, and with regard to communication and expression in civic democracies is outlined.

Examples of differing approaches towards citizenship and the citizens of the public sphere is given in detail – research reveals the *right of input of public opinion* in a comparative manner between Ireland, France and the USA. Chapter 3 then discusses the specific solutions to citizens' rights to the public realm, as put forward by *communication theorists and sociologists*. These centrally comprise of the right to express, the right to communicate, and the right to cultural diversity. In this section I critically assess the conceptualisation and defence of audiovisual services as a cultural and social right. Are they valid and justified with respect to a vigorous defence of a European culture? In this section, I examine the classification and defence of media - information, broadcasting, audiovisual service as a cultural right and a social right. What is the reasoning behind the argument for protection of cultural and / or social rights? What is the foundation of attempts to protect media in this way?

This leads me on to the main arguments put forward, based on fear of cultural imperialism, defence of national cultures and advocacy of cultural diversity. Their arguments are examined from the perspective of 'European culture'. Does it exist? Where does it exist? What are its defining characteristics? What makes it distinctively

different to 'the other's' North American, Australian or British culture? How does a culture define the nature of citizenship within that cultural grouping? Usually, and in historical patterns, citizenship was followed by an invention or assimilation of a particular culture (and primarily territorially based on border outlines in 18th and 19th centuries).

If a European culture exists, as it is claimed by many politicians, how is this represented in media and television? How is the European audio-visual model defined? And if a European culture exists, how is it protected in terms of rights and who protects these rights? To what extent, for example, does Ireland defend and protect European culture? And what of France, staunch defender of 'cultural rights', and fierce enemy of 'cultural imperialism'? It appears that France is keen to protect its own culture, nationally defined. France likes to appear to defend European culture, particularly when French culture is under threat.

Irish government civil servants vouch for the similarity in thinking between the French and Irish, particularly on audiovisual and agricultural matters. What then of the combined forces of Ireland and France together, protecting European culture from foreign imports? Evidence deriving from this research project proves my hypothesis that it is actually the European audiovisual industry that France and Ireland wish to protect. Interviewees admit that it is actually an independent national trade and commercial policy they wish to protect. In reality, it's really economic and trading rights – not national culture, or European culture – that is their primary priority.

This returns to my original premise – that human rights deriving from restrictive market practices are voiced in the market and trading community (in the present day, the WTO) but take on the mantle of defence of cultural hegemony and a call for separateness in citizenship when in actuality, the basis of their demand for rights is autonomy and independence in commercial and trading policy.

Part Two, comprising of chapters 4 and 5, examines human rights in the public spheres of markets. In these chapters I firstly cast an eye back to the historical trading situation of Ireland in the 18th and 19th centuries, and I subsequently examine research evidence in the light of public opinion on the issues of separate Irish nationhood and trade

autonomy. These chapters establish the relationship between markets and human rights from an historical perspective that I propose could be re-applied to the modern day. Referring to documentation and interview transcripts, Irish and European broadcasting policy is analysed from a trade and human rights perspective, and Ireland's autonomy of trade policy with relation to audiovisual services (including broadcasting) is critically assessed.

Part Three follows from the theories of rights protection set out in Chapter 3 by examining the practical provisions in legislative texts, and the practicalities which allow the national state to fulfil its 'duty', as some might argue, to protect its national citizens' rights. Chapter 6 undertakes an historical analysis of Irish trade policy on audiovisual and broadcasting services from 1982 – 2002, as an actor within the EU and WTO negotiations.

Chapter 7 follows on with an examination of the modern processes at Ireland's disposal for the protection and safeguarding of national citizens' rights, through marketplace rules. In this section I detail the WTO provision for 'No Commitments' to liberalised trade for the audiovisual sector, and the provision for 'Exemptions to Most Favoured Nation' status for the audiovisual sector which means effectively that the EU can reserve its MEDIA funding programme for European producers, and Ireland can retain its tax incentive scheme Section 481 (formerly Section 35). This tax-break for films is presently (September 2003) under threat of non-renewal beyond its present expiry date by the Irish Minister for Finance.

The various arguments for and against quotas (for European production on-screen time) and direct subsidies are also detailed. These provisions have always created heated political debate. Quotas and subsidies are often labelled 'state aid', and strictly disallowed under WTO rules under normal circumstances. The audiovisual sector is however allowed to avail of 'state aid for cultural objectives'.

I follow with a description of the variety of state aid allowed by Ireland to its audiovisual producers. The state aid takes the form of either indirect aid (soft loans, tax incentives) or direct funding (public service broadcasting licence fee, subsidies).

However, because of the strong opposition against all state aid (led by USA, Japan, EC DG Competition) Ireland was in a position in 1998 defending its national right to control the issue of the public service licence fee vis a vis the European Commission. Then Minister of AHGI, de Valera, did not accept that the licence fee was a state aid, and thus subject to rules of financial transparency. This debate between DG Competition and D/AHGI over the wording of a *1998 EC Council Resolution on Public Service Broadcasting*, and its funding, is indicative of the degree of cultural sovereignty which Ireland retains.

The last part of this section summarises the discussion over the issues of cultural imperialism, cultural diversity and cultural specificity. I make a summary of the 'solutions' presently in operation – successful to a greater or lesser degree – that amount to direct funding, indirect aid, a licence fee deliverable to an audiovisual channel for the whole editorial selection they transmit, and all state aid that is given for cultural objectives (i.e. audiovisual production).

Research evidence appears to prove my hypothesis that governments above all wish to protect national *industry*, and the economic and trading rights of foreign nations more than national or European *culture*.

The final chapter 8 draws conclusions, and puts forward a proposal for an alternative approach towards safeguarding citizens' rights to the public sphere, which is based on theories of human rights in trading communities, otherwise classed as trading rights.

I ask: what is wrong with the current approach? It appears that in the policy arenas of Brussels and Geneva, during the political pressure exerted within the European Commission and the WTO, the present solutions are deficient. Why? The notion of culture, and cultural objectives will always be challenged, and challenged repeatedly, at every round of negotiations. The effective annexation of audiovisual products and services is a temporary solution. They are presently protected using 'Exemptions from liberalised trade', but exemptions are designed to expire after five years. At best, the EC can hope for a maintenance of the unstable and likely to be contested status quo.

What is required is a more stable and permanent solution to this returning debacle. At this point, I examine the proposals which have been put forward by a diverse range of pro-culture lobbies or organisations. These range from a retraction of the category of 'audiovisual services' from WTO trade rules, to a new cultural trade instrument that would be administered by the UN. I assess the likelihood of success of the suggestions put forward so far.

This thesis ends with a proposal for an alternative approach to this policy problematic that is based on theories of human rights in trading communities, otherwise classed as trading rights.

PART I:

CITIZENSHIP, CULTURE AND COMMUNICATION

Chapter 1.

Theories, concepts and approaches to Culture and Citizenship

This thesis challenges the national or national identity model of citizenship, through a conceptual critique of authors with particular specialism on the Irish question, or elements of identity claimed to be ‘representatively Irish’. I argue that conceptually, citizenship that is related to the territorial boundaries of the nation state and the eulogised ‘identity’ of the Irish people attributed to national citizenship is no longer tenable.

The nationalism of Ireland that led to a cultural mythological picture of ‘Irish identity’ – yet to be redefined by Irish media ministers – and a political and economic independence of sorts ties the citizens to the nation state. I question the professed sovereignty of this nation state with regard to its ability to allow the expression and reinvention of its ‘national identity’. So, first I will show the flaws in the argument that persists in disseminating or holding on to images of ‘traditional’ Irish identity.

To support this, the empirical evidence in later chapters suggests that any assertion that the nation of Ireland is authoritatively in control with relation to its media policy is a fallacy. My research on policy formulation with regard to media and ‘cultural industries’ policy determined multi-nationally within the EU community of member states and the GATT / World Trade Organisation forum indicates that Ireland has to date given no priority to the protection of its ‘unique cultural identity’, but rather has sought to protect other more economically and industrially critical industries. Policymakers in government often suggest that Irish national media should ideally express and nurture an image of ‘Irish identity’, although this is generally unspecified or defined in tangible detail. Empirically, I demonstrate that policymaking over the past twenty years indicates that in practice Ireland is either not in a position to protect that identity or expression thereof, if it were to be ever precisely defined, nor is it generally government priority.

This chapter focuses on a review of the literature examining the national or cultural model of citizenship. In the first part, this researcher aims to present the previous and current work on the concepts of citizenship, identity, and culture.

1.1 National Citizenship

The traditional argument is that citizenship is tied to the nation state (an idea espoused by, Rousseau, Herder, Hegel, Burke, Marshall (1950), and Rizman (2000). This idea has been generally accepted since 1791 when citizenship was linked to national territory for the first time by the French Constitution (according to McBride (2000) and Hobsbawm (1992)).

Rousseau's *Social Contract* (1762), the 'textbook' of the French revolution regards the State as a contract in which individuals surrender none of their natural rights, but rather agree for the protection of them. Habermas (1995:258) pinpoints the concept of citizenship as developing from Rousseau's notion of self-determination, essentially - determining one's own laws. However, Rousseauian Republicanism went further by suggesting that an individual's purpose and loyalty should be to the State. Herder later (1784-91) went even beyond that definition, adding to Rousseau's theory of the State that a community must be of historical origin, united by a common language (see also Burke on the nature of Englishness). Hegel expanded on historical unity and developed the ideology of nationalism.

For Rousseau, rights derived from the State ('national rights'), not as Locke believed from Nature ('natural rights'). Locke in addition understood that the singular purpose of the State was the protection of each individual's rights. Some, like Hegel and Herder in the 19th century believed rights were bestowed by organic nations. In the 21st century, some oligarchies maintain rights are a Western notion and therefore, not applicable to their culture.

Two key theorists examined for this research - German philosopher Jurgen Habermas (1989, 1994, 1995) and sociologist T H Marshall (1950) - diverge radically on their views of citizenship in relation to national communities.

Marshall appears to be influenced by Rousseau's statement that rights derive from the constitutional state, and combines this approach with a tinge of German philosophical nationalism (and Burke's earlier version of same). Marshall draws on Hegel's definition of citizenship of a nation. Marshall's focus on citizenship is exclusively tied to notions of membership of a national community. His introduction states "the citizenship whose history I wish to trace is, by definition, national" (Marshall, 1950:12). Marshall defines citizenship as citizenship of a nation state, of a common civilisation and heritage. It is accepted that national citizenship's evolution involved geographical fusion –from feudal society to medieval towns to national citizenship, and functional separation of institutions such as Parliament and courts (1950:12).

Marshall's focus is on citizenship within the context of the post-war British nation state. Marshall's insistence on the protection of citizens by common law, however, is an indication of his focus on Britain and the uniquely English tradition. For Marshall, "Citizenship is a status bestowed on those who are full members of a community" (1950:28). A citizen is a 'full member of the society', citizenship being equal to 'full membership of a community'. (1950:8) That community for Marshall is the national society, of the territorial nation state, Great Britain.

In the arena of State obligations to provide social services, Marshall suggested that the ideal level of equality of status would always be moving forward. The state might find it difficult to sustain the entire population at a 'civilised' level of resources, income, and services. In this case, Marshall takes a lead from Rousseau, and states, "It follows that individual rights must be subordinated to national plans". (1950:58) Marshall argues that,

"The obligation of the State is towards society as a whole...instead of to individual citizens. The maintenance of a fair balance between these collective and individual elements in social rights is a matter of vital importance to the democratic socialist State." (Marshall 1950:59)

Therefore, Marshall focuses not only on a national state, but also a social-democratic state, of which there were many in the 1940s and 1950s.

Marshall is criticised by this researcher for limiting his exploration of the possibilities of citizenship in a broader context than the social-democratic model fixed within the national state. Habermas (1989) charts the development of citizenship in a selection of European states – France and Germany, as well as Britain. In their exposition of the historical roots of citizenship both authors focus on Britain as the setting for an examination of the model of development of citizens rights and the public sphere.

It is important to appreciate that Britain was a unique case, unlike either America or Europe, for several sociological reasons: it was not ravaged by the Napoleonic / Robespierre wars on its own soil, which left the way open for the Industrial Revolution. It was the Empire of Trade, the sweatshop of the world; it had long lost its feudal system, it had economic prosperity and there was not the same 'frustration' that could lead to the overthrow of a social order. There was also not the same chasm of inequality between the rich and the poor, and it was relatively culturally homogenous and unified.

Habermas disputes Marshall's national citizenship criteria in a 1995 article on 'National identity and the future of the EU'. Habermas argues that conceptually, citizenship was never tied to national identity. He correctly argues that this is a Hegelian concept that came to the fore after many Continental wars (like the Seven Years War) had bruised national pride.

According to Habermas (1995), the history of the term 'nation' developed from 'natio' meaning, like 'gens' and 'populus', pre-politically organised tribes and peoples. Kant also defined 'nation' (gens) as " that group which recognizes itself as being gathered together in a society due to common descent" (1995:258).

"In this classic usage, therefore, nations are communities of people of the same descent, who are integrated geographically, in the form of settlements or neighbourhoods, and culturally by their common language, customs, and traditions, but who are not yet politically integrated in the form of state organization". (Habermas 1995: 258)

This argument disputes the French Republican integration of Constitutional political state with the inhabitants within the French territorial boundaries. While conceding that 'nation' since the French revolution and the birth of democracy is taken to mean a nation of citizens, with the right to political self-determination, Habermas argues that in

its proper meaning, 'nation' can only represent 'a nation of citizens'. 'Nation' is nothing more than territorial soil, without citizens who participate actively in the ruling of the democratic state (1995: 258). He explains that while the term 'nation' started out as designating a pre-political entity, it is now something that is supposed to play a constitutive role in defining the political identity of the citizen within a democratic polity.

While Rousseau emphasised the importance of the 'general will', Rousseau's Republicanism assumed the wisest in society are able to decide the best course of action at least for the good of the majority, if this does not reflect the will of all its members. For Habermas, a nation of citizens derives its identity from the praxis (i.e. practice, participation) of citizens in political ruling, not from some common ethnic and cultural properties (1995: 258). The criterion of common heritage for citizenship is unsuitable for the modern age. Citizenship, in the opinion of this researcher, needs to be redefined in the modern context of an international community, a global economy, trans-national legislation and universal communication systems.

These key authors promote different models of citizenship and integration. The model inspiring Habermas is built on political praxis, and integration through discussion and communication. The model suggested by Marshall is defined by both the status of citizenship in addition to the rights imbued in that status. Marshall's citizen acquires rights via struggle within a national context, whereas Habermas' citizen communicates politically within an international context.

1.2 The Cultural Republican model

While Habermas promotes communication flows as an effective promoter of solidarity, Marshall argues that community solidarity in Great Britain during the wars of the early 20th century had its roots in the 18th century bond of patriotic nationalism deriving from the birth of the modern nation state. Marshall omits to blame patriotic nationalism for being the root cause of many of the wars of the same period. Marshall conceptualises of a cultural republican model of citizenship. Marshall aligns himself with the definition of citizenship as full membership of a 'national' community of common historical culture

and heritage. This was an idea originating with the birth of Republicanism aided by 'patriotic nationalism'.

Nationalism fuelled the formation of culturally and ethnically homogenous states, helped by the mass communication of literary works of historians and romantic writings. However, as ideologies, both Republicanism and Nationalism requires a considerable amount of self-sacrifice, to the point of death - one's own and others - in the service of one's community, country or 'nation'. Habermas views nationalism as a Republican motivation to fight and die for the national territory that usually leads to the emergence of the Nation. Without the usual violence associated with nationalism however, the republican citizenship model can recommend "loyalty to the community demonstrated by a willingness to sacrifice personal gains to advance its interests" (Habermas 1989: 277). Habermas highlights some dangers of nationalism. Because it is a form of collective (national) consciousness, essentially constructed and spread only via the channels of modern mass communication it is open to manipulation by political elites. It played an important role in the French Revolution's conceptualization of citizenship, glorified in the literary works of historians and romantic writers (as was similarly the case in Ireland). Romanticism, the movement, took over from Enlightenment rationalism in the late 1770s, choosing to emphasise instead the emotional aspects of humanity, and thus playing a part in the development of a cultural identity.

Yet for Habermas, nationalism (1995:257) is not related to political enfranchisement. It grew with the birth of the nation state, and first light of democracy, but was not related to rights acquisitions. This researcher concurs with Habermas' opinion.

When citizenship is tied up with a nationalist community, this generally places to the fore the cultural dimension of citizenship, and the fixed ideology (see Kearney) of a common culture or cultural identity. Marshall (1950), Corcoran (2001) and Millar (2000) all recommend a cultural republican citizenship model closely linked to nationality within national boundaries.

Modern communication theorist Corcoran, also recommends national cultural citizenship for its value to the national community. He argues that a healthy culture

supports individual liberties; each individual is respectful of the other; individuals are bonded in commonality and shared-ness, and are willing to make sacrifices for the other. A common culture, he argues, can foster civic responsibility by all for others. These 'common bonds' help foster high levels of solidarity and a willingness to make sacrifices for fellow citizens. Unrealistically, I think, Corcoran argues "A common culture holds the disparate elements of society together in many ways, not least by fostering a willingness among citizens for the mutual accommodations and sacrifices necessary for a functioning democracy" (2001:21).

This researcher finds Corcoran's idealism problematic on two aspects. First, I disagree that culture is common within a society. Societies comprise of a community of different institutions, different backgrounds, and different upbringings. Second, I do not concur that the 'culture' in its institutionalized forms, should decree civil sacrifice. This can be taken to extremes, and Corcoran doesn't put any limits on this. As Habermas notes, in its most extreme version, this can mean personal death.

Arguments positing the cultural aspect of citizenship, and allowing the cultural elements of history to take precedence over political and economic elements represent for this author, in this thesis, a republican model of citizenship. The republican model of citizenship (Millar, Young Irishmen of 19th century, Rousseau, Malby, Babeuf, Marechal) also emphasises common ownership of property; it lives by a redistributive ethos; and is akin to the system of collective property ownership and cultivation of the feudal or Indian American system.

Habermas' view is a little different from that of the present author: Habermas views 'republican' citizenship to be exclusively with relation to political self-determination. In this interpretation, the republican meaning of citizenship involves the problem of societal self-organisation. At its core are the political rights of participation and communication (Habermas 1994:25). 'Republican citizenship' for Habermas derives from writings by Gauthier, Kant and Rousseau. According to Gauthier, citizenship is "the legal institution via which the individual member of a nation takes part as an active agent in the concrete nexus of state actions" (quoted in *ibid*, 1994:261). Kant's viewpoint on citizenship was that "legislation can only issue from the concurring and unified will of everyone, to the extent that each decides the same about all and that all decide the same about each..." (p260). In addition, both Rousseau and Kant instead

defined 'popular sovereignty' as "the transformation of authoritarian into self-legislated power'.

In conclusion this researcher employs the term republican citizenship as that meaning self-determination, within national territorial boundaries, demanding of personal sacrifice, common ownership of resources and a dominance of the cultural aspect.

1.3 Culture and Identity

Some writers argue that citizenship is cultural as well as political, meaning belonging to a particular cultural heritage in addition to a political and economic sovereign community (for example, Wolfe Tone and the United Irishmen in 1770s until Act of Union in 1800, Burke writing in the late 1700's, Rudolf Rizman (2000); Gibbons (1998); Williams (1990)).

However, it is widely acknowledged that linking citizenship to national cultural identity can lead dangerously close to associating citizenship with nationalism, and an exclusionary attitude that can result in xenophobia and racism. According to Habermas, citizenship is limited not according to national identity but according to a historically defined cultural identity (Habermas 1995:227). Hobsbawm views increased racial violence and the trend towards disturbingly high levels of right-wing party support as "a defensive fundamentalist reaction against the decline of the nation state and the continual cultural flux of modernity" (1992).

By the 19th century, Herder claimed that the 'spirit of the nation' was alive and represented in the national culture. Montesquieu also spoke of the 'esprit' of a nation. And according to McLoughlin (1999), Burke also conceived of an identifiable distinct Irish national culture in the 18th and early 19th century that represented the 'spirit of the nation'. Williams (1981:11) analyses the use and development of the word 'culture', and maintains that a distinctive phase of development was its usage in the late 18th century in English and German to define "the 'spirit' which informed the 'whole way of life' of a distinct people". Herder first used 'cultures' in plural form between 1784 – 1791 in order to distinguish from any singular sense of 'civilisation'.

Whelan (1996:60) argues that the United Irishmen only tentatively represented the ideology of 19th century Romanticism in Ireland. Others (Hampsher-Monk (1992)) maintain that it was Burke who was the harbinger of Romanticism. Burke underlined the *irrational* ties that connected citizens. However, the ideas of Montesquieu (whose principal work was not yet written in Burke's lifetime), and its ties with a 'national' culture were strongly motivating. Montesquieu developed a theory that each nation has an '*esprit*' or character, which is represented in national 'laws'. *L'esprit* is represented by the climate, geography, diet, customs and particular nature of that nation. The United Irishmen realised that the natural progression in Montesquieu thought from national '*esprit*' to national '*les lois*' (laws) did not happen in Ireland. Ireland was the odd one out in the European Enlightenment. Ireland, it was deemed, possessed a national 'character'. This character invariably embodied the Catholic tradition – protected in media policy against criticism until the 1980's in Ireland, according to Barbrook (1992). (see Kearney on Celtic Revivalist tradition of culture). However, this *esprit* was not represented in the national *lois* because the Catholic population was excluded from political power.

Because the mass of these disenfranchised Catholics had received no education (partly as a result of the Penal laws, repealed in 1778), the task of the United Irishmen was to politicise popular culture and through this, stimulate public opinion which would in turn force change to *les lois*. The ideology of European Romanticism helped in the fabrication of a national (cultural) identity.

1.4 What defines the culture?

By defining 'culture' as being the 'whole way of life' and 'the spirit of a people', Williams (1990) also subscribes to that national relationship with culture and citizenship as drawn by Montesquieu, Burke, Herder and Hegel. He outlines how in the 19th c. the word 'culture' was used in comparative anthropological and sociological terms to describe a "whole and distinctive way of life" (1981:11). This gave birth to attempting to identify the 'determining elements' that produces distinctive cultures. However, Williams shows how in late 20th c. work, culture is seen as "the signifying system through which necessarily a social order is communicated, reproduced, experienced and explored." (p13) Thus, sociology of culture is 'necessarily and centrally concerned with

manifest cultural practices and production' (p14). From his sociological viewpoint, culture is everyday. Venturelli (1998b) classifies culture as being nationalist, modernist, or postmodernist, and views the cultural problem of the Information Society to be framed as "the question of expression".

For Anthony Smith, Herder and Hegel, language is the decisive element in any culture. Douglas Hyde (founder of the Gaelic League and later President of Ireland) defined Irish national identity on the inaugural broadcast of Dublin 2RN radio as identifiable by its language:

“A nation is not made by Act of Parliament nor Treaty. A nation is made first of all by its language, if it has one, by its music, songs, games and customs. We desire to especially emphasise what we have derived from our Gaelic ancestors.” (Gorham 1967:23)

As noted by Rex Cathcart, “the Ulster writer Richard Hayward believed that the regular transmission of a song or a play in the national language would be a powerful factor in the creation of a national being” (Cathcart 1984:42).

Initially in any case, the protection of “Irish national identity” was to be fought on the frontiers of language, and one language only. The English language represented firstly a political dominance, and secondly a cultural invasion – combine them both (in broadcasting), and BBC radio represented a form of “propaganda in a foreign tongue”. (Postmaster General JJ Walsh, quoted in Gorham (1967:13))

In seeking to promote the Irish language above others, organisations such as the Language Freedom Movement charged Radio Eireann with bias. They claimed that Irish culture and Gaelic culture were not identical, and thus Radio Eireann was in breach of obligations to be impartial in treatment of language. (Fisher 1978:30)

Since 1794 in France successive governments have attempted to use the French language as a vector for the construction of national identity. Full political and civil rights were only granted to Jews in 1791 on the condition that they ‘convert’ to the French language, replacing their use of Yiddish and other traditional customs.

Corcoran (2001) sees culture as being defined not by language specifically, but rather by common institutions orienting the people towards a common view. Corcoran suggests that national culture depicted on national public service broadcasting helps to

achieve a good civic society of a common culture. Corcoran's model – national culture on the national public service broadcaster - is epitomised by Canada's view of broadcasting as “a public service essential to the maintenance and enhancement of national identity and cultural sovereignty” as defined in the 1991 Broadcasting Act and also by early attempts at legislating Irish broadcasting services to serve the cultural national model of identity.

The irony is that it is incredibly difficult to define, let alone agree on what constitutes a 'national culture', a 'cultural heritage', or specifically an 'Irish culture'. Eileen Kane defines culture as “the common, learned way of life shared by members of a society; not only society's arts and sciences, but also laws, political organisations, patterns of child-raising, methods of making and using tools, ways of resolving disputes; in short, all its shared patterns and content of ideas, values and behaviours... Culture is a short-hand for living which provides our (each) particular society's answers to the questions which face every man universally.” (quoted in O Tuathaigh 1984:97-98)

The situation of the future has been described as a global post-modernistic cultural identity. Smith (1990) quoted in (McQuail 1994:116) describes this as “a culture tied to no place or period...contextless, a true melange of disparate components drawn from everywhere and nowhere, borne upon the channels of the global telecommunications system. Widely diffused in space, a global culture is cut off from any past...it has no history”. It has no values either, notes McQuail, apart from those that esteem a Western form of capitalism, individualism, consumerism, hedonism and commercialism.

1.5 Cultural Identity

For Hegel, the democratic and economic 'state' was identical to the nation. Herder, Hegel and Burke all conceptualised a nation to be rooted historically with a characteristic and distinctive common cultural heritage, shared by the community of people, the *volk*. It was Herder in the late 18th century who first coined the notion of 'cultures', yet Herder was not an Enlightenment thinker.

According to Kearney (1997), Hegelian nationalism, and linkage of the state with the nation, and iced on top with a common cultural historical heritage was not an Irish Celtic concept. Gibbons (1998) suggests that Enlightenment universalism usually wipes out notions of national culture and nationalism, although he points to the United Irishmen who argued that Enlightenment universalism and Irish nationalism were compatible. The Young Ireland 19th c. argument was that Ireland is culturally different, therefore entitled to separate nationhood status from Britain. They held that diversity in culture required separation in a sovereign nation state. Much of this Romanticist rhetoric was put forward after the Act of Union in 1800, a key turning point for the nature of the frame in which Irish rights were shaped. This thesis posits that the cultural diversity argument helped lead to national sovereignty and laws, yet was not the initiator.

Yet, McBride (2000:170) suggests that the United Irishmen and Irish radicalism in the 18th c. were largely responsible for cultural production (and a cultural revival) in the late 18th century - from ballads to publications of Gaelic magazines. The United Irishmen Society revived and promoted Irish culture, history and heritage, through Irish language and music revivals, song, symbols and images. The literature featured Irish antiquities, music and language, and the first republicans were involved in the revival of Irish music, and promoted the study of the Irish language. The *Northern Star* and *The Press*, and the republican songbook *Paddy's Resource* (1795) all have poems and songs in them that glorified Ireland's history and culture as well as its martial traditions (see also Yeats and Celtic Revival in Kearney (1997)). However, he suggests that

"The United Irishmen were interested less in recovering the particular features of the Gaelic past, than in demonstrating that it met universal standards of civility, refinement and politeness. What is missing from these declarations is the nineteenth century argument, so central to Young Ireland propaganda, that Ireland's right to separate nationhood was grounded in cultural difference". (McBride 2000:171)

The United Irishmen sought inspiration from Paine and Locke and the French Revolution, not from Burke. Wolfe Tone was the most prominent member of the radical 'United Irishmen' group, and most in tune with the rise of European Enlightenment principles flourishing on the continent. He and the United Irishmen Society sought to repudiate a divisive Irish past, break the connection with England, identified as the source of Ireland's political woes, and adopt and embrace with enthusiasm the

universalism and modernity of the forces of Enlightenment – in direct opposition to the theory of Burke.

Their mentor, if one can be identified, was Thomas Paine. While "Locke was still cited as the orthodox exponent of contractual government, his writings were now reread in the light of Paine's democratic convictions. Paine's citizens reserved the right to remodel their government as they saw fit." (McBride 2000) Ideologically, the United Irishmen sought to educate their labourer readership with the "principles of popular sovereignty, with conceptions of natural and civil rights, universal suffrage and representative government, and with the American and French constitutions." (ibid, 2000:176)

The ambition of the United Irishmen and their leader, Wolfe Tone – and it was principally this group that sought to create public outcry and force reform – was to combine the Enlightenment spirit of 'universalism' with the Romanticist concept of a cultural nationalism, in order to infiltrate Ireland and the body politic with the new ideals, wisdom and truth from the Continent.

The solution to oppressive colonial rule as viewed by the United Irishmen was to firstly, reform the Irish people by adopting a cultural nationalist position (relating, for example, cultural rights to national identity). Secondly, the United Irishmen sought to reform Irish laws and the system of government to include and represent Catholics and their heritage of traditions (effectively, imbuing the Irish Catholics with civil and political rights).

In a manner similar to that of the United Irishmen employing press and pamphlets, when radio broadcasting commenced in Ireland, radio was to be the vehicle by which the most salient elements of Irish cultural heritage (language, music, singing and games) would be brought back from the brink of extinction. When in 1922, the new Irish Free State considered a request from the Marconi company to operate a broadcasting service, and to sell the necessary receiving equipment, the initial offer was that Marconi would provide "an efficient and adequate programme of music, speech, songs and news" (Cathcart 1984:40). However, a Special Committee of the Dail reviewing the control of content recommended instead that, rather than be used for entertainment, radio should be utilised as "an instrument of popular education...ministering commercial and

cultural progress” (1984:40). The final report of the Broadcasting Committee of the Dail in 1924 considered that the Irish broadcast service should be the servant of education, agriculture and identity, offering Irish and foreign language lessons and educational discussions on a variety of historical and practical subjects. Yet, less than 0.5% of listeners stayed tuned to Irish language broadcasts. By the 1950s, the audience was just 0.1%. Despite the Irish language programmes, and a service that had become, according to president William Cosgrave a “vehicle for Irish Ireland propaganda” (Gorham 1967:6), many listeners preferred to listen to BBC, American Forces Radio, Radio Luxembourg or other European broadcasts.

1.6 European cultural identity

In the case of the European Union and their drive to promote a European cultural identity within the context of economic and political unification, Anderson (1983) doubts if this “imagined community”, promoted for political reasons, will take any root. While there exists a strong belief that national European cultural identities may be undermined and displaced through the importation of North American media products (and thus should be prevented), it is suggested that cultural transnationalisation within the boundaries of Europe would help the political unification project (and thus should be encouraged). This seeming contradiction fails to take account of the unlikelihood of such an effort. Intra-European national identity must first overcome as many different languages as Member States in the EU, while American media product is produced in one of the most widely spoken languages of the world.

A precise and common definition of what ‘European culture’ amounts to remains unspecified – other than the suggestion that there exists European unity in a complex union of a diversity of cultures, languages and history. Some suggest that the singular common thread of European Union cultures lies in their common Christian heritage and tradition. Current debate within the political actors involved in developing a European constitution is split over the need or requirement to include a reference to ‘God’ in the text. Therefore, not all Europeans agree that Christianity represents a common European element.

Like Schlesinger (1997) and Habermas (1995), I do not subscribe to the notion of a 'common European culture' on which a European citizenship can be based. Schlesinger argues that this rhetoric is unfounded, while Habermas argues that this is a notion that should stay in the European medieval middle ages. In addition, it is unrealistic to assume that the idea of a 'national culture' and all the associated concepts of bonds, community, citizenship and sovereignty which are associated with the idea of a national culture can be simply transposed to the wider European level in the hope that a 'common European culture' will be generated.

1.7 Historical identity

The United Irishmen were strongly led by Enlightenment thought, and wished to throw off the restrictive shackles of British tradition. Burke, although a stalwart supporter of tradition and custom could see that modifications were required by an authoritarian empire, for example, restraining its immoral policies and admitting Catholics into the Irish citizenry. Burke worked hard to defend the rights of Catholics to enter and participate in citizenship in Ireland, but he was not in favour of an Enlightenment style full enfranchisement of universal man, according to Hampsher-Monk (1987, 1992), unlike Wolfe Tone and the United Irishmen.

Burke focused instead not on the religion of the Irish and their eligibility for citizenship (as was Wolfe Tone's argument), but on their organic and historical cultural ties. Burke's concept of citizens in community rested on moral ties, national historical bonds forged over centuries, and republican duty to your country. These were the bonds of Burke's community of citizens. Yet "Burke always resisted the extension of the franchise to the lower classes, arguing that the corruption and disorder occasioned by elections were grounds for restricting it." (Hampsher-Monk 1987:18) Distinct from the United Irishmen's Enlightenment vision, Burke (like Marshall) represented tradition: "culture is an organic unity and its civilisation a national heritage".

In broadcasting terms, however, when the Irish national radio station faced a dwindling listenership for traditional Irish music in 1934, 2RN's new director Dr. TJ Kiernan argued that:

“Merely to be traditional is not to be national, certainly not to be constructively national. ... The old is good, but it is not good to live entirely on the old. Irish broadcasting has an important function in stimulating an interest in all kinds of music” (Cathcart 1984:44)

His intentions to revamp the music agenda went against the previous Government policy that had condemned foreign advertisements utilising jazz music.

While Burke thought citizens were bonded through tradition and heritage, Marshall also saw the bonds of citizenship being formed both politically and culturally: politically through the combined struggle for the attainment of citizenship rights.

"Citizenship requires a bonda direct sense of community membership based on loyalty to a civilisation which is a common possession. It is a loyalty of free men endowed with rights and protected by common law. Its growth is stimulated both by the struggle to win those rights and by their enjoyment when won." (1950:41)

In this remark, Marshall presents his utopian sentiment of allegiance within a community - combining a Hegelian notion of national heritage with a resolute belief in the British institutional tradition of common law. (Burke also favoured common law – it resonated of tradition and heritage).

This bond was particularly strong in the 18th century - which saw the birth of modern civil rights - and of modern national consciousness. Marshall is linking the bond of belonging to a community with the birth of nationhood. This researcher questions whether this is still a legitimate modern concept, and what then of a post-national community bond such as that required of the European Community?

However, he also realised that the *expectations* of citizens to what they are legitimately entitled to is a constantly moving forward target, which the State may never come close to achieving. Subsequently, the bond of citizenship is constantly changing, as is the definition.

Cullen (1972) also suggests that bonds of citizenship can be developed through common grievances against authority, and Whelan (1996) suggests that bonds of community in Ireland were forged through awareness of rights repression (through

penal persecution), and culturally through the medium of songs and literature telling history of the national land, soil and heritage.

In Ireland, common hatred of the repression of rights and the imposition of Church tithes drew people of all classes together in a common bond. McBride argues that the United Irishmen's agenda was to break the ancien regime and colonial ties of deference and allegiance by the farmers, shopkeepers, artisans and mechanics to Great Britain, in a manner similar to the American colonists. In this way, the United Irishmen sought to break the traditional bonds of subservience to Great Britain, and construct a new way of integrating the populace.

The colonially oppressed in Ireland also called for a redistribution of the land, for the people of Ireland. Property and land was a major issue for the common peasants in Ireland, where many families survived on sub-letting small plots from landlords of the great estates. The land had been confiscated by the British, and settled with Protestant planters, while rights to practice their Catholicism and continue generations on the land had been taken away. The Irish suffered greatly under the Penal Laws, much of the discontent being centered on the issue of the misappropriation of the land.

Marshall draws a distinction between citizenship bonds, and social ties. One is political and civil, the other is class-based. Social ties (1950:98) may be classified as being based either on difference or similarity. Similarity unites most obviously through the recognition of a common interest. Similarity suggests groups, such as nationalities, social class, occupational associations or age groups.

Marshall argues that the force that unites a social class is 'consciousness of kind'. 'Kind' is "simply that particular sort of similarity which builds social classes and not trade unions, literary societies, political parties or county associations." Identity is also 'that what you are not'. It is clear any sense of similarity within a group implies a consciousness of difference from those *not of the group* (1950:99).

It is interesting that Marshall writing in 1950 believed community bonds should be closer-knit than a nation state could ever allow:

"But the national community is too large and remote to command this kind of loyalty and to make it a continual driving force. That is why many people think

that the solution of our problem lies in the development of more limited loyalties, to the local community and especially the working group.” (Marshall, 1950:80)

He also professes that “nationality..is not like a profession or an income or a belief, detachable in thought from the whole personality.” (Ibid, p100)

It is the belief of the present author that the bonds of community can be physically or psychologically stretched, but what is more decisive for bonding is the level and relative access to that level at which a community makes decisions for others and rules itself.

1.8 The Media in the Construction of Identity

For Whelan (1996), the 18th century in Ireland witnessed the *construction of a national identity* that had not been conceived of in all its aspects until then. A national identity was constructed artificially, and publicised nationally. The movement of Romanticism helped this construction: these theories encouraged notions of ‘cultural identity’. To foster this construction, Wolfe Tone and the United Irishmen used pamphleteering extensively.

The foundation of the Irish state, argues Kearney (1997) was shaped by Yeats and a Celtic Revival ideal promulgated by Wolfe Tone. This Irish ‘national’ tradition that they spoke, sang and wrote about relied much on pre-colonial pagan Celtic myths of the motherland, represented by a mythical figure, Cathleen Ni Houlihan. Anderson’s (1987) conceptualisation of ‘nation’ as an ‘imagined’ limited, sovereign, community has much in common with Kearney’s elaboration of the use of ‘myth’ employed by Irish Celtic Revivalists. Much of the mythology employed by these writers focused on stories of heroic republican self-sacrifice, for the nation, according to Kearney. Kearney’s alternative is a transformative ‘utopia’ of recreating identity in flux: he cites Kavanagh, Joyce and Beckett as masters of this concept.

Smith (1980) maintains that the emergence of the newspaper in 1848 came at a time when the idea of establishing a homogenous “nationhood” was taking shape within the consciousness of the entire populations and within class structures. Each nationalist movement in Europe began, and gained strength with their own newspapers. Each

newspaper represented the ideas of a political party seeking to gain control. Thus the Liberals, Radicals and Agrarians and any other party that gained the power of a newspaper mouthpiece also cornered first mover advantage in the political landscape (Anthony Smith, 1980: 11). All newspapers, he notes, expressed this view of the coming nationhood.

Hardt (1979) in McQuail (1994) has also highlighted the perceived integrative stimulant of the newspaper in the 19th and early 20th century. The various functions of the press as assigned to it by German theorists ranged from “binding society together, giving leadership to the public, helping to establish the ‘public sphere’, providing for the exchange of ideas between leaders and masses, satisfying needs for information, providing society with a mirror of itself, and acting as the ‘conscience of society’”. (Hardt 1979 in McQuail 1994:73)

The bond of citizenship was particularly strong in the Romanticist period of the 19th century - which saw the birth of modern civil rights and of modern national consciousness in many countries.

The seeds of 20th century British (national) war efforts were planted in the development in the 18th century patriotic songs like “God Save the Queen” and “Rule Britannia”, along with the popular and parliamentary political agitation. Not only songs, but also the distribution of information via political journalism, newspapers, public meetings, and propaganda campaigns contributed to a growing national consciousness (Marshall 1950:41) that developed easily enough into patriotic nationalism.

The identity and culture of Catholicism at that time was the strongest uniting emblem, with which the excluded Catholics could identify, and Catholicism also represented traditional Irish nationhood and the Irish culture that permeated Irish life in that era. At the time that Yeats and Wolfe Tone were popularising propaganda myths of the Irish motherland, and a non-sectarian Irish tradition, other writers such as Beckett and Joyce – the “cosmopolitan elite” says Kearney – either had ‘no identity’ or recreated their own personal identity by mixing Irish with foreign. MD Higgins & Kiberd (2002) diverge from this view, arguing that it was the artists in exile, like Beckett and Joyce, who eulogised ancient rural myths, and thus gave birth to the ideals of Irish nationalism,

while they were abroad and in exile. They suggest that nationality is born in exile by and through these authors being forced into exile due to censorship.

Corcoran posits that the most important diffusion methods of a 'common culture' (that is based on geographical territories, a common language, shared experiences, memories and hopes....) are via institutions (like 'cultural structures' in government, media, schools, trade unions, churches, legal systems and so on.). This is how best to diffuse a common culture throughout society, argues Corcoran, as distinct from the present author, who recommends the media, and face-to-face encounters and events.

Cultures, Corcoran states,

"tend to be territorially concentrated and based on a shared language and history...Cultures provide their members with a meaningful way of life across a full range of human activities and involve shared values, memories and orientations to the future. They are societal in so far as they are embodied in common institutions, in government structures, media, schools, trade unions, churches, legal systems and so on. These institutions underpin a culture's survival by diffusing a common culture throughout society."(2001:19)

This researcher argues that each of these institutions may differ from one to the other, and that it is incorrect to suggest that everyone in a nation state subscribes to, or attends the same common institutions. This may have been the situation in the past, but with multi-cultural societies, this is not the case.

In post-revolutionary America, the free ex-colonists had difficulties finding solutions to their immediate problem of forging unity among a multitude of states. Where previously there had been a mother Empire, following the Declaration of Independence it was their primary task to determine whether a sentiment of allegiance be better forged through alliance to a small state, or a large federal nation. This was the issue of the articles and letters of the republic between Federalist and anti-Federalist literature:

'The ratification debates consisted, in large measure, of a controversy over which institutional, social, and psychological conditions were best able to promote a sentiment of allegiance and, hence, the disinterestedness and willingness to abide by the laws of one's state, which can fairly be described as civic virtue.' (Sinopoli 1992:6)

Essentially post Revolutionary America was in debate about the conceptions of person and citizen, and 'the psychological ties that bind a people to their government and rulers to their constitutional and legal duties' (Sinopoli, 1992:6). Unlike Europe, America

retained its sense of Christian (Puritan) values, whereas European philosophers (Rousseau) during the French Revolution were determined to overthrow the Christian hierarchy and Christianity and replace it with unlimited belief in Humanism. Religion (even religious diversity) in America was believed to be one check against the disintegration of the community, and during the course of the Revolution when dissenting ministers had fought together in a common cause, religion had been a gelling force. The new European Constitution (2003) is now unlikely to mention Christianity, or any reference to God. More secular countries have succeeded in creating a more general reference instead to Europe's 'cultural, religious and humanist inheritance'. (*Irish Times*, 5/09/03)

1.9 Nationhood is cultural and national

Both Herder and Hegel also conceived of a nation as homogenous in language, culture and history.

The cultural purity of the Irish nationals was a concept taken up by the nationalist Young Irelanders, who followed on from Tone after the unsuccessful 1798 Rebellion at which the United Irishmen were defeated. For the Young Irelanders, the Irish nation was an organic entity bonded by a common language (McBride 2000: 172). The Young Ireland 19th century argument was that Ireland was culturally different, therefore entitled to separate nationhood status from Britain. They held that diversity in culture required separation in a sovereign nation state. Much of this Romanticist rhetoric was put forward after the Act of Union in 1800, a key turning point for the nature of the frame in which Irish rights were shaped. Therein, the argument for cultural diversity supports the striving for national sovereignty and laws.

Daniel O'Connell ("The Liberator") was the man whose campaign resulted in Catholic emancipation in 1829, and paved the way for the idea of 'Catholic culture' as representing 'Irish culture', the 'Irish nation' and 'Irish nationhood' – from which the concept and battle cry of 'Irish cultural nationalism' developed.

1.10 Constructing identity through broadcasting in Ireland (1922 – 2002)

JB Thompson (1993) in McQuail (1994) argues that the processes of modernisation meant that the traditions and cultures of a community were no longer passed on primarily through the oral tradition of storytelling, but increasingly through the media. In this sense, the emerging broadcasting service was employed to form a hegemonic dominant consensus within new nation states based on geographical boundaries. A new nation needs the cement of a national ideology to bridge the gap between classes and cultural divides.

Those subscribing to the centripetal force of media argue that the cohesive force of media are endowed with the capacity to unite diverse elements and even different cultures within a single society, providing a common set of values and assisting in the formation of a shared identity. This centripetal media force is associated with the ideals of order, control, unity, assimilation and cohesion (when viewed positively). Members of the Chicago School in the US believed media could have a positive influence in the assimilation of immigrants into their new nation (Clark 1969, in McQuail 1994: 73) while the role of media to forge a new post-colonial national identity was emphasised in early literature on the process of 'modernisation' according to Pye (1963 in McQuail: 73).

Given the condition of the state of Ireland even in 1960 – “still a comparatively young state, born in violence and immediately afterwards torn by civil war, with a continuing internal security threat, an unsolved problem as regards Northern Ireland, economically underdeveloped and sociologically unsettled...” (Fisher, 1978:26) it is hardly surprising that any medium which could transmit a centrally controlled yet widely diffused *unifying message was eagerly employed.*

Hegemonic ideology was a concept first developed by Gramsci in the 1960s / 1970s, and later developed by Raymond Williams. Hegemonic ideology transmits cultural traditions and specifications under the guise of constancy backed by the weight of history to the population often through mass media institutions. Hegemonic ideology is said to be successful if it connects with the community's subconscious and mobilises them to change or indeed, to remain stationary. (See Stevenson 1995:17) While the

appearance is given that the national culture and heritage is age-old, the criteria of these traditions and heritage are continually being re-sketched and re-defined according to the goals as determined by the manipulative ruling group, whilst being presented as fixed and ancestral.

The functionalist theory of media and society attributes hegemonic powers to mass media, when they are consciously employed to integrate society. Functionalist theory claims have much to do with maintaining social order, promoting continuity of culture and values, managing tension and integrating individuals. Media have a stabilising effect of maintaining the status quo, and drawing support for it and its associated cultural and social values. Functionalism maintains, not changes society. This idea is reinforced by the types of programmes promoting national identity broadcast by the early BBC – events which would, according to Cardiff and Scannell (1987) “restore the currency of older cultural traditions and to re-establish their purchase on the heart and imagination of the public” (1987:159). These televised events, revisited year after year, themselves became integrated into the national identity under construction, while the BBC in so broadcasting wrapped itself in the robes of a national institution.

Katz and Dayan (1986 in McQuail:81) note that major social events which garner wide and diverse audiences can assist greatly in the drawing together of otherwise separate and atomised communities. In the Irish context this idea could be applied to events such as the RTE television coverage of the visit of President Kennedy to Ireland and the opening of the Second Vatican Council under Pope John XXIII in the 1960s.

In the early 20th century, media was seen as potentially unifying and integrative – what McQuail calls the functionalist theory of media and society. By now, as we come into the early 21st century, new media is coming to be seen as either positively centrifugal (if one refers to governments investing in bringing about a new information society) or as negatively centrifugal (if you hold the opinion that the new information technologies will create a society of have’s and have-not’s). In a negative interpretation of media’s centrifugal force, it is believed media can effect notions of dispersion, fragmentation, isolation, loss of values and vulnerability.

When radio broadcasting was being introduced in societies in the 1920s, its potential as a weapon of integration was seized upon by national governments. Many “nation-

states” as we now know them were at the time only just coming into existence. The idea of uniting a disparate audience of *regional, tribal and ethnic loyalties into one collective nation*, with a shared, if fabricated cultural identity was very attractive to the governing powers. The radio was to be the tool with which a national identity would be forged, and its direction would be a State affair. Dail Eireann held the opinion that an Irish broadcasting service could both help to foster an Irish identity and simultaneously discourage the listening to foreign (especially British) broadcast services. Douglas Hyde defined the ‘national culture’ in 1926 as “the heritage of the Os and the Macs” derived from “one of the oldest civilisations in Europe”. (O’Tuathaigh 1984: 98)

Since the 1926 Wireless Telegraphy Act, legislation governing Irish broadcasting services *elements that highlight the notion of promoting the national identity* has remained constant, while the elements that are deemed to constitute Irish national identity have been in constant flux.

The 1960 Broadcasting Authority Act requires that broadcasting should “respect the national aims” with regard to the Irish language and national culture (Section 17). Specifically, Section 17 states the Authority’s “general duty with respect to national aims” and “in performing its functions, the Authority shall bear constantly in mind the national aims of restoring the Irish language and preserving and developing the national culture and shall endeavour to promote these aims”. (Fisher 1978: 26)

In 1961 the RTE Broadcasting Authority interpreted this as meaning the “provision of a programme” which “would have a distinctively Irish quality”, reflecting “traditional Irish values” (RTE Annual report 1960-61 quoted in Fisher, 1978), while a decade later in 1971 the Authority saw its role as assisting “the development of a deeper appreciation of the intrinsic value of Irish language, history and tradition, the development of a better public consciousness of national identity...” (1973 Broadcasting Authority).

The Report of the Broadcast Review Committee (1974) listed specific cultural attributes which were to be reflected in a broadcasting service which would be “essentially Irish in content and character” and which “in particular encourages and fosters the Irish language”. These cultural specificities of Irish culture included the religious beliefs and traditions, work and recreation styles, local and regional community festivals, and

traditional variety in entertainment, musical and literary talent of the inhabitants of Ireland as well as the two spoken languages in use in Ireland (O'Tuathaigh: 98).

As Irish political affiliations and responsibility for political circumstances began to change – firstly with the reporting of political problems in the North, and later with the discussion and prospects of joining the European Economic Community – so too did the manner in which the national broadcaster reflected Ireland's changing identity. RTE was party to the process of re-constructing and reflecting a new, more modern identity. The 1974 Final Report published by the Broadcasting Review Committee recommended that content as regards the Irish broadcasting system should be a balanced service of information, enlightenment and entertainment essentially Irish in character, and contribute positively to the cultural, social and economic fabric of Ireland.

These recommendations were brought into legislation in the 1976 Broadcasting Act, taking into account Ireland's 1975 joining of the European Union, and respecting democracy in the midst of political upheavals in the North of Ireland. Thus, RTE was to “uphold the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression”. Whilst reiterating its duty to Irish culture and language, RTE was also to help public awareness about the other cultures and communities both within the whole of Ireland and the EEC, thus promoting peace and understanding. (1976 Broadcasting Act, in Fisher 1978:43)

Thus, as the political environment changed, so too did Ireland's perceived identity, and this was duly expected to be reflected in the dominant audiovisual media.

Labour's belief (during the 1982-1987 period) was that broadcasting should be public service driven, with an enhanced commitment to facilitate ‘community broadcasting’ in the locality. This concept centred on local ownership and use of the local radio broadcasting stations.

At the time when minister for Communications Jim Mitchell was attempting with difficulty to legally establish commercial broadcasting, “The Labour party at that period, believed that broadcasting should be owned by the people, used for the people, and for the good of the people, and there would be neighbourhood discourse and all

these wonderful things... It was a typical Michael D. Higgins philosophy of ‘everyone getting involved in radio at the local level’ and conversing wonderfully at the local level”. (Interview, D/AHGI 4, PO Communications, Dublin)

The Labour party was at that time intent on developing a policy for local and ‘community’ broadcasting. This was not viewed by the government department as a realistic aim or viable in the long term – they queried the commercial viability of the project, and projected listenership numbers: who would listen to it? How would it be sustained? How would it generate revenue? *For how long will local shops in a coverage area of 3 to 6 miles keep advertising after the initial novelty has worn off?*

At that period, only six local radio stations – and these were mainly broadcasting from urban centres – were viewed to be commercially viable in the economic climate of the early 1980s, some operating at the very margins. In addition, broadcasting legislation proposals arising from the previous government and consultations were heavy with public service obligations. It was believed (by Fine Gael Jim Mitchell, and Fianna Fail Ray Burke) that Labour’s commitment to the public service ethic acted as the principal block to the legal establishment of commercial broadcasting during the 1982-87 period.

After years of Fine Gael / Labour disputes on the subject, the new Fianna Fail government came in and promised to resolve the issue swiftly. The programme for government vowed to “sort out the mess that had been prevailing for the previous five or six years” (Interview, D/AHGI 4, P.O. Communications, Dublin). There was a deliberate intention on the part of the department of Communications headed by Minister Burke (1987-1991) to avoid all references to terms such as ‘national’, ‘local’, ‘community’ or ‘neighbourhood’ broadcasting. It was decided that the Bill should only make reference to ‘sound broadcasting’ because “we had had such interminable rows within the previous government about the concepts of local, and regional, and community broadcasting. And they just raised hackles. So, if you don’t call it anything (specific), it leaves everything open. And you avoid what we figured would be these interminable rows”. (Interview, D/AHGI 4, Dublin)

Minister Higgins (Labour) took up office in the Fianna Fail (Taoiseach Albert Reynolds) / Labour coalition government of 1992-1995. When Albert Reynolds resigned in December 1994, Higgins was re-appointed in the new Fine Gael / Labour

government coalition inaugurated in February 1995 led by Taoiseach John Bruton (FG). Higgins' term of office as Minister of his own creation, a new department of the Arts, Culture and the Gaeltacht, ran from 1993 – 1997.

Minister Higgins' thinking on broadcasting issues was derived from a cultural not economic perspective: his model for broadcasting was a "citizenship model with a public service broadcasting message, not a market paradigm with a commodification message. It was an uphill battle all the time". (Interview, MD Higgins, Dublin)

While fighting political battles at home, 1992 had seen the EU Maastricht Treaty enshrine 'Culture' as an area of EC concern. This acknowledges the importance of European cultures, and recommends that they 'should be taken into account' in the overall schema of policy deliberation. However, the European Commission takes the view that without a strong reference to culture in the founding Treaties, and a subsequent mandate for the area, the Commission will do nothing. Higgins is of the opinion that the weak position of culture within the founding treaties of the European Union is due to three reasons: firstly, European nations were extremely sensitive to the abuse of culture for fascistic purposes after the Second World War. Secondly, because culture is so closely associated with education, the insistence on Member State subsidiarity becomes a factor. And thirdly, culture like human rights, has traditionally, been the responsibility of the Council of Europe. According to Higgins, "there is no semblance of a cultural policy" held in the European Commission. It is advanced by Higgins that the relative weakness of culture, and the Commissioner for Culture within the College of Commissioners and the European Commission is "because culture is unimportant. Those driving European integration are not interested in culture. They are interested in consumption, and consumer culture". He remarks that "Europe has sold the pass repeatedly on cultural issues", with the Commissioner for Culture representing the weakest possible Directorate-General within the College of Commissioners.

Within the debate for European integration and the construction of a European identity to which Europeans will subscribe, the notion of fostering common bonding via audiovisual events of national importance – social or sporting – remains a key issue of much debate in the modern situation of pay-per-view sports events. Some deemed of supranational importance like the Olympics and Soccer World Cup have been enshrined

within EU law to remain freely available, so that they remain available and accessible to all.

Following Higgins, Minister Sile de Valera (1997 – 2002) was appointed Minister of the renamed Department of Arts, Heritage, Gaeltacht and the Islands in a Fianna Fail / Progressive Democrat government led by Taoiseach Bertie Ahern (FF) in July 1997.

She is remembered for prevarication on introducing the necessary legislation designed to facilitate the establishment of nationally available Digital Terrestrial Television (DTT) in Ireland.

The national public broadcaster RTE first petitioned the FG / Labour government for a sum of IR£40 million (later revised to IR£80 million) with their plan for a national Digital Terrestrial Television service in September 1996. Throughout the following five years, RTE highlighted the issue of relevance for Irish national digital content, and the uniquely ‘national’ geographical coverage that their proposal presented. Their concerns focused on the need to retain “some sense of Irish identity” in programming offered via digital transmission:

“Irish national interests and the requirements of the Irish public dictate that digital video broadcasting is too important in its impact on cultural and economic activity to be left to international market forces. Ireland’s national interest requires that it control its own digital platforms, thus enabling it to develop the distinct culture of its society. Ireland must act now - National policy and national legislation are urgent requirements. If we believe that Irish views and Irish voices are to have a place in the digital landscape, if we are committed to Irish culture as a rich strand in the fabric of our future, we must do what is needed to ensure that the new digital technology will carry Irish content, and that Ireland will have a controlling influence on the communications media in this country in the next century.” (RTE Digital Television and the Information Society: an implementation strategy, 1997, p7)

The view of the Department of AHGI was that traditionally, it held responsibility for the cultural and quality levels of broadcasting content for Irish based services across all platforms. Their position, highlighting the cultural and access issues of digital terrestrial delivery, was outlined in July 1998:

“D/AHGI consider that from a cultural perspective, it is desirable that centralised control be exercised over the overall programming mix that will be provided over DTT... This control over content raises questions however over the capability of DTT to compete with cable, MMDS and satellite, and as a consequence, the attractiveness of investing in DTT. Because of this control requirement, the D/AHGI do

not wish the Office of the Director of Telecommunications Regulation (ODTR) to select the DTT operator as that Office has no expertise in relation to the cultural considerations which must be brought to bear on the selection". (Position paper of D/AHGI, July 1998)

For this reason, the D/AHGI wanted to see a joint venture company created, with RTE as the minority partner to run the DTT transmission network, which would result, they hoped, in maximising Irish content on digital services. In addition, of all the modes of delivery of digital television, DTT was the only option that could guarantee universal accessibility to all geographical areas of the country, including rural areas. DTT represented the singular universal access medium – "anyone in the country can access it without paying a subscription to a cable, MMDS or a satellite company".

In public, the approach of D/AHGI was in line with RTE's proposal of a new regulatory structure that would oversee the introduction of DTT in Ireland, and have responsibility for the supervision of content of digital services over all platforms. For the other departments, this seemed to be an inordinately lengthy and time-consuming process, with the result that DTT would start late, other entrants would already be prominent in the marketplace, and DTT would lose its attractiveness. In private, D/AHGI was "not convinced that DTT will flourish", and did not wish to precipitate the closure of analogue services. (D/AHGI comments for discussion, July 1998)

The departments of Public Enterprise (D/PE); Finance (D/F); Enterprise, Trade and Employment (D/ENT-EMP) as well as the ODTR took the view that a new approach in line with European trends of convergence between the telecommunications, media and information technology sectors was called for. Broadly, this called for a 'light touch' regulatory environment, with no additional cultural content obligations on the DTT operator, other than a stipulation that Irish services (RTE 1, Network 2, TnaG and TV3) should be carried on all platforms on a free-to-air basis. Other than this, D/PE argued that the operator should be entitled to "enjoy commercial freedom in constructing the remainder of the programme package". (D/PE Summary view on Digital Television, July 1998)

These departments were influenced by the NERA / Smith report on "*The future delivery of television services in Ireland*" commissioned from economic consultants by the ODTR. The NERA / Smith report favoured a regulatory approach along similar lines to

the EC Convergence Green Paper launched by Commissioner Bangemann (DG Information Society and Telecommunications) in late 1996. This Green Paper was the focus of considerable consultation and public hearings throughout 1998 at the time when Minister de Valera was considering her approach to digital television legislation, and UK digital television was on the point of launch (May 1998).

Minister de Valera had aimed to have legislation for the regulation of digital television in place by mid 1998. Draft texts of the *Broadcasting Bill 1999* (published 27 May 1999) eventually emerged as the *Broadcasting Act of 2001*. However, the slow progress meant that by February 2002, Sky was so well advanced that Irish DTT was “unlikely to be given the go ahead” (D/PE civil servant, interview, Dublin)

After ten years of waiting for Irish legislation, and five years of intra-governmental discussions, inaction on the part of Minister de Valera allowed Sky to gain the precious foothold in the Irish digital market that meant there was no assurance nor obligation on the principal digital provider for the transmission of Irish national TV services, nor for the assurance of broadcasting of Irish content.

Summary

In this chapter, I have outlined that the roots of cultural republican nationalism lay with the ancien regime-French revolutionary model. However, according to Whelan, Ireland was not representative of the ancien regime (whereas, Burke did see it as part of that tradition). Whelan (Whelan 1996) argues that Ireland was rather a British colony, with problems deriving from the rule of the British Empire, much like those experienced by America (Whelan 1996:56). This present author agrees with Whelan. Ireland’s citizenship is anti-colonial, of an American-British model, rather than of the citizenship type of French-European extraction. Citizenship has been inextricably tied up with the birth or emergence of a nation state (see Hobsbawm 1992) since the 19th century– and in Ireland’s case this was no exception. Ireland differed markedly however with the European citizenship movements that overthrew direct Monarchy in a social and political revolution. This thesis argues that the example of Ireland is not like the European citizenship tradition for a number of reasons. In particular, Ireland’s history is so closely tied with that of Great Britain, that it’s attempt for independence from

colonial repression is more akin to the American colonists' desire for the same freedom and demand for sovereign rights from Britain.

This author's opinion is that Ireland's tradition of citizenship is anti-colonial (and incomplete) as opposed to France's tradition of anti-monarchy and socially revolutionary.

This author criticises Marshall for his exclusive reference to a community within the boundaries of the territorial nation state. When Marshall speaks of the nature of citizenship as meaning a 'full member of a community', he refers to a human community, a community of 'social heritage' and a 'national' community (as did Burke, adherent to traditional heritage). This needs to be set in context. In direct opposition to the 'enemy' of Hitler and Nazism, Marshall writing in 1950s Britain was seeking to reaffirm the primacy and centrality of the national territory, the nation state, Great Britain, and the British citizen. This thesis is not based on a 'national' conceptualisation of citizenship. Geographical Western territories in the 21st century are so culturally diverse, it seems untenable in this day to put forth a concept of citizenship as belonging to a singular historical cultural heritage. These 'traditions' of nationhood were so often in reality fabricated and artificially constructed, and in many cases are the factious root of obscene wars, that this author prefers to speak of a political community, and an economic community wherein the basis of citizenship is ideally active.

Marshall himself admits the problem of 'nationality' indivisible from the person:

"When two foreigners meet in peaceful conversation, their attitudes are greatly affected by their different nationalities, and this is a difference of which they are both conscious. And yet the relationship is entirely personal, the nationality expressing itself through the individual it has created. They meet as the products, not as the representatives, of their enviroing social groups. But when two enemy foreigners meet in time of war, each sees within and behind the man who confronts him the image of the group which he represents. It is a meeting of two conflicting interests, two fragments of personalities, two points on the perimeters of two vastly greater wholes." (p101)

The problems for the present author with Marshall's insistence on definition of community membership as derivative of national membership are plain:

Firstly there is the issue of those non-nationals who are tainted as non-citizens, with all the associated inequality, exclusion, and prejudices. Habermas, haunted by the ghost of German fascism is particularly mindful of these concerns.

Secondly, sentiments of 'community membership' and 'common heritage' had no effect on redressing the problems of social inequality or class structure because of the lack of political enfranchisement by the masses of working people enlisted for their patriotic support.

And finally, nationalism does not create citizenship (in Habermasian terms of political enfranchisement and active participation), yet nationalism does create war. An increasing number of theorists – 'cultural pluralists' – argue that citizenship must take account of the differences between regions of cultural difference and groups of cultural particularity. Cultural pluralists advocate that different allowances and cultural rights should be made for culturally diverse groups such as Aborigines, Hispanics, women, religious minorities and so on. But critics say that if groups are encouraged to look inward and focus on their 'difference' then the commonality and community that citizenship hopes to achieve will be undermined. (Kymlicka and Norman 1995:304)

Respect for cultural differences and special consideration for cultural minorities are rights sought by those who consider citizenship to be not merely a legal definition of status, but a question of cultural identity. This belief system has roots in the 18th century nationalism that accompanied the birth of the French Republic and the twinning of citizenship with nation membership.

Chapter 2.

Citizenship beyond the Nation State

2.1 The demise of the nation state

Habermas (1994) states that the classic form of the nation-state is presently disintegrating. However, if Europe were to become a European Union (a multilingual loose federation of semi-sovereign states of different nations), he argues that the nation-states would continue to exert a strong structural force.

Nonetheless, nation-states constitute a problem to the European Union because their democratic processes so far have only functioned within national borders. So far, the political public sphere is fragmented into national units. The role of the citizen has so far only been institutionalised at the level of the nation-state, so citizens have no effective means of debating European decisions and influencing the decision-making processes. (Corcoran's institutions are implicitly national). There is no European public opinion or public sphere.

Laffan et al (2000: 31) describe the 'reconfiguration' of the nation state rather than a loss or a 'hollowing-out' of nation state power. Similarly, Calabrese and Burgelman (1999) suggest the demise of the nation state is exaggerated. Laffan et al do not subscribe to the notion of the EU as a 'post-national environment'.

Corcoran asserts that the nation state has become a law taker not a law maker, but it has been the nation states' own choice (Hamelink, Ward, Raboy agree). Corcoran asks if 'cultural rights of nation states' need to be protected in the future, seeing as

"Nation states, now more law takers than law makers, have become brokers of agreements articulated in supra-national agencies which have become the real sites of policy-making: WTO, ITU, OECD, G-7, WIPO. The main players are giant corporations." (Corcoran 2001:26)

He concurs that there is a loss of national policymaking power, and asks who is principally responsible? Corcoran accords with Ward (and Hamelink and Raboy as well as this researcher) that it is the nation state itself, through the actions of national governments. It is the governments of nation states that are giving away unprecedented

power of governance on a range of supra-national agencies that have no democratic accountability. Raboy agrees:

"Nation states are trading away what remains of their diminishing sovereignty for a new role as brokers of international agreements on behalf of their client national corporations". (Raboy 1998:68)

Calabrese and Borchert (1996) asserts that simply because the state's role is limited does not mean it should abandon communication policies. These authors put the onus on responsible government, for creating and cultivating competent citizens, and for guaranteeing a democratic civil society by sticking by a minimal set of obligations regarding a social policy of communication. Raboy (1998) also dismisses the assumption that globalisation and the disintegration of national sovereignty represents the end of public policy approaches to media and communications.

This researcher's criticism is that Calabrese & Borchert propose communication policies should be treated as social policies of weakened states, which are acting on behalf of multinational corporations. How does he envisage that this will happen? Calabrese and Borchert acknowledge that the notion that the state has a responsibility for securing certain "social" or positive rights of citizenship is under serious attack today. However, if citizenship is to develop at an EU level, then the EC would require authority to enact social policy, a sector over which it currently does not exercise competency.

Hamelink (1998:72) adds that 'it should surprise no-one' that as the economic importance of communications trade grew, it meant that communication politics has shifted to the increasingly important WTO trade forum. Since 1995, new policies decided in the fora of the ITU, WTO and OECD are forming the basis for the new global regulatory framework in communications. (Raboy 1998, 2002)

Private US telecom operators argue that in a free competitive and perfectly functioning telephone market the onus should be on the government to create a social policy with regard to telecommunication services, rather than on them to be held responsible for ensuring universality of access dependent on need.

Is the democratic potential of communication affected or not by the mode of ownership of the infrastructure? Does the nature of the ownership of (e.g. the Internet's components) determine the public or non-publicness of its communication or discourse? In a later chapter, this thesis will discuss the philosophical theories of property, and the relationship between property ownership and citizenship.

2.2 Post-nationalists

Those who conceive of citizenship in terms other than purely national, for example, Hobsbawn (1992), Habermas (1995), Ferry (2000), Kearney (1997), Dahlgren (1995), Garnham (1990), Closa (1996), Weiler (1995, 1997, 1999), Schlesinger (1997) and Murdock & Golding (1989) all suggest a revision of Marshall's national cultural focus. Raboy (1998, 2002) and Hamelink (1995) focus on the global context, arguing that communication systems are being privatised and regulated on the global trade scale. For Hamelink, "Democracy cannot stop at the local border. Citizenship cannot be limited to a nationality, a state" (Hamelink 1995:146). People are citizens both of their state, and the world.

The European integration project was promoted and conceived as a means of overcoming the irrational and dangerous tendencies of nationalism. *Taming nationalism* remains central to the discourse on European integration, because as President Mitterand of France argued, "nationalism means war." (EP Plenary, 17 /01/95 quoted in (Laffan, O'Donnell et al. 2000:18)

Viroli (1995) in McBride (2000) differentiates between patriotism and nationalism. While patriots fought 'to strengthen or invoke love of the political institutions and the way of life that sustain the common liberty of a people', nationalists were concerned with the threat posed by 'cultural contamination'. Patriotism, unlike nationalism, is primarily concerned with political liberty and the necessary legal and constitutional framework that preserves it.

2.3 Global citizenship debate

The option of some form of global citizenship is considered by Falk (1994). Falk outlines four 'global citizen types' and offers four reasons for the validity of citizenship beyond the nation state and the move towards a global political community.

According to Habermas (1995:279), the idea of a global or 'world public sphere' was first raised by Kant within the context of the French revolution – an idea that Habermas argues "today could become a political reality for the first time with the new forms of global communication. Although we are still far from achieving it, the arrival of world citizenship is no longer merely a phantom".

Raboy (1998) identifies the need for global media policy, and seeks to develop a global framework for democratic media and encourages input from a global civil society.

Because global communication environments have displaced national models of communication regulation, new transnational policy is needed in order to serve the global public interest. This creates a new challenge for policy development. This researcher agrees with Raboy that *policy is largely beyond the control of any one government* (1998:66).

Hamelink concurs with Raboy's approach - he says, "today's key institution for world communication is the World Trade Organisation" (Hamelink 1998:73). This (WTO) forum he suggests therefore should be the major focus for all those citizens' groups and civil coalitions concerned about quality, access, availability and affordability of information services.

He also argues (1995:132) that in order for people to empower themselves in the arena of world communication, against the global privatization of communication systems, a global dimension to the formation of a global cultural space is required. This will require the 'revolt of civil society'. Yet, Hamelink admits that the notion of civil society still remains tied to the notion of the nation-state. Hamelink argues for a notion of civil society that goes beyond national borders, reflecting the powerlessness of individual states to cope with global problems. He calls for a global civil society.

Hamelink and Raboy are very much singing to the same hymn-sheet on the issue of WTO, global media regulation, and a responsive and responsible global civil society.

Raboy's main questions are, firstly, what type of global 'society' is sought? And secondly, what forms of media regulation are appropriate?

His basis premise is that the global media environment is a public resource to be organised and regulated in the public interest, which gives legitimacy to global public intervention.

"Broadening access will require appropriate transnational regulatory mechanisms, as well as mechanisms for a more equitable distribution of global commercial benefits. There is a need for the international appropriation of some air and space for the distribution outside the country of origin" (Raboy, 1998: 67)

To develop a global framework for democratic media is a political project, maintains Raboy. It is a political project to create democratic debate, and afterwards create a permanent democratic forum for developing global media policy. As yet, there is no appropriate global public forum in which to discuss global media regulation, but the CRIS (Communication Rights in the Information Society) campaign is aiming to input into the Geneva WSIS conference in 2003. Raboy recommends global citizenship should be formed through public debate that takes place in international fora like UNESCO and ITU, and involve groups beyond solely the participation of Member States's governments.

2.4 Collective Identity

Herder, Hegel and Burke commonly understood a nation to be rooted historically with a characteristic and distinctive common cultural heritage, shared by the community of people, the *volk*. Corcoran emphasises the common-ness of culture - a common language, a common identity, a set of collective memories all help to create a strong sense of common membership to a society (Corcoran 2001).

On the other hand, Dahlgren (1995) examines the concept of 'civil society' rather than a national society, marked by participation by the public. Schlesinger (1997) argues that

cultural identity is not equal to national identity. National identity for Schlesinger is just one form of a collective identity. Habermas (1995) echoes Schlesinger: both argue that to be a national is not identical to being a citizen. Unlike Hegel and Herder, Habermas argues that a unified political culture does not need to be based on all citizens sharing the same language or same ethnic or cultural origins, as the US and Swiss multicultural societies demonstrate.

Habermas recommends collective 'weal' could be co-ordinated through dedication to a Constitution in Europe ('constitutional patriotism'). Habermas (1994) is satisfied that a political culture can serve as the fundamental common denominator for a constitutional patriotism. The first written Constitution was that in America in 1776, drawn from the inherited British constitutional tradition e.g. Magna Carta of 1215, Petition of Right of 1628, the Bill of Rights of 1689. Continental nationalism developed following defeat in territorial war. The aim of the American Constitution was primarily to limit the power lust and tyrannical acquisitiveness of bad rulers. This contrasted with the aims of the French Constitution, which was to invest sovereignty in the people and claim France as a nation.

JB Thompson argues that communities derived knowledge of their past and heritage through "mediated symbolic forms". He maintains that this affects one's sense of belonging to a collective identity - now "we feel ourselves to belong to groups and communities which are constituted in part through the media" (JB Thompson 1995: 35) rather than through oral traditions as before.

Habermas also confirms that the integration of communities can only be successful through communication and public dialogue. ("The ideal of the public sphere calls for social integration to be based on rational-critical discourse". (Quoted in Calhoun 1992:29)) Communication in this context means not merely sharing what people already think or know but also a process of potential transformation in which reason is advanced by debate itself.

This researcher holds the opinion that debate about citizenship should be distinct from debates on culture. The identity of each citizen holding citizenship of a nation is not necessarily of a 'common culture'. Hamelink (1999) also suggests that not all members of a collective community share the same culture.

The challenge in a time when many authors agree - Habermas (1995), Corcoran (2001), Kearney (1997), Dahlgren (1995), Weiler (1995), Closa (1996), Falk (1994) that the nation state's ability to regulate for its own national territory is withering, is to attempt to define 'community' rather than a futile attempt to either retreat to the 'national and cultural' corner (complete with a redistributive national welfare system model, as posited by Marshall (1950) or Calabrese & Burgelman (1999)) or an even more unsteady attempt at defining the 'common European culture' (as argued by Habermas (1995)) and maintaining the existence of one. Dahlgren (1995:36) agrees that "Community as such has become a highly problematic notion in the contemporary world." This thesis subscribes to the notion of a citizenship within a political and economic, democratic market community that is transnational and multinational, even global.

2.5 The European citizenship debate

According to Hyland, Loftus et al. (1995), the debate on EU citizenship started between member states in 1975, although EU citizenship was only introduced in the Maastricht Treaty.

Habermas wonders if the European concept is so nation-state driven that the possibilities for collective political action across national borders is in question, as is the "consciousness of an obligation toward the European common-weal" (p266). Can there ever be such a thing as 'European citizenship'?

Shaw (Shaw 1997, 1998) agrees that if the EU now represents a form of (emergent) 'polity' (if not a state) then it must have a membership and a relationship to the 'people' who are its members (Shaw 1998:295). However, like Habermas, she acknowledges that EU citizenship remains dependent on national citizenship, and citizen membership of one of the member states. EU citizenship is dependent upon definitions of nationality determined at national level. It complements and does not replace national citizenship (Shaw 1998:298).

Some authors and the EU governments are attempting to conceptualise of a citizenship within a boundary delineated by the sum of all EU territories, shared by all EU citizens co-temporarily with distinct nation state citizenship. The European debate on citizenship authors and ideas include Habermas's pan- EU public sphere, pan-EU political parties, and allegiance to a Constitution; Closa's constitutional fundamental rights and Kearney's conceptualisation of federal regions of Europe.

In an attempt to move beyond Marshallian allegiance to a cultural nationalism, Habermas, Hyland and Closa recommend a movement towards constitutional patriotism. Habermas favours patriotism to a constitution and constitutionally enshrined rights, by which any future Federal Republic of European States would be rooted in a supranational shared political culture of the European Community sustained by pan-European public spheres. Habermas' idea of a European constitutional patriotism would have to grow out of 'different interpretations of the same universalist rights and constitutional principles which are marked by the context of different national histories'. This researcher estimates that the interpretations may be difficult to match – even today, different European nations have very different ideas of what constitutes 'citizenship' as highlighted by Tsagarousianou (1998).

Both Ward (2001) and Closa (1996) argue that the EU has not made much inroad with pan-EU citizenship, and are regressing to the sphere of the national both in terms of rights (Closa 1996) and regulation of media systems that are not trans-frontier (Ward 2001). Closa argues that the EU defends nationally based forms of rights rather than developing new systems of rights. Currently, EU rights are linked primarily to nationality (explicitly, a citizen of a Member State nation), and secondarily to the functioning and promotion of the internal market (implicitly, a citizen of the EU economic common market). Maastricht Treaty Articles 8a-8e set out in detail the principal rights associated with Union citizenship, but there is no further reference to duties, and this aspect of EU citizenship (i.e. how individuals are constituted as sovereign within a given polity) remains as yet wholly obscure.

As outlined above, Habermas subscribes to citizenship as an active participating member of a politically controlled state rather than membership of a geographically defined community. According to Habermas' belief-system, EU citizenship erroneously

therefore links citizenship to national identity. Instead, he suggests (1995) the EU should look forward to a new potential of supra-national political decision-making held together through enfranchised democratic participation. The problem as he sees it lies in the reliance and definition of membership upon national criteria – issues are discussed with an eye to national interests while possibilities for collective political participation at the level of the intra-state are few. He suggests (Habermas 1994:32) that in the future, differentiation could occur in a European culture between a common political culture and the branching national traditions of art, literature or philosophy. The cultural elites and the mass media would have an important role to play here. This researcher accepts this as a useful solution.

Habermas, Closa and Ward recommend the development of European public sphere as the cornerstone for any further developments of a European social contract involving citizenship rights. Only in a pan-European public sphere can notions of public good be discussed and the democratic will of the people be known (Closa 1996:15). Habermas proposes a public sphere facilitated by media institutions that are so internally democratised that they would have a mechanism to ensure wider democratic access and prevent concentration of ownership and scale of their organisation (in Calhoun 1992:28). Yet, Venturelli (1998) and Calhoun (1992) criticise Habermas for his inability to specify as to how the internal organisation of such a public sphere might be realised in terms of policies promoted by the social institutions of advanced capitalism. (Calhoun 1992: 29, 38). Calhoun (1992:36) notes that several other writers argue for the notion of multiple, sometimes overlapping public spheres between which should exist a field of communication flow. Dahlgren suggests that both public sphere and civil society need to be employed together.

Ward (2001) however argues that EU citizenship does not exist principally because Europeans don't care to discuss EU related news, and there is a lack of discursive communicative structures that make political community possible. Ward concludes that there is a democratic deficit amongst EU citizens principally because of the lack of communication between Europeans. Habermas (1995) suggests that the lack of intra-European communication is due to the fact that national public spheres are culturally isolated from each other within the EU.

Ward (2001) argues that in broadcasting policy formulation for trans-frontier broadcasting the EU has moved away from an early 1982 (Hahn MEP) notion of a trans-European public sphere and pan-European television channel and reverted to old ideas of leaving broadcasting matters to national governments (including, he maintains, the definition and funding of their own broadcasting systems).

However, the evidence of this thesis' research on policy formulation by the EU and their member states, and Ireland's role in this process demonstrates that Ward's position on the sovereignty of national governments of small states is not valid with respect to Ireland.

Yet there are others that fail to consider the need for a common European public sphere (Corcoran 2001). In my view, if television is to remain a national affair, then we can't expect any such form of a pan-European citizenship, or European cultural rights to take hold, in the manner in which Corcoran suggests, where citizens are bonded and willing to have civic responsibility.

2.6 Political and Economic Citizenship

2.6.1 Political Civic communitarian Model

For Habermas, citizenship is inherently associated with the political community, participation in public life, the discussion of news and public affairs. Habermas emphasises the neo-Aristotelian, civic humanist political community and the action of citizens forming part of a democracy. According to the civic communitarian model, politically active individuals in any community are eligible citizens, without restriction to a national identity as is suggested by Marshall.

The civic communitarian model that this thesis subscribes to is inspired by Aristotle and his concepts of public debate and collective deliberation; Dahlgren's argument that participation in society is the essence of citizenship, and JS Mill's ideas on public debate as well as Corcoran and Sinopoli.

Habermas (1995:261) draws on the tradition of political philosophy of Aristotle. Citizenship in this model is membership in a self-determining ethical community. This

model defines an essential component of citizen capacity as participation in self-rule: this is the essence of freedom.

He holds that the communitarian model creates single persons in pursuit collectively of their particular interests in a shared praxis (p262). The republican model is thus dependent on citizens' activity, and the institutions of constitutional freedom are only worth as much as a population makes of them.

Burke's ideal of a civil social man is also in the tradition of a communitarian vision of citizenship as put forward by Aristotle, Habermas, Marshall, Sinopoli, and Corcoran.

2.6.2 Liberal Economic Citizenship Model

Another conceptualisation of citizenship is nothing to do with national cultural identity, or civic praxis, but on the payment of taxes to the economic state.

Habermas argues the economic dimension of the birth of the nation state. The development of the modern state was necessary for the development of trade – the bureaucracy necessary for the imposition and collection of taxes to fund expansion into foreign markets needed to be centralised. Thus the Treasury was the focus of the town, and the modern nation was merely a state based on taxation, argues Habermas. (Habermas 1989:17)

Habermas argues that the modern nation began to take over from the town as locus of administration and power with the rise of mercantilist capitalism. The development of the modern state was necessary for the development of trade – the bureaucracy necessary for the imposition and collection of taxes to fund expansion into foreign markets needed to be centralised.

Some assume that 'national identity' came into being as a result of industrialization and the formation of nation states. This does not seem a wholly appropriate or applicable theory for Ireland, since it did not experience mass industrialisation of its economy, and additionally it appears that a national identity was in the midst of construction before the outright demand for separate nationhood from Britain. Thus, according to the

present author, trade growth pushed human rights, and, according to Habermas, it initiated the development of the modern state. Therefore a national citizen is just one member of the nation, who pays his taxes, or is on the tax register. The economic contribution of the person to the state is the over-riding factor of citizenship according to this premise, and cultural nationalism had little to do with gaining autonomy or individual rights. This researcher aligns with Habermas over Marshall – it is apparent that rights were not linked to national identity citizenship, or the state, but rather taxation and trade forced the issue of citizenship.

Habermas' thesis (Habermas 1995:257) is that nation states provided the conditions for capitalism to develop, providing also the infrastructure for central administration, and the legal framework for free individual and free collective action. The nation state also encouraged cultural and ethnic homogeneity. On the back of this, since the late 18th century and the French revolution, democratization of government occurred. Both nation state and democracy were born out of the French Revolution. Culturally, both have been growing in the shadow of *nationalism*.

Habermas views liberal citizens (Habermas 1995:261) as those who are keen to secure rights, ensure equal treatment and influence decision-makers. Citizens of a liberal model are private persons who bring their pre-political interests to bear in relation to the state apparatus, according to Habermas.

'Participation' in rule for its own sake is not valued, and in this sense, differs from communitarian citizenship.

Marshall writes on the rights associated with liberal economic citizenship: civil and political rights. Civil rights are those "rights necessary for individual freedom - liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice"(1950:10). Civil rights gave all men the capacity in turn to earn, save, acquire property through purchase or tenancy, and thus to enjoy whatever political rights were attached to these economic achievements.

Political rights are those that give the "right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body" (Ibid p20). In the 19th century capitalist society, political

rights were a secondary product of civil rights - it was the privilege of a limited economic class. The 20th century abandoned this rule, and attached political rights directly and independently to citizenship via the Act of 1918. Political enfranchisement of women was also introduced.

Calabrese and Borchert (1996) take the view that National Information Infrastructure (NII) could spawn future divisions according to economic class. They argue that one possible future for this technology is stratification along class lines, with the "new class" enjoying increased democratic opportunities at the expense of the majority of the population: the new 'class system' is separated as information rich from information poor. They propose the NII should be inserted into a wider framework of US social policy.

Yet, one of the reasons liberalism could not accept republicanism was because of the republican insistence on social redistribution –the use of one man's productivity or talent for the aggregate benefit. The central tenet of republican proportionate equality, social equality and redistributive equality was a key reason why liberals had to reject republicanism.

In response, the republicans took the stance that liberalism lauded 'economic man', he who maximises his private interests, and does little else to serve the community. Economic man is an anathema to Aristotle and classic republican views because it is their opinion that well-developed citizenship only results from participation in the polis, or political arena. Tocqueville noted that liberalism fosters an 'atomistic' view of self with regard to the wider society. Citizens think "of themselves in isolation and imagine that their whole destiny is in their own hands" (*Democracy* by de Toqueville (1994:508) quoted in Sinopoli 1992:32).

Liberals argue that they respect the dignity of each individual, who should be free to pursue his autonomous opinion and incentives, granting like freedoms to others. Individualism and autonomy are the hallmarks of a liberal community. The liberalist equality of freedom translates as no individual should be subject to coercion or use by another (especially by the state) for others' benefit. This foundational principle is phrased in the American Constitution by "The state shall not pass laws that would abridge... personal liberties".

No one person should be made to be subjected to another's conception of the general good. In fact, liberals do not believe any one concept of the general good could gain agreement from all the members of the political community. Brittan (1989:28) puts forward the solution of a free market in ideas because "The point is that no one person or group, or committee, or 'establishment' can be trusted to make a superior choice."

Why is the difference so stark between French republican and American liberal history? It could be argued that the difference between the prevalent French Republican collective community vis a vis the American liberal, individual, entrepreneurial social model lies with 18th and 19th century use and distribution of land. The particular land and property rights employed by the communities gave naissance to the particular form of citizenship – collective land rights and a redistributive social model in France, and individual entrepreneurship, and an essentially private model in America.

Thus far the EU has pursued a liberal model of citizenship, based on rights that facilitate the economic growth of capitalist development. However, it is also still tied to the national cultural republican model of national cultural identities and allegiances and rights, since there is no common allegiance as yet to a European political state. There is evidence to suggest that citizens of the EU are in truth citizens of nation states linked by a common currency, the Euro, or the trans-national market that the Euro aims to consolidate.

Habermas draws attention to the 'system integration' (1995:265) of economy and administration at the supra-national level based on the five freedoms of the common market, which as yet has not been complemented by coordination in other policy fields such as environment, fiscal, social policy, or education policy. While there is a push for political integration, political legitimacy thus far is only operative effectively at the level of the nation state.

2.7 Nationhood is civic institutional and territorial

McBride (2000:72) argues that Tone and his United Irishmen colleagues saw the Irish nation as civic and territorial only. According to his thesis, the United Irishmen did not

perceive of the Irish nation as an ethnic and cultural entity (in the vein of Hegel or Burke – both antithetical to the United Irishmen’s argument), but rather as a community of laws and institutions. He argues that citizenship in Ireland developed for economic and political reasons, but the cultural and social argument was added to reinforce their struggle against the British. (McBride, Whelan). I concur with their analysis.

For Viroli (1995, quoted in McBride 2000), the United Irishmen fought for patriotism as opposed to the Young Irelander’s nationalism. Patriotism, according to Viroli, encompasses hopes for political liberty and self-governance, as opposed to nationalists’ clamour for cultural purity, yet Habermas (1995:277) also suggests that citizenship be backed up by “a patriotic identity”.

2.8 What defines citizenship? Citizenship and communication

Dahlgren (1995) points out, that the nature of citizenship has metamorphosed over the centuries, and will probably change more over the future. Citizenship and its rights cannot be regarded as static – whether it is seen as a cultural, legal, political, or civic identity. Further, e-democracy experiments by Tsagarousianou (1998) showed that even in the modern day, the concept of what constitutes ‘citizenship’ differs markedly between countries and the expectations of urban centres within diverse national cultures.

Communication is central to citizenship. This view is held by Ward (2001), Closa (1996), Venturelli (1998), Garnham (1990), Calabrese & Borchert (1996), Murdock (1989), and Habermas (1989). These authors agree that citizenship rests and depends on excellent communication within communities, although the nature and scope of those communities may be in dispute between these same authors. Habermas (1989) also argues that communication binds a society, or holds a community together, while in a later article (1995), he argues that the ‘constructed collective consciousness’ that is known as nationalism spreads only via the channels of modern mass communication.

This researcher suggests that Habermas’ model of a deliberative democracy (Habermas 1994:32) is an ideal. This model according to Habermas hinges on flows of communication, rather than “the people” of “the” community. Habermas argues that democracy hinges on communication flows.

"Citizenship can today only be enacted in the paradoxical sense of compliance with the procedural rationality of a political will-formation, the more or less discursive character of which depends on the vitality of the informal circuit of public communication". ((Habermas 1995:269)

Authors are in dispute however as to the best way of securing and facilitating excellent communication between citizens in a post-national community. Habermas (1995) argues that national public spheres are culturally isolated from each other within the EU.

Ward arrives at the conclusion that there is a democratic deficit amongst EU citizens principally because of the lack of communication between Europeans principally caused by disinterest. Habermas also posits that there is a growing gap between on the one hand, the opportunities for citizens to participate in policy-formation or alteration and on the other hand, being affected by policy instigation (1995:267). Habermas insists that "an interplay between institutionalized processes of opinion and will formation" is required (1995:32).

He suggests that communication networks of European-wide public spheres may yet emerge, networks that may form a favourable context both for new regional parliamentary bodies in the process of merging, and for a European Parliament furnished with greater competence.

I concur with Habermas (1995:264) that a European citizenship should be rooted in a supranationally shared political culture of the European Community, however Ward (2001) argues that EU citizenship does not exist principally because Europeans don't care to discuss EU related news, and there is a lack of discursive communicative structures that make political community possible.

Chapter 3

Citizenship and the Public Sphere: Rights, Liberties and Issues

In this chapter, this thesis examines the democratic issues surrounding citizenship and communication rights (or what are referred to as “rights of the public sphere”). The most important issues as identified by landmark and related theorists are classified along the following lines: firstly, the issues of equality (of persons, resources, and education), and inequality. Many theorists argue that inequality (of persons, resources and education) should be compensated by a right to receive from society that which will help to balance inequality.

Secondly, communication theorists writing on audiovisual policies adopted by governments or the EU identify the issue of access (to media-transmitted information, and to the public sphere).

Finally, the issues of inclusion and exclusion relate to citizens’ input into the policy critiquing and policy-making process. This issue is examined in the light of research evidence detailing modern Irish, American and French approaches to the consultation of public opinion during the policy-making and policy-deliberation process.

In the second part of this chapter, freedoms and liberties relating to the subject of communication are outlined. These are sub-divided according to the current state of debate – between those who advocate the right to express (opinion), and those advocating the more encompassing right to communicate.

The chapter then follows with an examination of the present manner of arguing for citizens’ rights to expression and communication. The most prevalent paradigm at present argues that these two rights can be defended in World Trade Agreements as ‘rights to cultural diversity’, or ‘cultural rights’. The warrants underpinning this argument are critically analysed.

This thesis argues that fears of cultural imperialism fears, and insistence on the rights to cultural diversity disguise the underlying issue – that of fear of imperialism of trade autonomy, and loss of trade revenue, ostensibly, for that nation state itself.

Theoretical concepts of media and communication theorists centre on questions such as:

1. How are rights to be protected?
2. Who protects rights? Is it the responsibility or duty of national governments, Constitutions or international regulations and law?
3. Why protect rights?
4. What rights are to be protected, and how are they to be articulated? Free speech? Freedom of opinion? Freedom of expression? Liberty of the press? Freedom of communication? Freedom of communication, speech, and opinion?

This present author seeks to distinguish the manner in which these rights are similar to, differ from, or are in opposition to economic rights, trade rights, civil rights, or rights to property.

In relation to the empirical research of this thesis, questions guiding this chapters' discussion address:

1. What is the relative importance compared to other issues of governance, of the public sphere or democratic rights to communication issues for Irish policy makers?
2. What measures have been taken by Irish civil society representatives to secure Irish citizens' rights in the EU sphere?
3. What were the modes of consultation employed by the Irish government in devising audiovisual or broadcasting policy?
4. What form did public opinion take in inputting into the political public sphere?
5. What inputs have been made by stakeholders in Irish civil society to secure communication rights under discussion by EU decision-makers?
6. Who were the main policy actors?
7. And finally, how do policy practices or proposals today or in recent history relate to American (liberal), French-European (protectionist), or Irish (liberal) models of citizenship?

3.1 Equality and Inequality

3.1.1 Equality of persons

The sociologist TH Marshall (1950) was interested in citizenship and its impact on social inequality. In the landmark work, *Citizenship and Social Class*, he draws some general conclusions about the impact of citizenship on social inequality. For Marshall, there is an 'equality implicit in the concept of citizenship' (p30). Marshall's hypothesis posits that there is a type of human equality in citizenship that is full membership of a community.

Marshall is of the opinion that "Citizenship is a status bestowed on those who are full members of a community" (p28) and "All who possess the status are equal with respect to the rights and duties with which the status is endowed" (1950:28-29).

For Marshall, equality of status, not income was the primary objective. American society is unique for championing social freedom, not social equality. Marshall's hypothesis of basic human equality was not incompatible with economic inequality (Marshall 1950:77). Marshall's system differed from socialism because it would preserve the essentials of the free market.

Citizenship therefore for Marshall amounts to the acquisition of rights to enable full participation in a common political community. Yet, in historical circumstances the demand for human rights and basic treatment vis a vis the oppressor, ruler or monarch was often a demand for firstly, equal treatment, before subsequently demanding full civil and political rights.

"It is clear (Marshall) was taking as the standard of civilised life the conditions regarded by his generation (i.e. 1950s post-war Britain) as appropriate to a gentleman. ...the claim of all to enjoy those conditions is a claim to be admitted to a share in the social heritage, which in turn means a claim to be accepted as full members of the society, that is, as citizens" (Alfred Marshall in T.H. Marshall 1950:7)

Marshall's 'equality implicit in the concept of citizenship' (1950:30) has resonance in Habermas' insistence on the 'equality of common humanity' where a citizen is one

'homme' among many. Habermas' ideal participatory public sphere is a normative objective, yet never implemented. Yet within its 'institutional criteria' lies the centrality of egalitarian participation in political discussion by all members of the public on concerns common to them (otherwise referred to as the communitarian model of citizenship).

Although both Habermas and Marshall utilise the criterion of 'equality' for their definitions of citizenship, the notion of 'equality' needs to be explicitly defined. Amartya Sen (1992) notes that it is difficult to come to agreement on what and how it is decided that parity or equality should be given out: equality of what? he asks, and how should equality be accurately judged?

Equality of humanity, which Habermas promotes, would seem to take its lead from the 1787 French Declaration of Human Rights, its uniqueness lying in its attempt to incorporate all men (though not women) into citizenship to some degree. Everyone should be able to expect that all will receive equal protection and respect, in his or her integrity as a unique individual, as a member of an ethnic or minority cultural group and as a citizen, i.e. as a member of a polity. Kant states, "legislation can only issue from the concurring and unified will of everyone, to the extent that each decides the same about all and that all decide the same about each..." (Habermas 1994:24). Thus, everyone can expect to be respected by everybody else as free and equal.

Unlike the 1776 American Declaration of Independence, which allowed only men of certain property and religious criteria to choose American citizenship, the French Revolutionary declaration aimed to be, from the outset, much more universal and ecumenical. America was an influence on France taking the lead with a written Constitution, but French deputies of the National Assembly wanted something more universal than the American Declaration.

"As Duke Mathieu de Montmorency exhorted: "the Americans have set a great example in the new hemisphere; let us give one to the universe" (Hunt 1996:15)

In its turn, the French Declaration came to influence America – it was Eleanor Roosevelt in 1947 who proposed the change of wording from 'natural rights' to 'human rights', leading to the UN Declaration of 'Human Rights', though it is suggested that

Paine was the first to utilise 'human' in his English translation of the *Declaration des Droits de l'Homme*.

Habermas seems to suggest that humanity in democratic citizenship was the original aim of early 18th century German public spheres. The notion, later corrupted by capitalists, was to establish the 'parity of humanity' and thus welcome every human being as a citizen. Human rights possess a spirit of universalism –which all persons have in common in spite of their differences. Human rights emphasise humanity, a basic community of human individuals. Regardless of the particular society in which he lives, each individual retains his human rights. This right of equality amongst humans leads to a creed of human rights, though Marshall stipulates rights that are institutionalised within national constitutions (a model developed from Rousseau, Hegel, Herder). Fundamental or universal human rights must be capable of being extended to all persons regardless of country of origin, class, colour, creed or sexual inclination. They are universal, and global, representing the 'essential moral conditions that ought to be guaranteed to citizens in any social or political order' (Bellamy 1993:44).

Fundamental rights are generally granted equally to citizens and non-citizens alike. Closa (1996) maintains human rights are granted to everybody within the territory of a state. But in the EU some civil rights, particularly the free movement of people have been elevated to the status of a 'fundamental' right.

Thomas Paine and the New World emphasised the equality of each individual, so much so that it brought de Tocqueville to remark on America's liberalism as a 'natural phenomenon', noting that

"The great advantage of the Americans is, that they have arrived at a state of democracy without having to endure a democratic revolution; and that they are born equal, instead of becoming so." (*Democracy in America* 1835, quoted in Hartz 1955).

Recall at this point that Thomas Paine and his *Rights of Man* were the great inspiration for Wolfe Tone and the United Irishmen in the late 1700s. Add to that the revolutionary rhetoric of the uproar in France, and the Protestants in Ireland were facing a major Irish rebellion by 1798. Thomas Paine's individual liberty was at odds with Burke's insistence on tradition and custom, his advocacy of quiet, slow change and his

determination that men's ties woven together over generations should not be dissolved overnight.

However, while debates over inclusion and exclusion of citizens were uniquely wide-ranging in France between 1789-92, opening the discussion to ponder on civil and political rights for women, Jews, Calvinists and other minorities in their land, Americans were much more intransigent to opening the discussion of citizenship rights to slaves or women, servants or property-less men.

America's contribution to the notion of 'equality' rests in the 'freedom of equality' as championed by Thomas Paine and the New Society. America valued social freedom, not social equality. Social equality and equality of resources is a distinctly European tradition, some authors linking it to Babeuf and Marechal, who dreamed of a 'community of wealth' in post-feudal Europe.

It is technically correct to stress that real citizens in the 18th century were propertied, wealthy, educated, or clergy. American citizens were white, male, propertied, and practised the 'correct' religion. Post-Revolution, French citizens were to be both male and female - everyone was to be included. In 18th c. Ireland, citizens were Cromwellian Protestant planters and landowners. The point that must be emphasised however is in the nature of the debates over citizenship, over who should be included and what rights should be bestowed, between the New and the Old World.

A common thread between the French and American Revolutions was their declaration of the equality of rights of persons. However, differences emerged in their respective debates on who belonged or could belong to the public sphere of civil society.

Although later abolished by the Jacobin Republic, the French 1791 Constitution first drew a distinction between 'active' and 'passive' citizenry. Active citizenship entailed political rights, and passive citizenship allowed equality in non-political matters.

In France, the initial distinction between 'active' and 'passive' citizenry proposed in a pamphlet by Abbe Sieyes in 1789 was influenced by Lockean associations between citizenship and individual property ownership. Sieyes accepted that in order for political office to be open to those with talent, not privilege, it was justifiable to request that such

talent must first be demonstrated by the ability to acquire property. Active citizens were to possess political rights – they could vote and hold office, while passive citizens could enjoy civil rights, including equal protection under the law in matters of marriage, property, or religion. Passive citizens could not however participate directly in forming a government or exercising governmental authority. While the issue of a constitutional distinction between active and passive citizenship was viewed by some to be in direct opposition to the universalism of the Declaration, the notion was passed into Constitutional law until the idea was abolished completely in 1792.

However, unlike America, the French were open to discussing citizenship rights and total inclusion for all men, regardless of colour, race, or religion. Unlike America, there were strong political associations of women in France who demanded better education and better protection of their property. America (in particular the Southern states that relied more heavily on the lucrative trade) came very late to the discussion of the abolition of slavery. Slavery was finally abolished in the French colonies in 1794, but it took the Americans until 1862-88 to do the same. In Ireland, Burke and the United Irishmen both pushed for the inclusion of Catholics into the citizenry – there, it was an issue of sex, religion, as well as wealth and property. Irish Catholics demanding citizenship clamoured for a restitution of their land and confiscated property.

3. 1. 2 Equality of Resources

Marshall argued that systems of capitalism and social class are defined along lines of inequality. He asks how it was so that capitalism (a system of inequality) and citizenship (an attempt at encouraging equality amongst community members) grew and flourished simultaneously in England during the same historic period? For a time they were allies, not enemies, unlike in the 20th century.

Marshall's aim is not for absolute equality. The aim is "to remove inequalities which cannot be regarded as legitimate, but the standard of legitimacy is different". It is possible that the inequalities permitted by the two halves of the movement (citizenship and economic systems) will not coincide (1950:77).

He notes (*ibid*, p21) that remnants of inequality based on differences of economic substance lingered on until 1949, though they have not gone away in 2003. Marshall argues that the more wealth is regarded as conclusive proof of merit, the more poverty is seen as evidence of failure. This is a representative modern neoliberal view of society (Marshall 1950:32).

Locke's theory of liberal rights centred on a theory of individual rights – individual civil and individual political, in order that the freedom of individuals would not be violated by state repression. Classic liberalism (as defined by Beiner, 1995) is a type of political community which operates in the service of individual identity, and there is a primacy of the individual over the group. However, Sabine (1951) argues that the liberal conception of a free society was one that finds “a workable relationship between the common good and a multiplicity of private, sectional and class interests.” (Sabine G.H. 1951:625) Liberalism can be regarded as broadly identical to the modern meaning of ‘democracy’ wherein a liberal government seeks to respect and integrate not only the rights of individuals but also the rights of communities.

Civil rights were designed to compensate for social inequality that arose from a result of freedom replacing protection. Civil rights gave to each man the power to try and make a living independently, in the economic struggle. And they made it possible to deny him social protection on the basis that he was equipped with the means to protect himself. Only women and children were allowed social protection from charitable bodies, but in accepting this they renounced citizenship (1950:33).

Civil rights confer the 'legal capacity to strive for the things one would like to possess but do not guarantee the possession of any of them' (*ibid*, p35). For example, a property right is a right to acquire and protect property if you can get it, but it is not a right to possess property.

Civil property rights are currently associated with either the protection of intellectual property (in the form of patents, copyrights or trademarks and the payment of royalties), or in media studies, with the ownership of communication systems such as broadcasting, telecom, cable systems and whether they are privately or publicly owned.

In such cases, property rights are owned by an individual – which may also be a corporate entity classed as the same – whose freedom the state should respect.

Trying to balance the right of the media to liberty of expression (as articulated in US and Irish constitutions) with the right of citizens to receive a widely representative range of views in the interests of democratic participation (as outlined in the European Convention on Human Rights) is a current dilemma. Media corporations actively defend against state impositions or restrictions by utilising the freedom of communication claim, often employed to further their own commercial enterprise, suggests Feintuck (1999:13) while simultaneously restricting the variety and nature of opinions represented. The problem with the positively stated and expressly defined freedoms of the American constitution, developed in response to the "perceived tyranny of the ancien regime in Europe" (ibid, p181) is that increasingly they are being used against the pursuit of common citizenship interests in mass communication by "corporate media giants [who] can utilise such rights much more effectively than the individual citizens for whom they were intended historically". (ibid, p182)

Increasingly, the question is being asked whether media institutions enjoy greater or lesser protection of their citizenship rights than individuals. Janowitz (1980), like Marshall before him argues for increased emphasis on citizen obligations, rather than the familiar insistence on protective legal rights. With this shifted focus, he argues, the quality of a citizen would be determined according to the sense of civic responsibility he gave to the community welfare. Thus, media organisations, like any other citizen would be subject to Marshall's citizenship caveat: "If citizenship is invoked in the defence of rights, the corresponding duties of citizenship cannot be ignored". (Marshall 1977:9)

Marshall believed that a free market was not incompatible with communitarian redistributive rights, although they might lessen its competitiveness. He hoped that the expansion of social rights could modify the capitalist system so as to bring about equality in the realm of both class distinctions and economic well-being. Marshall must have assumed that the modern industrial community would eventually stabilise. However, the conflict between the free market and measures to provide equality in the

modern age is still raging. The development of the Information Society is beset with the problematic of a 'digital divide' in the 21st century.

Marshall stipulated that "measures designed to raise the general level of civilisation of the workers must not interfere with the freedom of the market. If they did, they might become indistinguishable from socialism" (1950: 80), but his focus was on the policies of Britain, with a social-democratic government in power.

He would have 'deplored' State interference if that would have meant defining a list of legal rights to which all men were entitled (Marshall 1950:8) although he readily admitted that "the preservation of economic inequalities has been made more difficult by the enrichment of the status of citizenship". There is less room for them, and there is more and more likelihood of their being challenged (Marshall 1950:77). Rights invested in the status of citizenship (freedom, common law, national justice and so on) would obviously undermine social class inequalities and the injustice of the whole class system, based as it was inherently on inequality. Social rights of the 20th century have imposed modifications on the capitalist class system, as they subordinate market price to social justice.

Marshall proposes the social right to a guaranteed minimum.

"The State guarantees a minimum supply of certain essential goods and services (such as medical attention and supplies, shelter, and education) or a minimum money income available to be spent on essentials - as in the case of Old Age Pensions, insurance benefits, and family allowances." (1959:54)

His aim was to ensure that all citizens should attain at least to the prescribed minimum, either by their own resources or with assistance if they could not do it without (p54). Hence benefits were to be given to only those in real need.

Calabrese and Borchert (1996:262) agree that the intervention of the welfare state is justified when citizens have basic needs that need to be met and fulfilled before they can realistically participate in society, and thus act as enlightened citizens. This has been always a major justification for publicly funded education. They fervently adhere to Marshall's social rights system, which provide the means required to secure access to

the prevailing standard of living, and thus the full benefits of citizenship - this for Calabrese was a strengthening of the 'positive' concept of liberty.

Corcoran suggests that the public service broadcaster receiving public funds is justified in offsetting market failure in the audiovisual market. He argues that public funds are needed to re-dress the balance for citizenship needs (2001:30). This researcher agrees, but suggests that a new balance of programming should fit the bill - not information, education and entertainment about the nation state's common culture, as Corcoran proposes.

Corcoran argues that widespread market failure in broadcasting exists, but unlike Marshall, he argues that if the market fails, governments must step in. *Marshall stated* that the State would be responsible for granting those rights yet would have led "step by step, to acts of State interference which he would have deplored" (p8). Corcoran employs the principle of publicity developed by Emmanuel Kant which underlines the importance of (public service) broadcasting in promoting citizenship, and which represents a key justification for public funding to offset market failure.

3.1.3 Equality of Education

In general it could be said that social collective rights predominated in Europe by grace of the Keynesian or welfare state regimes. However in the sphere of education in Britain, individual rights were given priority over collective rights from the early 1940s. Rather than having to compete in a lottery for secondary and higher education, there were moves to have 'selection and distribution into appropriate places, sufficient in number to accommodate all, at least at the secondary school level' (Marshall 1950:63). Education according to different ages, abilities and aptitudes - representing absolute priority for individual rights - was to be provided through an extension of the social right. One positive result of the United Irishmen's struggle for independence was to highlight the need for free Catholic education on the political agenda. The British conceded and an Education Act was introduced in Ireland in the 19th century.

Marshall's right to 'be educated' falls on the government, and he classes this as a social right for the citizens (p62). Marshall identifies two strands of education rights – the right of the citizen to be educated, and secondly, the need of the government to have an educated public. It is possible however that not all governments favour this idea, and they actively prefer their people to be, and remain ignorant.

Marshall argues that the education of children is essential to the perpetration of citizenship because the State, when guaranteeing that all children should be educated, is trying to stimulate the growth of 'citizens in the making'. The right to education is a social right of citizenship because the aim of education during childhood is to shape the future adult. It should be regarded as the right not of the child to go to school but as the right of the adult citizen to have been educated. Without education, people cannot exercise their civil rights - for civil rights are "designed for use by reasonable and intelligent persons who have learned to read and write. Education is a necessary right of civil freedom" (p26). Education was the first of the 20th century's social rights.

The central tenet of the republican citizenship model of proportionate equality, social equality and redistributive equality was a key reason why liberals had to reject republicanism. The liberalist emphasis on equality of freedom translates as no individual should be subject to coercion or use by another (particularly by the state) for others' benefit. This foundational principle is phrased in the American Constitution by "The state shall not pass laws that would abridge...personal liberties".

If one of the reasons liberalism could not accept republicanism was because of the republican insistence on the use of one man's productivity or talent for the aggregate benefit through a system of social redistribution, in response, the republicans took the stance that liberalism lauded 'economic man', he who maximises his private interests, and does little else to serve the community. Historian Lance Banning believes classical republicanism views merely economic man as "less than fully human". (Sinopoli 1992:13)

Marshall and Habermas both stress 'equality' in citizenship, a concept that is held in common by both American and French Declarations. However, it would appear that Habermas aligns himself more closely with the spirit of the French Declaration in

qualifying the criteria of 'equality' with a communitarian – universalistic – humanitarian vision of 'equality of humanity'.

In both American and European Declarations, the equality of rights of persons is established for the first time. Both communities specify both civil and political rights, though they differ from each other in assessing who should garner which category of rights, and who should be included.

3.1.4 Right to Receive

The right to receive is a 'positive liberty'. It seeks to actively use government mechanisms to meet people's common basic needs through the intervention of the welfare state. Others focus on the rights to the provision of goods and services, in terms of social benefits provided in a public service:

Asa Briggs defines the welfare state:

"A 'welfare state' is a state in which organised power is deliberately used (through politics and administration) in an effort to modify the play of market forces in at least three directions: First, by guaranteeing individuals and families a minimum income irrespective of the market value of their work or their property; Second, by narrowing the extent of insecurity by enabling individuals and families to meet certain 'social contingencies' (for example, sickness, old age and unemployment) which lead otherwise to individual and family crises; and Third, by ensuring that all citizens without distinction of status or class are offered the best standards available in relation to a certain agreed range of social services." (Briggs 1961: 228-250)

Calabrese and Borchert (1996:249) and Feintuck (1999) argue that communication policy should be put centre stage in any meaningful discussions about the future of the modern welfare state. Calabrese and Borchert argue that a revitalization of the welfare state, including a fuller consideration given to communication policy within an expanded social policy is essential in order to mitigate against the shaping market imperatives of capital accumulation.

The authors focus on the state's obligation to promoting civic competence and ensuring communication needs (as defined according to welfare state principles, which they uphold) are fulfilled so that people can actively partake as citizens. Calabrese argues for

universal service, others (Raboy 2002; Preston and Flynn 1999) argue in favour of public service.

Hamelink explains that universal service as standard has been in existence and essential to the provision of telecommunication services since the beginning. He cites the 1934 US Communications Act which provided "to make available, so far as possible, to all people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communications service with adequate facilities at reasonable charges" (Hamelink 1995:96).

But, the 1997 WTO Agreement on Basic Telecommunication Services (signed by 70 countries) has implications for the governance of the basic infrastructures of communications. On universal service it says

"Any member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and *are not more burdensome than necessary* for the kind of universal service defined by the member." (Italics added)

The Basic Telecommunications Agreement's "essential focus is on access to markets for telecommunication service providers, and not on public access to telecommunication services" argues Hamelink (1998:72). He concludes that the WTO approach to universal service favours the business interests of foreign corporations over the social interests of a nation's citizens.

Hamelink suggests that privatization and liberalization force universal service out of the picture. He is doubtful that private enterprises will make efforts to meet public obligations of universal service, or universal access. (p96)

Calabrese and Borchert (1996) also argue for universal service provisions. Previously, telecommunications companies in the USA were obliged to provide "common carrier" service. Common carrier service provided transmission capabilities to anyone who could pay the going rate (whereas, broadcasters on the other hand, do not have to provide access to anyone who can pay for access). However, recent shifts in

terminology have been from the action of providing “universal service from the telecom network” to the state of “universal access to the network”.

Hills (1989) explains in (Hamelink 1995) that,

"The argument adopted by consumer groups in the USA is that access is not universal service - that the telephone should be priced at a level which makes it possible for disadvantaged groups to use it for social reasons rather than simply as an emergency service" (Hills, 1989:141)

Hamelink argues that “The Court (of Human Rights) has in its opinions over the past years judged that the human right to receive (in Article 10 of the 1950 Convention) should be interpreted in a democratic society as “the right to be properly informed about matters of public interest””. (source: personal correspondence)

Article 10 relating to Freedom of Expression of the European Convention of Human Rights (ECHR) provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The essential points to remember about the ECHR is that firstly, Article 10 applies to ‘everyone’ and that means as well as a private individual, a limited company, or a journalist, newspaper, book publisher or broadcasting organisation. The commercial nature or character of the applicant is not relevant and does not deprive the individual from protection of rights under the Convention. (Merrills and Robertson 2001:169) Corporate persons under the Convention have as much rights as individual persons.

Secondly, with regard to the nature of the ‘information and ideas’ that should be freely expressed and received, there is no restriction on the nature of the content. That is, although case law has not as yet provided a precise definition of the terms ‘ideas’ and ‘information’, the Court (in *Groppera Radio AG* case) decided that broadcasting and

retransmission of programmes were covered by the right enshrined in the first two sentences of Article 1 “without there being any need to make distinctions according to the content of the programmes”. (Series A, No. 173, para.55)

According to Merrills and Robertson (2001:169) case law on the right to receive information is thin on the ground, although some indications have been established as to how this ought to be interpreted. Note above Hamelink’s argument that case law has led the European Court of Human Rights to interpret this ‘human right to receive’ information and ideas as “the right to be properly informed about matters of public interest”.

According to a Court judgement (Dichand and others V. Austria, 2002) “the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (De Haes and Gijssels v. Belgium judgment of 24 February 1997, *Reports* 1997-I, p 233-234, § 37). Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog” (Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p28, § 63; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III)”.

In three cases (the *Leander* case, Series A, No. 116, para. 74; the *Gaskin* case, Series A, No. 160; and the *Guerra* case, judgement of 19 February 1998), the issue arose of obligations of government to provide information to a claimant. Merrills and Robertson report that ‘The Court rejected the claim under Article 10, holding that freedom to receive information did not involve a *positive obligation* to collect and disseminate the information in question. It is clear therefore that the right to receive information does not entail a corresponding obligation on the part of government to provide it. However, if a person is prevented from obtaining information from other sources, Article 10 will be relevant.’(Ibid, 2001:170)

The second part of Article 10 details the authorised limitations in order to facilitate the ‘duties and responsibilities’ that accompanies the exercise of freedoms in the first paragraph. In some cases, the Court has emphasised the responsibilities of publishers

(not to publish obscene magazines for children in the *Handyside* case) or the duty of the Press to “impart information and ideas on political issues” (*Lingens case*, Series A, No. 103, para.41). The Court in this case emphasised the necessity of Press freedom and the concept of the Press as playing an essential part in a democratic society and the reasoning of individuals. The principle also that restrictions on the Convention’s rights and freedoms should not be encouraged, implying therefore that it is rather freedom of publication that is more important, and restriction should only be exercised in exceptional circumstances.

So, in conclusion, this author’s reading of the interpretation by the Court of ECHR Art 10 has led to decisions indicating that the right to receive information and ideas is not the obligation of governments (to provide and disseminate that information), but there is a duty on the shoulders of the Press and publishers to distribute as widely as possible information and ideas on political issues, without restriction and only then in exceptional circumstances, and thus play an essential part in the reasoning of individuals within a democratic society. According to the ECHR, there exists no duty on government to provide certain types of information, yet the responsibility to provide information necessary for democratic involvement lies with the Press and publishers.

A caveat however to the above – the EU is not a signatory to the ECHR, and this is one reason why it developed its own EU Charter of Fundamental Rights. In this, the ECHR Article 10 has lost some of its potency, for the Article on Freedom of Expression and Information (Article 11) in the EU Charter states:

1. “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected”.

Thus, the EU does not recognise corresponding duties and responsibilities (as in the ECHR) for either States or the Press. While the European Commission therefore is due to respect the rights incorporated in the Charter, these provisions are in relative terms, weak. What must be remembered about the EU is that it is not a state, and it only has the extent of powers that are transferred upon it by member states. Therefore, it can only

protect citizens' fundamental rights in the areas where EU law applies. (In the area of culture, and social policy the EU does not have competence, and thus cannot protect citizens' rights in these spheres.) And since the Charter for Fundamental Rights is a political agreement without being legally binding, the extent of the Charter's force may be only that it will be *taken into account* by the ECJ in its decisions. However, because the ECHR goes further in many areas than the EU Charter, it could be that the ECJ will continue to take inspiration from the ECHR.

As Feintuck (1999:8) points out, "In the interests of understanding how systems of media regulation operate and the roles that the law plays, it will be necessary to examine the range of constitutional fundamentals that inform systems for media regulation in different jurisdictions under different constitutional arrangements". Judicial decisions and administrative law in the area of media regulation (e.g. Broadcasting Acts) are informed and guided by normative principles, formulated according to diverse constitutional contexts, historical backgrounds and traditions. The Constitutional obligations regarding *citizen rights and freedoms are value-laden*, and provide the framework of expectations and values that should inform an area such as media regulation. The important feature of these institutional dimensions is that they are stabilised by fundamental legal rights (Dahlgren 1995:127). They are a fundamental organising principle, and for any democratic right, they must be vigorously defended and expanded. Yet Feintuck is adamant that when considering media regulation in other jurisdictions, it must be viewed within the different constitutional contexts, backgrounds and traditions to regulatory activity. Different constitutions will give rise to different competencies. (1999:35)

The Irish Constitution (Kelly J. M., 1994) provides for the right to communicate in Article 40.3, the right to Freedom of Expression (Art. 40.6.1.i) and in Article 45 the Constitution gives guidelines on Directive Principles of Social Policy.

Art. 45.2.iii provides that "The State shall, in particular, direct its policy towards securing... That , especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment." Mr de Valera had stated in

the Dail debate on the Article that it should serve to be 'a constant reminder to the legislature of the direction in which it should work'.

Although views within the Constitutional Review Group in 1996 were divided as to whether Article 45 should be deleted altogether, or retained in an amended (more modern form), some objections against deletion were raised. In particular, it was reasoned that the Article asserts principles of continuing relevance and importance in a democratic society, and to abandon them altogether after almost 60 years in force might suggest that the principles set out were deemed to be no longer useful, even if renewed in a different wording in the context of EU membership (1996:392).

The principles of continued relevance included that of concern for the distribution of ownership and control of material resources so as best to serve the common good, and that of retaining primary concern for the interests of all the people (i.e. for social inclusiveness) over sectoral interests, however powerful their political influence.

The Irish Constitution's protection of freedom of expression is set out in Article 40.6.1.i. states:

"The State guarantees liberty for the exercise, subject to public order and morality, of the right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law."

According to the Constitution Review Group (1996), the current Irish Article protecting freedom of expression should be replaced by a new clause protecting the right of free speech modelled on the Article 10 of the European Convention of Human Rights. While, according to Kelly (1994), Article 40 of the Irish Constitution could be interpreted by the courts as *not extending* to the dissemination of factual information (p924), Article 10 ECHR "explicitly recognises the right of citizens to receive and impart information" regardless of frontiers and subject only to other "legitimate interests deserving of legal protection" (EC Directive on Conditional Access (EC Directive 98/84/EC of 20 Nov. 1998).

The Constitutional Review Group raised the question of whether the media (organs of public opinion) should have a constitutional obligation to afford access for the expression of a widely representative range of views in the interests of democracy. (1996:293). The media, they argue, should not only have the freedom, but also the responsibility for upholding democratic principles. An indication of a similar manner of thinking was demonstrated in America by former President Clinton between 1997-1998. Clinton announced the establishment of the *Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*. The Committee was expected to study and recommend "what public interest responsibilities should accompany the broadcasters' receipt of digital television licenses"³ On the other hand, the Review Group opined, "No private medium of expression can be compelled to express particular opinions or even a representative range of opinions without infringing the right of free speech." (1996:295)

3.1.5 Social rights

Social rights according to Marshall amounted to "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society" (1950:11). The education system and social services developed out of 20th century social rights.

These social rights were to guarantee a minimum income, an elementary school education in basic literacy, and a provision of 'essential goods and services'. Marshall included shelter and medical goods and services. Others argue that communication services also form part of this package.

Habermas (1995:268) comments that social rights from a functionalist point of view signify the installation of a welfare bureaucracy, and from a normative viewpoint, they grant the compensatory claims individuals make to a supposedly just distribution of social wealth. It appears that Habermas doesn't think they will achieve equality in the sense envisaged by Marshall.

3.1.6 Social rights in GATT, (General Agreement on Trade and Tariffs)

For France, the Common Agricultural Policy (CAP) acted as a kind of social policy. France's original deal with Germany in the 1950s when the EEC Treaty was drawn up was a bi-lateral understanding between the two that "that Germany was going to have to pay for the benefits of the common market, because they would benefit in the industrial area and France was going to have to be recompensed in the agricultural area" (D/ENT-EMP 1, interview).

France, like Ireland, needed to find a solution to its problem of large regional populations and the maintenance of them. France favoured the retention of an image of rural antiquity on the land, an element respected as an aspect of French national identity, and the CAP helped them to maintain that. In Ireland, "Politically [agriculture remains supremely important] because it's an important value in Ireland and the people hold to that value – the life of the land, the life of rural Ireland, there is a need for things to be done to maintain the standard of that life in rural Ireland. Things are changing of course in terms of Europe, and things will change with the next Enlargement." (D/ENT-EMP 1, interview, Dublin)

Despite the strong farm lobbies in Ireland, the problems with rural counties like Mayo, Leitrim, Roscommon and Donegal, and the heavy presence of representatives from the department of Agriculture located in Brussels and Geneva, it remains an issue in which Ireland is a small player. France has always been the most vocal supporter of agricultural subsidies, and the greatest defender of the maintenance of the CAP. For Irish interests too, the CAP remains an issue close to the heart of the Irish government, and in Council meetings, Ireland would tend to row in behind the French stance on CAP and would tend to support a slower progression towards liberalisation of trade in the farming and agricultural sector.

Therefore, France and Ireland followed the same thinking with regard to agricultural trade rights, cultural heritage and social welfare rights. According to this view, it is valid to perceive farming, agriculture and rural landscaping as a 'cultural objective', and it is acceptable to provide large support subsidies for the preservation and continuation of a traditional 'cultural activity' or the sustenance of a cultural dimension of the

landscape. Akin to the idea of CAP as a social policy, France was instrumental in the proposal and push for a 'social clause' within GATT, to protect the social rights of citizens, and of farmers or agricultural producers. This was proposed firstly in 1986 before the Uruguay Round of GATT commenced and again in late 1994 when all members wished to see the Uruguay Round speedily and successfully concluded. The EU was always resistant to the inclusion of a 'social clause' in GATT, and the French proposal didn't get very far. When the suggestion was raised once again, at the point at the end of 1994 when negotiations on difficult sectors were getting stickier, it was wholeheartedly regarded as an "aunt sally" proposal. The French pushed hard for the social clause, but relinquished this demand later for a real concession on agriculture. Once France had secured a respite on the liberalisation of trade in agricultural products, they dropped their hardened stance on the social clause. The Irish negotiator in Geneva suggested, "We think we've got problems with Mayo and Leitrim and Roscommon and Donegal and so forth, but France has got massive problems in terms of its regional populations and how to maintain them." (D/ENT-EMP 1, interview). The key aspect of this issue is employment, and sustaining populations in rural areas.

In later years the European Parliament took up the banner for a 'social clause in trade agreements', the Socialists in particular arguing that there should be 'no global market without a social dimension'. However, although this gained widespread support within the European Parliament, it was never supported by the European Commission and was not pursued as a demand at the 1996 Singapore review of the World Trade Organisation (WTO)⁴. It was viewed to be a demand that would never be supported by the supporters of the free market within the EU of member states (Britain and Germany particularly) nor by the ASEAN nations in the WTO.

This is an example of a Socialist – European Parliament - French attempt to insert 'social rights' into trade agreements. This represents a failed vision by those parties, yet they maintain the 'social rights' pressure on the WTO. Could CAP be articulated as a cultural objective? As creation of audiovisual production is a cultural objective, protecting the traditions of the rural community could also possibly be viewed as a cultural objective related to the cultural identity of rural communities.

3. 2 Access and Restricted Access

“The public sphere of civil society stood or fell with the principle of universal access. A public sphere from which specific groups would be eo ipso excluded was less than merely incomplete; it was not a public sphere at all. “ (Habermas 1989:85)

For Habermas (1989), equality of access (to political participation) was primary. For Habermas, the communitarian model of citizenship within the realm of communication facilitated the participation of all (i.e. readers) to engage in critical public debate. In practice, notes Habermas, only property owners and the educated were ‘full citizens’.

Habermas outlines the ‘ideal’ bourgeois public sphere (or, public civic life) as being ruled by three principles: firstly, the law of equality of ‘common humanity’. Discussion was to disregard status, the better argument possessed the potential to assert itself against the ranks of social hierarchy. Even the lowliest participant could assert himself through the means of reason thereby establishing the equality or parity of ‘common humanity’ (Habermas 1989:36). Secondly, discussion centred on ‘issues of common concern’ which had previously received uncritical treatment by the authorities of Church or State but which were now of critical importance to the activities of a capitalist class. Thirdly, the discursive public represented an inclusive public, open access being the central tenet: “Everyone had to be able to participate, and the groups established the public as in principle inclusive” (1989:36).

Venturelli (1998a) posits that Habermas draws on Aristotle, Kant and Hegel. His attempts to formulate a theory of public communication draw on a neo-Aristotelian theory of public freedom – i.e. participation in public space on equal terms (p91). Habermas also attempts to rework the moral liberalist Kant and his principle of publicity which asserts that for democracy to be valid, “there must exist fully public communicative processes unconstrained by unequal and distorted social and economic forces” (Venturelli 1998a: 33). Additionally, argues Venturelli, Habermas draws on the thought of Hegel and his approach that public freedom is dependent on the democratisation of the institutional organisation of civil society. This results in an assertion that, by combining neo-Aristotelian communitarian principles with Kantian liberalist theories, in order to provide public spaces capable of producing valid social

outcomes there must exist: “first, fully public communicative processes unconstrained by political or economic force; and secondly, public space must be public in terms of universal access in order for all those possibly affected to be admitted.” (Venturelli 1998a: 92)

Venturelli’s own thesis asserts Kant’s principle of publicity as providing the standard by which democratic governments and rights can be judged as promoting (or not, as the case may be) public participation in public space. Kant’s key point is the exercise of reason and basing judgement on reasons. Freedom for Kant is participation in public space where citizens can deliberate and be ‘convinced by reason’ (1998a:14). Venturelli posits communication rights as political and moral rights, asserting a Kantian right to publicity. This differs to the right of freedom of expression, in that the right to publicity denotes “right of public freedom of speech, knowledge, information, and participation”. This researcher concurs with Venturelli that Habermas’s argument is also based on the Kant definition.

Habermas’ insistence that everyone should be able to participate in civic ruling is complemented by Marshall’s drive to provide the practical necessities (particularly education) to make use of this institutional right. Habermas identifies the *Deutsche Gesellschaften* (Germany reading societies) as those that made the first moves towards social inclusiveness. Later, the French constitution was formulated, and private people were from that moment on characterised as citizens of the Constitutional state. While the notion of a Constitution was novel in France, written constitutions were a political tradition in the New England colonies. Rousseau followed the American Declaration almost by word. Fundamental principles included the notion that all human beings were in principle included in its public sphere, being born free and equal.

Habermas identified a second barrier to equal participation in society. If the first was the illiteracy of the masses that precluded their entry to the public sphere, the second was their lack of financial resources that prevented them from paying for the reading matter under discussion. Between the literate and non-literate public lay a wide gap of income inequality. Habermas notes: “They did not have at their disposal the buying power needed for even the most modest *participation* in the market of cultural goods” (Habermas 1989:38, italics added).

Cost, for many media communication theorists is the key problematic with regard to modern day access to the public sphere.

There is concern about the price of access to new media too. Public service broadcasting prided itself on being available at low cost to the entire nation, and of its status as a non-profit making organisation. Ireland's licence fee now costs 150 Euro, following an increase of 40% in 2002. Former president of the American Library Association, Patricia Schuman is one of those concerned that "we are rapidly moving into an era when we will pay an increasingly expensive fee for information that in the past was...provided free" (Pavlik 1998:306). Since the costs of original production are ever increasing, profit can only be garnered from the repeated distribution of product which has already recouped its costs.

Venturelli (1998a), Mowlana (1997) and Calabrese & Borchert (1996) all debate the issues of concentration of media institutions, their power of monopoly over access to their products and services, and the commercial market pricing of their goods.

In response to this requirement for fulfilment of citizenship rights to participate, Marshall called for a universal (social) right to minimum income to be incorporated into citizenship rights so that everyone could enjoy the standard of the norm in society. Marshall was particularly focused on the material well-being of each person in the community, and the level of economic welfare needed to be able to fully participate in citizenship. Marshall makes the valid point that the fair level required for 'decent' living is according to the prevalent standards of the day.

Common concerns between Habermas and Marshall include the fact that Marshall is preoccupied with allowing citizens to participate in full membership of the community through the acquisition of civil, political and social rights. His is a sociological pursuit of a broader relationship between the citizen and society as a whole. Habermas is meantime focused on the importance of the public sphere as a mode of societal integration, analysing the social conditions necessary to stimulate a rational critical debate about public issues (Calhoun 1992:5). Habermas' citizenship is more akin to the stricter political definition of a citizen and his or her relationship with the State.⁵

3.2.1 Universal access in media – the public service tradition

Raymond Williams traces the notion of a broadcasting system operating as a public service back to the Victorians' sense of social duty on behalf of the community and those most in need of reform, especially with regard to their cultural and educational needs (Williams 1961:313-317 in Scannell 1990:22). According to Williams it was this Victorian idea of public service and education of the poorer classes which helped formulate the public service ideals of broadcasting in its early era from the 1920's to the 1950's.

Jean Seaton (1988:120) argues instead that, rather than a prevalent Victorian ethos of public service, it was the socio-political environment in Britain in the 1920s that helped to formulate opinion and garner acceptance for a public broadcasting service. The population by the end of the First World War were well accustomed to (although not entirely in favour of) the centralisation of all services under government control in the 'national interest'. Broadcasting was developed in this mould because of the acceptance of both government and population that centralised distribution and control of resources in the best interests of the security and welfare of the public.

On the other hand Beveridge, like Marshall, was opposed to the social consequences of industrial competition, and the *restriction of consumer choice* in favour of the profit-generating product that accompanies free market forces (Beveridge 1934 cited in Seaton 1988: 120). Reith also was of the commonly held view in that era (according to Seaton), that capitalist competition could be inefficient in its management of resources. Raymond Williams argues that it was possible to develop a concept of 'public service' in Britain in the 1920s because of the general social-political shunning of market competition in favour of state regulated protection. (Ibid, 1988: 134)

Reith's main objective in serving the national public interest was to provide a service that would be accessible to all people of the nation. This was possible to procure because the British Broadcasting Corporation was motivated by social not financial reasons. The BBC did not aim to make profit, all revenue was redirected into programme making and so the extent of transmission reception was not limited to

profitable urban areas. Paddy Scannell illustrates how the BBC, in its effort to make its services available to all “has meant an investment out of all proportion to the returns in order to reach those regions that strictly economic considerations would simply neglect” (1990: 25). This meant installing sixty-five new transmitting stations in order to extend its reach of the population by 0.1% to the 99.1% it now reaches with good quality reception. Socialist writers, remarks Seaton, were particularly approving of this *modus operandi* (Seaton 1988: 120).

McQuail lists the main features as found in fully-fledged public service broadcasting systems as the following: provision of a universal service; democratically accountable to the national public; independent from vested interests and state control; financed by payments from all citizens (and not only from advertisers); and seeking to provide a high quality service (McQuail 1994: 172). However, he also acknowledges that “There has never been a generally accepted version of the theory of “public service broadcasting” and the diversity of forms is now greater than ever before” (McQuail 1994:126).

The idea that broadcasting should be operated as a public service is an extension of the idea of social responsibility of the media (which itself was an add-on to the fundamental right of the Freedom of the Press). According to the 1947 U.S. theory of social responsibility (McQuail 1994: 24) media have certain obligations to society because media ownership is a privilege, held in public trust. Such obligations include truthfulness, and objectivity in reporting news while operating according to agreed codes of ethics and professional standards. The 1947 US Social responsibility theory admits that while in general social responsibility should be self-regulating, under some circumstances, intervention and limitation of media freedoms can be necessary in the public interest. Though, McQuail notes that media ‘freedoms’ are referred to in the 1947 Social Responsibility theory, while UNESCO emphasises “responsibilities”.

Up until 1977 (when the Annan report broke with tradition and took the libertarian model as an ideal) successive reports in Britain had defined broadcasting as a public service – defined as “catering for all sections of the community, reaching all parts of the country regardless of cost, seeking to educate, inform, and improve and prepared to lead public opinion rather than follow it”, according to Seaton. (1988: 263)

In contrast to the altruistic motives of the British public broadcasting service, Ireland's first national broadcasting service was, according to Gorham, "regarded primarily as a means of selling wireless sets" (Gorham 1967:6). Yet, once Dail Eireann recommended in 1926 that broadcasting should be a State service, with responsibility to government, an intention to serve the public interest was limited to providing a service to the whole nation.

The Annan Committee of 1977 overturned years of philosophical tradition in Britain supporting the ideals of public service broadcasting. Although a later report in 1986 by the Peacock Committee re-established the value of public service in broadcasting for the greater good of democratic information, one of its members (Samuel Brittan, a monetarist theorist) was of the view that "the goal of British broadcasting should move towards a sophisticated market system based on consumer sovereignty" (Seaton 1988:264).

Annan ruled in favour of a libertarian ideology of media. According to McQuail (1994:122), "the libertarian view is that media social theory and media policy are both inconsistent with media freedom". Media freedom (as defined according to the principal of Freedom of Communication enshrined in the First Amendment of the U.S. Constitution) is incompatible with legal, government or public interference. The resulting report proposed that broadcasting – a product like any other - should be encouraged to develop in the free competitive environment of a deregulated marketplace, arguing that the market was capable of achieving balance and pluralism without restrictive regulation controls. An increase in broadcast channels would provide a multiplicity of voices, and would respond to consumer demands for increased choice. The libertarian theory of the market posits that media create a free marketplace of ideas - free expression is encouraged - in which the best are recognised and the worst fail. (Ibid p128) On the other hand, FCC chairman Newton Minnow – someone who has had considerable experience of the libertarian model of broadcasting – has suggested that the new media landscape free-for-all will become nothing but a cultural wasteland exploited for commercial profit. (Pavlik 1998: 126)

The Annan report recommended that “broadcasting should cater for the full range of groups and interests in society, rather than seek to offer moral leadership” (Seaton 1988: 263). Annan’s definition of “good broadcasting” was that which reflected the pluralist and multi-racial society, which Britain was increasingly becoming. The best way that this could be achieved, it was argued, was through unregulated competition – for audiences, revenue and programmes. The 1983 Government White Paper on the introduction of cable admitted that it was not necessary to stipulate what kind of service cable operators should provide, (other than must-carry rules as outlined by the Hunt Report) because following libertarian theory “cable’s success will depend on people’s readiness to pay for it and recognition that it offers value for money”, or not (Hollins 1984: 283). Diversity and quality of service would be determined, the White Paper maintained, by leaving such matters to the market.

In 1986, the Peacock Report of the British government-appointed Committee of the same name provided eight principles of the “public service idea”. In addition to the above commonalities, Peacock added some specifications regarding the nature of content transmitted. Namely, it should provide for all tastes and interests; cater for minorities, and have a concern for national identity and community. With regard to the increased competitiveness of the broadcasting market in Britain at the time, he also included the notion that the principle of public service should encourage competition in programmes (and not just audiences), and should encourage the freedom of broadcasters (McQuail 1994: 126).

The issue of universal access to new technologies is of central importance to policy makers. Pavlik (1998) reports that members of the Telecommunications Policy Round Table are concerned that a market-driven information highway will bypass the poor and poorly educated. Guaranteeing access to all citizens is of fundamental priority. Pavlik argues that “the implications of universal access are profound for the democratic process, which rests on the principle of a government responsive to and in touch with the people. To be responsive, the government must communicate with the people”⁶. Thus all people must have access to the principal mode of communication, increasingly through new media technologies. Otherwise, not only will global society be fragmented into minority audiences, but also only a minority of audiences will have knowledge of the global society.

3.2.2 Right of Access

Those communication theorists who argue for a 'right to access the public sphere' include Hamelink, proposing equal access to the means of public expression of opinions. This researcher aligns her reasoning with this interpretation. The right to universal and equitable access to the public sphere or public realm is advocated by Habermas (1989), Raboy (1998), UNESCO (1980), UN Article 19 of Declaration of Human Rights (1948), Murdock & Golding (1989) and Calabrese & Borchert (1996).

Access to the means of expression and distribution of opinions means inevitably purchasing the products and services of 'media markets'. This term was coined by Ireland's Department of Public Enterprise in the development of a 1998 Bill, *Public Right of Access and Diversity of Ownership in Relation to Broadcasting and Other Media*. Media markets were identified as "including newspapers and magazines; broadcasting and terrestrial television; satellite and digital television; cable and MMDS services; and internet services." ⁷ Engaging with the economic consumption of media products and services offered in media markets inevitably means engaging with the economic rules that govern the World Trade Organisation, presently operating according to a predominantly American –Western capitalistic ethos.

Hamelink suggests that because not everyone in every society has already the freedom of expression, "therefore, the right to freedom of expression would have to rather focus on the provision of access to the public expression of opinions than on the prevention of restricting opinions. Equal access to the means of expression is not guaranteed by the liberal right to freedom of expression." ((Hamelink 1999:85) Habermas also argued that many are excluded from the public sphere arena simply because they do not have the necessary funds in order to purchase the products and services available, at increasing cost, in the media markets.

In a similar way, the human right of every person to the highest attainable standard of health (as outlined in the UN International Covenant on Economic, Social and Cultural

Rights) is in conflict with the market demands of unlimited price freedom. Negotiations within the TRIPS Trade in Intellectual Property Agreement have focused heavily to date on health and medicine. The TRIPS agreement focus is on the payment of royalties to intellectual copyright holders. Former UN High Commissioner for Human Rights, Mary Robinson, recently highlighted the plight of the poor vis a vis their ability to take advantage of medicinal intelligence that is currently so highly priced that only the rich can afford the patented drugs essential for survival in some of the poorest HIV-infected countries in the world. With respect to accessing the privately protected and expensively licensed intellectual property that creates medicines, Robinson has suggested that “further improvement to the TRIPS agreement on intellectual property rights might be needed, if the deal fails to deliver on the key goal agreed at Doha of protecting public health and promoting access to medicines for all”. (*Irish Times*, 12/09/03)

Just before the WTO trade round negotiations were due to start at Cancun, there was a last-minute deal struck (30/08/03) after years of negotiations that would permit poor countries to import cheaper generic versions of anti-AIDS drugs. Hamelink argues that the proposal for ‘global and equitable access to knowledge’ is restricted and blocked by the development of a ‘strict regime for the protection of intellectual property rights in WTO negotiations’. In the same way as access to life-saving medicines has been facilitated by the WTO after years of pressure, access to information and knowledge could keep democratic societies breathing and in good health will require alterations to the present American-led WTO rules of engagement in the marketplace.

UNESCO / MacBride (1980) and Murdock & Golding (1989) propose a right to equal access to new and old channels of communication and information facilities. They suggest imposing responsibilities of guaranteeing universal access, diversity of content, and provision for feedback, interactivity and participation by the users. Murdock & Golding (1989:183) set out the three communications needs for effective citizenship. Firstly, access to information, advice, and analysis on their rights in other spheres. The second communication need for effective citizenship is access to information, interpretation and debate that involves political choices, and ability to use their communication faculties in order to criticise, oppose, or propose alternative courses of action. Finally, good citizenship depends on the communication of their opinions

represented within the central communication sectors and they must be able to contribute to developing those representations.

In the next section this research tests the quality of citizenship exercised by the Irish, French and American modern models of citizenship through the lens of Murdock and Golding, and their insistence that the second communication need for effective citizenship is 'access to information, interpretation and debate that involves political choices, and ability to use their communication faculties in order to criticise, oppose, or propose alternative courses of action' (1989: 183).

3.2.3 Right of Input of Public Opinion / Right to participate

Venturelli goes beyond 'right of access', to demands for a right to participation in public space, or rights of inclusion in public deliberation. Venturelli (1998a) and Habermas (1990, 1987) both take a lead from the moral liberalism of Kant, and classic Aristotelianism. This researcher asks - how are you to enforce or police rights of participation or inclusion?

Venturelli argues that citizenship is dependent upon the 'fundamental rights' of right of knowledge and public participation in public space, and critically – following a line of thinking developed by Kant – a right to publicity. Venturelli's interpretation of Kant's right to publicity guarantees public freedom of speech, knowledge, information and participation. Essentially it requires all members of political society to make public use of their reason in all matters of public policy and law by which they should be governed. (The Kantian right to publicity differs from JS Mill's freedom of expression.) Venturelli's use of Kant is a strong concept – the right to participate in public space – however; I find it difficult to align myself with a right that has little or no chance of being able to be guaranteed as yet in the 21st century.

Venturelli's suggested solution is that "provisions to ensure that the public and constitutional information rights of citizens to expression and information are given priority over the private rights of the information industries to be free from obligations to the public-opinion-formation process, to cultural diversity, education, and other constitutional functions of public space." (1998a: 103) How does Venturelli suggest that

the 'right to participate' – facilitated through broad access to the public realm, and to suitably informative content - might be guaranteed?

Raboy (1994) illustrates how the tradition of a Canadian public authority with a statutory obligation to hold public hearings and to consult the public over changes to Canadian broadcasting policy has encouraged the strong voicing of public opinion and debate over the way Canadians see the role of their broadcasting systems.

He argues if broadcasting is still deemed to be of some importance to public life, then the public cannot and should not be absent from the debates that determine its shape and future. However, "the point is that if broadcasting is still deemed to be of some importance to public life, the public cannot be absent from the debates and struggles that make it what it is." (1994: 5)

Yet, Raboy is coming from a Canadian perspective where CRTC – the independent public authority and state agency – is required by law to hold public hearings on matters of public interest. It also provides an important space (what amounts to a public sphere) for public debate on broadcasting matters, and the general orientation of Canadian (private / public) broadcasters. The critical aspect of this situation is that it has statutory responsibility to enable public participation in broadcasting decision-making. The CRTC is required by law to hold a public hearing in connection with the issuing, suspension or revocation of a licence, as well as in the case of amendment or renewal of a license, unless it is (in the case of a revocation, for example) satisfied that such a hearing is not required in the public interest. It may also hold a public hearing in connection with any other matter under its jurisdiction, if it thinks that it would be in the public interest to do so.

Raboy holds up the Canadian model as demonstrating how public participation in the sphere of broadcasting policy-making and regulation is legitimate, legalized and should be encouraged. However, Canada may be a unique and unrepeatabe case, as there is a strong history in Canada of multi-racial pressure lobby groups pressuring government during the policymaking process, and setting up their own community-based alternative networked public spaces, unlike in Ireland.

The process culminated in a new Broadcasting Act 1991 which explicitly recognised broadcasting as “a public service essential to the maintenance and enhancement of national identity and cultural sovereignty”.

The Broadcasting Forum (2002) in Ireland sought to create the same type of public input. Access was organized via regional country meetings hosted by the national public service broadcaster, RTE, as well as Internet sites dedicated to the forum of experts meeting to discuss the future national broadcasting policy.

Arising from the Irish Broadcasting Forum was a large increase in licence fee payable by the public television set owners, that was to be divided unequally between the national public service broadcaster, and commercial channels that broadcast a specific ‘public service type’ of programme. This is the first time in Irish broadcasting policy history that the licence fee has been divided between the national public service broadcaster and commercial stations. The rationale behind it lies on the nature of the programming offered that can be funded. On this issue, the Minister for Communications, Ahern did not reputedly listen to the advice of his civil servants.

Raboy (1998) and Hamelink suggest civil society must be more aggressive in formulating the agenda for world communication policy, and with the CRIS campaign in Geneva, they are working towards their legitimate inclusion. It is their ambition to increase the social space (that is, the public sphere or realm) in which non-state, non-commercial actors seek to influence decisions regarding the orientation and regulation of broadcasting systems.

Hamelink also suggests that civil society groups take their grievances to loci of decision making like the WTO, ITU and so others. Communication that facilitates self-empowerment, argues Hamelink, must not be state-centric or market-centric.

"It has to be inspired by civil democracy. Civil society does not only entail rights for its citizens, it also implies duties. The duty to revolt against the worlds of Orwell and Huxley is essential to the democratic process. Only the revolt of civil society can change the disempowerment world communication causes" ((Hamelink 1995: 145)

In the next section, this thesis addresses how, and to what degree, civil society influenced the formulation of broadcasting policy and trade policy relating to audiovisual services in Ireland, with a comparative regard to France and the US, during the years 1982-2002.

3.2.4 Modern Irish, American and French approaches to public opinion consultation

With respect to this primary research, this researcher sought to answer the following empirical questions: Who participates in government, and to what extent does the government take account of public opinion? On what basis does government policy lie? Who does government consult with – the public, or corporations? What recommendations or grievances have Irish citizens voiced? If it can be assumed on the basis of this evidence that policy decisions affecting Ireland's communications and audiovisual and cultural sectors are initiated by the European Commission, within which discussions Ireland often plays a small part, it must be asked: who is pushing the government into putting forward particular policy proposals, or amendments to Commission proposals? Consultations held by the D/AHGI did not become "fashionable" until about seven years ago (1995).

"Currently, consultation is – you don't do anything without consultation, but the environment was quite different 7 or 8 years ago. The audiovisual sector wouldn't have been as strong and relatively cohesive and coherent as it is now. You might not have had a representative voice to talk to." (D/AHGI 2, interview, Dublin)

Before Britain's Channel 4 there were very few independent producers, or for that matter, independent television production. Prior to that, there was not the vogue for consulting anyone other than the national broadcaster RTE.

"There wouldn't have been a whole lot of people to consult with outside of RTE. We would have consulted with anybody who was around, and RTE". (D/AHGI 1, interview, Dublin)

Policy will also be derived from consultations with the industrial sector based in Ireland.

"We would look at what proposals the Commission are coming forward with. Because you can appreciate that in the Common Commercial policy areas, the Commission are the people that make proposals, and the Member States advise

and consult with them. A lot of our action would be reaction to Commission proposals and when the Commission comes forward with proposals in that area as in any other area, we would be taking consultations with all interested parties and coming to a conclusion as to what our appropriate position was.” (D/ENT-EMP 3, trade official, Dublin)

The Department of Trade, Enterprise and Employment attempted to garner some public opinion on the matter of trade and Irish exporters in 1984 as GATT (1985) loomed onto the horizon. An Irish Geneva representative recalls:

“We made efforts to consult people – representative groups, and that didn’t give rise to anything useful. And then we tried a mail shot to the 300 biggest companies in Ireland to see if that would get us information. And in the end really we came to the conclusion that, for most manufacturing companies, they were too small to spend time worrying about why they weren’t getting into a market. They’d just look around for a market they could get into, and they’d work on that.” (D/ENT-EMP 2, Geneva negotiator to GATT, Interview)

Another viewpoint from the D/ ENT-EMP was:

“They (Irish industry) were regarding themselves as being small players from a small country and how could they move this enormous mountain that was in their way in the form of Indian regulations as there may have been, so they decided – well the thing to do is to steer a course around this regulation, and they probably did that, and managed to live with it. But they weren’t coming out in the Irish government so that we’d negotiate something.” (D/ENT-EMP 1, Interview, Geneva negotiator to GATT)

While other Member States were influenced by very well organised lobbies on goods and services, Ireland didn’t have well organised lobbying, other than on agriculture. In 1984, other key Irish products were textiles and clothing. Irish companies preferred on the whole to find alternative ways around trade barriers, rather than aim to crack, for example, the Japanese market and find out what barriers they were coming up against. The foreign companies based in Ireland on the other hand did lobby government: “they’d come in and say ‘look, you know that we came here to sell to these markets’ but since most of the foreign companies were selling to Europe and wider Europe out of here, that was for the most part taken care of.” (D/ENT-EMP 1, Geneva negotiator) Evident here is the difference in approach from American companies. The French model is more inclined towards public debate (as illustrated in a letter to D/ AHGI).

Reacting to the dearth of response from companies in Ireland, this official said, “At home, (policy development) things were driven by civil servants. It was us thinking

things out. That was typical of the way things were done. It was really civil servants, the old 'de Valera style', looking into their hearts, on the basis of what they knew, guessing what was in the national interest, as much as anything". (D/ENT-EMP 2, interview) The national interest in the 1984 period was "agriculture, textiles". These remained the priority even until 1995, evident from a Dail Question posed to Enda Kenny, Minister for Tourism and Trade that stated that while the department agreed on the EU position, and agreed that further liberalisation measures should be implemented, "adverse effects on sensitive industries like agriculture and the textile sector should be minimised." (October 5, 1995)

These therefore - agricultural trade, and trade in textiles - formed the basis of trade rights in the years 1984-85.

For the most recent trade round consultation, the D/ ENTEMP is

"consulting widely: from representative bodies in the industry such as IBEC, our Exporters Association, Small Business Association – those sorts of people. We have a standing arrangement with the non-governmental organisations, the umbrella group called Comhlambh which represents Concern, Trocaire... We use Forfas, the economic analyst. We operate it as wide as possible, the consultation system, on a continuing basis, to give us the view on how to respond to Commission proposals, and also to raise issues which we feel might be important for us. They also come to us in the context of putting forward their own points of view, particularly the NGO's and particularly the industry representative organisation. We have a continuing dialogue with all these people which pretty much, works very well. We would be very interested in talking to multinational firms established here, in getting their point of view in relation to trade issues, and how they're affected. And we would be reflecting that in our national position that we would be putting in to Brussels" (D/ENT-EMP 3, interview)

Further to outside advice, the department chairs a Standing Committee on a weekly basis, comprising members of other departments as appropriate in addition to representatives from the department of Foreign Affairs. These departments offer input. This researcher's conclusion is that there is a lack of public opinion input regarding trade rights and trade policy in Ireland.

The awareness and consultation campaign in association with Forfas was run to "stir up a bit of interest" in the currently on-going Doha Millennium Trade round. The consultation process was launched at the end of 2001, particularly targeting both foreign operations and locally owned indigenous companies. From the launch of an interactive

website, 15 to 20 companies replied. No replies were submitted from any 'Services' companies or telecommunications companies.

IBEC (Irish Business and Employers' Confederation) admitted that the General Agreement on Services (GATS) was not something that "inspires our members' imagination". IBEC represents the Audiovisual Federation and Telecommunications Councils, amounting to the principal audiovisual, broadcasting producers and distributors in Ireland, as well as the telecomms council members. With such a poor response, it was impossible to discover "from as many interests as possible what sort of issues would be of interest to Ireland and the Irish economic sector, what sorts of points of view they might want to put forward, what offensive interests they have, what defensive interests they have" (D/ENT-EMP 3, trade official, interview, Dublin) as the D/ENT-EMP hoped. It is worth noting that, in a further attempt to secure companies' opinions and positions on WTO trade-related issues, a series of workshops were organised with the assistance of IBEC, Enterprise Ireland and the IDA. The sectoral-specific workshops illuminate the key areas of strategic Irish economic interests for the Doha trade round:

- 1) Electronics and engineering;
- 2) Agri-business;
- 3) Chemicals and pharmaceuticals;
- 4) Computer services and software – these are, it was noted, "huge for Ireland";
- 5) Audiovisual services – believed to be a 'growing industry' comprising the film, music and digital content producers and distributors; and
- 6) The clothing and textile sector (Forfas, interview, March 2002, Dublin).

Enterprise Ireland's opinion is that "There will never be a cinema industry in Ireland", and admitted that it is their intention to actively promote sectors involved in games and animation production; films made for television; technology for cinema distribution and digital music. These are the trade strengths of Ireland, and interests of current Irish trade negotiators, and they will be seeking greater exploitation of those areas. (Interview, National Informatics Director, Enterprise Ireland, October 2002, Dublin)

From Forfas' point of view, the consultation process for the Doha Round was "pseudo-democratic", to be enacted in the event that a civil society group lodged complaints

afterwards. Yet the interest from the public and the newspapers was minimal regarding the Doha Round and the public consultation. Irish businesses themselves - those that stand to lose or gain most in trade negotiations - paid little attention. In reality, companies find WTO too 'long-term' a commitment. WTO is not, as a result, business-driven, even though "exporters have well tested channels of communication to put forward their case" (Enda Kenny, Answer to Dail Question, 5 October 1995). Forfas believes that government officials or NGOs effect greater influence over issues discussed in WTO than businesses. Businesses, focused on the smaller picture⁸ do not make World Trade Organisation business their priority. They expect and assume government agencies (i.e. Forfas) to make decisions in this area for them. The national public service broadcaster, RTE, expects the D/AHGI and at a European level, EBU (European Broadcasting Union) to lobby on their behalf and activate strategies. Ireland, along with other Member States were due to submit a list of their trade interests and key markets to which they are requesting access, their offensive and defensive interests, to the European Commission by June 2002, in the context of formulating a Common Negotiating Position within the EC 133 Committee.

Forfas has since reported the results of its trade round consultation in Ireland and outlined its trade priorities for the Doha Round. As part of an overall Irish government strategy to develop both Ireland's creativity as well as its electronic network into a global 'hub' for the distribution of digital content and audiovisual services, Forfas recommends that Ireland should support greater liberalisation of the trade sector of audiovisual services. While recognising that it may not be possible to reach agreement for greater liberalisation on all audiovisual services, Forfas suggests that above all, "Ireland should concentrate on securing the widespread application of GATS disciplines to the music recording and distribution industry." (2003:40)

How do policy-formation practices today relate to American, European or Irish models of citizenship? In what ways do public policy consultations differ in the US and in France, for example?

American business interests possess none of the Irish reticence when it comes to making their views known on requesting access to certain foreign markets. Often multinationals formulate most of their policy and approach towards multi-lateral negotiations within

their headquarters in the US. Likewise, American government policy derives from the USTR offices located in Washington and Geneva and is relayed by the US Trade Representative who “does whatever she needs to do with the European Commission”. (USTR representative, interview, Brussels)

Representatives from foreign multinationals located in Ireland, and the American Embassy “talk to us very regularly on all of the issues that come up, in relation to major disputes between the EU and the US”. (D/ENT-EMP official, interview, Dublin) Multinationals are strongly influenced by the HQ position taken on global trade disputes between the EU and the US. Often these reflect tensions between multinationals operating in Ireland or within the EU, and the multinational’s parents.

US international trade policy is devised firstly through private sector advisors on sectoral negotiations that represent industry, rather than companies. These advise on ‘best future’ options. Following this there are open solicitations and public hearings, from the NGO community and individual citizens, as well as trade associations. Then there is the congressional process. Before the proposed trade policy can be enacted, the US Administration has to consult with Congress in order to obtain official approval and a mandate to negotiate. It is argued that the Bush government is much more protectionist of their national industries than with the previous Clinton administration. Unilateral American foreign policy is intensified by blatant national rights protection for national industries. Bush is not reluctant to donate massive subsidies to its own American industries when hit by financial or terrorist crises. Most recently, indigenous steel producers, and airline industries were financially supported following the September 11th attacks and earlier in the 20th century, the American administration protected its own movie industry with the Fin Sym rules.

For audiovisual, issues that are important for industry are important for the US government. While the US Trade Representative may claim that the Motion Picture Alliance (MPA) “doesn’t define our position”, interviewees often recommended that this author speak directly to industry representative bodies, with the purpose of ‘working it out yourself’ as regards the future American trade strategy. (USTR representatives, US mission to the EU, Interview, Brussels)

Thus, the list as divulged of industry representatives which directly lobby the US representatives in Brussels, Geneva and Dublin are: MPA (Motion Pictures Alliance); Business Software Alliance (viewed as “very active” in Brussels, representing computer hardware and software giants IBM, Bell, Apple, Intel and Microsoft); AOL Time Warner Amazon; European Competitive Telecoms Association; US Chamber of Commerce; European Telecom Networks Organisation (ETNO); International Federation of the Phonographic Industry (IFPI) representing sound recorders, and the recording industry association RIAA.

In a not dissimilar fashion, Irish government agency Forfas admitted that “Microsoft’s view becomes “our view” if Forfas accepts their proposal”. (Forfas official, interview, Dublin).

This leads this researcher to ask if Irish government tactics are having the effect of protecting the trade rights of US corporate entities? Does Forfas encourage the seeking of US or foreign opinion more than from Irish companies? Or is it simply the case that Irish traders and civil society are not as vocal as they were in the 18th century?

The stark contrast between the Irish and American models of consultation and that employed by the French is highlighted in a letter to D/AHGI from the French Embassy in Dublin. In relation to the discussions of revising the EC Directive Television Without Frontiers, the French Cultural Ambassador asked firstly,

“Whether public debate exists on the promotion of European audiovisual work and in particular the diffusion of European and national works, investment quotas and other promotional means”.

The French cultural section also wished to be advised of “the position of different regulatory bodies, public and private radio stations, producers (including independents), writers, artistic and intellectual milieus”. (Letter from French Embassy in Ireland to D/AHGI, 18 July 2001). This is an indication of the French fervour of protecting French culture.

To such an enquiry, the D/AHGI was obliged to reply:

“ To my knowledge there has been *no organised public debate* underway in Ireland in connection with the promotion of European audiovisual work. A number of workshops were held earlier this year on (revision of Articles 4 and 5) aspects of the Directive which were attended by a representative of this Department and a wide range of interested organisations.” (emphasis added)

The department could not identify for this researcher who these 'interested organisations' were, attending on behalf of Ireland's audiovisual interests. It is evident to this researcher that few other opinions are sought by D/AHGI on broadcasting policy other than those of RTE and consultants. However, it would not be mistaken to assume that 'public consultation' (which amounted to asking RTE for its input) in Ireland has been replaced almost entirely by 'consultations with consultants'.

The reply to the French Cultural Ambassador reveals that

"Ireland supported the provision of Articles 4 and 5 concerning European works and independent productions. It remains to be seen whether the Consultants (contracted by the European Commission) consider these Articles as continuing to serve a useful purpose and whether they are recommending their retention or amendment." (Letter from French Embassy to Ireland D/AHGI, 18 July 2001).

An official from D/PE acknowledged that government policy is very much increasingly reliant on consultants' reports. They are the basis of government these days: one government department commissions one consultants' report, another department commissions another consultant's report, and then there might be a consultant's report commissioned to report on one of the first consultants' reports. The reliance on consultants is compounded by the tendency within some departments (though not in the case of personnel dealing with broadcasting issues) to move civil servants around between unrelated departments and unrelated portfolios. These consultants accrue a considerable amount of public expenditure. "It gets very expensive," the D/PE official admitted.

Input into EU decision making by Irish public opinion is limited in the case of the Irish broadcasting industry, particularly the national public service broadcaster, who ostensibly has a responsibility to draw attention to the public interest nature of its service. It may be argued that it has a duty to represent the wishes of its public owners, the citizens who access it? Could it not be said that RTE is a public opinion representative of the citizens of the public sphere in which it broadcasts, and therefore should represent those opinions to the real decision-makers, the EC? The issue of 'duty' and on whose shoulders it lies remains a key dispute between communication theorists – some of whom argue it is the government's duty to provide for its citizens, others who

argue it is the duty of civil society to voice their objections and opinions – and communication providers. US telecommunications corporations argue that there is no obligation on them to provide for citizens' welfare or rights.

RTE is an outstanding example of a national public service broadcaster that does not lobby in Brussels, assuming that lobbying done on its behalf by EBU (European Broadcasting Union) will be sufficient. The EBU is an organisation widely held to be “probably the least dynamic organisation in Europe” according to Banotti MEP. All other national or European-wide broadcasters, private and public, are directly represented in Brussels-located offices through lobbying and administrative personnel.

The Irish audiovisual representatives of the current industry are public service broadcasters RTE and TnaG; commercial national broadcaster TV3; Film makers Ireland representing the film production industry; the Music Board; and IBEC's Audiovisual Federation members. Most of these organisations do not input at EU level.

3. 3 Freedoms and liberties

Enlightenment conceptualisations of rights emphasised ‘freedom’ from traditional ways of thinking. Self-empowerment was advocated using reason, mind and intelligence (Kant). Garnham (1990a) suggests two concepts of the notion of human freedom: economic freedom and political freedom.

Warner (1990) argues that in 18th century America freedom was represented by “liberality”. Liberality was a key gentlemanlike quality meaning freedom from poverty, freedom from servile subjection or slavery and freedom from subordination arising from lack of material independence. Finally, most pertinent to the discussion of print and social authority, “it was associated with freedom to elevate the mind by application to the authoritative books that contained the higher learning”. Liberality meant access to knowledge and information that enables individuals to form an opinion and come to independent decisions. This researcher finds value in Warner's definition of freedom. With regard to the media regulation sphere, this researcher argues that this implication

of freedom to knowledge, information and higher learning has the potential to be integrated into a possible form of civil right.

According to Warner liberality touched on wealth, independence and learning. It allowed the gentleman a higher exalted status above the locals. His identity was based upon "freedom from the kinds of private interest that would compromise his public commitment" (1990:29). All these 'freedoms from' amounted to a disposition to undertake important responsibilities in the wider community. (Ibid p28)

3.3.1 Right to Express

Raymond Williams (1961) in Sparks (1993) made the distinction between the right to speak or 'transmit', and the right to receive. This distinction between the right to express and the right to receive continues to be a key issue in current discussion. This researcher holds the opinion that both the right to receive and the right to express are essential in true democratic communication. In addition, media theorists suggest *highly* nuanced versions of the right to access and participate in the public sphere, and the right to receive audiovisual content of a certain genre, even interpreting these as social goods, guaranteed to be received as part of a public service in the overall social policy of a government.

Debate is prevalent as to whether this is a negative liberty or a positive liberty. For Williams, both the (negative liberty) right to express, and the (positive liberty) right to receive achieved through government support need to be guaranteed in a 'truly democratic system of communication' (Sparks 1993:81), though exactly how is left vague and unanswered by Williams.

Isaiah Berlin (1969) discussed in Calabrese & Borchert (1996)) also gives preference to the classification of freedom of expression as a 'negative liberty' – that is, obstacles that may impede the pursuit of individual interests are removed, particularly where government control may be excessive, and individuals are left to define and satisfy their own needs as they choose.

Whereas, positive liberty is put forward by welfare state proponents who maintain that everyone has common needs in society and that these should be collectively defined and met through government intervention and/or mechanisms. These are traditionally interpreted as social rights. For example, Marshall argues that the civil right to freedom of speech has little real substance if, from lack of education, you have nothing to say that is worth saying, and no means of making yourself heard if you say it. But these blatant inequalities, he says, are not due to defects in civil rights, but to lack of social rights, which in the mid 19th century were in the doldrums.

The right to free expression is classified as a cultural right by many communication theorists (Venturelli 1998a, UNESCO, Feintuck 1999:85, Higgins 1999), because media systems can disseminate cultural images and elements that play into the formation of a cultural identity which is then linked mistakenly with the nation.

Those who advocate rights of expression include Hamelink. Hamelink's concept is the right to the public expression of opinions. Those who suggest a right to communicate include Hamelink, MacBride, and Raymond Williams. Mc Caffrey, in developing a theory of good political communication also recommends a right to communicate. (McCaffrey 1991).

Freedom of Expression is protected in Article 19 of the UN 1948 Universal Declaration of Human Rights and in Article 10 of European Convention on Human Rights & Fundamental Freedoms. The ECHR Article 10 states that:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers"

The European Court of Human Rights has interpreted this article, says Hamelink as meaning a right to receive information and ideas, not just broadcast signals and it imposes upon broadcasters the duty to accommodate this receivers' right. (1995:133). He cites the European Court of Human Rights, which has stated that "not only do the mass media have a right to impart information, they have the task 'to impart information and ideas on matters of public interest' and the public has a right to receive such information and ideas."(1995:133) Thus, argues Hamelink, the media are purveyors of information and public watchdogs, according to the European Court of Human Rights.

Hamelink suggests a Communication Charter (1995:155) that consists of the elements of the fundamental right to communicate. He has recently updated this in the context of the UN Communication Rights in the Information Society CRIS campaign.⁹

3.3.2 Right to Communicate

It should be noted at this stage that there is no prior existence of an internationally recognized 'human right to communicate'. It is this which Hamelink hopes the WSIS will establish, in an initial form as a 'Universal Declaration on the Right to Communicate' in Geneva, December 2003.

The 'right to communicate' was defined as 'a new concept' by a UNESCO commission for the study of communication problems (1980, see Hamelink 1999) and this was specified as providing "the right to be informed, the right to inform, the right to privacy, the right to participate in public communication - all elements of a new concept, the right to communicate" (UNESCO 1980).¹⁰ It is noted however that Jean D'Arcy (1969:14-18)¹¹ first elaborated on the vision that "the time will come when the Universal Declaration of Human Rights will have to encompass a more extensive right than man's right to information... This is the right of men to communicate."

The UNESCO definition of the 'right to communicate' was allegedly based on Article 19 of the 1948 UN Declaration of Human Rights providing for freedom of expression and opinion, and interpreted by UNESCO as the 'right to communicate' and the 'right to have access to communication channels' (Hamelink 1999 detailing MacBride Report). The report proposed further development of the 'right to communicate' – essentially, communication should be considered as a basic human right, in order to help achieve social equity through communication. Hamelink concludes that the recommendations have not been effective (1999:85).

Raboy argues that communication rights were originally basic social and political rights.

"From the early beginnings of parliamentary institutions, communication rights were framed as basic social and political rights. Media were used by

social actors as sources of empowerment, as well as for mobilisation and persuasion. Typical of the modern state was the creation of institutions such as public service broadcasting, public telephone and telegraph monopolies, and public regulatory agencies. Today, the emergence of a global media regime is at once symptomatic of a new type of society in emergence, and a challenge to shaping that society towards a new phase of social progress" (Raboy 1998:66).

The many and multiplying declarations protecting rights and freedoms – to cultural expression, freedom of expression, involvement and participation in communication – often secure the judicial principles of rights, but provide no duty, or responsibility for implementation. Declarations¹² can hold as much political weight as ‘recommendations’. However, they lack ‘legal teeth’, and stand as little more than ‘pious statements’ (Corcoran 2001). Hamelink (1999) argues on the other hand that these declarations however are often the predecessor to binding treaties or an evolution into international law, and are as such, valuable.

It is most likely that the Irish government would find any right to communicate immensely problematic if it were to be legally binding. This author can present an example of the opposition of the Irish government to the recent EU Charter on Human Rights that was signed as part of the Nice Treaty in December 2000. The key issue under discussion at the Nice IGC was the status of the Charter: whether the Charter would be signed as a political declaration, or a legally binding document, or whether it should have political status initially with the possibility of acquiring legal status (either through judicial interpretation or through subsequent treaty amendments).

Ireland foresaw difficulties with a legal status, because a legally binding charter could conflict with the Irish Constitution, and if this was the case in relation to an as yet unforeseen issue, then a referendum would be required to pass the Charter into Irish law. The issue of a legal Charter also brought difficulties regarding the supremacy of the European Court of Justice over the Irish courts. For these political, judicial and constitutional reasons therefore, Ireland was not in favour of an EU Charter for Fundamental Rights becoming anything more than a political declaration. In it, the Irish position on the drafting of the Charter Article on Freedom of Expression strove to go no further than the rights as declared in the European Convention on Human Rights.

The question of the legal status of the Charter raises questions as to the ability of individuals to challenge infringement of their rights by the European Community,

where they are directly and individually concerned by those decisions. In this instance, the individual must pass through the national court system to challenge Community decisions or regulations, yet there is growing consensus that direct access to the European Court of Justice must be widened. A recent submission by the *Council of the Bars and Law Societies of the European Union* to the discussions of the Charter for Fundamental Rights relating to Article 230 EC argued that the EC Treaty limits the possibilities of individuals to adequate remedy in the eventuality of infringement of their rights by Community institutions. (source: Cathryn Costello, Irish centre for European Law). A German judge, Udo di Fabio of the German Constitutional Court has further argued that the monitoring of rights under the Charter should rather be entrusted to a specific (new) human rights court, operating in tandem with a binding Charter, rather than be entrusted to the ECJ. (see Udo di Fabio, "Fuer eine Grundrechtsdebatte ist es Zeit", *Frankfurter Allgemeine Zeitung*, 17 November 1999, p11).

A drawback with many legal declarations is that in asserting standards of human rights and freedoms relating to the question of culture, information, and expression, they speak or refer primarily to true minority cultures.

Corcoran concedes that "it is clear that culture is being used in these texts (i.e. the UN (1948) Universal Declaration of Human Rights, Article 27, 22; and UNESCO conventions and declarations, such as the UNESCO (1995) World Commission on Culture and Development) in the anthropological sense, to include a society's material as well as its symbolic culture, (however) there is still a suggestion that the underlying concern is mainly for minority cultures"(2001:18). Corcoran suggests that these rights (UN Declaration of Human Rights (1948), Articles 22 and 27) ¹³ which traditionally protected the rights of minority cultures should have their remit widened so as they apply to majority ethnic or linguistic groups.

In effect, he proposes that the 'national' culture becomes as protected in laws and practice as hereto 'minority ethnic' cultures were. He is suggesting that in globalisation trends, the nation state comes to appear like a linguistic and ethnic minority, with the need for national minority cultural rights.

3.4 Theories and Arguments in favour of rights protection

In the following section, this thesis examines the concept of 'cultural rights'. The research outlines the theories behind the concept of cultural imperialism. Then it outlines and critically examines the evidence given by the European broadcasters and key figures in the European audiovisual arena as to why communication should be classified as a cultural right.

These arguments are ostensibly founded on the assumptions that there is a European culture; that audiovisual is a cultural service; that there exists a European audiovisual model; and that the European Union has a right to cultural diversity.

3.4.1 Fear of Cultural or Economic imperialism?

The theory of cultural imperialism as defined by Tomlinson (1991 in McQuail 1994: 114) refers to a threat to national identity as a result of a communication flow imbalance. The general direction of effect is a weakening followed by displacement of the indigenous culture, which is overthrown in favour of the penetrating model. This is part and parcel of the growth of modernity bringing with it a consumerist capitalist ideological system which challenges and changes older traditional culture. Elihu Katz supports the belief that modernisation tows in its wake "a standardisation and secularisation of culture, such that the traditional values and arts, those that give a culture its character, are being overwhelmed by the influx of western popular culture" (Katz 1977:108). The idea that Europe is currently threatened by cultural dominance from American media product is very much in vogue with those, like France, who favour quotas and media or cultural policies which place limits on US cultural invasion whilst encouraging national cultural production.

McQuail (1994:114) argues that the cultural imperialism argument does not withstand close scrutiny. Firstly because that which nations are attempting to protect – i.e. national identity however it is defined – is, as noted above, a set of cultural criteria often dependent on newly established geographical borders and with a very recent history. He notes that it was only in the 19th and early 20th centuries that national independence

movements all around the world redrew their national boundaries, rediscovered distinctive national cultural traditions and invented a sum total termed “the national identity”. Ireland, Greece and Finland are some examples.

The strongest cultural identities are those based on language, religion and nationhood according to McQuail, while the weakest, and least likely to survive are those whose basis is founded on taste, fashion and style. He argues that international media content affects only “superficial and short-term cultural phenomena”. (1994:117)

Eoin G. Cassidy concedes on the other hand that,

“In large part, the media are shaping a transnational western popular culture which exerts a stronger influence on young people than their local national culture. Within the context of such acculturation, the protection and promotion of national culture has become an important issue”. (Cassidy quoted in Corcoran 2001:5)

This researcher questions this – the present author argues that cultural identity is shaped in person-to-person contact, and television plays a minor part in the formation of cultural identity, but plays a major part in information, debate and political awareness.

Regarding European Union cultural identity, McQuail doubts whether such a weak concept will grow in strength without policy measures to support it, whereas strong national European identities with historical bases may well survive the present and future ‘Americanisation’ of media product. Some hope within the European Union that the day may come when, for example, a person may call him or herself ‘European, of French origin’. The term cultural imperialism has more relevance for developing Third World countries that are more vulnerable to the alien invasion of Americanisation because of the immediate attraction of material benefits which accompany it.

JB Thompson (1995: 164) disagrees with the cultural imperialist thesis. He maintains that no culture was ‘pure, untainted, authentic’ before the introduction of broadcasting. Even non-western developing countries are hybrid cultures - the result of many centuries of invasions, imposition of foreign cultural traditions, colonial power struggles and so on. According to Thompson, cultures adapt and survive, changing in the process. Fundamentally, Thompson disagrees with Schiller’s notion that like the discredited model of mass communications effects known as the ‘hypodermic syringe’, the process

of reception is one-way from which “individuals orientated towards personal consumption supposedly emerge”. (Ibid, p172)

From the entire heated debate surrounding protection of the national culture, it would seem that economic logic – the protectionism of national industries that are threatened by American media or cultural products - is principally the underlying rationale for all this cultural imperialist posturing. Thompson is of the opinion that Herbert Schiller's¹⁴ (1969) original thesis of cultural imperialism was “effectively an argument about the extension and consolidation at the level of communications and information of a power that was fundamentally economic in character”. (Thompson 1995:167, but see also Mowlana 1997). This researcher tends to support Thompson's view.

McQuail argues that the proliferation of transnational media channels involves a “downgrading of cultural specificity in themes and settings, and a preference for formats and genres which are thought to be more universal” (McQuail 1994: 111), transnational content being generally North American in character.

Yet Thompson makes the interesting observation that despite the indisputable evidence of American culture and media products dominating the global mass communication arena, the economic power of these media institutions is no longer predominantly American. He notes the increasing levels of investment, ownership and control in the American market by foreign companies. Thus while Hollywood remains one of the most important production centres of film and television entertainment, a growing number of studios are owned by transnational corporations. The economic basis of media domination has been internationalised, investment capital for media production being drawn from a global range of sources (Thompson 1995: 169). Sony in Hollywood is illustrative of this argument. While the economic capital may no longer be American, the media product remains distinctly resonant of the American cultural tradition, and it is argued is the least expensive and most widely available on the media products market, although South American television product in the form of soap operas is increasingly popular on a global scale.

Katz addresses the dilemma posed by the suggestion for more indigenous programming (to counteract foreign cultural influx). Firstly, he is unsure whether the media are

capable of answering the call since most indigenous commercial programming merely mimics a successful international formula, thus contributing nothing to the shoring up of national culture. And secondly, the question is posed: which indigenous tradition should be promoted? He gives the example of Algerian culture, where both French and Arab elements co-exist, and asks which should be emphasised? (1977: 112) Ireland similarly will need to address this question, having become multi-racial over a short span of recent years.

Hamelink (1995) argues that decisions regarding local cultural expression are decided by global policies in multi-national fora such as the WTO where decisions are taken on trade in services (in the GATS agreement) or on intellectual property rights (by the TRIPS agreement) (1995:122). He argues that subsequently people are made powerless, without the capacity to control the decisions that affect their lives. They are 'disempowered' and culturally dominated.

"World communication furthers people's disempowerment since the major technological trend (digitization) creates new forms of dependency and vulnerability. The trends towards consolidation and deregulation reinforce censored access to information and limit use of knowledge resources, the trend towards globalization creates a cultural environment that victimizes people, spreads compulsive consumerism and reduces local cultural space." (1995:127)

This last section, to all intents and purposes, is identical to theories of cultural imperialism. Hamelink argues that if a community is not in control of its own local cultural space, there is no forum in which people can develop their own cultural identity, "to empower itself culturally" (1995:131). Communities need common cultural space in order to define their identity autonomously. Thus, there is a battle for 'local cultural space'. The greatest threat is the process of cultural globalization, according to Hamelink.

3.4.2 Audiovisual is a cultural service

The position of European broadcasters, independent producers, directors and distributors (represented by CEPI, EUROKINEMA, FIAD, CICCE, FEITIS, GESAC, EBU, FERA, UNIC) lobbying the Irish Minister for Arts, Culture, Gaeltacht and the Islands de Valera advocated a defensive approach in negotiations, They argued for the

retention of cultural sovereignty for the reason that the measures (like MEDIA, *Eurimages*, and national incentives) are “aimed at offsetting the competitive advantage of the American industry, and the monopoly from which it benefits”. The reasons are here stated in American market monopoly terms rather than cultural or nationalistic. However, the demands for cultural sovereignty are implying, as in the words of Wolfe Tone and the Young Irishmen, a separate cultural nation.

Also, it is argued that “the creation and production of audiovisual works are actually aimed primarily at meeting objectives of pluralism and cultural diversity, and the public funding granted by Member States in various forms ..is actually a reflection of this”. (9 July 1999:4 position paper prior to Seattle negotiations)

The only film lobby in Ireland – Film Makers Ireland, established in 1993 to represent Ireland’s producers of television drama, feature films, documentaries and animation – is represented at the European level by CEPI, CEAP and FIPF.

The European Audiovisual Observatory, ARD German television public service channel, EBU (European Broadcasting Union), DG Culture, Canada and France also define audiovisual services as a ‘cultural service’ in policy documentation and debate.

3.4.3 The EU Audiovisual Model

The European audiovisual model is according to EBU¹⁵ “consisting of European and national regulation, as well as support schemes”. This model is defined as “built on the coexistence of a dynamic public sector and the private sector, combining the concern for pluralism (of content and information) with audience satisfaction, defending access to culture, linguistic diversity and the various political, ethnic and religious sensitivities”¹⁶, according to French audiovisual producer / distributor lobbyists.

For the D/AHGI the European audiovisual model facilitates the expression of Irish and European identity.

“We want to have an expression of Irish identity in the audiovisual sector, hence our support for the local industry. We are European; we want to have our European identity expressed in the European audiovisual sector. Apart from that, once the space is there to enable Europe and Ireland to express itself, we have no

great hang-ups about what material comes in to Ireland.” (D/AHGI 2, interview, Dublin)

From the same interviewee, no expansion was given on how much space is required to ensure this expression, nor the extent to which this space is representatively Irish, expressing uniquely Irish identity. This researcher argues that much of the content classified as ‘European’ is of British or Irish in origin, and the remainder of the content on screen is often imported American product.

3.4.4 Cultural rights

Corcoran’s key question asks: "Are there cultural preconditions which underpin the liberal value of freedom of individual choice and can issues of cultural membership be incorporated into liberal principles of human rights? The notion of cultural, as opposed to individual, rights is crucial here". (Corcoran 2001:19)

“It is increasingly difficult to assert "cultural exceptions" in transnational trade negotiations and insert a non-economic recognition into the meaning of communication. The paradox here is that this seismic shift of power away from democratically controlled institutions is being brought about by the *actions of nation states themselves* as governments confer unprecedented power of governance on a range of supranational agencies with no democratic accountability. For true believers in market liberalisation, the driving vision is to restore competition "to its natural state" and push back the power of the state to its proper minimal terrain, guaranteeing law and order and property rights". ((Corcoran 2001: 26-27)

Corcoran defines “cultural rights of persons belonging to national minorities include the rights to preserve and develop their ethnic, cultural, linguistic and religious identity, freely use their national language, create and maintain their own educational and cultural institutions, maintain contact with persons of common ethnic origin within and outside their country and take part in public affairs". (Corcoran 2001:16) He suggests widening the remit of 'cultural rights' previously reserved for ethnic, linguistic and other minorities, and suggesting that these rights too apply to majority groups.

Corcoran admits that the area of cultural rights is a relatively under-defined category of human rights, and has usually pertained to minority ethnic or linguistic groups. However, he finds it might be useful for a theory of cultural rights to underpin national laws, international agreements and inform professional ethics and practices in all

cultural industries, especially broadcasting. This is he claims because of the power of media and broadcasting for the cohesion of society.

In Ireland, former Minister Higgins (Labour) was guided by Corcoran amongst others in his deliberations on broadcasting policy.

During his time in office as Culture Minister, active within the European Union fora, Higgins challenged the ECOFIN Council, and those Ministers who politically were 'right of centre'. According to Higgins, their market thinking dogma rested on the belief that "we can return to cultural issues when the marketplace is more buoyant and the economy recovers". For Higgins, it was a question of an egalitarian model, a residual model, or a rights model. Many EU Ministers operated according to a 'residual model' of culture.

In 1995, Minister Higgins produced his *Green Paper on the Future of Irish Broadcasting*. The academic-natured proposals contained within were refined into the 'Clear Focus' Heads of Bill (1996). The *Clear Focus* government proposals for broadcast legislation foundered in July 1997 when a new Fianna Fail-Progressive Democrat government came to power. His predominant thinking behind these policy documents was the desire to define a 'cultural space for citizens'. Being familiar with both academic literature and media industry publications, Higgins formulated the *Green Paper* (1995) by drawing on Raymond Williams, Thomas Paine's theories of the rights of man, the notion of collective cultural rights, devised within a public sphere model based on Habermasian thinking. His principal advisor during this time was Colm O'Briain. Advice relative to the Canadian position on broadcasting and cultural policy was sought from Prof. Farrel Corcoran of Dublin City University. The policy issue from a trade and communications point of view was that Ireland was trying to preserve space for the national voice, and needed to legislate for broadcasting from a citizenship not a market model.

The main concept that Higgins wished to argue was the "new concept of the cultural space...citizenship applied to cultural space". One of his main challenges was to address the public's perception of broadcasting as a 'cultural issue'. The Minister's argument centred on the rights of those who are excluded from the market - those

unemployed, with low consumer consumption patterns who nonetheless still possessed “communication rights”. Habermas identifies access to the marketplace in order to avail of the published public opinion, news, and information – i.e. goods available on the market – as a key democratic right. (1989:38)

At his starting point in the years 1993 and 1994 as Irish Minister for Culture, Higgins posits that he had found himself in a minority in Europe of two or three taking an opposing view to the other twelve Culture ministers in the Council of Ministers who took a market-based approach to culture. In 1996, Ireland held the Presidency of the EU for the latter six months. An informal meeting of EU Culture Ministers was convened in Galway in the Autumn. By the time of the Galway Culture Ministers’ meeting, a majority of Ministers had come over to the approach that Higgins espoused, and had accepted that audiovisual was a cultural aspect of citizenship, rather than a commodity product. However, despite a majority of EU Culture Ministers coming round to his approach, Higgins admits this had little or no effect on the standpoint of the European Commission. Although he acquired influence within the European Parliament and amongst other Member States’ Ministers of Audiovisual and Culture during in his time in office, he hadn’t managed to change the Commission’s thinking. (Interview with MD Higgins, Dublin)

Higgins’ work prior to rising to fame as Culture Minister focused on human rights. In his view, rights are “indivisible”; they “cannot be recovered in a piecemeal way”. For Higgins, civil, political, social, cultural and economic rights are all of one family that hold equal standing. They cannot be divided into primary and secondary rights. The model of citizenship that he admired offered the full round of rights. In Higgins’ opinion, “There is no way that the market model can deliver cultural rights or communication rights”. This author considers that the cultural rights of minorities to expression are well protected legally. However, traditionally, civil and political rights have held greater weight than social or cultural rights.

3.5 The Right to Cultural Diversity

The issue of 'cultural diversity' remains, within the Council of Ministers, an "unresolved issue". It was noted in the EU Draft Council Conclusions in preparation of the third WTO Ministerial Council (6 October 1999) that on issues of cultural diversity, there was little agreement between Member States. It remained an outstanding issue, indicating that further discussions were necessary to come to agreement during the forthcoming WTO (Seattle) negotiations.

The classic opposition argument to that of free and liberal trade in audiovisual services has been based on the assumption that national governments should be capable of drafting and enforcing national regulations for the audiovisual or 'cultural' industries, for the promotion of 'cultural diversity' in addition to 'national culture' and 'national cultural expression'. The argument for 'cultural diversity' is based on the leeway allowed to national governments to remain nationally sovereign, autonomous and to enact national policy strategies. This thesis suggests that Culture Ministers utilise the 'cultural diversity' and 'national cultural autonomy' argument to disguise the *underlying desire for the retention of an independent commercial and trade policy*. Despite the desire for independence in these matters - autonomy of the Irish tax regime being the new line of defence against the encroachment of the EU - the Irish Minister for Foreign Affairs, Brian Cowen, recently argued in the context of the Nice Treaty Referendum II that "sovereignty means shared sovereignty, to be used with others" (RTE radio 1 panellists discussion, 12 October 2002).

This thesis' empirical findings suggest that Ireland's autonomy in cultural policy is extremely limited. Further, evidence reveals that, in the totality of trade strategies since the Tokyo Round of 1979 (and possibly before, although this period is not under research), Ireland's interests in protecting or safeguarding the culture aspect of trade in cultural goods and services has been low priority, *save for the period during which Minister Higgins highlighted its importance in 1994*. One reason for this may be that American audiovisual dominance of screens was not so pronounced in Ireland prior to the development of an independent commercial broadcasting sector.

Part II: Human Rights in the Public Spheres of Markets

Chapter 4.

The Introduction of liberal economic principles

In Part 2, this thesis argues that expression of a nationalistic determination of a separate 'culture' and national citizenship in Ireland first surfaced as an awareness and demand for trading rights and autonomous trade policy. I seek to demonstrate that a defence of public sphere rights as cultural rights have firstly, no basis in historical truth in Ireland's case, and secondly, are no longer applicable to multi-cultural societies.

Separate Irish nationhood and the foundation of an independent Irish nation state was built upon a cultural revivalist strategy devised by Wolfe Tone and the United Irishmen (1791) that elevated pre-colonial pagan Celtic myths of the Irish motherland (see Kearney, McBride 2000) and exalted a cultural republican model of citizenship (Rousseau, Malby, Babeuf, Marechal, Millar (2000)) that stated cultural difference was a strong enough reason for independence from Britain and a separate, distinct nationhood.

In the final stages, Ireland's demands for inclusion of Catholics in citizenship were bolstered by a cultural argument. This was reinforced by the 19th c. Young Irelander movement. However, it is my thesis that the beginnings of this demand for citizenship status originated in discontent with Britain's policy on Ireland's trade, publicised and politicised through republican newsprint and pamphlets that stimulated public opinion and debate.

My understanding is that the beginnings of an awareness of 'human rights' appeared approximately 30 years earlier within the marketplace community, where discussions first surfaced regarding unfair and restrictive regulation of trading and international trade.

Britain's restriction of the independent trade policy of American colonists started creating unrest from the 1720 Tobacco Law, and exploded with the imposition of the 1765 Stamp Act. Irish Catholics expressed dissent about their trading terms and conditions with America as dictated by Great Britain from 1774 onwards when Irish commercial interests became subject to American-British tension and continued to be a cause of great concern until 1782 when Ireland gained autonomy and independence from Britain in foreign trade policy.

Whelan (1996) suggests that political discussions were located in the 17th and 18th centuries (and still are....) mainly in the press, pamphlets and the 'coffee houses' of Dublin – i.e. the multitude of pubs and public houses - following the influx of Enlightenment influence. I suggest that the public sphere of illiterate people (that is, the majority) was located in the fairs, markets and trading centres of the small towns and countryside. (Randall (1996) suggests that markets in 18th and 19th centuries were the principal locus of community identity.)

Therefore, this thesis argues that the development of print and spread of newspaper literature placed the oral discontent to be found in the loci of marketplaces and trading ports (see also Whelan (1996)) into the written expression of public opinion which called for independent nationhood for reasons of a different cultural identity to that of Great Britain. This culture was based on a different religious identity, and associated customs. Yet it is this thesis' argument that the beginning of the demand for citizenship rights was founded on economic rationales. The economic and civil rights of the majority of Irish people were violated under British rule.

McLoughlin (1999) confirms my hypothesis that British colonial trade policy was key to the development of an independent Ireland. It derived from firstly, the sense of injustice in return for their loyalty to the British crown, and secondly in 1782, combined with demands for independence in trade and commercial policy and other areas of legislature. This created the development of a sense of distinct Irish identity, and an imagined independent country, that then led on to the sense of Irish nationalism and the creation of a myth of Irish culture and cultural heritage.

Locke's concept of a social contract amongst men to form a society and act sovereignly and independently was in direct contrast to Coke's concept of feudal allegiance and

subservience to a divine king. Locke published *Two Treatises of Government* in 1690, the *Second Treatise* being his key work. The Lockean theory of individual rights to life, expression, press freedom and property overturned and replaced Coke's theory of collective rights. Locke's utilitarian plan of individual civil and political rights won out in the rebellious American colonies seeking independence and liberty from Britain.

In Ireland, the United Irishmen led by Wolfe Tone were greatly inspired by Thomas Paine's work, *The rights of man*. Paine's theory of natural rights, deriving from the historical models of Rome and Greece, applied only to individuals, not to cultures (according to Gibbons (1998)). Therefore Paine was writing on natural rights of the individual man in a similar vein to Locke's theory of individual rights. Political debate focused on rights that were designed to protect the individual's freedom from state repression. These are classed as 'negative' Utilitarian rights.

In practice, the United Irishmen's demands for citizenship rights in the 18th century focused on demands for civil participation, political enfranchisement and sovereignty, and a redistribution of confiscated land back to the Catholic community, with individual property rights to share in its wealth. (Cullen 1972, Whelan 1996) They demanded the enfranchisement of Catholics into the citizenry; parliamentary reform to include self-government; a redistribution of property, and the right to independent trade relations with America.

Unlike the United Irishmen, Burke took a stance that was anti-Locke. Burke was a disbeliever of Locke's theory of a pre-social man with abstract natural rights, and he was similarly opposed to the idea of free individuals. In the same way as he opposed free individuals, Burke conceptualised the function of rights as being for the purpose of gluing society together, not for the protection of the individual person. Burke's view was strictly pro-community and in favour of cohesive society. Burke's concept of rights was historical, passed on through tradition, history, and the nation. (Pappin III 1997) National citizenship, as espoused by Rousseau, Herder, Hegel and Burke is legally bound to protect nationally based rights. Closa argues that nationality became the essential determining factor for citizens' rights, when citizenship became linked to a territorial boundary, within which public space citizenship and rights could be guaranteed and protected.

Who is responsible for the duty reciprocating the right to freedom of expression, the right to reception of information and communication and the right to participation in public debate?

Can it still be correctly assumed that it is the duty of the nation state to protect its citizens' rights if the normal operation of market activities fails to adequately supply public goods? (Corcoran 2001, Keynes, MD Higgins, Ward 2001, Calabrese & Borchert 1996 all think so, as did Roosevelt's 1930's New Deal policies)

Some theorists (Raboy, Hamelink, Corcoran 2001) argue that the nation state has willingly ceded authority and power in a range of policy areas to international intergovernmental institutions and organisations. This thesis' empirical research appears to support that claim.

While traditionally, in other areas or spheres of activity, a violation of rights can result in compensation for the victimised, this is not yet an active practice with relation to rights of the public sphere, although Murdock and Golding (1989) suggest it is the responsibility and duty of the communication and information systems to meet the demands and needs of citizens in relation to communication. Is it possible to extract compensation for the violation of individual rights from that private sector which avidly avoids stringent adherence to legislation, both national and international? It might be possible within the WTO like in the NAFTA Canadian agreement.

In the following section, I outline the trading environment of Ireland with America and Great Britain in the 17th and 18th centuries. I show how demands for human rights first originated within the context of trade, and trading rights within communities. These were initially demanded by American colonists, then Irish Catholics in rebellion against the colonial oppressor of human rights of that era, Great Britain. This thesis argues that demands for national autonomy in trade and commercial matters took precedence over demands for cultural separatism, and that the former was the basis of Irish demands for sovereign citizenship.

4. 1 The liberal market, protested

Kerridge suggests that the prominence of the market, and its remedy to all problems came at a specific historical time, "at the intersection of the old and the new, at the junction between patterns of trading relationships and controls which dated back into the early modern period and the new vibrant 19th century economy of the "Workshop of the World." (B. L. Anderson and A.J. Latham 1984:4)

A combination of factors: the Enlightenment forces of progress, a developing free liberal market and the political economy of Adam Smith (*Wealth of Nations* 1776) all helped to create an unsubstantiated belief in the self-regulating power of the market.

The capitalist market is the hallmark of utilitarian liberal thought. The liberal political community promotes a route from bourgeois economic principles to potential sources of wealth. (Adam Smith, Utilitarians) In the 18th century, civilisations lived or perished depending on the land. The most dramatic impact of the French and Industrial Revolutions was on landed property, land tenure and agriculture.

Despite a common goal – freeing the link between peasant and land so that labour could move freely from village to village or from village to town, and in order that the wealth of the land could be exploited more efficiently and to greater profit – America took to capitalistic entrepreneurship with much greater enthusiasm than in Europe. It was a common belief that the main source of wealth in the 17th and 18th centuries – land – should be transformed capitalistically in order to promote the economic development of the country. Three things had to take place – firstly, land had to be transformed into a commodity, for private ownership and sale. (Britain, which had never experienced feudalism in the European sense, had already put all land into private holdings with the 1760 Enclosure Acts.) Secondly, land had to pass into the hands of those enlightened, profit-motivated and self-interested men who would develop its potential and productivity for the market much more efficiently than a forced labourer. And thirdly, great masses of agrarian peasants had to become the new mobile labour-force for the

industrial and agricultural economies. (Hobsbawm 1962) This had different results in a variety of countries.

Rather than turning into the owner-occupier small commercial farmer of the American system (who was encouraged to 'move up the social scale' by in turn employing labour workers on his private enterprise), the French farm-workers developed into a nation of small-scale peasant proprietors. They were satisfied with what they had, made an agreeable life on the land without too much hardship, and resisted pressures to move to the towns, thus slowing the growth of French industrial development.

This was not adopted wholesale or without protest in many parts of England, in particular when the local civic authorities resisted this dogma of the market in favour of continuing local stability and peace and order. In France, the vast bulk of the rural population (from the largest feudal lord down to the most poverty-stricken shepherd) vehemently opposed any introduction of bourgeois-individualist rationalism on the land. Between 1789 and 1848 feudalism and oaths of allegiance to their landlord were abolished, the poor were forced off their land and the peasantry were set free to move about for work or buy back their land.

In Europe, the ideals of collective land ownership had been retained, even past the abolition of feudalism. Resistance came from both the traditional peasantry, and the pre-capitalist landlords. While the European peasants were keen for land, they did not want the bourgeois agrarian economy that went with it.

'The introduction of liberalism on the land shattered the social structure the peasant had always inhabited and relied upon: in its place it left nothing but the rich, and 'freedom' felt like solitude.' (Hobsbawm 1962:194)

Nonetheless, in Britain as well as in France, public confidence in the self-regulating powers of the liberal market was weak. Many towns in 18th century Britain, for example, Oxford and Coventry, shared an emphasis and insistence on traditional forms of regulation and control. Randall et al. (Randall, Charlesworth et al. 1996) suggest that despite the Parliamentary push for a national market economy, "Even those cities most committed to free markets in the 18th c. were not prepared to push ideology before public order" (p11). Randall et al. note that "Even those most concerned to maintain

free trade did not shrink from market intervention to safeguard social welfare and social and political order" (p12) especially regarding low bread prices.

Marshall, for one who promotes social rights so strongly, favours the precedence of the market system over any rights allowances, stipulating that "measures designed to raise the general level of civilisation of the workers must not interfere with the freedom of the market. If they did, they might become indistinguishable from socialism". (Marshall 1950:80)

Marshall believed that a free market was not incompatible with communitarian redistributive rights, although they might lessen its competitiveness. He hoped that the expansion of social rights could modify the capitalist system so as to bring about equality in the realm of both class distinctions and economic well-being. Marshall must have assumed that the modern industrial community would eventually stabilise. However, the conflict between the free market and measures to provide equality in the modern age is still raging. We see this particularly in the concentrations of corporations, a limited number of dominant players within the marketplace, and a burgeoning rich-poor divide in the 21st century.

It was the British Parliament that led the way towards a free market - it repealed the old statutes concerning forestalling and regrating in 1772, and central government also acted in ways which distorted the market in grain.

However, the free market rhetoric could always be subdued when occasions demanded market manipulation, for example, during times of continental food crisis, which instigated food riots in Britain and Ireland.

"Advocates of the free market in the later 18th c. were concerned to argue that the removal of regulation would ensure regularity of supply and could not play into the hands of speculators and monopolists. Popular opinion was by no means assured and the ancient distrust of the middleman continued to inform crowd and paternalist thinking alike." (Randall 1996:9)

There were many who had little enthusiasm for "the free market and unfettered capitalist world order they foresaw. " (Ibid, 1996:24)

The free market flew in the face of a long-established tradition of collective rights and collective customs. Peasants were still accustomed to receiving help from their

landlords in times of high prices or scarcity. This made them continue to expect a heavily interventionist and 'paternalist economy' market model. For example, peasants held the right to low priced bread, the right to gather fuel from the landlord's forest, and other collective rights that had roots in a peasant-landlord-king feudal regime. Randal et al suggest that there was "a deep-rooted community determination to uphold a popular market culture in marked contrast to the free market culture of the Classical Economists" (p15)

In the new free-market economy, the power of the public lay in the collective power of public protest, riot and revolution which the authorities feared and sought to avoid.

"Change in market provisioning and market practices was a much contested arena of conflict between the older models of regulation and control and new forces of market freedom and autonomy". (Randall, Charlesworth et al. 1996:5)

Food markets, the provision and exchange and trading of foodstuffs is suggested by Randal et al. as one of the main arenas where tensions were played out - there was the attempt at the rise of a national market in grain, prices increased, availability of foodstuffs fluctuated, and there was much popular unrest and riots caused by anger over food controls during the 18th century. The real power to control prices is ascertained to be the buyers and consumers who kept an active check and unashamedly reported unfair trading behaviour to local middlemen. Anomalies were often reported in the press and newsheets.

While the action was centred on the marketplace, the incitement and organization of popular protests (against deviance in the marketplace, against unfair prices and price fixing, against dishonest dealers and stockpilers of goods, against illicit taxes) was stimulated by the growing presence of the press and the formulation of public opinion in printed debate.

4.2 The 18th century marketplace as locus of community and public sphere

Habermas argues that the practice of critiquing State actions had its roots in the private (meaning, within the locality of the private conjugal family) criticism of literary works – what Habermas distinguishes as the ‘literary public sphere’. From this base, and with the move to more public locations of discussion like the coffee houses in Great Britain in the late 17th to early 18th centuries criticism transmuted from literary to political topics. Although the blossoming number of coffee houses in Great Britain in the early 18th century were theoretically more open to a wider strata of the middle classes, the drinks themselves (tea, coffee, chocolate) served in these houses were the drinks of the ‘well to do’ classes. Although these seats of discussion were in principle less formal in manner than French literary salons, the growing number of participants still remained among the exclusively male landed gentry, moneyed capitalist and aristocratic nobility, professionals and merchant classes.

Randall et al. suggest rather that the marketplace and the market is an interesting location by which to identify changing social, economic and political relationships in the period of the long 18th century (taken as stretching from the mid 1600s to the early part of the 19th century).

The markets (rather than coffee houses as Habermas posits) are suggested as being the locus of the community identity. This was the place where news was exchanged and the locality came together, sometimes to organise collective protests to protect their collective rights and customary rights coming under pressure by the new free market economy. These authors suggest that the market place, not the church or public house, was the centre of community.

They argue that in Britain,

"The market and the marketplace [also] formed a concrete physical location and the centre for community interchange, not only economic but also social and political. The market was the principal focus of community identity. It was a place where relationships were made and developed, where news and gossip were exchanged, where values, attitudes and opinions were disseminated,

acquired or debated. Much more than the church or the public house...the market was the one place where all classes would meet, where all groups in a highly socially stratified society could mingle cheek by jowl. Here was the lifeblood of community. In that community, the values and the culture of the market of the majority remained, in the 18th century in many respects firmly fixed in the regulatory economy of the past. " (Randall, Charlesworth et al. 1996:12)

Cullen (1972) concurs that this was also the case in Ireland from the late 18th to mid 19th centuries. Cullen argues that Irish communities formed around the marketplace. Ireland's towns and villages could not have grown and developed without commercial activity, and these social arenas centred around markets. This model of development is akin to the development of city states (e.g. Geneva, Florence, Athens). In 1725, eight of the ten major towns in Ireland were ports. Dublin, trading predominantly with Britain and Cork, whose main trade was with European maritime nations and the colonies of the Atlantic economy were the two largest ports.

"The towns could not have grown except in the context of expanding trade. Trade itself could not have increased unless transport facilities improved. All the larger towns were deeply involved in trade, a fact highlighted by most of the major towns being seaports." (Cullen 1972:86)

One of the first objectives of an improving landlord in Ireland was to establish markets and fairs and often to erect a market-house. Many insignificant villages also grew rapidly in the second half of the 18th century, expanding around a market for livestock, produce or cloth produced in the surrounding district. Some villages grew up around fairs for cattle and products of the cloth industry.

Recent academic research has re-focused on the "role of the market and its power to modernize and to transform". Some authors have a concept of the market as "agency" and of the market as "ideological impetus" and who posit the market as a force for social and political change. These authors include Anderson and Latham (1984) and Hont and Ignatieff (1983).

4. 3 The blossoming of the critical public sphere - - the politicisation of media, press and public opinion

The changes brought about in the realm of enfranchisement of the lower classes in Ireland during the late 1780s was largely due to the democratisation of the press and the large propaganda distribution machine of the United Irishmen, despite severe legal and political restrictions on public discourse imposed at a time of international war and domestic unrest, particularly during the 1790s.

Paine's *Rights of Man* was a leading inspiration to the United Irishmen. Paine managed to write about complex theories in an accessible manner, comprehensible to the non-literary public. It was through Paine and Wolfe Tone, and their use of vernacular (English) language that the majority of Irish disenfranchised Catholics were able to comprehend, and thus participate in the vernacular (as opposed to high literary) public sphere. (Whelan 1996)

In Britain, the public sphere grew within coffeehouses and journals; in France, debate flourished within literary salons held in private aristocratic homes; in Germany at table societies hosted by academics; and in Ireland, in the location of markets, fairs, public houses, press and pamphlets.

Catholic, illiterate non-citizens first became 'citizens' of the oral public sphere through listening to the recitation of newspapers in public places and watching politicised popular theatre, and hearing songs and poems, and the public opinions in the public sphere. (Gibbons 1998) 'Oral culture', and the politicisation of these methods of spreading news helped the illiterate Catholics integrate into the public sphere. They stimulated public opinion towards a demand to change the laws.

The United Irishmen – who led the politicisation of popular vernacular cultural forms – wanted citizenship rights for the Catholic population, representing four-fifths of the entire nation. They could only legally print in Belfast, and there, the *Northern Star* paper was their chief vehicle for radical politics. They tried to outline the benefits to the populace of following parliamentary reform, and the movement fighting for it.

McBride explains that,

"In their attempts to communicate with a constituency which had little experience of political debate, the United Irishmen highlighted the tangible benefits which would follow from parliamentary reform, with the abolition or reduction of tithes, church rates, hearth money, excise taxes and the county cess all high on the agenda". (McBride 2000:163)

The English described the situation as "peasants being led by intelligent treason". (Whelan 1996)

McBride suggests that the roots of the 1798 Irish Rebellion lay with economic and social changes that had started in the 1750s and 1760s with the beginnings of sustained commercial and agricultural growth in an expansionist 18th century economy. However, while these factors created the social conditions for politicization, McBride suggests it was the "unprecedented explosion of print culture that converted discontent into disaffection" (McBride 2000: 173), first in the northern province, then Leinster and Munster.

The new lower-class literature had subversive effects. The handbills that were distributed at "every village, fair and market" were teaching people that they were the most wretched, oppressed, abused people, and that "all their miseries could be attributed to one political cause, namely, the radically bad government under which they lived". (McBride 2000: 176)

The United Irishmen are said to have made every man a politician. It was the United Irishmen's task to use the vernacular common-day language in writing, and the oral forms of entertainment familiar to them, to create an "accessible, democratic language of politics" which would enable the common people to become citizens and voice a public opinion. Gibbons (1998) notes that the concentration on vernacular media meant that all people could take part in the Revolution against British Rule in 1798. It was through oral (and the politicisation of oral culture) that the 'public sphere' was brought and adopted by the illiterate. Often these handbills and public newsheets were sold in markets and village fairs, making this arena the principal locus of the public sphere for the non-elitist non-reading public.

Whelan (1996) acknowledges the politicisation of popular culture and the stimulation of public opinion, yet does not address the issue of trade in Ireland as a factor of the development of the public sphere.

Hampsher-Monk argues that Burke was in great favour of public opinion – but preferred not to listen to it himself, or to take account of it in Bristol, which was his constituency.

"Opinion was the great support of the state, thought Burke, and the politician's art was in managing and concerting opinion amongst the politically aware community - necessarily, he thought, a small proportion of the population. The statesman must pay attention to the nature of opinion and the social forces and institutions which shape and support it. Americans asked for their traditional English rights without disturbing the social structure of their colonial society; the French were inspired by abstract rights; and as the revolution wore on undermined more and more of the social institutions of traditional French society - the aristocracy, local government, the administration of law, the Church, the economy. In the absence of these institutional supports, public opinion was easy prey to abstract radical ideas, which, he thought, dissociated from experience and lacking a deep foundation in the minds of the people, were easily manipulated for ultimately terrifying purposes. " (Hampsher-Monk 1987:41) Burke feared a Hobbesian state of nature.

However, it is noted earlier by Hampsher-Monk (1987) that Burke was only tolerant to a limited degree of the public opinion that was expressed to him as an MP. It is said that one of the reasons why he lost his office in Bristol is partly due to his attitude that while an MP should listen carefully to his constituents, he should reserve actions pending on making his own mind up about what would be in the constituency's best interests, or the common public good.

Marshall argues that the awakening of public opinion in Britain along with a growing national consciousness produced sensations of 'community membership' and 'common heritage'. However they had no effect whatever on social inequality or class structure, because of the lack of political enfranchisement or utility of that political voting power by the masses of working people.

4.4 The Public Sphere of the Market and Expression of Public Opinion

The press and pamphlets of the day helped to organise local protest if needed, and were the shapers of public opinion with regard to the market economy, prices and trading regulations. (Randall, Charlesworth et al. 1996) They were often the ones also who were “quick to condemn the activities of those who were deemed to have deprived the local market of food supplies or to have artificially inflated prices. This might even be seen to encourage crowd action”. (Randall, Charlesworth et al. 1996:14) Demonstrations of public opinion took the form of peaceable demonstrations, minor fracas, or full-blown food riots disguising a political agenda. Riots often started over food, but they might reflect long-held grievances about other subjects. The riots were focused on food or drink, but really they were social protests with a wider agenda. The most striking aspect of the 18th century protests is their acceptability – it represented and augmented a ‘tradition of protest’, and their community nature. Although all the public might not get involved, all members of the society usually held an opinion.

Usually it was the weavers, textile workers, miners, and lower classes who were involved in food riots. The middle ranks were often not prepared to take an active part in market disturbances, however they might use their real powers to express hostility towards the authorities themselves, or use their powers within the corporation. The Middling sort (acknowledged as those 'propertied' or those 'citizens' like artisans and urban tradespeople) supported a moral economic stance. They might not approve of the riotous form of much popular protest and the collective strength of the rioters, but they had an ethic of the sort which embodied "A deep commitment to a world view structured by a discourse of rights and entitlements, in which communities had obligations to protect their weaker and poorer members from the ill-effects of both natural and man-made disasters, was required to make them behave in this way". (Renton, quoted in Randal et al 1996:21)

The press hovered at times between endorsing public forms of protest and yet acknowledging the need to maintain social order.

However, public opinion in 18th century Britain was formed not only in the press, but also in the open through politicised theatrical displays conveyed in symbolic puppetry or messages to an illiterate public, often at election times. "Theatre of the streets was a highly effective means of reinforcing political messages to a largely sub-literate populace". (Ibid p22)

This is an important point – oral distribution of news also played an important role in the formation of public opinion amongst the illiterate, non-reading public. The reading public sphere of literate people represented only a minute percentage of the general public. Meantime, the vast majority of the non-reading public availed themselves of news, and news of disturbances at public readings of broadsheets, and in Ireland in particular, it is noted that through satire and verse that were sung or performed wholly in the vernacular language of common-day use many poor Catholics became aware of their political and civil rights.

4.5 Human rights in trade: The Empire and Colony in the 18th century

I wish to highlight the role of trade and trading practices in the development of an awareness of rights, the notion of citizen, and citizenship in the psyche of the member of the public. I argue that trade barriers were recognized as the first act of oppression of human rights. It was in the marketplace, within the perspective of the marketplace society, that the first members became aware of their rights, and demanded them from a 'human' and 'natural' rights perspective. This differs from some theorists and philosophers who argue the volk, the culture, the identity and the nation was the driving force behind the demand for rights – which the nation state could then protect.

4.6 Irish – US trade factor in rights' claims

Between 1760 and the early 1770s, Ireland's trade with the American colony was strong and profitable. However, Ireland as a colony of the British Empire was adversely affected by the numerous and various Acts introduced by Britain that provoked American political dissent leading to rebellion and independence. Burke never viewed the American war as a revolution, but as a civil war within the Empire. The difference between the French and the American revolutions was this: American revolution was never a social revolution, while the French was from the start infused with radical political ideas, according to Hampsher-Monk (1987).

Ireland and its trade with America was inadvertently penalised by Britain's moves to contain the American revolution, and the colony of Ireland repeatedly played piggy-in-the-middle in between a British-American war. In Ireland, there was strong sympathy for the American cause against the British – they were being penalized by the same British Parliamentary Acts, and experiencing their own rights suppression.

September 1759 has been identified by Stanlis (1997) as the start of the change in relations between America and Britain. French Canada was surrendered to the British, and Americans realised they no longer needed the military might and protection of Great Britain against the Spaniards to the South and the French to the north. They felt they were no longer under threat of war from external enemies, better able to defend themselves on home ground, and therefore, much more self-reliant. (p30)

However, in terms of internal aggressions, Acts prohibited the export of American goods to anywhere other than Britain, giving the British Empire a monopoly over the sale of American goods. Acts also imposed external taxes on certain American items and products, and it is maintained that the fact of external taxation was the weakest link of the colonies' tolerance with the mother country's methods of control.

The 1764 Sugar Act was the first in a series of parliamentary measures that externally taxed the American colonies. For Irish philosopher Edmund Burke, also MP for Bristol, an important port and trading community, 1764 was the "turning point in Britain's policy towards her American colonies, because in that year, for the first time,

Parliament was not content to control America through commercial regulations, but instead sought to secure revenue through taxation." 1764 was a key date for a change in British policy towards her colonies, through enacting bad economic policy that caused severe discontent and ever-increasing public disturbances. According to Burke, there was already evidence of internal government in America and colonial self-rule.

For Stanlis (1997), the discontent between America and Britain was centred on the issue of sovereign rights. This is indicative that oppression within trade leads to an awareness and rebellion for rights. This came to the fore when policy changes were introduced by Britain relating to trade, commerce, the trading environment and the regulation and governance of that environment. Britain's policies in these Acts raised issues of "taxation and representation, revenue and regulation, freedom and subordination". Taxation issues created avid discontent, and gave rise to the stimulation of political public opinion. Americans protested, saying that a British gentleman's right was 'no taxation without representation'. America was effectively querying: are we subject or are we independent? Stanlis suggests that "The American revolutionaries appealed to abstract slogans about 'rights' in order to justify exempting themselves from taxes under British sovereignty. "(Stanlis 1997: 30)

In American eyes, governments in America were 'perfect states' and in 'no way subject' to Great Britain. In British eyes, the American governments were 'corporations empowered to make byelaws'. (Stanlis 1997:24)

It is clear then that the outcry over the regulation of trade stimulated debate on rights and citizenship. Ireland came to be caught up in this because of her geographical location as an important port for American goods en route to the British Isles. The contest was between Great Britain's right to tax vis a vis the right of American colonies to their independent economic policy. To be taxable, the Americans reasoned, warranted political rights, and a right to political input.

In Burke's eyes Britain's role was to supervise, not supersede colonial governments. Trying to rule territories on 'mere abstract principles of government' was ludicrous, he thought. To insist on an 'abstract right' to tax the colonies, was fatal. Burke saw that the attempt by the ministry to enforce its 'rights' of sovereignty in America would result in the loss of the colonies. His advice to the British Parliament was:

"Leave America, if she has taxable matter in her, to tax herself." (Stanlis (1997:35))

He considered his warnings for Britain on the American issue had relevance for Britain's other colonies – his home country Ireland in particular.

Burke wished to help his fellow Irishmen. This put him in a difficult political dilemma: how to help Ireland without ruining his own credibility. He voiced opposition to Britain's handling of the American situation, in the hope that the advice would also benefit Ireland. Hampsher-Monk illustrates how Burke pushed for free trade, as did Marshall. Both on the other hand argued the case for national culture and national heritage and identity.

"Through championing imperial free trade in the case of America, he (Burke) sought to alleviate restrictions on Irish trade too. More generally he sought to link the cases of America and Ireland and to use the loss of the American colonies as a warning lest Ireland should go the same way. This ploy proved successful - substantial trading concessions were made". (Hampsher-Monk 1987:27)

Burke changed his opinion during the course of the American revolution (or civil war within the British colony, as he called it) from first defending Britain's right to sovereignty in policy making, to subsequently calling for the American colonies to be granted separate nationhood – once he saw that in many policy areas, they had governed themselves.

In response, Britain's insistence on its sovereign rights (employing the concepts of Blackstone) to issue whatever policy it deemed reasonable in the areas of taxes, trade, and regulation of commerce angered American colonists so much that they in return insisted on their individual human rights. (Frohnen 1997, Stanlis 1997, McBride 2000)

The 1764 Sugar Act was followed in 1765 by the Stamp Act, which caused such a furore that it was repealed within a year, in March 1766. By 1765 print had been elevated to the status of "indispensable to political life" and was seen by some as the primary agent of world emancipation. (Warner 1990:31)

The American colony would have been quite happy to continue as a British subject in a colony-empire relationship, had it not been for the heavy imposition of external taxes on transatlantic trade between America and the rest of the world.

The American founders like James Madison and Hamilton started to publicly scrutinise and rationally debate many years of disagreeable laws like the Navigation Acts, imposed on the American colonies by the mother country, governing trade and commerce and the sale or re-sale of indigenous goods to other countries. In this researcher's interpretation, international trade gives rise to awareness of human rights, and demands for sovereign rights over commercial activities and financial autonomy. Anglo-American arguments sailing across the Atlantic focused on the colonists seeking rationales for the imposition of objectionable Parliamentary acts on the colony. Burke in particular chastised the British government for its insistence on the 'abstract right to tax', and instead urged caution and compromise. Further attempts by King George III to impose tighter controls on the British Empire led to a backlash, and the gradual unleashing of years of festering malcontent.

4.7 Restriction of Free Expression in Published Opinion

The press has historically been regulated for political purposes through fiscal taxes. Repression of human rights to freedom of expression via The Stamp Act (1765) was the final straw for American colonists. For them it represented a violation against the right to free expression by imposing taxes on all printed material and dangerously aggrieving the most educated and literate in American society. By raising the price of previously inexpensive press, the Stamp Act also restricted the right of the reading public to receive public information at low cost. The subject caused a furore in press and printed pamphlets of the time (particularly in the *Virginia Gazette*). At the same time as he was sending the British navy to attack colonists' ships, King George III shut down the local justice system, so the colonists complained they had no legal means of redressing any infringements of their natural rights. They also were aggrieved that as subjects, they were being taxed without proper political representation in the British Parliament. 'No taxation without representation' was their riposte. Americans' unhappiness and frustration at the failure of the king to protect their natural and common law rights and freedoms aroused a strong desire to break with the past. In essence, as subjects, they owed him no further allegiance because as king he had 'deposed himself' by failing to protect their natural freedoms.

The Stamp duty was the principal tax on newspapers, designed to limit the proliferation of the clandestine radical press in Britain. Yet Stamp duty evasion was rampant in the early 1830's and government powers of clampdown were increased. The Stamp duty itself was increased by 75% to limit widespread smuggling. To be found even in possession of an unstamped newspaper carried severe penalties. Strict enforcement of press stamp duties succeeded in eradicating opportunities of expression by undesirable political adversaries to the ruling government by 1837. However, Victorian middle-class reformers adopted resistance against press taxes, arguing that the Stamp duty law was so openly and widely flouted it should be repealed. Their campaign was efficiently organised, and by 1855 the Stamp duty had been abolished. Other legislation governing the taxing of newspapers was finally removed by the late 19th century – with the abolition of the advertisement duty in 1853 and the security system in 1869 (Curran 1988: 27).

Curran (Curran and Seaton 1988) argues that it was not the admirable ideals of a pluralist press market that stoked the fire of the campaign for a free press. More accurately, it was the “growing conviction that free trade and normative controls were a morally preferable and more efficient control system than direct controls administered by the state”¹⁷. In other words, given a more libertarian market environment, the increasingly confident Victorian middle class could then be free to use the expanding press for the advancement of their own interests – the press would be used to substitute one dominant social order by another.

It is an argument advanced in today's media climate – powerful media conglomerates eager to reduce and eliminate state regulation of broadcasting, not for any utopian ideals of commitment to diversity of expression (although their most common argument is that increased channels give greater “consumer choice”) but really for their own powerful interests of profit and greater market concentration. In the global media environment, where information is a key product, this has serious implications for political and democratic control of societies.

4.8 Repression of Human Rights in Trade

The 1765 Stamp Act was repealed within a year, in March 1766, but was replaced by the 1766 American Act. The American Act prohibited the export of any American goods to any port in Europe north of Finisterre (NW Spain) other than Great Britain. This was going to have great consequence for the export of flaxseed to Ireland. Linen and flax seed was the main business between Ireland and the American colonies. Between the years 1770-71 there was a dramatic shift in the structure of Irish-American trade, principally in the trade of linen shipped direct to America. The quantities rose from 800,000 yards in 1770 to 3 million yards in the following year. America exported flax seed to Ireland, and Ireland re-exported it as linen to America.

Ireland protested at the limitations in her trade with America following the 1766 American Act, and although the British response to exclude Ireland from the ruling was swift, "the ...crisis underscored the vulnerability of (Ireland's) trade to the actions of a distant parliament. Across the Atlantic, it was further proof of the inability of the British parliament to manage the trade of the empire in the interest of the American colonies". (Truxes 1988:234)

It didn't take Ireland long to realise that it was repeatedly getting embroiled in wars between Britain and the British colonies of America. Ireland was penalized for being a colonially ruled country, caught physically in the trans-Atlantic marketplace. The greatest concern was the feared demise of the linen industry because of the disallowed access of American products into Ireland, in particular the much-prized flax seed.

Likewise, America valued Ireland for its role as an intermediary stationing point for its re-exports to Great Britain, especially during the 1776 Revolution when American ships could not land there. Commerce with Ireland was one of the few channels available to the farmers of the northern colonies whereby their produce could move directly into the British Isles.

After the 1766 American Act, Parliament enforced the 1767 Townsend Acts. These required the collection of duties on some, selected British goods in American ports. The

intention was to raise revenue in America for the Empire. In response, the colonies exercised a limited boycott of British goods, designed to hurt the trade of the mother Empire. However, an exception was made by the British to favour Ireland.

Ireland's main export to America between 1768 and 1771 was linen and wool. Irish linen was a big import to American colonies. Cork was very active in provisioning for the crews of trans-atlantic vessels in meat and wheat. This demand for wheat, despite the superiority of American wheat, was particularly strong again during the American Revolution.

In 1773 the British Parliament came to the rescue of the East India Tea Company in the shape of the Tea Act. The company was near bankruptcy, and Parliament's interference gave it huge concessions, and thus "unassailable competitive advantage" in the colonies. (Truxes 1988:236)

The 1774 Coercive Acts came following the disorders in America, and their unambiguous opposition to the actions of the Mother Empire. The British ministry clamped harsh restrictive measures on colonial commerce and government. These resulted in stimulating bad relations between America and Britain once again, and helped lead to a full-scale revolutionary war. American colonists again tried to restrict British commerce, this time without excepting Ireland.

American defiance to the Coercive Acts became official on 17 September 1774. Irish interests became affected by the British colonial Acts after the first move by Americans to insist on their rights with the 1774 American Congress on trading rights. The First Continental Congress of the Suffolk Resolves were "a radically defiant statement of American rights and prerogatives." That document recommended withholding "all commercial intercourse with Great Britain, Ireland, and the West Indies" until the full restoration of American rights. No Irish imports could enter colonial ports after 1st December 1774, and exports were to end on 10th September 1775. It meant that Ireland couldn't export linen, flaxseed or flour to America, which had implications for a slowdown in the linen-manufacturing sector, eventually leading to decay.

The Americans sympathised with the Irish predicament of proclaimed innocence in a statement saying: "If we continued our commerce with you, our agreement not to import from Britain would be fruitless. " (First Continental Congress of the Suffolk Resolves, 17 September 1774 quoted in Truxes 1988:248)

In July 1775, despite the dangers, Ireland's Protestants and Dissenters remained supportive of the American cause. In October 1776, there was discussion within the Continental Congress regarding the possibility of re-opening trade with the Irish only.

Finally, one of the most celebrated events in Irish commercial history (Truxes 1988:238) occurred between February 1776 and December 1778. The British imposed a total embargo on Irish exports to America. This was potentially devastating: if Irish linen trade to America was embargoed, then the manufacture of it was likely to be depressed. The Belfast merchants formally petitioned the British parliament for relief citing "the decay of their linen manufacture, occasioned by the unhappy differences between Great Britain and her colonies". (p242)

The embargo only raised more hackles in Ireland against the British. According to Truxes, it "focused the discontent in Ireland over English commercial regulation that lay just beneath the veneer of Anglo-Irish harmony. Although the impact of the embargo upon the provisioning trades was greatly exaggerated in both the liberal press and on the floor of the House of Commons, there was some basis for discontent". (Truxes 1988: 238)

The American Revolution commenced in 1776. Between February 1776 and December 1778 Great Britain banned all Irish exports to the rebelling American colonies, and effectively Irish-US trade was cut off. However, despite this situation, military demand from both the British armies and the American rebels combined to create a demand for Irish goods that was unparalleled. "During the years of the American Revolution, Ireland produced a significant surplus of those articles upon which the fate of 18th century armies depended. The British Army relied upon supplies purchased in Ireland during its American campaign, and in a much narrower sense, so did the Continental Army." (Truxes 1988:248)

On the one hand, British military ships stopped at Cork for provisions, supplies and victuals (mainly in beef, wheat, butter) before setting off on their trans-Atlantic voyage with the intention to subdue the American revolutionaries.

On the other hand, in October 1776 the Continental Congress re-opened the channel of clandestine trade between the colonies and Ireland, and it was from the Northern ports (Larne, Belfast, Newry – those that most helped the American cause) that vessels filled with gunpowder, linen and woollen produce for army use departed in transit for the American armies. Because of the build-up of British Navy ships patrolling the North American coast, it was safer for contraband Irish goods intended for the rebel army to be transferred to France whereupon they were loaded upon neutral ships of European nations destined for those French and Dutch West Indies ports in the Caribbean that were considered neutral.

Ireland gained by the increase in demand for her products as well as the high prices paid in war-time colonies. There was a great demand for Irish pork, butter, biscuits, herring and linen during the war and this was further boosted throughout the 1700s by a succession of poor crops in England. All flour producers in Ireland also knew that American flour was superior and likely to be in great demand once the American dispute was settled. However, due to the ban on importation of American flour, the Irish flour mills profited. Two years into the war, some products, especially linen and wool experienced inflated prices of between 600 % and 1000 % above 1772-1774 levels. There were similar price rises in beef and pork. Military demand in war-time put up prices on both sides of the Atlantic, and while Ireland's producers did good business, much of the poorer classes throughout the country suffered through scarcity and price increases.

4.9 The beginnings of the demands for rights

Why did trading or trade rights come to the fore when they did? McBride (2000:173) and Whelan suggest that from the 1750s and 1760s there was growth in overseas trade and agricultural production in Ireland. There were also the beginnings of agrarian

insurgency among farmers and craftsmen adversely affected by shifts in the new market economy. Higher demands during the American Revolution also made peasants suffer.

Whelan (1996) asserts that an expansionist 18th century economy between 1760 and 1840 – namely, the modernizing commercial exploitation of property rents, of commonage lands, of cattle and milk products – resulted in political, cultural and linguistic changes in Ireland during those years. This meant that some Catholic farmers nurtured large commercial farms, entered politics and helped to push Catholic rights discourses to the fore of domestic politics. Property owners, although unusually Catholic, pushed for citizenship rights. Their property ownership gave them leverage to demand political rights.

During this economic and commercial growth period, largely as a result of British intermediary expertise and assistance in marketing and financial services, as Truxes (1988) asserts, only one fifth of the population had full civil and political rights. Exclusion, says Cullen was based on sex and religion and means.

"The 1841 census divided the population into four categories according to their means. The division depended on substance, also in rural areas on the size of holdings. The first category included property owners, also farmers of more than 50 acres. The second included artisans, and farmers with from 5 to 50 acres, the third category included labourers and smallholders up to 5 acres. For the rural districts of the country at large, the first two categories accounted for 30 % or the families. Seventy per cent of the rural population of Ireland as a whole therefore consisted of labourers, smallholders with less than five acres and the less prosperous artisans. However, what is more significant is the contrast between the two broad divisions in the different regions within the country. The first two categories combined ranged from as high as 40 - 42 % in the eastern counties to as low as 15 % in Mayo". (Cullen 1972:111)

Catholics were excluded from government. The one fifth of the population with full civil and political rights belonged to the Irish Church and was in communion with the Church of England. "These people controlled the country's Parliament and had a duty to make laws consistent with the needs of the whole Irish people." (Frohnen 1997:134)

This combination of disenfranchised masses – encompassing merchants, tradespeople, sellers, buyers, producers, businessmen – with the rich pickings to be had in an

expanding economy came together to force the issue of trade rights in the late 1700s – early 1800s.

Simultaneously, during the late 1790s, The United Irishmen continued to imagine the Irish nation in civic and territorial terms rather than as an ethnic or cultural entity. While nationalists feared cultural imperialism, what they really wanted was self-government and control over commercial affairs. The nationalist cultural revival was in an effort to prove Gaelic civility and so gain civil and political status in British parliamentary eyes. They linked the rights to cultural expression with trade rights, the right to independent commercial policy and ‘free trade’.

The United Irishmen were opposed to social revolution *per se*, but they did want a redistribution of property, abolition of tithes and hearth money, lower indirect taxes, the abolition of excise laws, and reform of the legal process. Truxes suggests that "Behind the demand for ‘national government’ there lay a complex set of political notions." Wolfe Tone was in favour of:

1. Separatism (although he repeated in public the classic view of the Anglo-Irish connection as a dual monarchy)
2. Independent foreign policy (why should Ireland continue to fight Britains’ battles, he asked?)
3. A separate navy (to trade with, as well as to police the sea coast for smuggling and contraband)
4. A national flag.

To recap, this thesis argues that trade restrictions on Ireland in 1774 stimulated discontent firstly in the marketplace. This discontent (in England, about market corruption and price hikes; in France, about the end of the feudal support system; and in Ireland, relating to restrictions on her trade with America) focused on the economic and political issues of the day. They were publicised orally and in print, to spread dissent. The propertied classes were the first to express discontent in Ireland, France and America. In Ireland, a few Catholic but principally Protestant property owners demanded free trade with America. Freedom to determine her own international trade policy was finally granted to Ireland in 1782.

Chapter 5.

Independent Trade, Sovereign Citizenship

In this chapter the thesis wishes to emphasise the critical importance of the notion of autonomy in trade for those folk who desired independence. This researcher stresses that national independence, and a separate nation state status developed from the frustration of Irish traders with British infringement of their rights to free trade.

This chapter will outline the history of the Irish struggle for independence in trade policy in the late 18th century – once independent trade had been granted in 1782- and the significance of autonomous trade for citizenship and citizens' human rights.

The latter section of this chapter takes a closer look at the modern day situation that Ireland finds itself in with regard to free and autonomous trade. *It is the intention to illustrate the present day restrictions on Ireland's free trade, with respect to Ireland's membership of the European Union. As EU member states negotiate with one voice in the World Trade Organization forum, this chapter examines the extent to which Ireland, member state of the EU, can or does exercise an independent trade policy.*

The issue of trade autonomy raises questions for the ability of the nation state (Ireland) *to fully protect its citizens' rights.*

5.1 Irish trade autonomy in 18th c. foreign commercial activities

In this section, the thesis will outline the influence of the American War of Independence on the development of independent Irish trade autonomy in its foreign commercial activities. America launched the War of Independence in 1776 with the Declaration of Independence by the United States of America. Between 1778 and 1782, Ireland fought her own separate revolution against Britain, ostensibly demanding 'free trade rights', in the light of difficulties in Irish-American trade relations as a direct result of being a British colony.

This took its most clarified form after the 1798 Irish revolution, led by the Irish Volunteer Movement. In the following years, the Irish Commons demanded free trade. The Volunteers and the reform-minded Irish parliament proposed sweeping changes in the summer of 1782 by "giving the Irish Parliament broad powers to manage foreign commerce as well as internal domestic affairs. Thus, when trade resumed in 1783 between Ireland and America, now the United States of America, it did so on a significantly different footing." (Truxes 1988:249) Free trade allowed "trade between Ireland and the British colonies and Plantations in America and the West Indies to be carried on in a like manner as it is now carried on between Great Britain and the said Colonies and Settlements". (Ibid) By 1782, Ireland's demands to be autonomous in her foreign trade and commercial activities were granted.

The 1783 Act for Facilitating the Trade and Intercourse between this Kingdom and the United States of America was passed by Parliament in Dublin. The Irish parliament wanted to stimulate foreign commerce and keep Irish trade under Irish control. This "reflected the wishes of Patriots both to stimulate foreign commerce and to keep Irish trade under Irish control". (Truxes, 1988:249) The Act made Irish-American trade more free than it had ever been between 1662 and 1775. After the Revolution, Ireland was one of the few European markets to open its doors to American products (particularly to the new trade in tobacco) as well as flaxseed and lumber exports to America. In the post-Revolution period, Irish trade was on a more stable basis. Ireland had an individual relationship with America, rather than through Great Britain.

However, Truxes argues that the benefits were short-lived, and that independent trade did not bed down in Ireland. He maintains "Ireland's freedom from commercial regulation from across the Irish Sea did not outlive the 18th century. Likewise, the constitutional gains of 1782 proved largely specious when tested by crisis, particularly that faced by the Irish government after the spread of French revolutionary ideas to Ireland in the 1790s." (1988:251) However, the main advantage gained was that "Irish trade emerged from the period of the American Revolution less confined than it had been in nearly a century and a half, and it was never again forced into a restrictive mould to serve the narrow interests of Great Britain." (p251)

Stimulated in this way by American demands of freedom from British external taxation, Ireland had demanded and won human rights in trade by 1782. Ireland had gained the control of its independence, autonomy and rights in foreign commercial activities.

5.2 Theorists' approaches towards national state autonomy

Hamelink (1995) suggests that in the 21st century, even governments are not fully autonomous in their trade policy actions, because they are pressured into changing their position of independence because of threats of sanctions from Western (US / EU) trading partners. He adds that frequently these real policy decisions are not made in the GATT forum, but in bi-lateral encounters on the fringes, whereby countries are forced to accommodate to US interests (and in return, avoid trade sanctions). This researcher concurs with the situation as described by Hamelink within the WTO sphere.

In relation to the EU sphere, Ward (2001) on the other hand argues that the conclusions reached by Kaitatzi Whitlock (1996) and Venturelli (1998a), suggesting that the EU has done nothing else but deregulate the audiovisual arena using "a blanket application of competition policy", eroding all principles of broadcasting policy that have been in existence since the WWII are 'overstating the case'. (2001:82) Ward disagrees strongly with 'The Orthodoxy' as he calls it, that is, those who believe the driving force of European policy is an economic, industrial, liberalisation logic. Ward therefore disputes the suggestion that member states are said to be 'disempowered' in the sphere of television regulation.

Ward maintains that these erroneous arguments themselves stem from an 'unhelpful' distinction elaborated by Richard Collins (1993) in approaches to audio-visual policy termed the dirigiste (i.e. the cultural concerns put forward by certain sections of the EC and the EP) and the free market approach. The proponents of this 'orthodoxy' reject the latter approach that has been favoured by the stronger Commission DGs with responsibility for Competition, Trade or Information Society, and which is assumed to dominate the EP's cultural concerns.

Ward's spirited defense of the policy approach by the European Commission rests on a declaration by the EC that with regard to state aid, anti-competitive funding, and public

service broadcasters, it has always emphasised that "the philosophy of public service broadcasting is something that lies outside the competition rules and the strict terms of the European Treaty". Ward argues that the EC always defers to the interpretation of public service broadcasting as given by the European Court of Justice in the context of the Treaty, and thus the EC manages to 'circumvent any direct involvement in defining, either the remit of public service broadcasting or the nature of funding that these broadcasters receive". (2001: 85)

The evidence unearthed by this researcher leads her to disagree with Ward's view of, in the first instance, the autonomy of the nation state with regard to public service broadcasting's definition and funding. Secondly, this researcher does not accept Ward's argument that the EC distances itself from involvement in this sphere. In the following section of this chapter, evidence from internal documents to government suggests that EC opinion was not as non-existent as Ward appears to suggest. At the same time, certain civil servants within the Irish government, particularly within the department with responsibility for broadcasting issues prefer to dispute an overpowering EC role. Despite this protestation, it is clear from documentation that a power struggle does exist between the nation state Ireland, and the EC with respect to Ireland's autonomous policy decisions, both in trade and in audiovisual.

5.3 Modern restrictions on Ireland's trade autonomy

5.3.1 Ireland in EU negotiations

One of the key questions guiding this research was the enquiry: to what extent is Ireland autonomous and / or influential in decisions taken over broadcasting or communications policy within multi-national fora? Further, to what extent is Ireland's trade policy independent (since gaining autonomous independence from British colonial rule in trade and commerce issues in 1782)?

It was decided in 1985 that the European Commission would act on behalf of the Member States in WTO negotiations.

"It was agreed in 1985 that the Commission would negotiate on behalf of the Union and on behalf of the Member States, and that there would be a co-

coordinated position agreed in advance, which would be presented by the Commission. Obviously once the agreement was made, it would have to be approved at EU level, but also approved at the level of each Member State, at national level as well. So, whatever came out of the Round had to be agreed by the EU Council, - I'm not sure about the Parliament at the time, but it also had to be approved through the approval mechanism of each of the individual Member States, including Ireland". (D/ENT-EMP 4, Services negotiator, D/ENT-EMP)

Hence, the importance of agreement between the states of the EU in the formulation of a EU 'common position' which the EU can bring to the WTO table for negotiation. Agreement between Member States is the key factor in policy-decision making, but since the weighting of votes within the Council is calculated according to the population size of a Member State, Ireland is not in the strongest negotiating position at the EU table.

"EU negotiations are about 'weight'. Ireland in European Union negotiations tends to support the French. Ireland won't be a 'demandeur' of anything because they'll only have to 'pay' in other areas, that area possibly being concessions on agriculture. So they're more inclined to let others fight battles for them, avoid losing brownie points, and remember – since Ireland only has 3 votes (within the Council of Ministers), they are fully aware that as a small state, Ireland carries very little 'weight'. We do only have 3 votes after all, and more and more stuff is coming through qualified majority voting, so we're not as vital to get on board as say, Spain would be, or Britain, Germany or Italy, or even the Dutch. The French, some others, the Italians took up a defensive position against liberalisation in Uruguay Round discussions. I would have thought that Ireland just sat there and didn't have to take much of a position because the French and others were taking the position for them. Ireland probably wouldn't have come forward to try and find a resolution on that because, a) we were insignificant in terms of the business compared to the other countries and you have to have a notion of just where you stand in these matters, and b) we would have been afraid that if we became 'demandeur' for that, we would have to pay for it, and that the payment might be in agriculture. 'Demandeurs' have to pay." (D/ENT-EMP 1 interview, chief Irish negotiator to the GATT, 1980-1986)

In direct opposition to Ward's suggestion of national sovereignty vis a vis the EC, and contradicting much government rhetoric, civil servants within the broadcasting division of D/ AHGI are realistic about Ireland's position within Council Ministerial meetings.

"If people (in the Council of Ministers) don't go along with you on a point, if you're isolated on a point, you know you're going to lose. If you bring two or three with you, other countries take more notice. They think, "let's not alienate that lot". If it's just France, or just Germany, or just Ireland (pushing a certain position), people think – 'Oh, it's just that bunch again trying to get something special for themselves.' You get very little sympathy when you're on your own.

It's very rare there's an issue where you really find yourself on your own. Ireland would always try to get support from one or two others. There is a concern at times that the initiative for everything rests with the Commission, but if you pay enough significant attention to it, you can influence that too." (Interview, D/AHGI 1, Dublin)

Similarly, an official from D/ Public Enterprise emphasised the necessity for Ireland to be seen to be taking the 'winning side'. It was emphasised on many occasions by different departments (D/AHGI, D/PE, D/ENT-EMP) how the national Irish stance on issues is so affected by the weighting of votes in the Council.

"Unless it was an issue you're feeling reasonably strong about, if you're in a strong minority, not a blocking minority, Council can out-vote you. From a political perspective it doesn't happen very often. Council doesn't like to back a country into a corner. Everyone at Council meetings makes a huge effort to compromise. The over-riding rationale is "If they're going to outvote us, we'll get the political kudos of agreement with other Member States" " (D/PE 1, telephone interview, 19/12/2001).

Directives in their final form are largely a result of political horse-trading. There is huge and overwhelming motivation to create consensus and agreement between the member governments. Therefore, no national EU government can be wholly autonomous, other than the biggest states with strong veto power, and who are willing to use it. Small states like Ireland have little effectual autonomy in trade matters, though are trying to hold on to retain autonomy over the enticing tax based incentives system designed to lure foreign trade and foreign direct investment.

Ireland could be influential within Europe, despite its small state status, argues another D/AHGI civil servant. However, much depends on the physical presence of Irish Ministers at the negotiating table. Minister Sile de Valera attended few Brussels Council Ministerial meetings, and for others sent civil servants in her place. The signal that this sends to other Member States is this: "if you're not around the table in Europe, you're not a player." If the Minister doesn't attend, then it is assumed that Ireland is not interested in the issues. It is understood that it doesn't matter to Ireland. For years, Europe wasn't important to Ireland, and Irish Ministers looked too much to their own local constituency, and local government issues, because that's where they get elected and can retain power.

This researcher argues that the evidence is irrefutable - Ireland is not a big player at the EU negotiating table, and is unlikely to force an issue that will not find support with other (larger and more powerful) Member States. (The only occasion on which Ireland notably took a different stance on an audiovisual issue was in relation to the definition of 'independent producer' within discussions on EC Directive Television without Frontiers. ¹⁸) Until the passing of the Nice Referendum on 19 October 2002 Ireland had 3 votes in the Council of Ministers (compared to larger states like France and Germany holding 10 votes). With the passing of the Nice Treaty, Ireland's voting power increases to 7 votes (along similar weighting with other small countries) while the larger states increase their votes to 29.

Further, it has often been repeated by civil servants that concern for the outcome of negotiations on audiovisual services have to be balanced with the other sectoral trade priorities for Ireland, viewed within the bigger picture. In previous negotiation rounds of GATT and WTO (Tokyo 1979, Uruguay 1994, Seattle 1999) Ireland's priorities lay in a defensive protection of their agriculture, textiles and transport industries. Audiovisual and the vehement defence of culture has usually been strongly led by the French, and it is evident that the Irish would prefer to save political kudos for other arguments and other days if the French are prepared to put themselves on the front line for the purposes of cultural defence. France, more than any other EU country, strongly defends its national culture, and is quick to threaten the power of its veto.

Many civil servants interviewed spoke of the policy-making process as "reacting to" European Commission proposals. Both Corcoran and Hamelink have suggested similar. Reluctantly, it is acknowledged by civil servants that the Commission takes the initiative to propose legislation or policy in a certain area. Eventually, often through a co-decision procedure with the European Parliament, or by qualified majority voting in the Council of Ministers, a European 'common position' is reached. The procedure of proposals usually start with a Commission 'non-paper' raising either the Commission's own ideas, formulated often with the help of consultants, or alternatively, the proposal could be based on the ideas of one or other of the Member States. These circulated non-papers are usually so extreme that Member States disagree violently and vocally to them. A game of to and fro then follows, between the Commission and the Member States until their own College of Commissioners (described as "a government

department almost”) clears the proposal, and a formal policy proposal is issued from the Commission. As one civil servant remarked:

“At EU level, it’s – the EU and the Member States negotiate together, as a group, and there are some things that are within the competence of the EU and some other things that are the competence of the Member States, and *it’s not always clear which is which, quite frankly.*” ((D/ENT-EMP 4, Services GATT negotiator).

A key broadcasting official of D/AHGI gave a less accusatory view of the Commission’s influence, keen to dispel persistent testimonies that initiative for policy rests with the Commission. He said:

“I’d disagree with your concept of the Europeanisation of broadcasting policy. No matter what one thinks of the Commission, they haven’t interfered up until quite recently – they haven’t interfered even up until now, and we don’t know to what extent they will interfere in broadcasting policy and in the programming of broadcasting.” (Interview, D/AHGI 1, Dublin)

What has happened instead, he insists, is a national liberalisation of audiovisual infrastructure, transmission platforms and satellite by individual countries, including Ireland, which marked the end of the era of state monopolies in these sectors. Barbrook (1992) suggested that Ireland jettisoned many other democratic concerns from the 1960s, when economic regeneration became an imperative. Rather, it is claimed,

“Ours is state funded, but not state controlled [as in other European environments], but it was a monopoly until the 80s, so with the advent of the new technology you’ve had this great burst of provision of new services, many of them pay services, many driven by advertising revenue, and that is what has brought the European Commission into the frame.” (D/AHGI 2, Interview, Dublin)

This civil servant argues that Ireland made the choice independently to liberalise its communications industries nationally, and this has brought EC rulings to bear. However, this researcher would point out that discussions within the EC on transfrontier broadcasting were taking place in the early 1980s when Ireland was still struggling to introduce an alternative commercial broadcaster. Rather, this researcher posits that evidence suggests it was EC initiatives and activities in this sector which led the way for Ireland’s change in broadcasting from the early 1980s, and not vice versa.

One trade official (D/ ENTEMP) suggested that agreement with Commission proposals depends to the extent of their alignment with national policy strategies already in place.

Theorists who suggest that the EC policy initiatives particularly with regard to liberalisation and de-regulation only mirror what is already happening in the individual Member states echo this view. In the eventuality that the shift towards liberalisation in national policy has not already taken place in the individual nation state, then it is conceded that the process of formulating a national position (offensive or defensive) on a particular trade sector will be derived from consultations within the government ministries concerned on a particular Commission proposal:

“If we don’t have a situation where we have particular defensive or offensive interests, we will be looking at Commission proposals in say, the particular areas, to see how it fits in with the overall approach – our overall approach to the WTO – and we seek to see whether what the Commission is proposing fits in with the way in which we have developed a policy towards trade liberalization generally, and a policy towards in particular development of the economies of developing countries. So that would give us the opportunity to look at them from that point of view, rather than from a specific interest in the topic, say.”(D/ENT-EMP 3, trade official, Dublin)

5.3.2 Ireland in World Trade Organisation negotiations

GATT was an American idea for post war Europe, a provisional agreement between war-weary countries for an intergovernmental agreement, then a legal organisation, which would regulate what governments did in the arena of trade and tariffs. The General Agreement on Tariffs and Trade became the World Trade Organisation, on a legal standing and with a wider remit on 1st January 1995 at the strong instigation from the US. When it comes to negotiations within GATT, the concept of ‘critical mass’ comes strongly into play. For a proposal to be agreed, there needs to exist a certain minimum of countries willing to agree. For example, the US might not wish to liberalise a particular good or service until at least 90% of the world market is liberalised. A critical mass of countries need to agree to liberalise in the particular sector before the US, for example, would open up their own markets. In intra-WTO negotiations, the discussions are headed for failure unless the discussion centralises upon something that most countries will agree to. In the case of audiovisual, everyone knew it would be difficult because key states did not agree on the option of either full liberalisation of this sector nor the alternative of excluding cultural goods and services completely from the GATT agreement. This lack of critical mass support for total liberalisation or total annexation of audiovisual services or ‘cultural products’ meant it was one of the sectors

left towards the end, in the hope that a last minute deal could be reached. (D/ENT-EMP 4; MD Higgins)

Notwithstanding the claim by certain officials (particularly within the D/AHGI) that Ireland is in control of its own audiovisual policy, and is legally free to make a decision more stringent than the global accord reached with regard to audiovisual imports onto national television screens (D/ENT-EMP 4, Services), it is evident that in today's situation, Ireland cannot act autonomously – even in the case of supporting the protection of the ideal of cultural diversity. In November 1999, when approached by the Canadian ambassadors prior to the Seattle negotiations, Ireland refused to offer formal support. While it was agreed that Ireland might “sympathise” with the Canadian ideal of creating a separate footnote with WTO negotiations or external to WTO, an international instrument for cultural trade matters, the D/AHGI said that Ireland, being a member state of the EU, could not act uni-laterally in relation to Canada's request. (12 Nov. 1999, minutes of meeting between D/AHGI and Canadian embassy)

This position is indicative of the power structures of multi-lateral negotiations over trade issues. The real locus of power and decision-making is Geneva, not Brussels. While the European Commission has right of authority to propose EU internal policy, much of the nitty gritty decision-making of GATT / WTO negotiations is formulated on a daily basis within the Article 133 (formerly 113) Committee. The weekly meeting of the EC 133 Committee is held in Brussels, but “in Geneva it meets on a daily basis to deal with current issues, and that's where the nuts and bolts of trade policy are worked out. The overall direction for it is done through the 133 Committee in Brussels, and Geneva based people would go to Brussels for the 133 usually.” (D/ENT-EMP 1, interview, Dublin) The D/AHGI are acutely aware that the EU negotiating mandate for the trade rounds are determined within the Article 133 Committee (which develops a Common Commercial Policy), attended by officials from the D/ENT-EMP principally, with occasional inputs from officials from the D/AHGI when audiovisual is under discussion. Ireland stations representatives from the D/ Trade and the D/ Foreign Affairs in their Geneva office, the Irish representation to the WTO. Through their presence here through the 133 Committee, Ireland has an opportunity to influence the European agenda on all of the issues that come forward. There is daily reporting back to Dublin

following each morning's 133 Committee meeting (of EU Member States representatives) and further meetings in GATT / WTO.

"The person in Geneva was really quite influential. They were directly feeding the Irish position into the EU position. We had tended to have good people in Geneva who were influential, really beyond Ireland's significance. Partly because we supported France on agriculture, it gave us a weight we mightn't otherwise have had. Still, the fact that our man in Geneva held attention with other Member States and the EC then would carry weight with the politicians at home. Things tended to get decided in Geneva rather than in Brussels. Resultingly, the person in Geneva was more directly influential". (D/ENT-EMP 2, interview, Geneva official 1986)

5.4 Ireland's autonomy in broadcasting challenged by EC

DG Competition

In this section, I examine the development and defence of the Amsterdam Treaty's Protocol on Public Service Broadcasting – aiming to protect public service broadcasting's existence and continued funding – and the subsequent challenge to this declaration on national autonomy in broadcasting by the EC Directorate General Competition, using its subsequently drafted response to the Protocol – a Council Resolution on Public Service Broadcasting (PSB). The conclusion reached by this researcher is that DG Competition (formerly DG-IV) controls national autonomy over cultural sovereignty in Ireland, according to the basis of 'open and fair trade'.

5.5 The Amsterdam Treaty Protocol on Public Service Broadcasting Vs. The Council Resolution on Public Service Broadcasting

5.5.1 The Protocol to the EC Amsterdam Treaty on Public Service Broadcasting

At the European level, 1998 saw considerable activity between Member States wishing to secure the rationale and financial support for public service broadcasting, following several complaints from commercial operations accusing governments of unfairly filtering public State funds to a singular State-chosen broadcasting entity in an

uncompetitive fashion. The concerted efforts of Member State governments led to the addition of a Protocol prefacing the Amsterdam Treaty (1997), and the devising of a Council Resolution on 'Public Service Broadcasting and the legitimate use of State aid for the furtherance of democratic objectives'.

The October 1997 Protocol on the System of Public Broadcasting in the Member States declares that :

Public service broadcasting systems in the EU Member States are "directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism". The provisions agreed between the Member States agreed that:

"The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account." (EC Amsterdam Treaty, Protocol on PSB, 1997)

While it is thus left to the Member state to define, fund and organise public service broadcasting and its remit, - national autonomy is here implied - it is left undefined at Community level what is meant when reference is made to "the public interest". Further, it is not clearly specified what trade might be affected – trade in audiovisual services, trade in telecommunications services or trade in e- commerce.

The Protocol came about following complaints by private broadcasters regarding state aid to public service broadcasters to the Commission. The European Commission sat on these for years, realising it was a "political hornet's nest". One or two complainants (for example, by Portugal) brought the Commission to court and the Commission got a "sound thrashing from the Courts". There was a movement towards *making a decision*. The Commission approach was, according to D/AHGI "very blunt", the "vibes from DG IV, the boot boys of the Commission" gave "cause for concerns". i.e. their approach was – if you put money into programming, it's illegal. You can fund public service programming, but not public service broadcasting. DG IV had quite extensive powers and very little responsibility to the Council of Ministers. There was an attempt by many

countries to dampen the more extreme end of the Commission (i.e. DG Competition's) approach.

Public service broadcasting represents in this context the putting together of a schedule. It is the editorial policy under scrutiny. In the opinion of D/AHGI, the DG IV approach was very biased towards the private broadcasters' approach. The criticism of the Commission approach by D/ACG was that while broadcasters like BBC have £2 billion yearly to spend, and they don't need advertising funding, it is taken that the BBC doesn't interfere with the market. The Irish government's approach would be that this is a narrow view – in Ireland, the BBC does affect the market because it draws viewers away from other Irish, local channels.

Ireland's funding system is different again from France and Spain. In these countries there is no limit put on their aid to public service broadcasting. The governments make up the difference between advertising revenue and programme production costs, and the balance is given to them. Ireland has a discrete fund from the TV licence fee, but it's quite different, because the message to RTE is "That's all you're getting guys! Do your best with that!"¹⁹

Hence, public service broadcasting was "on the line". The first idea of putting the Protocol into the Amsterdam Treaty – and thus representing the EC wish to safeguard the television licence fee - derived from this problem with the private broadcasters taking the Commission to court, and DG IV's hard line stance. Ireland supported the creation of a Protocol. (D/AHGI 1, interview, Dublin)

The main issues involved in discussions were the critical concepts of 'public service broadcasting' and 'public service programming'. The intention by those supporting the Protocol was to protect the entity or activity known as 'public service broadcasting' (i.e. the putting together of a schedule).

"It (the Protocol) came up fairly late in the day. We were doing it more in hope than in expectation. We wanted to be seen to show that it was a good idea, that public service broadcasting should have some special status even within competition law. That was the political will at the time. The Protocol only came to light very late at the eleventh hour. We thought the jig was over by then, but we wanted it to happen. Whoever had proposed it initially were fairly small-fry, and we ourselves were small". (D/AHGI 1, interview)

But, it was Helmut Kohl's attention that made it happen.

“What swung it (the Protocol) in the end was Helmut Kohl said – “That's a great idea! I want to see that in (the Treaty), and all of a sudden people began to take real notice of it. The Commission nearly died! This was the last thing they wanted. That's why the language at the end of it adds, “providing it doesn't distort competition”. There was no such language when the Member States were proposing it. The Commission realised that once Germany²⁰ backs it, it might well be carried, and we'd better start developing alternative wording ourselves!” (D/AGHI 1, interview)

While no country could publicly disagree with the language devised by DG IV in relation to proportionate funding, and distortion of competition, “All of that, you can't object to. At the same time, you know that what they're really saying is “We don't really want this here. We want control of it”. And the issue remains – who's in control here?” (D/AHGI 1, interview) This view of DG IV and the European Commission is commonly held by a number of government servants.

5.5.2 The Council Resolution on Public Service Broadcasting

RTE's response to the drafting of a subsequent Council Resolution on Public Service Broadcasting (1998) initiative by the Austrian Presidency in November 1998 stated its guiding principles. RTE argued that “the single most important principle to adopt is that public service broadcasting serves the needs of community and citizenship in preference to the claims of markets and consumerism. It follows that public service broadcasting must be distinguished from blanket categories such as “information industries”, or “new communications technologies” on the grounds that it creates and conveys meanings (social, political, cultural, ethical as well as economic) in the democracies of the Member States. Recognition of those distinctive characteristics of public service broadcasting should form the foundation of broadcast and communications regulation in Member States.”²¹ (Letter from RTE to D/ AHGI, 20 August 1998)

The Draft Resolution of the Council and of the Representatives of the governments of the Member States (14 October 1998) meeting within the Council concerning Public Service Broadcasting encountered difficulties with DG Competition by 20 October 1998. DG Competition had raised issues in relation to two sections of the Draft Council resolution. They were in effect questioning:

- a) The sole competence of the Member States to define, confer, organise and finance the public service mission, as confirmed by the Protocol on Public Service Broadcasting, and
- b) The appropriateness of the section stating “Transparent funding of systems of public service broadcasting constitutes a fundamental precondition for fair competition among broadcasting enterprises in the digital age”²²

These two sections relating to the funding and financing of public service broadcasting services underwent substantial changes over the following weeks. In a Proposal of Ireland submitted to the Draft Council Resolution Working Group, Ireland had suggested that a new paragraph should be inserted, to read:

“Each member state has *exclusive competence* to provide for the form and level of the funding of public service broadcasters in accordance with the Protocol of the Amsterdam Treaty”²³ (Proposal of Ireland, Draft Council Resolution concerning public service broadcasting, emphasis added)

Essentially the main areas of negotiation at the EU Council Working Group related to the competence (‘exclusive’, ‘sole’ or otherwise) in the area of public service broadcasting remit and funding. Critically, Ireland’s attempt for independence was thwarted by DG Competition.

The Council Legal Service took issue with the insistence of “sole Member state competence” on the issue of funding, arguing in fact “No such provision was to be found in the Protocol. This was apparently an attempt to interpret the Protocol, which should be avoided because it overstepped the boundaries of a Resolution as defined.” Reminding the Working Group on Audiovisual Services that negotiation of the Public Service Broadcasting Protocol had been “an extremely laborious process”, the Council legal service advised against any loose interpretation or summarising of the Protocol, and instead that any reference to it should be a direct quotation.²⁴

By 28 October, the Draft Council Resolution stated rather that “The systems of funding for public service broadcasters are matters for the Member States and have to be open”.²⁵

The words “are matters for the Member States” were subsequently deleted, and the new paragraph 8 read:

“The systems of funding for public service broadcasting have to apply financial openness (to ensure that such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account)” 26

The Draft Resolution as drafted in the light of discussions at the meeting of the Council Audiovisual Working Party on 29 October addressed the difficult paragraph 8 as follows:

“The systems of funding for public service broadcasting have to apply financial openness, (1) to ensure that such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account (2)”. 27

Both the Irish and German delegations entered “reservations” on the discussions surrounding the wording of Paragraph 8 relating to funding competence and the transparency of public service funding. Meeting Document 1 of the Council Member States representatives of 28 October 1998 had inserted a new paragraph (D) in the preamble, recalling “the affirmation of competence of the Member States concerning remit and funding set out in the Protocol on the system of public service broadcasting to the Treaty of Amsterdam” (which was in the process of ratification at the time).

The EU Council Draft Resolution disagreements eventually reached a compromise *between on the one hand the assertion by Ireland and Germany of ‘exclusive competence’ for Member States (for the setting of the public service remit and the level of funding) and on the other hand, those Member States (UK, Netherlands, Luxembourg, Denmark, Portugal) that favoured explicit references to financial transparency.*²⁸ The Irish Minister de Valera remarked that overall the text was acceptable to Ireland; it would serve as a useful addition in Community policy to the Protocol, but that,

“It would appear (despite the Protocol’s provision for Member State competence in these matters) that the European Commission would contend that it has a shared competence with the Member States at least in respect of determining the proportionality of the funding”. (Ibid 13, paragraph 3)

The first part of the Protocol aims to define public service broadcasting, and the nature of its funding. The second part says, “providing it doesn’t distort competition to an

unwarranted degree”. Effectively DG IV is saying – “that’s our job”. DG IV is asserting that they want control over the funding issue, and patrolling its effect on competition. An Irish broadcasting official from the D/AHGI is explicit: “The issue remains – who’s in control here?” DG IV is going to have the final say on the nature and extent of national funding, and if it’s acceptable according to their criteria.

This is a second example of the Member state’s ability to define and fund its own audiovisual broadcasting services being challenged by DG Competition. This would appear to be confirmed by an Irish official of the Broadcasting division of D/AHGI.

This researcher asked a key official in D/AHGI if he thought Ireland retained sovereignty over the broadcasting sector? He replied:

“To a degree. The (TVWF) Directive says we can impose more stringent rules on broadcasters if we want, but only on our own one. We get a lot of regulation from Brussels. Everything we do fits into the framework of the Union. But we have a part to play there.” (D/AHGI 1)

There has been a dispute going on about this ever since. DG IV’s initial attempts - a set of guidelines in the late 1990’s - to deal with this issue were met with “very virulent objection” by Member States. DG IV produced what amounted to a non-paper that took a very extreme market driven view that Ireland allegedly objected to. DG IV may appear to have softened their arguments over the years, but only because “the language they use now is more sophisticated.”

The compromise amounted to a re-statement and re-affirmation of paragraphs directly quoted from the Protocol. The problematic Paragraph 8 was deleted. The intention of Paragraph 3 relating to ‘new audiovisual and information services’ has some presence, but only in so far as it is ‘noted and reaffirmed’ that public service broadcasting must continue to benefit from technological progress (Para 3), and must be able to continue to offer services that include the development and diversification of activities in the digital age (Para 6).²⁹

The loss of Ireland’s sovereignty over State competence in funding its audiovisual services using the licence fee is further stressed by the conclusions of a Multilateral Meeting on State Aid (20 October 1998) chaired by DG Competition. By the end of the

meeting, the choice for the Member State representatives was stark: “the DG IV chairman stated that the choice for Member States is between co-operating with DG IV on the adoption of guidelines for general application or the adoption by DG IV of a case by case approach.” (Ibid 13, paragraph 5)

Why was Ireland’s autonomy so weakened by DG Competition on the issue of sovereignty of provision and means of national rights to expression and reception?

In MD Higgins’ opinion, the EC Culture Commissioner, Mario Monti was a chief culprit. According to Higgins, he “played second fiddle to the Commissioner responsible for market completion”. Higgins challenged the EC Director-General of DG Culture, Monti to take a stronger stance against the European commercial industry monopolies that were threatening media pluralism, and rebuked him when Monti failed to take account of the European Parliament decision on Public Service Broadcasting (as demonstrated by the adoption of the *Tongue Report* by the EP on 16 September 1996) Commissioner Monti was encouraged to take a stronger position against the prevailing and dominant approach of the EC that was based on the assumptions of competition in the marketplace, and the notion of audiovisual product being a marketable ‘commodity’. Commissioner Monti, according to Higgins, “behaved disgracefully”. His policy of promoting competition has created monopoly.

“In the name of assuring competition and completing the market, Monti was dismantling state monopolies but allowing market monopolies to emerge. He was talking about removing state subsidies for broadcasting, but doing nothing about the emergence of monopolies in relation to Bertelsmann, Kirch, Murdoch and the others. This was very, very dangerous”. (Interview, MD Higgins, Dublin)

Commissioner Monti further enraged those parliamentarians pursuing democratic citizens’ rights within the European Parliament by ignoring the EP Resolution on Public Service Broadcasting, further to an EP debate and vote on the Carole Tongue MEP *Report on Public Service Broadcasting*. This EP resolution had been passed with sufficient majority, expressing the opinion of the members of the European Parliament. Monti failed to take the EP’s opinion into account. Later Jacques Delors stated that essentially, matters relating to public service broadcasting must be left up to the Commissioner with responsibility for the internal marketplace. The EP was incensed

that constitutionally, their level pegging with the European Commission in co-decision procedure had been ignored. The European Commission is legally bound to take account of European Parliament opinion in formulating policy. In acting contrary to the will of the EP, the Commission followed their own “myopic notion of a single market vision”.

Part III:

Irish International Audiovisual and Trade Policy, and the protection of Irish citizenship rights

Chapter 6

Irish trade policy on audiovisual and broadcasting services (1982 – 2002)

This is the first of two historical empirical research chapters detailing Irish trade policy, and modern human rights in trade as exercised within the WTO forum.

This chapter starts with the beginning of trade in services within GATT in the early 1980s, and the growth in legislation on broadcasting initiated at EU level from the perspective of past and present Irish government members. This past retrospective is then brought up to date until the present day, and Ireland's input into late 1990's EU legislation on trade / audiovisual policy.

6.1 The Beginning of Trade in Services

Services (financial, communications, transport, insurance, financial) became a subject of GATT scrutiny in the early 1980s. A GATT official, Jacques Nussbaulmer first raised the issue of how to internationally regulate the trade in services between nations. On this basis, services were worked up as an official GATT Work Programme in the early 1980s. At that time, there was not much transmitted over telephone wires and the issues weren't easily comprehended by many officials. One Irish GATT negotiator recalled, "It wasn't clear what we were talking about. The services trade was only just beginning, and people didn't have an insight" (Interview D/ENT-EMP 1, chief Irish negotiator to GATT 1980-1986)

Ireland, like most countries in the early 1980s, still had a system of nationalised transport, and nationalised communications and telephone structures that operated as a

monopoly. It was gradually realised that nationalised communications structures were a part of the problem on the road to free competition. This was recognised as a problem that had to be resolved in Ireland, where communications was a state owned sector, and as such, a protected monopoly. It is not possible to have free and liberal trade within a monopoly sector. Compared to other developing countries, hostile to a future American giant cleaning up on credit and banking services in their home country, Ireland was already theoretically open to global competition, before it knew the real meaning of the word.

“ Ireland came from a situation from the 1930s on to the early 60s of total protection, and in the 50s and 60s Ken Whittaker, and then in the 60s, we moved into sort of being ‘open and global’ before we knew the meaning of the word. Both with regards investment into Ireland and activities in Ireland, and the impact, the logic of that carried it forward to a situation whereby in the 1980s you had a situation where our protected services sector, particularly the state-owned ones, had problems and we realised that the world was changing, and that we couldn’t maintain something that wasn’t going to be efficient or effective, and secondly, we were generally supportive of moves to strengthen and extend the world trading system, so we were generally open. There would have been fears in Ireland that to do this we’ll have to compensate those who don’t want it, and they’ll be looking for compensation in agriculture. There were fears of that sort. But in fact in the Uruguay Round that didn’t really arise. The MacSharry outcome and his deals on world trade have been to make minimal commitments in the sector of agriculture and to make a very big commitment that ‘next time’ there would be a negotiation on agriculture. So in fact we did make concessions in return for broadening the trade system.” (Interview, chief Irish GATT negotiator 1980-1986, Dublin)

Others from the department of trade (D/ENT-EMP 4, Services negotiator) confirm the key date of the 1960s as the moment when Ireland opened its market to the world. These were the years of discussion prior to Ireland joining the European Community in 1973. In 1958, the Fianna Fail government accepted the recommendations of the *Whittaker Report on Economic Development*. Whittaker recommended that the Irish state should adopt an economic plan for the rapid urbanization and industrialization of the country. This was to be done by attracting foreign multinational investment, investing in infrastructure projects and constructing a plan to develop the nationalized industries.

The specific policy turned away from that of a state-controlled monopoly and state assistance towards one of welcoming and attracting inward investment, welcoming

liberalisation and trade that allows various producers to sell their products to Europe or further, and the formation of Irish industries that could produce goods for the European or world market, and not solely for the Irish market. By 1972, economic regeneration was more important to the Irish nation than the perpetuation of some 'lost' old-style national identity based on strict Catholic codes and mores, according to Barbrook (1992). This 'opening up' of Irish mentality and economy has led to the policy now dominant in the year 2002 of encouraging further liberalisation of trade, and fostering a very liberal regime towards inward investment. (D/ENT-EMP 3; D/ENT-EMP 4, services).

From the point of view of a civil servant from the Broadcasting division (D/Communications), GATT wasn't an issue in relation to communications or broadcasting services, notwithstanding the discussions inaugurated by Nussbaulmer in the early 1980s. The conceptual thinking surrounding broadcasting in government in those years wrestled principally with the question of the necessity for the State to be involved in the provision of certain communications services, and was marked by the increasing desire by the State to legalise private sector broadcasting services. Additionally, Ireland has always operated to some extent in a competitive television service market, due to its proximity to and reception of British broadcast services.

“ In the circles that I mixed in, that (i.e. discussions on services within GATT from 1983 onwards) was not an issue. On the other hand, I also moved in trade circles, y'know the liberalisation of trade, it may well have been an issue. I have no recollection of that being an issue; whether we were ever consulted when the precedent of the WTO (GATT) decided that broadcasting would be embraced. I'm surprised if it would have been allowed to be uninhibitively embraced as a service to be traded, because certainly within Europe, there was always going to be some degree of recognition that broadcast services were more than just commodities, that there is a public interest dimension to broadcasting. They were never going to be allowed to classify it as solely as a service. It was never, not going to be the case that broadcasting would be allowed to be thought of as exactly the same as a commodity.” (Interview, D/AHGI 4, Broadcasting division, Dublin)

The Tokyo Trade Round that was signed in 1979 had failed to reach agreement on agricultural negotiations. Agriculture was regarded as 'unfinished business' when Ireland began to build up a small team of negotiators based in Geneva with specific competence for GATT issues. Multi-national trade increased in importance, and

Ireland's desire to have input grew accordingly, although in the early 1980s, Ireland didn't look far beyond the EU markets, and didn't push the doors of any foreign markets that weren't already open.

“When I went out (in January 1980) there was some doubt as to whether there was really substantial interest in the GATT from Ireland's point of view in terms of requiring someone to be full time on it. But it quickly emerged that it was very important for Ireland and we built up from a one man position to now there are four people out there, but I started just on my own. We built it up over the period because it (multi - national trade) became more and more important. Obviously it was of big importance – of defensive importance – in terms of agriculture, and agricultural trade.” (D/ENT-EMP 1, interview, GATT negotiator in Geneva 1980-1986, Dublin)

Ireland's principle priority in the early 1980s at the level of multi-lateral trade was agriculture. According to a key negotiating official, agriculture had a huge economic import for the country. Government tended to give a “very high priority to agriculture”. The numbers involved in agriculture in Ireland have diminished since the 1930s when approximately 600,000 people were involved in the sector which represented at least one third of national output. This number fell to about 300,000 in the 1960s who claimed to be employed in agricultural activities when Ireland was discussing joining the European Union. For Ireland, agriculture has traditionally represented a very large part of exports and trade. This was evident by the fact that in 1984, the year of Ireland's Presidency of the European Union, discussions within GATT according to an official based in Geneva, fell into two categories – ‘agriculture’, and then there was ‘everything else that isn't ‘agriculture’. The department of Agriculture looks after agriculture – for that department, according to an official from the department of Trade, Enterprise and Employment, “they don't mind if there's no success in multinational trade negotiations outside of agriculture, but you can't have a successful round without success in agriculture, because it's key for the developing countries. And it was always that way”. (D/ENT-EMP 1, interview)

Another official posted to Geneva for the Irish Presidency period confirms “that (agriculture) was the biggie from Ireland's point of view through all that period. Trade in goods and services were the “Cinderella” in terms of importance in policymaking”. (D/ENT-EMP 2, Geneva assistant negotiator, 1984, interview, Dublin) Ireland was principally concerned in early multi-national trade rounds in the defence of its

agricultural interests, its export subsidies and the preservation of a romantic image of rural Ireland.

Audiovisual services were, as noted previously, brought into the international realm of trade in 1983 when the European Court of Justice classified 'broadcasts' as 'services'.

Hamelink draws attention to the dangers of defining broadcasting as a 'service', and then applying the competition or classic trade rules to this (commercial) activity. "Commercialization implies that increasingly citizens are required to pay for information services rendered by public bodies". (Hamelink 1995:101) Deregulatory policies that reinforce commercialization (e.g. the charging for information by government departments) will tend to relate access to the affordability of the service. The price, not the public interest becomes the decisive factor in commercialization ethos. This, Hamelink fears " may lead to the peculiar phenomenon of more and more people disconnecting from the 'information society' as they can no longer afford the charges." (Ibid, p101)

The audiovisual sector was discussed formally for the first time within the context of the *Uruguay Round multi-lateral negotiations on the occasion of members of the Group of Negotiations on Services (GNS) meeting in August of 1990*³⁰. The Uruguay Round of GATT was originally meant to have finished by the end of 1990. Agriculture, and audiovisual services remained sensitive issues, without conclusive agreement. In 1990 then, the discussions on audiovisual services centred around the question of including an Annex on audiovisual services to be added to the agreement on trade in services. The trading countries had managed to agree on an Annex for air transport, but there was clear indication from the US and Japan and others that an Annex excluding the audiovisual sector from liberalised trade was not an option. The critical mass of world political support was not there. Why did states reach agreement to annex air transport from more liberal trade, but not the audiovisual sector?

In the words of one Irish negotiator for services, this was "because there was a separate regime operating air transport that they decided to leave well alone. Audiovisual was different because the market was dominated by the US and there were fears by the US that something would be done to disturb that, i.e. something would happen to reduce the

amount of product that they could sell abroad, so they had defensive interests from the point of view of audiovisual. They wouldn't be happy to leave audiovisual totally out of the WTO agreement because that would still leave them exposed to the threat that they saw, that the French or Irish might reduce the sales of American TV programmes or the distribution of American films in those countries. If total exclusion of audiovisual products had been decided, you could have had an Annex that said that, similar to the one for air transport, and if all countries agreed, that would have been the end of the matter. However, not all countries agreed." (D/ENT-EMP 4, Irish negotiator on services, interview)

6.2 Start of EC law on television market-driven

The years 1982 to 1987 were crucial for the broadcasting policy world for a variety of reasons. These years represent the evolution period of current EU legislation providing for trans-frontier broadcasting. During the then Minister for Communications Jim Mitchell's term in office, discussions on the feasibility and approaches towards a pan-European law on trans-border broadcasting were bubbling away in Brussels, within the European Commission and European Parliament, and in Strasbourg at the Council of Europe.

Firstly in 1982, the European Parliament had produced the *Hahn Report* on the *Feasibility of a pan-European TV channel*. This led the European Commission to issue a non-paper in 1983 forming a basis for discussion. (The pan-European channel "Europa" which led from the Hahn recommendations was not a success, did not attract advertising, and was scrapped shortly after its launch). The EC non-paper *Realities and Tendencies in European TV* came at the same time as the European Court of Justice in Strasbourg was in the process of developing case law on trans-border broadcasting for the provision of legal certainties within a European market. The ECJ came to the conclusion that 'broadcasts' would be classified as 'services'. By the following year, 1984, the then EEC (European Economic Community) were holding serious discussions on communications, with the intention of proposing a policy initiative.

The Council of Europe took the initiative by convening a Convention on Transfrontier Television between its Members. Interest from the Commission followed the Council of Europe, and the 1989 EC Directive on *Television Without Frontiers* to which all discussions led in the end largely mirrors the conclusions arising from the Council of Europe Convention. The Convention was not binding; its recommendations are not mandatory, the Council of Europe being composed of members who act as a “group of friends”. Ireland has signed the Council of Europe Convention, though the Dail has never formally ratified it. For some in the D/ AHGI, this bears “no great significance – ratification just went down the list of priorities, once the [EC] Directive was there”. (Interview with D/AHGI 1, Dublin) Following the Convention in 1984, the EEC published an *EEC Green Paper on The Establishment of a Common Market in Broadcasting*. Debate on this Green Paper followed, until July 1986 when the European Commission first proposed that a Broadcast Directive should be created.

The initial Commission proposal for a Broadcast Directive suggested that quota limits for European works would be set at a minimum of 30%, rising to a minimum of 60% by the third year thereafter. The Council of Europe decided that with a Commission Directive on the horizon, wide-ranging discussions should be held. One civil servant suggested that the relationship between the Council of Europe and the European Commission was so close, and at times in competition, that it was possible to force change in the Commission’s approach through voicing opposition via the Council Convention. The Council of Europe subsequently organised the first Council of Europe European Ministerial Conference on Mass Media Policy in Vienna, December 1986. By the end of Minister Mitchell’s term as Minister for Communications, the single European Act had been passed (1 January 1987), and a few weeks later the European Commission had made a formal *Proposal for an EC Council Directive on certain Broadcasting Matters*. This proposal eventually made its way to becoming the 1989 Directive *Television Without Frontiers*.

6.3 RTE’s monopoly and commercial broadcasting

While Europe was discussing trans-frontier commercial broadcasting, on Irish soil the Minister Mitchell (Fine Gael party) was caught in the legal irons of an RTE monopoly,

with illegal private broadcasting in his back yard, and the non-negotiable approach by his government partners. The Minister was caught in a rash of private illegal radio broadcasting stations that were re-opening as fast as the government could shut them down, and simultaneously embroiled in aggravated discussions with his Labour coalition partners about the conceptual nature of broadcasting.

The Fine Gael party were very much in favour of establishing the playing field for independent private broadcasting. They were trying to take account of the clear public demand for an alternative to the State broadcaster, RTE. Since the 1960s and throughout the 1970s there had been a general movement in Britain and on the Continent towards greater liberalisation of the airwaves and the introduction of independent broadcasting. Ireland retained the system of one State-funded monopoly broadcaster until 1988. The policy driver during the 1980s was to a large degree recognition of the public's demand for 'choice' in broadcasting services.

“In the earlier years the policy driver was the demand for choice, that demand was manifested through the emergence of the pirate radio broadcasting and it was manifested as well by the increasing liberalisation of the broadcast media. The UK did it first, but continental Europe also began to go the road of not having national state monopolies, and again that was in line with the feeling of the time, the thinking of the time, even the economic theory of the time which tends to be articulated as a form of Thatcherism or Reaganism, but there is actually an economic principle underneath about the State, that there isn't any critical imperative on the State to deliver, for example, broadcasting services. *(The present author argues that this statement implies a rejection of social rights delivered by the state, and a rejection of the Victorian or mid-20th century ethos of public service provided by national governments)*. That tied in with the cultural change that was taking place, it manifested in these demands. Ireland and the administration and government were no more immune to that kind of pressure or sense of change than was any other administration. So, you had the demand for choice throughout the 1980s”. (D/AHGI 4, Principal Officer, Communications)

The critical philosophical split which became evident was the absolute antagonism of the Labour coalition partners to the notion of 'commercial broadcasting'. The Labour element of the coalition Government pressed for stronger public service broadcasting, and a strengthened RTE, and a greater emphasis on the 'community' aspect of radio broadcasting in the proposed legislation. They had “ideological reservations about

commercial sector involvement in broadcasting and wanted the RTE role substantially strengthened". (Interview, D/AHGI 4)

Conceptually under discussion were the questions of the role of the media in society, the philosophy of public service broadcasting and the warnings of popular output aiming for mass audiences delivering programmes of the lowest common denominator.

This opposition from the public broadcaster and its supporters effectively "stymied the private broadcasting for much of that coalition." (until 1987).

The government's inability to reach consensus meant that no legislation was passed until a new government took office in March 1987 – six years after the Independent Local Radio Authority Bill was originally proposed by Fianna Fail, and following five years of contentious discussion to no avail.

European discussions in the Commission, the Parliament and the Council of Europe were pushing forward on the concept of a 'common market' in broadcasting services while Ireland struggled to gain control of its illegal broadcasting problem, and lay some ground rules for the liberalisation of the airwaves. It took a new government and an eradication of the Labour element before the public service monopoly that 'the public' had clearly grown weary of was able to be broken.

6.4 Ireland's perspective on TVWF in market not cultural terms

During the summer of 1989, the details of the EC Directive *Television Without Frontiers* were hammered out between the Member States in the Council of Ministers. Carla Hills, the USTR representative arranged a lobbying tour of the European capitals to present the American position. To many, the US position was too forcefully represented, and EU Member States did not welcome the visit. According to Hirsch and Petersen (1992) the situation as of mid 1989 was this: Denmark and Belgium firmly against the Directive, and following the lead of these two states, Netherlands, Greece, France and West Germany also declared they too would vote 'Against'.

For Ireland, the *Television Without Frontiers* Directive was seen by key civil servants in the Department of Communications as a measure to promote a single market in

European audiovisual services, through the removal of barriers to a cross-border flow of programmes. The EC hoped this would help stimulate European audiovisual production. The Directive was not viewed as a cultural measure in Ireland.

“The debate raised no issues for Ireland. We agreed with the basic tenet, which was that once a broadcaster was regulated in another Member State, then no other country could regulate them or put any barrier in the way of cross-border reception. For example, Germany couldn’t stop me from reaching their viewer, and I would be regulated in Ireland. This country had never done anything – why would you? – to try to prevent the reception of UK services. But now that there was a Directive telling us we couldn’t do anything about it didn’t really cause us that much grief or difficulty. In practical terms, it would have been impossible to do, and people would have just laughed at you if you tried to do anything, once that was the basic tenet.” (Interview, D/AHGI 1, Assistant Principal, Department of Communications, Dublin)

6.5 The Revision of EC Directive Television Without Frontiers and its relation to GATT

Both the discussions within the Uruguay Round of GATT in the closing months of 1994, and the early 1995 prospect of opening discussions on the revision of the 1989 EC Directive *Television Without Frontiers* revolved around the issue of market access (or trade rights). The issue at stake here is the possible result of limiting and restricting market access for cultural and national identity purposes when national markets are liberalised and opened up for free trade purposes. In this dilemma, some would argue that there could be implications for national identity and national citizenship sentiments.

From the view of the USTR, the *Television without Frontiers* Directive – in particular its local content rules that provide for a ‘majority’ of transmission time to be reserved for European product ‘where practicable’ – represented an unfair market access barrier to US audiovisual products, with the consequence of depriving US producers potential export income. For the US, programme quotas acting in Europe’s favour are “blatantly protectionist and unjustifiable”, and “an enemy of free trade”. In Ireland’s opinion, the EC TVWF Directive was not designed as a cultural instrument but as a measure to both increase intra-EU cross-border trade and restrict the entry of non-EU audiovisual product. This perspective differs markedly from the resolutely cultural protectionist stance.

One trade services negotiator can sum up Ireland's perspective on trade rights in markets:

"You can look at TVWF as a liberalising instrument or a restricting instrument. But each member state would be free to do whatever they like, before the EU was there. The TV Directive showed that there was cross-border trade, and commercial interest in TV, and that the market would be open to some degree, and you could insist on 50 % European content. On the other hand that meant you weren't free to insist on more than 50%, so by definition, 50 % was open to the non-EU world to compete. De facto that 50% was filled by American. In reality, even though you could insist on 50% European, nobody did that, and if you looked at the position in Ireland in 1992, for cinema probably 95 % of films shown were US produced, and on TV (leaving aside news and current affairs) it was probably above 50 % as well. So, the TV Directive determined the basis on which the market would be open and it put limits on what somebody like France could do to outlaw American content. On the other hand, it allowed them some latitude to set a limit on American content, and that obviously would be a concern for the US and they wouldn't have wanted to agree to something at world level that would have allowed countries to close them off to that extent. Because de facto, the US were dominating those markets, so it wouldn't have been in their commercial interest if countries were to cut back." (D/ENT-EMP 4, Services, interview, Dublin)

The fraught last six months of the Uruguay Round negotiations coincided with intra-European discussions on the revision of the Directive *Television Without Frontiers*. Within the EC Directive, a majority of member states within the EU wished to protect Europeans' rights to view national and European audiovisual content. The two are inextricably linked, both attempting to deal with issues of market access or the limiting of that access to the European market against foreign (generally American) audiovisual product. The debate is dominated by the question of between cultural rights and market access rights. This was additionally a period when Franco-Irish relations with regard to the audiovisual sector turned sour.

The issues of cultural space and cultural identity that were restricting to some extent the influx of foreign, non-EU, more often than not American, audiovisual product onto TV screens were important at this time. They were informing not only Irish national debate in relation to the role of RTE the public broadcaster and its licence fee but also at the EU level, the discussions being held in relation to the revision of the EC Directive on *Television without Frontiers*.

According to former Minister for Arts, Culture and the Gaeltacht MD Higgins, it was the extreme and unwavering French position of protecting their own culture, identity, language, and audiovisual, particularly film industries that led to the complete breakdown in negotiations over the audiovisual sector at the end of 1994. Audiovisual was the second largest export earner for the US, and they angled that it should be slipped in, unnoticed, at the end. However, this strategy backfired badly when chief US negotiator, Micky Kantor became irritated late in the negotiations, and late at night specifically over the French cinema-seat tax. French cinema patrons are effectively required to pay a tax while seeing an American movie, and the benefits of the tax goes to the French film industry. The Americans saw this as a discrimination against American (and any other non-French) films. This argument was apparently enough to provoke the French delegation into a total non-negotiable mode, and as a direct consequence, there was a complete impasse on the issue and effectively, culture got left to one side at the very end of the Uruguay Round. Ostensibly, Higgins suggests that the negotiations on audiovisual failed because of the French insistence to fund and support their national film and cinema industry in whatever way they chose.

When the following question was asked of the Irish chief negotiator in Geneva to the GATT (1980-1986): “Do you think it (the AV / film sector) was at all important to Irish trade interests?” the answer came back “No”. Another official from the D/ ENT-EMP echoed, “Audiovisual left such a faint trace, it didn’t matter whatsoever. AV didn’t figure in Ireland’s position – Ireland’s protectionist stance was on the issues of agriculture, and textiles to a lesser extent because of the Irish government’s interests with Fruit of the Loom in Donegal. Ireland was not in the least bothered with AV services, although Ireland would have supported France, aligned with France in the wider EU debate on AV services. In general, Ireland was pro and very much in favour of liberalising and cutting tariffs because Ireland’s trade exports were so important to the economy. Services (in 1995, 1996) were only a developing area in the WTO at the time.” (D/ENT-EMP 6, former principal of EU/WTO unit in dept of Tourism and Trade, 1995-96)

An official from the D/AHGI repeats this view,
“The Uruguay Trade round was a can of worms. There was no sense of importance of audiovisual. There was no permanent representative for Culture or Audiovisual affairs

over in the Brussels Irish Permanent Representation to the EU, whereas the department of Agriculture has three or four reps. permanently stationed over there.” (Interview, D/AHGI 3, Broadcasting division, Dublin)

6.6 Audio Visual Services Defined

An audiovisual Service is associated with an individual (and therefore, potential scope exists for the enforcement of individual rights).

An ‘audiovisual service’ for the Broadcasting department of AHGI is something you “elect to go to, or do, or see. For cinema (an audiovisual service), you elect to go. You buy a ticket, and you go in. Streaming video on the Internet is seen via individual selection. On the Internet, you can move to a different website, or with VOD (Video on Demand) you can select a specific programme at a specific time. Streaming video onto the Internet is not broadcasting. TV is available to all.”

The distinction thus made is that individually selected services (cinema, video, WebPages, web-broadcast) are ‘audiovisual services’. Broadcasting is viewed as different because it is theoretically available simultaneously to everyone. With broadcasting, there is a limited selection of programmes. This researcher disagrees with his concept of public service broadcasting as the ‘whole schedule of programmes’. Not all programmes are of a public service nature.

“ Individual demand is different. Maybe as technology changes, the concept of broadcasting will have to change too. For example, when a different set of adverts are targeted to the uniquely addressable individual consumer, admittedly the definition of broadcasting begins to fray at the edges and you’d have to think carefully with regulation what you want to call broadcasting and what’s not.” (D/AHGI 1, interview, Dublin)

Audiovisual services are defined by the European Community and its Member States in trade negotiations as film and video production, distribution, and projection. They include television activities and studios for sound. Multimedia products and services are not however classified as audiovisual services, these being included under a separate category. Effectively, audiovisual services as defined by the US lists on e-commerce as

‘supplementary telecommunications services’. These were included in America’s Telecommunications, not Audiovisual proposal to the WTO.

The WTO Secretariat and Council will continue to use the CPC classification system of Audiovisual products and services or any other system of classification that a member country wishes to be guided by, although privately the Counsellor for AV services admitted that the “current classification is obsolete. It would be a good idea to revise it, but difficult from a technical point of view. It would be difficult to get consensus to start the revision and classification”.³¹ The counsellor remarked that it would be very difficult to get agreement between 144 trading nations on revising classification, and it would become obsolete for technical reasons before the ink was dry. She did not think there was much scope for work in this area, partly because such major trading blocks as Canada and the EU would be very much in opposition to the suggestion. The problem lies with the area of technical neutrality, i.e. to mix telecoms and AV services is “a taboo subject”. Instead, it was indicated that in future negotiations, what might happen instead is that other areas of negotiation might impact on AV if other sectors are re-negotiated. There may consequently be a domino effect on audiovisual.

However, the Counsellor for Audiovisual Services repeatedly insisted that the WTO Secretariat maintains strict neutrality of opinion and action. While she admitted that “The Secretariat will do its own research” (and much of what originates from the Secretariat in terms of ‘Background papers’ draws heavily on OECD research documents), the role of the WTO Secretariat in devising a new audiovisual classification system is theoretically, nil. Proposals will come from member countries within trading negotiations, and papers are put on the table. Classification is decided at the highest political level by and amongst the member countries. It was stressed that the most the Secretariat can do is “mediate”.³² This position as put forward by WTO counsellors is contested by both a Senior Economist within Forfas, and by members of the Irish permanent representation to the WTO – both insist that the WTO panel is increasingly formulating policy, particularly relating to trade in services.

The EC utilises the definition of the audiovisual sector as defined in UN 1991 MTN /120 category list, and uses the definition of “European” as outlined in the MEDIA and Eurimages programmes. In these senses, ‘European’ extends outside of EU Member

States. This has implications for the definition of 'European identity'. If media grants and support aids are meant for the 'European Audiovisual sector' in order to preserve 'European identity', and 'European' means 15 member states but including 'non-EU' states like Turkey, and those of the former Eastern bloc, then it bears repercussions for the solidity of EU arguments about the European public sphere, European culture and European identity.

EC DG Trade is of the WTO-opinion that the CPC classification is outdated. While the UN CPC list is provisional rather than mandatory, DG Trade recognises that there is no internationally recognised classification. Classification can be decided by the member country. DG Trade is 'undecided' on the definition of an audiovisual service. The audiovisual industry itself is divided on the issue of software. This is a category that includes recreational software, video games and music. Because computer services are now approaching audiovisual, there is a need to find a solution. Because no consensus is yet reached, it will possibly be clarified through negotiations at the Doha Round.

EC DG Culture takes a defensive approach to the definition of audiovisual services. A representative argued that the EC doesn't feel it has to match the trade classification system as followed by the WTO, yet is concerned that the US proposal for reclassification of audiovisual services is the only one on the table, thus determining the *parameters for discussion*. Head of EC DG Culture, Viviane Reding, asked:

“What do we have to gain from negotiations in which we are asked to further open a European market that is already largely dominated by non-European programmes, when no significant access is to be expected for European works, for example in the United States market?” (Statement, 2 August 1999)

The European audiovisual industry lobbying group agreed in principle with the EC DG Culture approach. They argued on 9 July 1999 that the EU should have defensive interests only, with no offensive interests. They recommended that the EC should not even consider making liberalisation commitments on new distribution technology (especially electronic) of audiovisual works, and it should prevent part of the issue from being drawn into the field of e-commerce. Extra care must be taken with questions of electronic distribution - it may be a back door to av. The stance of the European audiovisual producers, filmmakers and distributors is that “There is no tactical interest for the Europeans in obtaining complete liberalisation of electronic distribution

(computer networks, electronic commerce) for audiovisual works, because in exchange Europe would have to offer this option to its partners.”³³(p14)

A different opinion was put forward by the European Broadcasting Union, who suggested that “simply to defend the status quo would not be an adequate response. Instead, a stable solution should be sought that would prevent the European audiovisual model – consisting of European and national regulation, as well as support schemes – from being challenged in every subsequent round of trade negotiations”. (September 2001)

It is important to recognise that whichever member country first puts forward a proposal for negotiation remains, until other proposals are submitted, the initiator. In the case of ‘audiovisual services’, the United States has been one of the first (along with Japan, Brazil and Switzerland) with offensive interests in the audiovisual market, which they would wish to push. Thus, the fact that the proposal from the United States puts forward a suggestion of a reclassification and re-definition of ‘audiovisual services’ is a strong indication of how future GATS trade negotiations in this area will proceed. The US proposal becomes the basis of future negotiations, until other counter-proposals are offered. The European Community and its Member States in the area of audiovisual services has only defensive interests, thus are keen to keep quiet and stay low, with the intention of trying to maintain the status quo as it was left at the end of the Uruguay Round of GATT. They will not be putting forward a proposal for a revision of the definition of ‘audiovisual services’.

6.7 Irish Trade policy

The Irish government’s *1998 Trade Policy Statement* details the implications of a global free-trade arena arising from a neo-liberalisation trade trend. In this scenario, the role of the State would be limited to assisting industries to become more competitive; strictly curtailing State aid and supports; and ensuring that tariff and non-tariff trade barriers, such as subsidies, are eliminated entirely.

The Uruguay Round “saw further significant reductions in tariffs; a strengthening of the provisions on non-tariff barriers; creation of a more effective system for settling disputes; an extension of the WTO system to cover trade in services, intellectual property and agricultural trade; and the creation of the WTO itself as a permanent forum for trade negotiations.” (1998: para 2.8.1)

Under the WTO plans for the Millennium Round negotiations, the Irish government expects the furthering of progressive liberalisation of trade through the reduction of tariff and non-tariff barriers on a global or sectoral basis.

“In the global free-trade scenario, State supports in general, including those targeted at exporters, would be strictly curtailed. The focus of Government activity would rather be on measures to enhance the competitive environment, including a reduction of regulatory and other burdens on business. It would also be essential to ensure coherence between economic/trade policy and policy objectives in related areas. *(for example on audiovisual or cultural matters)* Close contact between Government and business through organs such as the Trade Advisory Forum and the Competitiveness Council would be essential to ensure continued responsiveness of Government to the needs of business.” (Paragraph 3.8.1³⁴)

While accepting that a global free trade arena will mean “further limits on State intervention”, it is allowed that “State supports for exporters (would be) concentrated on those companies which demonstrate a capacity for sustainable export growth and for whom such State support can make an appreciable contribution to their success in this respect.” (Ibid, Para 3.8.2) Enterprise Ireland have identified the key sectors of games, animation, film for television (not cinema), cinema distribution and the technology for that distribution as those worthy of “active promotion”. Enterprise Ireland, like Forfas is under the auspices of the D/ENT-EMP, which regulates ‘technology’ rather than ‘culture’, which is the remit of the new D/Arts, Sport and Tourism. In the new Fianna Fail-Progressive Democrat government of 2002, the Broadcasting section of the former D/AHGI moved under the umbrella of the re-structured Department of Communications, Marine and Natural Resources.

The Irish government’s strategy, as outlined in the *1998 Statement of National Trade Policy* (Para 3.10) is to: plan on the assumption that the trend towards further liberalisation of trade and investment flows will continue, with the likelihood of further

curbs on non-tariff barriers including subsidies and the possibility that already-low tariff levels may be eliminated entirely. The Irish government is also planning to prepare for a more liberal trading environment, enhance the competitive environment by reducing regulatory and other burdens on business and ensure coherence between economic/trade policy and policy objectives in related areas.

6.8 Irish trade potential in the audiovisual industry

As a potential growth industry, Ireland has many advantages if it is compared to its European neighbours. Firstly, films and television product and multimedia content are produced in English, and have thus a potentially global distribution net. English language content can cross international borders more easily, and can penetrate US markets much more readily than those films that must be dubbed or sub-titled in movie theatres. Secondly, DG Information Society has identified that in the field of digitally produced, compressed and distributed audiovisual content, Ireland has many strengths. By building on the existing skills in software, IT, computer and telecommunications, Ireland has theoretically a lead start on the development of internationally traded audiovisual, multimedia, digital media, interactive products and services. Thirdly, Ireland is well placed to take advantage of the designated focus of the new MEDIA III aid-programme that is concentrating on assisting the development and distribution of television and multimedia content. The *1999 Final report of the Film Industry Strategic Review Group* remarks that “It is important to ensure that Ireland is not treated less favourably than other EU States. Even more important is the need to ensure that the Irish (and the European industry) is not handicapped relative to non-EU states that heavily support their film industries.” (p43)

The *1999 Final report of the Film Industry Strategic Review Group* provides a number of reasons why State aid is important to a developing Irish film and television industry, (i.e.) for strategic, cultural, and competitive arguments (p74), but concludes that “The case for substantial and continuing State backing is conclusive. At issue ... is the form, magnitude and the strategic and economic effectiveness of different types of support, not the existence of the support itself”. (p70)

This compares with the *1992 Report of the Special Working Group on the Film Production Industry*³⁵ where the principal battle royale was between the Department of Arts, Culture and the Gaeltacht (then Minister, Michael D. Higgins) and the Department of Finance whose representative refused to acknowledge that the film and television industry in Ireland warranted any special treatment. Likewise, the opinion of the Department of Industry and Commerce (now Enterprise, Trade and Employment) was that the film industry was an industry like any other and had therefore to fight for Government Exchequer funds just like any other industry sector.

Both the IDA and An Bord Trachtala expressed a like opinion that the development of the audiovisual 'service' industry in Ireland merited State intervention and continued support (p21).

The two departments - Department of Finance and the Department of Industry & Commerce - were in unison by questioning whether the outcome of financial State assistance would be worth the considerable investment. Both were adamant that "the film industry should not be treated as an industry which, because of ill-defined cultural or artistic characteristics, should be given significantly more generous State aid than other sectors of the economy" (p22). The Department of Finance further warned against the dangers of State subsidies – in its opinion, excess support can "stifle initiative" (p32). In contrast, the Review Group argued that support for the growing film industry was warranted because of its future economic potential, its role in promoting national culture both at home and abroad, and its activity of helping to avoid cultural domination by foreign influences (p28).

The significant shift in film policy was the transfer of responsibility for film matters and administration of funds to assist the film industry from the Arts Council, which since the 1973 Arts Act, looked after film as an 'art form', to the Irish Film Board in 1980. The Irish Film Board was established by the Oireachtas to 'deal with the industry and to administer a film production fund' (p28). Section 35 special tax incentives were introduced in the 1987 Finance Act, but are currently under threat of extinction by the present Minister McCreevy.

Chapter 7

Modern human rights in trade

In this, the second empirical research chapter the researcher explores the options currently available to the Irish government, or any EU member state, to enforce human rights within the marketplace (WTO). In detailing the current trade rules open to negotiation, this chapter examines the current protectionist rhetoric that colours the EU and Irish approach, and the arguments put forward against their approach.

In the next, and final chapter, this researcher will draw conclusions as to the relative protection for Irish citizens' communication rights afforded by Irish governmental decisions, and this thesis will propose an alternative approach.

7.1 Trade Rights and Trade Rules

The author recalls at this point that national autonomy and sovereignty was traditionally (in the 18th - 19th centuries) secured in the first instance, by trade rules regulating independent commercial and international trade policy.

In theory, the use of trade rules to safeguard national or EU sovereignty in decision-making in relation to audiovisual services guarantee the following 'rights': the right to impose trade barriers; the right to limit or restrict market access; the right to restrict foreign investment; the right to retain autonomy of national or EU audiovisual policy; the to right to impose content quotas; and the right to retain state support measures and state subsidies to the sector. Additionally, each EU negotiating member state retains the right to impose greater limitations on market access to foreigners, and retains the right to list additional state support measures as exemptions to the MFN (Most Favoured Nation) rule.

This research suggests that Ireland has not exercised these rights. Ireland has refrained, for political reasons, from going beyond the basic minimum agreed by the Community member states as stated by the common position.

7.2 The Trade Rules: Commitments, Exemptions, and Most Favoured National Treatment

7.2.1 Commitments

The GATT trade rules focus on a trading nation making a commitment to open and liberalise their national market to outside and foreign competitors. Commitments bind countries to adopting no new measures or import rules more restrictive than current laws restricting entry into their markets for these services. Once countries have made commitments under the GATS (*General Agreement on Trade in Services*) to liberalise sectors of their economies, they must ‘refrain from introducing any new measures that may inhibit trade’, and they cannot ‘un-commit’.

The Uruguay Round was the one and only opportunity available to trading nations to exclude a sector from free and liberal trade. Very few WTO members took commitments on audiovisual services. Some that did from the Asia Pacific region were fully expecting to be targeted by USTR (United States Trade Representative) trade negotiators in the Seattle Round (1999) with the intention of pressurising them to “commit to removing cultural safeguard measures in their audiovisual services sectors”³⁶.

Lobby groups and representatives of European broadcasters, independent producers, directors and distributors - CEPI, EUROKINEMA, FIAD, CICCE, FEITIS, GESAC, EBU, FERA, and UNIC³⁷ - petitioned Minister de Valera (9 July 1999) prior to an EC Culture Ministerial Council meeting where the situation on WTO negotiations on the audiovisual sector was to be reviewed in readiness for the end of 1999 Seattle trade meeting. For this group, the implications of taking *commitments* to liberalise the European audiovisual sector would, it was argued:

“jeopardise future and foreseen policies and measures including,

- a) making new forms of e-distribution of audiovisual works subject to obligations to invest in national production;
- b) a future financial instrument to be adopted by Council of Ministers to attract private capital into European production;
- c) measures to transpose existing regulation for traditional audiovisual services to new audiovisual services;
- d) incentives to promote multilingual content,
- e) measures to digitise audiovisual heritage,

- f) financial or tax incentives for the circulation of EU audiovisual works in Europe,
- g) extension of the public service broadcasting mission to new services,
- h) creation of means of financing the public service broadcasting service or other public interest activities,
- i) the regulation of digital access gateway points;
- j) the extension of safeguards on pluralism in the media particularly cultural and linguistic diversity, to include new services.”

The European Community and its Member States therefore made *no commitments* to open up the market on audiovisual products and services. As an Irish negotiator explains, the real outcome was a result of time restrictions and lack of consensus.

“When it came to Market Access, the EU had to ask –do we list AV as one of the sectors in our schedule that we were prepared to liberalise? You can write it in, some argue, and then insert some restrictions, i.e. you can partly liberalise it and that would have been quite possible. But the US already had 95 % of the cinema market, and 50% of the TV market, probably more, so if you were willing to accept the status quo you could have written something along those lines in the schedule, saying American companies can have access to our TV and cinema, but they can never have market share because of x, or y, depending on what sector you were talking about. That kind of idea would have been in negotiation. But it came to the end and nothing had been agreed on that, so in the end, the EU got to the stage where everyone said: this Uruguay Round is two years over-running already, we’ve already tried to conclude it at the end of 1990 and failed, at the end of ‘91, similarly, and it’s now the end of ‘93. So, if we’re ever going to conclude it, we’d better conclude. So, the EU had to take a decision then whether to put AV services in the schedule or not, and the decision was to leave it out.” (D/ENT-EMP 4, Services negotiator, interview)

In official statements from the EU, it was explained that the dominant thinking behind this strategic approach in refraining from taking commitments on the audiovisual sector was the belief that the EC and its Member States should ‘retain room for manoeuvre’ with relation to future possible cultural and audiovisual policies, measures or instruments that it might be desirable to implement either at a national or Community level for the purposes of preserving cultural diversity. The EC position remains the “wish to retain the option of taking any national or Community measures we feel are justified and appropriate in order to preserve and promote true diversity in audiovisual content for the people of Europe. Freedom of action is at the heart of the negotiating mandate.” (Statement by Viviane Reding, EC DG Culture, 2 August 1999)

At the Irish national level, Minister Higgins expressed concern that it was possible to foresee, but impossible to predict, the situation of devising a policy that might be in

breach of GATT rules. The EU states came to agreement that nothing should be signed and committed to at GATT level that might “tie our hands”. This left the implementation of policy open, to be decided at EU or national level. Countries that did not make commitments – and this included about 80% of countries targeted as lucrative foreign markets by the US - “reserve the right to impose new or more burdensome measures that may have a trade limiting affect without penalty” whereas countries that have already included audiovisual services in their commitment schedules will be expected to undertake further liberalisation of markets for these services. The Asia Pacific governments expected the US to put particular pressure on the elimination of measures that “aim to promote and enhance national culture”. There are similarities between the measures put in place by various Asia Pacific governments, and those by the European Community. They include local television content quota or content regulations; restrictions on foreign advertisements; restrictions on foreign ownership and control; tax incentives or government subsidies; and any limits or caps on foreign investment.

7.2.2 Most Favoured Nation Treatment and Exemptions

The second strategic trade rule to deploy to a nation state’s advantage is the Most Favoured Nation (MFN) treatment, or exemptions to that. MFN Treatment means that all foreign entrants to a sector opened up to liberalisation must be given an equal chance to compete. There should be no discrimination. It is currently termed by the US as “normal trading relations”. The MFN treatment clause means that when a Member country makes a commitment to liberalise part of a sector, and has not explicitly exempted that part of the sector from the application of Most Favoured Nation treatment, then every one of that country’s trading partners *is entitled to benefit from* that liberalising commitment. National treatment of foreign services or service suppliers entitles them to treatment no less favourable than domestic services or suppliers, for example in the receipt of state funding for comparable activities in a sector. WTO Members may grant national treatment, or enter limitations. It is within the limits of the MFN rule that individual nation states can in theory, exercise national autonomy.

Thus, Ireland in the devising of its own cultural, audiovisual or international trade policy is at liberty to further restrict access to foreign market entrants or to favour indigenous suppliers, even within the confines of *finding* agreement within a European Community Common Commercial Policy. On National Treatment therefore, Ireland has the freedom to grant support subsidies to its own local audiovisual industry, and exclude this support to outside foreign competitors.

What came out of the Uruguay Round was “carte blanche to do whatever we like in terms of limiting US access to our market. The upshot of the Uruguay Round was that the culture voice had its way, in that nothing was put in the WTO agreements that limit our freedom of action. De facto, though, they (Ireland) haven’t actually done very much in terms of limiting the US. In theory we’re still free at EU level to make any decision we like, subject to whatever is agreed at the EU level. The Irish authorities are free to make whatever decision they might like to make in relation to Ireland. De facto, what was the position? The position that all Irish cinema screens at the moment are filled with American films, at least 90 % - will we ever do anything to change that? Is there any point in doing anything to change that? We insist on having Irish in schools, are we going to insist on having Irish films on screen? Personally I doubt it. Similarly with TV – we could in theory insist on having considerably higher percentage of Irish production on TV. Have we done that? No.” (D/ENT-EMP 4, services, interview)

However, the GATS rules dictate that the MFN obligation applies automatically unless it is specifically excluded for listed policies or support system, e.g. Section 481 for film. If a particular subsidy is not listed and exempted, it becomes automatically open to all market players. It remains doubtful however, whether Ireland takes advantage of this national right to limit foreign material on screens.

The EC and its Member States took exemptions on MFN for the audiovisual sector, under Article 12 and Article 5 of GATS³⁸.

If no exemptions were entered, according to a senior civil servant in D/AHGI,

“ We would be obliged to give the same treatment to any signatory to the GATS as an Irish person gets in Ireland. Everybody that has signed up to this gets the same treatment as the national of any country. We didn’t want to do that for two reasons: a) we didn’t want the subsidies – that’s too strong a word – the aid systems particularly the aid systems that exist in Europe; we did not want them to be stopped. That’s what we could have done. Europe could have said ‘fine, we’ll dispense with all of these programs that assist the European industry and

let everybody fend for themselves'. The European audiovisual industry, if it ever becomes self-supporting – that's another day's work, but at the moment, it's a very fragile little animal – and so we said no, we're not prepared to dismantle these systems, and also we're not prepared to give you MFN treatment in relation to access to these systems. So, we're just plain selfish. But selfish in the interests of the European AV sector". (D/AHGI 2, interview)

Here, the D/AHGI projects an argument in defence of the audiovisual production industry. Both industry, and culture (by former Ministers de Valera, and MD Higgins) are employed in the defence of subsidies to the audiovisual sector.

The contentious point about exemptions from MFN obligations is that they should, in principle, only last for ten years. The EC argues that MFN exemptions can remain in place as a 'structural and indefinite policy' in line with the present EC position of operating according to a principle of precaution (DG Culture, interview, Brussels), while the US and others pushing to open up the audiovisual sector would demand their phasing out and permanent elimination, once the exemptions 'expire' in 2005. Exemptions taken by the EC on MFN allows for the development of national AV policies, and preferential treatment for European audiovisual industries for cultural diversity objectives. In a formal statement on behalf of the EC, it was clarified that exemptions to the GATS MFN obligation were taken "in order to preserve works of European origin, to preserve the possibility to maintain bilateral or plurilateral agreements on the co-production of audiovisual works in relation to distribution and access to funding; and to preserve European support programmes such as the action plan for advanced television services, MEDIA or Eurimages." (Reply of Sir Leon Brittan to written question by PPE group in European Parliament, 12 November 1997) Exemptions taken by the EC were explicitly listed in the GATS schedule to cover (a) Co-production agreements, (b) MEDIA Programme (c) EC Directive TVWF (d) National Aid Exemptions and (e) the Council of Europe 'Eurimages' support scheme.

Through the processes of taking firstly, no commitments to liberalise, and secondly using the exemptions to MFN treatment, member states could orchestrate a situation whereby the audiovisual sector would arrive at a status not dissimilar to the effects of a total exclusion annex, as had been reached on air transport by all the GATT members. A broad application of the market access schedules and the MFN exemption options could mean that an individual country could effectively exclude the audiovisual sector from

liberalised trade and from MFN treatment on audiovisual tariffs. This would represent a clear statement that free trade does not apply to audiovisual services.

“The effect of the MFN exemptions that were taken by the EU and they were taken to cover all the then EU member states could be interpreted as meaning that really the MFN principle didn’t apply. If you take latitude to allow us to do things in the future, that would be contrary to MFN, the effect of those exemptions is to ‘carve audiovisual out’. So, the EU put in some fairly widely drafted MFN exemptions, with a broad coverage to say, “If we need to do something that infringes MFN, then so be it, we’ll do it”. And the effect is radically the same as if it were an Annex.” (D/ENT-EMP 4, services negotiator, Dublin, interview)

In August 2000 in the preparations to the Seattle Round it appears that a new Irish Culture Minister, de Valera, desired to take a stronger position than that agreed by the European Community member states. The minister’s stronger stance aims to defend support for the industry on a cultural rights basis. In response to the recommendations circulated by the French audiovisual industry lobby group outlined previously, the Minister officially outlined Ireland government policy. In line with EU common cultural policy, and with the position agreed in the EU General Affairs Council conclusions (22 October 1999) relating to a new round of trade negotiations (Seattle), it was stated that Ireland:

- a) ‘strongly supported’ the principle of protecting cultural diversity
- b) advocated strong support for the development of audiovisual projects at national and EU level for the promotion of cultural diversity in the audiovisual media within Europe
- c) was not willing to agree to a reduction in the level of investment in development relative to the MEDIA II programme

Additionally, the Minister added that,

“We are also sympathetic to the view that international trade law should recognise the special nature of intellectual and creative works *avoiding any rules that would have the effect of applying raw competition criteria* to works of culture and the fostering of cultural diversity and creativity”. [Italics added]

This last paragraph was reworked by the D/ENT-EMP. Following discussions and input the last paragraph softened Minister de Valera’s robust stance on the extension of “raw competition criteria” to cultural works. The final version instead saw the final paragraph

go no further than the already familiar common EU approach to trade negotiations on audiovisual.

The department of Trade, Enterprise and Employment suggested the following wording:

“We are also sympathetic to the view that international law, including trade law, should recognise the special nature of intellectual and creative works. Ireland supported the recognition of this fact in the EU General Affairs Council conclusions of 22 October 1999 on a New Round of Trade negotiations within the WTO. In dealing with cultural issues, these conclusions state: “During the forthcoming WTO negotiations the Union will ensure, as in the Uruguay Round, that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audiovisual policies for the purpose of preserving their cultural diversity”.

It is noted that when negotiations on GATS audiovisual appeared as if they were getting serious (possibly the following year, in 2001) “the EU Member States might try to get an interpretation of what the conclusion actually means”. (Letter from D/ENT-EMP to D/AHGI in response to European audiovisual lobby, 30 August 2000).

In the event, the Seattle trade round talks lacked American political will, and they failed. The agenda for the Doha / Millennium Round was agreed in November 2001, and the round was launched. Member States were expected to formally list their offensive interests by June 2001 – in Ireland’s case, this was done after the D/ENT-EMP – Forfas consultation period.

The researcher draws the conclusion that in trade negotiations, the D/ ENT-EMP holds the upper hand. While the D/AHGI might try to negotiate for a stronger defence of Irish national ‘cultural’ rights which involve the funding and support of national broadcasting and production systems, the D/ ENT-EMP does not entertain any suggestion of limiting foreign access to the national audiovisual market.

MD Higgins appears to concur with this – he maintains that there was no attempt by the D/ ENT-EMP to consult with him over trade matters. Higgins argues that in his period of office, trade policy just ‘drifted along’ without detailed objectives.

7.3 State aid for cultural objectives

The Uruguay Round of GATT started in 1986, and was due to conclude at the end of 1990. Agreement was not reached on a number of issues. By 1993, after failing a second time to draw an end to the talks at the end of 1991, everyone participating was eager to reach agreement. A general cultural exception was considered in the negotiations and rejected. The European Community's official stance was that "a cultural exception would go too far and allow abuses, and proposed that the unique character of the audiovisual sector be preserved by means of a cultural specificity clause" which would allow special treatment for the sector, rather than exempting it from the rules of international trade. The European Commission preferred the 'cultural specificity' approach for several reasons. One of these was the obvious difficulty with the negotiation of a cultural exception.

When there was no agreement on a cultural annex, compromise between the Member States of the European Community in negotiation with the main trading nations in opposition (US, Japan, Brazil) had to focus on using the existing trade rules (i.e. No commitments, and Most Favoured Nation Treatment, and Exemptions) to accommodate the national interests of the French, Irish and Southern European countries as expressed in cultural terms

The opinion of the European Commission (DG Culture) with regard to State Aids to the cinema sector explicitly outline that

"Aid for cinematographic production has a purely cultural aspect and an industrial aspect. In respect of the industrial aspect, it is noted that this aid for a product (i.e. a film) has for effect that the audiovisual sector will benefit from support necessary to achieve the cultural objective, namely that of audiovisual creation (or production). With regard to this aid to industry, it can be argued that the necessary operational structure has to exist within the country to make cultural creation possible".³⁹

This researcher queries whether all audiovisual creation or production is cultural? This researcher does not agree that it is, particularly with relation to the vast quantities of entertainment or fictional audiovisual product that fills television schedules.

With the above, the European Commission has defined the ‘cultural objectives’ of State Aid to cinema and audiovisual industries as “audiovisual creation” or production, and for this production to take place, there must be in place the necessary “operational structures’. This communication from the Commission was augmented by a *Communication from the Commission on the application of State Aid rules to public service broadcasting* (November 2001). “Cultural objectives” are also defined as “the safeguarding of the European cultural values and our cultural diversity”. (Commission Staff Working Paper, April 2001:7)

According to a trade official from D/ENT-EMP, “We’re relatively free on what we do on subsidies in relation to any service including AV. Officially, we have MFN exemptions on audiovisual. So if it was a question of subsidizing audiovisual, it doesn’t have to be done on the basis of MFN, because the exemption is there.” (D/ENT-EMP 4, services)

Subsidies for anything other than free to air (broadcasting) services are not under consideration. New audiovisual or digital services are unlikely to be given extra Irish government assistance to aid their development and provision to or reception by the public. D/ AHGI’s definition of ‘broadcasting service’ is that it is public, and available to all, all the time. Non-payment of the licence fee does not withdraw your right to the broadcasting service, but it does mean that you must defend your reasons for non-payment in court. Recent reports would appear to conflict with the department’s apparent benevolence. An Post, the organisation which collects the licence fee on behalf of RTE has acknowledged (*Irish Times* 27/09/03) that there is an “intensive drive to prosecute television licence defaulters”, leading to court prosecutions and fines of up to 634 euro. Those claimants who have argued from a social welfare perspective have not been granted special circumstances. Instead, those on low income have been faced with small fines plus costs. There are only a certain section of the population entitled to a free television licence, among those are the over-70s or those in care⁴⁰.

On the other hand, D/ AHGI defines ‘audiovisual service’ as individual and on private demand.

In the opinion of an Irish broadcasting government official,

“To the extent that RTE wants to develop digital services that are in the public service mode, which is free to air, then maybe the government is prepared to give them an increase in licence fee to contribute towards the cost of those services. But in general at the present time, there is no sense that there would be any subsidy to anybody other than the licence fee payment to RTE for the provision of free to air services. It’s not excluded at present, certainly, the EC wouldn’t raise too many difficulties over a Member State wishing to subsidize the driving forward of new services but that subsidy would have to be available to all. At the present time, we’re not thinking about subsidizing the provision of broadcasting services in the traditional sense, and I don’t think the D/ENT-EMP is thinking of subsidizing the e-commerce type services. Market forces - if the market will support the services, and if people have the entrepreneurial spirit to provide the services, they can be provided. (D/AHGI 2, interview, Dublin)

All subsidies and state support systems are included in this broad category of uncompetitive state aids by the US. The WTO Article XV of GATS dealing with subsidies suggests that “subsidies may cause trade distortions”.⁴¹

The *1995 Irish Green Paper on Broadcasting* addresses head on the demands of “US audiovisual industries”⁴². European private broadcasters and telecommunications conglomerates’ demands are not mentioned. The villain depicted is the US who “has argued against state support for the audiovisual sector in the European Union and press for the removal of quotas and subsidies designed to protect and develop the European cultural industries. Negotiations on these issues, stalled at the end of the Uruguay Round, will no doubt have to resume, the objective being, from an American (*not to mention an Irish D/ENT-EMP*) perspective, to clear away all remaining trade barriers”. (1995:133)

“It was agreed that there would be negotiations on subsidies for services prior to the Services agreement coming into effect in 1995. On the goods side, there was an extensive agreement on subsidies already, and there’s a second agreement on agriculture subsidies, but there’s nothing much agreed in relation to services. So negotiations on subsidies for Services at WTO level were due to start in 2001. I presume that very little has happened – they’re part of the Millennium Round. So, subsidies are an issue in the (next) Round.” (D/ENT-EMP 4, services)

EC DG Competition, the leading European-wide voice on subsidies, operates according to stringent regulations with regard to aids and support measures for the (European) audiovisual industry. Existing and emerging rules governing aids for the sector scheme must be transparent and proportional to the objectives. There are specifications that not more than 50% of the production cost can be met by State aid, and no cumulative effect

of State aid should exceed the 50% limit. Supports are to be based on objective cultural criteria.

7.3.1 EU MEDIA programme

European-wide support systems, that can be availed of by “European” (and this is a loose definition) productions include Council of Europe initiatives and European Union assistance programmes. The Council of Europe controls the purse strings of Eurimages, a fund for coproductions (its budget for 1992 alone was £13 million), while the EU’s MEDIA Programme, initiated in 1990 and now in its third phase called MEDIA III, is expected to run from 2001 to 2005, with a budget of EURO 500 million. MEDIA II’s budget for the previous five years was 200 million EURO. With both these pan-European initiatives, funds are available for film production, training, development of projects and companies, and distribution.

Rather naively, the D/AHGI does not think Ireland’s support systems will be challenged under the WTO and the GATS agreement, because the funding is modest. It is estimated that the bigger issue is the MEDIA PLUS programme and the French levy on cinema seats. In Ireland, this idea from de Valera’s Think Tank was thrown out, principally because it was argued that “it’s a tax on poor man’s entertainment. Now, while going to a multi-plex is not exactly cheap, but it’s an additional tax, and our government policy is to try and reduce the taxes and also reduce the number of tax efficient schemes, so that the whole thing becomes more neutral” (D/AHGI 2). It is the department’s view that “people are entitled to be entertained” (D/ AHGI 1).

In arguing from a taxation point of view, the D/AHGI seeks a type of ‘equality’, as explained by Habermas and Marshall, in the public sphere. The desire not to levy taxes supports human (rather than “propertied”, above averagely wealthy) citizens, and their human rights. However, if one was to take the view that citizens are taxable members of a society or community, then it is within reason to suggest that a tax which enables the proliferation of representation (in audiovisual terms) of ‘their’ culture could be exercised. The department’s lack of desire to tax sits uneasily with the other and opposing argument suggesting cumulative benefit in terms of audiovisual production.

It is financially proven that the French film industry benefits enormously from the cinema tax levy, which taxes all films shown in French cinemas, and these contributions (from both foreign and French films) are put towards supporting the home film industry.

7.3.2 Irish financial support systems

According to the D/AHGI, “We fund the public b/caster, all of the other broadcasters are regulated through the Broadcasting Commission of Ireland which is under our aegis. The film industry has legislation which is purely supportive in terms of funding through the Film Board – that is under our auspices. The tax relief schemes, the tax incentive schemes for the film industry, Section 481 which used to be Section 35, and then the BSE scheme for the music industry and quite recently we’ve set up a non-statutory music board. At the moment it’s purely non-statutory. Those are the legislative planks through which we must operate.”(D/AHGI 2) ⁴³

The August 1999 *Final report of the Film Industry Strategic Review Group* commissioned by the Minister for Arts, Heritage, Gaeltacht and the Islands (AHGI) remarks that “State incentives and support systems exist in almost every country in the world apart from the United States”. (1999:37) (There are many, including this author, who argue that the US is well used to employing state aid support systems for its own industries.) Some reasons offered for the lack of US state aids to their flourishing industry are suggested: “A number of historical reasons account for the American experience, including its large and affluent home market, its relative hegemonic economic and cultural position during most of the 20th century, its early development of large and integrated companies and its magnetic attraction of film talent from all over the world. All of these factors were crucial to success in an industry where economies of scale in marketing, distribution and research and development are among the important keys to mass market success”. (p69)

As listed in this report, Irish State aids range from tax-based incentives, soft loans, grants, guarantee funds and so-called automatic systems. Most of these aids are aimed at production. (p41) These state support systems are divided into two categories, either

- (a) “ direct subsidies (which can be either automatic or selective), usually related to cultural or artistic criteria, or
- (b) supports (such as tax incentives, equity and loan systems) designed to foster a more commercially structured and market driven industry.”

The report remarks that the latter type, most evidently employed in Australia, Canada, the UK (from the mid-1980s onward) and Ireland are more successful in creating a self-sustaining industry while at the same time avoiding the pitfalls evident in the 'direct' type A. Direct subsidies have a tendency to "mask and aggravate fundamental structural problems, lack market orientation and create an excessive bias in favour of art films".⁴⁴ It is suggested by the report authors that France, Italy and Germany are the main culprits in excessively using this schema, to the detriment of their indigenous industry. While recognising the faults of a direct subsidy system, the report highlights the great advantages of Ireland's membership of the EU, and the crucial role the MEDIA support system in place at EU wide level has played in the development of the Irish industry.

The February 1999 report *The Bigger Picture*, commissioned by Ireland's only film lobbying group, FilmMakers Ireland on the prospects of growth of the Irish film and television industry identifies continuing and increased government support as critical to the survival of the indigenous industry.⁴⁵ The report acknowledges that "There has been some discussion of late as to why the government should support the industry at all" (p25), yet provides evidence that "all countries support their industries in some shape or form (with the exception of the US)" (p27). While the US provides no funding of any sort to its second largest export business, the countries listed as providing national funding include Australia, Canada, UK, Germany, France and Ireland. Of the countries listed, France supports its film industry with the widest variety of systems – tax relief, tax credit, regional and national funding, investment funding, as well as a cinema tax. Ireland in contrast offers three models of support – tax relief, tax credit and national funding.

Film Makers Ireland comments that compared with other countries, in particular with the UK, Ireland's major competitor in the market of audiovisual services, "the Irish State's involvement is quite modest...Compared to the support Ireland gives its manufacturing sector and the distortions it creates, it could be argued that the State gives the film industry the cold shoulder." (p27)

FMI's demands for greater governmental support (in particular 100 % tax relief base to Section 481) are based on the rationale that an industry in its infancy, as they describe the Irish film industry, should deserve more support than other relatively mature industries. Section 481 financing is regarded by FMI to be a key support in the attainment of a critical industry mass. It is recommended by this industry representative body that tax relief on Section 481 should be increased (from 80 %) to 100% in order to ensure continuing growth of the film industry in Ireland. FMI also suggests that this policy move would help "prevent its replacement with a more dirigiste grant-based system which would mean that the industry will never innovate financially" (p32). FMI seek government support on a par or comparable to direct support as received by the film industries in Australia (100% tax relief), France (investment financing), or the UK (that uses other incentives like Lottery funds finance). Similarly, the Review Group⁴⁶ also recommended an extension in legislation of the time frame of the Section 481, which would give a clear signal to the national and international film and investment communities that the Irish government is committed in the long-term (and not just subject to renewed approval every three years) to building up the film and television production industries. Section 481 was recently renewed for a further five years.

However, an interview with an Enterprise Ireland (EI) official (October 2002) who inputs into WTO negotiation preparations revealed that EI does not envisage a true Irish film industry ever existing.

7.3.3 Irish Section 481 Tax Incentives and Irish Film Board Loans

From the time of the establishment of the D/ACG by Minister Higgins, it became "government policy to assist the audiovisual sector". At the national level, the Film Board that had been allowed to go into abeyance in the mid 1980's due to funding squeezes was reconstituted. A small Section 35 had been put in its place at that time.

"When the new department was created in 1993, it became government policy to try and develop an 'Irish Film Industry', and the Film Board was reconstituted and given increased resources to develop the indigenous sector and then the Section 35 was reinvented to both assist the indigenous sector and to attract in investment into the country by way of outside producers coming in to produce either or part of films here...the objective being to try and create all the time a

self-sustaining audiovisual sector and concurrently with that, there was amending legislation that impacted on the broadcaster in that for the first time, it was statutorily decreed that a certain amount of the broadcasters' financial resources should be used for independent commissioning from the audiovisual sector, also contributing to the development of the AV industry. Prior to 1993 RTE was free to produce everything in-house if they wanted to. So, nationally over the past 9, 10 years there has been an incredible leap in the amount of resources diverted into the AV sector here." (D/AHGI 2)

This official pinpoints the new department in 1993 as the starting point of a government policy to develop and help an 'audiovisual industry'.

In 2002, there exist a number of sources of State funding in Ireland (e.g. loans from the Irish Film Board; commissions from RTE and TG4; grants from The Arts Council, other types of (for example, marketing) assistance from the IDA, Enterprise Ireland or Udaras na Gaeltachta. Finally, there are the Section 481 tax incentives (or what used to be known as Section 35 of the 1987 Finance Act). Of these, "the primary modes of State support to the Irish film industry take the form of tax incentives administered through the Department of Arts, Heritage, Gaeltacht and the Islands, and soft loans administered through the Irish Film Board"⁴⁷. Section 481 (of the 1996 Finance Act) provides for tax relief up to 80% of investment, while finance from the Irish Film Board amounts to recoupable loans of between 10 to 15% of the budget of small to medium sized films.

In the hopes of a D/AHGI official, the section 481 entices foreign filmmakers and producers to produce in Ireland. He is aware that this will only continue so long as "the bottom line is that if they (the US or Australians) can make the scenery look like where it's supposed to be, and if it comes in at the cheapest price, that's where they will film if they're going on location. At the end of the day, the film is cheaper to make in Ireland as a result of section 481 than anywhere else."

This may no longer be the case. There are numerous examples of films and advertisements being filmed and post-produced abroad because of the current high rates of Irish film crews. It is not, in 2002, cheaper to make in Ireland than anywhere else, and many within the industry believe that Irish film production companies and workers have priced themselves out of the market.

"Section 481 is not available to non-Irish, non-European citizens, but the way it operates effectively doesn't make much difference if they're an American film

company comes in, Irish investors invest, and the tax relief is granted. In practice, Section 481 is available to anybody yet the tax benefits are for Irish citizens. (*This is one indication of employing human rights in trade to assist the rights protection of Irish citizens*) The Film Board is definitely indigenous, it's meant only to assist Irish, but under European legislation, it has to be any EU citizen. In practice, most of the funds do go to the Irish. And the amounts involved are not something to make an issue of." (D/AHGI 2)

7.3.4 Direct funding for public service broadcasting and the Licence Fee

The former Minister for Arts, Culture and the Gaeltacht proposed a fundamental shift in managing broadcasting services funding in Ireland in the 1997 document *Heads of Bill: Clear Focus* which followed on from his *1995 Green Paper*. Michael D. Higgins' underlying premise was that the development of digital compression of television signals and the facilitation of digital transmission would increase the number, quality and availability of audiovisual services available to Irish viewers. However, "the vast majority of the new services will be commercial activities, driven ultimately by the profit imperative, and funded by means of advertising, subscription and pay-per-view arrangements. These commercially funded services, given their trans-national nature, will be very lightly regulated, if..at all, and can be expected to limit their investment in programming to what the commercial market will support" (p42). BSKYB is always one of those corporations hopeful of broadcasting services trans-continentially, yet of being lightly-regulated without prosecution and in accordance with British law owing to BskyB's operational jurisdiction.

Minister Higgins wished to "copper-fasten the concept of licence-fee funding of RTE as a reasonable payment for a national broadcasting service, rather than a State subsidy" (p45). The Minister proposed that the licence fee level would be adjustable in line with annual rises in the CPI Price Index, subject to review at least every five years or more frequently if deemed desirable or necessary. Increases in the licence fee would be a matter between the Department of Arts, Culture and the Gaeltacht and the newly formulated Irish Broadcasting Commission, and would not be subject to Government approval (p65).

“Michael D. Higgins envisaged a single regulatory authority – the Broadcasting Commission – with full time members, fairly heavy weight, with considerable powers of interrogation over broadcasters and the meeting of their legal and other requirements. All RTE licence fee money was to be channelled through them. The Broadcasting Commission usurped the authority role of the RTE authority, but the authority represented the concept of a single broadcasting authority for the country. Essentially, MD Higgins’ concept was that the Broadcasting Commission would pay RTE the full licence fee, but it would also pass judgement on RTE’s performance as a public service broadcaster and report to government. But they wouldn’t have had any other powers other than telling tales to government.” (D/AHGI 1, interview)

However, this proposal was not popular, neither among the radio operators, the private broadcasters, not RTE. It was too much like “Soviet control”. Nor did the following government (FF/ PD partnership) take up Higgins’ idea. The 1997 FF / PD government didn’t feel that a central heavyweight department was the way to go. They had opposed it from the beginning.

Government subsidies to national broadcasters had in those years of the late 1990s been coming under intense pressure in the European sphere by private commercial broadcasters, keen to get their slice of the funding cake. In response to this international pressure, Minister Higgins acknowledged that “There are many competing demands for public funding of the public service programming that is provided by independent broadcasters”, but expressed that he “is of the view that the division of licence fee revenue among broadcasters according to the type of programming provided would be a virtually impossible task; would lead to an administrative nightmare; would dilute RTE’s effectiveness as the national broadcaster, and would generally lead to a situation where programming might be produced simply because it might qualify for a funding subsidy from the licence fee.” (p44) (See and compare De Valera’s baking cake analogy and ingredients / separate pricing policy below.)

This is the updated situation in Ireland as of 2003, following the raise in licence fee and associated stipulations for receipt of public service funding. For the first time in Irish broadcasting history, part of the licence fee will be given to commercial broadcasters for public service type programming.

It was acknowledged in the *1995 Green Paper on Broadcasting* that “The independent broadcasting sector has put forward the proposition that, as they believe that some of the statutory obligations placed on them constitute public service broadcasting, they should be entitled to a share of licence fee revenue” (p184). Thus, Minister Dermot Ahern (of the Department of Communications, Natural Resources and the Marine) has listened to the commercial broadcasters’ argument, and implemented some of their proposals. In this policy issue, the Minister reputedly did not take the advice of his senior civil servants. The argument was made that certain programmes are made (in relation to the performing arts and particular public service responsibilities) that “cannot be sustained solely through the generation of advertising or sponsorship revenues” (p185) and that “clearly can be funded only by licence fee revenue or other Government sources” (p185). However, it is also admitted that Irish broadcasting is now underpinned principally from advertising revenue (Para 8.9, p186), and there is the acknowledgement by staff within the Broadcasting division that changes in advertising have a direct effect on the nature and definition of ‘broadcasting services’.

The distinction as drawn by the then Minister Higgins for qualification for State funding / subsidy was the following: ‘public service broadcasting’ was equal to a “broadcasting service provided by a publicly owned broadcaster”, that broadcasting service being “a service provided by a broadcaster or broadcasters in the public service, as distinct from the concept of segments of public service programming within a commercially run broadcasting service” (p43). (See the revised definition of a broadcasting service in De Valera’s 1999 Broadcasting Act.)

The constraints of economic and financial policies pursued by the Government would affect *future funding of broadcasting* and the options available were described in the Green Paper as limited to receipts from either television licence fees or by direct funds from the Exchequer. However, none of this proposed legislation came into effect because the Minister in question lost office with the change of Irish government in 1997. Government policy has now (2003) shifted in the opposite direction to Higgins’ policy.

The Irish desire to implement its own licence fee policy was strongly contested by DG IV in 1998. DG Competition insisted on RTE’s financial openness and accountability.

On its part, former Minister de Valera insisted that the licence fee did not constitute state aid.

7.3.5 Ireland and DG Competition (IV) licence fee dispute

In preparing for a meeting of the Audiovisual / Culture Council on 17 November 1998, at which the Irish culture Minister de Valera was present, Ireland suggested the following addition to the 29 October draft of the Council Resolution on Public Service Broadcasting of paragraph 8: “The systems of funding for public service broadcasting in respect of new audiovisual and information services which are provided on a commercial basis and outside the public service remit have to apply financial openness to ensure that such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account”. Is it to be understood that de Valera was suggesting RTE’s new AV services must be financially transparent – but not its public broadcasting services?

The clues to Ireland’s formal Ministerial reservations on Paragraph 8 lie in a Briefing for COREPER (i.e., those Irish representatives who attend daily or weekly committee meetings on EU business, stationed within the Permanent Representation of Ireland to the EU) for the 17 November 1998 Audiovisual / Culture Council meeting. In a fundamental clash with DG Competition and their heavy-handed involvement in public service funding arrangements ⁴⁸ the Department of Arts, Heritage, Gaeltacht and the Islands stated that:

“In a nutshell, we think that it is not possible to apply analytical accounting to the public service activity without disrupting that activity to an extent which deprives it of its essential characteristics, in particular, the editorial independence of the broadcaster.”

This researcher asks why not? This researcher argues that this is in the public interest, to know where the public funding goes. Just as much as it is legitimate for the public to know how much is spent on star presenters – it’s the public money and a publicly owned station, thus the public are the shareholders in RTE’s financial accounting practices. It is this researcher’s conclusion that RTE have a tradition of unwillingness to reveal their financial spending and costs, although has come under pressure within the

recent past to be more transparent with both. Under this pressure, RTE has gradually acquiesced.

Ireland's concern lay with the assessment that DG Competition had failed to adequately take account of the Irish system for funding public service broadcasting, since Ireland did not accept that the licence fee was a State aid.

DG Competition's discussion document proposed that "the costs of only certain types of programming net of associated advertising revenue would be regarded as meeting the criteria of public service and be eligible to attract state aid in the form of licence fee income compatible with the common market".⁴⁹ DG Competition proposed that public service broadcasters "would implement separate accounting systems able to identify with the necessary precision the assets, resources, costs and revenues attributable to the public service area from the commercial area."

It is my opinion that the Department's argument is flawed. The Irish public service broadcaster is not a wholly publicly funded public service broadcasting model. RTE derives up to / more than 50 % of its revenue from advertising and / or commercial sponsorship. RTE has a considerable staffing problem. (2000 staff, compared to commercial broadcaster TV3's staff of 250 as well as other heavy expenses, such as orchestras.) This, and RTE's other non-essential expenditures were mentioned in the *1992 Report of the Special Working Group on the Film Production Industry in Ireland*, but these issues that were brought to light were not addressed by RTE. Like any good business, and unless the Irish Exchequer seeks to pour public funds into a black hole this researcher holds that RTE should be capable of accounting accurately for its expenditure, especially when operating to a public service remit with the use of public funds.

Ironically, the Department was prepared to accept that it was possible to apply analytical accounting to "new audiovisual and information services" that are provided on a commercial, not public service remit. In order to safeguard this position, Ireland's Proposal to the Draft Council Resolution had suggested that Paragraph 3 (reading as of the 11 November draft "The fulfilment of the public service broadcasting's mission must continue to benefit from technological progress") should be altered to read instead:

“Public service broadcasters have an important role in bringing the benefits of the new (insert “audiovisual and”) information services to the public”.⁵⁰

Subsequent to the DG Competition discussion document, Ireland had produced an analogy of ‘baking a cake’, which was designed to represent the variety of processes (ingredients) involved in producing public service programming and a public service broadcasting schedule. The Irish “Baking a Cake” Public Service Accounting model is worth quoting in its entirety:

“Ireland sees the system of public service broadcasting...like baking a cake. You have the ingredients: eggs, flour, milk, fruit and so on. You have the cook who mixes the ingredients and bakes the cake. The cake is there for anyone who wants cake. If a person wants an egg he can go to the grocery and ask for an egg. A person does not go to the bakery, demand the cake and expect to pay for an egg on the basis that an egg is all he wants. DG IV (Competition) would have us believe that it is perfectly reasonable to have one’s cake for the price of an egg. Not only that, DG IV would have us believe that it can take a slide rule and work out how much of the time, experience and creativity of the cook relates to the egg in the cake. Not even the cook knows this.”⁵¹

To continue the analogy, this researcher is of the opinion that the cook should know, if the cook wishes to sell his cake in order to cover his costs, to ensure that he is not going to lose money on his cake, leaving aside a cook’s wish to make a profit if he so desires.

It was argued,

“DG IV proposes that public service broadcasters would implement separate accounting systems able to identify with the necessary precision the assets, resources, costs and revenues attributable to the public service area from the commercial area. To continue with the baking analogy we accept the view that if the baker wishes to bake cakes other than the public service cake that this should be a transparently separate operation. These other cakes would include services such as pay television, video-on-demand, retransmission services and so on. To have it any other way would poison the public service cake in the same way as the DG IV proposals would. In the light of this we ask DG IV to ...place at the centre of its thoughts the fact that the Protocol allows each Member State to employ the cook and to give him the financial means to bake a cake which suits us. The cake may not be to the taste of the Commission, however, that is the point of the Protocol”. [ibid 11, paragraph 6]

DG Competition is accused by the Department as exercising the role of “content police”. DG Competition, it is suggested, is stabbing “a knife in the heart of the system of public service broadcasting”.⁵²

It is this author's view that emotive arguments which have so pervaded and controlled any and all discussion of public service broadcasting, cultural diversity and national control of audiovisual services require a rational re-think.

7.3.6 Quotas

The concept of quotas started to be employed at the European level in November 1987. This date saw the Council of Europe's Second Ministerial Conference on Mass Media Policy convened in Stockholm. At this meeting, the 'group of friends' reached a non-binding agreement on the extent of quotas for European works to be included in the developing European Commission Directive. The French government were the principal instigators and the most insistent on retaining the original 1988 proposal of 60% European content on European screens. This desire for a high fixed quota, which was not favoured by some other EU Member States, was partly a reflection of French national cultural policy and in addition the fact that French artists and producers put strong pressure on the government to protect French culture from American 'cultural imperialism'. French MEPs were the main driving force for 60% quotas in Brussels, much to the alarm of the US Trade Representative and the Motion Picture Association of America.

Between January and June of 1989 it became obvious to the European Commission and the Council of Europe that there existed strong opposition to the issue of European content quotas amongst many EU Member States. The European Commission suggested that the Directive could be so arranged so that the article relating to quotas would be 'politically', not 'legally' binding. Effectively, this would mean that the EC would not bring the Member State to court for breach of the Directive if the country didn't meet its quota goals. (Hirsch & Petersen, 1992)

The French proposal of 60% European content quota had been revised by Autumn 1989, following objections from Member States and the USTR. Article 4 in the final proposal stipulated a quota aim of "a majority of European works", and this was caveated by the ruinous escape clause "where practicable". It is believed that the words

'where practicable' were requested to be inserted by Prime Minister Thatcher, at the behest of President Reagan. It suited Rupert Murdoch too, operating out his British base. This eleventh hour insertion was to cause the Commission many headaches in later years. By the time of the first TVWF 'monitoring report' in 1994, the Commission realised Article 4 needed urgent clarification, following approximately 31 complaints to the Commission relating to non-compliance and problems of interpretation for TV operators and national governments.

In 1989, Ireland did not object to the quota obligations. If there was any reaction to be recorded, it was only that Ireland was sceptical that the quota obligations would lead to the creation, as the Commission were hoping, of a European market for 'European output product'. Given the language barriers within the European Union of Member States, it was unlikely – and time has been witness to this – that Member State nationals would watch much else other than their own indigenous production, plus dubbed American imports. "The Italians watch Italian and American; the French watch French and American; the Germans watch German and American; and we watch a lot of UK, American, and our own". (Interview, D/AHGI 1, Department of Communications, Dublin)

On 3 October 1989, a qualified majority adopted the EC Directive *Television Without Frontiers* in the Council of Ministers. Denmark and Belgium voted against it. France only supported it in the end of the day because the day before – 2 October – had seen the successful resolution of a two-day discussion and planning session, 'Les Assises de l'Audiovisuel' led by President Mitterand, and a battalion of audiovisual professionals and experts. The closing declaration, signed by 26 Ministers and the President of the European Commission officially established the support scheme for audiovisual productions, *Eureka*. Mitterand had first pushed this agenda the year before, at a December 1988 European Council meeting in Rhodes. The formal establishment of such a subsidy package for European audiovisual productions meant that France could give its official backing to the TVWF Directive and vote 'yes'. By signing the TVWF Directive, they approved the free and liberal intra-European market in audiovisual products and services. *Eureka* was to be the new addition to the late 1980s battery of EC and Council of Europe support schemes to boost trans-European audiovisual production, none of which were that well-financed. 1987 had seen the inauguration of

the EC's MEDIA 2 programme, followed in 1990 by MEDIA 95, while the Council of Europe had launched *Eurimages* in 1988.

Throughout the 1980s, Irish governments had struggled to emulate the neo-liberal economic theories prevailing in America, the UK, and France. During the time of Minister Burke's tenure of office, Ireland had smashed the monopoly of the public service broadcaster and its unions, and the European Union had eradicated national autonomy for the regulation of broadcast services. The EU had established the ground rules for a common market in multi-European transmission and sale of audiovisual product. By the late 1980s, the Fianna Fail government and Minister for Communications Ray Burke had also voluntarily entered into this market by way of the liberalisation of its own broadcasting system towards a mix of private commercial and public service radio and TV broadcasters. This echoes Hamelink and Raboy, who both argue that it is national governments that liberalise their national public spheres, and run the risk of then not being in a controlling position of the operators within that sphere.

Five years on from the adoption of the 1989 original Directive, it was expected that the European Commission would submit a report on the application of the Directive, and make proposals for any revisions if deemed necessary in light of the rapidly changing audiovisual field and new technological evolutions. In November of 1994 the European Parliament had officially called for the proposed revision of the TVWF Directive to be submitted without delay. The main problem over those five years was the lack of clarity of the wording 'where practicable' in Article 4, and the lack of rigidity of enforcement by the Commission on the issue of quotas. Discussions on the TVWF revision were delayed, it appears for reasons other than a full Uruguay Round agenda. The European Commission itself was due for revision – President of the EC, Jacques Delors was to be replaced by a new incoming President, Santer in early 1995. This also entailed a 'cabinet reshuffle'. The old College of Commissioners were due to finish their term at the same time, which meant that in audiovisual affairs, Commissioner Pinheiro was to be replaced by Commissioner Oreja (by many accounts, a weak Spanish figure) as head of the DG for Culture and Audiovisual.

This change of personnel on 25 January 1995 had a marked effect. In general, the main areas of contention over the revised Directive were, firstly whether the Directive's remit

should be expanded to cover 'new audiovisual services' (and apply the 50% quotas to them), and secondly, whether the quota system needed reinforcing. Interestingly, Pinheiro had suggested towards the end of his term in office at the end of 1994 that any revised TVWF Directive should extend the application of the legislation to include point-to-point services (i.e., one of the on-demand type services), as well as point-to-multipoint, including Video on Demand – a critical 'new audiovisual service' under pressurised discussion at that time. The US, having failed to secure their demands on audiovisual in the Uruguay Round were at the beginning of 1995, in phase one of a new stronger offensive strategy in US-EU negotiations on the audiovisual issue. A G7 Summit was also coming up in February 1995, and it was the American's strategy to ensure that the then situation would not be made more restrictive, either by tightening the levels of restriction or by expanding restriction to new communication technologies. It was of key importance that quotas would not be extended to new audiovisual services, such as point-to-point services like Video on Demand. Failure to assuage American concerns on these issues was threatening to damage transatlantic relations in the Summit. Pinheiro's proposal for the extension of a revised Directive was rejected. The incoming Commissioner for Culture, Oreja, suggested that a forthcoming Green Paper (on new Audiovisual Services) should address the issue of Video on Demand, and in the meantime a revised TVWF should row back on the protectionist approach. Oreja considered that the Article 5 containing the 'where practicable' clause should be eliminated altogether - due to excessive legal problems - and minimum European content levels should be targeted to the recorded levels in 1989.

By the time the new College of Commissioners debated the TVWF revision in March 1995, thirteen votes to four (with one abstention) voted in favour of an unchanged text. When the Commission unveiled its 'new' proposal for a 'revised' TVWF at the end of March 1995, it was the turn of the European Parliament to give its official opinion, which under the co-decision procedure, is due to be taken account of. However, Parliamentarians remember this particular case of the TVWF revision for the unconstitutional abuse of their rights in the co-decision procedure. Article 3.4 establishes the Code of Conduct between the EC and the European Parliament, stating that "The Commission shall ensure that the Council bodies are reminded in good time not to reach a political agreement on its proposals before the EP has given its opinion".

However, before the EP had considered the Commission proposal and given its official opinion on a revised TVWF text (eventually doing so during First Reading on 14 February 1996, and Second Reading in November later that year), the Council of Ministers representing the 15 Member States had reached a 'political agreement' (20 November 1995). Their conclusion was that there should be 'no change' over the proposed revision of the Directive. The political agreement between the Member States effectively did not take into account any recommendations from the EP, particularly their desire to widen the scope of a revised Directive to include new audiovisual services. The EP had also recommended that the clause 'where practicable' should be deleted, thus closing the loophole whereby many commercial broadcasters, and in particular Sky in the UK, avoided their obligations to show 50% European content.

The Council of Ministers' political agreement deserves greater scrutiny. Once again, division of opinion between the Member States was clear cut - the French wished to tighten the quota requirements, while France's usual adversaries, the German and the British wanted to scrap them altogether. According to an Irish official involved in the negotiations, by the time of the TVWF revision, there were two schools of thought on the European quota revision. One school maintained that quotas were not tough enough. Heavier quota provisions were needed. The French led this position to an "extreme degree" (and were supported by four other states. In the final vote, only five countries, of 15, defended quotas). The French wanted to match the showing of one Hollywood movie with one European produced programme, or a European, preferably French, movie. The French proposal, argues the official, would have had implications for Ireland. "We would have said goodbye to indigenous production, because we couldn't have afforded it. RTE can't afford to make a high-quality film to match a Hollywood movie, and if there was no American movie as part of a schedule, nobody would be watching it. In his opinion, the French proposal for strengthened quotas would have put "an unbearable burden on the sector here", because "There is a reality. RTE have their revenue of £120 million a year. They have two TV stations, radio stations, orchestras and performing groups to run as well. It wasn't practically possible to do that" (D/AHGI 1). The French position appeared in a non-paper and was so vehemently disagreed with, it never appeared as a formal proposal.

“The other school of thought at that time said that quotas had been a complete waste of time. They should be got rid of altogether, but Minister Higgins was not of this view. Of the countries round the table, several times France and Ireland were alone on standing for quotas and independent production matters.” (D/AHGI 1)

The elimination of quotas was supported by up to six Member States (including Britain and Germany). As eleven of the fifteen refused to support a tighter version of the 1989 Directive, the compromise as suggested by Spain, clearly in the driving seat – Spanish Cultural minister Alborch led the Council discussions during the 1995 Spanish presidency of the EU and Oreja was the Spanish Commissioner of DG Culture – was ‘no change’. Ireland’s position, as put forward by Minister Higgins “supported the tightening of the loophole “where practicable”, supported maintaining quotas and making it more difficult to elude them. RTE didn’t object to the compromise reached at the end of pre-TVWF revision discussions – i.e. a maintenance of the status quo – but they wouldn’t have wanted the proposal within the French non-paper.” (D/AHGI 1, interview, D/AHGI) Unofficially, RTE (representing ‘public opinion’) would prefer not to have to fulfil obligations to quotas.

While in the European forum, Higgins supported the wholesale evasion of quota obligations and sided with France, in Ireland he stated that he did not favour the employment of quotas for particular types of programming (for example for cultural broadcasting productions, for Irish artistic recordings, for the promotion of Irish culture, or for productions originating in Ireland). The minister argued against quotas as a policy option in the *1995 Green Paper on Broadcasting*. He argued that “experience elsewhere with the use of statutory quotas for specific programme categories would not encourage Government to go down this road”. Effectively, the use of statutory quotas is ruled out – “The mechanism is a blunt, inflexible instrument. If it is enshrined in legislation the quota must be met. Therefore, quantity rather than quality becomes the criterion. Mediocrity may become the norm if artists and composers are guaranteed airplay. Programming as a consequence could become dull and unimaginative and will probably fail to reflect the needs and wishes of the audience to be served.” (p227)

It was suggested in the *1992 Report of the Special Working Group on the Film Production Industry in Ireland* that these quotas stipulations have had the reverse effect

of their intention because “There are grounds for believing that terminology such as “a reasonable proportion”, “as far as is practicable”, and “where practicable and by appropriate means” in these texts (i.e. *TVWF* and Section 5 of the *1990 Broadcasting Act*) affords RTE too much discretion with regard to the commissioning of independent productions, given the importance of the independent production sector (while) RTE has indicated that it conforms to the letter of the Directive”. (p41)

Broadcast programming quotas as stipulated by the EC Directive *Television Without Frontiers* at present are enshrined in Irish law by means of Statutory instrument No. 251. Articles 4 and 5 of the Broadcast Directive hold the relevant stipulations as to the minimum quantity of European productions that are to be shown on television. The articles stipulate a minimum of 50% European content to be shown on screen, when practicable. In the recent *Broadcasting Act 2001*, the Irish government has imposed a positive quota to screen more Irish-produced programmes. RTE is now required to invest 15 million Euro in independently produced programmes in the year 2001. The Irish Broadcasting Act 2001 orders that RTE spending should be invested in a) the commissioning of the making of independent television programmes, b) the procuring the formulation by persons or proposals for the commissioning by RTE or the making of independent television programmes; and c) the assisting in the completion of independent television programmes, the making of which has not been commissioned by RTE.

This researcher interprets this move as representing a positive shift towards the local territorial expression of its culture, although the terms in which this provision has been drafted indicate a Ministerial desire for that cultural expression to be ‘Irish’ and ‘national’, of ‘Irish’ and ‘regional’ in character.

Chapter 8

8.1 Conclusions

Does Irish policy protect rights according to the communitarian approach to citizenship, to which this thesis subscribes? Does the Irish model of policy-making align itself with Habermas' ideal deliberative democracy? To what extent does Ireland protect its 'cultural right' to expression, in the traditional way in which this right is articulated? To what extent are the rights to express and receive (i.e. 'communicate') upheld in policy-making? This research has chosen to address the question to what extent, and in what way, Ireland protects Irish human rights to communicate within a post-national public sphere? In the sphere of the international marketplace, which trade rights does Ireland defend, and to what extent is it successful?

This researcher concludes that Ireland, unlike France has not elevated audiovisual concerns as a priority since the integration of the economy into the global market (via the EU), and does not choose when led by Fianna Fail policies to protect Irish citizens' rights beyond the minimum proposed by the EU.

On the other hand, this researcher argues that in so doing, some Irish governments have protected the trade rights of other countries, those establishing business in the Irish jurisdiction, rather than the communication rights of their own citizens. Others who classify communication as a 'cultural right' would argue that Ireland fails to protect Irish citizens' 'cultural' rights.

The Irish government has frequently failed, yet there is scope to give better protection than the minimum set at EU level, if Ireland so chose. In relation to MFN (Most Favoured Nation) treatment, Ireland in the devising of its own cultural, audiovisual or international trade policy is at liberty to further restrict access to foreign market entrants or to favour indigenous suppliers, even within the confines of finding agreement within a European Community Common Commercial Policy. On National Treatment therefore, Ireland has the freedom to grant support subsidies to its own local audiovisual industry, and exclude this support to outside foreign competitors. However, the GATS rules dictate that the MFN obligation applies automatically unless it is specifically excluded

for listed policies or support systems, e.g. Section 481 for film. If a particular subsidy is not listed and exempted, it becomes automatically open to all market players. The issue remains however – did Ireland take advantage of this national right to limit foreign material on screens?

One Irish negotiator underlined the theoretical freedom of action that Ireland gained following the agreement at the Uruguay Round – technically, it is possible for Ireland to do one thing, and for the UK and France to do another. While this might not be politically desirable, given the overwhelming desire for common EU action amongst Member states, the provisions are in place at the global GATS level for Ireland to take a stricter policy line on the quantity of foreign, non-EU content.

However, as is evident from interviews with government officials with responsibility for trade, there was no sense of imperative on the part of the Irish government to restrict the quantity of foreign audiovisual imports despite possessing the ability to utilise regulatory instruments put in place as part of the Uruguay Round process that could have facilitated the same. Some civil servants are on record in this thesis (see p204) as cataloguing a failure of the government to guarantee future indigenous Irish production.

Yet, this goes further. When asked if the audiovisual sector had played an important factor in the negotiations orchestrated in Geneva, a lead negotiator indicated that the sector had made no significant impact on the manner of devising the Irish negotiating position. The issues that had received the most serious attention and protection were agriculture and textiles, rather than audiovisual. This is true both of the early 1995/96 years of GATT negotiations, as well as of later years. Unmistakably clear comments from officials from both departments – of Trade, Enterprise and Employment, and of the department of Arts, Heritage, the Gaeltacht and the Islands – illustrate that audiovisual did not feature as a priority in trade negotiations; the sector was not well represented within Irish Representations in Brussels or Geneva; and that no importance was given to the issue of restricting non-Irish content to the Irish audiovisual market.

Despite the fact that the Irish Minister for Culture and Audiovisual was Michael D Higgins at the critical period of the last six months of Uruguay Round discussions, he too remarked that “within the two principal departments controlling external trade

affairs (i.e. D/ ENT-EMP and D/ Foreign Affairs), there is “no sensibility” to culture. Essentially, Higgins argues, “We are already Americans with attitude”. (Interview, MD Higgins, Dublin) This researcher argues that Ireland is protecting Americans’ rights to expression in the national public sphere, rather than those of Irish or EU citizens. It is the present author’s opinion that Ireland protects American trade rights. Lack of public awareness of the relevance of WTO trade rounds for Irish citizens and their rights helps lead to a dominance of opinion and input from American and other foreign companies.

While audiovisual services were a very sensitive trade issue, principally because of the insistence by the French (and southern European countries to a lesser degree) of the right to protect their national cultural identity, there were other issues that had also failed to reach agreement at the end of 1990, and on which talks had been extended. Those sectors that tended to cause difficulties naturally then filtered to the end of the talks – agriculture, audiovisual, but also financial services, telecommunications, maritime transport, air transport and movement of persons (this latter issue had immigration implications).

While it was stressed on the one hand that in trade rounds, what was being signed was ‘the whole package’, and ‘nothing is agreed until everything is agreed’, there was some dispute amongst interviewees as to how a balance might be struck between the demands of competing difficult sectors. For example, was there any chance that a good concession on agriculture might be more important for Irish interests than forcing a break up in talks over the audiovisual issue?

Several D/ENT-EMP officials negated this possibility – for them, there was no trade off between agriculture and audiovisual. Both were sensitive areas, but for different reasons, and according to the predominant D/ ENT-EMP opinion those sectors were negotiated separately, without a trade-off between one area and the other. However, remarks by one of the current trade officials in D/ENT-EMP appear to contradict this view.

He says:

“The position on audiovisual would have been adopted by the D/ Arts. As part of an overall package, there would have been negotiations on many areas. Obviously there would have been competing interests. There would have been a process of conceding on some other area, when agriculture took precedence and

we needed to gain support for our position on that.” (D/ENT-EMP 5, Irish negotiator on Services, 133 Committee member, interview, Dublin)

While not suggesting that audiovisual would have suffered at the hands of agriculture – and on both these issues, Ireland was France’s staunchest supporter –the implication here is that audiovisual and the cultural protection issue is low priority in the greater scale of agreeing a whole package of liberalisation on many different areas and sectors of greater economic importance to Ireland than a small indigenous audiovisual sector.

Undoubtedly, it was the French at least initially who highlighted most strongly the cultural concerns surrounding *the idea* of space for national culture and European culture in the audiovisual media. Former Minister Higgins proclaims that his role became more pronounced and it was he that led the argument demanding a cultural exception clause in GATT when the Community of Member States had rejected the idea of a total Annex on cultural goods and services. At the point where Minister Higgins took up the French baton, there had been a ‘significant retreat’ on the original strong stance of the French position taken by Minister for Culture, Toubon, because of a change in the cultural minister to D’ouste Blazy. Higgins felt he had to take up a stronger position to compensate for the weakening of the French defences. (Interview, MD Higgins TD, Dublin) For Higgins and the interests of the fledgling Irish film industry, there were economic reasons for supporting the ‘cultural exception’. While the French film industry was largely financed by a highly controversial cinema seat levy system which amounted to a tax on non-French films shown in French cinemas, Minister Higgins had by 1994 established the new government department of the Arts, Culture and the Gaeltacht and had put in place a significant directional policy to promote the growth of an indigenous film industry, riding on the back of selling Ireland as a location for foreign film production and shooting. MEP Banotti, through her dialogue with the US movie industry majors and their representatives in the EU/US Audiovisual Round Table hoped to attract inward investment to Ireland by luring US production houses to shoot on location in Ireland, and as a by-product of that, create opportunities for hands-on training for the young Irish film-makers. The French did not at all support the EU / US Roundtable, arguing that it compromised independence of EU decision-making.

However, from the point of view of a key civil servant of the D/ AHGI broadcasting division:

“In fairness, it wasn’t any great philosophical debate – there was, led by the French particularly. One way or another, the French would have been leading very strongly on this – the French point of view was one our Minister (Higgins) fully sympathised with and supported. It wouldn’t have made any difference which Minister or whose persuasion it was, there was a view that the European audiovisual industry was important to Europe, and that it should be supported and that the domination by America of the European industry. I have no problem with the way it is...It’s a fact! But, there was no great soul-searching. It was determined that Ireland and the other Member States were determined to protect the assistance to the European industry, and there was unanimity and the Commission was quite happy to maintain that Common Position. We all recognised that it could have been, to an extent, a high-risk strategy. And it still might be a high-risk strategy, but at the moment, Europe is of that frame of mind, and you won’t find large files in this department arguing the pros and cons of what we should or shouldn’t do – we (i.e. the department and the Minister of the day) just took a view that that was the right way to go. Our attitude would be – what are the French thinking? and can we think similarly? The French for example are passionate about this, but...it is also worth bearing in mind that we are a small nation; the resources we have to ‘think’ are quite limited. So our resources are very limited - 5 or 6 people in the Broadcasting division, another 5 or 6 people in the Film Division- and on issues like this we tend to be pragmatic. We take a position, but you won’t find normally long large detailed philosophical treatises of pros and cons.” (Interview, D/AHGI 2, Broadcasting division, Dublin)

To think like the French, this researcher recommends the Irish government requires greater policy-input from the artistic and academic sector, and encourage wider public debate.

While it might be argued that the Irish position ‘pragmatically’ attempts to emulate the French ‘philosophy’, no effort was spared by either former Minister Higgins or MEP Banotti in puncturing the French façade. The impression given to other Member States by the French is an “incredible pride in their language and in their culture. They are just absolutely fanatical about protecting the European audiovisual sector, and *nothing* will change them. Even if the rest of Europe would change its mind, you wouldn’t get agreement on a Common Position. The French would use their veto.” (D/AHGI 2, Interview, Dublin)

The right of veto of any EU member state (the Luxembourg Compromise) is based on the ‘protection of vital national interest’. While a member state might believe that a particular issue is of great national importance, the veto is only accepted by other

Member states – and thus a common decision is blocked – if the country, or the lobby that that country has amalgamated carries sufficient ‘weight’ within the Council of Ministers. Ireland is not in that league of strong and weighty nations. France is.

“Ireland would never be able to block something on its own. If the Irish were to take a Luxembourg Compromise position on something being negotiated in multi-national trade, I don’t think anybody would recognise it. If the French, the Germans, and the Italians were to take a similar position on it, I think the weighting changes so drastically that maybe people would actually have to take a more political view on it. See Europe is all about weight. And they will recognise vital national interests, but it has to balance really in terms of how it leaves the rest of Europe and whether your particular difficulty weighs in that balance.”(Interview, D/ENT-EMP 1)

While a nation might deem protection of its national culture of vital national interest, no nation could block a decision being taken against this national interest unless it is sufficiently weighty, like France, or it uses the combined weight of many nations, thinking in a similar manner.

Thus, some in the Irish broadcasting policy environment would like to think like the French, but yet they cannot, for a number of given reasons – resources, lack of veto or a ‘small state’ status. Another obstacle might be that simply Ireland doesn’t and will never be able to match the passion and pride in their culture that colours the French position.

8.2 An alternative proposal

The approach advocated by those in favour of cultural rights discourses that tie collective rights of a community exclusively with 19th century historical Romantic ideals of a national community is not appropriate for the challenges that European citizenship and global markets present.

This researcher suggests that the inequalities that are clearly inherent in the differences in personal wealth between citizens should be counteracted by argument with an emphasis on human trading rights to property. Property in this case is interpreted to mean knowledge, information, skill, labour, craft, art and education as proposed by Mowlana (1997) above, and others (Warner 1990), Habermas (1989), Marshall (1950),

William Cobbett (1763-1835) in Williams (1990:13-17) and by an extrapolation of the continual and continued association of acquisition of property with learning, education, and literature as put forward by the United Irishmen.

The rationale behind this suggestion that rights relating to communication, public opinion and freedom to participate in public spheres should be strengthened within legal guarantees for 'property rights' is that property rights hold much greater weight than any conceptualisation of 'cultural rights' or 'social rights' in fora of international policymaking such as the World Trade Organisation where rules regulating trade and commerce of communication products and services are established for the global marketplace. Additionally, audiovisual services are defined, at least by the Irish government's Broadcasting division, as 'individual' services – therefore, individual rights could be argued to apply. Further, all citizens have the civil right to procure property, and this right ought to be enforced in the marketplace where trade takes place, by way of individual trade or trading rights.

I suggest a redefinition of civil property rights, related to the public sphere: the civil rights to access the means of communication, and the right to the knowledge (individual property) necessary for democratic involvement (political input) and political participation.

Citizenship, both in America and in France grew up in the debate surrounding taxes, and taxable citizens. This researcher recognises that American citizenship was initially exclusively reserved for white male tax-paying owners of private property. In France, the 'active' politically involved citizens (as opposed to passive 'civil' citizens) were determined by selecting those who paid taxes. France was more advanced than America through the opening of the debate on citizenship to discussion of widening access to citizenship, the status of citizens, and citizens' rights. France discussed the inclusion of slaves and women. The fact was that there were many more women becoming politically involved in order to insist on their rights, particularly the safeguarding of their property.

Marx 1878 (in Calabrese & Burgelman 1999:3) claims that citizenship following the French Revolution was entirely dependent on property ownership, not on the

universalism of humans. He noted that "the franchise of political power came as a right of property ownership and that in this context man was defined as bourgeois man, "not man as a citizen" (1978:43), and thus the idea of citizenship was grounded on conditions of economic inequality. The issues of taxes and property were also made prominent by the United Irishmen trying to move the people towards political revolution (McBride 2000). Garnham (1990) suggests the key to property rights is that voting citizens live with the consequences of their political decisions.

Calabrese and Burgelman (1999:4) suggest that citizenship continues to be influenced by the wealth and economic stature of individuals, despite formal full political enfranchisement. Studies of local democratic involvement ("e-democracy projects") by an urban public using interactive electronic democratic forums in Bologna, Amsterdam, Manchester, and Santa Monica (see Tsagarousianou 1998:170) seem to bear witness to Calabrese & Burgelman's suggestion. Tsagarousianou concedes that financial restrictions of citizens are a factor for the experiments' lack of success in getting the local citizenry more involved. However other reasons were also put forward to explain why the full potential for interactivity inherent in new technologies had not been explored, namely: lack of citizen access to the necessary technology, citizens' negative predisposition to the technologies utilized, technical limitations, lack of political will and factors related to political culture.

Venturelli suggests that "commercial expression has been gaining larger protections in liberal jurisprudence and public policy than the political - expression rights of citizens". (1998:97) This is because, she argues (1998:92) the principle of freedom of expression, while enshrined in legally justiciable declarations on human rights, is frequently subordinate to a class of rights concerning property. Venturelli, for example, "traces the emergence of information liberalisation, which invokes a vision of unprecedented transfers of knowledge through modern communication networks to individuals worldwide, to the ideological revival of John Locke's late 17th century theory of limited government, justifying political authority based on proprietary (as against divine or democratic) power." (Corcoran 2001:27) This is what Habermas (1989) calls a concentration of expression under proprietary governance on a scale not encountered since the passing of feudal society.

Many communication theorists ask - if the infrastructure on which communication via the Internet relies is increasingly operated and owned by commercial vendors, what is at stake for democracy in the ownership of its component parts? Calabrese and Borchert (1996, April) ask whether the ownership of the communication system is becoming the sole indicator of the publicness or democratic nature of a communication infrastructure. Does the ownership of the space in which communication occurs determine the "public" or "non-publicness" of the communication? The issue of ownership is sometimes considered by contemporary progressives to be the primary, if not the sole, criterion for judging the publicness of a communications infrastructure. Can commercial ownership contradict the possibility of undistorted public communication? (1996:260) Does commercialisation of an infrastructure mean it becomes undemocratic?

Hamelink (1995:127) argues that the trend towards privatization and commercialization of the production of knowledge has made knowledge and information created and controlled as private property. He argues that the notion of knowledge as a 'common good' has been almost wiped out.

'Property' rights are currently discussed within the framework of either

- a) the ownership of communication systems, that is, whether they are publicly or privately owned. (See Calabrese 1996), or
- b) the protection of intellectual property, in the form of patents, copyrights or trademarks (this is 'common heritage' in Hamelink's 1995 view)

The discussion over 'property' seems to be taking two strands here: on the one hand, property is used in relation to knowledge, learning, acquisition of news for the formation of autonomous and independent opinion. This thesis propose a definition of property in the communication sphere as knowledge and learning or skill, or employable activity. Cobbett (in Williams 1990:13, see also Williams 1983) defended poor people's rights to property. He interpreted property as a man's labour or skill or craft, and demanded the same rights for that, as for other forms of property such as for land. In Cobbett's eyes, a person was a slave unless he had rights to do what he chose with the only property available to him, his labour. In today's terms, that interpretation could include knowledge, learning and education.

On the other hand, property is used in relation to the media institutions and transmission networks that previously used to be publicly owned (public service broadcasters etc.) but are increasingly owned by private corporations. Thus, the transmission network is 'their' private property. (Calabrese & Borchert 1996, Venturelli 1998a).

Mowlana (1997) suggests that the definition of property is no longer restricted to land or capital. In the periods of the Agrarian and Industrial revolutions, land and capital were the source of people's wealth, prosperity, and autonomy of action. These resources were taxed, and the owners of these forms of property were politically active citizens as a consequence.

Mowlana (1997) suggests that the transition from information as a by-product of the trade and economic process towards a global economy reliant on an 'information-based economy' has made information a form of wealth and a national resource in itself. This shift in the position of information (replacing to a degree the land and capital) to a central product of a nation's economy has brought about new definitions of "property". For example, 'property' can now be interpreted as covering that class of patents, copyrights and trademarks, and 'property rights' can refer to rights securing intellectual property rather than land (during the agricultural revolution) or capital (during the industrial revolution). Property in the 'information revolution' may also be, according to Mowlana, information, skills, and knowledge. For the wealth of nations, this form of property is increasingly their base source of wealth (rather than, in the past, manufacturing, or agriculture developed on the basis of land property).

These can be privately owned and privately appropriated, but in classical liberal theory, everyone has the civil right to own property. Citizenship rights and liberties guaranteed by the American Constitution must not be infringed by the State. Therefore, the right to own property must also not be infringed by the powers that may have overtaken the State's control of this area.

This researcher aligns herself with Mowlana's thinking, and proposes a way of interpreting education, information and news as 'property'— i.e. that which allows the formation of an autonomous opinion. As Warner (1990) argues, the benefits of property in 18th century America was that it provided the possibility of independence of thought

and action. Property owners then were not physical slaves. New property owners now cannot be thought of as intellectual slaves. They are, rather, intellectually autonomous.

As Hamelink (Hamelink 1995:127) suggests, access to knowledge empowers: if access to knowledge is restrained, people are disempowered. If people are deprived of information, they can be dominated.

Recalling that this thesis subscribes to a concept of citizenship that is political, not cultural; and post-national not national; this researcher makes a distinction between information necessary for political citizenship and that entertainment content that some may argue contributes to 'the whole public service broadcasting editorial selection'.

The thesis' perspective on entertainment differs from the acceptance by Marshall and D/AHGI that there is a fundamental right to be entertained. Marshall suggested that "Common enjoyment is a common right" (1950:82), and this was related to the fundamental equality of citizens. There are others (Katz 1977) who argue that "entertainment is anything but neutral, and is an active force in the communication of values"⁵³. He maintains that the value of entertainment needs to be taken more seriously, especially since modern broadcasting schedules devote a large chunk of broadcast time to entertainment programmes. Yet, the majority of these are imported, not indigenous, thus this thesis does not subscribe to an abstract 'right' to be entertained. This thesis concerns itself with the post-national political integration and participation as citizens. However, this thesis works on the assumption that awareness, respect and appreciation of other cultures is also desirable.

This thesis therefore argues that citizens critically require access to information which is related to policy initiatives and government activities (Murdock and Golding 1989) – i.e. news, current affairs, and investigative documentaries, and need to a lesser extent the right of access to contemporary drama and entertainment - whether indigenously produced or from abroad.

This researcher concedes that there exists a natural tendency for the free market to dysfunction. For Marshall and Clossa, this fact supports their demand for social rights. This researcher agrees that citizen's rights to information and participation can be

compromised if the market is the sole provider of this information critical to involved citizenship.

Solutions put forward by Calabrese & Borchert (1996), Calabrese & Burgelman (1999) and the European Parliament, argue for the treatment of communication policy as a welfare and social policy. Calabrese & Borchert employ a version of Briggs' (1961) definition of a 'welfare state': organised power is deliberately used through politics and administration in an effort to modify the play of market forces. However, Dahlgren as well as Marshall opposes this proposal. Despite presenting the case strongly for social rights, Marshall did not wish to see government intervention disrupt free market functioning. His social rights were designed to compensate for deficiencies left by free market operation.

However, the flaw in the argument for welfare rights to communication, and social policies to compensate for market inefficiencies is the following: due to the redistributive economic nature of social or welfare rights, this type of policy will necessarily be limited to the national sphere. (Laffan et al, 2001; Calabrese & Burgelman 1999). This type of policy has difficulty with any forms of citizenship that exist beyond the national state, and its possibilities for redistributive actions. The EU does not exercise competency over social policy.

The approach advocated by those in favour of 'cultural rights' discourses that tie collective rights of a welfare community with 19th century Romantic ideals of a national community is not appropriate for the challenges that European citizenship and global markets present.

Rather, this thesis suggests that the inequalities that are clearly implicated by differences in personal wealth between citizens should be counteracted by an argument with an emphasis on human rights to property enforced in trading marketplaces. Property in this case is interpreted to mean knowledge, information, skill, and education as proposed by Mowlana (1997), Warner (1990), Habermas (1989), Marshall (1950), Cobbett (in Williams, R. 1983, 1990), and through extrapolation of the argument put forward by the United Irishmen when they associated property acquisition for would-be citizens with education, learning and literature.

The reasoning behind this suggestion is the following. Rights related to communication, public opinion and freedom to participation in public spheres should be strengthened within legal guarantees for 'property rights', in fora of international policymaking such as the WTO where rules regulating trade and commerce of communication products and services are established for the global marketplace. Further, all citizens have the civil right to property – knowledge, information for democratic political participation – and it is this researcher's opinion that this right ought to be enforced in the marketplace where trade takes place.

While this researcher is aiming to safeguard property rights within the economic environment of the WTO, there exists already that class of rights known as intellectual property rights (IPR) that is regulated by the TRIPS agreement, and is principally concerned with medicine and health⁵⁴. TRIPS relates to the payment of royalties, but many countries have not yet implemented two new WIPO (World Intellectual Property Organization) Treaties concerning copyright and neighbouring rights. While the EC adopted a Directive in 2001 (Copyright and Neighbouring Rights) in order to adapt EC law to the new intellectual property developments of WIPO, only 30 out of 140 countries have so far also done this. It is not envisaged then that the discussion will continue much further within the WTO until a critical mass of members have ratified the WIPO Treaties.

The principle of intellectual property rights is based on exclusionary proprietary rights held by the property-owner, the benefit of which is not released to others unless for economic recompense determined by market competition. The UN Declaration of Human Rights (Article 27) defends intellectual property as a human right: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author". This article appears to protect the right of the property –owner over and above the right of others to the exercise of their (other) human rights. Therefore the access to property that may benefit and honour others' individual or collective human rights is put in question. The economic argument for IPR is that it provides incentive to the inventor to invent knowing that he / she will receive compensatory reward. Thus, IPR encourages a process that promotes economic growth.

A useful distinction is made by Ostergard (1999) when he argues that there ought to exist distinct categories of property rights, in a hierarchical structure of necessity. As he points out, the UN Declaration does not recognise the different priority in property rights – some being essential for intellectual or physical survival and others not.

If there were to exist two types of property, i.e. that which is essential for well-being and health (e.g. medicine), and that which is non-essential (e.g. music) the critical distinction would be that “whatever property is needed to maintain an individual’s physical well-being must be accessible if all human beings are to be permitted to achieve their potential.” (1999:170) In the case of audiovisual services, it could be argued that the information and knowledge and opinions necessary for the proper functioning of a democratic society must be accessible on an individual basis, for the benefit of the collective polity. Only if this is the case, are each individual’s basic civil and political rights being respected, and the polity can continue to function properly.

Intellectual property rights regulation should not, he argues, make a small section of the population (the copyright owners) monopoly owners, and the rest of the people worse off because they are not able to acquire the intellectual knowledge. The present author argues that the people who do not own the IP rights still have other rights (civil, political in particular) that must be met. IP rights supply one set of individuals the right to exclusionary ownership of that property, while denying all others the right to benefit from that knowledge. The problem with IP rights as they stand is that the deal is giving exclusive control to one party, while simultaneously denying others’ their individual rights to acquire that property.

Ostergard (1999) suggests that in a situation of competing rights – those of the property owner vis a vis those who have civil and political rights, there needs to be a compromise or a prioritisation between competing demands for rights. A balance must be struck between private individuals’ control on the use of property, and - for public interest objectives - restrictions on the availability of that property for others’ well-being. It could also be proposed, as Anderson Q.C. suggests, that any ‘interference’ with property (i.e. in breach of Article 1 of the European Convention of Human Rights), as determined by the European Court of Human Rights could be decided on “whether the interference at issue strikes a fair balance between the demands of the general interest of

the community and the requirements of the protection of an individual's fundamental rights". (Anderson 1999:549) Article 1 ECHR states:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair **the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest** or to secure the payment of taxes or other contributions or penalties." (see Anderson, D. 1999)

Interference with property – deprivations, controls on its use, restrictions and so on – brought before the European Court of Human Rights under Article 1 are usually, but not always, compensated in monetary terms. This could be a useful way to address the issue of enforcing rights in the WTO, a body which operates according to economic benefits, and follows policies that endow economic advantage to its members. There is no express obligation to pay compensation for interferences, but it is an area that has been explored in case-law. The nature of the interference, the extent of that interference, and the degree of damage to the applicant are all factors that are taken into account in compensation cases. The crucial question, according to Anderson, is "does the interference infringe a legitimate expectation of the applicant, upon which the applicant has relied?"(1999:556). In the case of knowledge and information, this could be considerable. Much would depend on the expectation of the individual, or collective of individuals to either the State's or the media's responsibility to provide the access to knowledge necessary for active participation and therefore full citizenship.

The debate splits on the issue of responsibility for upholding human rights – is it the role and responsibility of the media (as suggested by the Irish Constitution, and the European Convention on Human Rights). Is it the responsibility of the state (as suggested by the European Court of Human Rights and Ostergard 1999), or should doctrines of human rights be included in international treaties such as the MAI Multilateral Agreement on Investment, and the Marrakesh Agreement establishing the World Trade Organisation (1994), as McCorquodale and Fairbrother (1999:735-766) suggest. In this way, possibly the activities of international organisations as well as transnational corporations could be made to follow international human rights law, and they could be forced to pay compensation if rights are violated as a result of their policies. Alternatively, on the 50th anniversary of the UN Universal Declaration of

Human Rights, a committee have suggested that the EU should develop a human rights policy (see *Leading by Example – Human Rights agenda for the European Union for the Year 2000*).

Defending a right to property within the WTO is presently problematic for the following reasons. Firstly, property as I have defined it currently falls under the category of audiovisual services and thus falls within the remit of GATS, not TRIPS. It is not impossible that TRIPS and audiovisual will begin to overlap and converge in the future, but presently this is not the case. Secondly, since the WTO is dominated by economic concerns, my proposal that monetary compensation for interference with property is more in tune with the organisation than others' suggestions. However, the WTO argues that they define and follow no policy, and it is the Member States of that organisation wherein duties for human rights lie. Further, cases that are taken in breach of the European Convention on Human Rights are usually against one of the member states of the Council of Europe which have ratified the Convention, rather than against an international organisation. Thirdly, following the collapse of the Cancun trade round (September 2003), questions now loom large over the WTO both as an institution and as a viable arena in which to agree and enforce a multilateral trading system. The Cancun failure, repeating the disappointment of Seattle, echoes the criticism laid at its door by Pascal Lamy, the EU Trade Commissioner. He accused the WTO – which makes decisions by consensus rather than voting – as a medieval organisation. “The procedures and rules of this organisation have not supported the weight of the task.” (Lamy, quoted in *Irish Times*, 16 September 2003). It is therefore not impossible to envisage that serious questions will be raised in the immediate future about the WTO and the system of agreeing international trade, and in this eventuality the author's proposal for defending individual property rights to information may well find itself out of date and not applicable to the scenario presented within the short-time future. Cancun's failure may become the turning point for the WTO.

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¹ See Para 35, Council Decision on MEDIA Plus, 20 December 2000

² DG Competition (October 1998). *Application of Articles 90(2), 92, and 93 of the EC Treaty to the Broadcasting Sector*

³ For further details and minutes of meetings, see <http://www.ntia.doc.gov/pubintadvcom/pubint.htm> viewed on 02/04/1998)

⁴ Notes from an EP labour party meeting, 14 January 1997

⁵ see Van Steenbergen (1994)

⁶ p307 Pavlik New Media Technologies

⁷ Fax (23 June 1998) from D/ PE to D/ AHGI relating to 'Broadcasting and other media (public right of access and diversity of ownership) Bill, 1998

⁸ in the case of the extremely small Irish audiovisual industry, businesses are focused on the issue of RTE's licence fee increase request, the government's 2002 budget outlook, the definition of 'independent producer' in Irish and EU legislation; the retaining and extending of Section 481 grants to the film industry. According to IBEC AV Federation, IBEC's members are more concerned about the level of commissioning from RTE; the attraction of Hollywood to Ireland for film-making; and production subsidies and tax benefits.

⁹ See Draft Declaration on the Right to Communicate (World Summit on the Information Society, Geneva, December 2003). (March 2003)

¹⁰ quote from International Commission for the Study of Communication Problems, UNESCO, 1980a, Recommendations 52, 53, 54, p 265, in Hamelink (1999:82). www.crisinfo.org

¹¹ See D'Arcy J. (1969), The Right to Communicate, CIC (International Commission for the Study of Communication Problems, known as the 'MacBride Commission'), Document No. 36, page3. See also article by Fisher, D. on communication rights and the role and vision of Jean d'Arcy at <http://www.iicom.org/intermedia/Dec02/fisher.html> (viewed 7/10/03)

¹² Declarations protecting rights judicially include the Vienna Declaration (duty of state to protect human rights and freedoms); Maastricht Guidelines or Linberg Principles (1997); the European Convention on Human Rights, Article 10 on Freedom of Expression; the UN (1948) Universal Declaration on Human Rights, Article 19, Freedom of Expression, and Articles 27 and 22 ; the Council of Europe Declaration on Freedom of Expression and Information, Article 82; and the UNESCO (1995) World Commission on Culture and Development (Our Creative Diversity). (see Hunt (1996), Arambulo (1999) on the development of human rights

¹³ Another reference to cultural rights in universal declarations is the Universal Declaration of Human Rights (1948), Article 27 declares that "everyone has the right to participate in the cultural life of the community". Article 22 says "Everyone is entitled to the realisation, through national effort and international co-operation, of the cultural rights indispensable for his / her dignity and the free development of his / her personality". Corcoran, F. (2001). Cultural Rights and Media Performance. Media and the Marketplace: Ethical Perspectives. E. G. Cassidy and A. G. McGrady. Dublin, Institute of Public Administration: 15-32.

¹⁴ Cultural imperialist thesis as defined by Herbert Schiller Mass Communications and American Empire 1969

¹⁵ EBU paper on WTO negotiations and the audiovisual sector: preserving Europe's cultural diversity

¹⁶ letter to Sile de Valera, 9 July 1999

¹⁷ p28 Curran as above

¹⁸ Ireland's small audiovisual (in this sense, film and television) production economy meant that most producers focus on the commissioning capacity of RTE. Other Member States have a greater number of broadcaster outlets which independent production companies can target. On this issue, other Member States found difficulty in comprehending Ireland's objection to the proposed definition of independent producer

¹⁹ At the end of 2002, the Irish licence fee was increased by 40% to Euro 150, with the aim to commission at least Euro 15 million home produced programming from the Irish independent television production sector. For the first time in Ireland – and it sets a precedent for other countries – 5% of the licence fee was to be open to private commercial broadcasters, for public service programming.

²⁰ For detail as to the difference in the status and role of media in Germany, see Porter V. (1993) "Broadcasting Pluralism and the Freedom of Expression in France, Germany and Ireland", in National Identity and Europe: The Television Revolution, edited by Drummond P., R. Paterson and J. Willis, London, British Film Institute. For a detailed analysis of West German broadcasting see V. Porter and S. Hasselbach "The Re-regulation of West German Broadcasting – recent decisions of the Federal Constitutional Court" in Politics and Society in Germany, Austria and Switzerland, vol.1 no.2, Winter 1988

²¹ Letter from RTE to D/ Arts Heritage Gaeltacht and the Islands, 20 August 1998, in response to initiative by Austrian Presidency to formulate a Council Resolution concerning Public Service Broadcasting

²² Both these points are footnoted with the proposal that they should be 'reviewed in the light of the meeting with DG IV officials of 20 October 1998'. (see Note from the Austrian presidency to the European Union Council Audiovisual Working Party, Brussels 14 October 1998)

²³ Proposal of Ireland, Draft Council Resolution concerning public service broadcasting (doc: 112228/98 AUDIO 39)

²⁴ Council of the European Union, comments and contribution by the Council Legal Service to the proceedings of the Audiovisual Working Party on the Draft council Resolution concerning public service broadcasting, Brussels, 3 November 1998

²⁵ A new paragraph 8, Draft resolution of the Council ... concerning public service broadcasting, Brussels, 28 October 1998. Meeting document Number 1

²⁶ Another new-er Paragraph 8, Draft Resolution of the Council... concerning public service broadcasting, Brussels, 28 October 1998, Meeting Document Number 2

²⁷ Introductory Note from the General Secretariat of the Council of the European Union to the Permanent Representative's Committee, Brussels, 30 October 1998 regarding the Draft Resolution of the Council ... concerning public service broadcasting.

²⁸ Briefing note for the Minister de Valera, for attendance at the Audiovisual / Culture Council, 17 November 1998 on the Draft Resolution of the Council concerning Public service broadcasting

²⁹ Summary of Final Text – Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council concerning public service broadcasting, Brussels, 7 December 1998 (13154/98)

³⁰ WTO document, MTN.GNS/AUD/1, 27 September 1990

³¹ Interview with Audiovisual Services Counsellor, World Trade Organisation Secretariat, Geneva, 25 March 2002

³² This strictly neutral position as was stressed by the Audiovisual Counsellor has been refuted by a number of other policymakers, namely, the trade negotiator for Ireland (in an interview with the Irish Permanent Representation to the World Trade Organisation, Geneva 26 March 2002) in addition to Trade Economist at Irish government agency Forfas. Ireland's chief negotiator on WTO issues located in Geneva conceded that the WTO Secretariat 'does make policy'.

³³ 9 July 1999, position paper to Minister de Valera prior to Seattle trade talks where GATS 2000 agenda was to be decided.

³⁴ *Statement of National Trade Policy*. Department of Enterprise, Trade and Employment, January 1998

³⁵ Report of the Special Working Group on the Film Production Industry in Ireland, December 1992, commissioned by the Taoiseach, Albert Reynolds. The report draws heavily on the results and recommendations that were made in the report commissioned by the Irish Film Centre on the *Indigenous Audiovisual Production Industry* as well as the Film Makers Ireland *Report on the Independent Television Production Sector* prepared by Siobhan O'Donoghue. [*The government was still acting on this report when MD Higgins stepped in in 1993 and became Minister, taking a wholly different tack*]

³⁶ See the discussion paper commissioned by the Asia Pacific Broadcasting Union, July 1999, examining seven ABU members - India, Japan, Malaysia, South Korea, Thailand and Australia and Indonesia. The latter two countries both took no commitments.

³⁷ CEPI – Coordination Européenne des Producteurs Indépendants; CICCE – Comité des Industries Cinématographiques des Communautés européennes; EBU – European Broadcasting Union (representing RTE); EUROKINEMA – Association de Producteurs de Cinéma et de Télévision; FEITIS – Fédération Européenne des Industries Techniques de l'Image et du Son; FERA – Fédération Européenne des Réalisateurs de l'Audiovisuel; FIAD – Fédération Internationale des Associations de Distributeurs de Films; GESAC – Groupement Européen des Sociétés d'Auteurs et Compositeurs; UNIC – Union Internationale des Cinémas. Ireland's audiovisual industry producers' are represented by FMI (Film Makers Ireland) who are a member of CEPI.

³⁸ See Article 2 in GATS Agreement for MFN Exemptions List

³⁹ pp18, Section 5 of Commission Staff Working Paper on certain legal aspects relating to cinematographic and other audiovisual works, Brussels 11 April 2001 (SEC(2001)619)

⁴⁰ Details on other qualifying circumstances for legitimate non-payment of a licence fee are available from the Department of Social and Family Affairs.

⁴¹ The WTO Secretariat prepared a note presenting information on the subject of Subsidies related to Trade in Services contained in WTO Trade Policy Reviews (circulated as S/WPGR/W/25) in response to trade delegations' desires to "continue the technical analysis of subsidies related to trade in services". Discussion on relevant conceptual and legal issues is noted as 'continuing' following the circulation of an informal note (3 April 1998) in order to assist in the 'identification of the circumstances in which subsidies may cause trade distortions'. See WTO Working Party on GATS Rules, Draft, Report to the Council for Trade in Services (20 November 1998, S/WPGR/W/28)

⁴² pp 133 1995 Green Paper on Broadcasting, produced by Minister Michael D. Higgins

⁴³ Irish Acts and Statutory Instruments that refer to financial support for the production and broadcasting of European and / or national audiovisual productions are the following:

- a) Section 18, Radio and Television Act 1988
- b) Section 4, Broadcasting Authority (Amendment) Act, 1993
- c) Statutory Instrument No. 313, European Communities (Broadcasting) Regulations, 1999
- d) Section 33, Broadcasting Act, 2001

⁴⁴ pp38 The Strategic Development of the Irish Film and Television Industry 2000-2010: Final report of the Film Industry Strategic Review Group to the Minister for Arts, Heritage, Gaeltacht and the Islands, August 1999. Commissioned by then Minister for Arts etc. Sile De Valera.

⁴⁵ The Bigger Picture. An independent economic report commissioned by Film Makers Ireland on the Irish film and television industry, February 1999, p23

⁴⁶ Final Report of the film industry Strategic review group to the Minister for Arts, Heritage Gaeltacht and the Island, Sile de Valera, August 1999

⁴⁷ pp106, Appendix 5, Government Incentive and supports in selected countries, The Strategic Development of the Irish Film and Television Industry 2000-2010

⁴⁸ A discussion paper issued by DG IV (Competition) entitled Application of Articles 90 (2), 92, and 93 of the EC Treaty to the Broadcasting Sector had caused much consternation within the Department of Arts, heritage, Gaeltacht and the Islands. Following the issuing of this document there had been a Multi-lateral meeting on State Aid, 19-20 October 1998 which outlined the 'baking a cake' analogy of public service broadcasting.

⁴⁹ Ireland's Briefing Document for COREPER, in preparation for Audiovisual / Culture Council of 17 November 1998 on the Draft Council Resolution concerning public service broadcasting, paragraph 4.

⁵⁰ Proposal of Ireland to Draft Council Resolution concerning public service broadcasting. (doc. 11228/98 AUDIO 39)

⁵¹ These comments are taken from the text of the Irish contribution to the Multi-lateral Meeting on State Aid, 19-20 October 1998, further to DG IV / Competition discussion document Application of Articles 90 (2), 92, and 93 of the EC Treaty to the Broadcasting Sector

⁵² These comments are taken from the text of the Irish contribution to the Multi-lateral Meeting on State Aid, 19-20 October 1998, further to DG IV / Competition discussion document Application of Articles 90 (2), 92, and 93 of the EC Treaty to the Broadcasting Sector

⁵³ p115 Elihu Katz "Cultural continuity and change: the role of the mass media" from Communications policy for national development 1977

⁵⁴ The TRIPS agreement on Intellectual Property is now principally discussed in relation to health and medicines, although some articles relate to audiovisual. These are Article 2 (on cinematographic work), Articles 9-14 within the Copyright and Related Rights section, and Article 71 (on new developments).

Appendix A

Methodology of Research project

This section illustrates the methodology of the research undertaken to answer the main questions posed at the outset of this research project. The conclusions supporting this thesis' arguments are based on qualitative research and qualitative empirical data.

The aim of this research was to analyse the development of Irish audiovisual and communication policy with regard to the democratic communication rights of Irish citizens within the international European and multinational global policy-making context.

Policy is defined for the purposes of this research project as the plan of action, strategic steps and measures, as adopted by a person or organisation. In the arena of political governance, policy is both a proposed action or programme, as well as the implementation of regulation or law-making.

This appendix is in the following order: firstly I outline an elaboration of those research *strategies and methods* adopted, and the procedures followed in order to conduct the investigation and answer the main questions. Secondly, the primary resources unearthed by this plan are outlined. Thirdly, the diverse challenges encountered that led to changes in the initial procedural methods are explained. And fourthly, the main problems encountered with the eventually successful chosen procedures adopted are then outlined.

A. 1 Research strategies and methods adopted

The principal methods employed were firstly, the gathering of documentation from a variety of Irish government departments illustrating policy strategies relating to regulation or support of audiovisual industries, and policy actions relating to trade in audiovisual services. The principal departments petitioned were the Departments of Arts, Heritage, Gaeltacht and the Islands; Department of Enterprise, Trade, and Employment (Market Access Unit, E-business Unit) ; Department of Public Enterprise

(Telecommunications Regulation unit), and Department of Foreign Affairs (EU Affairs section).

Secondly, potential interviewees, i.e. key policy players, were identified through informal discussions with the main Irish government departments, and personal contacts within the European Union arena, as well as the scouring of the *Administration Yearbook* for personnel from years past. It was intended that semi-structured interviews would involve the participation of a representative selection of those key actors currently and previously involved in the policy process during the past twenty years from Irish government, EU institutions (European Commission and European Parliament), and World Trade Organisation counsellors and members' representatives. Additionally, interviews were sought with non-governmental lobby organisations that contributed the civic or public aspect to the policy debate.

A. 2 Primary resources unveiled and utilised

Primary resources used fell into two distinct categories:

- (a) publicly available qualitative data, and
- (b) data not generally available in the public domain, and hence secured using the Irish Freedom of Information Act 1997. Transcripts of interviews form an additional aspect of this category of non-publicly available data.

Publicly available policy strategies and recommendations were easily obtained. Non-publicly available records illustrating how policy positions altered or were changed in the course of inter-departmental or intra-EU Member State negotiations and discussions proved considerably more difficult to obtain. This author encountered serious and sustained difficulties with access to policy documentation that was not already in the public domain.

A.2.1 Public Documentation

Public documentation included legislative acts and regulatory laws (for example, official Bills, Heads of Bills and Acts) and official and released reports (for example, Oireachtas Reports, European Parliament reports, reports by Forfas; foreign reports

minating from the United States and Canadian administrations, reports from conferences abroad; and reports by indigenous and European film production lobbyists.

Public documents examined also included Irish Parliamentary debates and speeches (e.g. Dail parliamentary questions and responses; Minister's speeches and public statements; European Parliament working documents and speeches). These were supplemented by opinions and submissions from third-party representations (Oireachtas Parliament Committee of Foreign Affairs, International lobby networks, official conclusions from Council of EU, General Affairs Council, EU Secretariat, WTO members).

In addition, newspaper articles on the legislative process augmented this wealth of documentation.

A.2.2 Non-public documentation

Non-public documentation, released under the Freedom Of Information (FOI) Act 1997 and request process unveiled data such as consultant's and advisors' reports commissioned by government departments ("the stuff of government these days" remarked one civil servant). Opinions from external sources were among the released material.

The FOI process also facilitated access to reports of meetings held to discuss the issues raised and the observations and comments on the commissioned consultants' reports. These government comments most frequently took the form of intra and inter-departmental letters, faxes and correspondence between departments and minutes of inter-departmental hearings, and often including letters with advisory or recommendatory comments from government departments acting in an 'advisory' role to the principal government department formulating policy (the 'lead' department).

Non-governmental opinions relating to a legislative proposal were detailed in submissions and advice from Irish broadcasters, the Office of the Director of Telecommunications (ODTR), the IRTC regulator, and responses from open public consultations.

In relation to the Irish government's input into the European Community legislative process, the FOI process unveiled government records detailing for example the Irish position on EC initiatives and Ireland's response to and communication between the European Commission on relevant broadcasting or audiovisual issues.

This research also found detailed evidence of the relation between the Irish government and the European Commission in correspondence between government departments and the Irish Permanent Representation to the EU, based in offices in Geneva and Brussels. For example, records forthcoming from the Irish department of Foreign Affairs detailed EC / WTO discussions as reported from the Irish permanent representation located in Geneva. Other more official material included policy "non-papers" (e.g. EC Staff Working papers) and supplementary documentation from EC Working Groups on Audiovisual Services; and material from Council of Europe conferences and committees.

No memos from government were released under FOI. All memos to and for government were classified as confidential, and were refused access under Section 19 of FOI Act 1997. Section 19(1)(a) refers to a record that has been submitted to Government for their consideration. A Memo to Government falls within this category. It was explained that certain memos may be released under Sections 19(3)(a) and (b). These articles provide a level of relief from the exemptions contained in Regulation 19(1). The usual relief is that contained in 19(3)(b) where the record (Memo) relates to a decision of the Government that was made 5 years before the receipt of the freedom of information request. In such instances this usually means over 5 years after the actual Memo was produced. Often Memos are prepared for a particular meeting of Government but subsequently they may not be discussed due to more pressing requirements. Also an actual decision of Government pursuant to the original Memo may not be made for some time.

In general, Memos for government were regarded as sacred, and were always classed as too confidential to release.

A.2.3 Interviews

An offer of compensation came from all the government departments to which FOI requests had been made. In the place of papers and written documentation, key civil servants with responsibility for the policy area in which this author's interest lay, offered to make themselves freely and willingly available for in-depth interviews.

This researcher accepted the offer of interviewing the current civil servants in office with responsibility for relevant policy areas. In addition, with the assistance of the *Administration Yearbook*, published by the Department of Finance – previously annually, now every few years – it was possible to identify the civil servants at Principal Officer and Assistant Principal Officer levels within the same or similarly titled departments over the past two decades. With the help of Press Officers and civil servants currently within departments, this author was able to track down and contact for interview the key civil servants involved in important policy decisions spanning the desired time frame of this project – early 1980's to the present.

In this way, therefore, the primary empirical data deriving from public documents, and non-public government papers and files is heavily supplemented with material taken from informally structured interviews with those policy makers available and willing to participate in this research project. Unfortunately, and against former research strategic planning, it was sometimes the case that this author had received little or no documentation from the FOI process prior to the interview of a key policy-maker, principally because of the extraordinary delays allowed in the FOI process – particularly, the four week period allotted to the departments before any reply is legally required by the Act.

In total, substantial evidence in this thesis relies on interviews carried out with 10-15 civil servants of senior positions located in *four government departments* over a twenty year period. Additionally, this researcher interviewed those of a senior position active within the European Union debate on audiovisual policy, and cultural or market issues - MEP Mary Banotti, and former Minister for Culture, Michael D Higgins. This researcher had also personally been centrally positioned within the EU debate on public service broadcasting at a critical period, between 1995 and 1997 when employed within a range of European Union institutions – the Council of Europe, the European

Commission, and the European Parliament. During these work contracts, this researcher was exposed to the main axis of EU debate on audiovisual policy.

In addition to 10-15 short telephone and long (1-2 hours) face-to-face interviews performed in Dublin, this research also benefits from interviews performed in Brussels with key personnel within the European Commission, Directorate General Culture and Directorate General Trade. Additionally, insights from key players located within the Secretariat of the World Trade Organisation in Geneva (counsellors for e-commerce, and audiovisual services) as well as representatives from the United States Mission to the EU in Brussels add an extra dimension and perspective to this thesis' research and conclusions.

Interviewees offering alternative perspectives included representatives from Film Makers Ireland (FMI), Ireland's sole lobby organisation for film and television producers; IBEC Audiovisual and Telecoms Services Council representatives, and spokespersons from the government agencies Enterprise Ireland and Forfas. This researcher also took account of the comments and contributions offered to the government initiative, Forum for Broadcasting, which was on-going during the period of research.

While access to interviewees located within Irish government departments who had portfolios for audiovisual, trade or e-commerce policy dating from 1982 was freely offered, it was a different scenario when this author sought to interview current and former government Ministers. The timing of the interviews in this instance played a critical part. Interviews were now taking place between January and March 2002, this author having been occupied with the making, processing and administration of FOI requests and replies to four government departments between September 2001 and February 2002 – D/ Arts Heritage Gaeltacht and the Islands, D/ Trade Enterprise and Employment, D/ Foreign Affairs, and D/ Public Enterprise. In Ireland in that year, a General Election was planned for May 2002. As a result, all representatives of Ireland's political parties with seats in the Irish Parliament (TD's) were preoccupied with electioneering, and regrettably, time could often not be afforded by current and former Ministers.

A.3 Challenges encountered forcing change of strategy

A.3.1 Access to and release of non-public documentation

The most significant problem encountered in the initial stages of documentation sourcing and collection was the experience of lengthy delays in receiving any non-public documentation from departments, particularly evident over the period of the Summer of 2001 when government activity slows considerably and many departments are short-staffed.

Following delays lasting weeks, and encroaching months, awaiting replies to small-scale requests for documents and papers relating to key policy proposals and deliberation at EU and WTO levels, this author reluctantly and in the last resort turned to the assistance of the 1997 Freedom of Information Act which authorises the release of non-public material relating to government policy in a standardised and rule-based manner, and subject to specific timeframes. Civil servants prefer to work within the confines of the FOI Act, rather than releasing material in an informal manner, and they thus can avoid releasing material in any way that might create a “dangerous precedent”.

The FOI Act allows therefore for the demand for release of otherwise unobtainable material, however access to any non-public documentation originating from before the inauguration of the FOI Act of 21 April 1998 is in practice effectively denied. There does exist a provision within the Act for the release of papers and files dated before 21 April 1998 – the article 6 (5) (a) explains that there is a right of access to records “created before the commencement of this Act” when these are “necessary or expedient in order to understand records created after [such] commencement” of this Act. In theory, therefore, files dating before 21 April 1998 are accessible, if the requester can prove that they are required for the greater understanding of a record created after 21 April 1998 - however, this is a lengthy, arduous and time-consuming argument to try and win.

A possible way-through the impasse frequently encountered in departments, i.e. their reluctance to release any file pre-dating 1998 because there was “no statutory legal basis by which to work by” is a method of requesting a current file under FOI (e.g. for Trade policy, request to see current file on GATS 2000; for Arts/ Culture, ask to see current

file on Television Without Frontiers Revision) and then hopefully, access may be permitted to pre-1998 files on those related matters by arguing that 'in order to understand how this position was arrived at, I would need access to files dating back to... 1984 in the case of TVWF and 1989 in the case of Trade in audiovisual / cultural services'. This researcher was advised to pursue this route in order that I could be 'fast-tracked' onto the historical files that were of greater interest. However reasonable this may appear in theory, this method of accessing files dating from pre-1998 was not successful in practice, and was strongly resisted by departments.

In general, the rules of release of all government papers are subject to the 30 years *Archive Act* or the 1998 Freedom of Information Act, and papers relating to the time frame in between are effectively covered by the Official Secrets Act protecting papers from release until thirty years have passed. (It had been planned by government to change this rule, and release government papers after five years rather than thirty, but at the time of writing (February 2003) this change is being contested by civil servants, and a Bill amending the FOI 1998 Act looks likely.)

The current framework of legislation governing the release of government papers carried implications for this research project, in that the timeframe of policy under examination was initially planned to span 1982 to 2002. Hence, the unwillingness of departments to release papers prior to 1998 created difficulties. In light of this declaration by departments, the empirical focus of the research had to be adjusted. Originally, this author had hoped to conduct an empirical in-depth case study of the formation of EC Television Without Frontiers from the Irish perspective, first proposed in the early 1980s. This clearly was going to be impossible. Thus the focus shifted to more recent policy formation within the international and EU field, where Ireland's position on broadcasting and audiovisual matters could still however be detected and examined.

A.3.2 Sensitive nature of in-field observation research

Qualitative in-field research as a participant observer did not materialise as hoped or planned, primarily due to the political and economic sensitivity of the potential information. As a result, this insight into current Irish roles in EU or WTO policymaking was dependent on acquiring access to meetings, which in the present role

of academic researcher was not facilitated and evidence had to rely entirely on documents and interviews.

Three separate and distinct attempts were made by this researcher to incorporate an aspect of in-field participant observation data into the project.

(a) EU Charter of Fundamental Rights

These ‘live policy’ case studies which were potentially relevant to my work were firstly, the work of the European Parliament on the drafting and deliberation on the EU Charter for Fundamental Rights. In particular, this author was interested in the development and respective governmental / EU institutional inputs into the drafting of the Article on Freedom of Expression. This work was ongoing during the year 2000, with many of the debates being held in Brussels or Strasbourg.

(b) EU Nice Treaty IGC (Intergovernmental Conference)

The second policy event revolved around the week debate and signing of the Nice Treaty, orchestrated by the French presidency of the European Union, which took place in Nice in December 2000. A key aspect of the Nice Treaty Intergovernmental convention was the final wording and agreement on the Charter for Fundamental Rights. As an example of political horse-trading in pressurised circumstances, this event would have been valuable to this research for the knowledge it would have provided on the role of Ireland within the arena of the European Union with regard to policymaking affecting citizens’ rights to communication, information and expression.

(c) World Trade Organisation Doha Trade Round and Irish consultation process

The third ‘real-time’ policy process, located in Dublin at the initial stages of the process, was the development and formulation of the official Irish position on audiovisual services and industries with respect to a new World Trade Round (Doha Round 2001), appearing at the time of writing (February 2003) to be splitting apart due to lack of agreement between USA on the one hand and EU and Japan on the other over the American proposals for the reduction of tariffs and trade barriers.

This author was in regular and close contact with the government agency Forfas, assigned by the Department of Trade, Enterprise and Employment to consult widely amongst industry and public and draw up a formal Irish policy position on trade in

'services' (amongst other aspects) prior to this position being sent to the European Commission, and the subsequent development of a Community Common position on the negotiation of trade rules for services within the World Trade Organisation in Geneva. However, due to the commercial and political sensitivity of the information being gathered from individual firms located within Ireland and their official representatives, it was decided after lengthy deliberation with Forfas that while my offer of assistance might be welcomed in the consultative process, any information gathered by this researcher would be subject to copyright restrictions as well as severe censorship.

A.4 Problems encountered with final procedure chosen

As the empirical data search focus shifted to the recent present, and the FOI requests narrowed the scale of search to the years 1998 to the present, subsequently, the following problems were encountered.

A.4.1 Type of document sought did not exist

It was argued that many policy decisions made within the Irish government are not documented in copious pieces of paper, and changes in policy positions are not committed to paper. (The European Commission told a similar tale, arguing that any sensitive discussions are not minuted because they would immediately be leaked). While there exist documents relating to Dail debates and departmental discussion, decisions, this researcher was informed, are made by word of mouth, over an informal working lunch, or over the telephone. The lack of written documentation was justified by the fact that this is the trademark of a small administration, the beauty of which is that personal meetings are the key to smooth government, the downside of which is that to commit policy changes and alterations to paper is considered to be 'a considerable administrative burden' for the departments, who are seemingly under-staffed. Any "sharp exchanges" or "robust debate" over, say, the conclusions of a consultants' report for example might sometimes be recorded in letter or annotated comment form.

Many departments (D/public enterprise, D/ enterprise trade employment) all intoned that precise recordings of documents and policy decisions did not in fact exist.

Bulletpoints, not copious notes detailing a change of policy, mark turning points. Things were moving way too fast in the E-business unit of D/ENT-EMP (in existence since 1999) for policy decisions to be noted on paper. The favourite phrase in this unit was “...ready, aim, fire...”

A.4.2 Prohibitive estimates and charges for records

Often the departments petitioned sought to charge heavily for the ‘search and retrieval’ time involved in retrieving these documents from their variously located archives, in addition to charging for the photocopying (and time involved in) process. The average hourly cost of ‘search and retrieval’ was E20.95 / hour and E0.04 for each page of photocopying. Initial costings for accessing those files of interest ranged between estimates of IR£66 to ‘thousands of pounds’ (d/ public enterprise) or the popular estimate of ‘at least £2000 plus £500 manhour costs’ (d/ ahgi, d/ entemp).

At this response, it was deemed a good idea to arrange a meeting with the departments in question to try and ascertain which records were relevant to my research, and thus narrow down the FOI request for files, some of which were multi-volumed.

This researcher argued in response to excessive charging estimates that the files were critical to the “understanding of an issue of national importance” as provided for in Section 47(b) (5) of the 1997 Act, in which case, the FOI officer “may reduce the amount of or waive a fee or deposit”.

It was the opinion of D/AHGI Principal Officer Ciaran o’Hobain that a charge of £66 to access three files would not be waived because it is “economic to collect [the fee] in this case”, and it was believed that the issues concerned were “not of national importance”. He suggested that I formally submit an appeal case if I so wished, although after two months of the FOI process, no requested records had been released, and were held until a deposit was paid.

The final decision by D/ AHGI as verbally communicated was:

“The line I would be taking is that the Act imposes an obligation. It says that the fee shall be imposed providing it is economic to collect it, and in this case it would be. The only circumstances when it [the fee] would be waived is where the issue concerned

would be of national importance. I would be of the view that that would require a very high test. While not questioning at all that it would be – the research you’re conducting – could be in the public interest or for the public good, that it wouldn’t pass that high test. It would be my decision if you were to formally submit a case that I would take the view that the fee should not be waived.. “ (phone message left by Ciaran o’Hobain, Principal Officer, Broadcasting Policy Division, 13 December 2001))

The FOI request and reply process in its entirety lasted six months – i.e. the time taken between initial request to departments for documents relating to a particular field of interest, to their obtainment. This author did not seek the route of appealing decisions made by departments regarding files deemed as ‘non-releasable’, an action frequently defended by Section 19 of the Act. Appeals, it was advised by one of the co-authors of the Act (Eithne Fitzgerald, former Minister of State, Department of the Tanaiste) were unpopular amongst civil servants and time-consuming. Appeals would not act in the researcher’s favour if at a later date, it was necessary to conduct interviews with the Principal Officer of that department whose decision not to release documents I was appealing.

However, the basis on which departments were seeking to deter this researcher’s *in-depth research and investigation* into files by way of excessive and exaggerated imaginative accounting was deemed to have ‘no legal standing’ according to Fitzgerald.

One of the most critical aspects to making a successful request is the precise wording of the *initial request*. Departments are obliged to assist the requester to correctly and speedily identify relevant records, and eventually, through a detailed selection process, this researcher was given assistance by the department officials to narrow down the range of files that were of potential interest. This process of selection of files, and the precise wording of the initial FOI request is a high art. For example, the following phrases will prevent misunderstandings, and thus unwarranted delays, arising in the initial request:

“Under Section 7 of the FOI Act 1997, I request “all records relating to... and any other records necessary to the understanding of...”. Alternatively, ask for a “list of records they are pertinent to the area of...” or “a schedule of records, from which I can choose to view / access ...”, or ask “what documents / records are held in respect of ..”.

A.4.3 Release of some documents viewed as potentially damaging to Ireland's international relations

Irish legislation is primarily driven by EU legislation, according to a d/ Public Enterprise official. Any input by Ireland generally predates 1998, and therefore is not subject to FOI. However, in order to track changes in Irish policy position, and the reasons for those shifts, it is useful to secure notes from Council Working Groups. Ireland's position is noted, and maybe whether it has changed. Working Groups take their name from the EC Directive under debate (e.g. TVWF Working Group, USO Working Group etc.) Between Working Group meetings in Brussels, Ireland might have discussed the EC Directive within inter-departmental meetings in the pre-Directive process, and Ireland's position might change during this process. However, there will not exist a continuous recording of nuances, or changes in policy strategy.

The problem however with gaining access to documents relating to working groups discussions is that Working group or Council meetings indicate the positions of all Member States, and this creates problems with their release. Under FOI, officials were obliged to ask all the Member States' individually for their consent to release a certain Working Group document. On many occasions, relevant records were not released, or released with sections blacked out precisely because they would reveal the positions of other Member States governments.

The most frequent reply that was returned by the department of Foreign Affairs – ironically in relation to a request for files relating to the drafting, formulation and negotiation of Article 15 - “Freedom of Expression” of the EU Charter of Fundamental Rights - was that release of this information could arguably adversely affect the international relations of the State.

The D/FA refused access to all papers detailing the Irish position and discussion of the Charter for Fundamental Rights, on the basis that,

1. under section 24 (1) (c) of the FOI Act – dealing with security, defence and international relations issues - access to these records could be expected to adversely affect the international relations of the State;

2. they could disclose positions taken for the purposes of negotiations carried on by or on behalf of the Government - s.21(1)(c).;
3. furthermore D/FA was of the opinion that as some material was obtained in confidence and on the understanding that it would be treated as confidential, to grant access to it would prejudice the giving of further information - s.26(1)(a) of the FOI Act.
4. they are records within the meaning of s.19(6) of the FOI Act and have been, or are proposed to be submitted to the Government for their consideration - s.19(1)(a) of the FOI Act. (e.g. briefings by Irish diplomatic representatives further to EU meetings)

In conclusion, the D/FA was of the opinion that the public interest would not, on balance, be better served by granting access to records relating to the article within the Charter for Fundamental Rights dealing with Freedom of Expression.

Naturally, this researcher was invited to appeal the decision, and she did, in March 2002. Of 40 records relating to “the drafting, formulation and negotiation of Article 15 (Freedom of Expression) of the EU Charter for Fundamental Rights”, the D/ FA made a decision to release only 6 of them, for the above reasons. In particular, it was repeated that the ‘international relations of the State’ might be adversely effected , and it was deemed that ‘the public interest would not be served’ by granting their release. Following appeal some more papers were released, but only those giving the opinions and positions of other EU countries, and none were eventually released relating to Irish discussions and opinions relating to the Charter article.

In a similar fashion, any records originating from European Community discussions were obliged to be only partially released, again because they “contained information communicated in confidence within an international organisation of states” and since the record referred to the positions held by other EU members, it was opined that “damage to our international relations could reasonably be expected to arise by release of this record” (D/ ENT-EMP, Market access division, with responsibility for international trade negotiations, December 2001)

A.4.4 Right of refusal of request by departments

Departments retain the right to refuse FOI requests if they are deemed to be too wide-ranging, and would take up too much staffing hours, and in general affect the day-to-day workings of the department. According to FOI Act drafter Fitzgerald, this shift in approach by the government departments towards refusing outrightly 'trawling requests' is as a result of several individuals who, since 1998, have for personal reasons, subjected certain departments to persistent and troublesome requests, an action that cost these departments much time and many man-hours. The lack of specific staff assigned to dealing with FOI requests was often put forward as a reason for delays in processing my request through the various stages. As a result, the manner in which requests are approached in the year 2003 is markedly different to the departmental approach of 1998.

All departments, save the department of Public Enterprise and the e-business unit of department of Enterprise Trade and Employment, refused my request as provided for in the FoI Act Section 12 (d) that access to the records may be provided through a opportunity to visit the department for inspection of records for selection purposes. All other units and departments insisted that documents would be listed, and selection would be on the basis of sight unseen prior to photocopying. This choice made by departments usually resulted in vast quantities of documents irrelevant to my request being photocopied by valuable man-hours.

Certainly, this understaffing was identified as playing a major part in the delays with the FOI requests made by this researcher. This reasoning was additionally put forward to explain why I was not allowed to access the records, as suggested in the Act through a choice of visit to the department and selection for photocopying. The D / AHGI and the D/FA were in particular against such visits, insisting that records would be photocopied and posted out. Again, the lack of staff – and the requirement that a member of staff be present while files are looked through – is blamed as the root of this non-adherence to the Act.

Conclusions on the empirical research process

This author concludes that the operation of the FOI Act in Ireland is grinding to inoperability, and is likely to worsen.

Recent reports (*Irish Times*, 05.02.2003) suggest that further restrictions are to be sought by civil servants by the presentation of a Bill to amend the 1998 Act due to pass through the Oireachtas before Easter 2003. Civil servants are eager to avoid the potential scenario of having to grant public access to Cabinet papers five years rather than thirty years after their creation. (i.e. those dated before January 1998.) Due to the large increase in number of FOI requests (almost 12,000 made between April and December of 2001), and particularly in view of the 18% of requests that come from press and journalists (the civil servants here feel that they are the journalists' researchers), this researcher can confirm that 'many Government departments have taken an increasingly restrictive interpretation of the Act'.

This current scenario is at odds with the experience of previous users of the Act for research purposes - DIT PhD student Colm Murphy did not experience the same restrictions on access to papers by visiting the department, and was not obliged to pay costs. Reports suggest that the Bill to amend the 1998 FOI Act will aim to "offer departments even greater grounds for refusals and to make FOI applications more costly". (IT, 05.02.2003)

In conclusion, the situation appears that more barriers will be erected by government in an attempt to deny the average citizens' right of access and means to obtain information about current and future government policy affecting citizens.

Courtesy of DCU, this researcher was obliged to pay in total E 141,54 for the securement of documentation from four departments, all papers received by March 2002. [this sum broke down into E83,80 to D/ AHGI; E15,00 to D/ ENTEMP; and E42,74 to D/ foreign affairs. The department of Public Enterprise waived the fee "in recognition of the difficulties [you have] experienced in accessing relevant records". (January 2002)

(See full text of Freedom of Information Act (1997) on www.irlgov.ie/finance)

LETTER OF APPEAL FURTHER TO FOI DECISION OF D/ FOREIGN AFFAIRS

Ms. Emer Whelan / Ms. Sheila O'Neill
FOI Manager
Department of Foreign Affairs
Iveagh House
St. Stephen's Green
Dublin 2

14 March 2002

Dear Ms. Whelan, Ms O'Neill,

I write in connection with a Freedom of Information request submitted on 31 January 2002 and further to correspondence between myself and Mr. Tim Harrington, First Secretary of the Human Rights Unit at the Department of Foreign Affairs in relation to same.

Mr. Harrington has gone through the records relevant to my request and has provided me with a schedule of documents deemed relevant, and the status as to their release / non-release.

Of 40 records relating to "the drafting, formulation and negotiation of Article 15 (Freedom of Expression) of the EU Charter for Fundamental Rights", he has made a decision to release only 6 of them. Please find here attached a cheque for Euro 35.74 for the receipt of photocopies of these releasable documents.

With regard to the remaining 34 documents that Mr. Harrington has decided not to release, I wish to appeal this decision. In light of the fact that I am performing doctoral research relating to 'Citizenship, Information & Expression Rights of Citizens, and Irish, EU and global Media Policy ' I am of the opinion that access to these records is vital not only to serve the academic community, but critically, the public interest.

Please find here also attached a letter from my academic supervisor, Prof. Paschal Preston of Dublin City University outlining the need for such documents, as well as an outline of my academic doctoral research, which highlights the extent to which my PhD devotes to the theoretical foundations of citizenship. To this end, the analysis of the formulation of the article on Freedom of Expression within the EU Charter for Fundamental Rights is fundamental to my research.

I would therefore request that these remaining documents relevant to my request be released to me with the shortest possible delay.

Yours sincerely,

NoelleAnne O'Sullivan