VOLUME II

Jurisdictional Pressures: Ireland's Position in an Evolving Global Legal Climate

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Volume II

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Letters from the Co-Editors-in-Chief:

Of the many cases I read throughout my time studying at the University of Galway, *Sierra Club v Morton* [405 US 727 (1972)] remains the one which had a particularly lasting impact upon my outlook of legal writing. Although I shall reserve examinations of jurisprudence for the substantive content of the journal itself, I nonetheless ask the reader to humour me in considering the background circumstances which influenced Mr. Justice Douglas in delivering his seminal dissent – namely, that natural resources ought to have legal standing. The case concerned a proposal to construct a ski resort in the Mineral King Valley located in the State of California, a development which was unsurprisingly met by legal challenges from concerned environmentalists. During the several months for which judgment remained pending in this case, Mr. Justice Douglas was asked to author a foreword for the Southern California Law Review and, in agreeing to do so, happened across an article authored by one Christopher Stone entitled, "Should Trees Have Standing? – Towards Legal Rights for Natural Objects". Upon reading the article and reflecting upon the prospect of recognising rights for nature, Mr. Justice Douglas proceeded to hold that the Mineral King Valley, of itself, had legal standing to participate in the proceedings as a party. Although such judgment was ultimately a minority one, I nonetheless consider it to be one of the greatest testaments to the work of legal journals and the importance of individual thought. In this regard, it gives me great pride to see the University of Galway Law Review successfully conclude its second volume, and to thereby perform the vital function of giving a platform to so many important legal issues.

The success of a law review is wholly dependent upon the talent of its contributors, and I would like to take this opportunity to thank the authors who are published within this year's journal. The reader can enjoy insightful analyses of a wide variety of topical issues, many of which impact each of our day-to-day lives, and it has proved a most rewarding task to oversee the progression of

these works to publication. Equally, the production of this year's journal would not have been possible without the work and dedication of our exceptional team of editors. Due to the relative infancy of our journal, the commitment required of our small team in navigating the various stages of the editing process cannot be overstated, and I am indebted to them for their diligence and talent. Importantly, I would like to thank our incoming Co-Editors in Chief, Tom O'Connor and Emma Halpin, for their tireless work throughout the past two volumes of the University of Galway Law Review. Both as a team and as individuals, Tom and Emma are outstanding candidates for the editorial position, and I keenly look forward to reading Volume 3 with confidence that it shall be a most accomplished work.

Since our earliest days, the University of Galway Law Review has been most fortunate to receive such incredible support from the faculty at the School of Law, whose expertise and enthusiasm for the project has proved to be an invaluable asset to our team throughout the past two years. Importantly, I would like to thank our faculty reviewers, whose time and effort has ensured that this year's journal features legal commentary of the highest standard. In particular, I would like to express my gratitude to Professor Martin Hogg, Dr. Rónán Kennedy and Larry Donnelly who, despite their schedules, have consistently engaged with the journal and offered invaluable guidance to the team in establishing this publication. Finally, the University of Galway Law Review is deeply indebted to the journal's sponsor, William Fry LLP, whose generosity and enthusiasm has made the establishment and maintenance of this journal possible. It has been a pleasure to work with the firm throughout the past two years, which I hope shall symbolise the beginning of a long and prosperous relationship between William Fry LLP and the University of Galway Law Review.

Finally, I would like to express my gratitude to my family, friends and – most importantly – my incredible Co-Editor in Chief, Róisín. While the past year has proved a most challenging one, being afforded the opportunity to share the editorial position with such a profound talent has been an honour.

Rhiannon Mulcaire

Co-Editor-in-Chief

One of the first lectures of my undergraduate degree was centred around learning the skill of legal research. As the lecturer talked in depth about the vast scope of resources provided through the many legal databases available to both students and practitioners alike, they placed particular emphasis on the legal journals that we could access. In the days following that lecture, as I tinkered with those various databases, searching cases and misusing the search tools, I discovered a completely new world – the world of legal writing. This world was discovered primarily through those journals my lecturer spoke so highly of, and was a world of case notes, of critiques of legislative provisions, and of wonderings on the future of law. This world, of which I had known nothing, was so easy to explore once I had been given the right tools. Those journals were, and continue to be the maps which help me navigate on my journey to understanding the law and all its intricacies. It has been a privilege to work with a number of incredibly talented contributors, to help draw another map for the next group of students embarking on their legal journeys.

This volume of the University of Galway was a labour of love, and would not have been possible without the assistance, guidance and talents of many people:

To our team of editors: Adam, Molly, Maurice, Róisín, Sarah, Tom and Emma – thank you all for your hard work, for your replies to frantic late-night emails, and for your time. Many of the team worked throughout their final year to ensure that no comma was misplaced, no citation was incorrect, and I am very grateful to them all for their hard work, dedication and their patience.

The faculty of the School of Law at the University of Galway have been invaluable in their support of Volume II. Particular thanks must be directed to Professor Martin Hogg, Dr Ronán Kennedy, and Larry Donnelly for their guidance as faculty advisors. Thanks also to our dedicated panel of

faculty reviewers for being so generous with their time and their expertise, and for their continued support of the University of Galway Law Review. Thanks to William Fry LLP for their generous sponsorship, in particular to Lucinda Farmbrough for her support and guidance over the last number of years.

To my friends and my family – my parents, and my sisters – I express my profound gratitude. We are the product of those we surround ourselves with, and I could not have picked a better bunch.

My time as an undergraduate student at the University of Galway has come to an end, but this Law Review will continue on in the very capable hands of two brilliant people – Emma Halpin and Tom O'Connor. Emma and Tom, you have both played an integral role in the success of this journal. Your love for the law, and your talents for ensuring that learning about the law is accessible to all, astound me. Thank you for all you have done, and I cannot wait to see what great heights the Law Review will reach under your management.

Finally, to my Co-Editor-in-Chief, Rhiannon. It is always great to work with a person whose talent, eloquence and wit stops you in your tracks, but it's even better when that person happens to be your best friend. It has been an absolute honour to share this position with you.

Róisín Elizabeth Cowan

Co-Editor-in-Chief

Note from the Incoming Co-Editors-in-Chief:

Working with the University of Galway Law Review has been an true source of enjoyment for both of us during our studies. We are honoured to be taking on the roles of co-editors-in-chief of Volume III.

We are conscious that we have got big shoes to fill. Róisín Elizabeth Cowan and Rhiannon Mulcaire have demonstrated extraordinary commitment as co-editors-in-chief of Volumes I and II. They have been incredibly supportive of us, and we greatly appreciate them selecting us as their successors. A special thank you as well to the founder of the University of Galway Law Review, Matthew Mulrooney, without whom none of this would have been possible. We look forward to building on the tremendous work done by all three of them.

Finally, the University of Galway Law Review exists thanks to our contributors and the unyielding support from the staff in the School of Law. We are delighted that we have not driven you all away (yet!) and we are excited to continue working with you. If you would like to get involved in any capacity, please do not hesitate to reach out to us by email: lawreview@universityofgalway.ie.

That's all for now!

Emma Halpin and Tom O'Connor

Incoming Co-Editors-in-Chief

Foreword by Professor Tom O'Malley, S.C

Grant Gilmore, a leading twentieth-century American academic lawyer, used to say that the hallmark of any great institution is that its Golden Age is only partly in the past; it is also partly in the present and partly in the future. The contents of this Law Review provide convincing evidence that the University of Galway Law School is now experiencing a Golden Age. The sheer range and quality of the articles, covering topics as varied as children's rights, competition law, company law and gender diversity, to name but a few, reflects not only the outstanding intellectual ability of the authors but also the excellent and dedicated teaching, supervision and mentoring they received during their time in the Law School.

Academic lawyers nowadays must often contend with competing loyalties. Their employing institutions increasingly demand publication of peer-reviewed research, preferably in international journals. Those journals, in turn, tend to favour articles with a strong theoretical focus and some reference point beyond the law itself. Moreover, their readership is likely to be exclusively academic. However, academic lawyers also have a loyalty to their own legal system or, of course, to the international legal system if that happens to be their specialism. These twin loyalties are not always easily reconciled.

The precise role of the academic lawyer is the subject of ongoing debate, but I tend to favour the views of Andrew Burrows who, it should be recalled, was the first person to be appointed directly from academia to the United Kingdom Supreme Court, as recently 2020. He has repeatedly championed the value of practical legal scholarship involving a close analysis of the law as it develops. This is not to devalue theoretical scholarship – anyone who works on sentencing, as I do, appreciates the major contributions that philosophers and social scientists have made to that branch of law. What we must guard against is the dismissal of practical legal scholarship as somehow unworthy of "true" academic lawyers.

Practical legal scholarship should not be confused with cursory comment on recent cases and statutes. Academic lawyers have the time, training and inclination to engage in reflective analysis and to locate legal developments within their broader contexts, historical and otherwise. As Lady Justice Carr said in a recent, excellent lecture on this topic: "Academic lawyers help judges not only understand what the law is, but also, from a variety of perspectives, what the law should be." ((2023) 23 Oxford University Commonwealth Law Journal 1, 15). Or, as another eminent judge, Lord Goff, once put it, when judges decide cases, they are manufacturing tiny pieces of mosaic. It then becomes the role of academic lawyers to assemble the entire mosaic. We are fortunate in Ireland that our courts, right up to the Supreme Court, are highly receptive to academic scholarship and never hessite to quote it when they find it of use.

Each of the articles in this issue of the Law Journal is a model of what top-quality academic scholarship should be. Each is clearly the product of painstaking research, close and perceptive analysis and deep reflection on how the law should develop. I extend my warmest congratulations to the authors, and also to the editors who have done such a splendid job in selecting articles for publication and editing them with manifest professionalism. The future of our legal system is in good hands.

Professor Tom O'Malley, S.C

The Forgotten Children: An Examination of the Irish State's Failure to Adhere to the UN Convention on the Rights of the Child when Dealing with Children Entering State and Alternative Care

Miriam Scally, BCL

Introduction

Recent decades have seen the Irish legislature make significant improvements to legislation regarding children in state and alternative care. However, what still needs to be done? While Ireland is party to the UN Convention on the Rights of the Child (henceforth, "CRC"), the question must nevertheless be raised as to whether Ireland is, in fact, adhering to its minimum obligations as set out under the Convention? This article shall demonstrate how the current administration of Ireland's state and alternative care system fails to give full effect to the rights of the child, and shall evaluate how these shortcomings manifest themselves in the lives of children entering care. Notably, this article employs the CRC as a conceptual basis for measuring the success of Ireland's treatment towards children in care.

The Existing Legislative Framework:

Ireland's Weak Attempts to Adhere to the CRC within the Existing Legislation

To query why the Irish state's pathways into care are weak, the existing legal framework which gives effect to children's rights in Ireland must initially be examined.

Fundamentally, Ireland's lack of a child-centred approach in this regard is curated by the state's unwillingness to fully implement the CRC, which Ireland became party to in 1992.[1] The primary domestic implementation of the CRC is the Child Care Act 1991 (henceforth, "1991 Act"),[2] which is, indeed, partially reflective of the CRC,[3] which can be explicitly seen in the wording of section 24 of the 1991 Act. Regrettably, however, gaps exist in the legislation's broader implementation of the CRC, which ultimately limits the 1991 Act's[4] ability to preserve children's rights in practice. An example of this is the requirement to have regard for the views of the child when determining the appropriate course of care to be made in respect of him or her. While the views of the child are not dealt with in the 1991 Act,[5] section 9(2) of the Child and Family Agency Act 2013 (henceforth, "2013 Act") provides that regard must be had for the views of any child who comes within the scope of both the 1991 Act or the Adoption Act 2010.[6] While some may initially consider this to be a step forward, the reality is that the legislation does not explicitly state how to ascertain the views of the child. As a result of this lack of specificity, the child's views are frequently lost amongst other matters, rendering the aforementioned legislative provisions to regularly prove meaningless in practice. As with a majority of laws relating to children in alternative care, although the

[1] In its 2016 Concluding Observations, the Committee urged the State to take, as a matter of priority, all necessary measures to fully incorporate the Convention into domestic law: Committee on the Rights of the Child, 'Concluding observations on the combined third and fourth periodic reports of Ireland' (1 March 2016) UN Doc CRC/C/IRL/CO/3.
[2] Child Care Act 1991.
[3] Aisling Parkes, Caroline Shore, Conor O'Mahony and Kenneth Burns, 'The right of the child to be heard: Professional experiences of childcare proceedings in the Irish district court' (2015) 27 *Child and Family Law Quarterly* 426.
[4] 1991 Act (n2).
[5] ibid.
[6] Adoption Act 2010.

legislation theoretically appears to commit Ireland to a robust vindication of children's rights, its *de facto* implementation of the CRC leaves much to be desired.[7]

Beyond legislation, the Constitution is a further vital source of authority concerning the issue of children's rights in Ireland. Article 42A was introduced into the Irish Constitution in 2015 and "recognises and affirms the natural and imprescriptible rights of all children", while also providing that, as far as practicable, the views of a child shall be "ascertained and given due weight" by the State when navigating issues of care. This amendment bolsters the child's welfare, representing a new approach to children's rights in Ireland through seeking to place children at the centre of decision-making relating to their upbringing and general welfare.[8] Article 42A means that children have the right for their best interests to be the "paramount consideration" where the State seeks to intervene to protect and promote the welfare of the child,[9] which applies to issues of adoption, guardianship, custody and access.[10]

The Irish State has made the first step in the right direction by creating provisions which identify that the child's interests are paramount in decisions that affect them and that their views must be ascertained in decisions that affect them. However, the provisions alone are useless without a nuanced and robust plan concerning their implementation. When ascertaining the views of the

[7] Sandra Roe, *'A Report on the findings of an Open Policy Debate on the Review of the Child Care Act 1991 on behalf of The Department of Children and Youth Affairs'* Sandra Roe Research 26, available at <https://assets.gov.ie/27771/64c5d904b9ba4deab2ec9683c9d2fad7.pdf> accessed 29 February 2023.
[8] Geoffrey Shannon, *Child and Family Law* (3rd edn, Round Hall: Thomson Reuters 2020) 2.
[9] Citizens Information 'Fundamental rights under the Irish Constitution' (www.citizensinformation.ie, edited 6 May 2022), available at <https://www.citizensinformation.ie/en/government_in_ireland/irish_constitution_1/constitution_fundamental_rights.html#:~:text=Article%2042A%20was%20added%20to,protect%20their%20safety%20and%20welfare.> accessed 1 March 2023.
[10] ibid.

child the legislature should look to the Committee on the Rights of the Child's general comment No. 12 for guidance.[11] In general comment No. 12 the Committee offers guidance on how to fully implement Article 12 of the CRC, for example, it is clearly stated in general comment No. 12 that Article 12 is not a limitation but should rather be seen as an obligation on the state to assess the child's capacity to form their views.[12] It is subsequently stated that the State must presume that the child in question has the capacity to form their views and it is not up to the child to prove capacity.[13] When implementing Article 3 of the CRC into domestic legislation the Irish State should look to General comment 14 made by the Committee on the Rights of the Child.[14] The Committee examines Article 3 in a holistic sense by looking at the individual child's substantive unique needs within their individual case[15] while at the same time advising on how to promote the child's welfare in a procedural context. According to the Committee, to promote the child's welfare in a procedural context where there is more than one interpretation of a legal provision the one that promotes the best interests of the child should be chosen.[16] The Committee continues that where a decision may affect a child or group of children, the decision-making process must include an evaluation of the possible impact on that child or group of children.[17]

Accordingly, although both the State and the Irish Legislature are clearly making attempts to protect children's rights, these are not, of themselves, sufficient. As this article will demonstrate, a

[11] UN Committee on the Rights of the Child, 'General Comment No.12 (2009) The right of the child to be heard' (20 July 2009) UN Doc CRC/C/GC/12.
[12] ibid, paragraph [20].
[13] ibid.
[14] UN Committee on the Rights of the Children, 'General comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3,para 1)*' (29 May 2013) UN Doc CRC/C/GC/14.
[15] ibid, paragraph [6](a).
[16] ibid, paragraph [6](b).
[17] ibid, paragraph [6](c).

collateral article's insertion into the Constitution doesn't remedy the deeply broken existing legal structure surrounding children's rights, and a broader, more integrated solution is required. #

Pathways to Implementation and the Recognition of Dignity:

Ireland must fully incorporate the CRC for the Law to be Governed by a Child Centred Approach

Beyond demonstrating a merely symbolic commitment to children, Ireland's incomplete implementation of the CRC hinders Ireland's ability to give full effect to its obligations as under Article 4 of the CRC. The CRC in its concluding observations on the combined fifth and sixth periodic reports of Ireland found that the Convention should be fully implemented into national legislation so as to address any inconsistencies between current domestic legislation and the CRC.[18] This, coupled with the experiences observed in other jurisdictions which highlight the positive impacts of domestic incorporation, further illustrate the need for the national transposition of the CRC to be revisited.[19]

Indeed, the merits of incorporating the CRC become increasingly apparent upon examining the principles governing the Convention itself. The child-centred approach in the CRC emanates from the fact that the Convention demands that children be treated with inherent dignity.[20] From a Kantian perspective, it is this initial recognition of dignity that will lead to the manifestation and

[18] UN Committee on the Rights of the Child, 'Concluding observations on the combined fifth and sixth periodic reports of Ireland' (28 February 2023) UN Doc CRC/C/IRL/CO/5-6, paragraph 6.
[19] Ursula Kilkelly, Laura Lundy 'Does legal incorporation of the UNCRC matter?' (News and Events, 4 September 2020), available at <https://www.ucc.ie/en/law/news/does-legal-incorporation-of-the-uncrc-matter.html> accessed 1 March 2023.
[20] Karen A. Polonko and Lucien X Lombardo 'Human dignity and children: Operationalizing a human rights concept.' (2005) 18(1) Global Bioethics 19.

recognition of human rights.[21] Perhaps this is why there is such an emphasis on dignity in the preamble of the CRC, which references both the "inherent dignity" and the "equal and inalienable rights of all members of the human family".[22] While this argument is deeply deontological, it is submitted that all arguments surrounding human rights law should be completely deontological and, accordingly, dignity must also underpin the concept of a child-centred approach to legislation.[23] Indeed, as Ireland has not implemented the CRC in its entirety, the current legal framework has gaps in its implementation, awareness, engagement and, most importantly, its outcomes from the perspective of the child.[24] The Irish Human Rights and Equality Commission considers that existing decision-making structures require more human rights and equality expertise, including in relation to considering the views, needs and rights of children,[25] a recommendation which is in line with the CRC[26] and with the Committee on the Rights of the Child.[27]If implemented, this recommendation would bring Ireland closer to a child-centred approach that would permeate all aspects of a child's life.

[21] Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012).
[22] Polonko and Lombardo (n20).
[23] ibid.
[24] Irish Human Rights and Equality Commission, *Ireland and the Rights of the Child Submission to the Committee on the Rights of the Child on Ireland's combined fifth and sixth periodic reports* (Irish Human Rights and Equality Commission August 2022) 16.
[25] ibid.
[26] United Nations ,'Convention on the Rights of the Child' (n1), see Article 12 and Article 3.
[27] UN Committee on the Rights of the Child (n14).

IHREC Recommendations

Are there existing structures which can implement Ireland's obligations under the CRC, and improve the lives of children in state and alternative care? The Irish Human Rights and Equality Commissions (henceforth, "IHREC") have made several recommendations in this regard.

Having regard to children in state and alternative care, the Commission's suggestion of placing more emphasis on the Public Sector's Equality and Human Rights Duty is very compelling, [28] a duty which has been part of the legal structure that oversees human rights and equality in Ireland since 2014.[29] Section 42 of the Human Rights and Commission Act 2014 imposes a legal duty on public bodies to try to eliminate discrimination, promote equality of opportunity and protect the human rights of both staff and those to whom they offer services when carrying out their daily work.[30] Thus, the Child and Family Agency (CFA), being a public body, has a statutory duty to promote the welfare of all children in various kinds state and state and alternative care,[31] a duty which is clear and which corresponds with ample guidance regarding how to eliminate discrimination.[32] Finally, the Commission also recommends that the State should issue a circular to public bodies to advance compliance with the Public Sector Equality and Human Rights Duty.[33] This article welcomes these recommendations by the IHREC, considering that the circular and the Equality and Human Rights Duty are examples of clear guidance which limit discretion on the parts of judges, social workers and other professionals. Once the gaps in the legislation are

[28] Irish Human Rights and Equality Commission (n24), 15.
[29] ibid.
[30] ibid.
[31] United Nations, 'Convention on the Rights of the Child' (n1), Article 3.
[32] Irish Human Rights and Equality Commission Act 2014, s.42.
[33] Irish Human Rights and Equality Commission (n24), 16.

eradicated, this discretion which can lead to inconsistency of results is limited. While, of course, there needs to be a certain amount of discretion granted to judges and professionals, these recommendations mean that this discretion would be exercised in a more robust and clear framework.

The lack of data makes it difficult for the IHREC to do its job and adhere to the provisions of the CRC.[34] Under the CRC, Ireland is obliged to engage in state reporting,[35] and to engage in dissemination and awareness raising.[36] The IHREC welcomes the commitment to maximising the use of research data in the Youth Justice Strategy 2021 to 2027,[37] while also recommending that all public bodies publish equality data on children in an accessible format.[38] The collection of data is a vital part of being able to recognise the issues that children in alternative care are facing - without this data, the law which addresses the variety of issues that these children face cannot be effectively created.

[34] Vivienne Clarke, 'Lack of State data on children very frustrating, says human rights chief' *The Irish Times* (Dublin, 25 January 2023), available at <https://www.irishtimes.com/ireland/2023/01/25/lack-of-state-data-on-children-very-frustrating-says-human-rights-chief/ > accessed 4 February 2023.
[35] United Nations, 'Convention on the Rights of the Child' (n1) Article 44.
[36] ibid, Article 42.
[37] Department of Justice Youth Strategy 2021 – 2027 (April 2021), available at <https://www.gov.ie/pdf/?file=https://assets.gov.ie/132269/2d81d8ff-db61-4f13-8037-d66249de526c.pdf#page=null>, accessed 17 September 2023.
[38] Irish Human Rights and Equality Commission (n24), 20.

Pathways into State and Alternative Care:

Court Ordered Care Orders

How do these aforementioned legislative gaps manifest in the lives of children entering state and alternative care? This article shall now outline the different pathways into care that demonstrate the negative outcomes produced by our incomplete and weak laws.

The legal framework for childcare proceedings rests on Article 42A, which outlines the duty of the State to "supply the place of the parents' ' where a child's parents fail in their duty towards him or her.[39] Article 20 of the CRC also outlines that a child deprived of his or her family environment is entitled to special protection and assistance provided by the State.[40] The obligation of the State is discharged through the 1991 Act,[41] which allows the CFA to make applications to the District Court to promote the welfare of children who are not receiving adequate care.[42] The District Court can grant a variety of orders under the 1991 Act,[43] with it being noted that the court possesses an "extremely wide jurisdiction" in this regard in the case of *Eastern Health Board v District Court Judge McDonnell and others*.[44] Out of all the pathways a child can enter the care of the State, entrance through a care order offers the most extensive protection, as these children are covered by a wide range of statutory provisions within both the 1991 Act and the 2013 Act.[45]

[39] Conor O'Mahony, Kenneth Burns, Aisling Parkes and Caroline Shore, 'Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland' (2016) 30(2) International Journal of Law, Policy and the Family 132.
[40] Article 20.1.
[41] ibid.
[42] 1991 Act (n2), s.3(1), s.3(2)(a).
[43] See the Child Care Act 1991, in particular s.13, s.17, s.18, and s.19.
[44] *Eastern Health Board v District Court Judge McDonnell and others* [1999] IEHC 123, [1999] 1 IR 174.
[45] 1991 Act (n2); see also the Child and Family Agency Act 2013, s.29(1).

Childcare proceedings will often involve allegations of child abuse and/or neglect, meaning they frequently involve very vulnerable parties.[46] Accordingly, the Irish legal framework often makes allowances - for example, while parents can contest an order, the judiciary has expressed a preference for a modified version of the adversarial court model to be operated.[47] The Supreme Court has described it as an "inquiry as to what is best to be done for the child in the particular circumstances pertaining".[48] Notwithstanding this, however, childcare proceedings remain highly adversarial.[49] Therefore, while entrance to care through the court system offers the most protection, this pathway is not without fault.

Further, there is a severe lack of consistency when it comes to childcare proceedings, particularly on a regional basis.[50] Both the weak contextual and legislative bases and the lack of guidance as described above has manifested itself in conflicting applications. In particular, these inconsistencies arise from the differing approaches adopted from case to case and/or from judge to judge.[51] Indeed, the Child Law Project, an Irish group that report on judicial child care proceedings and provide information to the public on the operation of the child care system in the courts,[52] has confirmed regional variations in practice.[53] Equally, the levels of inconsistency are also striking when it comes to the issue of ascertaining the voice of the child.[54] In the CRC, the

[46] O'Mahony, Burns, Parkes and Shore (n39) 135,136.
[47] ibid, 136.
[48] *Southern Health Board v CH* [1996] 1 IR 219 (O'Flaherty J at 237 emphasis in original).
[49] *Health Services Executive v OA* [2013] IEHC 172, at [63] to [64].
[50] Conor O'Mahony, Kenneth Burns, Aisling Parkes and Caroline Shore (n39), 143.
[51] ibid, 144.
[52] Child Law Project (2023), available at <https://www.childlawproject.ie/> accessed 7 September 2023.
[53] O'Mahony, Burns, Parkes and Shore (n39), 145.
[54] ibid, 146.

voice of the child must be ascertained in proceedings,[55] because otherwise the best interests of the child cannot be determined.[56] Although mechanisms do exist to ascertain the voice of the child in care proceedings, these are currently discretionary under the 1991 Act.[57] It should also be noted that research indicates that chronological age - rather than maturity or capability to form a view as outlined in the CRC - is the metric that Irish courts use to determine whether a child should be heard during childcare proceedings.[58] Further, for less mature children, while the CRC permits less weight to be attached to child's views, they can nonetheless not be completely excluded once capability of forming a view can be demonstrated.[59] Therefore, Ireland's childcare laws needs to be both more detailed and precise, because the current provisions that guide judges are evidently proving too vague. Children are politically weak and need robust and clear legislation which recognises their rights. However, because the current legislation is incomplete and the CRC provisions are not fully implemented, Ireland instead has a system that allows for unsupervised judicial discretion which exploits the poor political capital associated with children. The law itself needs to take on a supervisory role to control this discretion, and thereby vindicate the rights of the child.

A remedy that has been proposed for the issues arising within childcare proceedings in the general courts is the creation of a specialised family court. The Law Reform Commission was the first to

[55] United Nations 'Convention on the Rights of the Child' (n1), Article 12.
[56] ibid, Article 13(1).
[57] 1991 Act (n2), s.24.
[58]United Nations, 'Convention on the Rights of the Child' (n1), Article 12(1); see also O'Mahony, Burns, Parkes and Shore (n39), 147.
[59] United Nations, 'Convention on the Rights of the Child' (n1).

suggest the establishment of a specialist family law court as early as 1996,[60] and even identified similar problems to the ones that still exist today within its report.[61] However, the mere existence of a separate court is not the single solution.[62] The solution lies in a specialized court equipped to deal with family law matters.[63] In Australia, there is research to show that even with the existence of a separate children's court, there remain similar issues to those that exist here in Ireland.[64] There is cause for tentative optimism, however, as the Family Courts Bill 2023 has now entered its second stage.[65] This new Bill provides for the establishment of family court divisions within the existing court structure, and outlines a set of guiding principles for the family court system to make the best interests of the child paramount. The Bill does appear to account for Ireland's CRC obligations, such as its provisions regarding affording due weight to the child's maturity when ascertaining his or her views.[66] Additionally, the Bill also addresses the inappropriateness of the adversarial nature of the general court system, through the introduction of proceedings which are conducted in a manner that is friendly to the specific parties and minimises conflict as much as possible.[67] Overall, if this Bill comes into law, it could address a majority of the problems issued above through its efforts to create a specialised family court rather than a merely separate one. This creation of a completely new court structure is certainly a positive step in the right direction

[60] Law Reform Commission, *Report on Family Courts* (LRC 52-1996); see also O'Mahony, Burns, Parkes and Shore (n39), 150.
[61] Law Reform Commission, *Report on Family Courts* (LRC 52-1996).
[62] O'Mahony, Burns, Parkes and Shore (n39), 151.
[63] ibid.
[64] See Rosemary Sheehan and Allan Borowski, 'Australia's Children's Courts: An assessment of the status of and challenges facing the child welfare jurisdiction in Victoria' (2014) 36(2) Journal of Social Welfare and Family Law 101, 108.
[65]Seanad Éireann debate Thursday 2 Feb 2023 Vol. 291 No. 8 available at <https://www.oireachtas.ie/en/debates/debate/seanad/2023-02-02/19/> accessed 21 March 2023.
[66] ibid.
[67] Seanad Éireann debate (n65).

towards the preservation of children's rights, and will, indeed, promote the best interests of the child.[68] Nevertheless, this does not mean that the State should ignore the aforementioned gaps in the existing legislative framework; court orders are not the only pathway into state and alternative care, as examined below.

Voluntary Care

The issues contained within Ireland's childcare legislation become even more apparent when examining children in voluntary care placements. The informality of these placements could be beneficial to a vulnerable child, as they get to avoid the court system. Nevertheless, the unfortunate reality is that the lack of legal protection afforded to these children means that they are greatly underserved by the State.

Voluntary care agreements, as outlined in section 4 of the 1991 Act, are concluded between a child's parent(s) and the CFA, with no independent oversight at the point of entry into care.[69] Ireland's obligations to the CRC are not passive obligations,[70] yet this article submits that the approach being taken by the Irish legislature is passive when dealing with children entering voluntary care, as demonstrated by the lack of legislation dealing directly with children in such care. The State needs to create legislation for these children which has inbuilt checks and balances

[68] United Nations 'Convention on the Rights of the Child' (n 1) Article 3.
[69] Rebekah Brennan, Conor O'Mahony and Kenneth Burns, 'The rights of the child in voluntary care in Ireland: A call for reform in law, policy and practice' (2021) 125 Children and Youth Services Review, paragraph 2.
[70] ibid.

concerning the welfare of children in voluntary care placements. Indeed, this is what this article submits is required under the sought-after robust legislative framework.

The Voluntary Care in Ireland Study[71] was one of the first in depth empirical examinations internationally of voluntary care agreements.[72] It examines qualitative data on the system in operation in Ireland.[73]Participants shared the view that voluntary care may allow resources which would otherwise be spent on expensive court proceedings to be used to intervene in the child's life at an early enough stage that the child may be prevented from entering care in the first place.[74] Another benefit of using the formal voluntary care approach is that you avoid the highly stressful adversarial nature of the courts.[75] Further, the Voluntary Care in Study Ireland also found that, through consenting to voluntary care, parents can acknowledge that difficulties need to be addressed,[76] which has been suggested can make the reunification of the family more likely.[77]

However, are there sufficient mechanisms to obtain the views of the child going into voluntary care, as per Article 12 of the CRC?[78] The voluntary care pathway is led by social work, and is an administrative system.[79] While the court system offers a level of checks and balances and has built-in mechanisms to try and ensure that the child's welfare is protected, children placed in voluntary care are not afforded these protections. For example, children in voluntary care are captured under

[71] Brennan, O'Mahony and Burns (n69), paragraph 3.
[72] Child Law Project (2023), available at <https://www.childlawproject.ie/> accessed 7 September 2023.
[73] ibid.
[74] Brennan, O'Mahony and Burns (n69), paragraph 4.1.
[75] ibid.
[76] Brennan, O'Mahony and Burns (n69), paragraph 4.1.
[77] ibid.
[78] United Nations, 'Convention on the Rights of the Child' (n1), Article 12.
[79] Brennan, O'Mahony and Burns (n69), paragraph 1.

the section 9 of the 2013 Act, which obliges the CFA to ensure that consideration will be given to the views of the child. This general and nebulous obligation to "give consideration" to the wishes of the child is far weaker than the obligations imposed upon the State in relation to court proceedings, as provided under Article 42A of the Constitution. While the 1991 Act provides specific mechanisms under sections 25 and 26 through which the views of the child can be ascertained during court proceedings, the Act remains silent regarding children in voluntary care.[80] The CRC, however, requires the welfare of all children to be protected, irrespective of the avenue through which a child enters care.[81] How can Ireland be held as fulfilling its obligations if children in voluntary care are, quite literally, being forgotten about? Ultimately, this oversight was destined to arise resulting from the 1991 Act's severe lack of guidance regarding children in voluntary care. It has already been shown by the literature that children's views are not ascertained during court proceedings.[82] Therefore, it only makes sense that the complete absence of mechanisms in voluntary care situations will render these issues to be even more pronounced.[83]

The Health Information and Quality Authority documented cases where voluntary care went on for up to ten years, and raised concerns with the CFA that children were being "subjected to voluntary consent for significant periods of time" without efforts being made to formalise the arrangement by securing a legal care order for the child, "despite clear indications that they would

[80] Brennan, O'Mahony and Burns (n69), paragraph 2.
[81] United Nations, 'Convention on the Rights of the Child' (n1), Article 2.
[82] Aisling Parkes, Caroline Shore, Conor O'Mahony and Kenneth Burns, 'The right of the child to be heard: Professional experiences of childcare proceedings in the Irish district court' (2015) 27(4) 423, 444.
[83] Brennan, O'Mahony and Burns (n69), paragraph 2.

not be reunified" with their parents.[84] The Committee on the Rights of the Child in their concluding observations on the combined fifth and sixth periodic reports on Ireland even expressed that Ireland should try to reduce the number of children being placed in voluntary care arrangements by ensuring sufficient family based and community-based care options for children who are taken away from their parents.[85] In the Voluntary Care in Ireland Study, it was highlighted by some participants that court orders were preferable to voluntary care arrangements, with one participant noting that there is very little pressure on social workers to continue checking on children in voluntary care when the court is not involved.[86] This lack of periodic review is most likely due to the lack of independent oversight within the voluntary care system.[87] Further, the state of voluntary care today in Ireland is also contrary to Article 25 of the CRC,[88] which requires that children in state care receive periodic review of their placement. In its aforementioned report, the IHREC submitted that the State should monitor the use of voluntary care arrangements.[89] The continuous monitoring of placements was also supported by the UN Committee on the Rights of the Child.[90] This would allow for the State to efficiently limit the duration of voluntary care arrangements, as this is not in the best interests of the child.[91] Indeed, the Special Rapporteur on

[84] Jack Power, 'Children left in State care 'twilight zone' indefinitely by Tusla' *The Irish Times* (Dublin 11 May 2020), available at < https://www.irishtimes.com/news/social-affairs/children-left-in-state-care-twilight-zone-indefinitely-by-tusla-1.4249959> accessed 19 March 2023.
[85] Committee on the Rights of the Child (n18), paragraph 27(a).
[86] Brennan, O'Mahony and Burns (n69), paragraph 4.2.1.
[87] ibid.
[88] United Nations, 'Convention on the Rights of the Child' (n1), Article 25.
[89] Irish Human Rights and Equality Commission (n24), 58.
[90] Committee on the Rights of the Child (n 18), paragraph 27(c).
[91] Brennan, O'Mahony and Burns (n69), paragraph 4.2.2.

Child Protection found that a maximum period of 12 months should apply to voluntary care placements in Ireland.[92]

The unstable nature of these agreements is hindering voluntary care from being an appropriate pathway into state and alternative care,[93] and more extensive, detailed legislation is required in this area. However, if the Legislature ultimately decides to do so, protection of the child must be balanced with the child's right to family preservation.[94] Both of these aspects of the child's best interests are important when formulating child protection law, although both must be evaluated against each other to produce a fair and justified approach to voluntary care placements. Nevertheless, due to the lack of legislation protecting children in voluntary care placements, there is currently no balancing of these rights. This can be demonstrated by the instability of voluntary care arrangements, which permit a parent to demand their child back at any time during the agreement.[95] Although the CFA can make an application to the court for an emergency order it they are concerned that the child should not return to his or her parent, it is not always possible to secure an order to halt the transfer of care.[96] Ultimately, there is virtually no balancing of the general interests of the child against the rights of the parents.[97] As a result, this approach leverages

[92] Geoffrey Shannon, *Eleventh report of the Special Rapporteur on Child Protection: A report submitted to the Oireachtas*, (2018) 153, available at <https://assets.gov.ie/27444/92175b78d19a47abb4d500f8da2d90b7.pdf> accessed 12 March 2023.
[93] Brennan, O'Mahony and Burns (n69), paragraph 4.2.3.
[94] United Nations, 'Convention on the Rights of the Child'(n1), Article 5; see also United Nations, 'Convention on the Rights of the Child' (n1), Article 3..
[95] Brennan, O'Mahony and Burns (n69), paragraph 4.2.3.
[96] ibid.
[97] United Nations, 'Convention on the Rights of the Child' (n1), Article 3.; see also United Nations, 'Convention on the Rights of the Child' (n1), Article 5.

power towards the parent(s) of the child which is neither a child-centred approach, nor is it the vision of the CRC.

Private Family Arrangements

Ireland relies heavily on the family unit when it comes to childcare law,[98] which stems from the Irish Constitution's affirmation of the general importance of the family pursuant to Article 41.[99]Corresponding to this recognition, this article submits that informal kinship arrangements (commonly termed as private family arrangements in academic commentary) are an excellent way of preserving the child's identity within their family unit, [100] particularly as private family arrangements (henceforth, "PFAs") have minimal to no state intervention.[101] By PFA, this article means arrangements whereby children are cared for full-time by kinship carers.[102] These people are not parents or legal guardians, and the child is not in state care under the 1991 Act pursuant to either a care order under section 18 or a formal voluntary care agreement under section 4. Accordingly, the child is thereby permitted to stay within the community and preserve his or her family identity.[103] However, carers are neither recognised nor assessed by the CFA as foster-carers, although social workers play a role in setting up arrangements.[104]

[98] Kenneth Burns, Conor O'Mahony and Rebekah Brennan,' "Private Family Arrangements" for children in Ireland: The Informal Grey Space In-Between State Care and the Family Home'(2021) 51(4) The British Journal of Social Work 1204.
[99] Article 41.
[100] Burns, O'Mahony and Brennan (n98), 1203,1220.
[101] ibid, 1207.
[102] ibid, 1205.
[103] United Nations, 'Convention on the Rights of the Child' (n1), Article 8.
[104] ibid.

In an Irish context, this article must distinguish between "private foster care" arrangements and PFAs.[105] While these arrangements are similar in some ways, Part IVB of the 1991 Act empowers the CFA to enter the premises and investigate whether a child in private foster care placement is receiving adequate care.[106] In contrast, however, this minimal measure does not apply to PFAs. If a family member in a private family arrangement would like to strengthen his or her position as carer, they can apply to the court after twelve months to become the child's legal guardian.[107]

However, the severe lack of information and protection from the State can ultimately be to the detriment of these children. There is a lack of research on children in private family arrangements, and it is difficult to address any issues which may arise when there is very little known about these children.

Indeed, PFAs have created a situation where children are neither cared for by a parent/guardian nor by the state.[108] The child in a PFA is located in a sort of middle ground, as they are placed in a care arrangement without a parent/guardian or the care of the State.[109] Further, this also raises questions regarding whether there is a discharge of the constitutional obligation towards the child,[110] because the person who has legal responsibility for the child remains his or her parents who are no longer actually caring for the child.[111] Both the lack of legal foundation for children placed in care of this nature and its consequences were demonstrated in the case of *PG v Child and*

[105] Child Care Act 1991, part IVB (as inserted into Section 16 of the Children Act 2001); see also Kenneth Burns, Conor O'Mahony and Rebekah Brennan, (n98), 1205.
[106] Child Care Act 1991, part IVB (as inserted into Section 16 of the Children Act 2001).
[107] Kenneth Burns, Conor O'Mahony and Rebekah Brennan (n98), 1207.
[108] ibid, 1208.
[109] ibid.
[110] Kenneth Burns, Conor O'Mahony and Rebekah Brennan (n98), 1208.
[111] ibid.

Family Agency Act.[112] This case concerned a mother of four children, who unfortunately suffered from addiction and mental health issues.[113] The application in question related to three of the children,[114] and the applicant and the respondent ultimately agreed that the applicant would act as caregiver for the three children as there was a significant risk to the children's welfare.[115] A care plan was subsequently set out in November of 2013.[116] Months later, a conference was held on the 28th April 2014 to revisit the case,[117] but no further formal review of the care plan had been carried out until the case was heard at the High Court in 2019, despite the fact that a number of issues had arisen from events during the years previous.[118] The applicant feared that because there was no court order present, there was no legal basis for the children being within her custody and that the mother or her partner could demand to have the children returned at any time.[119]

It should be noted that there is a divergence of academic opinion regarding the *PG* case.[120] Geoffrey Shannon puts the case of *PG* under voluntary care,[121] while Kenneth Burns, Conor O'Mahony and Rebekah Brennan find that the case concerns a PFA.[122] In a PFA, the CFA plays a facilitatory role, but the child is not in the care of the State in the way that children in voluntary care are. This demonstrates the confusion and dire lack of research surrounding children in PFAs, and how many academics are unaware of the existence of such agreements.

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[112] *PG v Child and Family Agency Act* [2018] IEHR 812, [2019] 1 ILRM 213.
[113] ibid, per Mr. Justice Meenan.
[114] ibid.
[115] ibid.
[116] ibid.
[117] ibid.
[118] ibid.
[119] ibid.
[120] *PG v Child and Family Agency Act* (n112).
[121] Geoffrey Shannon, *Child and Family Law* (3rd edn, Round Hall: Thomson Reuters 2020) 284.
[122] Burns, O'Mahony and Brennan (n98), 1203, 1220.

A deeply troubling aspect of the *PG* case is that on the 16th of April 2018, the respondent wrote to the applicant to inform her that they were closing her family's case and that they had no current concerns regarding the children's family.[123] On this basis, one must ask themselves how these children get lost within the system? This is how, with a poor legal basis, there is nothing to compel authorities to intervene. Infrastructurally, there is also a severe lack of support for the CFA.[124] Social workers receive a vast volume of referrals, which ultimately make it impossible to deal with all children in alternative care.[125]

Article 3(3) of the CRC outlines that States Parties are obligated to ensure that the institutions, services and facilities responsible for the care or protection of children will conform to standards established by competent authorities. Further, if Article 3(3) is to be implemented sufficiently, there needs to be a robust legislative framework to support it.[126] The Committee on the Rights of the Child have also commented on the lack of sufficient monitoring systems and the need for an increase in the number of professionals working with children in alternative care so they may have prompt access to social workers and individualised care responses .[127]

The lack of support available for the parties in *PG* is due to the lack of a legislative basis to compel the CFA to be involved, coupled with the overstretched resources within the CFA itself. This has

[123] *PG v Child and Family Agency Act* (n112), paragraph [7], per Mr. Justice Meenan.
[124] Grainia Long, 'By not fully funding Tusla, the State fails to protect children' *The Irish Times* (Dublin 27 February 2017), available at <https://www.irishtimes.com/opinion/by-not-fully-funding-tusla-the-state-fails-to-protect-children-1.2989552> accessed 22 March 2023.
[125] Noel Baker, 'Tusla referrals reach 18-month high as case backlog increases' *Irish Examiner* (Cork 23 August 2022), available at <https://www.irishexaminer.com/news/arid-40945259.html> accessed 22 March 2023.
[126] UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (United Nations Children's Fund 2007) 41.
[127] UN Committee on the Rights of the Child (n18), paragraphs 27(c) and 27(d).

accumulated, and ultimately brought the state of PFAs to a point of crisis. Justice Meenan found that there were sufficient grounds for a care order to be made by the CFA in the case of *PG*.[128] Justice Meenan also found it strange how the Agency could have concluded that there were no grounds for concern regarding the welfare of the three children, given the fact that they had not reviewed their case for four years.[129] The case of *PG* is a manifestation of our broken system and if this approach continues, it will give effect to more cases like this.

Participants in a study which consisted of professionals that work in the sphere of state and alternative care emphasised that PFAs commonly involve the "burden" of care shifting from the State to families.[130] This begs the question as to whether the State is discharging itself of its constitutional duty regarding children in PFAs.[131] There is also concern regarding the fact that once children in these arrangements reach the age of 18, they have no right to aftercare supports under the Child Care (Amendment) Act 2015, as they are not in state care.[132] This therefore contravenes Article 2 of the CRC, regarding the issue of non-discrimination.[133]

Many of the issues that arise in formal voluntary care agreements arise in private family agreements. In the same way that issues surrounding court ordered care orders are exacerbated by the lack of legislative foundation with regards to formal voluntary care agreements, the issues then arising in relation to voluntary agreements are equally aggravated by the total lack of legislative basis relating

[128] ibid.
[129] Burns, O'Mahony and Brennan (n98), 1209.
[130] ibid, 1212.
[131] Article 42A.
[132] Burns, O'Mahony and Brennan (n98), 1208.
[133] United Nations, 'Convention on the Rights of the Child (n1), Article 2.

to private family arrangements. It's evident that less legislative protection being offered to the child subsequently increases the likelihood of him or her being forgotten within the system.

A Roadmap for the Irish State:

Each child in state and alternative care has varying needs. The individuality of each child is currently lost through Irish childcare legislation, as it fails to adhere to these various needs. The different pathways into state and alternative care are weak and, given that the child is politically weak, this ultimately leads to children being lost within a broken system. Ireland needs to invest time and resources in this area, to produce robust legislation that renders children who are deprived of a family environment as seen and heard.

Ireland needs to develop policy that allows legal practitioners and social workers to recognise individual children's rights in their unique cases while also promoting children's rights in a broader sense by promoting child centred policy and decision making.[134]The CRC adopts a child-centred approach, so for Ireland to fully realise its obligations under the Convention it should follow the implementation advice from the Committee on the Rights of the Child.[135]

Any new legislation introduced by the Irish legislature needs to have internal checking mechanisms that prevent children from becoming lost within the system. Social workers and various other professionals are the front end of this system and, by the time a case has reached them, the existing

[134] UN Committee on the Rights of the Children (n14), paragraph 6.
[135] UN Committee on the Rights of the Child (n18).

legislative mistakes cannot be undone. This is why this article emphasises the need for a strong legislative framework that encompasses all kinds of children. This legislation needs guidance to allow professionals and judges to exercise controlled discretion, which will lead to more consistent and justified results. The Family Law Court Bill seems to remedy many of these issues with regards to court orders, thereby providing an indication that the State is making some level of improvements.[136]

Regarding children in voluntary care placements and PFAs, there needs to be some sort of a provision created that allows the child to be taken into care which is not based on parental consent. There comes a point where family reunification will not be possible and, by keeping the child in this grey area, the Irish State is failing these children.

Finally, there needs to be some sort of monitoring system for children in state and alternative care. This article submits that for children in voluntary care agreements and PFAs, there should be a quasi-judicial body to act as an independent oversight, perhaps modelled on the Adoption Authority of Ireland. This body will have to monitor placements, and thereby ensure that the voice of the child is being heard.[137]

[136] Seanad Éireann debate Thursday 2 Feb 2023 Vol. 291 No. 8, available at <https://www.oireachtas.ie/en/debates/debate/seanad/2023-02-02/19/> accessed 25 March 2023.
[137] United Nations, 'Convention on the Rights of the Child' (n1), Article 12.

Conclusion

This article wishes to demonstrate the significance of a robust legislative framework, which is the net that will catch these vulnerable children. Ireland is currently failing children in state and alternative care, and therefore failing to fulfil their obligations under the CRC. The failures examined in this article are symptoms of a weak legislative basis. If the Irish State closed the gaps in the current legislation and directed more funding to the CFA, many of these failures would be remedied. Further, it is important to do further research on these children, as there is currently very little information concerning them in existence. Ultimately, this article wishes to shine a light on some of the most forgotten about and vulnerable children in Irish society today, lending them a necessary platform to render them seen and heard.

A Juvenile Justice System That Truly Serves Juveniles: Analysing The Impact of Restorative Justice Programmes on Recidivism Rates Amongst Juvenile Offenders

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Introduction

Restorative Justice (RJ) is a 'theoretical framework' that views crime as a violation of people and relationships, and aims to re-establish the equilibrium that the commission of a crime has offset 'by involving the primary stakeholders (i.e. victim, offender, and the affected community) in the decision-making process of how best to restore this balance.'[1] There is a formidable body of literature that attests to the effectiveness of RJ as a means of reducing recidivism amongst juvenile offenders.[2]

The corpus of existing law in the international domain, and to a great, albeit lesser extent in Ireland, favours a way of administering juvenile justice that prioritises rehabilitative responses to deviance, centres the voice and contributions of youth, and relegates the option of detaining young people who commit offences to being the last port of call. This approach coincides with the ethos of RJ. All of this being said, the principles enshrined in many of the documents that

[1] David B. Wilson, Ajima Olaghere, Catherine S. Kimbrell, 'Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis' (2018) Inter-university Consortium for Political and Social Research.
[2] Lawrence W. Sherman, Heather Strang, Daniel J. Woods, 'Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)' (2000) Australian National University Centre for Restorative Justice.

advocate for a more tolerant approach to dealing with offending young people seem only to have attracted widespread commitment on the surface-level, and in practice, the documents containing these principles are often flouted.[3]

The primary legal instrument that asserts the importance of abiding by the aforementioned principles on the international stage is the United Nations' Convention on the Rights of the Child (CRC); as Doek states, the CRC is a 'human rights treaty that covers many different areas such as civil rights and freedoms, education and child protection,' but none of these areas have enjoyed as thorough an elaboration in 'international guidelines and standards' as juvenile justice.[4] Article 3 of the CRC declares the primacy of 'the best interest of the child' principle in cases involving a young person who contravenes the law, and Doek correlates this provision to criminal justice by claiming that the provision calls for an approach that gives way to 'rehabilitation and RJ objectives in dealing with children in conflict with the law.'[5] Notwithstanding this, Muncie describes the CRC as 'the most ratified human rights convention in the world, but lamentably also the most violated.'[6] There are many obstacles that stand in the way of the widespread implementation of RJ in juvenile justice systems. This article will take a closer look at one of the major obstacles preventing the effective roll-out of more restorative, juvenile justice policy, namely, media-based

[3]As an example, *Bell at al.* states that "the prohibition of the CRC on the recruitment and participation in hostilities of under 15s is being flouted routinely in many armed conflicts." See Bill Bell, Rachel Brett, Rachel Marcus and Sarah Muscroft, 'Children's Rights: Reality or Rhetoric? The UN Convention on the Rights of the Child: The First Ten Years.' (1999) International Save the Children Alliance.

[4] Jaap Doek, 'The UN Convention on the Rights of the Child' in Josine Junger-Tas and Frieder Dunkel (eds), *Reforming Juvenile Justice* (Springer 2009), pp.19-31.

[5] ibid.

[6] John Muncie, 'The Punitive Turn in Juvenile Justice: Cultures of Control and Rights Compliance in Western Europe and the USA' (2008) 8(2) Youth Justice 107-121.

sensationalism in the coverage of youth offending and the negative influence that this has. The article will also navigate the laws that relate to juvenile justice and appraise the conventional approach that is taken to address juvenile offending in Ireland and other jurisdictions; interrogate RJ as a philosophy and outline what it represents as a system of conflict resolution. Furthermore, it will examine what the literature says about the capacity of RJ procedures to reduce recidivism rates amongst juvenile offenders. Limitations presented by the literature on the effect RJ has on recidivism rates will be explored, and recommendations on how to roll out RJ programmes in a way that unleashes its full potential vis-à-vis the minimisation of recidivist behaviour from young offenders will also be presented.

Contemporary Legal Landscape:

Existing Law

International human rights norms, particularly the United Nations' Convention on the Rights of the Child (CRC) have hugely impacted reforms to juvenile justice in Europe over the past three decades.[7] The CRC came into force in 1990 with the aim of recognising children's rights worldwide, and it promulgates safeguards for 'children in conflict with the law.'[8] Furthermore,

[7] Frieder Dünkel, 'Juvenile Justice and Human Rights: European Perspectives' in Helmut Kury, Sławomir Redo and Evelyn Shea (eds), *Women and Children as Victims and Offenders: Background, Prevention and Reintegration – Suggestions for Succeeding Generations (Volume 2)* (Springer Cham 2016), pp. 671-81.

[8] UN General Assembly A/RES/40/33 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (1985), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-standard-minimum-rules-administration-juvenile>, accessed 18 May 2023.

there has been a sizable influence from human rights standards that have been set out on the international stage.[9] The United Nations' Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), for example, has been a 'mark-stone' in the juvenile justice human rights movement.[10] In a European context, the Council of Europe issued Recommendations in 2003 and 2008 which have defined the character of juvenile justice policy at the European level as being one that is sensitive to 'diversion, minimum intervention… RJ and other constructive measures.'[11] The concept of 'child friendly justice' has also arisen in the pan-European human rights sphere, and places a special emphasis on the child's right to participate in the juvenile justice process and be heard, as articulated in the UN Convention of the Rights of the Child and supported by the jurisprudence of the European Court of Human Rights.[12] Forde states that the standards in these international and regional documents assert the need to emphasise reintegration over punitiveness, the importance of diversion, and the need to pay attention to the well-being of children as well as their procedural rights.[13]

In Ireland, the seminal piece of legislation in the domain of juvenile justice is the Children Act 2001.[14] According to Forde and Swirak, the conception of the Children Act heralded the 'beginning of a new era' for juvenile justice in Ireland, albeit a 'late start' for Ireland in

[9] Dünkel (n7).
[10] ibid.
[11] Dünkel (n7).
[12] Ton Liefaard, 'Child-Friendly Justice: Protection and Participation Of Children In The Justice System' (2015) 88(4) Temple Law Review 905-927.
[13] Louise Forde, 'Welfare, Justice, and Diverse Models of Youth Justice: A Children's Rights Analysis' (2021) 29(4) The International Journal of Children's Rights 920-945.
[14] 'Children and the Criminal Justice System' (*Citizens Information*, 18 August 2020), available at < https://www.citizensinformation.ie/en/justice/children-and-young-offenders/children-and-the-criminal-justice-system-in-ireland/>, accessed 18 May 2023.

modernising its youth justice system.[15] Sargent states that prior to the enactment of the legislation, and for the majority of the 20th century, the State was largely 'absent from the practicalities of regulating children' and ceded this duty to religious and voluntary organisations.[16] In line with what is reflected in the human rights norms supported by the CRC, Seymour believes that the provisions of the Children Act 2001 places emphasis on the policy of resorting to detaining juvenile offenders as a measure of last resort, an increased application of community-based penalties and the amplification of RJ in the juvenile justice system.[17] Upon the publication of the Children Act, Mary Hanafin, the then Minister for Children, said that the law was 'the most significant piece of legislation in relation to juvenile justice since 1908.'[18] In community with the Children Act, the Youth Justice Strategy 2021-2027 is also driving forward a juvenile justice paradigm that is undergirded by international children's rights principles.[19] In other jurisdictions, such as those of New Zealand and Scotland - countries that are renowned for their progressive approach to juvenile justice based on RJ and welfare principles - work is being done to ingrain the CRC into national law.[20]

[15] Louise Forde and Katharina Swirak, 'The Development of the Irish Youth Justice System: Toward a Children's Rights Model of Youth Justice' (2023) 39(1) Journal of Contemporary Criminal Justice 114-132.
[16] Paul Sargent, *Wild Arabs and Savages: A History of Juvenile Justice in Ireland* (Manchester University Press 2016).
[17] Mairéad Seymour, 'Transition and Reform: Juvenile Justice in the Republic of Ireland' in Scott H. Decker and Nerea Marteache (eds), *International Handbook of Juvenile Justice* (Springer International 2017).
[18] Ciaran McCullagh, 'Juvenile Justice in Ireland: Rhetoric and Reality' in Tom O'Connor and Mike Murphy (eds) *Social Care in Ireland* (CIT Press 2006).
[19] Forde and Swirak (n15).
[20] ibid.

Conventional Approach To Juvenile Justice

In legal discourse, there is the classic distinction between 'the law on the books' and 'the law in action,'[21] and the case of juvenile justice is yet another example of the axiom's utility. Liefaard notes that juvenile justice is an area where children's rights continue to be routinely violated internationally.[22] Marshall *et al.* point out that there has been significant commentary issued by the UN Committee on the Rights of the Child ('The Committee') to clarify how justice proceedings can be made more accessible for young offenders.[23] They go on to state that despite these attempts, children 'remain ill-informed, not just about the nature of justice proceedings in which they may be implicated, but about the very existence of their rights' and that there has been minimal attempt to 'scrutinise' this state of affairs.[24] The Committee, in 2007, claimed that 'many State Parties still have a long way to go in achieving full compliance with the CRC.'[25] This failure to satisfy international juvenile justice standards is in stark juxtaposition to the mandate that falls upon all signatories to the CRC and the various other legal documents setting out the agenda for juvenile justice.

Dünkel *et al.* share that in Western Europe, there are contradictory youth justice policies , some of which do not align with the standard promoted by the CRC and other regional instruments

[21] This distinction refers to the difference between what law is stated as and how it operates when applied; see also Roscoe Pound, 'Law in Books and Law in Action' (1910) 44(1) American Law Review 12-36.
[22] Ton Liefaard, 'Juvenile Justice from a Children's Rights Perspective' in Wouter Vandenhole, Ellen Desmet, Didier Reynaert and Sara Lembrechts (eds) *Routledge International Handbook of Children's Rights Studies* (Routledge 2017).
[23] Helen Stalford, Liam Cairns and Jeremy Marshall, 'Achieving Child Friendly Justice through Child Friendly Methods: Let's Start With the Right to Information' (2017) 5(3) Social Inclusion 207-218.
[24] ibid.
[25] John Muncie, 'The United Nations, children's rights and juvenile justice' in Wayne Taylor, Rod Earle and Richard Hester (eds) *Youth Justice Handbook: Theory, Policy and Practice* (Routledge 2010).

pertaining to juvenile justice.[26] They identify England, Wales, and the Netherlands as being jurisdictions in which juvenile justice is coloured by neo-liberal tendencies.[27]

In other nations, such as Germany, a moderate system of 'minimum intervention' is what prevails, and in some countries, Belgium for example, there is a clear RJ-based influence.[28]

A lot has been written about how a more punitive, neo-liberal style to juvenile justice policy-creation has been adopted by jurisdictions across the world. In the United States, Butts and Mears write that policymakers have implemented programmes with the purpose of making the juvenile justice system more harsh by arranging for young offenders to be transferred to adult courts and for juvenile courts to deal with young offenders with 'more harshness.'[29] The Supreme Court of the United States summed up the contemporary state of affairs in juvenile justice policy with stunning presage in the case of *Kent v United States*,[30] when it stated that "the child receives the worst of both worlds: he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[31] There is in fact evidence that a profit-motive is, at times, what stimulates this harsher regime for youth offenders in jurisdictions such as the United States'. Lithwick writes about the so-called "kids for cash" scandal, which saw two

[26] Frieder Dünkel, 'Juvenile Justice Systems in Europe: Reform Developments between Justice, Welfare and "New Punitiveness"' (2014) 1(1) Kriminologijos Studijos.
[27] ibid, Dünkel argues that repressive reforms were made to the juvenile justice system in these countries that intensified 'youth justice interventions by raising the maximum sentences for youth detention and by introducing additional forms of secure accommodation.'
[28] Dünkel (n26).
[29] Jeffrey A. Butts and Daniel P. Mears, 'Reviving Juvenile Justice in a Get-Tough Era' (2001) 33(2) Youth & Society 169-198.
[30] *Kent v United States* 383 US 541 (1966).
[31] See also Barry C. Feld, 'The Politics of Race and Juvenile Justice: The 'Due Process Revolution' and the Conservative Reaction' (2003) 20(4) Justice Quarterly 765-800; Peter W. Greenwood, 'Responding to Juvenile Crime: Lessons Learned' (1996) 6(3) The Future of Children 75-85.

members of the Pennsylvania judiciary sentencing thousands of children to for-profit juvenile detention centres between 2003 and 2008, sometimes on the basis of trivial charges.[32] The two judges responsible for this pleaded guilty to receiving $2.6 million in kickbacks from the detention centre's operators in exchange for sending juvenile offenders to for-profit prisons and are now serving time in jail.[33] Although this issue of a profit incentive cannot be generalised across jurisdictions, it speaks to one of the many unbecoming challenges that stands in the way of the administration of sound juvenile justice policy - and partially explains the tilt towards stricter, more neoliberal, sentencing for juvenile offenders.

Despite the general inclination towards more punitive juvenile justice policy in certain jurisdictions, the evidence seems to suggest that there is no positive correlation between harshness and reduced offending. Greenwood conducted a study which evaluated bootcamps in the USA - which he stated were increasingly being introduced due to 'political popularity' - and it found that four of the eight programmes had no effect on recidivism, one of the programmes actually increased recidivism, and only three showed improvements in 'some recidivism measures.'[34] Butts and Mears looked at programmes that were considered harsh by design and focused on transferring youth who breached the law to adult courts; they concluded that researchers have not found any clear benefits to these programmes, and that court transfer did not improve public safety or deduce favourable outcomes with regards to the individual

[32] Dahlia Lithwick, 'A reminder as the school year opens: The juvenile justice system eats kids for breakfast.' (*Slate*, 9 September 2015), available at <https://slate.com/news-and-politics/2015/09/sexting-zero-tolerance-and-kids-for-cash-the-juvenile-justice-system-is-corrupt.html> accessed 17 September 2023.
[33] ibid.
[34] Peter W. Greenwood, 'Responding to Juvenile Crime: Lessons Learned' (1996) 6(3) The Future of Children 75-85.

behaviour of juvenile offenders or the rate of juvenile crime.[35] There is a case to be made for the belief that taking a more hard-line approach to juvenile justice only worsens matters, as it amplifies the problems that led the juvenile offender to crime and furthers their ostracisation.

Othmani concurs with this sentiment and contends that taking a punitive approach to youth offenders only aggravates the effects of their afflicted socialisation.[36] Othmani goes on to state that a preferable approach would be one that diverted from formal processing into community programmes 'based in RJ principles.'[37] Gatti *et al.* spearheaded a study that showed that youths who are 'poor, impulsive, poorly supervised by their parents' and 'exposed to deviant friends' are more inclined, to be subject to intervention by the juvenile justice system, and that this increased interaction with the system heightens the likelihood of being involved with the justice system in adulthood.[38] This suggests that a move away from punitiveness and towards the ideal promoted by the CRC is what juvenile justice system operators, and policymakers, should be striving towards.

Youth justice systems can either be classified as 'welfare-based', meaning that they respond to infractions based on the needs of the child involved; or 'justice-based', which is concerned with applying standard criminal justice procedure in cases of deviations from the law. The drafters

[35] ibid.
[36] Ahmed Othmani, 'Young Offenders and Youth at Risk: Overview of Current International Approaches – Juvenile Justice in Europe' (Conference on 'Developing Citizenship Amongst Youth in Conflict With the Law', Port Elizabeth, South Africa, 17-19 June 2002), available at <https://www.ojp.gov/ncjrs/virtual-library/abstracts/young-offenders-and-youth-risk-overview-current-international> accessed 21 May 2023.
[37] ibid.
[38] Uberto Gatti, Richard E. Tremblay and Frank Vitaro, 'Iatrogenic Effect of Juvenile Justice' (2009) 50(8) Journal of Child Psychology and Psychiatry 991-998.

of Ireland's Children Act overtly tried to avoid an ideological attachment to either school of thought and instead opted for an approach centred on 'pragmatism.'[39] There are components of the legislation, for example, that mark the importance of diversion from the criminal justice system due to the relative vulnerability of children, and so treats them differently to adults.[40] In practice, however, some have argued that the story is not as straightforward. Far from appreciating children's vulnerability, Kilkelly argues that, to a great extent, the Juvenile Court in Ireland operates like an adult District Court and that young people have not been catered to, before the Juvenile Court, in a way that accounts for their age, maturity, and their intellectual and emotional capabilities.[41] Arthur believes that the 'Irish approach' as per the 2001 Act, in balancing the child's best interests against competing concerns, is deeply flawed and disregards Ireland's duty under international law to protect the best interests of young people in judicial proceedings.[42] Under the 2001 Act, the age of criminal responsibility is 12 years old, which is not too far from the European average of 14.[43] However, the Criminal Justice Act 2006 declares an exception to the rule; under s.129 of the Act, children who are aged as low as 10 can be charged in cases involving murder, manslaughter, rape, or aggravated sexual assault.[44] S.129 eradicates the rebuttable presumption under Irish law that children between 7-14 years do not

[39] Forde and Swirak (n15).
[40] Children and the Criminal Justice System' (*Citizens Information*, 18 August 2020), available at <https://www.citizensinformation.ie/en/justice/children-and-young-offenders/children-and-the-criminal-justice-system-in-ireland/> accessed 18 May 2023.
[41] Ursula Kilkelly, 'Youth Courts and Children's Rights: The Irish Experience' (2008) 8(1) Youth Justice 39-56.
[42] Raymond Arthur, 'Protecting the Best Interests of the Child: A Comparative Analysis of the Youth Justice Systems in Ireland, England and Scotland' (2010) 18(2) International Journal of Children's Rights 217-231.
[43] Citizens Information (n40).
[44] ibid.

have the capacity to commit a crime due to their inability to fully comprehend the wrongness of their act or omission.[45] In effect, this means that Ireland has the lowest age of criminal responsibility in Europe for serious offences.[46] The UN Committee on the Rights of the Child expressed their disappointment at the fact that Ireland's age of criminal responsibility for serious offences is so low.[47]

In The Beijing Rules, it is recommended that the minimum age of criminal responsibility should not be set 'too low', in light of the emotional, mental, and intellectual maturity of the child.[48] Accordingly, it might make sense to look to developmental science to seek guidance on what constitutes a sufficient minimum age. Steinberg argues that the ways in which we react to juvenile offending should be 'informed by the lessons of developmental science', especially on questions relating to 'the criminal culpability of adolescents, adolescents' competence to stand trial, and the impact of punitive sanctions on adolescents' development and behaviour.'[49] Steinberg believes that the research on developmental science bears out the fundamental difference between juveniles and youth, and that this calls, not only for differential treatment of juveniles and adults by the justice system, but for a distinct juvenile justice system in which adolescents are 'judged, tried, and sanctioned in developmentally appropriate ways'.[50]

[45] Arthur (n42).
[46] ibid.
[47] Arthur (n42).
[48] ibid.
[49] Laurence Steinberg, 'Adolescent Development and Juvenile Justice' (2009) 5 Annual Review of Clinical Psychology 459-485.
[50] ibid.

Media Sensationalism and Criminal Justice:

The gap between the juvenile justice human rights obligations that various States sign their name to and the way in which juvenile justice is carried out in their jurisdictions is worthy of reflection. It is necessary for anyone who seeks to understand the reason for this asynchronicity to analyse the phenomena that prevent the smooth roll-out of a truly human rights-based juvenile justice system. One of the factors that has played a considerable role in inspiring juvenile justice policy is the media coverage of criminal incidents involving young people.[51] In analysing two groups of young people in the UK, who participated in their own unique subculture - namely, the Mods and Rockers - and were responsible for minor infractions of the law, Cohen gave life to the concept of "moral panics." These could be created through the media, politicians, and general public responding to youth crime in a manner that is disproportionate to the scale of offence committed thus bolstering an image of young people as being more sinister than they were.[52]

In a manner that complements Cohen's observation, Newburn argues that the idea of the 'criminal child' primarily stems from the fact that children and young people become the subject of 'moral concern' in the media.[53] He then goes on to state that as a result of this, the government has to appear to the public as if they are 'doing something about it.'[54] The idea of a media that

[51] Donna M. Bishop, 'Public Opinion and Juvenile Justice Policy: Myths and Misconceptions' (2006) 5(4) Criminology and Public Policy 653-664.
[52] Stanley Cohen, 'Mods and Rockers: The Inventory as Manufactured News' in Stanley Cohen and Jock Young (eds) *The Manufacture of News: Social Problems, Deviance and the Mass Media* (Constable 1976), 263-279.
[53] Tim Newburn, *Criminology* (Willan 2007).
[54] ibid.

is possessed by the motivation of stirring moral panics about young people, rather than sharing accurate stories about young people to the public is especially alarming considering the power that the media has over the policymaking process. Franklin stated that the perception of childhood's 'decline into disorder' is often at the core of 'mediatised politics'- this refers to the direct influence that media-promoted stories have on policy formulation, especially in youth justice policy.[55] Fittingly Franklin calls this 'legislation by tabloid.'[56] Critcher powerfully describes the role of the media as being one which 'mediates between policy and public agendas, constructs the public agenda and seeks to influence policy agendas.'[57] Bishop went so far as to state that policymakers often rely on the media as 'barometers of public opinion', overestimating public support for punishment and thus leading to policies being created on the basis of misperception.[58]

A striking example of how media sensationalism and populist responses can lead to more punitive changes to juvenile justice, is the Jamie Bulger case in the UK. This involved the abduction and murder of a two-year-old boy, by two adolescents who were aged 10 years old. The age of criminal responsibility in England went from being an issue that was rarely discussed to being the centre of attention in the media and political conversation after the killing of Jamie Bulger;

[55] Bob Franklin, 'Children's rights and media wrongs: changing representations of children and the developing rights agenda' in Bob Franklin (ed) *The New Handbook of Children's Rights: Comparative Policy and Practice* (Routledge 2001).
[56] ibid.
[57] Chas Critcher, 'Media, Government and Moral Panic: The Politics of Paedophilia in Britain 2000-1' (2002) 3(4) Journalism Studies 521-535.
[58] Bishop (n51).

the case actually led to the UK age of criminal responsibility being lowered to 10 years.[59] After the tragic incident, The Sun Newspaper spearheaded a petition signed by 300,000 people, stating that the 'Bulger killers must rot in jail for life.'[60] Hay set out to prove that in the manufacturing of a moral crisis surrounding the Jamie Bolder incident by the media, 'panic-worthy' narratives were drawn together under the themes of 'the threat posed by juvenile criminality' and the 'subversion of otherwise innocent youth.'[61] Indeed it was hyperbolic narratives like these that led to the age of criminal responsibility being lowered and it is disproportionate responses to youth offending that produces excessively punitive responses that do little to reduce, but at times serve to aggravate, youth crime.

What is Restorative Justice (RJ)?

As is the case for most broad philosophies, RJ cannot be pinned down to a unitary definition, and so Mulligan postulates an understanding of RJ that is in contrast to the 'paradigms that precede it', in particular, retributive punishment. [62] The latter views crime as 'an offender against State power' and seeks to punish offending by inflicting proportionate punishment upon the offender - it focuses heavily on the offence but 'largely ignores the victim.'[63] RJ programmes,

[59] Harriet Pierpoint, 'Why ten-year-old children should not be held criminally responsible' (*University of South Wales,* 18 November 2021), available at <https://www.southwales.ac.uk/news/news-2021/why-ten-year-old-children-should-not-be-held-criminally-responsible/> accessed 23 May 2023.
[60] Jo Aldridge and Simon Cross, 'Young People Today' (2008) 2(3) Journal of Children and Media 203-218.
[61] Colin Hay, 'Mobilisation through Interpellation: James Bulger, Juvenile Crime and the Construction of a Moral Panic' (1995) 4(2) 197-223.
[62] Steve Mulligan, 'From Retribution to Repair: Juvenile Justice and the History of Restorative Justice' (2009) 31(1) University of La Verne Law Review 139-149.
[63] ibid.

conversely, 'promote healing and restoration for the victim', whilst seeking 'repentance and responsibility' from the offender.[64] A feature that sets RJ apart from other modes of conflict resolution is its involvement of the broader community as an important stakeholder to an offence, and a key contributor to the creation of resolutions to the harm caused by the infraction.[65] Zehr, a leading RJ scholar, shares how RJ can lead to desirable outcomes such as 'reconciliation… as well as decreased recidivism.'[66] RJ is on record as having its roots in indigenous systems of dispute resolution.[67]

It is only in recent decades that RJ has received 'wide currency' internationally and has been absorbed into various criminal justice processes in jurisdictions the world-over.[68] RJ first emerged in criminal justice discourse in the 1970s and has grown to attract endorsement from regional and international bodies that are at the heart of major legal developments, such as the United Nations and the European Union.[69]

[64] Mulligan (n62).
[65] Howard Zehr, *The Little Book of Restorative Justice: Revised and Updated (Justice and Peacebuilding)* (2nd edn, Good Books 2015).
[66]ibid
[67] Hilary Cremin, Edward Sellman and Gillean McCluskey, 'Interdisciplinary Perspectives on Restorative Justice: Developing Insights for Education' (2012) 60(4) British Journal of Educational Studies 421-437.
[68] Howard Zehr, 'Doing Justice, Healing Trauma: The Role of Restorative Justice in Peacebuilding' (2008) 1(1) South Asian Journal of Peacebuilding 1-16.
[69] Marilyn Armour, 'Restorative Justice: Some Facts and History' (2012) 27(1) Tikkun 25-65.

In practice, RJ can take different forms. The most popular programmatic manifestations of RJ are victim-offender mediation, family group conferencing (FGC), and sentencing circles.[70] It is important to note that RJ programmes are usually entered into consensually, and the offender must first be willing to admit to their wrongdoing.[71] However due to the specific nature of RJ processes, they may not be welcomed by some victims or seen as appropriate for particular cases.[72] Victim-offender mediation allows victims to meet the offender who committed the offence against them in a 'safe and structured' setting for negotiation and problem solving, with the aim of holding the offender to account and collectively deciding how the offender will right the wrong they caused.[73] FGC usually involves the victim, the offender, supporting parties associated with the primary parties to the offence, and a trained facilitator.[74] Similar to FGC, sentencing circles involve the victim, offender, and other relevant stakeholders in the wider community.[75] In line with the previous two programmes, a consensual agreement is drafted at the end of the sentencing circle, that clearly outlines what the offender will do to make amends for the negative effect that their offence has had on the victim and the wider community.[76]

[70] Wilson, Olaghere and Kimbrell (n1).
[71] ibid.
[72] Kathleen Daly, 'The limits of restorative justice' in Dennis Sullivan and Larry Tifft (eds.) *Handbook of Restorative Justice: A Global Perspective* (Routledge, 2007), 134-145.
[73] 'Restorative Justice for Juveniles Literature Review: A Product of the Model Programs Guide' (*Office of Juvenile Justice and Delinquency Prevention*, 2020) available at <https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/restorative-justice-for-juveniles#3> accessed 23 May 2023.
[74] ibid.
[75] Office of Juvenile Justice and Delinquency Prevention (n73).
[76] ibid.

Restorative Justice and Juvenile Offenders:

RJ has grown in popularity across jurisdictions, but it has been especially popular amongst juvenile justice advocates.[77] It has also come to influence juvenile justice systems across the world; notable examples are the systems in Australia, Canada, Hong Kong, and Israel. In New Zealand, reforms were made that mandated programmes such as mediation and family group conferencing in 1989, and since then, youth offences have reduced by approximately two-thirds.[78] RJ programmes involving juvenile offenders have been strongly supported by evidence as being a mode of mediating conflict that produces beneficial outcomes for all parties. McGarrell writes that through a RJ programme that he analysed, the victims were willing to forgive offenders for their violation, and Daly found that young people involved in RJ programmes tend to view the process as 'fair.'[79]

Recidivism: What Does The Literature Say?

Rodriguez spearheaded a study that used juvenile court data from an urban, metropolitan area in the USA, and it found that young people who participated in a RJ programme were 'less likely to recidivate than juveniles in a comparison group.'[80] Bradshaw and Rosenborough conducted the first meta-analysis that examined the effectiveness of victim-offender mediation and family group conferencing in stunting recidivism rates. Their findings support the utility of both of these RJ

[77] Mulligan (n62).
[78] ibid.
[79] Kathleen Daly, 'Mind the Gap: Restorative Justice in Theory and Practice' in Andrew von Hirsch, Julian V. Roberts, Anthony E. Bottoms, Kent Roach and Mara Schiff (eds) Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms? (Hart Publishing 2003).
[80] Nancy Rodriguez, 'Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism' (2007) 53(3) Crime and Delinquency 355-379.

programmes as a means to reducing recidivism and the authors believe that their study contributed 'to the empirical base of the effectiveness of RJ dialogue programmes in reducing juvenile recidivism and supporting the use of restorative justice programmes as empirically supported interventions for juvenile offences.'[81] Rodriguez conducted a study in 2005, that set out to compare recidivism rates between juveniles who participated in a RJ programme and who did not, and he found that there was lower recidivism in the group of young people who underwent a RJ programme.[82] Umbreit *et al.* looked at a specific RJ programme for the study they conducted - the 'Tennessee Victim Offender Mediation' programme - and found that young people who participated in it were significantly less likely to reoffend than juveniles in a comparison group.[83] Luke and Lind appraised a programme in Wales that was based on RJ procedure and found that it significantly reduced recidivism.[84] An early meta-analysis led by Bonta *et al.* showed an 8% reduction in the reoffending rate in the pool of young people who partook in programmes that had 'restorative features', as compared to the young people who did not.[85] More recently in 2017, Bouffard *et al.* marshalled a study on RJ and juvenile offenders that supported the 'effectiveness' of RJ programmes relative to traditional juvenile court processing and suggests that each degree of RJ intervention, even those that require minimal intervention,

[81] William Bradshaw and David J. Roseborough, 'Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism' (2005) 69(2) Federal Probation Journal 15.
[82] Nancy Rodriguez, 'Restorative Justice, Communities, and Delinquency: Whom Do We Reintegrate?' (2005) 4(1) Criminology & Public Policy 103-130.
[83] Mark S. Umbreit, Robert B. Coates, and Betty Vos, 'The Impact of Victim-Offender Mediation: Two Decades of Research' (2001) Federal Probation 29-35.
[84] Garth Luke and Bronwyn Lind, 'Reducing Juvenile Crime: Conferencing versus Court' (2002) 69 Crime and Justice Bulletin.
[85] James Bonta, Suzanne Wallace-Capretta and Jennifer Rooney, *Restorative Justice: An Evaluation of the Restorative Resolutions Project* (Report No. 1998-05, Solicitor General of Canada).

reduces recidivism risk compared to juvenile court processing.[86] This interesting finding allows for juvenile justice operators to be innovative in how they allocate young people to various RJ procedures; more resource-heavy ones can be given to serious offenders, whilst those that require less investment can be ascribed to petty offenders. Bergseth and Bouffard conducted a multivariate analysis which suggested that juveniles who participated in RJ programmes fared better than those who were referred to juvenile court on each metric measured in the study, including 'time to reoffense.'[87] The evidence presented clearly stands in strong support of the ability of RJ to curb recidivism rates amongst juvenile offenders.

An important caveat raised in the literature is the question of whether RJ was suitable for offenders who commit serious crimes. Levrant points out that RJ programmes are often seen as being inappropriate for particular kinds of offences, and that it should be reserved for less serious crimes.[88] There is some conflicting evidence on the efficacy of RJ in the case of more serious offending - this is a point that needs to be considered in any attempt to roll out RJ programmes for young people.

Limitations and Challenges

As Wilson et al. point out in their 2018 work, although evidence strongly suggests that RJ can reduce recidivism, the methodological weaknesses in the literature prevents one from coming to

[86] Jeff Bouffard, Maisha Cooper, Kathleen Bergseth, 'The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders' (2016) 15(4) Youth Violence and Juvenile Justice 465-480.
[87] Kathleen J. Bouffard and Jeffrey A. Bouffard, 'The long-term impact of Restorative Justice Programming for Juvenile Offenders' (2007) 35(4) Journal of Criminal Justice 433-451.
[88] Sharon Levant, Francis T. Cullen, Betsy Fulton and John F. Wozniak, 'Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?' in Declan Roche (ed) *Restorative Justice: Ideals and Realities* (Routledge 2004).

a strongly positive conclusion.[89] One of the methodological shortcomings identified by Bergseth and Bouffard was the use of 'biased' samples in RJ research; in that juvenile offenders who took the RJ programme who did not have an offending history, were compared to a sample who had previously committed offences.[90] Naturally, this produces positive results in favour of RJ, but results that are lacking in credibility. Another issue pointed out by Bergseth and Bouffard is self-selection bias, which tends to arise as a result of the voluntary nature of RJ programmes - due to the fact that 'appropriate' offenders are chosen for programmes, the juveniles involved might be the most 'amenable to treatment.'[91] The various ways in which 'recidivism' is defined in the literature also presents a challenge; in some evaluations it took on a broad definition and in others a more narrow one. This limits the achievement of generalisability within the body of existing literature and makes it difficult to issue any definitive claims in relation to RJ and its relationship to recidivism rates.

Recommendations

There is a lot to be said about the inadequacies of the juvenile justice system as compared to the standard set internationally vis-a-vis international children's rights and best practice with relation to juvenile justice. A lot can also be said about the bountiful evidence that attests to the efficacy of RJ as a means of effecting juvenile justice in a way that is rooted in the ethos of the CRC and

[89] Wilson, Olaghere and Kimbrell (n1).
[90] Bergseth, Cooper and Bouffard (n86).
[91] ibid.

that has a positive effect in reducing rates of recidivism amongst young offenders - which is one of the primary purposes of any juvenile justice system. However, it is important not to romanticise what RJ has to offer in this regard, lest we overlook significant practical factors and apply RJ programmes that do not unleash the full potential of RJ. Instead, it is important to address the literature in its totality to fully comprehend RJ programmes for their benefits and their flaws and aim to implement programmes in a way that is empirically sound and might best assist those to which it is best suited.

In applying RJ in a way that captures all that it has to offer, there is scope to consider unique features of youth crime that the criminal justice system may not have the ability to capture. Levitt and Lochner write about how instability in the home is a crucial determinant of youth crime.[92] A holistic application of RJ may be able to account for this factor and allow for the achievement of empathy between participants of RJ programmes (in contrast with the cold, detached nature of the justice process). Steiner and Cauffman claim that evidence suggests a high percentage of juvenile offenders suffer from treatable psychopathy, but few child psychologists are involved in their treatment.[93] Although easier to state than practically actualise, a RJ programme could allow for an offending youth to be referred to a mental health professional - as an agreement at the end of a RJ procedure, for example.

[92] Steven Levitt and Lance Lochner, 'The Determinants of Juvenile Crime' in Jonathan Gruber (ed) *Risky Behavior Among Youths: An Economic Analysis* (University of Chicago Press 2001).

[93] Hans Steiner and Elizabeth Cauffman, 'Juvenile Justice, Delinquency, and Psychiatry' (1998) 7(3) Child and Adolescent Psychiatric Clinics of North America 653-672.

Webster highlights that there is an over-representation of minority and migrant young people in poverty, and exclusion from education and employment, which explains their likelihood of being involved with the juvenile justice system in Europe.[94] If it is the case that, as the evidence suggests, youth coming into contact with the criminal justice system can lead to them continuing to offend into their adulthood, and migrant youth might be more likely to find themselves before the juvenile justice system due to certain structural issues that may be out of their control - there is a serious question of 'racial justice' that is worthy of discussion here. A fairer alternative might be the involvement of young migrants in an RJ process that is actually proven to do more to reduce recidivism, than a criminal justice system that might play some role in implicitly encouraging it.

These are all issues that exist at the margins of the criminal justice system due to the 'shortness of its gaze', which RJ may well be able to confront given appropriate preparation and funding.

Conclusion

> "I would there were no age between ten and three-and-twenty, or that youth would sleep out the rest; for there is nothing in the between but getting wenches with child, wronging the ancientry, stealing, fighting."

[94] Colin Webster "Race', Ethnicity, Social Class, and Juvenile Justice in Europe' in Barry Goldstein (ed) *Juvenile Justice in Europe: Past, Present and Future* (Routledge 2018).

This is a quote from English literary extraordinaire, William Shakespeare.[95] In ways it speaks to what criminologists call the 'age-crime curve' (the fact that evidence has shown the propensity for youth crime to rise in teenage years and steadily decline afterwards),[96] but it also reveals the inherent vulnerability of young people as human beings finding their way in the world. In theory, juvenile justice accounts for this idiosyncrasy, only prevalent amongst society's young people. However, practically, it is too often neglected. This neglect has not only been caused by a failure to put the stated law into practice, but by the accommodation of perverse narratives that distort the true image of young people; an image more in line with what was stated by Shakespeare centuries ago, than what could be found in contemporary British tabloids after the tragic killing of Jamie Bulger. RJ has been promulgated by many of the bodies that have theoretically set the standard with regards to youth justice and has been proven to have positive effects in reducing recidivism- which is what juvenile justice is designed to do. This warrants a major shift in orientation amongst jurisdictions that are failing to fulfil the mandate placed upon them by the CRC and other documents that iterate children's rights; from a strategy of undue punitiveness, to one that embraces more restorative means of carrying out youth justice. Although there are caveats in the literature on the effectiveness of RJ in decreasing recidivist behaviour with regards young people, it is clear that the philosophical disposition of far too many jurisdictions is out of

[95] William Shakespeare, *The Winter's Tale* (1623), Act III, Scene III; see also Hartley Dean, 'Underclassed or Undermined? Young People and Social Citizenship' in Robert Macdonald (ed) *Youth, The 'Underclass' and Social Exclusion'* (Routledge 1997).

[96] Rolf Loeber, Barbara Menting, Donald R. Lynam, Terri E. Moffitt, Magda Stouthamer-Loeber, Rebecca Stallings, David P. Farrington and Dustin Pardini, 'Findings from the Pittsburgh Youth Study: Cognitive Impulsivity and Intelligence as Predictors of the Age-Crime Curve' (2012) 51(11) Journal of the American Academy of Child and Adolescent Psychiatry 1136-1149.

sync with what has been called for by international standards that aim to best serve the interests of the child - and a greater step towards RJ might be what is needed to synchronise a field that should have been put in harmony a long, long time ago.

Should Platforms be Confined to Liability for Hate Speech? – a Comparative Analysis of the European Court of Human Rights and the United States

Irene Park, BCL & Business

Introduction

The issue of hate speech on social media has become a growing concern in recent years. Elon Musk, who defines himself as a "freedom of speech absolutist," has been a controversial figure in the debate on this issue, with his platform of choice Twitter, now known as X, seeing an unprecedented rise in hate speech.[1] The dissemination of hate speech and speech inciting violence can occur rapidly and sometimes remain persistently available online, as observed by the European Court of Human Rights in the case of *Delfi v Estonia*.[2] As Murray argues, while online platforms have been struggling to keep up with the overwhelming production of obscene and indecent material, 'the failure of laws to adequately cross borders have exasperated the issue.'[3]

This raises the question about how to effectively manage the dissemination of hate speech online, and how platform regulation can play a role in this. In Europe, hate speech regulation is 'a matter

[1] Sheera Frenkel and Kate Cogner, 'Hate Speech's Rise on Twitter under Elon Musk is Unprecedented, Researchers Find' *The New York Times* (2 December 2022), available at <https://www.nytimes.com/2022/12/02/technology/twitter-hate-speech.html>, accessed 17 September 2023.
[2] *Delfi AS v Estonia* App No 646 64669/09 (ECHR, 16 June 2015).
[3] Andrew Murray, *Information Technology Law: The Law and Society* (4th edn, Oxford University Press 2019) 16.

of recognising the dignity of all members of society and thereby upholding their citizenry.'[4] Prohibition of hate speech also conveys the protection of one's reputation and promotes a sense of 'inclusivity, diversity and equality' in the society.[5] It is understood that the function of the State is to protect its citizens from 'hate speech [which] is designed to undermine the common humanity of a vulnerable minority.'[6] In contrast, the United States places a high value on freedom of speech, grounded in the First Amendment to the United States Constitution.[7] This article aims to analyse the different stances taken by Europe, specifically the European Court of Human Rights (ECtHR), and the United States (US) on the regulation of hate speech and platform liability. It will also examine the different forms of platform regulation and available remedies.

Part I: Freedom of Speech and Hate Speech in the ECtHR and the US:

The ECtHR Approach

The European Convention on Human Rights (ECHR) provides for protection of freedom of expression under Article 10.[8] It 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

[4] Uta Kohl 'Platform regulation of hate speech – a transatlantic speech compromise?' (2022) 14(1) Journal of Media Law, 25-49, 29.
[5] ibid, 30.
[6] ibid.
[7] US Constitutional Amendment I, clause 1.
[8] European Convention on Human Rights, Article 10.

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 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.

In addition, Article 17 provides that

> Nothing in this convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for the Convention.[9]

McGonagle states that the ECtHR has 'interpreted Article 10 in a manner that recognises and values the role of the media in a democratic society,' although much depends on the circumstances of each case.[10] Platforms provide a space to express views and opinions through 'comments, analysis or criticism.'[11] The importance of free media is to protect the freedom of expression by acting as a 'safeguard against abuse of power by ensuring accountability.'[12] It keeps public opinion

[9] European Convention on Human Rights, Article 17.
[10] Marie McGonagle, *Media Law* (2nd edn, Round Hall 2003) 31.
[11] ibid, 4.
[12] ibid, 7.

informed and provides a forum for open debate. In the case of *Jersild v Denmark*, the ECtHR highlighted the importance of the press acting as a 'public watchdog' and its significant role in a democratic society.[13] In the case of *Open Door Counselling Ltd v Ireland*, the ECtHR found in its application of Article 10 that freedom of expression is the principle and its limitations are the exception: the application of such limitations should be constrained to requirements as prescribed by law, have a legitimate aim, be proportionate to that aim, and be necessary in a democratic society.[14] Additionally, in the case of *Livingstone v Adjudication Panel for England*, Livingstone described a journalist as a Nazi concentration camp guard. The English Court in this case held that his speech was protected under Article 10 as the scope of free speech included abuse speech.[15] In *Magyar v Hungary*, the ECtHR found that the Hungarian courts unduly restricted the freedom of expression of a news portal by finding it liable for posting of a hyperlink leading to defamatory content, thus violating Article 10 of the ECHR.[16]

Whilst protecting some offensive speech under Article 10, on the other hand, the ECtHR has ruled against the protection of hate speech on grounds of public interest in upholding the democratic nature of the State. In *Szima v Hungary*, the Court held that there was no violation of Article 10 when a leader of a police trade union was dismissed for posting highly offensive material on the union website. The dismissal was necessary in a democratic society for the stability of the State, to uphold public confidence in the police.[17] The ECtHR in the case of *Handyside v UK* held that Article

[13] *Jersild v Denmark* App no 15890/89 (ECHR, 23 September 1994).
[14] *Open Door Counselling & Ors v Ireland* App no 14235 (ECHR, 29 October 1992).
[15] Livingstone v Adjudication Panel for England [2006] EWHC 2533, [2006] HRLR 45.
[16] *Magyar Jeti Zrt v Hungary* App no 11257/16 (ECHR, 4 December 2018).
[17] *Szima v Hungary* App no 29723/11 (ECHR, 9 October 2012).

10.2 is applicable 'to those that offend, shock or disturb the State or any sector of the population.'[18] Additionally, as stated by Rawls, Article 17 which provides for the exception to freedom of speech is justified by the rationale that 'there should be no freedom for the enemies of freedom.'[19] The ECtHR in *Lawless v Ireland (No 3)* held that the purpose of Art.17 is to render it impossible for anyone who seeks to deny fundamental freedoms to others to rely on Art.10 to exercise that freedom for themselves.'[20] Individuals who are the target of hate speech are entitled to enjoy their "democratic rights and privileges".[21] They are "adversely affected by hate speech as is their right to live peacefully and with dignity".[22] All citizens have the right to "participate in the democratic process free from harassment".[23] Butler and Turenne argues that "a truly non-discriminatory, tolerant and respectful Internet" exists only in a democratic society.[24] Regulation of hate speech is important as "the self-realisation of the individual and democratic self-government would be undermined if hate speech in the public domain were to be left uncensored".[25]

The US Approach

There is conflict between the ECtHR and the US in their approach to hate speech. Europe, although it protects merely offensive speech, prohibits hate speech and has been moving towards

[18] *Handyside v UK* App no 5493/72 (ECHR, 7 December 1976).
[19] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 218.
[20] *Lawless v Ireland (No 3)* App no 332/57 (ECHR, 1 July 1961).
[21] Asaf Fisher, 'Regulating Hate Speech' (2006) 8 University of Technology Sydney Law Review 21-48, 45.
[22] ibid.
[23] ibid, 46.
[24] Oliver Butler and Sophie Turenne, 'The regulation of hate speech online and its enforcement – a comparative outlook' (2022) 14(1) Journal of Media Law 20 -24, 23.
[25] Kohl (n4), 26.

the extension of the notion of hate speech from racial hate speech to encompassing religious, sexual orientation, gender and other hate speech.[26] On the other hand, the US protects hate speech apart from the 'most immediately harmful speech.'[27] This conflict is evident in the case of *LICRA et UEJF v Yahoo! Inc and Yahoo! France*.[28] In this case, the French Court prohibited the sale of Nazi items to French users. However, when this case was brought to the US, the Court at the first hearing overruled the French Court's decision on the basis that it was an unconstitutional restraint on the freedom of speech rights.[29] The US opposes any limitations on freedom of speech as it takes a strong stance towards the First Amendment which states:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[30]

This difference between the ECtHR and the US approach has been highlighted by Judge Yudkivska in the case of *Veideland v Sweden* as quoted "for many well-known political and historical reasons today's Europe cannot afford the luxury of such a vision of the paramount value of free speech".[31] The US Supreme Court ruled in *Reno v ACLU* that the First Amendment applies to internet communications.[32] This causes issues as the US government refuses to enter into any

[26] Murray (n3), 120.
[27] ibid.
[28] Ligue contre le racisme et l'antisémitisme (LICRA) and UEJF v Yahoo! Inc. and Yahoo! France [2000] EMLR 69, paragraph 15 (Tribunal de Grande Instance de Paris Nov 22, 2000).
[29] Yahoo! Inc. v La Ligue Contre le Racisme et l'Antisémitisme, 433 F3d 1199 (9th Cir 2006).
[30] US Constitution Amendment I, clause 1.
[31] *Veideland & Ors v Sweden* App no 1813/07 (ECHR, 9 February 2012).
[32] Reno v American Civil Liberties Union 521 US 844 (1997).

international treaty or agreement which conflicts with its duty to uphold the US Constitution.[33] This provides that jurisdictional issues relating to cybercrime and internet hate speech will continue.

The US Constitution protects hate speech and will only criminalise it where the violence is imminent.[34] Legislation regulating hate speech has been struck down twice by the US Supreme Court in the cases of *RAV v City of St Paul* and *Virginia v Black*.[35] The 'slippery slope' argument against regulation of hate speech is that "admitting one exception will lead to another, and yet another, until those in power are free to stifle opposition in the name of protecting democratic ideals".[36] The Court in *Whitney v California* stated that the First Amendment guards against "the occasional tyrannies of governing majorities".[37] Thus, allowing for an exception of freedom of speech sets a precedent and may lead to the possibility of misuse and abuse for the authority to further regulate speech unnecessarily. The ideology is that erroneous and offensive speech is inevitable and must be protected in order to promote freedom of speech.[38]

On the other hand, it is argued that the main purpose of hate speech is 'to convey a message of inferiority.'[39] Fisher argues that '[i]t is a form of speech that is of marginal value and significant harm' and 'the case for regulation is compelling.'[40] As per O'Leary, 'where balancing of qualified

[33] Murray (n3), 121.
[34] Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (2nd edn, Bloomsbury Professional 2019) 80.
[35] *RAV v City of St Paul* 505 US 377 (1992) and *Virginia v Black* 538 US 343 (2003).
[36] Fisher (n21), 23.
[37] *Whitney v California* 274 US 357 (1927).
[38] Fisher (n21), 23.
[39] ibid, 47.
[40] ibid.

rights and legitimate public interests is at issue, the drawing of red lines and creation of absolutist principles may be problematic.'[41] Tsesis states that

> [L]ike fighting words, hate speech, plays 'no essential part of any exposition of ideas, and [is] of such slight social value as to a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality. Purveyors of hate speech aim at spreading degrading falsities and proposing intolerant solutions which, like defamation, can be limited without violating the First Amendment.[42]

Hate speech goes beyond offence and causes injury. As Fisher clearly states, the effect of hate speech is 'to intimidate its victim, to silence him or her.'[43] Hate speech sets the grounds for treating members of the victimised group unfairly and offers justification for action.[44]

In the United States, the Supreme Court has considerably restricted the government's ability to prevent the distribution of racist and provocative materials. While the Court has upheld legislation that increase punishments for crimes motivated by hatred, it has ruled that regulations which punish the use of hate speech against historically oppressed minority groups are unlawful.[45] This has allowed for individuals to promote 'persecution, oppression, and holy war, so long as they do not explicitly call for immediate violent actions.'[46] The 'three pivotal strands of thought' affecting First Amendment jurisprudence are: *Brandenburg v Ohio*'s 'imminent threat of harm' standard, the

[41] Síofra O'Leary, 'Balancing Rights in a Digital Age' (2018) Irish Jurist 59-92, 92.
[42] Alexander Tsesis, 'Hate in Cyberspace: Regulating Hate Speech on the Internet" (2001) 38 San Diego Law Review 817-874, 848.
[43] Fisher (n21), 29.
[44] ibid.
[45] Tsesis (n42), 838.
[46] ibid.

'marketplace of ideas' created by Justice Holmes' dissent in *Abrams v United States*, and *RAV v St Paul*'s blanket prohibition against content based regulations.[47]

Justice Holmes in *Abrams v United States* made a dissenting judgment that when individual rights are not at stake, only the imminent threat of impending evil or the desire to bring it about justifies the Congress limiting the freedom of speech.[48] 'Fighting words' are statements which provoke violence to ordinary individuals and are not protected by the Constitution.[49] This was affirmed in *Brandenburg v Ohio*.[50] As per Tsesis,

> [T]he Court's determination that anti-incitement laws are constitutional only when their scope is limited to preventing immediate unlawful actions is based on the false assumption that the advocacy of future violence cannot have devastating effects.[51]

As seen historically from the Nazi Holocaust and American slavery, prolonged incitements and propaganda of crime and hate create catastrophic outcomes. The outlook of the imminent threat of harm test is that hazardous, racist incitement is always akin to fist fights in which one side verbally provokes another into an impromptu conflict.[52] This is a narrow view of the full implications and potential risks of hate speech.

[47] ibid, 839.
[48] *Abrams v United States* 250 US 616 (1919).
[49] Tsesis (n42), 839.
[50] *Brandenburg v Ohio* 395 US 444 (1969).
[51] Tsesis (n42), 840.
[52] ibid, 842.

Another doctrine of speech is the 'marketplace of ideas' by Justice Holmes in *Abrams v United States* which encompasses that the truth is the principle which is respected by the strongest majority of the community.[53] As Tsesis suggests,

> [t]he marketplace of ideas is, then, a forum for herd mentality to direct the flow of law and to force others to follow it, regardless of whether the product is conductive to overall social well-being or only increases the happiness of those who dominate.[54]

Therefore, under this ideology, law is governed and enforced by those who are in power, and the legislations imposed will only reflect the interests of the most powerful, which may potentially include policies that sacrifice or endanger minority groups. This utilitarian ideology is in total disregard of the minorities. Tsesis states that 'Holmes' view on the subjugation and elimination of the weak might lead to at least authoritarianism, and at worst totalitarianism, and the denial of basic rights to minorities.'[55] This view manifests the risk to democracy that an absolutist interpretation of the First Amendment may bring about. Holmes' view does not reflect the broad scope of democracy: 'fairness, justice, and equal representation to all, regardless of whether they are powerful.'[56] Hate speech harms democracy as it advocates that some groups in society should be denied fundamental rights.

[53] *Abrams v United States* 250 US 616 (1919).
[54] Tsesis (n42), 844.
[55] ibid, 846.
[56] ibid, 846.

The Supreme Court in *RAV v St Paul* laid a blanket prohibition against legislation targeting hate speech as it was 'content discrimination.'[57] In order to protect the human rights of vulnerable groups, a blanket prohibition against fighting words could be enacted, but it could not solely target hate speech. Tsesis opinionated that the majority's approach in *RAV v St Paul* allows individuals to express racist views which are worthless and underserving of constitutional protection, as well as concerning the negative impact this precedent would have in interpreting the First Amendment in future case law.[58] Content-based limitations have been found constitutional for the following terms of speech: operating adult theatres, threatening the President, electioneering within 100 feet of a polling place on election day, using trade names, burning draft cards, and distributing obscene materials.[59] Therefore, the majority in *RAV v St Paul* disregarded the precedents permitting some content-based restrictions on speech. Tsesis states: '[t]he ideal of inviolable fundamental rights should not be scarified at the altar of an absolutist reading of the First Amendment.'[60]

Analysis

As Fisher argues, 'there should be a strong presumption against the constitutionality of a statute that curtails freedom of political communication' as the law should guard against the 'impulse of the legislature to proscribe … speech that is subversive, offensive and irrational.'[61] Nevertheless,

[57] *RAV v City of St Paul* 505 US 377 (1992).
[58] Tsesis (n42), 850.
[59] ibid, 852.
[60] ibid, 853.
[61] Fisher (n21), 47.

freedom of speech is not absolute and may be limited in some circumstances. As Fisher describes it:

> Fundamentally, the free speech/hate speech dichotomy … assumes that regulation of hate speech is inconsistent with the preservation of freedom of speech. However, once it is accepted that free speech is not absolute and that it is preferable to conceptualise speech as existing on a continuum, the dichotomy collapses and the conceptual barriers against the regulation of hate speech do not appear as insurmountable.[62]

Although the First Amendment does not prohibit 'aggressive displays of disrespect' which encompasses hate speech, it nevertheless permits such speech from being removed by 'private actors' such as intermediaries.[63] The First Amendment is primarily concerned with protecting speech against government interventions, rather than private bodies. As per Kohl:

> if a social media company removes hate speech of its own volition, … this is entirely within its rights, and in terms of public policy, often desirable. Twitter was applauded when it permanently suspended Donald Trump's account … If, however, that removal had been demanded by government, it would have been considered an intolerable threat to the freedom of citizens and would have been struck down as unconstitutional.[64]

The scope of self-regulation is dealt with further on in this article.

[62] ibid, 32.
[63] Kohl (n4), 33.
[64] ibid, 32.

There is difficulty reconciling the restriction of hate speech with freedom of speech.[65] "The legislature must be sensitive to the tension that exists between a speech that is expressed in a political context that is tinged with racist invective and may be interpreted as offensive, and a speech that is, by its nature, injurious".[66] Although the legislature has the authority to regulate hate speech, it must ensure that any such laws are written in such way that is narrow enough to preserve freedom of expression.[67] US platforms that cater to European users can be expected to adhere to European obligations to control online content in respect to their localised services.[68] This is because each State, as permitted by customary international law on jurisdiction, applies its laws to activities that affect its territory regardless of whether they originate from outside its jurisdiction.[69] Despite the technological challenges brought on by the nature of digital media, the question of whether the State can or should take further action to regulate hate speech can only be answered in the context of the institutional values that directly or indirectly shape the law in various jurisdictions.[70]

In analysing the different stances taken by the ECtHR and the US, it is evident that the European principle of prohibiting hate speech to protect rights of minorities, and the US principle of protecting freedom of speech, stem from the same concern of protecting democracy. One side argues that undermining rights of minorities and allowing for the threat against their rights hinders

[65] Fisher, (n21), 48.
[66] ibid.
[67] ibid.
[68] Kohl (n4), 28.
[69] ibid.
[70] Butler and Turenne (n24), 23.

the overarching goal of upholding fairness and equality in a democratic society. On the other hand, it is argued that it is essential to have safeguards against government intervention of censorship in expression of one's opinion.

In the European perspective, strict adherence to free speech that leaves no restriction demonstrates endorsement of communications that threaten or disturb the democratic State or any part of the overall population. If hate speech in the public sphere were to remain uncensored, it would undermine inclusiveness and equality encompassed in democratic sovereignty. It is the duty of the State to protect minority communities and ensure their status as equal citizens. This means that any threats to their rights, such as hate speech, must be removed and it is the government's responsibility to do so.

The ideal of fortitude, self-sufficiency and self-reliance, and implicitly, mistrust of the government which developed through the US sociological background, is firmly ingrained in the First Amendment. The US speech regime removes the State from the equation altogether due to the doubt over the State's ability to accurately identify what is good, bad, truthful and untrue. Thus, its fundamental interest is preventing governmental interference, especially when that interference involves selecting between acceptable and unacceptable forms of expression.

In other words, both European and US speech jurisprudence use concepts like diversity, multiculturalism, citizenship, and human dignity to justify their respective approaches to regulate speech. Yet, the divergence in their methods leads to either support for or resistance to hate speech regulation, reflecting the dissimilar priorities of the two jurisdictions. Europe is concerned with

the effects of unfettered hate speech, while the US is concerned with the effects of government content intervention. Ultimately, Europe fears the impact that a particular content potentially has on society, whereas the US fears the impact of the government obtaining authority to control such content.

Part II: Regulation of Platforms and Appropriate Sanctions

Forms of Platform Regulation

Hate speech predates digitalisation, but the internet and social media undeniably facilitated expression of hatred towards minority groups to a much greater degree, highlighting the need for regulation of hate speech on the internet.[71] The issue with platform liability arises because online content can be transmitted around the globe, which poses challenges in determining the appropriate form of regulation. Critiques have addressed the intransigence between jurisdictions in their approaches to the regulation of hate speech.[72] There are several issues with the regulation of hate speech online in the context of personal jurisdiction. Nevertheless, cyberspace is not a jurisdiction on its own nor a space that is separate to the 'real world' which is confined by States and jurisdictions. As Tsesis states, "[l]ike other electromagnetic occurrences such as telephone conversations, illegal transactions fall within the purview of states. Much like governments are empowered to regulate activities occurring within their borders, so too they can regulate this new social space known as cyberspace".[73] The Parliament can grant federal courts power to hear cases

[71] Pauline Walley and Cliona Kimber, *Cyber Law and Employment* (Round Hall 2016) 282.
[72] Kohl (n4).
[73] Tsesis (n42), 838.

if messages transcend state lines.[74] There are various viewpoints on how to regulate hate speech platforms because it is a complicated problem. Nonetheless, a few general strategies that have been proposed are as follows:

Self-regulation enables an industry to establish and monitor its own standards of conduct. In most European countries, platform regulation "take form of either self-regulation or statutory regulation. … The UK has a self-regulatory system called the Press Complaints Commission which has been criticised for its ineffectiveness and lenience towards journalists and editors, proving lack of 'outside scrutiny'".[75] In the US, Citron and other writers have "called upon internet intermediaries to enforce their own very effective user terms and conditions, and to demonstrate a greater degree of corporate social responsibility".[76] The ECtHR has also made it clear that "internet service providers have obligations themselves if the material hosted is so extreme as to derail the fundamental rights of others".[77] Duties and responsibilities of platforms for user-generated comments are assumed in Article 10(2) ECHR as highlighted in the *Delfi v Estonia* case.[78] Nevertheless, it is argued that private actors cannot be relied upon to apply the law impartially and objectively while putting their own interests aside:

> [t]he rule of law, or equality before the law, is constituted by laws being adjudicated by the judiciary; it is the function of independent and transparent courts to be the final and

[74] ibid, 835.
[75] Carolan and O'Neill (n34), 547.
[76] Walley and Kimber (n71), 291.
[77] ibid, 292.
[78] *Delfi AS v Estonia* App No 646 64669/09 (ECHR, 16 June 2015).

> authoritative adjudicator on whether a law has been broken and whether sanctions should be applied.[79]

Another option is to introduce criminal statutes penalising the dissemination of hate speech on the internet. As per Tsesis, "it is logical to think laws prohibiting discrimination will decrease the incidence of prejudice".[80] In response to the absolutist interpretation of the First Amendment, a representative democracy places higher value on defending human rights, which calls for uniform federal laws to guarantee them. Law can help eradicate racism and make democracy safer from unethical groups attempting to bring it down.[81] Tsesis further argues that:

> an overactive zeal for caution against infringing upon First Amendment rights should not deter legislators from taking steps to prevent the downfall of liberal democracy. Society's interest in stability and diversity outweighs individual and group interests in expressions intended, eventually, to destroy constitutional institutions.[82]

Lastly, the imposition of transnational treaties and compromise between jurisdictions is a key strategy for platform regulation. The case for establishing transnational treaties to govern hate speech online is grounded on the premise that the internet is a global and interconnected space, and that hate speech can have negative repercussions that extend beyond national borders. Given the fragmented and ever-evolving nature of online platforms, international coordination and

[79] Kohl (n4), 38.
[80] Tsesis n(42), 869.
[81] ibid.
[82] ibid, 870.

cooperation are essential to successfully combat hate speech online. Transnational treaties and agreements can help nations cooperate to create norms for what constitutes hate speech as well as enforcement and accountability systems. This can help to guarantee that hate speech is not simply shifted to other jurisdictions with less rigorous legislation, and that those who engage in hate speech can be held liable regardless of their locations. Transnational agreements can also make it easier for governments, civil society groups, and technology corporations to communicate and work together, all of which are crucial in combatting online hate speech. Ultimately, the case for enacting international agreements to control online hate speech is based on the understanding that such speech is a worldwide issue that calls for a concerted, comprehensive response. While there are undoubtedly difficulties and complications with this strategy, it may be the best approach in terms of safeguarding human rights, encouraging tolerance and understanding, and ensuring that the internet remains a safe and inclusive environment for all users.

On this note, courts have the power to decide criminal cases only if they have personal jurisdiction over the defendants.[83] The defendant must often be present in the State or be extradited in order for the court to have jurisdiction over an online hate speech case. According to Tsesis, "[t]he United States can try citizens or noncitizens for actions taken outside this country that have consequences within it. It is a well-established principle that a state has the jurisdiction to punish acts taken outside the jurisdiction but intended to affect or affecting someone or something within

[83] ibid, 871.

it".[84] Therefore, proceedings should take place in the jurisdiction where the hate speech was disseminated online or where the hate speech caused a negative impact. Tsesis argues that "[e]ven if the United States chooses not to adopt that statute, it should nevertheless honour extradition requests from other countries".[85] Regarding the possible contribution of international treaties on this issue, while such treaties might offer certain benefits, they also face substantial practical difficulties in terms of implementation and enforcement. Therefore, rather than focusing on developing precise rules or regulations, it may be more effective to concentrate on general principles and guidelines.

Due to the significant role that platforms play as intermediaries in the dissemination of online hate speech, they should be subject to regulations on hate speech. The growth of social media has made it easy for hate speech to quickly reach a large audience, which could have detrimental effects. Moreover, platforms have the power to curate and manage the content that is shared on them, which gives them some degree of control over what is published and distributed. Platforms must have a duty to examine if they are facilitating or intensifying hate speech and to take action to remove it when it does. A robust regulatory framework can encourage platforms to take this obligation seriously and to put policies in place to prohibit and remove hate speech. It can also hold platforms accountable when they fail to uphold the standards, and ensure that the standards are consistent across platforms and jurisdictions. Through such analysis, it appears that regulating

[84] ibid, 872.
[85] ibid.

platforms is necessary to reduce the harms brought on by online hate speech, while respecting and balancing the need to safeguard freedom of expression. Ultimately, a thorough and cooperative strategy including many stakeholders would be required to properly police hate speech platforms. Rather than concluding to one sole approach to combat online hate speech, a collaborative approach including legal frameworks, self-regulation, technology advancements such as commercial filtering tools, and education to raise awareness could all be used to achieve this. Regulatory frameworks can encourage accountability and transparency, and education and campaigns can promote responsible online behaviour.

Appropriate Sanctions

Lastly, regarding the issue of the appropriate sanctions for hate speech online, it may be contended that online hate speech should be treated as a civil matter, with people or organisations who have been injured by it filing lawsuits against the offending speaker or platform. This strategy reduces the possibility of governmental overreach or censorship while protecting the rights and interests of individuals who have been directly harmed by hate speech. On the other hand, it may be argued that online hate speech should be considered a crime, with the state pursuing offenders and enforcing severe penalties as a deterrence. As per Ashraf:

> [A]s far as criminalisation of speech is concerned, it remains a contentious issue, with the legal scholars divided as to what kind of speech should ideally be criminalised; whether all hate speech be made punishable or only a certain type or whether it should be dealt under civil law. However, it is indisputable that any act which is capable of inciting violence is a

> serious case and calls for a stringent action to avoid further harm. Therefore, criminal sanctions may be regarded as most suitable to deal with such cases.[86]

The application of criminal law to the regulation of online communication may pose challenges, as there are potential concerns about protecting freedom of speech and the risk of selective enforcement. Enforcing criminal laws across borders can also be difficult due to the cross-jurisdictional nature of online speech. Nevertheless, these concerns can be accommodated by 'some sort of appropriate administrative, civil, or injunctive remedy, as distinct from a criminal sanction.'[87] Imposing criminal sanctions would emphasise the idea that hate speech is not acceptable in society and may result in severe punishment.

Overall, the decision to prosecute online hate speech is a policy matter that depends on a number of factors, including the severity of the speech in question, the context in which it was made, and the larger socio-political framework. In order to choose the most appropriate and successful solution for addressing online hate speech, it is crucial to carefully consider the possible advantages and drawbacks of each strategy.

[86] Mehvish Ashraf, 'Online Hate Speech in India: Issues and Regulatory Challenges' (2020) 3(5) International Journal of Law Management & Humanities 919-937, 932.
[87] George Wright, 'Cyber Harassment and the Scope of Freedom of Speech' (2020) 53 UC Davis Law Rev Online 187-212, 189.

Conclusion

In conclusion, the differing stances of the ECtHR and the US on hate speech regulation derive from their distinct institutional values. Nevertheless, the fundamental concerns of both jurisdictions are the same: the protection of democracy. While Europe aims to protect democracy by prioritising the rights and safety of minority groups, the US seeks to protect democracy by preventing governmental intervention of censorship in expression of one's views.

The widespread dissemination of hate speech online highlights the significant power and responsibility that platforms have in shaping online communication. Platforms are not neutral entities and should be subject to regulation. However, there is a risk of arbitrary law enforcement by the state, which may lead to concerns about the abuse of power. Nevertheless, the views of individuals who engage in hate speech should not be given more weight or authoritative protection than the rights of those who are targeted and discriminated against. The freedom of speech should not take precedence over the fundamental rights of individuals to personal safety and equal rights in a democratic society. Anti-hate speech frameworks may curtail individual freedoms, but they would ultimately reinforce the freedom of minorities or targeted groups.

To address the issue of online hate speech, a multi-faceted approach is necessary, including the regulation of platforms by implementing treaties, legislation, self-regulation and education, and the imposition of appropriate sanctions such as criminal liability alongside with the use of administrative, civil and injunctive measures.

Self-Preferencing – A New Form of Abuse of Dominance? A Case Note on the General Court's *Google Shopping* Judgment

Fiona Molloy, LL.M.

Introduction

The digital age forces EU competition law to adapt and refine itself. The novel challenges presented by rapidly evolving digital markets and the rise of so-called 'Big Tech' call for new tools to effectively curb the adverse effects of private market power. The recent landmark ruling of the EU's General Court in *Google Shopping*[1] illustrates some of the legal challenges evoked by the power imbalances on digital markets between quasi-monopolistic platforms such as Google on the one hand, and smaller players on the other. However, *Google Shopping* remains to be decided definitively, having been appealed to the Court of Justice.[2] The General Court's judgment can be read as being in line with a pro-interventionist approach in the EU regarding ultra-dominant undertakings, primarily driven by the EU Commission.[3] The central legal challenge in the judgment concerns the appropriate scope of previously existing competition law concepts under Article 102 TFEU, particularly the scope of leveraging. Many factors contribute to the determination of the appropriate scope of these concepts. In *Google Shopping*, the General Court was led by the desirability of both legal certainty and flexibility, as well as public policy concerns, and not least by the demands of the unprecedented nature of the factual situation. In its efforts to further contour the limits of competition law concepts, the Court took a bold step and acknowledged so-called

[1] Case T-612/17 *Google and Alphabet* v *Commission (Google Shopping)* ECLI:EU:T:2021:763.
[2] Case C-48/22 P *Google and Alphabet* v *Commission (Google Shopping)*.
[3] As expressly communicated most recently in Commission, 'Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', C(2023) 1923 final, and as seen in the new Digital Markets Act which subjects gatekeeper platforms to a host of obligations and prohibitions.

'self-preferencing' conduct as being capable of constituting abuse of dominance under Article 102 TFEU.

This article explores the extent to which the digital age necessitates the refinement of certain competition law concepts through the example of *Google Shopping*. The main aim of the article is to examine how the concept of 'self-preferencing', as demonstrated by Google's conduct, fits into the EU competition law order on abuse of dominance as set out in Article 102 TFEU. This article claims that the Court's reasoning in *Google Shopping* – particularly its exploration of the self-preferencing concept – falls into the general trend towards a more flexible case-by-case approach to EU competition law, and that this development generally improves the quality of decision-making regarding Big Tech undertakings. That said, it is argued that *Google Shopping* does not, and should not, provide precedence for an undue expansion of the abuse concept in Article 102 TFEU, as this would stifle effective competition and come at the expense of innovation, quality of services and products and, ultimately, the very consumer experience the law is seeking to protect.

This article first discusses the theory of harm applied by the EU General Court in *Google Shopping* by broadly situating the case in its Article 102 TFEU context. It then moves on to a specific examination of Google's conduct as a departure from 'competition on the merits' and subsequently addresses the anti-competitive effects of its conduct, as well as the changes in the law under the new Digital Markets Act, before highlighting the defences raised by Google and its opposition to a general duty of equal treatment. Finally, as part of the theory of harm discussion, the article explores self-preferencing as a nuanced type of leveraging abuse. The article then turns to the necessity of flexibility in the law with regard to Big Tech and evolving digital markets. Finally, the last section of the article will provide some overall concluding thoughts.

Google's Self-Preferencing as Abusive Conduct

This section seeks to demonstrate why *Google Shopping* exemplifies a heightened but well-gauged regulatory intervention grounded on a pragmatic reading of the established concept of leveraging abuse under Article 102 TFEU.

Scope and Concept of Abuse under Article 102 TFEU

Article 102 TFEU addresses the anti-competitive behaviour of one or more undertakings in a dominant market position. It is not a dominant position *per se*, but rather the abuse of dominance that is prohibited.[4] Article 102 TFEU lists four examples of abusive conduct.[5] However, the list is not intended to be exhaustive,[6] as the concept of abuse is rather elusive and can encompass many more different types of conduct.[7] Therefore, a single hard and fast definition of what constitutes abuse is both unfeasible and undesirable. *Hoffmann-La Roche* provides a broad definition of the concept of abuse. In that judgment, abuse was defined as being 'objective,' relating to methods departing from 'those which condition normal competition',[8] or, as referred to in subsequent case law, 'competition on the merits',[9] and that also have anti-competitive effects. The vagueness of these terms hints at the difficulty of establishing the existence of an abuse under Article 102 TFEU. This difficulty is then only exacerbated by the highly dynamic economic environment and the rise of Big Tech which constantly lead to new factual scenarios and legal challenges, particularly compared to the economic environment that existed when Article 102 TFEU (formerly Article 82

[4] See further David Bailey and Laura Elizabeth John (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press 2018), paragraph 10.008.
[5] Abusive conduct under Article 102 TFEU includes: (a) unfair purchase prices; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions; and (d) subjecting the contracting party to supplementary obligations unconnected to the subject of the contract.
[6] Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 26; see also Case C-52/09 *Konkurrensverket* v *TeliaSonera Sverige* [2011] ECR I-00527, paragraph 26; Case T-336/07 *Telefónica and Telefónica de España* v *Commission* (CR, 29 March 2012), paragraph 174.
[7] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (4th edn, Cambridge University Press 2019) 955.
[8] Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 00461, paragraph 91.
[9] *Google Shopping* (n1), paragraph 152.

EC) came into force over six decades ago. Even so, the Court in *Google Shopping* found Google to have engaged in abusive conduct contrary to Article 102 TFEU.

Google's Conduct as a Departure from Competition on the Merits

To ground its finding of abuse, the Court identified two relevant markets in *Google Shopping*, and Google was held to have leveraged its dominance from one into the other. Google operates on the market for general search services and on the market for specialised search services. It offers its comparative shopping service through its own search engine. It was not disputed by either party that Google holds a dominant position on the market for general search services[10] by virtue of its exceptionally high market share.[11] In fact, Google's dominance was held to amount to a 'superdominant,'[12] even quasi-monopolistic[13] position on that market. By contrast, Google's dominance does not extend to all neighbouring markets, so-called 'vertical' markets,[14] particularly the market for specialised search services. Google did not hold a dominant position on that market and was hence forced to compete with a number of rivals, such as eBay or Amazon that list offers from different sites, or Bestlist or Idealo for comparison online shopping specifically.[15] Whereas obtaining a dominant position by competing on the merits constitutes lawful competition,[16] '[extending a dominant firm's dominant position] to a neighbouring but separate market by distorting competition'[17] is a departure from 'competition on the merits.' Competing on the merits

[10] *Google Shopping* (n1), paragraph 119.
[11] Google's market share was mostly over 90% for at least over a decade in the national markets for general search services in all EEA countries, see EU Commission, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service' (27 June 2017), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784> accessed on 22 July 2023.
[12] *Google Shopping* (n1), paragraph 182.
[13] Joshua G Hazan, 'Stop Being Evil: A Proposal for Unbiased Google Search' (2013) 111(5) Michigan Law Review 789, 803.
[14] *Google Shopping* (n1), paragraph 2.
[15] ibid, paragraphs 3 and 7.
[16] ibid, paragraph 156, citing Case C-413/14 P *Intel* v *Commission* ECLI:EU:C:2017:632, paragraph 133.
[17] *Google Search (Shopping)* (Case AT-39740) Commission Decision of 27 June 2017 (notified under document number C(2017) 4444) recital 334.

'includes […] competition on quality, design, innovation and marketing.'[18] Google's manner of competing with its rivals was found to be a departure from competition on the merits.[19] Google placed its own comparison-shopping service at the most desirable positioning on the general search page (the top of the general results page) without it necessarily being the most 'relevant'. Additionally, Google visually enhanced the display of its own comparison shopping service by adding rich text and images (the so-called 'Shopping Units') instead of the relatively unappealing usual 'blue links'.[20] It is this combination of 'positioning and display' which, to the minds of the Commission and the Court, accounted for the first limb of the abuse – Google's promotion of its own comparison-shopping service.[21] The second limb of the abuse was the concurrent demotion of rival services,[22] by diverting traffic that is essential to the success of competing services,[23] as well as the lack of replaceability of the diverted traffic.[24] Google's rivals heavily rely on the traffic generated by a Google general search and there is no alternative to this traffic other than the costly and potentially even prohibitive option of increasing advertising.[25] In particular, the Commission in its decision identified three key factors[26] in its findings, which were subsequently confirmed by the Court:[27]

> (i) the importance to the success of competing specialised search services of traffic generated on Google's general search results page;
>
> (ii) the relevance of search engine user's behaviour when conducting online searches;

[18] Ioannis Kokkoris, 'The Google Saga: episode I' (2018) 14 European Competition Journal 462, 471.
[19] ibid, paragraphs 341-342; *Google Shopping* (n1), paragraph 197.
[20] *Google Shopping* (n1), paragraph 17.
[21] Google Search (Shopping) (n17) section 7.2.1; Google Shopping (n1) para 184.
[22] *Google Shopping* (n1) para 187.
[23] *Google Search (Shopping)* (n17), section 7.2.2.
[24] ibid, section 7.2.4.
[25] Hazan (n13), 806.
[26] *Google Search (Shopping)* (n17), sections 7.2.2-7.2.4.
[27] *Google Shopping* (n1), paragraph 197.

(iii) the fact that the diverted traffic constitutes a significant share of the traffic to rival services, as well as the lack of replaceability of that diverted traffic.

The second point raised by the Commission is essential to its assertion against Google as a whole. Search engine users usually only pay attention to the first few search results and ignore the others.[28] They tend to assume a correlation between visibility and relevance of the search results,[29] not least because Google has presented itself as a neutral search engine providing search results 'scientifically'[30] and based on quality and 'relevance'.[31] In the early days of the internet, Brin and Page, Google's cofounders, introduced an algorithmic search based purely on 'relevance.'[32] Nowadays, however, Google's algorithms are biased in favour of Google's own products even if they are not the most relevant.

Another factor that was held to indicate Google's departure from competition on the merits was Google's change of conduct. Google had entered the market for specialised search services with its initial product 'Froogle'. After the failure of the latter, Google had changed its conduct to the effect of promoting its own service and demoting rival services by introducing its visually more appealing 'Shopping Units' and placing them at the top of the list of 'blue links'.[33]

Finally, Google's alleged lack of intent to engage in anti-competitive behaviour was not sufficient to prevent a finding of abuse. Under *Hoffmann-La Roche,* abuse is an objective concept.[34] It is not

[28] ibid, paragraph 172.
[29] *Google Search (Shopping)* (n17), recital 535.
[30] Jay Matthew Strader, 'Google, Monopolization, Refusing to Deal and the Duty to Promote Economic Activity' (2019) 50(5) International Review of Intellectual Property and Competition Law 559.
[31] Diane Bartz and Malathi Nayak, 'Schmidt says Google has not cooked search results' (*Reuters*, 21 September 2011) available at <https://www.reuters.com/article/us-google-hearing-idUSTRE78K41Y20110921> accessed 09 March 2022.
[32] Sergey Brin and Lawrence Page, 'The Anatomy of a Large-Scale Hypertextual Web Search Engine' (1998) 30 Computer Networks and ISDN Systems 107, 116.
[33] *Google Shopping* (n1), paragraph 184.
[34] *Hoffmann-La Roche* (n8), paragraph 91.

necessary to prove anti-competitive intent, however, it may be a corroborating factor in a finding of abuse.[35]

Proof of Anti-Competitive Effects

Traditionally, leveraging or self-preferencing behaviour is not abusive as such.[36] The actual or potential anti-competitive effects of the conduct must also be proven in order to ground abuse.[37] Anti-competitive effects of self-preferencing conduct are effects that negatively impact effective competition. In particular, such effects could relate to the forced cessation of trading of rival services, the hampering of innovation and a decreased quality of products and services, such as search services, and, in turn, of the consumer experience. With regard to Google, the Commission found that Google's conduct had or was capable of having the following anti-competitive effects: foreclosure of competing comparison-shopping services; higher fees for merchants; higher prices for consumers; decreased innovation; decreased consumer choice; decreased quality of comparison shopping services.[38]

An assessment of the effects requires an analysis of the competitive situation if the conduct had not happened.[39] Google argued that the Commission had failed to prove any *actual* anti-competitive effects.[40] However, proof of actual effects is not necessary.[41] The Court held that Google's conduct was sufficiently grave to constitute a basis for 'potential effects.'[42] Furthermore, while the impugned conduct need not entirely eliminate competition on the downstream market to qualify

[35] ibid, paragraph 256, citing Case C-307/18 *Generics UK* v *Competition and Markets Authority* ECLI:EU:C:2020:52, paragraph 162.
[36] Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-09555 paras 250-254; see also *TeliaSonera* (n6), paragraphs 61-66.
[37] ibid, paragraph 438.
[38] Google Search (Shopping) (n17), section 7.3.1.
[39] Damien Geradin and Ianis Girgenson, 'The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach' in Jacques Bourgeois and Denis Waelbroeck (eds), *Ten years of effects-based approach in EU competition law: State of play and perspectives* (Bruylant, 2012) p. 211-241.
[40] *Google Shopping* (n1), paragraphs 368ff. and 396ff.
[41] ibid, paragraph 442.
[42] ibid, paragraph 378.

as abuse,[43] the effects must be sufficiently noticeable or capable thereof. Therefore, it was not necessary to prove a foreclosure of competition on the market for specialised shopping searches.[44] It sufficed to show that the effects were capable of having a 'chilling effect'[45] on competition and of stifling innovation which could in turn injure consumer welfare.

The DMA

Since the *Google Shopping* was handed down in 2021, the law has changed quite drastically with regard to proof of anti-competitive effects. The Digital Markets Act (DMA),[46] which fully entered into force during 2023, seeks to supplement the existing EU competition law order[47] by specifically targeting gatekeeper dominance. It is, therefore, narrower in scope than the case law. The main aim of the DMA is to heighten the responsibility of gatekeepers. The Regulation seeks to achieve this by setting out a list of obligations and prohibitions gatekeepers must comply with (Articles 5-7) and by imposing heavy fines upon non-compliance (Article 30). Article 6(5) explicitly prohibits self-preferencing ranking of services or products. Google's conduct would most likely come within the scope of this article. Notably, no actual or potential anti-competitive effects have to be demonstrated in order to establish an infringement of Article 6(5). The DMA, therefore, significantly lowers the bar for a finding of abusive self-preferencing compared to the case law-based test,[48] thus potentially building a less complex and more expedient EU competition law enforcement system.

[43] Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-03601, paragraph 563.
[44] *Google Shopping* (n1), paragraph 523.
[45] Hazan (n13), 806.
[46] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 2655/1.
[47] ibid, recital 10.
[48] As initially formulated in *Hoffmann-La Roche* (n8), and applied in *Google Shopping* (n1).

Moreover, the DMA also tackles the potential insufficiency of legal certainty and predictability within EU competition law, an argument heavily relied on by Google, by providing for clear and concrete rules. However, there is an argument that this rigid, 'uniform' and 'one-size-fits-all' approach is unsuited to keeping pace with the quickly evolving legal challenges of highly dynamic digital markets.[49] In order to mitigate this potential rigidity, Article 12 allows for amendments of the list of obligations and prohibitions. Additionally, the Commission wants to conduct continual market investigations[50]. It remains to be seen how adaptable the DMA is, but for the time being, a clear legislative instrument with a low bar of establishing *ex ante* abuse is an expedient supplement to *ex post* competition law enforcement for keeping gatekeepers in check.

Abusive Conduct Defences

Where *prima facie* abusive self-preferencing has been established, there are two types of defences available to rebut that finding – objective justification and the efficiency defence.[51] Generally, liability will not be imposed under Article 102 TFEU if the conduct is, on balance and in light of all the circumstances of the case, pro-competitive. As such, abuse will only be definitively established where there is no economic justification that counterbalances or even outweighs the anti-competitive effects of the conduct at issue.[52] An example of a justification is increased economic efficiency that also benefits consumers. This argument was advanced by Google. It claimed that the impugned conduct was mere quality improvements of its online search service.[53]

[49] Martin Eifert, Axel Metzger, Heike Schweitzer, Gerhard Wagner, 'Taming the Giants: The DMA/DMS Package' (2021) 58(4) Common Market Law Review 987, 1003.
[50] Article 19 DMA, see also EU Commission, 'The Digital Markets Act: ensuring fair and open digital markets' available at <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en#how-will-the-commission-ensure-that-the-tool-keeps-up-with-the-fast-evolving-digital-sector> accessed on 22 July 2023.
[51] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2020) 1118.
[52] Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-02331, paragraphs 84-86.
[53] *Google Shopping* (n1), paragraphs 122 and 158.

According to Google, the Shopping Units were introduced to benefit consumers by enhancing the search engine user's experience.

Google's defence is not convincing as the alleged quality improvements do not provide sufficient justification or increased economic efficiency that also benefits consumers to counterbalance the anti-competitive effects. The fact that Google's conduct is likely to foreclose, wholly or in part, competing comparison shopping services and decrease the quality of consumer experience generally cannot reasonably be said to be counterbalanced by quality improvements, such as visual enhancements, that Google applied to its service. Furthermore, the alleged quality improvements are narrower in scope than the anti-competitive effects as the quality improvements apply exclusively to Google's service and no other comparison-shopping service. A more effective means of improving user experience would have been to display all shopping services in this more visually appealing way. In other words, the alleged quality improvements have less positive bearing on competition and consumer welfare than the anti-competitive effects have negative bearing, and the quality improvements do not apply to comparison shopping services generally, but exclusively to Google's service. Therefore, Google was not able to show that the consumer benefits counterbalance the consumer harm.[54]

A General Duty of Equal Treatment?

The Commission's unease with Google's conduct stems from Google's prominent positioning of its own comparison-shopping service compared to rival services. Google treated its own service more favourable than other comparison-shopping services. The issue arises whether *Google Shopping* should be read as establishing a general duty for dominant undertakings to treat their own services and rival services equally in order to avoid allegations of self-preferencing.

[54] ibid, paragraph 568.

Google sought to defend the favourable manner of displaying its own services by arguing that the Shopping Units constituted necessary product advertising, and the ads were labelled as 'sponsored' accordingly. Google claimed that rival services were treated differently because they were mere free generic results, and that the discrimination was therefore justified.[55] The Court dismissed this argument. It held that the 'sponsored' label is not understood by most search engine users as an indicator of a discriminating manner of ranking search results.[56]

Google's supporters have read into the Commission's reasoning that a general duty under Article 102 TFEU to promote one's own services and rival services equally has been imposed. Based on this postulation, Google argued that such a duty is incompatible with competition on the merits and thus undermines the very meaning of competition.[57] Imposing such a duty would not only be extremely interventionist, it would also be nonsensical economically. Google is correct in arguing that proscribing a positive obligation of equal treatment on dominant undertakings would defeat the primary objective of competition law[58] – namely, to ensure an effective system of competition. After all, discrimination between one's own products and those of others lies at the very heart of competition. Promoting one's own products and services to a greater extent is a common business practice and undertakings are not required to promote their rival's products or services to the same extent as their own.[59] Arranging things differently would stifle competition by artificially creating a level playing field which would, in turn, injure innovation, quality improvements and consumer welfare.[60]

[55] ibid, paragraph 305.
[56] ibid, paragraph 313.
[57] Thomas Höppner, 'Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse' (2017) 1(3) European Competition and Regulatory Law Review 208, 210.
[58] Inge Graef, 'EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility' (2016) 68 Kluwer, Law International, International Competition Law Series 422.
[59] Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin?' (2015) 1(1) Competition Law and Policy Debate 4, 5.
[60] Kokkoris (n18), 471.

That said, Google's claim that the Commission's decision imposed such a duty of equal treatment on dominant undertakings is incorrect. There is no explicit or implicit support in *Google Shopping* for this assertion. The Court did, however, expressly refer to the EU maxim of equal treatment, which states that, unless justified, comparable situations must not be treated differently, and different situations must not be treated equally, and contended that 'unjustified difference in treatment' may constitute abuse.[61] Notably, the Court did not mention the example of abuse based on unjustified discrimination set out in Article 102(c) TFEU. In calling upon the general EU principle of equal treatment, the Court recognised a constitutional dimension to competition law and affirmed a role for the principle in abuse of dominance cases.[62] The fact that the theory of harm relied on includes a discriminatory element is no new occurrence in the case law,[63] but an express mention of the EU's equal treatment principle in an abuse of dominance scenario is unprecedented.[64] Against this background, it is easy to see how Google could have reached the conclusion that the decision imposes an obligation of equal treatment on dominant firms. In fact, the Court's heavy focus on the discriminatory nature of Google's conduct might even be said to invite misunderstandings as to the relevance of the equal treatment principle in an abuse of dominance context. In order to avoid misunderstandings of this kind, discrimination that promotes one's own services to a greater extent than rival services lies at the very heart of competition and will not suffice to ground leveraging abuse. Conversely, discrimination that promotes one's own services to a greater extent than rival services and that gives rise to an exclusionary effect on rival services will most likely amount to abusive self-preferencing conduct. It is hoped that the CJEU will set out further guiding principles in its judgment on the matter so as to curb the undesired effects of an overly literal interpretation of the non-discrimination

[61] *Google Shopping* (n1), paragraph 155.
[62] Lena Hornkohl, 'Article 102 TFEU, Equal Treatment and Discrimination after *Google Shopping*' (2022) 13(2) Journal of European Competition Law and Practice 99, 99-100.
[63] *Google Shopping* (n1), 108, citing *Hoffmann-La Roche* (n8), paragraph 134.
[64] ibid, 116.

principle. Generally, however, a fact-sensitive approach is to be favoured when determining whether or not the difference in treatment constitutes anti-competitive conduct.[65]

Arguably, the Court was correct in referring to the general principle of equal treatment in an abuse of dominance context. Article 102(c) TFEU mentions unjustified discrimination as an example of abusive conduct. The wording of this provision has undoubtedly been inspired by the principle of equal treatment. The fact that, particularly in earlier cases,[66] the Commission and the courts have relied on Article 102(c)TFEU alone to ground abuse strongly suggests that the equal treatment maxim does indeed have a role in abuse of dominance cases where there is an element of discrimination.[67] Furthermore, taking into consideration broader principles of EU law directs the analysis of abuse towards a more holistic understanding of Article 102 TFEU as embedded within the EU legal order as a whole.[68] A less constrained reading of Article 102 TFEU is one way of ensuring sufficient leeway in the law to maintain the provision's effectiveness in an economic environment where new legal challenges are emerging rapidly. Generally, 'every provision of community law must be […] interpreted in the light of the provisions of the community law as a whole.'[69] Wider non-discrimination and equal treatment considerations in the context of Article 102 TFEU are therefore valid.

Self-preferencing – A New Form of Abuse?

Legal certainty and predictability are central elements to Google's pleas for annulment of the Commission decision. Google claimed, *inter alia*, that the Commission's legal theory based on favouring is a wrong departure from the case law and that the Commission ought to have referred

[65] ibid, paragraphs 161, 165.
[66] See for example, *1998 Football World Cup* (Case IV/36.888) Commission Decision of 20 July 1999.
[67] Hornkohl (n62), 105.
[68] ibid.
[69] Case 283/82 *CILFIT* v *Ministry of Health* [1982] ECR 03415, paragraph 20.

to a more recognised form of abuse.[70] This article submits that self-preferencing abuse is a new independent form of abuse, but that it stems from an old concept of abuse and that the novel aspects in the Commission's or the Court's findings do not weaken the judgment by creating inconsistencies with previous case law or going against Article 102 TFEU or the principle of legal certainty and predictability.

In particular, Google claimed that the Commission ought to have applied the criteria of a refusal to supply, and, more specifically, the *Bronner*-test.[71] *Bronner* applies a high hurdle for a finding of abuse as the indispensability of the service or facility to the business of the person relying on it must first be established.[72] It must be demonstrated (1) that there are no other means of continuing business but for through the service or facility, and (2) that it is not economically viable to create a similar service or facility.[73] If the Court had found *Bronner* to apply in *Google Shopping*, Google's comparison shopping service would have potentially fallen short of the high standard of the indispensability requirement and, hence, Google would have been able to escape liability entirely.

Google also argued that the Commission's reliance on favouring and the 'lack of a clear legal test'[74] are inconsistent with the principle of legal certainty.[75] The Court rejected Google's argument and opined that a breach of the principle of legal certainty would require an inconsistent implementation of EU law,[76] and that self-preferencing in the present case ought to be viewed as part of the 'well-established' leveraging concept.[77] This article argues that the Court's finding a new form of abuse is valid for two reasons. First, the judgment overall is consistent with the principle

[70] See the second part of Google's Fifth plea, *Google Shopping* (n1), paragraph 199-204.
[71] ibid.
[72] Case C-7/97 *Bronner* v *Mediaprint* [1998] ECR I-07791, paragraph 41.
[73] ibid, paragraphs 43-47.
[74] *Google Shopping* (n1), paragraph 189.
[75] ibid, paragraph 145.
[76] ibid, paragraph 194, citing Cases T-50/06 RENV II and T-69/06 RENV II *Ireland and Aughinish Alumina* v *Commission* EU:T:2016:227, paragraph 59.
[77] ibid, paragraph 609.

of legal certainty. Second, the existing law allows for the discretionary approach displayed by the Commission.

First, the Court's reasoning is consistent with legal certainty as it is grounded in precedent on leveraging abuse. The Court managed elegantly to side-step the lack of a specific legal test by instead falling back on the concept of leveraging. Regrettably, the Court did not provide any definitive details on how, and to what extent, self-preferencing might be integrated into the leveraging concept. Monti has suggested approaching this by creating a 'taxonomy of abuses.'[78] This is indeed what the Court appears to have done in its reasoning, albeit not explicitly. Following this suggestion, it must be asked whether self-preferencing constitutes a broader *category* of abusive conduct, or a specific *type* or *subcategory* of the latter. Under Monti's approach, the leveraging concept in *Google Shopping* would be understood as a *category* of abuse, which can include various *subcategories* of abuse, such as Google's self-preferencing conduct. The relationship between leveraging and self-preferencing would thus appear to be vertical and hierarchical, rather than horizontal. Therefore, it would not undermine legal certainty if the specific *subcategory* of abuse (self-preferencing) is regarded as 'novel', so long as the finding of abuse is based on a recognised *category* of abuse (leveraging). On the facts of *Google Shopping,* the Court asserted that the Commission had applied 'established principles to new practices.'[79] The Court upheld the Commission's application of the 'well-established'[80] leveraging concept, which Google's conduct comes within the scope of,[81] to this new specific set of facts in *Google Shopping.*[82] Crucially, the principle of legal certainty does not require a strict formalistic adherence to previous case law, but

[78] Giorgio Monti, 'The General Court's Google Shopping Judgment and the scope of Article 102 TFEU' (2021) available at <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3963336> accessed on 29 July 2023, 7.
[79] *Google Shopping* (n1), paragraph 602.
[80] ibid, paragraph 609, citing Case 311/84 *Télémarketing* v *Compagnie luxembourgeoise de télédiffusion* [1985] ECR 03261; Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-05951; Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-02969; *Microsoft* (n43).
[81] ibid, paragraph 599.
[82] ibid, paragraph 629.

rather seeks to ensure that the law is transparent, consistent[83] and not arbitrary.[84] Moreover, in EU law there is no rule of precedent.[85] Naturally however, a complete departure from previous case law would most likely give rise to concerns. In *Google Shopping*, finding a partly 'new' theory of harm was legitimate and necessary due to the lack of case law on this specific fact scenario of algorithmic self-preferencing.[86] In referring to the leveraging concept, the Court grounded its argument in the case law on the wider subject of the case. Essentially, a new form of abuse, finding its roots in the established leveraging concept, was applied to a new factual scenario. Dismissing the validity of self-preferencing as a form of abuse due to legal certainty concerns is hence unjustified.

Second, both Article 102 TFEU and the leveraging concept allow for a discretionary approach and do not oppose a finding of self-preferencing as a new *subcategory* of abuse. A brief look at the text of the Article 102 TFEU helps illuminate the point. When the Article says, '[S]uch abuse may, in particular, consist in […]', the wording 'in particular' suggests that the list of abusive conduct in the Article is not intended to be exhaustive, but rather illustrative in nature. This has also been confirmed by the CJEU.[87] Indeed, Article 102 TFEU was deliberately designed to be 'open-ended',[88] to ensure a degree of flexibility regarding its application.[89] The fact that 'self-preferencing' or 'leveraging' are not explicitly enumerated in the Article's short list of types of abusive behaviour and that they are arguably indeed examples of 'new' forms of abuse, is *prima facie* unproblematic.

The leveraging concept is similarly open-ended. It is accepted as an umbrella term, as well as general and flexible[90] in nature. In the case law, leveraging is rarely, if ever, conceived of as a stand-

[83] ibid, paragraph 194.
[84] Yasmine Bouzoraa, 'Between Substance and Autonomy: Finding Legal Certainty in *Google Shopping*' (2022) 13(2) Journal of Competition Law and Practice 144, 146.
[85] Pinar Akman, 'The Theory of Abuse in *Google Search*: A Positive and Normative Assessment Under EU Competition Law' (2017) 2 Journal of Law, Technology and Policy 301, 306.
[86] Pablo Ibáñez Colomo, 'What is an Abuse of a Dominant Position? Deconstructing the Prohibition and the Categorizing Practices' in Pinar Akman, Or Brook and Konstantinos Stylianou (eds), *Research Handbook on Abuse of Dominance and Monopolization* (Elgar 2022) 29.
[87] *Telefónica and Telefónica de España* (n6), paragraph 174.
[88] Bouzoraa (n84), 150.
[89] Höppner (n57), 211.
[90] ibid.

alone concept of abuse. There are a number of rulings in which leveraging abuse was established but the specific theory of harm was based on a *subcategory* of leveraging. *Microsoft* (refusal to supply and tying),[91] *Télémarketing* (refusal to supply),[92] *TeliaSonera* (margin squeeze),[93] *Tetra Pak II* (tying)[94] and *Irish Sugar* (rebates)[95] shall serve as examples.[96] Evidently, the leveraging concept is meant to be applied in combination with a more concrete *subcategory* of abuse, which is precisely what the Court appears to have done in *Google Shopping*. If it is accepted, as the case law suggests, that leveraging is a 'generic term'[97] and that Article 102 TFEU is open-ended, it is perfectly valid to find and apply a new *subcategory* of leveraging abuse. From a legal perspective, the Commission's manoeuvring of the open nature of the leveraging theory to weave in a new *subcategory* is convincing.

To conclude, the Court constructed a persuasive argument based on the open nature of both Article 102 TFEU and of leveraging, and yet, did not depart from the principle of legal certainty.

Endorsing Interventionism and Flexibility in EU Competition Law

Thus far, it has been established that finding a new *subcategory* of leveraging abuse, as well as applying the law in a more holistic and pragmatic manner is valid from a doctrinal perspective. This section attends to the question of whether a more pragmatic application of the law is necessary and reasonable. This article claims that a rather interventionist and flexible attitude in this particular factual scenario was justified. It equips enforcement authorities with a new specific basis for abuse (self-preferencing) that will most likely prove both necessary and useful in the future, in order to protect a system of undistorted competition, as well as the broader goals of

[91] *Microsoft* (n43), paragraph 1344.
[92] *Télémarketing* (n80), paragraph 27.
[93] *Continental Can* (n6), paragraph 85.
[94] *Tetra Pak* (n80), paragraph 25.
[95] *Irish Sugar* (n80), paragraph 166.
[96] Friso Bostoen, 'The General Court's *Google Shopping* Judgment Finetuning the Legal Qualifications and Tests for Platform Abuse' (2022) 13(2) Journal of Competition Law and Practice 75, 76.
[97] *Google Shopping* (n1), paragraph 163.

competition law, such as enhancing economic efficiency, the internal market and, chiefly, consumer welfare.[98]

The cost of flexibility in the long run is, of course, an inevitable decrease in, albeit not necessarily a departure from, legal certainty and predictability. Indeed, the 'new' concept of self-preferencing abuse has been criticised for being opaque, and leveraging has been criticised as being an overly broad 'catch-all category.'[99] The 'default position' of the law is that self-preferencing practices do not in themselves fall outside of the scope of competition on the merits. Ultimately, exploiting one's own competitive advantages is what competition is inherently about. In that vein, it has been argued by some that competition policy should be reluctant to condemn self-preferencing practices and should not seek to 'fine-tune'[100] the market as this would come at the risk of artificially neutralising all competition and forcing a 'level playing field.'[101] However, certain instances – exceptions from the 'default position' as it were – require a more interventionist competition policy in order to maintain undistorted competition and further consumer welfare. *Google Shopping* is one of these instances. Flexibility enabled an appropriate application of the existing abuse of dominance regime to this new factual situation in *Google Shopping*. The following three reasons shall illustrate why.

First, digital markets are 'highly dynamic' and, hence, anti-competitive effects become irreversible significantly more quickly than in traditional markets.[102] A timely intervention, provided it is both appropriate and justified, would reduce the potential for anti-competitive effects becoming excessive. It is more difficult, or even impossible, to set aside these anti-competitive effects *ex post.*

[98] Hazan (n13), 791.
[99] Pablo Ibáñez Colomo, 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (2020) 43(4) World Competition 417, 432.
[100] ibid, 422.
[101] ibid.
[102] Federal Ministry for Economic Affairs and Energy, Report by the Commission 'Competition Law 4.0', 'A new competition framework for the digital economy' (2019) available at <https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3> accessed on 7 April 2022, 51.

Therefore, it would seem the lesser of two evils to risk an occasional 'fine-tuning' of the market and thus to err on the side of interventionism.

Second, a more interventionist approach is justified due to Google's 'superdominant'[103] position. Arguably, given the unique strength of its position, a higher degree of responsibility rests on Google compared to other dominant firms. Generally, all dominant undertakings have a 'special responsibility' not to unlawfully distort competition.[104] The 'special responsibility' concept, as initially formulated in *Michelin I*[105] and applied in subsequent case law,[106] suggests that the degree of this responsibility must be determined for each case individually[107] and 'will often turn on the extent of [the firm's] market power.'[108] In relying on the leveraging principle, rather than applying a more onerous standard such as the *Bronner*-test, the Court in *Google Shopping* attributed to Google a very high degree of responsibility to ensure that its conduct does not unlawfully distort competition. *Google Shopping* has set the tone for dealing with digital conglomerates in the future and has emboldened the Commission in its implementation of a heightened responsibility of gatekeepers under the DMA. Similarly, it laid a bedrock for future jurisprudence on the matter. This was most recently shown in the *Google Android*[109] judgment. Ten months after *Google Shopping*, the General Court upheld the Commission's finding of another form of abuse against Google. The abuse in that case concerned Google's practice of inducing OEMs ('original equipment manufacturers') to pre-install Google Search as a condition for obtaining GPS, which is essential, for free.[110] The conduct in *Android* was held to amount to exclusionary tying[111] – another form of leveraging abuse – and Google was subjected to another fine of several billion euros. Heightening

[103] *Google Shopping* (n1), paragraph 183.
[104] ibid, paragraph 150, citing *Intel* (n16), paragraph 135.
[105] Case C-322/81 *Michelin* v *Commission* [1983] ECR 03461, paragraph 57.
[106] *Intel* (n16), paragraph 135.
[107] ibid, paragraph 165, citing *TeliaSonera* (n6), paragraph 84.
[108] Peter Alexiadis and Alexandre de Streel, 'Designing an EU Intervention Standard for Digital Platforms' (2020) Robert Schuman Centre for Advanced Studies Research Paper No. 2020/14, available at <https://cadmus.eui.eu/bitstream/handle/1814/66307/RSCAS%202020_14.pdf?sequence=1>, 2.
[109] Case T-604/18 *Google and Alphabet* v *Commission (Google Android)* ECLI:EU:T:2022:541.
[110] ibid, paragraph 3f.
[111] ibid, paragraph 283ff.

the responsibility of digital giants is a desirable development in EU competition policy and is, in this case, justified in light of Google's unparalleled dominance.

Third, and closely related to the previous argument, there is a strong case that Google acts as a digital 'gatekeeper' platform due to its role as 'unavoidable trading partner'[112] for its rivals. Given the dependence of competing specialised search services on Google's general results page,[113] Google holds the power to direct internet traffic towards its own services and away from rival services. This position of unprecedented dominance as a gateway platform to the internet arguably warrants a greater degree of scrutiny to be applied to Google and other gatekeepers. It has even been proposed by Crémer, de Montjoye and Schweitzer that the burden of proof should be reversed for platforms with 'an intermediation infrastructure of particular relevance' that take on a quasi-regulatory role in 'markets with particularly high barriers to entry.' The authors make the case that a gatekeeper position warrants the actual assumption of abusive self-preferencing, unless the respective dominant undertaking manages to dispel the assumption by proving that its conduct does not entail any anti-competitive effects.[114] Such a reversal of the burden of proof would be quite far-reaching and heighten the responsibility of gatekeepers, but it would do so without demanding the undesirable duty to 'level the playing field.'[115]

To summarise, the fast-paced nature of digital markets and unprecedented scale of dominance call for adjustments to the existing competition law regime. While it is crucial that competition policy does not interfere with and attempts to 'fine-tune' competition generally, certain extreme degrees of dominance warrant and even necessitate a relaxed threshold for intervention, as well as heightened responsibility of digital giants and gatekeeper platforms.

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[112] Alexiadis and de Streel (n108), 36.
[113] ibid, 8.
[114] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (2019) available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed on 29 July 2023, 7.
[115] Pablo Ibáñez Colomo, 'The Role and Limits of Competition Law in Digital Markets: on the Reports and the Reforms Proposed' (2021) Zeitschrift für Europäisches Privatrecht 8, 17.

All that said, it is hoped that future case law, perhaps even the CJEU in its pending judgment,[116] will further contour the constituent elements of self-preferencing as part of, but yet distinct from, the leveraging concept. A reading of *Google Shopping* suggests that self-preferencing is distinct from leveraging in that it goes further than the mere extension of one's power from one market to another (leveraging). Self-preferencing appears to require (1) a leveraging practice, (2) that this practice is applied with a particular aim to promote one's own services[117] and (3) an exclusionary effect on rivals.[118] However, the concept of self-preferencing is currently still quite nebulous and the line between leveraging and self-preferencing and between lawful and unlawful self-preferencing is unclear.[119] Despite the Court's interventionist and flexible approach being justified in this case, *Google Shopping* is not a licence to unnecessarily broaden the scope of Article 102 TFEU. Any tendency to unduly expand the concept of abuse in the future must in any case be resisted. In addition, an excessively interventionist competition law system would artificially alter both competition and the market.[120] This would be overly far-reaching and go beyond the chief objective of competition law, which is to safeguard consumer welfare by establishing and protecting undistorted competition. A reluctance to intervene is hence preferable, save in exceptional circumstances as shown in *Google Shopping*. Increasing legal certainty and predictability with regards to algorithmic self-preferencing should be a vital objective for the future development of EU competition law.

Conclusion

This article has argued in favour of making certain refinements to the current EU competition law order in view of the challenges of digital markets and 'Big Tech'. The General Court's deployment

[116] Case C-48/22 P *Google and Alphabet* v *Commission (Google Shopping)*.
[117] *Google Shopping* (n1), paragraph 240.
[118] ibid, paragraph 378.
[119] Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (7th edn, Hart Publishing 2021) 317.
[120] Ibáñez Colomo (n115), 13.

of the 'self-preferencing' abuse in *Google Shopping* instantiates this sort of necessary tailoring of the existing law to the new demands of the digital age.

Specifically, the article has discussed self-preferencing as a form of abuse under Article 102 TFEU in light of the General Court *Google Shopping* judgment. It argued that self-preferencing can, in part, be considered a new independent form of leveraging abuse, and that the Court has accordingly prompted a slight expansion of Article 102 TFEU. However, self-preferencing should not be understood as a 'new' form of abuse in the detrimental sense of departing from precedent and the principle of legal certainty, as claimed by Google, but rather as a new *subcategory* of the established concept of leveraging abuse. The open nature of the leveraging concept allows for its use as an 'umbrella term' for different *subcategories* of abuse. Although the Court's reasoning in *Google Shopping* is convincing and justified, it is hoped that the still quite nebulous self-preferencing concept is further teased out by subsequent rulings, in order to address legal certainty concerns and to avoid an unfettered expansion of Article 102 TFEU.

Viewed in its wider framework, the General Court's reasoning was informed by its understanding of the general role of EU competition law. The more holistic approach invites increased interventionism; an approach reflected throughout the judgment. By, for instance, taking into account broader EU law principles (the equal treatment principle) and by finding an entirely new *subcategory* of abuse, the Court displayed a high degree of flexibility and interventionism in its ruling. This is, however, less concerning than it might at first appear. Google's unprecedented 'superdominance' and its position as gatekeeper both justify and even necessitate the Court's pragmatic approach. A more dogmatic application of the current competition law toolkit would have most likely led to the undesirable outcome of Google escaping liability entirely.

To conclude, *Google Shopping* is one of the first in what presumably will be a growing body of case law dealing with a number of new difficulties thrown up by the new digital markets – extreme forms of market dominance, gatekeeper positions, and rapidly changing market structures overall.

In light of all these challenges, EU competition law must remain sufficiently adaptable in order to be able to evolve in the environment it seeks to regulate.

Oifig gan Ainm: An "Fear an Phobail" agus an Stát Riaracháin na hÉireann

Ruairi McIntyre

Réamhrá

Ceard is brí le 'hOmbudsman'?: ceist tábhachtach bhíonn gan aird sa litríocht a dhíríonn ar an Oifig. Cé go nglacann téacsanna acadúla ceannairachta leis an aistriúcháin "Fear an Phobail" as Gaeilge,[1] cosúil le chuile tír eile le córas dlí bunaithe ar an 'tradisiún Westminster', ní dhéanadh aon iarracht in Éirinn an 'teasca institiúideach'[2] seo a aistriú san Acht an tOmbudsman nuair a bhunaíodh an oifig i 1980: ag léiriú nach meascaíonn an '*misfit*' seo le coincheap tradisiúnta an Stáit. Cumtha ó chiannaibh sa Shualainn,[3] tá se deacair áit a thabhairt don mheicníocht uathúil an tOmbudsman sa dheilbh tripháirteach an Stáit Riaracháin na hÉireann.

Cé nach dtagann an Ombudsman le na teoricí Montsequieu ag baint le structúr an Stáit, iarann an taighde seo breathnú ar cén chaoi oireann an oifig don dheilbh tripháirteach 'Westminster' ina bhfuil ár mBunreacht suite. Trí léirsiú na tacaíochta a sholáthraíonn an Ombudsman don bhrainse feidhmeannach (an Rialtas), don bhrainse breithiúnach (na cúirteanna), agus don bhrainse reachtach (an Oireachtas), taispeántar gur institiúid forlíontach é an Ombudsman do chuile brainse an Stáit. Anuas ar seo, léireofar go bhfuil innealra an tOmbudsman ag éirí níos tábhachtaí. In Éirinn, tír ina bhfuil costas agus teoranta an dlí, mímhuinín as an Rialtas, agus oiread an stát riaracháin ag meadú, árdaítear ceisteanna faoi neamhspléachas agus forálacha an tOmbudsman. Cé nach aontaíonn an píosa

[1] David Gwynn Morgan agus Gerard Hogan, *Administrative Law in Ireland* (Round Hall 2012) 260.
[2] Rick Snell, 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma', i C Finn (ed.), *Sunrise or Sunset? Administrative Law in the New Millenium: Papers Presented at the 2000 National Administrative Law Forum* (Canberra: Australian Institute of Administrative Law, 2000) 189.
[3] Bunaíodh an chéad Oifig an tOmbudsman sa Bhunreacht na Sualainne i 1909. Tá forálach air fós lonnaithe faoi Alt 6, Caibidil 12.

seo le argóintí teoiriciúil le coincheap an Ombudsman mar brainse aonach an Stáit ar leith, mar gheall ar thábachtas an Oifig sa Stát riarachán na hÉireann, críochnaíonn an píosa seo le plé maidir le aitheantas bunreachtúil na hOifige.

Bunaithe ag Acht an tOmbudsman 1980,[4] is meicníocht é an Oifig a iarraíonn gníomhartha idir an Stát agus an duine a shocrú ar bhealach neamhfhoirmiúil. Mar gheall ar an bhfeidhm seo, is mithid don Ombudsman casaoidí an phobail ag baint le seirbhisí an Stáit a scrúdú agus a réiteach.[5] I ndiaidh gearán,[6] nó mar gheall ar a thoil féin,[7] tosnaíonn an Ombudsman fiosrúcháin. Tá péire próisis eagraithe faoin meicníocht seo: réamhfhiosrú[8] neamhfhoirmiúil agus, mura socraíonn an reamhscrúdú seo an gníomh, próiseas foirmiúil, ina bhfuil moltaí eisithe don Roinn i dtreis.[9] Ní chuireann na moltaí seo banna ar an Roinn, ach is feidir leis an Ombudsman a thráchtaireacht agus thuarimí a chur os comhair an Oireachtas trí 'tuarascáil speisialta'[10] nó a 'thuarascáil bliantúil',[11] cumhacht a thugann adhairt don úadarás na hOifige. Go deimhin, tá an chuid is mó de na gníomhartha tugtha os comhair an Ombudsman socraithe gan muinín ar an próiseas foirmiúil, agus is anamh an cás a theastaíonn aire an oireachtas trína tuarascálacha.[12] Is tábhachtach a mhíniú i dtosach nach mbaineann an Ombudsman le oifigí eile le ainmneacha cosúlacha, an tOmbudsman Seribhísí Airgeadais agus Pinsean, an tOmbudsman do leanaí, agus an Ombudsman an Gharda Síochána san áireamh.

[4] Leasaithe ag Acht an tOmbudsman 2012.
[5] Bhí dlínse an Ombudsman sínte go leathan sa Acht an tOmbudsman 2012. Tá beagnach gach gníomhaire an Stáit faoi chumas an Ombudsman anois.
[6] Acht an tOmbudsman 1980, alt 4(3)(a).
[7] ibid, alt 4(3)(b).
[8] Réamhscrúdu an Achta.
[9] Acht an tOmbudsman 1980, alt 6.
[10] ibid, alt 6(5).
[11] ibid, alt 6(7).
[12] Oifig an tOmbudsman, *Tuarascáil an Ombudsman 1999* (Oifig an tOmbudsman 1999) 7.

Anuas ar seo, pléifidh an píosa seo an bhealach in a feabhsaíonn an tOmbudsman an comhéadan idir an pobal agus an stát, agus cén chaoi neartaíonn an oifig an charactar daonlathach an stáit. Leirítear an pointe seo trí sracfheachaint ar trí chaoi ina dtugann an Ombudsman cumhacht do gnáthéilitheoirí an phobail:

1) Maidir leis an brainse feidhmeannach - tugann an próiseas neamfhoirmiúil na hOifige deis do ghníomhairí an Stáit a gcuid seribhisí a fheabhsú agus fadhbanna ag baint leo a réiteach.
2) I gcomhthéacs an brainse breithiúnach - mar oifig a cabhraíonn éilitheoirí agus a scaoileann constaicí i mbealach daoine ag lorg ceartais agus cóir, cuireann an tOmbudsman gearáin an gnáthphobail chun cinn: ag tabhairt seans do éilitheorí laga sna córais an Stáit a réiteach.[13]
3) I dtaca leis an brainse reachtach - tríd a chumas thuarascáileach, is feidir leis an Ombudsman gníomhartha áirithe a chur os comhair an Oireachtas; uaireanta ag cur athrú forleathan, reachtach ar chois.

Tarraingíonn an píosa seo a struchtúr ón líosta seo, agus pléifidh sé na trí bhrainse faoi seach.

An Brainse Feidhmeannach

Comhseasmhach leis an méid atá ráite, is deachair a shocrú cén bhrainse an Stáit ina bhfuil an Oifig an tOmbudsman suite. Ní hanamh an tuarim gur chuid den Rialtas é an Oifig.[14] Go deimhin, san Astráil, is amhlaidh go noibríonn an 'Commonwealth Ombudsman' faoin mbrainse feidhmeannach.[15] In ainneoin an fíric nach bhfuil an Ombudsman na hEireann chomh corpraithe sa Rialtas (san Astráil,

[13] Oifig an tOmbudsman, *Tuarascáil an Ombudsman 1996* (Oifig an tOmbudsman 1996) 16.
[14] Cheryl Saunders, *It's Your Constitution: Governing Australia Today* (2ra egn, The Federation Press 2003) 114.
[15] John Robert Kerr, *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No. 144 of 1972 (Australian Government Publishing Service 1972).

is fedir leis an Aire cuardacha an Commonwealth Ombudsman a chur i gcoinne, agus a chinneadh a chrosadh[16]), is leir go gcuidíonn ár nOmbudsman leis an Rialtas freisin.

Is mithid don Ombudsman maoirseacht a dhéanamh ar gníomhairí an stáit agus an bhealach a sholáthraíonn siad a gcuid seirbhísí. Tríd a phróseas cuardach, tá freagracht ar an Ombudsman obair na ngníomhartha an stáit a choinneáil de réir focal an dlí agus le 'údurás cheart'.[17] Mar gheall are na contuirtí agus an t-éigeart a bhaineann le gníomhartha ag feidhmiú *ultra vires*, is léir go bhfuil an feidhm seo riachtanach le coimeád 'reachtas cothrom'.[18] Anuas ar an radharc dleathach seo, is feidir le próiseas neamhfhoirmiúil an tOmbudsman fadhbanna beaga a réiteach chomh maith, agus seirbhísí an Stáit a 'oireann dá dtimpeallacht'.[19] Go deimhin, 'sé an chuid is mó de obair na hOifige ná aimhrialtachta maorlathach. Is éasca an fíric seo a fheiceáil in obair an 'Parliamentary Ombudsman' an Reachta Aontaithe. Bhí an Oifig seo bunaithe ar cheapadh an 'fheirmeorín beag',[20] ag fulaingt in aghaidh 'ollphéist maorlathach'.[21]Cuireann Ombudsmain thar an domhain meáchan ar 'thábhacht an duine' i dtreo a chuid oibre, agus tá sé ráite ag an Ombudsman na hÉireann go háirithe go iarann sé 'solúbthacht' agus 'fíorthrua' a choinneáil i seirbhísí an Stáit.[22] Go deimhin, diríonn obair an tOmbudsman ar fhadhbanna foirgníochta. Tá snas, feabhas, agus leasú tagtha ar beagnach chuile gníomhaire agus seirbhís an Stáit mar gheall ar a chuid moltaí tuarascálacha. I ndiaidh a thuarascáil 'An Bhás Maith: Cúram Deireadh Saoil', bunaíodh an Líne Chabhrach Tacaíochta Méala agus seoladh Mol Cúraim agus Faisnéise IHF chun an pobal.[23] Mar gheall ar an dtuarascáil 'Súil Siar: Láimhseáil gearán

[16] ibid.
[17] Acht an tOmbudsman 1980, alt 4(2)(b)(i).
[18] ibid, alt 3(2)(b)(vii).
[19] Brian Lenihen TD ar na Nursing Home Subventions 540 Díospóireacht an Dáil. col. 543 (Feabhra 13, 2001).
[20] Réamhrá cumtha ag Lord Shawcross i Sir John Whyatt, *The Citizen and the Administration: the Redress of Grievances* (Stevens & Sons Ltd 1961) xiii.
[21] Nick O'Brien, 'What Future for the Ombudsman?' (2015) 86(1) The Political Quarterly 72, 72.
[22] Oifig an tOmbudsman, *Investigatory Report on the Non-Payment of Arrears of Contributory Pensions* (Oifig an tOmbudsman 1997).
[23] Oifig an tOmbudsman, *An Bhás Maith: Cúram Deireadh Saoil*' (Oifig an tOmbudsman 2014).

ag an nGníomhaireacht um Leanaí agus an Teaghlach', cuireadh ríomhchóras náisiúnta bainistíochta cásanna i mbun feidhme, bunaíodh fóram comhoibríoch Náisiúnta um Fheabhsú Cáilíochta, agus tosaíodh oiliúnt d'oifigigh ghearáin.[24] De bharr an tuarascáil '*Fair Recovery*: Ró-Íocaíochtaí de chuid na Roinne Gothaí Fostaíochta agus Coimirce Sóisialaí', curadh feabhas agus biseach ar na treoracha a ghabhann le ró-íocaíochtaí, eagraíodh lárionad glaonna nua chun gearánaigh a fhreagairt, agus bunaíodh coras nua le meabhrúcháin a eisiúint do dhaoine.[25] Is léir go bhféadann an Ombudsman, mar gheall ar a ghaol leis an phobail, fadhbanna foirgníochta a réiteach i gcaoi cnuaisciúnach de réir an 'feidhm claisaiceach' na hOifige thar an domhain.[26]

Anuas ar seo, is feidir leis an Ombudsman 'feabhas fadtréimhseach' a chur i mbun.[27] In ainneoin an fíric go dtugann an Oifig a aird ar 'oidimil an aonáin',[28] is mithid don Ombudsman fadhbanna a chosc, agus fréamh 'structúrach'[29] an chruacheist a réiteach.[30] Tá an neart moltaí fógartha ag an Ombudsman maidir le na próisis inmheánach na ngíomhairí an Stáit, agus athríodh próisis tuarascálacha inmheánach iComhairlí Contae,[31] próisis gearánach inmheánach sa HSE,[32] agus fograíodh treoracha le gníomhartha eile a cuidiú maidir le cursaí cosúlacha.[33] Chomh maith le sin (mar atá thíospléite) is feidir leis an Ombudsman leasú reachtach, agus leathreachtach, a chur ar chois. Mar gheall ar chás ag baint le daoine i dtithe altranais, athcheartaíodh na Nursing Home (Subvention) Regulations 1993 chun neamhaird a

[24] Oifig an tOmbudsman, *Súil Siar: Láimhseáil Gearán ag an nGníomhaireacht um Leanaí agus an Teaghlach* (Oifig an tOmbudsman 2017).
[25] Oifig an tOmbudsman, *Fair Recovery: Ró-Íocaíochtaí de chuid na Roinne Gothaí Fostaíochta agus Comirce Sóisialaí* (Oifig an tOmbudsman 2019).
[26] The European Ombudsman, *The Role of Ombudsman Institutions in Open Government* (OECD Working Paper on Public Governance U 29, 2018) 5.
[27] Oifig an tOmbudsman, *Tuarascáil an Ombudsman 1996* (Oifig an tOmbudsman 1996) 16.
[28] Nick O'Brien, 'Ombudsmen and Social Rights Adjudication' (2009) 3 Public Law 466, 470.
[29] Anne Abraham, 'The Ombudsman as Part of the UK Constitution: A Contested Role?' (2008) 61(1) Parliamentary Affairs 206, 214.
[30] Linda Mulcahy, 'The Collective Interest in Private Dispute Resolution', [2013] 33 *Oxford Journal of Legal Studies* 59, 78.
[31] Oifig an tOmbudsman, *Tuarascáil an Ombudsman 1998* (Oifig an tOmbudsman 1998) 18.
[32] Oifig an tOmbudsman, *Tuarascáil an Ombudsman 2020* (Oifig an tOmbudsman 2020) 26.
[33] Oifig an tOmbudsman, *Settling Complaints: The Ombudsman's Guide to Internal Complaints Systems* (Oifig an tOmbudsman, 1998).

thabhairt ar choinníolacha na clainne san áireamh an tsaibhris seanóirí.[34] I gcás eile, bhí moltaí ar an léirléamh oiriúnach maidir le tearmái uchtaithe sa Social Welfare Act 1996.[35] Go deimhin, bhí an chumas na hOifige athraigh sistéamach a ghin agus 'cuiseanna an mhíriartha a aithint' luaite sa thuarascáil an Ghrúpa Athbhreithnithe an Bhunreachta. Mar gheall ar inniúlacht an Ombudsman fadhbanna teicniúla ag réamhthús seirbhísí riarthacha an Stáit a réiteach go caothúil, go solúbhta, agus go discréideach, is forlíonadh tábhachtach é don bhrainse feidhmeannach an Stáit.

An Brainse Reachtach

I gcoinne leis an tuiscint thuasluaite go noibríonn an Ombudsman faoin bhrainse feidhmeannach, mhaífeadh saineolaí eile go bhfuil an Oifig lonnaithe faoin bhrainse reachtach. Go deimhin, tá 76% de na hOmbudsman timpeall an domhain ceapaithe ag an pharlaimint.[36] Cosúil leis an 'Parliamentary Ombudsman' na Ríochta Aontaithe, feidhmíonn an Ombudsman na hÉireann i ngar leis an Oireachtas. Tríd a chuid tuarascálacha, curadh fadhbanna agus cúrsaí tábhachta roimh an Oireachtas, agus tugadh 'fiachla' do imscrúidithe na hOifige.[37] Cuidíonn na tuarascála seo an Oireachtas ar dhá bhealach: (i) saibhríonn siad eolas an Oireachtas agus polasaí reachtach; (ii) neartaíonn siad freagracht an Rialtais.

I gcomparáid leis an 'indibhidiúlachas fréimhíocht' a bhaineann le cás dlí traidisiúnta,[38] is feidir le gearáin os comhair on Ombudsman tionchar a chur faoi polasaí reachtach agus diospóireacht parlaiminteach a spreagadh. Maidir le stáidear amháin, glacann 75% de hOmbudsman timpeall na

[34] Peter Tyndall, 'Thirty Years of the Ombudsman: Impact and the Future' (2015) 63(1) Administration 7.
[35] Social Welfare Act 1999, alt 23.
[36] European Ombudsman (u26), 8.
[37] Richard Kirkham, 'Challenging the Authority of the Ombudsman: the Parliamentary Ombudsman's Special report on Wartime Detainees' (2006) 69(5) Modern Law Review 792, 813.
[38] Anne Abraham, 'The Ombudsman and "paths to justice": a just alternative or just an alternative?' (2008) Public Law 1.

hEorpa páirt i leasuithe reachtach, agus is léir nach aon eisceacht é an Ombudsman na hÉireann.[39] I ndiaidh a thuarascáil '*Redress for Taxpayers (Special Report)*' agus an neamhaird a thug na Coimisinéirí Ioncaim are moltaí na hOifige, leasaíodh an Bille Airgeadais 2003.[40] Mar gheall ar a thuarascáil '*Report on Nursing Home Subventions*', athraíodh na Nursing Home (Subvention) Regulations 1993.[41] Go deimhin, mar gheall ar a chumas thuarascáileach roimh an Oireachtas, bhí an Ombudsman in ann a thionchar parlaiminteach fhéin a neartú. I ndiaidh an dtuarascáil speisialta ar 'Scéim um Chailliúint ar Muir',[42] cás iomráiteach ina dhiúltaigh an Coiste an Oireachtas um Thalmhaíocht agus Muir moltaí i dtuarscáil speisialta na hOmbudsman, bunaíodh an Coiste Oireachtas um Achainíocha ón bPobal. Is 'seoladáin foirmiúil' é an Coiste seo le neartú an 'comhairliú agus comhoibriú' idir an Ombudsman agus an Oireachtas.[43] Anuas ar seo, bunaíodh fochoiste speisialta faoin gCoiste um Achainíocha ón bPobal chun treoirlínte a chraobhú maidir leis an comhoibriú idir an Ombudsman agus an Coiste. Is feidir leis an fochoiste achainí[44] agus cúrsaí áirithe[45] a chur roimh an Oifig. Cuireann an Ombudsman fáilte roimh an forbairt seo, agus iarann sé tuilleadh comhoibriú inchiallaithe idir an Oireachtas agus é fhéin.[46]

Anuas ar seo, tá an dlúthbhaint idir an Ombudsman agus an Oireachtas tabhachtach ó thaobh 'freagracht' nó 'cuntasacht' an Rialtais freisin. Tugann an Oifig guth do eilitheoirí agus eolas don Oireachtas maidir le easnaimh na seirbhísí an Stáit agus an Rialtais. Neartaíonn seo freagracht an

[39] European Ombudsman (u 26) 22.
[40] Oifig an tOmbudsman, *Redress for Taxpayers (Special Report)* (Oifig an tOmbudsman, 2002).
[41] Oifig an tOmbudsman, *Report on Nursing Home Subventions* (Oifig an tOmbudsman, 2001).
[42] Oifig an tOmbudsman, *Tuarascáil Speisialta: an Scéim um Chailliúint ar Muir* (Oifig an tOmbudsman, 2009).
[43] Rialtas na hÉireann, *Clár an Rialtais 2011* (Sráid Mhuirfean, 2011).
[44] Buanordú na Dála 165D (2)(a).
[45] Buanordú na Dála 165A (11)(a)(i).
[46] Oifig an tOmbudsman, *Tuarascáil an Ombudsman 2011* (Oifig an tOmbudsman 2011) 17.

bhrainse feidhmeannach; 'coincheap órga'[47] riachtanach do ghach 'bunreacht sláintiúil'.[48] Maidir lena chuid iarrachtaí 'fadhbanna agus mí-úsáid údarás an Rialtais a nocht agus a chosc',[49] cabhraíonn an Ombudsman an Oireachtas mar ionstraim 'mhionscrúdaithe teicniúil'.[50] Go deimhin, feictear cé chomh tábhachtach agus oiríunach é maoirseacht na hOifige maidir le cuntasacht an Rialtais nuair a cuirtear an Ombudsman i gcomparáid leis an 'mbealach urramach agus indibhidiúlach' athbhreithniú breithiúnach.[51] Mar gheall ar an gcostas, moill, agus raon teorantach a bhaineann le athbhreithniú breithiúnach agus a 'achrann gcúirteanna, gcoimisnéirí, agus mbord',[52] is léir nach bhfuil an ascaill tradisiúnta seo chomh éifeachtach, inniúil, nó oiriúnach le leasuithe fadtréimhseach, suntasach a dhéanamh ar an dlí. Go deimhin, deirtear are fud an domhain go mbíonn 'tuarascáil dea-scríofa amháin níos éifeachtái le cur leasuithe polaitíochta ar chois ná blianta maoirseacht na gcúirteanna'.[53] In ainneoin an fíric go bhfuil dabhtanna ag meadú faoi chumas na cúirteanna freagracht an Rialtais a áirithiú,[54] tá faomhadh ag neartú maidir le cumas an Ombudsman cuntasacht a chinntiú.

An Brainse Breithiúnach

Mar sin, feictear cé chomh tábhachtach agus oiriúnach é próiseas an Ombudsman le polasaí an bhrainse feidhmeannach a oiriúnú, agus eolas a thabhair don bhrainse reachtach. In ainneoin

[47] Mark Bovens, Thomas Schillemans, agus Paul Hart 'Does Accountability Work? An Assessment Tool' (2008) 86(1) Public Administration 225, 225.
[48] Brian Thompson, Richard Kirkham agus Trevor Buck, *The Ombudsman Enterprise and Administrative Justice* (Routledge 2010) 18.
[49] Bovens, Schillemans agus Hart (u47), 225.
[50] Hansard Society, *The Challenge of Parliament: Making Government Accountable* (Vacher Dod Publishing 2001) alt 1.25.
[51] Thompson et al (u48), 42.
[52] Fiona Donson agus Darren 'O'Donovan 'Critical Junctures: regulating failures, Ireland's administrative state and the Office of the Ombudsman' [2014] Public Law 472, 474.
[53] John McMillan, 'The Ombudsman, Immigration and Beyond' ag an Seimineár IPAA, Canberra (October 25, 2005) 5.
[54] Robert Dingwall agus Emelie Cloatre 'Vanishing Trials?: An English Perspective' (2006) 7 Journal of Dispute Resolution 52.

difríochtaí dlínsiúil beaga,[55] tá comparáid suimiúil le scrúdú idir na cúirteanna agus an Ombudsman. Go deimhin, i ndiaidh scracfhéachaint ar chostas, foirmiúlacht, agus na teorantaí eile a bhaineann le athbhreithniú breithiúnach, feicfear na buntáistí an phróisis na hOmudsman.

Gan amhras, 'sé an constaic don cheartais is mó ná costas an dlí; go háirithe in aghaidh an Stát. Tá próseis an Ombudsman 'buntáisteach do dhaoine daibhre'[56] go háirithe mar gheall ar an 'éagothrom airgidis' idir an duine agus an Stát.[57] Anuas ar sin, tá an próiseas míchostasach an Ombudsman buntáisteach do ghníomhartha an Stáit - ag sábhál na hacmhainní an Stáit freisin. Go deimhin, in ainneoin an firic go bhfuil seirbhísí na hOmbudsman le fáil ag chách, cabhraíonn an Oifig daoine faoi míbhuntáiste go díréireach.[58] In Éirinn, tír ina ghlacann teoranta ag baint le teanga, cultúr, agus míchumas páirt níos feicéalaí agus níos feicéalaí sa sochaí, tugann an Ombudsman deis do dhaoine gan guth. Maidir le daoine i Soláthar Díreach, i ndiaidh tuarascáil i 2018, reitíodh fadhbanna maidir le bia na gcónatheoirí in ionad Sholáthar Díreach, agus curadh tuilleadh aiseanna cócaireachta anus hallaí bhia sna hionaid.[59] Sa thuariscáil 2019 'Tráchtaireacht ar Sholáthar Díreach, scrúdaigh an Ombudsman na fadhbanna na gcónaitheoirí cuntais bainc a oscailt.[60] Maidir le paistí, mar gheall ar a thuarascáil 'Súil Siar: Láimhseáil Gearán ag an nGíomhaireacht um Leanaí agus an Teaghlach (Tusla)', bunaíodh modúl bunúsach láimhseála gearán ar líne, Fóram Comhoibríoch Náisiúnta um Fheabhsú Cáilíochta, agus leasaíodh an ríomhchóras náisiúnta bainistíochta cásanna.[61] Maidir le daoine i muinín ar leas sóisilata,

[55] Mar shampla, ní feidir leis an Ombudsman cásanna ag baint le inimircigh agus príosúin a scrúdú dar leis an Acht an tOmbudsman 1980, alt 5(1)(e).
[56] Grúpa Aithbhreithnithe an Bhunreachta, *Tuarascáil an Ghrúpa an Aithbhreithnithe an Bhunreachta* (Stationery Office 1996) 425.
[57] O'Brien (u28), 469.
[58] Paul Verkuil, 'The Ombudsman and the Limits of the Adversary System' (1975) 75 Columbia Law Review 845.
[59] Oifig an tOmbudsman, *Tuarascáil Bhliaintúil an Ombudsman 2018* (Oifig an tOmbudsman 2018).
[60] Oifig an tOmbudsman, *Tráchtaireacht ar Sholáthar Díreach* (Oifig an tOmbudsman 2021).
[61] Oifig an tOmbudsman, *Súil Siar: Láimhseáil Gearán ag an nGníomhaireacht um Leanaí agus an Teaghlach* (Oifig an tOmbudsman 2017).

leasaíodh treoirlínte ag baint le cártaí leighis,[62] bunaíodh lárionad glaonna,[63] agus tosáiodh traenáil foirne faoi ró-íocaíochtaí.[64] Go deimhin, is amhlaidh go ndíríonn an Ombudsman ar fhadhbanna na ndaoine imeallaithe.

Anuas ar seo, tá Oifig an Ombudsman sár-fheistithe le déaláil le gearáin.[65] Is mithid do fhoireann na hOifige an oiread cáipéisí a scrúdú agus daoine a agallamh; agus tá an Oifig sároilte ar na phróisis 'fada, mionchúiseacha' seo.[66] Deirtear go mbíonn an 'obair an Ombudsman níos éifeachtaí i gcásanna riarthacha ná próiseas na gcúirteanna'.[67] Uaireanta, is fearr le éilitheoirí leasuithe sistéamach agus leithscéal ná dámaistí airgeadúil.[68]

Ní oibríonn an Oifig faoi na srianta 'foirmiúil agus dleathach' atá curtha ar na cúirteanna.[69] Is 'tréith bunriachtanach' í an solúbthacht don phróiseas na hOifige, agus is feidir leis an Ombudsman an 'féinriail, dínit, agus slándáil' an aonáin a áireamh ina chuid fiosrúchán in ionad prionsabail dleathach.[70] Is feidir leis fadhbanna a imscrúdú ar a thoill fhéin, agus ní mithid dó a fhasaigh a leanúint. Ach, 'sé an difríocht is mó idir an próiseas na hOifige agus gnás na gcúirteanna ná an fíric nach oibríonn an Ombudsman faoi na srianta 'ceartas aiceanta'.[71] Neamhchosúil leis an tOmbudsman Seribhísí Airgeadais agus Pinsean, ní oibríonn an Ombudsman faoi rialacha ag baint le follasú cáipéisí[72] agus éisteacht na finnéithe,[73] ag neartú solúbthacht agus éifeachtacht na phróisis na hOifige. Anus ar ché

[62] Oifig an tOmbudsman, *Cásleabhar an tOmbudsman: Samhraidh 2021* (Oifig an tOmbudsman 2021) 6.
[63] Oifig an tOmbudsman, *Tuarascáil Bhliaintúil an Ombudsman 2019* (Oifig an tOmbudsman 2019) 17.
[64] ibid.
[65] Dar le Parker J i *R (on the application of Gallagher) v Basildon DC* [2010] EWHC 2824, alt 27.
[66] Oifig an tOmbudsman, *Tuarascáil Bhliaintúil an Ombudsman 1992* (Oifig an tOmbudsman 1992) 1.
[67] Anthony Bradley, 'Role of Ombudsman in Relation to Citizens' Rights' (1980) 39(2) Common Law Journal 302, 322.
[68] Sa chás '*Beaumont Hospital*', dúradh go raibh na éilitheoirí sásta le leithscéal agus gealltanas an fadhbh a réiteach: Oifig an tOmbudsman, *Tuarascáil Bhliaintúil an Ombudsman 2009* (Oifig an tOmbudsman 2009) 62.
[69] Abraham (u26), 208.
[70] Oifig an tOmbudsman, *Tuarascáil Bhliaintúil an Ombudsman 2000* (Oifig an tOmbudsman 2000) 12.
[71] 'Natural justice' as Bearla.
[72] Tá an Ombudsman Seirbhísí Airgeadais agus Pinsean faoi na rialacha seo: *J & E Davy v Financial Services Ombudsman & anor* [2010] IESC 30.
[73] Tá an Ombudsman Seirbhísí Airgeadais agus Pinsean faoi na rialacha seo freisin: *Lyons v Financial Services Ombudsman* [2011] IEHC 454.

chomh buntáisteach ‘s a bhíonn an próiseas seo don éilitheoir, tá an seirbhís so-aimsithe na Ombudsman tábhacht don Rialtas agus don Oireachtas. Mar atá thuasráite, tá scrúdaithe an Ombudsman riachtanach le choinneáil freagracht an Rialtais, le cur eolas ar an Pharlaimint, agus le oiriúnú seirbhisí na ngíomhairí an Stáit. Cé go stopann an costas agus na srianta eagsúla athbhreithniú breithiúnach daoine ag dul roimh na cúirteanna, is léir go bhfuil an Ombudsman deafhesitithe daoine a cabhrú agus fadhbanna sistéamach a réiteach. Is deachair a shéanadh gur forlíonadh riachtanach é an Ombudsman don bhrainse breithiúnach an Stáit.

Brainse ar Leith?

Mar gheall ar thábhachtas an Ombudsman mar forlíonadh don teagasc an scartha cumhachtaí, is minic a thairgeadh an Oifig (agus meicníochtaí freagrachta eile) mar brainse aonach an Stáit: an “brainse ionraic”.[74] De réir an coincheap seo, is mithid do Ombudsmain ar fud an domhain ‘riaradh maith’ (nó ‘riaradh cóir agus fónta’ san Acht na hÉireann[75]) agus ‘ionraic an Rialtais’ a choinneáil ‘ó radharc an duine’.[76]

Go deimhin, is foirfe an institúid é an Ombudsman chun ‘riaradh cóir agus fónta’ a bhreithniú. I gcomparáid le athbhreithniú breithiúnach roimh na cúirteanna (próiseas a ndíríonn ar an cheist an fheidhmíonn gníomhairí an Stáit faoi focal an dlí), is feidir leis an Ombudsman breithniú ‘thar an imeallchríoch an dlí’.[77] Maidir le ‘riaradh cóir agus fónta’, coincheap ‘neamhdhleathach’ den chuid is mó,[78] tá meicníocht an Ombudsman deafheistithe an caighdeán solúbtha seo a phóilíniú agus a

[74] Bruce Ackermann, ‘The New Separation of Powers’ (2000) 113 Harvard Law Review 633, 691.
[75] Acht an tOmbudsman 1980, alt 4(2)(b)(vii).
[76] Tran Anne and Anita Stuhmcke, ‘The Commonwealth Ombudsman: An integrity branch of government?’ (2007) 32 Alternative Law Journal 223, 235.
[77] David Gwynn Morgan agus Gerard Hogan, *Administrative Law in Ireland* (Round Hall 2012) 269.
[78] Alex Brenninkmeijer, *Fair Governance: A Question of Lawfulness and Proper Conduct*, lecture to the Dutch Association for Public Administration, 21 November 2006, 3.

fhorbairt. Go deimhin, tá sé ráite ag an Ombudsman ina chuid treoracha[79] agus líostaí prionsabal[80] go bhfuil an coincheap 'riaradh cóir agus fónta' 'orgánach', agus go bhfuil sé in ann rialacha ag baint leis a fhorbairt go hincriminteach.[81] Feictear seo sa chaoi ina cháineann an Ombudsman gníomhairí a úsáideann teanga tecniúil,[82] agus sa bhéim a chuireann an Oifig ar tionscnaimh fáisnéiseacha.[83] Chomh maith le seo, is amhlaidh go bhfuil cearta daonna tábhachtach i bhfiosrúcháin ag baint le 'riaradh cóir' anois[84], agus is amhlaidh go bhfuil Ombudsmain ar fud an domhain 'príomhchosainteoirí' cearta daonna.[85] Go deimhin, tá sé ráite ag an Ombudsman na hÉireann go bhfuil cearta daonna tábhachtach nuair a scrúdaíonn sé 'riaradh cóir agus fónta'.[86]

Tá tionchar na forbairtí seo soléir i leasuithe atá curtha i bhfeidhm ar na polasaithe na gníomhairí an Stáit. Tá tiomantas fógraithe ag na Coimisinéirí Ioncaim[87] agus an státseirbhís[88] go leanfaidh siad na caighdeáin cearta daonna forbartha ag an Ombudsman, agus is léir gur uchtaíodh 'áireamh cearta daonna' sa sholáthar seirbhísí an Stáit ag casadh na mílte.[89] Ni hámháin a bhíonn an Ombudsman ina mhaoirseacht ar seirbhísí an Stáit ag cinntiú go noibríonn siad ar bhealach 'cóir agus fónta', ach sileann a thráchtaireacht ar cearta daonna agus caighdeáin bunúsacha tríd an Stáit Riarthach na hÉireann i lug. Cé nach feidir a rá don Ombudsman amháin atá an freagracht na luachanna bunúsacha seo a chosaint agus nach aontaíonn an alt seo leis an scoil coincheapúil seo, cuireann an dioscúrsa béim ar thábhachtas

[79] I Oifig an tOmbudsman, *Tuarascáil Bhliaintúil an Ombudsman 2002* (Oifig an tOmbudsman 2002).
[80] I Oifig an tOmbudsman, *Tuarascáil Bhliaintúil an Ombudsman 1995* (Oifig an tOmbudsman 1995).
[81] *Redress for Taxpayers* (u40).
[82] Oifig an tOmbudsman, *Tuarascáil Bhliaintúil an Ombudsman 1986* (Oifig an tOmbudsman 1986) 14.
[83] Oifig an tOmbudsman, *Tuarascáil Bhliaintúil an Ombudsman 2018* (Oifig an tOmbudsman 2018) 24.
[84] Milan Ambrož, 'The Mediating Role of the Ombudsman in the Protection of Human Rights' (2005) 14 International Journal of Social Welfare 145, 147; Benny YT Tai, 'Models of Ombudsman and Human Rights Protection' (2010) 1(3) International Journal of Politics and Good Governance 1.
[85] Council of Europe Human Rights Commissioner Thomas Hammarberg, 'Ombudsmen are Key Defenders of Human Rights - their independence must be respected', (18 Méan Fomhair 2006).
[86] Emily O'Reilly, 'Protecting Rights and Freedoms' (2003) 7 International Ombudsman Yearbook 24, 29.
[87] *Redress for Taxpayers* (u40), 10.
[88] Rinné an státseirbhís gealltanas cearta daonna a áireamh sa sholáthar seirbhísí: Oifig an tOmbudsman, *Tuarascáil Bhliaintúil an Ombudsman 2000* (Oifig an tOmbudsman 2000) 13.
[89] ibid.

an Oifig ó thaobh riaradh cóir, cearta daonna, agus ionracas an Stáit. Go deimhin, in ainneoin an tuairim an talt seo gur forlíon é an Ombudsman don dheilbh trípháirteach tradisiúnta an Stáit, tarrangíonn an coincheap acadúil na hoifige seo aird ar ionad bunreachtúil an tOmbudsman.

Aitheantas sa Bhunreacht

Mar a iarann an méid atá thuasscríofa a mhíniú, is forlíonadh riachtanach é an Ombudsman do na trí bhrainse Stáit na hÉireann. Ag an am céanna, daingníonn an Oifig nóisin bunreachtúil sa bhreis. Sa bhealach a thuariscíonn an Ombudsman don Oireachtas, neartaíonn an Oifig freagracht agus cuntasacht an Rialtais. Sa chaoi a soláthraíonn an Oifig ascaill eile do cheartas, tresíonn an Ombudsman rochtain cheartais. Go deimhin, sa bhealach a chintíonn an Ombudsman go bhfuil seirbhísí an Stáit á sholáthar i gcomhréir le cearta daonna, feabhsaíonn an Oifig seirbhísí an Stáit Riarthach go hiondúil. Ina theannta sin, tá tábhachtas an Ombudsman ag meadú. Tá an Stát riarthach na hÉireann ag athrú agus ag fás, agus tá an córas trípáirteach Westminster an Stát ag streachailt 'an réimse luachanna i mbun an bhunreachta a chaomhnú.'[90] Chomh fada 's a meadaíonn an méid gníomhairí agus reachtaíocht tánaisteach sa Stát, éireoidh an Ombudsman níos tábhachtaí agus níos tábhachtaí chun solúbthacht riachtanach a sholáthar do institiúidí bunreachtúil.

Mar sin, ardaíodh an cheist: Cén fáth atá an 'acmhainn bunreachtúil'[91] seo bunaithe ag reachtáiocht agus faoi chumas an Aire?[92] Tá ár stát riarthach agus a chuid luachanna bunreachtúil ag brath ar an

[90] Thompson, Kirkham agus Buck (u48), 18.

[91] Snell (u2), 189.

[92] Acht an tOmbudsman 1980, alt 5(3).

'innealra folúthach',[93] agus tá sé thar-am ár mbunreacht a nuashonrú ionas nach bhfulaingíonn an Ombudsman faoi 'thaoide luath polaitíochta'.[94]

Neamhspléachas

In ainneoin forálacha áirithe san Acht an tOmbudsman 1980 agus 2012 ar neamhspléachas an Ombudsman[95] go hiondúil agus cosaintí maidir lena fhoireann,[96] is léir nach bhfuil an Ombudsman imdhíonach ó bhrú an Rialtais. Mar shampla, i ndiaidh a bhunú i 1980, laghdaíodh a bhúiséad,[97] agus bhí dlínse caol bronnaithe air.[98] Ina teannta sin, chonacthas dushláin tugtha in aghaidh an Ombudsman maidir lena dhlínse. Cheistíodh na gníomhairí ina dhlínse sa chás '*Right to Nursing Home Care*',[99] easaontaíodh cumas an Ombudsman reachtaíocht tánaisteach *ultra vires* a bheachtú sa chás '*Contributory Pensions*',[100] agus diúltaíodh a mholtaí i gcásanna eile.[101] Mar gheall ar seo, bhí alt bunreachtúil nua molta sa thuarascáil an Ghrúpa Aithbhreithnithe an Bhunreachta chun an Ombudsman a chosaint cosúil lena forálacha ag baint leis an Ardreachtaire Cuntas agus Chiste.[102]

Teorainn

Le sin ráite, caithfear a rá go sháraíonn an Ombudsman a dhlínse uaireanta eile. Cé go bhfuil teorainn ar dlínse na hOifige san Acht, tá móltaí tugtha ag an Ombudsman maidir le gníomhairí lasmuigh a

[93] Public Administration Select Committee, *Ethics and Standards: The Regulation of Conduct in Public Life* (The Stationary Office, 2007), 3 (Ríocht Aontaithe).
[94] Donson agus O'Donovan (u52), 489.
[95] Acht an tOmbudsman 1980, alt 4(1): 'Beidh an tOmbudsman neamhspleách i gcomhlíonadh a fheidhmeanna'.
[96] ibid alt 2(2).
[97] Michael Mills, *Hurler on the Ditch: Memoir of a Journalist Who Became Ireland's First Ombudsman* (Currach Press 2006) 142.
[98] I dtosach, ní raibh ach seirbhísí an riarachán lárnach faoi dhlínse an tOmbudsman. Corpraíodh bordanna sláintiúil agus údaráis áitiúil sa Ombudsman Act (First Schedule) (Amendment) Order 1984 (SI 332/1984).
[99] Oifig an tOmbudsman, *An Cuma faoi Chúram?: Imscrúdú ar an gCeart chun i dTithe Altranais in Éirinn* (Oifig an tOmbudsman 2010).
[100] Oifig an tOmbudsman, *Investigatory Report on the Non-Payment of Arrears of Contributory Pensions* (Oifig an tOmbudsman 1997).
[101] Oifig an tOmbudsman, *Ró-Shean le bheith Cothrom?: Imscrúdú Leantach* (Oifig an tOmbudsman 2012).
[102] An Grúpa Aithbhreithithe an Bhunreachta (u56), 427.

údarás.[103] Anuas ar sin, cé go ndeir an reachtaíocht gur feidir leis an Ombudsman 'gníomhaíocht riarthach' a scrúdaigh, tá gníomhaíocht leathbhreithiúnach cáinte ag an Ombudsman: cinneadh maidir le deontais tithíochta[104] agus sochair ón stát[105] san áireamh. Chomh maith le so, níl srian ar bith ar ceard is brí le 'riaradh cóir agus fónta'. Tá sé ráite ag an Ombudsman gur feidir leis tagairt do aon ionstraim cearta daonna idirnáisiúnta (beag beann ar cé chomh glacthe is atá sé sa córas dlí na hÉireann)[106] nuair a a dhéanann é measúnú ar an gcaighdeán seachantach seo. Go deimhin, in aineoinn an gá é a chosaint, ardaítear an cheist faoi na teoranta atá ag teastáil ó oifig chomh tábhachtach agus cumhachtach leis an Ombudsman. Ba cheart go bhfreagrófaí an cheist seo i bhforbairtí reachtach, nó bunreachtúil, maidir leis an Oifig.

Glaonna Nua

Sé bhliana fichead i ndiaidh moltaí an Ghrúpa Aithbhreithnithe an Bhunreachta, tá an Ombudsman fós gan aitheantas bunreachtúil. In éineacht le seo, is léir go bhfuil an Oifig ag éirí níos tábhachtaí. Dar le tuarascáil nua, tá muinín an phobail as an Stát agus páirteachas vótálaí ag laghdú thar an OECD,[107] go háirithe in Éirinn.[108] Mar gheall ar seo, curadh béim ar thábhachtas 'Rialtais Oscailte': Státanna in a bhfuil na prionsabail 'cuntasacht, ionraic, agus trédhearcacht' lárnach dá chultúr. Go háirithe, díritear tráchtaireachta nua ar lárnachas an Ombudsman sa chomhthéacs seo.[109] Mar 'institiúid a dhéanamh caidreamh leis an bpobal, a chosnáionn cearta daonna, agus a daingníonn freagracht an Rialtais agus trédhearcacht an Stáit', is amhlaidh go bfhuil tábhachtas na hOifige curtha chun chinn faoi solas nua.

[103] Oifig an tOmbudsman, *Tuarascáil Bhliaintúil an Ombudsman 2006* (Oifig an tOmbudsman 2006) 31.
[104] Oifig an tOmbudsman, *Cásleabhar an Ombudsman 2020: Sligeach, Liatroim, agus Ros Comáin* (Oifig an tOmbudsman 2020) 9.
[105] Oifig an tOmbudsman, *Cásleabhar an Ombudsman 2019: Geimhreadh* (Oifig an tOmbudsman 2019) 6.
[106] O'Reilly (u86), 32.
[107] European Ombudsman (u26) 1.
[108] Organisation for Economic Coordination and Development, *Government at a Glance* (OECD 2013).
[109] European Ombudsman (u26).

Go deimhin, bhí aighneacht fógraithe ag an Ombudsman don '*Open Government Partnership National Action Plan*' 2016,[110] ar a aitheantas sa Bhunreacht. Ag luath an laghdú muinín an phobail, an tábhachtas 'Rialtas Oscailte', agus moltaí an Comhairle na hEorpa ar an gá cosaint bunreachtúil i gcomhthéacs an tOmbudsman,[111] shíl an Ombudsman go raibh tacaíocht bunreachtúil ag teastáil. In ainneoin an fíric nár ghlacadh an aighneacht seo, is amhlaidh go bhfuil brú ag meadú ar an Rialtas céimeanna a thogáil i dtreo leasuithe bunreachtúil sa thodhcaí.

Críoch

Iarradh an píosa seo an tábhachtas an Ombudsman a léiriú, agus áit an Oifig a aithint i measc an Stát trípáirteach na hÉireann. In ainneoin plé acadúil a chruthaíonn gur brainse aonach 'ionraic' é an Ombudsman, mar gheall ar chumas agus freagracht na hOifige seirbhísí an Rialtais a oiriniú, an Oireachtas a cuidiú, agus ascaill cheartais eile a sholáthar, is amhlaidh gur forlíonadh riachtanach é an Ombudsman do ghach brainse an Stáit. Chomh maith le sin, de thoradh an bhealach a threisíonn an Ombudsman cuntasacht an Rialtas, trédhearcacht an Stáit, agus teacht ar cheartas, feabhsáionn sé idigníomhú idir na brainsí an Stáit. I ndomhan agus tír ina bhfuil an Stát riarthach ag fás agus prionsabail ag baint le 'Rialtas Oscailte' a teacht chun chinn, is léir go bhfuil an Ombudsman ag éirí níos tábhachtái, agus go bhfuil tacaíocht bunreachtúil ag éirí níos riachtanaí.

[110] Oifig an tOmbudsman, *Submission on Constitutional Recognition of the Office of the Ombudsman* (Oifig an tOmbudsman 2016).
[111] Parliamentary Assembly of the Council of Europe, *The Institution of the Ombudsman* (Recommendation 1615/2003).

The Legislative Gap between Sexual Consent and Medical Consent and How that Affects Access to Emergency Hormonal Contraception in Ireland

Shauna Kenny, BCL

Identifying the Legislative Gap:

Introduction

The battle to achieve equality in access to medical resources for women is an endless cycle of struggles and disputes. The debate surrounding the use of emergency hormonal contraceptives is a particularly intricate, complicated, problematic topic that lingers in our community. The intricacies and difficulties for women and teenage girls in obtaining emergency hormonal contraceptives, a struggle which is emerging from the current legislation on medical consent and sexual consent will be examined. Viewing the legislation from a pragmatic point of view, it is extremely difficult to pinpoint any faults. However, when pragmatic legislation is applied to real-world everyday situations, it becomes evident that there is a significant amount of ambiguity regarding its application. This inquiry strives to highlight the imposing issue of the legislative gap between sexual consent and medical consent and how that affects access to emergency hormonal contraceptives for young women in Ireland, in particular adolescent women who require contraceptive services. [1]

[1] Emergency Hormonal Contraception is for the purposes of this inquiry is a post-coital pill which is taken up to 5 days following sexual intercourse. The two types of emergency hormonal contraception available in Ireland are the progesterone pill or ulipristal. (Another alternative emergency contraceptive method is the intrauterine copper device which can only be fitted by a trained doctor.) 'Emergency Contraception' *(IFPA)*, available at <https://www.ifpa.ie/factsheets/emergency-contraception/#:~:text=The%20main%20brand%20of%20the,the%20sooner%20it%20is%20taken. > accessed on 12 March 2023.

The Law

At the outset, it is required to identify the relevant and necessary law that is essential for the evaluation of this imposing legislative gap. The legal age of consent for all persons in this jurisdiction for sexual activities is 17 years old, contained within Section 3 of the Criminal Law (Sex Offences) Act 2006 as amended by Section 5 of the Criminal Law (Sexual Offences) (Amendment) Act 2007. It is provided in this section that it is a criminal offence to engage or attempt to engage in any sexual activity with a child under 17 years of age, whether or not the child consented to such activity because they do not possess the legal capacity to consent.[2] While consent is not generally accepted as a defence[3], there are exceptions to this rule which are set out in section 3.[4] One of these exceptions is that consent can be operative if the defendant is within two years of the child's age and if that is established then no offence of statutory rape was committed.[5] It is also important to note that under section 5 of the Criminal Law (Sexual Offences) Act 2006, the female child will not be guilty of an offence by reason of merely engaging in a consensual act of sexual intercourse, a provision which was approved in the Supreme Court by Denham CJ in *D (M) v Ireland* [2012].[6]

Generally, consent from a parent or guardian is required for all medical and surgical tests and procedures which are carried out on children. A child is defined in Ireland as any persons under the age of 18[7] and this is also the definition provided for by the United Nations Convention on the Rights of the Child.[8] However, in accordance with the Non-Fatal Offences Against the Person Act 1997,

[2] Criminal Law (Sexual Offences) Act 2006, s.3(1).
[3] Criminal Law (Sexual Offences) Act 2006, s.3(7).
[4] Criminal Law (Sexual Offences) Act 2006, s.5; s.3(10)(b).
[5] Criminal Law (Sexual Offences) Act 2006, s.3(10)(b).
[6] D (M) (A Minor) v Ireland AG & DPP [2012] IESC 10.
[7] Child Care Act 1991; Children Act 2001.
[8] United Nations Convention on the Rights of the Child 1989 Article 1.

children from 16 years old do not require parental consent with regards to medical advice, treatment procedures, etc, in this jurisdiction.[9] Finally, since there is no concrete legislation providing for the use of contraceptive services, there is consequently no set minimum age within this jurisdiction for which advice and prescriptions regarding hormonal contraceptives may be provided.[10]

The Age of Consent in Ireland

The first aspect of the debate on emergency hormonal contraceptives which must be explored is why is the minimum age of consent for sexual activities currently fixed at 17 years of age in Ireland? Ireland has one of the highest minimum age for sexual consent within the European Union with the majority of Member States having set the age for sexual consent between 14 and 16 years old.[11] The only country that has a higher minimum age than Ireland is Malta, with the age of consent standing firmly at 18 years old.[12] A primary point of inquiry for the purposes of this analysis on the legislative gap is how the age of consent is determined for each individual country. According to Clíona Saidléar[13], "The Age of Consent is a societal good" which is designed to benefit the social order and prevent premature sexualisation of children. The Age of Consent is referred to by Saidléar as a "multi-functional tool" which is crumbling under the weight of its numerous responsibilities and duties required in an attempt to satisfy society. However, the Age of Consent cannot possibly begin to sufficiently fulfil such responsibilities in the sheer absence of supplementary legislation and policy.

[9] Non-Fatal Offences Against the Person Act 1997, s.23.
[10] 'Children and rights in Ireland' *(Citizens Information)*, available at <https://www.citizensinformation.ie/en/birth_family_relationships/children_s_rights_and_policy/children_and_rights_in_ireland.html#:~:text=Contraceptive%20services,under%2017%20years%20of%20age.> accessed on 29 December 2022.
[11] 'Consent for sexual activity with an adult' *(European Union Agency for Fundamental Rights, 24 April 2018)*, available at <https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/consent-sexual-activity-adult> accessed on 3 January 2023.
[12] ibid, 11.
[13] Clíona Saidléar, 'Whose Age of Consent is it anyway?' (2006) Rape Crisis Network Ireland, Policy Paper.

One deficiency highlighted is the lack of statutory guidelines on how professionals should approach situations in which a child requires medical help or advice, but they do not wish for their parents to be consulted on the matter. What duty do medical professionals have to children and to what extent can they fulfil their duties in the absence of parental consent?[14]

This is a key question which is fundamental to overcoming the legislative gap on the right to hormonal contraceptives for teenage girls. A girl at 16 years old has the capacity under law to consent to medical procedures, tests, etc meaning that it is not necessary for parental consent to be obtained by the consulting professional, whether it be a doctor, nurse or pharmacist. However, the issue which emerges is that the age of consent for sexual activities is 17 years old and therefore it so follows that a girl who is 16 years old did not possess the capacity to consent to the sexual activity which occurred. It is at this point that the implications of the absence of legislative guidance on emergency hormonal contraception becomes clear. This gap creates a moral and ethical debate for prescribers as well as a justified fear of facing legal consequences if they do choose to prescribe the emergency hormonal contraception despite the fact that they could potentially be privy to information regarding statutory rape that they in order to maintain a duty of case duty, will have to report to the relevant authorities, save for in circumstances as set out in section 14(3).[15] However, there is no way to accurately predict whether or not the prescriber would be held liable for prescribing emergency hormonal contraception to an individual below the legal age for consent because no case of such a nature has yet been heard

[14] Cicely Roche, 'Children and the Law: Dispensing Prescriptions to Minors' (2010) Irish Pharmacy Journal, 168-169.
[15] Children First Act 2015, s.14(1); s.14(2); s.14(3).
Note that while pharmacists are not specifically referenced under Schedule 2 of the Children First Act 2015, they do however come within the meaning set down in Schedule 1, s.2(4). See also PSI, 'Preparation for the Children First Act 2015' available at
<https://www.thepsi.ie/gns/Pharmacy_Practice/PracticeUpdates/Preparation_for_the_Children_First_Act_2015.aspx > accessed on 11 September 2023.

in this jurisdiction.[16] Nonetheless, the fears and concerns surrounding the prescription of emergency hormonal contraception are extremely valid and it is understandable that given the fact there is no specific law governing this matter, it is natural for such moral debates to arise and in such instances prescribers will act in such a way in order to circumvent liability.

Contributing Factors to the Legislative Gap:

Pharmacy Code of Conduct (PSI)

It is necessary at this point to examine the pharmacy code of conduct, given the fact that the pharmacist is understood as a typical first point of contact for those who require emergency hormonal contraception.[17] For the purposes of the code, whenever the word 'must' is used it is referencing an obligation on the part of the pharmacist. The pharmacist is required to comply with all aspects of the code at all times. Failure to comply with same is dealt with under the Pharmacy Act 2007 and issue will only be taken if the failure amount to a '*serious breach'*. An honestly formed act or omission which although wrong will not amount to professional misconduct, however this will be examined on a case-by-case basis.[18] A fundamental stipulation at the beginning of the code reads as follows:

> Pharmacists must use their professional judgement and clinical expertise in order to make ethical decisions, while observing relevant legislation, practice standards and guidance. This may involve balancing different responsibilities and priorities.[19]

[16] Sandra Ryan, '*Emergency Contraception: The Ongoing Debate*' (2009) Irish Medical News, available at <https://www.ifpa.ie/emergency-contraception-the-ongoing-debate/> accessed on 1 March 2023.
[17] Richard Cooper, Paul Bissell, Joy Wingfield, 'Ethical, religious and factual beliefs about the supply of emergency hormonal contraception by UK community pharmacists' (2008) 34(1) J Family Planning Reproductive Health Care 47–50.
[18] *O'Laoire v. Medical Council*, Unreported, January 27th 1995.
[19] The Pharmacy Regulator, *Code of Conduct: Professional Principles, Standards and Ethics for Pharmacists* (2), available at <https://www.thepsi.ie/Libraries/Pharmacy_Practice/PSI_s_Code_of_Conduct_2019.sflb.ashx>.

Therefore, it is evident that ethics play a central role in the making of professional medical decisions and there is an innate duty to weigh one's priorities against one's obligations as a pharmacist. A key phrase to draw specific attention to is '*while observing relevant legislation'*. What is the relevant legislation that must be abided by when it comes to the prescribing and dispensing of emergency hormonal contraceptives? The two primary pieces of legislation are the Criminal Law (Sexual Offences) (Amendment) Act 2007 and the Non-Fatal Offences Against the Person Act 1997.[20] So to what extent must a pharmacist, if presented with the situation, observe relevant legislation in order to determine whether or not emergency hormonal contraception should be prescribed to a 16-year-old female? To come to a conclusion, it is necessary to examine other principles contained within the code.

The first principle creates a contrary obligation by requiring the pharmacist to abide by all statutory provisions governing the principle of consent[21] and that they are obliged to raise any concerns with the relevant authority in order to ensure the safety and wellbeing of the patient.[22] Once again a distinct deficiency is highlighted. Which statutory provision on consent should be afforded more weight when it comes to making a professional medical decision regarding the dispensing of emergency hormonal contraception: the legal age of consent for sexual activity which is set at 17 years old or the legal age for medical consent which stands at 16 years old? This ambiguity should not be left to the pharmacist to decipher and overcome. There is a clear urgency for supplementary legislation or express statutory guidelines in order to bridge this alarming gap within the law, a gap which ultimately exists because this issue has not been properly brought to the attention of organisations such as the Law Reform Commission.[23]

[20] Other relevant legislation includes but is not limited to: Pharmacy Act 2007; Medicinal Products (Prescription and Control of Supply) (Amendment) Regulations 2021.
[21] The Pharmacy Regulator (n19), Principle 1 (4).
[22] ibid, Principle 1 (8).
[23] ibid 14.

The subsequent obligation set out in the first principle as aforementioned is that the pharmacist must raise concern with the relative authority to safeguard the health of the patient which creates an entirely separate issue. While this principle can be interpreted in many different ways as there is no explicit definition for what 'safeguarding' ultimately means. Nonetheless, this onus on the pharmacist could in some situations due to the individual's interpretation, have the adverse effect of discouraging young girls who have not yet attained the legal age of consent for sexual activity from seeking advice or medical treatment for the benefit of their sexual health for fear of such information being disclosed to an authoritarian body. This situation could potentially arise where a 16-year-old makes a request for the morning after pill from the community pharmacist, that pharmacist will be burdened with the information that the child may have been victim to statutory rape and will be fixed with a duty to safeguard as set out by the Children First Act 2015.[24] However, this duty will not apply where the child is more than 15 years of age and the pharmacist has knowledge to reasonably believe that other party involved in the sexual activity was within 24 months of the child's age.[25] Nonetheless, such a provision could very well discourage a young woman from seeking the medical advice or treatment required which in turn inevitably results in a demotion in status of female youths' sexual health.

According to the second principle of the code, it is imperative that a pharmacist weighs the benefit of a product or service against the risk.[26] The type of risk is not specified so it is unclear whether it involves a side-effect of the product/service or whether it is the potential risk if the service is not administered. This very clearly highlights the importance of striking a proportionate balance between professional responsibilities and priorities and the patient's wellbeing. In this circumstance it is the

[24] Children First Act 2015, s.2(4).
[25] Children First Act 2015, s.14(3).
[26] The Pharmacy Regulator (n19), Principle 2 (9).

woman's sexual wellbeing which ultimately boils down to her constitutionally protected unenumerated right to bodily integrity.[27]

The Irish Constitution

Previous cases throughout the years have brought to life the existence of unenumerated rights, bodily integrity being one of the focal points of this constitutional discovery. In Article 40.3.2° the words "in particular" indicate that sub-section two[28] is a more detailed refinement of the general guarantee that is upheld in sub-section one[29] which extends to rights that are not specified within the Article.[30] While the refusal by a conscientious objector to provide emergency hormonal contraception does not in itself constitute an invasion of bodily integrity, if bodily integrity is broadened into a more general right as to not have one's health endangered by the State, this will inherently incorporate the guarantee in Article 40.3.2° that the human person shall be protected from unjust attack.[31] This interpretation of the article was enforced by the Supreme Court in *State (C) v Frawley.*[32] In this case, the circumstance of the Executive, through an act of omission without justification, which would subject the health of the human person to risk or danger is deemed unconstitutional. If we apply this precedent to our discussion, it is evident that pharmacists and other prescribers of emergency hormonal contraception all operate under the regulation of the HSE, which is a State body,[33] and that the refusal of a conscientious objector to provide a lawful medical treatment will result in a risk to the individual's health. In this circumstance the denial of post-coital contraception may result in the consequence of pregnancy. It is then up to interpretation and medical science as to which course of action carries a

[27] Article 40.
[28] Article 40.3.2°.
[29] Article 40.3.1°.
[30] Mr Justice Kenny in *Ryan v Attorney General* [1965] IR 294.
[31] Article 40.3.2°.
[32] The State (At the Prosecution of C) v. Frawley, [1976] IR 365.
[33] HSE Organisational Structure *(HSE)*, available at < https://www.hse.ie/eng/about/who/> accessed on 12 March 2023.

lower risk of danger to the individual's health, the administration of an emergency contraceptive pill or the more invasive option of abortion or alternatively in the absence of either option afforded, pregnancy and labour.

Conscientious Objection

The European Convention on Human Rights (ECHR hereinafter) recognises the right to conscientious objection as a consolidated right encompassed within the right to freedom of thought, conscience and religion[34] and protects the conscientious objector from discrimination.[35] Conscientious objection undoubtedly plays a central role in the debate on access to emergency hormonal contraception in Ireland. Conscientious objection grants medical and health professionals the right to refusal of a particular medical treatment or drug if it justifiably[36] comes into conflict with their moral, religious or ethical beliefs.[37] However, here ensue lies the predicament because where there are no laws to govern the prescription of emergency hormonal contraception, conscientious objection can legitimately be used and manipulated or pinned as a scapegoat for emergency hormonal contraception prescribers who do not wish to get involved in the debate on dispensing emergency hormonal contraception to the group that represents the highest use of emergency hormonal contraception, which is those under the age of majority.[38]

[34] European Convention on Human Rights (ECHR) Article 9.
[35] The Pharmacy Regulator (n19).
[36] Cicely Roche, 'Conscientious Objection: the right to refuse to dispense' (2008) Irish Pharmacy Journal 18: In the event of conscientious refusal to dispense, the burden shifts to the pharmacist to account for the reasoning behind the decision.
[37] ibid, 33.
[38] Zaami Vergallo, Marinelli di Luca, 'The Conscientious Objection: debate on emergency contraception' (2017) 168(2) Department of Anatomical, Histological, Forensic and Orthopaedic Sciences, Sapienza University of Rome, Rome, Italy, 113-119: Data from the study conducted show that people under the age of 18 represent the age cohort with the highest rate of use of emergency hormonal contraceptives.

The socio-cultural aspect of actual conscientious objection also gives rise to gross implications for young women,[39] in particular the target group of this inquiry, which is 16-year-olds who require post-coital contraception services. While this discussion could be expanded to encompass individuals under the age of 16 and their difficulties in obtaining emergency hormonal contraceptives, this avenue will not be explored because as aforementioned, the primary purpose of this inquiry is to address the problem emerging from the fact that a 16-year-old has the capacity under legislation to consent to medical treatments while equally not possessing the capacity to consent to sexual activities. The Council of Europe has expressed legitimate concerns regarding the issue of conscientious objection being misappropriated as regards to women's healthcare due to the fact that it is unregulated.[40] Evidence of this has been documented in practice during research conducted on community pharmacists in the United Kingdom (UK) and their views on dispensing emergency hormonal contraception. Throughout this inquiry three distinct categories were identified: pharmacists who view emergency hormonal contraception as unproblematic, pharmacists who prescribed contingently and pharmacists who were completely opposed due to religious and ethical beliefs. The group that appears to be the most controversial is that of the category of pharmacists who dispense the emergency contraceptive pill on a contingent basis as it was identified that those individuals were heavily influenced by a woman or girls socio-economic background and age.[41] This would indicate that the Council of Europe and ECtHR has great cause for concern but because the prescription of emergency hormonal contraception is still not governed by any specific law in the UK nor in this jurisdiction, the consequence is that the illegitimate use of conscientious objection will continue.

[39] Richard Cooper, Paul Bissell and Joy Wingfield, 'Ethical, religious and factual beliefs about the supply of emergency hormonal contraception by UK community pharmacists' (2008) 34(1) J Family Planning Reproductive Health Care, 47–50.
[40] *Frawley* (n34).
[41] ibid, 38.

The respective regulator of emergency hormonal contraception, which is the Health Service Executive (HSE)[42] in this jurisdiction, has included *'conscience clauses'* which compel a conscientious objector to refer the patient to another medical provider or health service that is willing to prescribe the drug.[43] For example, in the Pharmacy Code of Conduct, the fourth principle '*Work with Others'* stipulates that patients must be referred to another medical or healthcare provider if the pharmacist is unwilling or unable to provide a particular treatment.[44] Nonetheless, such clauses do not negate the fact that the legislative gap still remains an issue that demands addressing because there is no consistency as to how pharmacists choose to interpret the relevant legislation as per the code of conduct which they are obliged to follow. It has been noted that conscientious objection has become a very broad, far-reaching right and may be in certain circumstances contrary to human rights law, especially when the objection is disproportionate and would result in the unequal treatment of a particular group.[45] However, if an effort was made by the regulator (PSI) to compel all emergency hormonal contraception prescribers to dispense the treatment to all medically eligible patients upon their request, this compulsion could potentially be struck down as a violation of Article 9 ECHR, which encompasses the right to conscientious objection.[46]

[42] European Convention on Human Rights (n32).
[43] Gallagher CT, Holton A, McDonald LJ, et al., 'The fox and the grapes: an Anglo-Irish perspective on conscientious objection to the supply of emergency hormonal contraception without prescription' (2013) 39 Journal of Medical Ethics 638-642.
[44] The Pharmacy Regulator (n18), Principle 4(5).
[45] John Olusegun Adenitire, 'The BMA's guidance on conscientious objection may be contrary to human rights law', (2017) Journal of Medical Ethics, 260-263.
[46] Report of the Working Group on Access to Contraception (October 2019) available at <https://assets.gov.ie/38063/89059243e750415ebf7e96247a4225ae.pdf> accessed on 14 September 2023.

Remedying the Legislative Gap:

Sweden on The Right to Conscientious Objection

In Sweden, the right to conscientious objection is not recognised, even though the country is a Member State of the European Union. This highlights a particularly interesting debate as to how Sweden's refusal of the right has not been struck down as in breach of Article 9 ECHR,[47] though it is important to note that this is not from a lack of opportunity for the Court to rule on the matter. The European Court of Human Rights (ECtHR hereinafter) was presented with two separate applications in 2020 from midwives challenging Sweden's rejection of the consolidated right to conscientious objection.[48] While the two cases about to be discussed do not directly deal with emergency hormonal contraception, they deal with the exercising of conscientious objection in circumstances deal with the female's reproductive system however one must bear in mind the proportionality test when analysing such. The midwives in *Grimmark v Sweden*[49] and *Steen v Sweden,*[50] in two unrelated occasions, refused to assist in the termination of a pregnancy because the procedure came into conflict with their religious beliefs. As a consequence of their refusal to assist on this medical procedure they were denied employment and subsequently brought the issue before the ECtHR. This conclusion was reached due to the midwives claims not satisfying the proportionality analysis.

The doctrine of proportionality is applied by the ECtHR when an assessment is required to decide whether or not it is reasonable to interfere with a Convention right.[51] The Courts primary aim is to strike a fair balance between the interests of the individual and the interest of the general public and

[47] This argument is also made in conjunction with ECHR Article 10 and ECHR Article 14.
[48] Wojciech Brzozowski, 'The Midwife's Tale: Conscientious Objection to Abortion after *Grimmark* and *Steen'* (2021) 10(2) *Oxford Journal of Law and Religion* 298–316.
[49] *Ellinor Grimmark v Sweden* Application no 43726/17 (ECtHR, 11 February 2020).
[50] *Linda Steen v Sweden* Application no 62309/17 (ECtHR, 11 February 2020).
[51] Richard Clayton, Hugh Tomlinson, *'The Law of Human Rights'* (Oxford 2000) 278.

to weigh up what is the most appropriate course of action to ensure an equal balance of rights where there are competing interests.[52] It is also important to note that Article 9 ECHR does not include an unenumerated right to conscientious objection.[53] When evaluating the proportionality of a specific case, it is also necessary to consider the relationship it has to the margin of appreciation awarded to the Member State in relation to the right. The margin of appreciation doctrine is most applied in relation to cases dealing with the rights contained within Article 8 through 11 of the ECHR.[54] These are articles relating to qualified rights which contain limitation clauses meaning that the rights contained within such articles are not absolute and therefore encompass certain restrictions.[55] Article 9 ECHR, the right to freedom of thought, conscience and religion, as aforementioned, falls under this category of rights.

Ultimately the ECtHR concluded that the applications made by *Grimmark* and *Steen* were inadmissible pursuant to the criteria laid down in Article 35 ECHR, on the basis that their arguments were 'manifestly ill-founded'. [56] It is therefore clear that the ECtHR did not sway from the established jurisprudence[57] and do not condone medical and healthcare professionals giving precedence to their own religious beliefs over the wellbeing of the patient.[58] Additionally, the ECtHR recognised that there was an effective course of action prescribed by law available at Sweden's national level which had the legitimate aim of vindicating the rights of the woman to access abortion services.[59]

[52] The Council of Europe, 'The Margin of Appreciation' (*coe.int*, date of publication unknown) available at <https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp> accessed on 28/03/2023.
[53] ECHR Article 9(2).
[54] *Steen* (n50).
[55] Ignacio Rasilla del Mortal, 'The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine' (2006) 7(6) German Law Journal 611-624.
[56] ECHR, Article 35(3)(a).
[57] *Eweida and Others v United Kingdom* Application Nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013); *Skugar and Others v Russia* Application No 40010/04 (ECtHR, 3 December 2009).
[58] See also *Pichon and Sajous v France* Application No 49853/99 (ECtHR, 2 October 2001).
[59] Abortion Act of 1974 (SFS 1974:595).

Therefore, it is submitted that one way to impose equal prescription measures for emergency hormonal contraceptives across this jurisdiction would be to redact the right to conscientious objection. However, if that avenue were to be pursed there would need to be a sufficient basis in Irish law with regards to accessing emergency hormonal contraceptives. Nonetheless, this potential course of action would ensure that young women would not be denied emergency contraceptive treatment due to ethical, moral, or religious beliefs or socio-cultural aspects because women's health should take precedence over a medical professionals' belief system. This is where the urgent necessity for a balance between professional responsibility and a woman's right to personal autonomy and bodily integrity needs to be struck.

The Approach in other European Union Member States

In 2001, Ireland along with numerous other EU Member States including Sweden, made emergency hormonal contraception available to be sold as an over-the-counter drug without prescription from a trained doctor.[60] However, only two of these countries have introduced specific legislation to deal with the prescription of emergency hormonal contraception: France[61] and Portugal.[62] French legislation, introduced in the winter of 2000, made provision for girls under the age of 18. It provides that a girl under the age of 18 may be lawfully prescribed emergency hormonal contraception without the consent of a parent, guardian or legal representative[63] following a consultation with the prescriber, whether it be a pharmacist, doctor, or even school nurse, to assess the psycho-physical state of the individual. It additionally provides that the prescriber should indicate and explain other forms of

[60] Gunilla Aneblom, Margareta Larsson, Louise von Essen and Tanja Tydén, 'Women's voices about emergency contraceptive pills "over the counter": A Swedish perspective.' (2002) 66(5) Contraception, 339-343.
[61] Loi n° 2000-1209 relative à la contraception d'urgence *Journal Officiel de la République Française*, 2000.
[62] Loi n° 12/2001 de 29 de mai 2001.
[63] Loi n° 2001-588 relative à l'interruption volontaire de grossesse et à la contraception *Journal Officiel de la République Française*, 2001.

contraception which may be used for a prolonged period of time and how to prevent the transmission of sexual infections and diseases[64], a provision which is especially beneficial to promoting women's sexual health, working towards combating the 'taboo' nature of such topics. The incorporation of specific legislation would be a significant step in the right direction in this jurisdiction. Previously highlighted was the justified concern of conscientious objection being pinned as a scapegoat for prescribers of emergency hormonal contraception and the primary reason for this occurrence is the lack of statutory provision on the matter. The enactment of legislation similar to that as the legislation in France would be extremely effective in eliminating firstly, the artificial conscientious objectors and secondly, the ambiguity in the application of the principles contained within the pharmacy code of conduct.

From Gillick Competence to Fraser Guidelines

Our neighbours in the United Kingdom have issued guidance for doctors to assess the Gillick competence of a child. Gillick competence emerged in the UK as a result of the judgement in *Gillick v West Norfolk & Wisbech AHA & DHSS* [1985][65] and this guidance provides doctors with the flexibility and scope to lawfully provide medical treatment to a child without parental consent by means of assessing each child on a case-by case basis as to their capacity to consent. This means that if a doctor, following their assessment, is convinced that a child under the legal age required for medical consent has the capacity to make decisions as regards their own medical treatment and fully comprehends the implications of such decisions then obtaining parental consent is not necessary. Nevertheless, the doctor should still encourage the child, although deemed Gillick competent, to

[64] Décret n° 2002-39 relatif à la délivrance aux mineures des médicaments ayant pour but la contraception d'urgence *Journal Officiel de la République Française*, 2002.
[65] *Gillick v West Norfolk & Wisbech AHA & DHSS* [1985] 3 WLR (HL).

inform a parent or guardian. The flexibility afforded by virtue of the Gillick competency assessment helps to promote and ensure that health services are easily and readily accessible for children.

It is apparent that the HSE endorses its own version of Gillick competence passively in practice when it comes to the wellbeing of children[66] unfortunately, however, such guidelines have no legal validity in this jurisdiction. While there has been plenty of discussion on the implementation of similar guidelines,[67] there has not yet been a push to incorporate a legal framework or give any statutory footing to Gillick competence. Nonetheless it is submitted that the implementation of such guidelines would be extremely beneficial in this jurisdiction, and it should be pushed further and expanded to pharmacists also. If a pharmacist were permitted to assess the Gillick competence of an individual under the age of 17 who is seeking emergency hormonal contraception this would sufficiently support the closing of the legislative gap between sexual consent and medical consent and circumvent the legal ambiguity and fear of consequences which pharmacists are currently facing as outlined in Saidléar's article[68] which was examined in part one.

Furthermore, a subsidiary branch of the Gillick competence has emerged in the UK, the Fraser guidelines, which deal specifically with sexual health, contraceptive services and termination of pregnancy.[69] The Fraser guidelines stipulate five criterion which must be fulfilled in order for the doctor to proceed with the sought after advice or treatment without obtaining parental or guardian consent.[70] The first two criterion are the same as that provided when assessing the Gillick competency

[66] Cicely Roche, 'Children and the Law: Dispensing Prescriptions to Minors' (2010) Irish Pharmacy Journal, 168-169.
[67] Law Reform Commission, *Children and the Law: Medical Treatment* (LRC CP 59-2009).
[68] Saidléar (n13).
[69] Sue Axton v The Secretary of State for Health (The Family Planning Association: intervening) [2006] EWHC 37.
[70] 'Gillick competency and Fraser Guidelines' (*NSPCC,* 5 August 2022) available at <https://learning.nspcc.org.uk/child-protection-system/gillick-competence-fraser-guidelines#skip-to-content> accessed on 29 December 2022.

of a child, however the other three criterion are more specific to sexual health.[71] The third criteria provides that the advice or treatment may be given if the child is likely to begin or continue engaging in sexual activity regardless of whether or not they are prescribed the sought-after contraceptive treatment. The fourth and fifth criterion consist of a weighing the balance of the potential effect on the child's physical and/or mental health if the treatment is not provided and determining whether or not the prescribing of the treatment is in the best interest of the child. These are very progressive views to have emerged from Lord Fraser in the mid-1980s and are still extremely relevant today. Their incorporation into our legal system would be a great utility for medical professionals to take advantage of in order to safeguard the sexual health of our young population and it would minimise any potential incumbrances on this matter.

Resolution:

Free Contraception Service Scheme

A recent Dáil debate on the newly introduced free contraception service scheme[72] considered the potential implementation of Fraser guidelines in Ireland but despite this, no action was taken. The free contraception service scheme provides free access to various forms of contraceptive services for women between the age of 17 and 26 inclusive. This scheme absorbs the cost of appointments, prescriptions, and any medical procedures necessary for the preferred or chosen method of contraception.[73]

[71] Robert Wheeler, 'Gillick or Fraser? A plea for consistency over competence in children' (2006) 332 British Medical Journal, 807.
[72] Dáil Éireann Deb (6 July 2022) 1025(1), available at <https://www.oireachtas.ie/en/debates/debate/dail/2022-07-06/17/?highlight%5B0%5D=contraception&highlight%5B1%5D=contraception&highlight%5B2%5D=contraception> accessed on 13 January 2023.
[73] 'Contraception' (*IFPA,* 13 January 2023), available at <https://www.ifpa.ie/get-care/contraception-advice/> accessed on 2 January 2023.

While this scheme is extremely progressive and is advocating for women's autonomy right to bodily integrity, a point heavily contested in the Dáil was that one cannot stop teenagers under the legal age of consent from engaging in sexual activities so why is it impermissible to extend the benefit of the free scheme to be inclusive of 16-year-olds?[74] According to a press release from the Department of Health in December 2022,[75] funding is being provided in order to expand the benefit of the free contraception service scheme to include 16 year olds however, this will be subject to the amendment of current legislation. This is an extremely progressive step which will hopefully bridge the gap between sexual consent and medical consent in Ireland. The implementation of this provision to the free scheme will ultimately call for legislative amendment removing the ambiguity surrounding prescription of emergency hormonal contraception by pharmacists for 16-year-old girls in Ireland.

Conclusion

The evaluation of the present gap between sexual consent and medical consent clearly indicates that there is a need for legislative intervention either by way of amendment or the proposal of a new Bill which would subsequently be signed into Statute. Under the heading 'Remedying the Legislative Gap', three distinct ways in which the gap could be bridged were highlighted and evaluated.

The first proposed remedy was to abolish the right to conscientious objection in Ireland to reflect the current system in Sweden. However, this proposed avenue is probably the most unlikely and most

[74] Sheila Jones, 'Emergency Contraception Use by Irish Teenagers' (2005) 10(1) The European Journal of Contraception and Reproductive Health Care, 26-28: The findings from a study conducted on the prevalence and use of emergency hormonal contraception in Irish teenagers indicated that approximately 61.5% of girls are sexually active before they have reached the legal age of consent for sexual activity.

[75] Department of Health: Expansion of the free contraception scheme to include women aged 26 from 1 January 2023 (Press release) (16 December 2022), available at <https://www.gov.ie/en/press-release/95b1b-expansion-of-the-free-contraception-scheme-to-include-women-aged-26-from-1-january-2023/ > accessed on 12 March 2023.

complicated venture given the fact that it is a recognised consolidated right contained with the ECHR. If the right were rejected it is possible that action could be taken, and a case brought to the ECtHR rule as to whether it would be a breach of the convention. Nonetheless the court was previously presented with an opportunity to decide on such an issue and deemed the application inadmissible, so this is an extremely grey area meaning that the Courts decision is quite difficult to predict. The second proposed remedy is to introduce specific legislation dealing with the prescription and dispensing of emergency hormonal contraception like that introduced in France. This would adequately bridge the gap and provide emergency hormonal contraception prescribers with clear and unambiguous guidelines. Finally, the third possible solution to the legislative gap is to give legal validity to Gillick competence and Fraser guidelines in this jurisdiction in order to incorporate them into our practices, as has been carried out in the UK.

The approach that the Irish government appears to be leaning towards is either a legislative amendment or the introduction of a new Bill to combat the legislative gap. The issue appears to have come to light when the free contraception service scheme was being drafted, during which the issue for 16 year olds accessing such services was highlighted. While the Dáil considered the idea of the incorporation of Fraser guidelines it has since been announced that the free scheme is being extended to include 16-year-olds which will be carried out by way of legislative amendment or by way of a proposed Bill. This is a significant development and a huge step in the right direction to achieving a uniform approach to the prescription of emergency hormonal contraception in Ireland. Following the adjustment of the free contraception service scheme, there should be a removal of ambiguity and hopefully an overall unity of approach for emergency hormonal contraception prescribers. This has the major potential to once and for all eliminate the legislative gap between sexual consent and medical consent.

Piercing the Corporate Veil in Cases of Fraud: After Greymountain, is the Law Finally Black and White?

Eimear Osborne, BCL & Business

Introduction

The separateness of the legal personality of a company from that of its members and directors is as fundamental to company law as the 'neighbour principle' is to negligence and fundamental rights are to constitutional law. It is an essential part of the fabric of corporate law in the common law world. Nonetheless, the veil of incorporation can sometimes yield to stronger forces and may, for example, be 'lifted' or 'pierced' by statute or by the courts in order to ensure greater accountability in the use of the corporate form.

Powers v Greymountain Management Ltd (In Liquidation) ('**Greymountain**')[1] is an important development in Irish company law and serves as a stark reminder to company directors that failure to understand their duties and to act in the interest of the company at all times can have severe personal repercussions. *Greymountain* has shifted Irish company law from the 'grey' position whereby it was unclear when courts might pierce the corporate veil and better aligns it with other common law jurisdictions. The decision confirms that in circumstances where limited liability or the corporate form is abused, no-one is above or beyond the law.

Background to the Separateness of Legal Personality/Corporate Veil

The *Salomon* Principle

In *Salomon's Case* ('**Salomon**'),[2] the fundamental issue before the House of Lords was whether a company dominated and legally controlled by one person was legally incorporated in accordance

[1] *Powers v Greymountain Management Ltd (In Liquidation)* [2022] IEHC 599.
[2] *Salomon v A Salomon & Co Ltd* [1897] AC 22.

with the terms of the then governing companies legislation.[3] If, in accordance with the terms of the legislation, the company was incorporated legitimately, the responsibility for discharging corporate debts and liabilities rested solely with the company in its guise as a distinct legal person.[4] On appeal, it was clarified that there is nothing to prevent the formation of what are, in effect, one-person companies, and that (contrary to the finding of the Court of Appeal) Mr Salomon was not an agent of the company.

Implicit from the *obiter* comments was the inference that, had the company been incorporated to pursue an illegitimate purpose, such as a fraudulent or dishonest objective, then the otherwise legitimate incorporation of the company could be contaminated:

> If … the company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the Act, the appropriate remedy (if any) would seem to be to set aside the certificate of incorporation, or to treat the company as a nullity, or, if the appellant has committed a fraud or misdemeanour (which I do not think he has), he may be proceeded against civilly or criminally.[5]

The separateness of legal personality ('**SLP**'), as vindicated in *Salomon*, is a cornerstone of company law in common law jurisdictions. As had by then been recognised in the creation of bodies by royal charter and by statute, a company too was a legal person distinct from the natural persons (or other companies) who were its members.

Salomon established that, upon incorporation, a new and separate artificial entity – the legal person – comes into existence. This boundary between the company and its members is metaphorically described as the 'corporate veil', a veil that the law will rarely penetrate.

[3] (UK) Companies Act 1862, s.6.
[4] Incorporation was accepted in cases of a 'one-dominated business' pre-*Salomon*, for example in *Re George Newman & Co* [1885] 1 Ch 674 and *Farrar v Farrar* (1889) 40 Ch D 395.
[5] *Salomon v A Salomon & Co Ltd* (n2), at 33, per Lord Davey.

As will be discussed, case law since *Salomon* demonstrates that, by applying a flexible yet faithful interpretation of the *obiter* comments of Lord Macnaghten (alluded to above), a strict application of the *Salomon* principle could be displaced in circumstances where, *inter alia*, a company was incorporated to pursue an unjust business activity analogous to an equitable fraud.[6]

Piercing the Corporate Veil

The practical importance of the *Salomon* principle and the 'veil' that expresses it cannot be understated. Most significantly, the liabilities of a limited liability company are the company's liabilities, and the members need only contribute the amount of their paid-up capital if the company is unable to meet its debts. However, incorporation does not fully:

> cast a veil over the personality of a limited company through which the courts cannot see… The courts can, and often do, draw aside the veil… They look to see what really lies behind.[7]

Circumstances in which the corporate veil will be pierced

Some statutory provisions ignore the SLP by attaching responsibility for the company's obligations to company officers or others. Further, the courts may pierce the corporate veil in cases such as:

- fraud and the misapplication of monies;
- directors removing money from the company inappropriately; and
- negligence or impropriety.[8]

[6] Stephen Griffin, 'Disturbing Corporate Personality to Remedy a Fraudulent Incorporation: An Analysis of the Piercing Principle' (2016) 66(4) Northern Ireland Legal Quarterly 321-41.
[7] Lord Denning in *Littlewoods Mail Order Stores Ltd v IRC* [1969] 1 WLR 1241.
[8] *Powers v Greymountain Management Ltd (In Liquidation)* (n1).

Statutory Exceptions

Section 722 of the Companies Act 2014 (the '**2014 Act**') provides that a person is guilty if she or he is knowingly a party to the carrying on of the company business with intent to defraud its creditors or the creditors of any other person, or for any fraudulent purpose.

Significantly, s610 imposes personal liability without limitation, for all or part of the debts of a company, on persons who engage in fraudulent or reckless trading. At common law and under statute, a company and its veil may not be used to cloak or obscure, fraudulent activity.

Consequences of piercing the corporate veil

There are important practical consequences of a court 'piercing' the corporate veil. These may include making the assets of one company (the corporate veil of which has been pierced) available to the creditors of another company, or it may involve making the member(s) of a company personally liable for the company's debts beyond the value of the member(s) paid-up shares (i.e. ignoring members' limited liability). Therefore, it is a significant step for a court to pierce a company's corporate veil, with potentially severe repercussions for the members and / or directors.

Looking Back

Despite these long-established principles, until *Greymountain*,[9] there was no Irish precedent of the corporate veil being pierced by courts to hold directors or members personally liable for the fraud of the company. This has largely been a grey area in which courts have stated *obiter* that they *may*

[9] *Powers v Greymountain Management Ltd (In Liquidation)* (n1).

have pierced the corporate veil had the circumstances been different, most notably in cases of fraud, without actually doing so in the relevant cases.

In *Ellis v Nolan*,[10] the Court rejected an application for a 'planning injunction' under s27 of the Local Government (Planning and Development) Act 1963[11] against the directors of a private company *in respect of the alleged wrongs of the company*. In refusing the order, the Court held that, if the circumstances had been different, the 'directors may well be made responsible for fraud, misrepresentation, or the improper application of money or negligence'.[12]

In *Dublin County Council v Elton Homes Ltd*,[13] an injunction was sought to compel not only the company, but also its directors, to comply with the conditions of a planning permission. In refusing the application and holding that the directors had 'merely' engaged in mismanagement, the Court stated that

> if the case were one of fraud, or if the directors had syphoned off large sums of money out of the company, so as to leave it unable to fulfil its obligations, the court might be justified in lifting the veil of incorporation and fixing the directors with personal responsibility.[14]

In *Dublin County Council v O'Riordan*,[15] which also concerned an application for an injunction to require the company's directors to personally fulfil the planning obligations of the company, the court refused to grant the injunction on the basis that there was no evidence of 'fraud or the misapplication of monies'.[16] In *Dun Laoghaire Corporation v Parkhill Developments*,[17] Hamilton P refused to grant an injunction against a director of a company where they were in total control of

[10] *Ellis v Nolan* (Unreported, High Court, 6 May 1983).
[11] Local Government (Planning and Development) Act 1963, s27.
[12] *Ellis v Nolan* (n10), at 10.
[13] *Dublin County Council v Elton Homes Ltd* [1984] ILRM 297.
[14] ibid, at 300.
[15] Dublin County Council v O'Riordan [1985] IR 159.
[16] ibid, at 166.
[17] *Dun Laoghaire Corporation v Parkhill Developments* [1989] IR 447.

the company and managed it without regard to the requirements of the Companies Act 1963 as he had 'found no evidence of any fraud or misrepresentation on his part; any siphoning off or misapplication of the funds of the said company'.[18]

In *Mastertrade (Exports) Ltd v Phelan*,[19] Murphy J refused to strike out an action on the ground that a controlling shareholder would benefit improperly if it were allowed to proceed, stating that the companies concerned were not 'in any way tainted with fraud, illegality or deceit'. Such cases laid the foundation whereby, if such a case of fraud through a corporate vehicle was to come before the Irish courts, they would have jurisdiction to hold the officers of that company personally liable for the fraud of the company.

The Seminal Decision: Greymountain

Background

Greymountain Management Ltd (the '**Company**'), registered in Ireland, was an essential element of a fraudulent investment scheme in which members of the public, based primarily in the U.S., were defrauded by millions of euro, while misled into believing that they were trading in binary options.[20] However, no options were ever purchased and, instead, the money was used primarily for the personal benefit of the Company's shadow directors.

The use of a company registered in Ireland was a 'critical factor in the structure and overall success'[21] of the fraudulent operation and lent a 'veneer of legitimacy'[22] to the fraudulent scheme: investors were more confident that their funds were safe in the hands of a company that apparently was subject to Irish and EU regulation.[23] The Company had two Ireland-resident directors, Coates

[18] ibid, at 450.
[19] *Mastertrade (Exports) Ltd v Phelan* [2001] IEHC 17.
[20] *Powers v Greymountain Management Ltd (In Liquidation)* (n1), at 7.
[21] ibid, at 1.
[22] ibid, at 8.
[23] ibid.

and Grainger (a prerequisite for all companies in Ireland under the 2014 Act[24]), along with what were held to have been two shadow directors, David Cartu (resident in Dubai but with addresses in Israel and Georgia) and Jonathan Cartu (resident in Israel).

The Company was hopelessly insolvent and Powers sought an order against the Company's Irish directors and foreign shadow directors to make them personally liable for the funds that had been lost as a result of the alleged fraud. However, as discussed above, no court in this jurisdiction had ever pierced the corporate veil in such circumstances. Therefore, the issue for the High Court was whether, considering the *obiter* comments cited above at 2.3, the facts warranted such a ground-breaking step in Irish company law.

Piercing the Corporate Veil

While emphasising that the Court would not pierce the corporate veil lightly, Mr Justice Twomey concluded that the sole purpose of the Company was its function as an instrument of fraud.[25] Therefore, he held, the facts justified piercing the corporate veil and fixing the directors with personal liability.

Personal Liability of Shadow Directors

The Court felt there was no reason in principle not to consider the shadow directors in the same capacity as 'full' (*de jure* or *de facto*) directors when determining whether the corporate veil should be pierced.[26] Mr Justice Twomey found that the shadow directors had improperly extracted funds from the Company leaving it unable to discharge its liabilities to the plaintiff.[27]

[24] Companies Act 2014, s137.
[25] ibid, at 145.
[26] ibid, at 160.
[27] ibid, at 159.

Reiterating that the Court was not doing so lightly and that this should only be done in exceptional circumstances and in light of the shadow director's moral responsibility for the fraud, Mr Justice Twomey pierced the Company's veil of incorporation. He stated that it would be 'an affront to justice'[28] to allow the shadow directors to hide behind the Company's SLP, and, consequently, he pierced the corporate veil in respect of the shadow directors, holding them personally liable for the plaintiff's losses.[29]

Role of the Irish Directors

Mr Justice Twomey proceeded to consider the role of the Irish directors in the Company. He could not conclude definitively that they had been aware of the fraud or of its extent. Rather, he held that their acts and omissions had been of a 'completely different character'[30] in that they abrogated their duties as directors which enabled the shadow directors to use their position to defraud investors, and, in doing so, the Irish directors had unwittingly facilitated the fraud.[31]

The Court distinguished between the differing roles of the directors. Unable to accept that Grainger had a purely administrative role in the Company, akin to that of a company secretary, Mr Justice Twomey found that, in fact, Grainger had had an active role in the Company's operations, including signing payment-processing agreements on its behalf, thereby facilitating the fraud.[32] Grainger was a co-signatory on the Company's bank account and prepared and filed CRO documentation, including the Company's audited accounts.[33] Most significantly, Grainger had failed to discharge his director's duty to acquire a sufficient knowledge of the Company's business and, if he had done so, the fraud might potentially have been detected sooner. Grainger had failed

[28] *Powers v Greymountain Management Ltd (In Liquidation)* (n1), at 162.
[29] ibid, at 161.
[30] ibid, at 169.
[31] ibid, at 198.
[32] ibid, at 86.
[33] ibid, at 184.

to discharge his duty to investigate allegations of irregularities involving the Company, which had been brought to his attention. He also reassured gardai when they enquired about the Company's activities.[34]

In contrast, Coates was a student and Mr Justice Twomey found that he did not have any active role in the Company: Coates was a director in name only, as its owners 'needed a local person',[35] and he had taken the role to pay his college expenses. Mr Justice Twomey held that Coates, like Grainger, had failed to discharge his duty as a director to acquire a sufficient knowledge of the Company's business.[36] Coates was also found to have entirely abrogated the running of the Company to the shadow directors, with a total lack of oversight of what the Company was doing.[37]

Mr Justice Twomey pointed to the fact that both directors had signed a power of attorney in favour of one shadow director on the basis that they were nominee directors and that he was the actual owner of the Company, thereby facilitating the fraud.[38] The Court acknowledged that, although this can be standard practice in some commercial settings, the fact that a director is legally empowered to grant a power of attorney to a third party did not mean that it was appropriate to do so in a particular case.[39] Furthermore, it was not a defence, where in addition to granting the power of attorney, both directors did not oversee, to any degree, the purpose for which the power of attorney was used.[40] In other words, '[d]elegation could not be abdication'.

[34] *Powers v Greymountain Management Ltd (In Liquidation) (n1)*, at 219.
[35] ibid, at 186.
[36] ibid, at 193.
[37] ibid.
[38] ibid, at 183.
[39] ibid.
[40] ibid.

Directors' Failures

Mr Justice Twomey concluded that it was unlikely that the fraud would have occurred without the assistance (albeit unwitting) of the Irish directors who had not taken any steps to find out what the Company was actually doing.[41] The Irish directors had not performed the basic duties of a director as they had failed to:

- inform themselves about the nature of their duties as a director (or if they did, they ignored those duties);
- acquaint themselves with the affairs generally of the Company; and
- exercise appropriate supervision or oversight at a board level in respect of the execution or discharge of whatever tasks or functions had been properly and appropriately delegated to others.[42]

Personal Liability of the Irish Directors

Mr Justice Twomey held that, although he had 'some sympathy' for Coates and Grainger, he had far greater sympathy for the plaintiff who was the 'completely innocent' party to the transaction.[43] Accordingly, the Court pierced the corporate veil in respect of both Irish directors.[44]

The Court noted that Grainger was a 'very experienced company director'.[45] In choosing not to acquire a sufficient knowledge of the Company to enable him to discharge his duties, he ought to have known that he was in clear breach of those duties. The extent of the dereliction of duty and

[41] *Powers v Greymountain Management Ltd (In Liquidation)* (n1), at 199.
[42] ibid.
[43] ibid, at 202.
[44] ibid, at 170.
[45] ibid, at 216.

of the impropriety was such that it merited piercing the corporate veil and Grainger being made personally liable to the plaintiff.[46]

Although Coates was not as morally responsible as Grainger or the two shadow directors, the Court found that he had abrogated his duties as a director to such an extent that he should legally face the consequences of what the Company had done. This complete abrogation of his duties as a director gave the shadow directors free rein to use the Company as an instrument of fraud, without any oversight. Mr Justice Twomey held that ignorance of the law was not a defence and the complete and total disregard by Coates of his duties as a director was 'of an extreme nature'.[47]

Impact of *Greymountain*

Greymountain illustrates the exceptional circumstances in which a court, at common law, may decide to pierce the corporate veil and reiterates that only exceptional circumstances can justify a court doing so (occasions under statute each set their own threshold). The decision, the first of its kind in this jurisdiction, serves as an important reminder for members and directors that a court may go behind the SLP of a company in cases of fraud.

Just as the protection of limited liability for members of a limited company is vulnerable in the case of misuse of that protection, directorship is not a 'risk-free sinecure'.[48] Defences such as ignorance of the law or that a person was a director 'in name only' will fail. Directors must be aware of their statutory duties and responsibilities to a company and ought not to become a director of an Irish company unless they are prepared to actively perform those duties.[49] They must also acquaint themselves with the affairs of the company and exercise appropriate

[46] ibid, at 222.
[47] *Powers v Greymountain Management Ltd (In Liquidation)* (n 1) at 205.
[48] Mason Hayes & Curran, '2022 in Review – Restructuring and Insolvency', (*mhc.ie*, 2 December 2022), available at <https://www.mhc.ie/latest/insights/2022-in-review-restructuring-and-insolvency> accessed 18 September 2023.
[49] McCann FitzGerald, 'High Court Pierces Corporate Veil', (*mccannfitzgerald.ie*, 14 November 2022), available at <https://www.mccannfitzgerald.com/knowledge/company-secretarial-and-compliance/high-court-pierces-corporate-veil> accessed 18 September 2023.

supervision and oversight at a board level in respect of the performance of tasks or functions that the board has delegated.[50] In unambiguous fashion, *Greymountain* demonstrates that, in Irish law, the corporate veil is not absolute and should never be a sanctuary for those who misuse the corporate form in order to harm others.[51]

Although *Greymountain* was the first time that the Irish courts have pierced the corporate veil in a case of fraud, such precedent had already been set in other common law jurisdictions, to which this article now turns.

Cross-Jurisdictional Comparison

United Kingdom

Under both common law and statute, a company registered in the UK enjoys a legal personality separate and distinct from that of its members. Similar to Ireland, however, there are circumstances under both statute and common law in which the UK courts will ignore the separateness of corporate personality.

Statute:

The SLP of a company registered in the UK is recognised under s15 of the Companies Act 2006.[52] Moreover, s213 of the Insolvency Act 1986[53] provides that where any person has been knowingly party to the carrying on of a business 'with intent to defraud creditors of the company or of any other person, or for any fraudulent purpose', the court may look beyond the corporate veil and hold such persons personally liable.

[50] William Fry, 'Irish High Court Lifts Corporate Veil: Directors Personally Liable', 5 December 2022.
[51] Eversheds Sutherland, 'High Court makes Irish History: Piercing the Corporate Veil', (*eversheds-sutherland.com*, 21 December 2022), available at <https://www.eversheds-sutherland.com/global/en/where/europe/ireland/overview/articles/showarticle;ArticleID=en_global_ireland_high_court_makes_irish_history.html> accessed 18 September 2023.
[52] Companies Act 2006, s.15.
[53] Insolvency Act 1986, s.213.

Common Law

A review of pertinent authorities highlights that UK jurisprudence on piercing the veil of incorporation is somewhat unsettled:

VTB Capital plc v Nutritek International Corp:[54]

This was the first time the corporate veil doctrine was considered by the UK Supreme Court and, in doing so, the Court questioned the doctrine as an existential matter. The Supreme Court upheld the judgment of the Court of Appeal and declined to pierce the corporate veil, instead finding that, if the fraudulent misrepresentation claims were established, the plaintiff would be able to recover substantial damages in tort from the controllers, therefore providing adequate redress without disregarding the company's SLP. Lord Neuberger stated that, if the corporate veil was to be lifted, in reality it must be 'the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be)',[55] which was not found to be the circumstance in this case.

Prest v Petrodel Resources Ltd:

When it comes to the circumstances in which the corporate veil may be pierced, the leading authority in the UK is the decision of the Supreme Court in *Prest v Petrodel Resources Ltd (*'**Prest**'*)*.[56] Soon after *VTB Capital*, the decision in *Prest*, while offering clarity in respect of the doctrine, also created much uncertainty, holding that previous cases in which the corporate veil had been pierced,[57] had been decided incorrectly.

Delivering the leading judgment, Lord Sumption narrowed the scope of the jurisdiction to pierce the corporate veil significantly by designating it a 'rule of last resort'. It was to be an exceptional remedy that should only apply where there is no other legal instrument available, and, when it is applied, should only be done in cases of 'evasion' (such as cases of fraud) as opposed to cases of

[54] *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808.
[55] ibid, at 142.
[56] *Prest v Petrodel Resources Ltd* [2013] UKSC 34.
[57] *Trustor v Smallbone (No 2)* [2001] EWHC 703 (Ch) and *Gencor ACP Ltd v Dalby* [2000] EWHC 1560 (Ch).

'concealment'.[58] Consequently, the Supreme Court held that the UK courts have 'correctly' pierced the corporate veil in only two cases: *Gilford Motor Co Ltd v Horne* ('**Gilford**')[59] and *Jones v Lipman* ('**Jones**').[60]

Lady Hale, in delivering the most pronounced counter-opinion to Lord Sumption's judgment, accepted that *Gilford* and *Jones* rested on the evasion principle but held that the categories of 'evasion' and 'concealment' were not exhaustive, nor were 'evasion' cases the *only* cases that justified piercing the corporate veil. Citing *Re Darby*[61], Lady Hale opined that these categories were instead to be understood as examples of the underlying principle to prevent companies from being used as "engines of fraud".[62]

While there was disagreement amongst the judges in *Prest*, not all is discord and some principles can be drawn from *Prest*. Schall submits,[63] and I agree, that three propositions can safely be taken from *Prest* as the new UK common law, while a further, fourth, concerning the crucial scope of the principle, is undecided:

a) A doctrine of piercing the corporate veil exists under English law, which, after more than a century, finally qualifies the Salomon principle.
b) Piercing the corporate veil is a remedy of last resort.
c) Piercing the corporate veil is justified under the evasion principle.
d) The evasion principle is not exhaustive, but it is the only case of piercing the veil for corporate abuse that is spelt out and other cases will be rare; only a minority of the judges (Lords Sumption and Neuberger) agreed that only the 'limited' evasion principle will justify

[58] *Prest v Petrodel Resources Ltd* (n56), at 28.
[59] *Gilford Motor Co Ltd v Horne* [1933] Ch 935.
[60] *Jones v Lipman* [1962] 1 All ER 442.
[61] *Re Darby, ex parte Brougham* [1911] 1 KB 95.
[62] Lady Hale in (n56) at 89.
[63] Alexander Schall, 'The New Law of Piercing the Corporate Veil in the UK' (2016) 13 European Company and Financial Law Review 549.

the piercing of the corporate veil[64] so this statement in Lord Sumption's leading judgment cannot be conclusively regarded as stating the common law.

Re Darby:

This case, referred to by Lady Hale in her judgment,[65] concerned international fraud. The relevant company's SLP was disregarded to hold the controllers personally liable in damages as the judge concluded that the responsibility for the fraud properly rested with the two controllers behind one of the companies involved. *Salomon* was distinguished as, in *Salomon*, the company had not been incorporated with the *intention* of perpetrating a fraud.

Gilford Motor Co Ltd v Horne:

Accepted by the Supreme Court in *Prest* as a case in which the corporate veil *had* been pierced appropriately,[66] in *Horne* the defendant had been the managing director of the claimant company and had entered into a 'non-solicitation' covenant for the company's customers post-employment. On leaving the company's employment, Horne formed a company to carry on a competing business and that company engaged in soliciting of the claimant's customers. The Court of Appeal held that this company was a mere *façade*, or sham, used to cloak Horne's fraudulent behaviour, and granted an injunction to enforce the covenant against him.[67]

Jones v Lipman:

Also accepted by the Supreme Court as an occasion on which the corporate veil had been pierced appropriately,[68] in this case the defendant, who had contracted to sell his house to the plaintiff, tried to avoid an order of specific performance being given against him by conveying the house to a company formed by him. Ms Justice Russell rejected a defence based on the company being a

[64] *Prest v Petrodel Resources Ltd* (n56), at 35.
[65] ibid, at 91.
[66] ibid, at 29.
[67] *Gilford Motor Co Ltd v Horne* (n59).
[68] *Jones v Lipman* (n60), at 30.

separate person, describing it as 'the creature of the defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity'.[69]

Comparison with Australia

Under both common law and statute, a company registered in Australia enjoys a legal personality separate and distinct from that of its members. However, similar to both Ireland and the UK, there are circumstances both in common law and statute in which the Australian courts will ignore the separateness of corporate personality.

Statute

The SLP of a company registered in Australia is recognised under s124 of the Corporations Act 2001.[70]

Common Law

Although not legally binding on them, Australian courts tend to follow UK common law jurisprudence closely and, therefore, much of the above can be applied to the Australian jurisdiction too. However, it is yet to be seen to what extent *Prest* will be accepted or rejected in Australia.

Dennis Willcox Pty Ltd v Federal Commissioner of Taxation:[71]

Commentators have stated that 'in Australia it is still impossible to discern … the circumstances in which a court should lift the corporate veil',[72] that '[it] is impossible to list the cases in which

[69] ibid, at 445.
[70] Corporations Act 2001, s.124.
[71] *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267 (FC).
[72] Robert Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (15th edn, LexisNexis Buttersworth 2013) [4.400].

the veil will be lifted'.[73] Generally, it seems that the courts will take a fact-based approach on a case-by-case basis.[74]

Dennis Willcox provides guidance on this 'esoteric'[75] label. In a statement that now echoes that of Lord Sumption's 'evasion' principle in *Prest*, Jenkinson J stated that the corporate veil should be pierced, *inter alia*, if

> there is a mere sham or façade in which that company is playing a role, or that the creation or use of the company was designed to enable a legal or fiduciary obligation to be evaded or a fraud to be perpetrated.[76]

Re Edelsten, ex parte Donnelly:[77]

Further guidance was given in this case, whereby it was held that, in Australia, an argument of 'fraud' relates to the alleged use of a corporation by the controller to evade a legal or fiduciary obligation. To be argued successfully, the controller 'must have the intention to use the corporate structure in such a way as to deny the plaintiff some pre-existing legal right.'

Here, the Full Court of the Federal Court held that an argument of fraud is closely related to an argument that the corporate form is a sham or *façade*. The Court held that, in this case, no 'fraud' had in fact been perpetrated as the creation of a business was not to be characterised as a sham merely because 'it was undertaken for the purpose of ensuring that any property acquired after bankruptcy did not fall into the hands of a trustee in bankruptcy.'[78] Indeed, it might be observed that it would be lawful and common commercial planning to do so.

[73] S. Ottolenghi, 'From Peeping Behind the Veil to Ignoring it Completely' (1990) 53 Modern Law Review 338, 352.
[74] Ian Ramsay and David Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 Company and Securities Law Journal 250-271.
[75] Herron CJ in *Commissioner of Land Tax v Theosophical Foundation Pty Ltd* (1966) 67 SR (NSW) 70.
[76] ibid, at 272.
[77] *Re Edelsten, ex parte Donnelly* (Unreported, Federal Court, Northrop J, 11 September 1992).
[78] ibid, at 205.

Re Neo:[79]

Here it was found that the more 'blatant' the sham, the more likely it is that a fraud has been perpetrated. In this case, the Immigration Review Tribunal was asked to review a decision to refuse an application for a visa where sponsorship had been arranged by a company formed on the same day as the application was lodged, and the company did not carry on any business. The Tribunal held that '[T]he company was merely a vehicle used to circumvent Australian migration law. It was only a façade, its true purpose being to allow the applicants to remain in the country.'[80]

Conclusion

The common law and statutory provisions on piercing the corporate veil tread a fine policy line when tensions arise between two core legal principles that more frequently are compatible. When such a tension *does* arise on the facts of a case, is a court to respect the *Salomon*-inspired separate legal personality of a company that is so fundamental to our business and tax systems, or should that principle be diluted, or even ignored, if the interests of justice so require?

The case-law on the piercing of the corporate veil is the expression of this balancing of sometimes-competing interests and *Greymountain* is an important contribution to that evolving debate: although they will not do so lightly, the courts in the UK and Australia, and now in Ireland too, are highly likely to pierce the corporate veil in cases of fraud and deception.[81]

Despite this, the importance of the SLP as a core principle of company law must not be understated. As Lord Sumption said most succinctly: 'The separate personality and property of a company is sometimes described as a fiction, and in a sense it is. But the fiction is the whole

[79] *Re Neo* (Unreported, Immigration Review Tribunal, Metledge M, 30 July 1997).
[80] ibid, at 7.
[81] Peter Oh and Alan Dignam, 'Disregarding the Salomon Principle: An Empirical Analysis, 1885–2014' (2019) 39(1) Oxford Journal of Legal Studies 47.

foundation of … company law'.[82] Given the principle's central importance to commerce and law and the importance of predictability and certainly in business arrangements, each of the few qualifications of that principle must be clearly defined and applied sparingly. The recent decision in *Greymountain* meets both of those criteria.

[82] *Prest v Petrodel Resources Ltd* (n56), at 8.

Accommodating Gender Diversity in Modern Ireland: A Proposal for the Reform of the Gender Recognition Act 2015

Leoni Leonard, B.Corp + German

Introduction

The year 2015 marked a seismic shift in the tectonic plates of the Irish legal landscape. One needs little reminder of the passing of the Marriage Equality Referendum, which saw Ireland receive global acclaim for its advancements in the area of LGBTQI+ rights. [1] Concurrent to this was the introduction of the Gender Recognition Act 2015, which despite having gone relatively unnoticed in comparison to the aforementioned, has been dubbed "the vanguard of international best practice" in respect of transgender human rights. [2] At the time, this Act was subject to great praise for the rights it affords to transgender individuals.[3] However, some deficiencies in the Act are now evident, primarily that it neglects to recognise the rights of non-binary and intersex individuals. This article will argue that for Ireland to uphold its reputation as a front runner in this area of law, and in order to rectify this "inexplicable delay and denial" of rights, considerable reform must be implemented.[4] Specifically, this article proposes the introduction of two new legal genders as a workable solution.

[1] See for example, 'Ireland says 'yes' to gay marriage – reaction' (*BBC.com,* 23 May 2015), available at < https://www.bbc.com/news/world-europe-32860527> accessed 18 September 2023.
[2] Dominic McGrath and Pamela Avila, 'Trinity PhD Candidate Advises UK Parliament On Gender Recognition Law' (*universitytimes.ie*, 20 October 2015) available at <https://universitytimes.ie/2015/10/trinity-phd-candidate-advises-uk-parliament-on-gender-recognition-law/> accessed 14 February 2022.
[3] See for example, Libby Brooks, "A monumental change': how Ireland transformed transgender rights' (*The Guardian*, 15 January 2018) available at <https://www.theguardian.com/society/2018/jan/15/monumental-change-ireland-transformed-transgender-rights> accessed 18 September 2023.
[4] TENI Updates, 'Gender Recognition Review Report – TENI' (*teni.ie*, November 29 2019), available at <https://www.teni.ie/gender-recognition-review-report/> accessed 14 February 2022.

Definitions

This article concerns itself with the rights of 'gender diverse individuals', a term which encompasses intersex, transgender and non-binary individuals. Intersex individuals are those who possess a variation of what are considered to be standard, binary male and female sex characteristics.[5] Transgender persons are defined by the European Parliament as those "whose gender identity does not correspond to the gender they were assigned at birth".[6] Transgender, in a narrow sense, can be taken to mean those who are transitioning from one gender to another, be they pre- or post-operative. More commonly, it is used as an umbrella term that encompasses all gender diverse persons, including non-binary persons, i.e.: those who do not identify as either male or female. [7] In this article, the terms non-binary and transgender will be used separately, as the discrepancy between the rights afforded to transgender persons (in the narrow sense) and non-binary persons is central to the subject matter.

It is also pertinent to distinguish sex from gender. The distinction between sex and gender has long been debated, and indeed many schools of thought exist on this topic. Gender, as defined by the World Health Organisation, encompasses the socially constructed characteristics of women and men, while sex refers to the biological and physiological characteristics of women and men.[8] The common interpretation is that sex is a fixed attribute and one's gender flows from one's sex, ultimately with one's birth sex determining the gender they will express.

[5] Jayne Leonard, 'Intersex: Definition, Terminology, And Identities' (*medicalnewstoday.com*, 22 March 2021), available at <https://www.medicalnewstoday.com/articles/intersex> accessed 6 March 2022.
[6] European Parliament, 'Transgender Persons' Rights In EU Member States' (2010) 5, available at. <https://www.europarl.europa.eu/RegData/etudes/note/join/2010/425621/IPOL-LIBE_NT%282010%29425621_EN.pdf> accessed 6 March 2022.
[7] Peter Dunne, 'Legislation: Acknowledging Or Erasing Intersex Experiences? Gender 'Diversity' In German Law' (2019) 70 Northern Ireland Legal Quarterly.
[8] Gender And Health' (*who.int*, 2022) available at <https://www.who.int/health-topics/gender#tab=tab_1> accessed 14 February 2022.

The colloquial use of these terms interchangeably is problematic as it not only perpetuates the idea that sex and gender must be congruent, but also that they are immutable and binary. Society has created an unyielding assumption of biological dichotomy, despite the fact that the direct opposite is true. Science has shown that sex is a spectrum, where the space between male and female is filled with many biological variations.[9] Based on the fact that biological sex is not binary, it would be inaccurate to assume that gender is binary. This poses the question as to why the law demands that we subscribe exclusively to one binary gender?

Gender and the Law

The answer to the question of why the law so clearly favours a binary gender model can be found by looking at the history of our legal system.[10] Historically, gender played a large role in all property and succession matters. Traditionally, by the right of primogeniture, property would pass from the father to the eldest son, to their eldest son and so on. Thus, the idea that one could change their gender, or identify as both or neither genders, completely threatens the institution of male succession.[11] The complexity of this issue was evident in the case of *Sempill v Sempill*. In this case, an intersex individual was registered as female at birth but developed a male gender identity. He sought to lay claim to a large Scottish estate, which his cousin opposed.[12] In this case, the court's vexation as to how to deal with an individual who did not fit the binary norm was evident. In this case, it was held that the role of the court was 'to draw a firm line which leaves males on one side and females on the other'.[13] Evidently, pigeon-holing citizens into two distinct categories allows

[9] Amanda Montañez, 'Visualizing Sex As A Spectrum' (*Scientific American Blog Network*, 29 August 2017) available at <https://blogs.scientificamerican.com/sa-visual/visualizing-sex-as-a-spectrum/> accessed 14 February 2022.
[10] Stephen Whittle and Lewis Turner, '"Sex Changes"? Paradigm Shifts In 'Sex' And 'Gender' Following The Gender Recognition Act?" (2007) 12 Sociological Research Online.
[11] ibid, [3.2]; see also Sandra Duffy, 'Doing justice to gender diversity: Narratives of progress and the limits of law' (PhD Thesis, NUI Galway, 2020), available at <https://aran.library.nuigalway.ie/bitstream/handle/10379/16053/S%20Duffy%20Thesis%20June%202020.pdf?sequence=1&isAllowed=y> accessed 18 September 2023.
[12] *John A.C Forbes-Sempill v The Hon. Ewan Forbes-Sempill* (Unreported) Scottish Court of Session.
[13] ibid.

for the smoother administration of the law, as the law does not know how to correctly categorise, process or treat those who identify as neither gender, or as a gender that doesn't correspond to their birth sex.

The second justification was raised in *Rees v UK*, where it was successfully argued that the need to preserve history by keeping birth records in order usurped the right to have the gender on one's birth certificate altered.[14] The majority judgment opined that, should these records be tampered with, it could impede the tracing of lineage.[15]

The third justification relates to times when homosexuality was criminalised. In *B v France*, a case which concerned the application for a gender recognition cert by a transgender woman so that she could legally marry, the court highlighted its concern over 'half feminised' men being able to marry 'normally constituted' men.[16]

Development of the Law

Taking the entanglement between the law and gender into consideration, it is no surprise that the road to gender recognition for transgender people has been fraught with difficulty. As early as 1980, the European Court of Human Rights acknowledged that one's identity is inseparable from their person and that the right to the recognition of same is a general principle of law.[17] Many subsequent cases arose in various jurisdictions which plaintiffs sought to have their newly acquired transgender identity recognised, including the Irish case of *Foy v An tArd Chlaraitheoir*[18]. All of these cases were frustrated by the doctrine of the margin of appreciation, which gives the ECtHR

[14] *Rees v UK* (1986) ECHR 11.
[15] ibid, [21].
[16] *B v France* [1992] ECHR 40.
[17] *Van Oosterwijck v Belgium* (ECHR 6 November 1980).
[18] *Foy v An tArd Chlaraitheoir (No.1)* [2002] IEHC 116.

broad discretion regarding matters on which a consensus among State Parties has not been reached.[19]

It was not until 2002, in the case of *Goodwin v UK*, when a case for gender recognition was successfully pleaded. In this case, the ECtHR declared that the UK's refusal to recognise the gender of Ms Goodwin was "no longer sustainable".[20] Following this, Dr Lydia Foy, a transgender woman, once again, sought to have her gender recognised on all official documents. McKechnie J. held that the claimant's right to respect for her private life under Article 8 ECHR had been violated. Interestingly, Mr Justice McKechnie endorsed the ruling in *Bellinger v Bellinger*,[21] which completely rejected the common good arguments which up until that point, justified a refusal of gender recognition on the basis that allowing a change of gender would create complications in areas of family and succession law, criminal law and jeopardise the integrity of historic documents. Finally, Mr Justice McKechnie opined that flowing from one's right to human dignity is the right to freely develop and shape one's personality as they see fit.[22] Further, he implied that this right is not limited to one group of people: "All persons, by virtue of their being are so entitled".[23]

Current Position in Ireland: the Need for Reform

The current position of Irish law is that one is permitted to change their gender on the condition that they swear a 'settled and solemn intention'. [24] While in *theory*, all persons are entitled to have their gender recognised, in *practice*, intersex and non-binary individuals are precluded from having

[19] Tanya Ní Mhuirthile, 'Article 8 and the Realisation of the Right to Gender Recognition' in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury, 2014).
[20] Goodwin v United Kingdom (2002) ECHR 588.
[21] [2003] UKHL 21; [2003] 2 WLR 1174.
[22] *Foy* (n18).
[23] ibid.
[24] Gender Recognition Act 2015, s 10(1)(f)(ii).

their gender recognised, as the law does not acknowledge the existence of any gender beyond the binary.

The current legislation in this area, the Gender Recognition Act 2015 has been commended as a revolutionary piece of legislation that is "among the best in the world".[25] In 2019, the OECD reported that Ireland ranks 6% higher than average regarding legal LGBTQI+ inclusivity.[26] When compared with other jurisdictions, it is clear to see why this praise is warranted. For example, the Irish legislation is far more progressive and accommodating than that of the UK, the key difference being that Ireland operates a self-declaration model. This eliminates the requirement to be diagnosed with a disease or disorder such as gender dysphoria in order to obtain a gender recognition certificate. This legislation represents a step in the right direction for the rights of gender diverse people, but further action needs to be taken in order to vindicate their rights fully. Reviews of the Gender Recognition Act 2015 have been carried out annually since its inception, leading to the subsequent drafting of the Gender Recognition Act (Amendment) Bill 2017. The progress of this Bill has stagnated and at the time of writing it sits before the third stage of the Seanad, where it has sat for 18 months.[27] Seven years ago, a steady increase in the number of people self-identifying outside the binary was reported and it was noted that the government ought to adopt accommodations that respect and affirm non-binary identities.[28] Despite this, the proposed amendments do not provide for the legal recognition of non-binary identities, nor do they mention intersex individuals.

[25] Ní Mhuirthile (n19).
[26] 'Over The Rainbow? The Road To LGBTI Inclusion' (*oecd.org*, June 2020), available at <https://www.oecd.org/ireland/OECD-LGBTI-2020-Over-The-Rainbow-IRELAND.pdf> accessed 15 February 2022.
[27] 'Gender Recognition (Amendment) Bill 2017' (*oireachtas.ie*, 25 September 2020), available at <https://www.oireachtas.ie/en/bills/bill/2017/43/> accessed 6 March 2022.
[28] McGrath and Avila (n2).

Moreover, the scope of the Amendment Bill is extremely limited as it does not suggest any concrete mechanisms for the affirmation of the rights of non-binary individuals, but merely states that it will, at an unspecified point in the future, "ensure the consideration of non-binary identities".[29] Based on the vague nature of this statement, it is evident that this is not a key legislative concern. On the current trajectory, reform in this area is not anticipated to take place in the near future. The only way in which these identities can be properly respected is by affording them legal acknowledgement. Thus, there is a need for expedited reform in this area.

Proposal: The Introduction of Legal X and I Genders

This article proposes that Ireland should introduce two new legal genders, the purpose of this being to offer legal recognition to those who do not fit into one of the binary gender categories. Under the 'X' umbrella fall those who do not see themselves as having any particular binary gender identity, those who sometimes identify as male or female but would describe their gender as being 'fluid' and ultimately, anyone else who would like to adopt it. The 'I' category would encompass intersex individuals.

This proposal is an adaptation of laws that have been introduced in other jurisdictions. The X gender is something that has been implemented in many jurisdictions such as New Zealand, Germany, Canada and Malta, albeit with varying levels of restriction and subject to varying levels of success.[30] This criticism is useful from an Irish perspective as it allows us to take a measured and evaluative approach to reform. From an evaluation of other jurisdictions, it is evident that the more restrictions placed on who can avail of the third gender marker, the less effective the legislation is. In Germany, where a third gender option is only available to those who can medically certify that they have an intersex variance, the uptake of the X gender marker has been very low,

[29] 'Gender Recognition (Amendment) Bill 2017' (n27).
[30] Dunne (n7), 56.

to the point where one could argue that the four-year battle which led to this development was in vain.[31]

From this, we can discern that the reform needs to be as unrestricted as possible in order to ensure it is effective, useful, impactful and not just a symbolic piece of legislation. To this end, a self-declaration model like that of Malta is proposed, where one can apply to have 'X', or 'I' displayed on their official documents in a process that is as streamlined as renewing a passport.

Dunne, a key advocate for the rights of non-binary and intersex persons, has voiced some concerns in relation to the models in other jurisdictions. On the topic of a third X gender, he opines that since this category must accommodate all non-male and non-female identities, it will result in the grouping together of 'an inappropriate mix of highly different experiences', and that this has the potential to conflate the experiences of non-binary and intersex individuals in a way that undermines them.[32] He comments further that one extra gender marker cannot accurately capture an array of 'lived gender'.[33]

These concerns form the justification for the departure from what is common practice in other jurisdictions. It is true that the experiences of intersex and non-binary individuals differ greatly, so categorising them in the same way would be inaccurate. To provide only an X gender marker would have the effect of unifying these inherently different individuals by virtue of their 'otherness'.[34] Two gender markers allow for the lived gender experiences of each group to exist

[31] Eva Corlett, 'New Zealand Passes Law Making It Easier To Change Sex On Birth Certificates' (*The Guardian*, 9 December 2021) available at <https://www.theguardian.com/world/2021/dec/09/new-zealand-passes-law-making-it-easier-to-change-sex-on-birth-certificates> accessed 22 February 2022.
[32] Dunne (n7), 348.
[33] ibid, at 347.
[34] Dunne (n7), 348.

independently, ultimately proving that many experiences outside the male/female gender dichotomy exist.

The Legal Basis for Reform

As the number of people who identify as non-binary grows, so too does the number of people who are not being adequately recognised by the law, and whose human rights are being failing to be adequately upheld. The human right in question is the right to the free development of one's personality, which is linked to Article 8(1) of the ECHR. This Article provides the right to respect for one's private and family life, home and correspondence.[35] In recent years, the ECtHR has shown its preference for a broader interpretation of this right, one which takes 'private life'[36] to include personal identity and the protection of personal integrity.[37] This broader interpretation allows for the inference that gender identity, as an extension of one's personal identity should be afforded protection under Article 8(1) ECHR.

Validation of the right to the free development of one's personality is at the heart of this proposal. This right was recognised by McKechnie J. in *Foy No.2,* where he stated that:

> Everyone as a member of society has the right to human dignity, and with individual personalities, has the right to develop his being as he sees fit. Together with human freedom, a person, subject to the acquired rights of others, should be free to shape his personality in the way best suited to his person and to his life.[38]

This right to freely unfold one's personality is protected by Article 2 of the German Basic Law, and its importance was emphasised by the German Federal Constitutional Court in 2017, where

[35] European Convention on Human Rights, Article 8(1).
[36] ibid.
[37] Patrick O'Callaghan, 'Article 8 ECHR as a General Personality Right?: A Commentary on Axel Springer AG v Germany [2012] ECHR 227' (2015) 6(1) Journal of European Tort Law 69-84.
[38] *Foy v An tArd Chlaraitheoir (No.2)* [2007] IEHC 470.

they held that to not recognise the diverse gender of an intersex individual, was to violate their constitutional rights under this Article.[39] This is recognised as one of the first judicial statements in favour of recognition of a non-binary gender option - that is to say a non-traditional gender option.[40] It follows therefrom, that to deny one who is non-binary the right to recognition of their gender identity is to inhibit them from freely unfolding their personality in the way they see fit and is, therefore, a violation of their fundamental rights.

A guiding authority when considering this proposal should be the Yogyakarta Principles, a set of principles regarding, among other things, gender identity in an international human rights law context. These principles are not legally binding, but are commonly regarded as an international standard of best practice. Principle 31 recommends that States should 'make available a multiplicity of gender markers,' and it also provides that everyone should have the right to change gendered information on documents where such gendered information is required.[41] These two elements, when taken together, suggest that the drafters of the principles envisaged that the rights of the affected individuals would be vindicated where there is at least one extra gender marker introduced, and where one may avail of it without restriction. This, in essence, is what this article proposes.

The Importance of Depathologising Gender Diversity

Pathologisation is defined as 'the psycho-medical, legal and cultural practice of identifying a feature, an individual or a population as intrinsically disordered.'[42] Previously, people of diverse gender identities were blatantly pathologised by the law due to the requirement to have a diagnosed

[39] Dunne (n7).
[40] ibid.
[41] 'The Yogyakarta Principles (plus 10), Principle 31.C.II' (*yogakartaprinciples.org*, 10 November 2017) available at <https://yogyakartaprinciples.org/> accessed 21 September 2023.
[42] Maria Elisa Castro-Peraza and others, 'Gender Identity: The Human Right Of Depathologization' (2019) 16 International Journal of Environmental Research and Public Health.

gender disorder in order to obtain a gender recognition certificate. This practice of associating diverse gender identities with illness, although no longer a medical or legal practice, is still enshrined in society and is evident from the way gender diverse individuals are referred to. Specifically, it is reflected in the terminology used to refer to these individuals in judgments. For example, in *Foy,* the term 'core transsexual' was used and Mrs Foy's state of being transgender was referred to as a condition.[43] Further, in *Hannon*, the plaintiff's gender identity disorder was accepted by the court as a disability. [44]

This misclassification of gender diversity as a pathology is wholly inaccurate and no longer acceptable. The International Classification of Diseases classified "transsexualism" as a mental disorder until the release of its 11th edition, in which the concept of being born one gender but feeling an innermost conviction to identify as another became known as "gender incongruence".[45] The evolution of the ICD is indicative of the move away from the use of insulting and degrading terminology to refer to diverse gender identities, and this should be reflected in our laws and our society.

Although it is not expressly stated by the State that to have a diverse gender identity is disordered, the lack of a mechanism that allows for the express legal recognition of such an identity has an equivalent effect. It implies to society that to have such an identity is outside the realm of what the law sees as normal, and further perpetuates the stigmatisation of diverse gender identity. Just as the law informs citizens about what is legally right and wrong, equally it informs citizens about

[43] *Foy v An tArd Chlaraitheoir (No.2)* [2007] IEHC 470.
[44] Lucy-Ann Buckley, "Doing Gender' And Irish Employment Law' *in Lynsey Black And Peter Dunne (Eds): Law And Gender In Modern Ireland: Critique And Reform* (Bloomsbury 2019) 230.
[45] Kara Sheherazade, 'Gender Is Not An Illness- How Pathologizing Trans People Violates International Human Rights Law' (*gate.ngo*, 15 December 2017) available at <https://gate.ngo/gender-is-not-an-illness/> accessed 24 February 2022.

what morals, values and attitudes are socially acceptable.[46] The refusal of our legal system to recognise diverse gender identities signals to society that their existence is not legitimate, ultimately inflicting a type of social punishment on those individuals as a result of their non-conformity to the male/female dichotomy.[47]

If the law were to give recognition to these identities, some positive moral principles would trickle-down to wider society. It would send the message that these individuals exist, are legitimate in the eyes of the law and should be accepted in society. A clear basis for this argument can be gleaned from its application to matters of homosexuality and same-sex marriage. As recently as 1993, homosexuality was a criminally punishable offence and a socially reprehensible act.[48] A mere 22 years later, the right of same-sex marriage was enshrined in legislation.[49] Ultimately, the de-stigmatisation of gay rights can be attributed to the rights being placed on legislative footing, thus showing the influence the law has on the attitudes of society. Should legal recognition be granted to non-binary and intersex individuals, it would have the effect of chipping away at the social stigmatisation of gender diversity. Until this comes about, it cannot be said that Ireland's gender recognition laws are entirely depathologised, or that the rights of gender diverse individuals are adequately protected.

The Implication for Intersex Individuals

As it stands, intersex individuals derive some benefit from the Gender Recognition Act 2015, but this proposal would serve to benefit them infinitely more. Currently, it allows an intersex person

[46] Chief Justice Allsop, 'Values In Law: How They Influence And Shape Rules And The Application Of Law' (*fedcourt.gov.au*, 20 October 2016) available at <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20161020> accessed 24 February 2022.
[47] Stephen Whittle and Lewis Turner, "'Sex Changes'? Paradigm Shifts In 'Sex' And 'Gender' Following The Gender Recognition Act?" (2007) 12 Sociological Research Online.
[48] Fergus Ryan, 'Mapping a Transformed Landscape: Sexual Orientation and the Law in Ireland' in Lynsey Black and Peter Dunne (Eds): *Law And Gender In Modern Ireland: Critique And Reform* (Bloomsbury 2019) 74.
[49] ibid.

to obtain a revised birth certificate if it transpires that they were misgendered at birth. This is an extremely important mechanism, as many intersex variations are not recognisable at birth and therefore the sex that one is registered as is not always the sex that prevails in later years.[50] For people who wish to conform to gender norms and identify themselves as the gender corresponding to their prevalent sex, the current legislation is sufficient. However, for those who feel that male and female are not accurate descriptions of their biological individuality, the I gender marker proposes to act as a distinct and positive recognition of their diversity.

In some cases, it is possible to detect variations in pre-natal ultra-sound scans.[51] In the case of parents expecting an intersex baby, under Irish law, it is required to register the baby under a binary gender. For babies with ambiguous genitalia, this can mean undergoing non-consensual sex assignment surgery, in order to rectify the ambiguity and allow them to fully conform to one gender and be raised in line with the corresponding social norms.[52] This type of surgery violates the right to bodily integrity which is protected at international level by Article 8 ECHR and at national level by Article 40.3.1 as an unenumerated right guaranteed by the Constitution.[53]

The I gender marker seeks to deter parents from forcing irreversible and life-changing surgery on their new-born baby. A valid point was raised by the Columbian Constitutional Court, holding that this area is one in which parental autonomy should not take precedence over the autonomy of the child, as it would be difficult to determine that the parent is acting in the best interests of

[50] 'Androgen Insensitivity Syndrome (AIS)' (*isna.org*, date unknown) available at <https://isna.org/faq/conditions/ais/> accessed 22 February 2022.
[51]Claudia Boyd-Barrett, 'When Your Baby Is Intersex' (*babycenter.com*, 2022) available at <https://www.babycenter.com/baby/newborn-baby/when-your-baby-is-intersex_20000898> accessed 22 February 2022.
[52] Jack Heron, 'Gender Recognition in Comparison: Ireland, the UK and the World' (2019), 37(16) Irish Law Times, 231.
[53] Article 40.3.1°.

the child when the influence of social stigma is so great.[54] By offering parents an alternative to choosing a binary gender, it affords the child the opportunity to develop in their own unique way. As the child matures, they have the opportunity to decide whether to retain the I gender marker as a symbol of their gender diversity or identify as one of the binary genders.

However, if parents cannot be relied on to withstand social pressures in the best interests of their child, stronger mechanisms may need to be implemented in order to deter them from opting for these surgeries. The Maltese government, in recognising the severity of this human rights breach, has placed an explicit ban on all such surgeries.[55] In Malta, the penalty for allowing such a surgery to be carried out is up to five years imprisonment or a fine not exceeding €20,000.[56] A similar sanction should be imposed on all non-consensual sex reassignment surgeries, save in instances where the surgery is necessary for legitimate medical reasons.

A direct product of the introduction of the I marker would be the creation of more awareness around this biological variation. Intersex variations are not often the subject of public discourse, and not many people are aware of their existence, despite an estimated 1.7% of the population being affected by it.[57] It is hoped that the introduction of the I gender marker would raise the visibility of intersex individuals in society and promote societal acceptance of them. Affording legal recognition to intersex individuals, coupled with the criminalisation of non-consensual

[54] Blaise Vanderhorst, 'Whither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex' (2015) 9(1) Harvard Law and Policy Review 241, 257.
[55] Heron (n57).
[56] Markus Bauer, Daniela Truffer, 'Intersex Genital Mutilations Human Rights Violations Of Children With Variations Of Reproductive Anatomy' (*StopIGM.org,* 2019) available at <https://intersex.shadowreport.org/public/2019-CRC-Malta-NGO-Zwischengeschlecht-Intersex-IGM.pdf> accessed 28 February 2022.
[57] Peter Dunne, 'The Conditions For Obtaining Legal Gender Recognition: A Human Rights Evaluation' (PhD, Trinity College Dublin 2018) available at <http://www.tara.tcd.ie/bitstream/handle/2262/84084/PETER%20DUNNE%20-%20THESIS.pdf?sequence=1>.

surgical procedures offers the most optimal and comprehensive protection of their rights, including the rights to bodily integrity and personal autonomy.

The 'Misplaced' Approach of the UK Supreme Court[58]

The UK Supreme Court recently issued a judgment in what is one of the first gender recognition cases to be taken by a non-binary individual. *R (on the application of Elan-Cane)* concerned the application of a non-binary person for a passport with an X gender marker, which was denied by Her Majesty's Passport Office.[59] This case relied on the decision of *B v France*, which held that it was a breach of Article 8 ECHR to deny a transgender person recognition of their new identity, arguing that the refusal to acknowledge a non-gendered identity is a breach by analogy.[60] The Supreme Court held that there is no positive obligation imposed on the State by Article 8 ECHR to record a non-gendered identity on a person's passport, justifying this by citing the need to ensure a cohesive legal and administrative system.[61]

The Court did not accept Elan-Cane's submission that it was 'demeaning and distressing' to use a gender marker which did not accurately represent their identity. They rebutted that as the female gender marker corresponded to Elan-Cane's appearance, there was no obvious discrepancy and therefore no harm was caused.[62] In their highly insensitive judgment, the Court reduced the existence of non-gendered identities to mere 'feelings' or 'innermost thoughts', which is in direct contradiction to their existence as tangible realities and lived experiences.[63]

[58] Jack Castle and Oscar Davies 'Gender identities: a two-tier system?' (2015) 172(7965) New Law Journal, 11.
[59] *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56.
[60] *B v France* [1992] ECHR 40.
[61] R (on the application of Elan-Cane) (n59).
[62] ibid, at [40].
[63] Castle and Davies (n58).

Castle and Davies opine that this ruling, in effect, creates a two-tier system where the rights of all binary males and females are deemed to take precedence over the rights of non-binary individuals.[64] Put in such succinct terms, this opinion captures the gravity of the judgment. The ruling is an explicit denial of the right of non-binary individuals to have their true gender identity recognised by law. It must be borne in mind that the absence of Irish legislation to provide for the recognition of non-binary and intersex persons has the same substantive effect as the ruling in *Elan-Cane*. It means that transgender individuals may enjoy gender recognition, but non-binary and intersex individuals may not. To delineate between groups of gender diverse individuals in such a way as to, in effect, create two different classes of citizen, is not just. The implementation of X and I gender markers would eliminate this hierarchy, by placing those who are gender diverse on equal footing with cisgender people.

Alternative Solutions?

For the sake of completeness, it is important to consider if there are any other viable avenues for the recognition of non-binary and intersex identities. Proponents of the idea that an increased number of gender markers would undermine the experiences of those who use them, posit the suggestion of removing gender from official documents as a workable solution. [65] This movement is growing in support, particularly in America, with the argument being that by retaining gender markers, the State is exercising influence over something that is ultimately a private and personal matter.[66]

The suggestion was even raised by the German Federal Constitutional Court when they ruled that it was unconstitutional to not recognise the non-binary identity of an intersex person. The Court

[64] ibid.
[65] Dunne (n57).
[66] Anna Wipfler, 'Identity Crisis: The Limitations Of Expanding Government Recognition Of Gender Identity And The Possibility Of Genderless Identity Documents' (2016) 39 Harvard Journal of Law and Gender, 492.

gave deference to the government on how to rectify the issue, with the government ultimately deciding to implement a third gender marker as opposed to removing all references to gender from official documentation. It is not clear what the rationale of this decision was, but what is likely to have influenced their decision to not opt for the removal of gender from official documentation, is the onerous nature of the undertaking as it would require a large administrative overhaul.

Support for this proposition is not only scarce among governments, but also among international organisations, with the International Civil Aviation Organisation (ICAO), showing absolutely no support for it. The ICAO has allowed the registration of an X gender on passports since 2006, but they cite concerns that the removal of gender from passports altogether would create adverse effects on operations of border authorities and result in inconvenience for passengers.[67] The UK conducted research into the viability of this plan and although only 10% of ICAO Member States responded to the questionnaire, 100% of respondents stated their aversion to the proposal.[68] Realistically, the chances of all member states assenting to this proposal when only a small portion deemed the survey worthy of acknowledgment, are slim.

An inherent disadvantage of the removal of gender markers is that it cannot afford non-binary and intersex individuals visibility in the way that the implementation of X and I gender markers can. The preference for an X gender marker over the removal of the gender field on official documents was expressed by Christie Elan-Cane, stating that it would 'educate society and end the invisibility'.[69] In a society where there is little awareness of the existence of gender diverse individuals, the effect of removing gender markers would be to ostracise and invalidate the experiences of these individuals.

[67] R *(on the application of Elan-Cane)* (n59).
[68] R *(on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 at [21].
[69] Wipfler (n66).

Legitimacy in the eyes of society is of vital importance to non-binary individuals, with Christie Elan-Cane describing their case as a 'battle for legitimate identity'.[70] If gender markers were removed altogether, a non-binary or intersex person would find it impossible to prove the legitimacy of their identity if this was called into question. A submission to the government's Gender Recognition Act Review Group by a young non-binary individual expressed the concern that in the face of discrimination or hate crime, not having an identity document that displays their correct identity would put them in a precarious position.[71] Societally accepted legitimacy is at the core of the campaign for non-binary rights and is something that will only be achieved by an express legal recognition of these identities, not by the removal of gender markers.

The opposition to this proposal would appear to be insurmountable, and even if the power of global organisations could be overborne, it is not clear that the removal of gender from official documentation would have any beneficial impact on the lives of non-binary and intersex individuals. If the immediate affirmation of diverse gender identities is the aim, it appears that the implementation of X and I gender markers is a more appropriate solution.

Conclusion

To conclude, historic justifications for upholding a binary system of gender recognition serve no clear beneficial function and are therefore no longer valid. Upholding a hierarchical system where the rights of non-binary individuals are subordinate to the rights of binary individuals based on weak, so called "common good" arguments, is no longer morally sustainable. The process of amending the Gender Recognition Act 2015 is moving too slowly to keep pace with the needs of our rapidly evolving society. The changes proposed by the Amendment Bill do not address the legislative lacuna that exists in the place of legal recognition for non-binary and intersex individuals.

[70] ibid.

[71] 'Review (Under Section 7) Of The Gender Recognition Act 2015' submission 040 (*Gov.ie*, 28 November 2019), available at <https://www.gov.ie/en/consultation/001721-review-of-the-gender-recognition-act-2015> accessed 8 March 2022.

As it does not provide any gender markers other than male or female, the current legislation violates the rights and negates the existence of gender diverse individuals.

On the basis that legislation has proven to be effective in the furtherance of societal change, it is vital to introduce legal reform in this area. The introduction of X and I gender markers would affirm the existence and legitimacy of diverse gender identities, and in doing so, vindicate their rights under Article 8(1) ECHR. Further, it would assist in the move away from classifying gender diversity as a pathology, which in turn, will foster societal acceptance of variance in gender. In relation to intersex individuals specifically, this proposal ensures that their diversity is recognised and their right to bodily autonomy is respected by the criminalisation of non-consensual surgeries. Ultimately, the proposed reform ensures that non-binary and intersex individuals will acquire the legal recognition to which "all persons, by virtue of their being, are so entitled".[72]

[72] *Foy v An t-Ard Chláraitheoir & Ors* [2007] IEHC 470.

An Analysis of *Burke v Minister for Education and Skills* [2022] IESC 1

Ben McCartan

Introduction

The case of *Burke v Minister for Education* considers many important issues in constitutional law, namely the nature and scope of executive power, the limits of judicial review and rights of education in the Constitution.[1] The motion at issue was brought by two homeschooled students, Elijah Burke and Naomi Power who were left without any reasonable path to third-level education in the summer of 2020 due to a governmental calculated grade scheme which left a small cohort of Leaving Certificate students overlooked. The issues in this case not only offer fertile ground for academic discussion on the appropriate level of judicial review of executive action, but also illustrate the distinction between executive and administrative action. That is to say that the judgement of Chief Justice O'Donnell provided much-needed clarity into an area of law which has seen relatively little scrutiny, and which is riddled with complex and often competing lines of authority.

Facts and Issues

In May 2020, the Government announced the postponement of the Leaving Certificate examinations in view of public health concerns surrounding the Covid-19 pandemic. In turn, the Government established a calculated grade scheme pursuant to the powers afforded to the Executive under Article 28.2 of the Constitution, which was operated on an administrative basis by the Minister for Education. However, premised upon the interest of fairness, one stipulation

[1] *Burke v Minister for Education and Skills* [2022] IESC 1.

of the scheme, provided that a teacher could not grade the work of his, her or their own child, , instead requiring the relevant grade to be calculated by another teacher within the school. Thus, a small minority of students who were homeschooled by their parents - and who were thereby unable to source an alternative teacher to calculate their grades - could not avail of the scheme. The plaintiffs were two such students who were impacted by the Government's decision , and who were consequently left without a path to third-level education.

At first instance, the plaintiffs sought separate orders of certiorari from the High Court, quashing the Government's decision to refuse to provide them with a calculated grade.[2] Applying the *Keegan* test, [3] Mr Justice Meenan found in favour of each plaintiff on the grounds of unreasonableness, granting the relief sought. Subsequently, however, the State appealed this decision on the basis that the correct standard of review to be applied by the court was the more stringent clear disregard test used in *Boland.*[4] Claiming that the *Keegan* test of unreasonableness was normally reserved for the exercise of non-statutory executive power, the State argued that the clear disregard standard was the test commonly used to review exercises of non-statutory executive power in high policy areas like socio-economic policy, foreign affairs, and national security. However, the State did not seek a staying order, enabling the plaintiffs to both receive an individualised assessment.

The Court of Appeal,[5] acknowledging that fundamental rights had been engaged in this case, rejected the clear disregard argument and applied the *Meadows* test, which incorporates a proportionality component when constitutional rights were at issue. [6] Although a further appeal was considered moot since the dispute between the State and the respondents was already

[2] *Burke v Minister for Education and Skills* [2020] IEHC 418; see also *NP (A Minor) v Minister for Education and Skills* [2020] IEHC 479.
[3] *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642.
[4] *Boland v An Taoiseach* [1974] IR 338.
[5] *Burke v Minister for Education and Skills* [2021] IECA 67.
[6] *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701.

resolved, the case was nonetheless allowed to proceed to the Supreme Court because it concerned important issues of law such as the separation of powers and the scope of the executive power.

At the core of this case is the constitutional right of the parent to provide education in the home. Article 42.1 acknowledges that the family is the 'primary and natural educator of the child.' Article 42.2 establishes the parent's right to provide education in their homes. Accordingly, there is a derived right of children to receive such education in their homes.[7]

The intersection of administrative and constitutional law is a further key theme of this case. Administrative law is concerned with regulating the actions of the Government and public authorities through the instrument of judicial review. In cases where the administrative actions of the Executive infringe fundamental rights, the courts are tasked with balancing the vindication of individual rights with deference to executive discretion.

It was debated whether the Government's decision amounted to an executive or administrative action and, consequently, what standard of review ought to apply. It is well established that administrative action is amenable to judicial review, but a higher threshold has traditionally been applied to executive action in cases such as *TD v Minister for Education*,[8] *Boland v An Taoiseach*,[9] *Crotty v An Taoiseach*,[10] *McKenna v An Taoiseach*,[11] *and Horgan v Ireland.*[12] Further, where fundamental rights are infringed by legislation, a standard akin to a proportionality or reasonableness test is applied by the courts. Accordingly, the applicants argued for the recognition of a new right derived from

[7] *Burke* (n1).
[8] *TD v Minister for Education* [2001] IESC 101.
[9] *Boland* (n4).
[10] *Crotty v An Taoiseach* [1987] IR 713.
[11] *McKenna v An Taoiseach (No.2)* [1995] 2 IR 10.
[12] *Horgan v Ireland* [2003] IEHC 64.

Article 42.4, namely for the circumstances of homeschooled children to be taken into account when education policies are being devised and implemented. It was also submitted that pursuant to Article 40.1, the right to equal treatment had been breached.

Judgement

A majority of 4:1 led by Chief Justice O'Donnell found the Government's scheme to be an exercise of executive power. In reaching such a decision, the court considered that the scheme was explicitly stated to be established pursuant to the executive power provided under Article 28.2, and its source undoubtedly flowed from the Executive, without a statutory basis. Accordingly, it was clearly not an exercise of legislative power, or less still judicial, and therefore fell into the more eclectic jurisdiction of the executive branch. Chief Justice O'Donnell recognised that the impugned decision was of an administrative character, but this did not preclude the court from finding that the State's executive power was clearly engaged in these proceedings, holding that 'the fact that any such scheme would be properly characterised as the exercise of administrative action, would not preclude its source being executive power.'[13]

Equally, the Chief Justice astutely noted that the exercises of administrative and executive power were not mutually exclusive and that, traditionally, the health and education systems were largely administered by the Government with no statutory basis. Here, the departments charged with this administration derived their legal authority from the relevant Minister as a member of Government. Chief Justice O'Donnell was thereby satisfied to conclude that the scheme clearly engaged the executive power of the State and did not think it necessary to undertake a forensic determination of the difference between executive and administrative action. Regardless of the fact that the implementation of the scheme was detail orientated and technical in nature, the

[13] *Burke* (n1).

source of its authority came from a policy decision made by the Government in the context of a public health crisis, enabling it to fall within the ambit of the Executive.

The precise scope of executive power is difficult to define. As Conor Casey points out 'the parameters of executive power in the domestic sphere is an area lacking detailed examination.'[14] In *Haughey v Moriarty*,[15] the existence of the implicit powers of Government were recognised, although the Government is rarely required to assert such powers because it normally enjoys a parliamentary majority and can reliably reinforce most policy decisions through statute.[16] Indeed, it is primarily through statute that the executive branch advances its policy. Doyle and Hickey's residual and historical test is useful in identifying these inherent executive powers,[17] and the courts have recognised serval examples of this authority, including the power to control immigration,[18] the power to issue public health advice,[19] and the power to conduct non-statutory inquiries.[20]

In first identifying a governmental power, Doyle poses two questions: first, whether the power in question is one that a State must have in order to be considered a State; and second, whether it has already been assigned to another branch of government or if it has historically been exercised by the executive branch. In *Laurentiu v Minister for Justice,* Mr Justice Keane, referring to the power to deport aliens stated, 'it is clearly a power of an executive nature, since it can be exercised by the executive even in the absence of legislation.'[21] He went on to comment that this

[14] Conor Casey, 'Under-explored Corners: Inherent Executive Power in the Irish Constitutional Order' (2017) 40(1) Dublin University Law Journal 28.
[15] *Haughey v Moriarty* [1998] IESC 17.
[16] James Casey, Constitutional Law in Ireland, (3rd ed Round Hall 2000), 231.
[17] Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd ed, Clarus, 2019) 209-210.
[18] *Laurentiu v Minister for Justice* [1999] IESC 47.
[19] *Ryanair v An Taoiseach* [2020] IEHC 461.
[20] *Shatter v Guerin* [2019] IESC 11.
[21] *Laurentiu* (n18).

is a power that can be controlled and regulated by the Oireachtas, but not delegated. In the same case, Ms Justice Denham commented that 'the executive of a state, as an incident of sovereignty, has power and control over aliens.'[22] This mention of an incident of sovereignty is akin to Doyle's concept of a power a State must have in order to be considered a State.

In *N.V.H v. Minister for Justice & Equality*, Mr Justice O'Donnell (as he then was) used the historical justification when he stated that the control of entry into the state was 'as a matter of history a core function of the executive power.'[23]

The case of *Ryanair v An Taoiseach* provided clarity regarding the question of whether legislative intervention into an area traditionally controlled by an inherent executive power extinguishes such power. Mr Justice Simons established a test to decide this on a case-by-case basis, having regard to the legislative intent and considering whether it has 'expressly or by necessary implication' ousted the executive power.[24] This approach demonstrated a willingness by the courts to accept the possibility of executive powers being exercised alongside statutory powers. Further, it has been recognised in the cases of *Bode v Minister for Education* and *CA v Minister for Justice*, that the ability to create and operate non-statutory schemes is a feature of the executive power was strongly endorsed, but in both cases it was noted that these schemes did not place a burden on fundamental rights.[25] Since the power at issue in these proceedings had not been assigned to or exercised by the other branches of Government, and has historically been exercised by the Executive, it demonstrably satisfies the approach laid out by Doyle and Hickey.[26]

The most difficult question for the Court in this case was what test should be applied, considering that fundamental rights had been engaged by the calculated grade scheme. Chief Justice O'Donnell

[22] ibid.
[23] *N.V.H v Minister for Justice & Equality* [2017] IESC 35.
[24] *Ryanair* (n19).
[25] *Bode v Minister for Education* [2008] 3 I.R 663; *CA and TA (a minor) v Minister for Justice and Others* [2015] IEHC 432.
[26] Doyle and Hickey (n17), 209-210.

noted that the clear disregard test in *Boland* is well established when considering a need for judicial intervention in executive action. There is no express power in the Constitution that facilitates judicial review of executive action, as there is for legislative, but it was recognised in *Boland* as a power the courts must have as the ultimate guardians of compliance with the Constitution. Delving into the significance of Boland, Chief Justice O'Donnell stated, with reference to the work of Oran Doyle, that the decision was fully justified due to several constitutional provisions which limit executive discretion.[27] For example, the Government cannot ratify international treaties (Article 29.5) or declare war (Article 28.3.1) without the agreement of Dáil Éireann. If the Government was to breach these, or other provisions of the Constitution, it would necessarily fall to the courts for adjudication since they are sworn to uphold the Constitution (Article 34.6.1):

> Thus, it follows, almost inescapably, from the structure and detail of the Constitution that the executive is constrained by the Constitution and that the Courts are empowered to police and, where necessary, enforce those constraints.[28]

Further, Chief Justice O'Donnell noted that the reason this power is not expressly stated in the Constitution may be explained because, relative to the legislative branch, the Executive rarely directly engages fundamental rights compared to the more specific nature of the legislative branch. He referred to a line of authority stemming from the cases of *Boland, Crotty, McKenna* and *TD*, all of which involved executive action. In *Boland, Crotty* and *McKenna*, it was held that the government must act in clear disregard of constitutional provisions before the courts will intervene.[29] The *TD* case was more complicated, but it was held that the government must act in 'conscious and

[27] Oran Doyle, "Constitutional change in Ireland: political history and balance of power" (2017) 40(2) Dublin University Law Journal
[28] *Burke* (n1).
[29] *Boland* (n4); *Crotty* (n10); *McKenna* (n11).

deliberate breach… of their constitutional obligations' to merit judicial intervention.[30]

Chief Justice O'Donnell identified these cases as cases where constitutional standards, rather than individual rights, were impugned:

> An important distinction must be drawn between the provisions of the Constitution protecting the fundamental rights of the citizen on one hand, and those on the other, which regulate the separation of powers and in particular the conduct of the executive branch.[31]

By making the distinction between government action which affected fundamental rights and actions which affected constitutional 'structures,' Chief Justice O'Donnell was paving the way for the application of different tests to different types of governmental action. He argued that the significance of *Boland* lay in the fact that it was the first time it was asserted that the Government could be restrained by the courts with reference to the Constitution at all. But, since this distinction between types of government action had not been made previously, no consideration was given to the application of different tests. *Boland*, *Crotty*, *Mckenna* and *TD* were all claims brought with the goal of enforcing compliance with provisions regulating the structure of the Constitution, rather than provisions governing fundamental rights. It is interesting that he so readily classified *TD* as a 'structures' case, as it is frequently discussed as a case involving socio-economic rights. However, as Hickey points out, rights were not legally determined in the case.[32] The holding of the case was based on the fact that the separation of powers had been offended. By categorising *TD* as a 'structures' case, rather than a 'rights' case, O'Donnell CJ correctly recognised the unique nature of the case and how it was decided based on a judicial exercise of executive power.

This distinction is attractive because it recognises the vindication of rights as the utmost concern

[30] *TD* (n8).
[31] *Burke*, (n1).
[32] Tom Hickey "Reading TD Down" (2022) 6(3) Irish Judicial Studies Journal 19.

of the courts, while still respecting a higher level of deference to broader government decision making for which they are democratically accountable. However, it remains to be seen whether this distinction will be applied consistently in future years. The issue of whether a government's decision has placed a burden on fundamental rights or merely affected them is potentially a difficult distinction to make and will largely come down to statutory interpretation.

Chief Justice O'Donnell distinguished the *Burke* case on the basis that fundamental rights, rather than constitutional standards, had been breached by the calculated grade scheme. He argued that when the constitutional rights of a citizen are alleged to have been infringed by executive action, a similar test to that which would apply if the rights had been infringed by legislative action should be utilised, rendering the clear disregard standard inapplicable.[33] Prior to this case, executive action, especially matters of high policy, had generally been held to a clear disregard standard while legislation was reviewed on a proportionality basis. This raises the question as to why the Executive should be held to a higher standard than the Legislature when the effect on a citizen's rights is potentially the same. If the Government had established the calculated grades scheme pursuant to legislation, this would be the case. Traditionally this has been justified by both Article 28.4 which makes the government accountable to Dáil Éireann and the fact that legislation undergoes intensive scrutiny before being passed into law. For Chief Justice O'Donnell, this did not justify the extreme level of deference contended for by the applicants, especially when constitutional rights were infringed:

> There is no reason under the Constitution to extend deference to the executive's decision in this regard, over and above the presumption of constitutionality arising from the respect due to both of the other branches of government. But if it is established that the actions of the Government have breached the rights of the citizen, then the courts must uphold

[33] *Burke* (n1).

> the Constitution, and defend the rights of the citizen, in the same way and applying the same standards, as if those rights had been infringed by the actions of the legislative branch of government.[34]

It was firmly asserted that it is the courts' primary obligation to defend and vindicate the rights of the citizen. The Chief Justice cited the judgment of Mr. Justice Griffin in *Crotty*:

> [W]here Government actions infringe or threaten to infringe the rights of individuals citizens or persons the courts not only have the right to interfere with the executive power they have the constitutional obligation and duty to do so.[35]

After extensive deliberation, the court ultimately opted to utilise the proportionality test first established in *Heaney v Ireland*.[36] While Chief Justice O'Donnell noted that he did not view the test as necessarily a 'precise or failsafe test,' but he nonetheless considered it to be the most suitable tool in this context, whereby constitutionally protected rights were engaged. The question for the court was 'whether [the] means adopted to achieve a legitimate end is matched to it, so that it intrudes no more than is necessary on a protected right.'[37] It was found that the State's justification, that it would be unfair to other students to cater to these ones individually, did not justify the degree of interference with the plaintiff's rights, prompting the State's appeal to be ultimately dismissed.

When deciding whether a derived right for homeschooled children to have reasonable account taken of their situation existed, Chief Justice O'Donnell referred to *Friends of the Irish Environment v Ireland* which stated that the proposed right must be capable of being derived from the words of the text and structure of the Constitution.[38] He did not think that to be the case here and

[34] ibid.
[35] *Crotty* (10), per Mr Justice Griffin.
[36] *Heaney v Ireland* [1994] 3 I.R. 593.
[37] *Burke* (n1).
[38] *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49.

agreed that the right claimed by the plaintiffs was 'implausible and impermissibly vague.'[39] Notwithstanding this, the court reiterated that the Constitution recognises and protects the freedom of parents to educate their children within the home under Articles 42.1 and 42.3, and equally noted the corresponding derived rights of the child.

On the argument that the Government's actions had violated the plaintiff's right to equal treatment under Article 40.1, the court found it to be superfluous since their claim had already succeeded under Article 42, holding that 'if it is established that something is a breach of a constitutional right, then the argument gains nothing if it is also asserted that someone else was treated differently and better.[40] Additionally, Chief Justice O'Donnell remarked that it was unlikely to succeed since the differentiation was random and not based on human personality.

Dissent of Mr Justice Charleton

Mr Justice Charleton's dissenting judgement diverged from the majority on the classification of the Government's action. Arguing that the disputed action was administrative rather than executive due to its technical and detailed nature, he focused on the character of the action and distinguished precise administrative decisions from resolutions of policy. In drawing this delineation, he referred to Hogan, Morgan and Daly, who state that administrative decision-making involves little discretion and relies on knowledge of clear existing principles.[41] He further offered his own delineation at paragraph 36, considering that:

> Administration is the following through on schemes which policy has previously decided ought to be in place and where the parameters have been set whereby all that needs to be done is to decide on eligibility. Executive power, in contrast, truly engages the exercise of

[39] *Burke* (n1).
[40] ibid.
[41] Gerard Hogan, David Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Roundhall, 2019) 2.

> policy decisions.[42]

Decisions of policy are broad-ranging and of a political nature, which may involve the creation of administrative schemes or other decisions which have far-reaching consequences for the citizens of the State. Meanwhile, administration is the application of a scheme to discrete circumstances. For Mr Justice Charleton, the postponement of the Leaving Certificate and the establishment of the calculated grade scheme was an exercise of executive power, and the fault lay in the administration of the said scheme which exceeded its jurisdiction by inadvertently interfering with home-schooling rights.

Mr Justice Charleton's argument is founded in the distinction between administrative and executive action, although it still strongly emphasised the importance of the separation of powers and endorsed the use of the clear disregard test when reviewing executive action. He emphasised the fact that by engaging with decisions of policy, the courts would be led into areas in which they have no specific expertise or democratic mandate. Mr Justice Charleton employed the logic of Mr Justice Hardiman in TD, stating that 'decisions of policy were not capable of restraint because of the difference in function as between setting policy and the microcosm of a court hearing.' [43] He also quoted Mr Justice Hardiman in *Sinnott*, viewing that

> The evidence-based adversarial procedures of the court, which are excellently adapted for the administration of commutative justice, are too technical, too expensive, too focused on the individual issue to be an appropriate method for deciding on issues of policy.[44]

Charleton's judgement clearly advocates for a 'rigid, not porous,' view of the separation of

[42] *Burke* (n1), per Mr Justice Charleton.
[43] *TD* (n8), per Mr Justice Hardiman.
[44] *Sinnott v Minister for Education* [2001] 2 IR 599, per Mr Justice Hardiman.

powers as outlined by the majority in TD,[45] over Ms Justice Denham's system of 'checks and balances.'[46] He argued that an expansion of the court's power in this area would undermine the answerability of the Government to the Dáil, ultimately weakening the democratic process.

Analysis

Both the majority and dissenting judgement ultimately reached the same conclusion that the test applied should be one of proportionality or reasonableness. The disagreement was based on whether the disputed action constituted executive or administrative action.

The nature and scope of implicit executive power is difficult to accurately ascertain. It is contended here that the ability to create and operate non-statutory schemes, which has been readily recognised by the courts in *CA* and *Bode* among others, is an aspect of such power. Importantly, it was recognised that these schemes conferred a benefit on those involved, and did not seem to limit or restrict fundamental rights in any way. The widely accepted view, it seems, was outlined by Hogan and Kelly in that legislation is required before the executive may impose any obligation or burden on citizens' rights.[47] As cases such as *Ryanair* and *Laurentiu* have shown us, legislative intervention into an area previously administered by an unenumerated executive power can displace that executive power. The inherent executive power is the smallest power of government by a considerable margin and as Chief Justice O'Donnell pointed out, writing extra-judicially, 'it appears that there are no theoretical limits to the extent to which the powers previously exercised by the executive can be made the subject of legislation.'[48] However, as Casey argues, this is desirable due to the dominance of the executive in the Westminster style

[45] *TD* (n8).
[46] ibid., per Ms Justice Denham.
[47] Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th edn, Bloomsbury 2003), p.429.
[48] The Hon Mr Justice Donal O'Donnell 'Some Reflections on the Independence of the Judiciary in Ireland in 21st Century Europe' (2016) 19 Trinity College Law Review 5-39, 10.

government and a broader interpretation of the inherent executive power would undermine the process of parliamentary scrutiny and the democratic accountability of the government to the Dáil.[49]

When determining the type of power in question, Chief Justice O'Donnell focuses on the source of the authority. The legal authority to establish a non-legislative scheme flows directly from the Minister as a member of the Government. The fact that the scheme was detail-oriented and technical in nature did not preclude its source being executive power.[50] Chief Justice O'Donnell's source-based approach seems to envision a rather broad view of the executive power. He did not find it necessary or beneficial to differentiate between executive and administrative action. He likely recognised the difficulties that could arise from trying to separate the two concepts, which he considered to be 'not mutually exclusive.'[51]

Conversely, Mr Justice Charleton focused more on the literal character of the action. He maintained that the Government was capable of administering through Cabinet decisions and that not all decisions of Government involve the exercise of executive power. The distinction between these two actions can be quite nebulous, but Mr Justice Charleton offers some guiding principles. He distinguishes between the formulation of a policy and its implementation,[52] and compares decisions of policy - which contain guiding principles - with the precise decision-making involved in applying a scheme to individual circumstances. He held that administrative action should not trespass on the aims of the policy it is serving, nor exceed its jurisdiction in any way.[53] Ultimately, the conclusion he reached is that the Government's policy decision to postpone the Leaving Certificate and announce the calculated grade scheme in its place, did not exceed constitutional limits, but the administration of the scheme inadvertently placed a burden on the rights of the

[49] Conor Casey, "Under-explored Corners: Inherent Executive Power in the Irish Constitutional Order" (2017) 40(1) Dublin University Law Journal.
[50] *Burke* (n1).
[51] ibid., per Chief Justice O'Donnell.
[52] *Burke* (n1), per Mr Justice Charleton.
[53] ibid.

plaintiff.[54] Crucially, he noted that the Government's decision did not seem to force this action in any way, and it would have been possible to pursue the aims of the policy without interfering with the rights of the plaintiffs.[55]

The approach of Mr Justice Charleton, while logically appealing, is too uncompromising and necessarily involves a much narrower understanding of the executive power. Additionally, this construction of executive power is not consistent with case law or scholarship concerning this subject. It has been recognised that the creation and operation of non-statutory policy schemes, in sectors including education, involves the exercise of the inherent executive power of the State.[56] Equally, however, it has been suggested that these schemes can only confer an *ex gratia* benefit on citizen's rights, rather than a burden.[57] An example of such a scheme would be the funding for primary and secondary education prior to the enactment of the Education Act 1998,[58] which was commonly accepted to be within the remit of the government's inherent executive power. Chief Justice O'Donnell's approach to the issue is more pragmatic and nuanced, and affords due regard to the close relationship of administrative and executive action. It is also more coherent with case law generally.

The approach undertaken in *Burke* is commendable for introducing a clearer, more structured approach to reviewing executive action where fundamental rights are involved. The application of the proportionality review provides a higher standard of accountability than the rationality test outlined in *Keegan*,[59] while also proving more favourable than the *Meadows* test of reasonableness infused with proportionality, which was often confusing and inconsistent in its application. Even

[54] ibid.
[55] ibid.
[56] Gerard Hogan, Gerry Whyte, David Kenny and Rachel Walsh, *Kelly: The Irish Constitution* (Fifth edition, Bloomsbury 2018) at [5.1.18].
[57] *Bode* (n25).
[58] Hogan, Whyte, Kenny and Walsh (n56), at [5.1.18].
[59] Hogan, Morgan and Daly (n41), at [17-159].

from a fundamental perspective, it is difficult to derive a clear *ratio decidendi* from the various majority judgements in *Meadows* – as Chief Justice O'Donnell puts it, the particular circumstances of the case may have made it an 'imperfect vehicle for determination.'[60] The three majority judgements provide minimal guidance on how the test should be applied in the future and indeed seem to apply it inconsistently.[61] Throughout the decade preceding *Burke*, the concern was that the majority in *Meadows* established proportionality as a subcategory of the *Keegan* reasonableness test of considering whether a decision 'flies in the face of fundamental reason and common sense.'[62] While this fusion of the reasonableness and proportionality tests may initially appear appealing on face, including proportionality as a mere subcategory of the reasonableness test without sufficiently defining it may cause the proportionality review element to be applied inconsistently. Notwithstanding this, Brady nonetheless observes that some underlying principles can be drawn from the majority positions which flesh out the proportionality element and introduce an element of structure. In particular, Ms Justice Denham's judgment endorses the structured formulation of Mr Justice Costello in *Heaney v Ireland*, which poses three main questions: are the means rationally connected to the objective; do they impair rights as little as possible, and whether the effect on rights is proportionate to the objective.[63]

In selecting a simple structured proportionality test, the majority decision in *Burke* paves the way for a much more straightforward method of reviewing Government decision-making which places the focus on individual rights by encompassing all levels of executive action. The adoption of the three-part test established in *Heaney* provides a much clearer and more transparent approach in its future application than the subjective, ambiguous formulations adopted in *Meadows*. By abandoning the reasonableness component, the courts will be able to focus on the

[60] *Burke* (n1).
[61] Alan D.P. Brady, 'Proportionality, deference and fundamental rights in Irish administrative law: the aftermath of Meadows' (2010) 32 Dublin University Law Journal 136.
[62] ibid.; see also *Keegan* (n3).
[63] *Heany* (n36).

application of a consistent and credible proportionality review. Ultimately, the structured proportionality review is more precise and sophisticated due to the obligation imposed upon judges to identify specific criteria which is not only more systematic and transparent, but further avoids judgments based on policy or personal preference.

Chief Justice O'Donnell's approach firmly recognised the vindication of fundamental rights as the court's primary concern, while Mr Justice Charleton favoured a strict observance of the separation of powers. The Chief Justice's application of the proportionality test to executive action establishes a more adaptable and robust approach to vindicating constitutional rights. Mr Justice Charleton was in favour of the same test, but he held that executive action should still be held to a clear disregard standard. His argument was that a strict, non-malleable observance of the separation of powers was necessary for the 'harmonious operation of the moving parts of government.'[64]

Further, Chief Justice O'Donnell's reasoning seemed to favour a return to rights-based jurisprudence which was arguably the prevailing philosophy of the superior courts in the years leading up to the decision in *TD v Minister for Education.*[65] In this regard, Mr Justice Hardiman's recognition of the separation of powers as a 'superordinate constitutional value, capable of trumping any other constitutional concern,' can be seen as inconsistent with earlier case law. *State (Quinn) v Ryan* held that courts are the custodians of constitutional rights, and that these rights cannot be "circumvented or set at nought".[66] In *DG v Eastern Health Board*, Mr Justice Hamilton also declared that 'the courts have jurisdiction to do all things necessary to vindicate such rights.'[67] Ultimately, the *Burke* judgement is commendable for reasserting the notion that the courts' paramount concern is the protection of fundamental rights, and promoting a more activist

[64] *Burke* (n1), per Mr Justice Charleton.
[65] *TD* (n8), per Mr Justice Hardiman.
[66] *The State (Quinn) v Ryan* [1965] IR 70.
[67] *DG v Eastern Health Board* [1997] 3 IR 511.

approach when these rights are infringed by the other branches of government.

Conclusion

The approach taken by Chief Justice O'Donnell in *Burke v Minister for Education* firmly places the vindication of constitutional rights over the Executive's freedom of action. By distinguishing between instances where constitutional rights are alleged to be infringed and those whereby an action is alleged to infringe broader constitutional standards, this case signals a willingness from the courts to take a more flexible approach when considering judicial review of executive action.[68] The introduction of a straightforward proportionality review across the board is preferable to the approaches previously taken in *Meadows* and other cases where undue deference was shown to the executive branch.

[68] Laura Cahillane, 'The TD case and approaches to the separation of powers in Ireland' (2022) 6 Irish Judicial Studies Journal.