

THE EAGLE

The Trinity College Law Gazette

Volume 9 Issue 1
October 2022

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Design and layout: Emma Bowie

Cover Image: Ciara Hogan

Letter from the Editor

A chairde,

I am delighted to launch Volume 9 of *The Eagle* with the publication of our first online issue. Long-time readers of *The Eagle* will be familiar with our mission: to engage students with a range of political-legal issues by providing an accessible forum to write journalistic-style articles, free from the formalities associated with other legal publications. To this end, we do not limit submissions, nor Editorial Board positions, to law students. Our talented team of editors endeavours to ensure that all published articles are expressed in clear and plain English, devoid of legal jargon and complicated political terms. As our Deputy Editor Mark has often remarked, our objective is to publish pieces with the “reasonable student” in mind: “a friend studying STEM who has a basic awareness of, and interest in, current affairs!”

The reasons for why *The Eagle* places such a high value on the accessibility of its articles are, perhaps, less discussed. As Senator and former journalist Tom Clonan emphasises in this issue’s interview, there is an urgent need for traditional media platforms to amplify student voices - for these experiences to play a greater role in shaping our political discourse. We are, after all, the generation that has been locked out of social and affordable housing and will suffer the long-term effects of current deficient climate policies. In this regard, it is my intention that *The Eagle* not only provides a vehicle for critical debate amongst students, but serves as a “mirror to those in power, interrogating the status quo and challenging power relationships in society” (p. 37). I believe articles in this issue such as those detailing the rule of law breakdown in the European Union, the marginalisation of disabled children’s voices in Irish law and policy, and the unprecedented wave of street protests in the wake of Masha Amini’s death in Iran, succeed in fulfilling this objective.

In addition to the diverse array of political-legal pieces featured in this issue, we have sought to breathe new life into *The Eagle*’s ‘Social Section.’ We recognise *The Eagle*’s special role in documenting Trinity Law School life and celebrating the variety of activities coordinated by our excellent student-run law societies and publications. For this issue, I am delighted to feature such pieces, including an article detailing Trinity FLAC’s inaugural “Know Your Rights” workshop with local school children in collaboration with the Trinity Access Programme.

I would like to express my sincere gratitude to Cleary Gottlieb for their generous financial support of this issue. I am immensely grateful for the Senior Editorial Board members - Mark, Doireann, and Eoin - who have worked tirelessly over the past few weeks to maintain the running of our blog, train up our Editorial Board, and recruit first years to *The Eagle*. I would also like to thank our talented editors, who fact-checked and added Oxford commas with the greatest care to ensure that the structure and substance of this issue’s articles attained the highest quality. To our authors, thank you for taking the time out of a busy college term to craft such nuanced and thought-provoking pieces.

To anyone who is considering writing for The Eagle’s blog or print publications, I would encourage you to give it a go! We believe that everyone should have a say in the legal, social, and political issues that directly affect them, and will endeavour to support your writing process from first submission to final publication. It is my hope that this year, *The Eagle* will inspire and empower students to take charge of their political futures by generating social and political awareness, platforming marginalised voices, and holding up more “mirrors” to our elected representatives. We are, after all, “the most powerful resource that this Republic has” (p. 38).



Mark McGrane
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Le gach dea-ghuí,

Emma Bowie
Editor-in-Chief

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Children with Disabilities: Invisible in Irish Law and Policy

by Lily Price, *SF Law and Political Science*

In 1992 Ireland ratified the UN Convention on the Rights of the Child (UNCRC), aiming to ensure the civil, political, economic, social, and cultural rights of every child. This treaty applies to all children, regardless of whether they have a disability. Despite progress in recent years, children with disabilities in Ireland are not always afforded equal opportunities to succeed in life. While Ireland has enacted legislation to protect the rights of those with disabilities, most policies and services either cater towards adults with disabilities, or children without disabilities, often forgetting to include relevant provisions for children who suffer from disabilities. As a result of this inaction, it is submitted that the Irish government is doing these children an injustice by failing to provide adequate resources to support them.

“Children with disabilities” is a broad category, likely affecting someone close to each one of us. It encompasses children with visible, physical disabilities as well as the many children with invisible disabilities, such as hearing or sight loss, anxiety, ADHD, autism, and dyslexia. Children with long-term health problems are included, as are those who previously received mental health support. In failing to properly look after these children, the Oireachtas and Government are neglecting a significant proportion of our youth.

In March 2021, a report was launched by researchers at the University of Galway (formerly NUIG), highlighting shortcomings in our laws when it came to protecting the rights of children with disabilities. The aim of the report, titled “Mind the Gap,” was to

encourage government action to protect and fulfil the rights of children with disabilities set out in the UN Convention on the Rights of the Child and in the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

Invisible

The report found that children with disabilities have significantly different needs to both adults with disabilities and children without disabilities, but these requirements are rarely provided for in our laws. An example can be found in the Assisted Decision Making (Capacity) Act 2015, which applies only to adults. Children also have important decisions to make and may benefit from specific and tailored decision-making supports.

The 'Better Outcomes, Brighter Futures' Plan 2014 - 2020 commits to improving policy and services for young people in Ireland, listing ‘equality’ as one of its guiding principles, but mentions little about children with disabilities. By repeatedly mentioning the UNCRC, but failing to reference the UNCRPD, it also fails to outline the specific rights of these individuals, or the unique help they may need to realise these rights. Building on this plan, legislation that impacts the lives of these children needs to explicitly prohibit discrimination based on disability, whilst providing appropriate mechanisms to remedy any violations that may occur.

No Voice

Furthermore, the report highlighted that Irish children with disabilities are rarely asked for input into the laws, policies, and services that affect them. Essentially, they have no say in their own rights. Children with disabilities are not a homogenous group - each child is different and has individual needs. These are neglected when no one affords them a platform to raise concerns and voice their experiences. The first step to inclusive legislation and policies therefore involves speaking directly to children and their families. We need to provide an

“...most policies and services either cater towards adults with disabilities, or children without disabilities, often forgetting to include relevant provisions for children who suffer from disabilities”

accessible forum where they can be listened to. Measures to capture the voices of children with disabilities are required across mainstream and disability-specific legislation in order to realise their rights. Although the findings of this report were not necessarily surprising, they certainly highlighted serious problems in our laws and the way in which they are created. Since not all children are equal, the legislation must provide for this.

Education Crisis

Article 42 of the Irish Constitution enshrines every child's right to an education, accessible on an equal basis, as does Article 24 of the UNCRPD. Unfortunately, there is an ongoing battle for school places for children with disabilities, particularly in the Dublin area. Many children with special needs faced into this summer unsure as to whether they would have an appropriate school place in September. Parents and councillors alike desperately called for urgent passage of legislation to compel schools to open places for children with special educational needs.

In response, the Education (Provision in Respect of Children with Special Educational Needs) Bill 2022 was signed into law. This enables the Minister for Special Education to direct schools to open a special class within a timeframe of 6-8 weeks after receiving a report from the National Council for Special Education detailing the lack of sufficient school places available in the area. It fast-tracks the current Section 37A process in the Education (Admission to Schools) Act 2018, which can take 12-18 months to secure a school place.

Although this legislation is welcomed, the Minister for Education, Department of Education and National Council for Special Education has always had access to data on the number of children requiring special educational places - why has she not planned or acted accordingly until this moment? Students and families should never face the possibility of losing precious school time, waiting for the Government to remedy an easily foreseeable problem. The Minister for Education has committed to investing more funding into this issue, but it is clear an urgent review must take place, along with planning to ensure that children with disabilities do not go into summer 2023 without

an appropriate school place.

No Services

Not only have Irish children with disabilities been forgotten in laws and policies and face difficulty accessing education, but there is also a serious lack of available disability services. Of the 2,082 HSE positions for disability services staff in Ireland, an alarming 732 posts providing services for children with disabilities are vacant. There are over 17,000 children waiting on initial contact with a children's disability team. In a survey carried out this year by Inclusion Ireland, a startling 85 per cent of parents said they had waited over a year for disability services. Down Syndrome Ireland also collected data revealing that half of respondents reported not receiving any therapy within the last year. These children are entitled to care, which they are not receiving and many will regress permanently because of it. The young activist Cara Darmody is an 11-year-old from Tipperary who has repeatedly called on the Government to handle the "disgrace" that is the current autism resource situation. Despite her youth, she has been at the forefront of a movement highlighting the lack of autism services, demanding HSE and government action to remedy this issue. She has pleaded with the Taoiseach to help her younger brothers, who have been severely impacted from not being able to access basic services regularly. Nationwide, children are suffering irreversible damage due to the lack of these vital services. Cara continues to press for change, highlighting that these children "deserve better".

Conclusion

Unfortunately, it is evident that many challenges facing Irish children with special needs could be avoided with adequate law and policy. The State holds the primary responsibility for implementing children's rights. Children with disabilities have the same rights as every other child - this means the State must afford them equal opportunities to succeed in life. The Oireachtas must ensure the rights of children with disabilities are protected in legislation, whilst the Government must listen to the voices of these children to prevent injustice. At the same time, the Government must act fast and plan to ensure adequate funding, resources, and services are available so children with special needs do not become the neglected citizens of this State.

Third National Strategy on Domestic, Sexual, and Gender-Based Violence: An Analysis

by *Chloé Asconi-Feldman, SF Law*

In June 2022, the Government of Ireland published the Third National Strategy on Domestic, Sexual and Gender-Based Violence for 2022-2026 ('The Strategy'). The Strategy, led by the Minister for Justice Helen McEntee, holds a guiding mission of zero tolerance on domestic, sexual, and gender based violence. It is built on four pillars: prevention, protection, prosecution and policy coordination. This is achieved by shedding light on Domestic, Sexual and Gender-Based Violence (DSGBV) from an international, European, and Irish context.

The Strategy is prefaced with the fact that both men and women can be victims, although it additionally highlights an emphasis on women's needs due to the many socio-historical factors that have led them to be affected disproportionately by DSGBV. It also aims to embed a victim/survivor-centered approach to the responses of DSGBV, by improving support available to women and holding perpetrators of DSGBV accountable.

The key components of the strategy are reflected in the new pieces of legislation which the Government hopes to pass, including legislation that introduces a specific offence of non-fatal strangulation and stalking, a new Family Court Act, and increasing the minimum sentence for assault causing harm from 5 to 10 years. Furthermore, a key component of the Third Strategy was its establishment of an executive group consisting of representatives of the Department of Justice, the National Women's Council of Ireland (NWC) and Safe Ireland. The creation of this group is a step in the right direction allowing collaborative work between Government and civil society organisations.

The first National Strategy on Domestic, Sexual and Gender-Based Violence in Ireland was from 2010 to 2014. Following this, the second National Strategy ran from 2016-2021 and had many effects which

were highlighted in the Third Strategy. These effects include new legislation introducing stricter penalties for sexual offenders, and implementing two national 24 hour helpline services for domestic and sexual violence. The Third Strategy expands on the aspects the Second Strategy may have failed to address or execute, and how the Third Strategy can continue to improve upon prior legislation in the future. This additional analysis is apparent in its 48 page length compared to the Second Strategy's 8 pages. The Second Strategy made little reference to groups who are more vulnerable to DSGBV. For example, when mentioning young people and children in the Second Strategy, they were identified primarily as witnesses of DSGBV. The Third Strategy goes further and identifies children as victims/survivors and witnesses, reflecting main points from the UN Convention on the Rights of the Child Article 19 which states that parties must take appropriate legislative measures to protect the child from sexual abuse. These developments suggest an augmentation in effort and inclusivity in the current strategy as opposed to those prior.

The Third Strategy's summary acknowledges that different groups of victims hold additional risks due to discrimination. These groups include migrants, Travellers and Roma, people with disabilities, and LGBTI+ people. Another group of people that is mentioned in the Strategy is sex workers, outlining its aim to ensure that those in prostitution have their rights protected by having access to health care and safety. It also emphasises support and safe exit routes for those in the industry. Importantly, due to the fact that over a million women in Europe are involved in prostitution - of which one in seven are estimated to be trafficking victims - adding these measures to the Third Strategy is a good initiative for the future of sex workers' rights. This is an important step for the Irish government to make after passing the Criminal Law (Sexual Offences) in 2017 which sparked contro -

versy due to the fact that many sex workers did not feel as though their voices were heard. Although an attempt to criminalize aspects of sex work in order to protect sex workers from exploitation, the reality was that it forced sex workers to take more risks by avoiding the police which put their safety in jeopardy.

The Strategy also highlighted two issues that are especially relevant since they have grown in severity since the making of the last report. The first of these is online safety, and the impact of pornography on sexual violence. The text emphasizes that there is an increasing availability and use of violent pornography, which has massive impacts on young children who are often obtaining an erroneous sexual education and understanding from these videos. This harm is compounded by videos have scripts where there may not be sexual consent or where there is violent sexual actions.

“ Based on its contents, the Third National Strategy appears to be taking steps in the right direction for DSGBV prevention. ”

Therefore, the Government of Ireland is taking a step forwards in terms of meeting the requirement of Article 17 of the Istanbul Convention which states that parties should promote skills on how to deal with the information shown in these pornographic videos where there is such a lack of consent and violence. Alongside this, the government also plans to overhaul the sexual education curriculum in schools.

Another issue that the Strategy highlights is domestic abuse. It is proven that most violence against women tends to be from their current or former husbands, intimate partners, or known men. Violence from an intimate partner has been a primary contributor to female homelessness in particular. This is especially a problem in Ireland, where there is an ongoing housing crisis, rendering it difficult for women to seek refuge from a violent household, leading many to become homeless. Currently, the responses to victims are provided by state agencies, state-funded specialists, and community-based organisations, whereas a key

action that the Third Strategy plans to implement is a doubling of the number of refuge spaces in Ireland. There will also be national sexual and domestic violence prevalence studies conducted alternately at five-year intervals.

Based on its contents, the Third National Strategy appears to be taking steps in the right direction for DSGBV prevention. As we have seen in the past, the National Strategies have made significant progress in women’s rights and protection, developing legislation such as The Criminal Law (Sexual Offences) Act 2017 which introduced an improved statutory definition of consent to a sexual act. The Third Strategy’s particular focus on issues affecting vulnerable groups with greater risks when it comes to DSGBV has created a strong foundation for the future of women’s rights in Ireland, particularly in respect of sex worker rights and providing a reformatory approach to harmful pornographic material. With the proposed strategy now applicable, there now lies much potential in improving the realities of DSGBV in Ireland. However, there is now a call for proper and effective implementation and further progression for protection, education, and most importantly, compassion for all victims of gender-based violence.



Photo courtesy of Mark McGrane, JS Law





The Rule of Law-lessness in Europe

by Laoise Murray, SS Law

Increasingly we wonder: what is Europe if there is no trust?

Several political moments in the past month have pointed to threads unravelling in the tightly woven cloth that is the European legal community. The Swedish election results from September 11th saw the far-right Sweden Democrats become the largest party in the right-wing electoral alliance. On the 15th of September, the European Parliament declared that the Hungarian government had abandoned democracy and become a “hybrid regime of electoral autocracy” Similarly, in Italy, a far-right coalition led by Giorgia Meloni was voted into power on September 26th. It should be Europe’s concern that the first woman to become the prime minister of Italy likens her politics to that of the Tory Brexiteers. What is especially worrying is the influence these parties will wield in the European Parliament when voting as part of the European Conservatives and Reformists block - one that strongly advocates for a European legal order that “does less, but better.” Such a schismatic conservative movement grates harshly against the views of those who pursue deeper European integration and strictly adhere to European values.

Article 2 Treaty of the European Union

The European Union was established on the basis of a shared vision of democracy, the rule of law, protection of human rights, and free market principles as outlined in Article 2 of the Treaty on the European Union (‘TEU’). The “rule of law” aspect of Article 2 TEU is often singled out by European institutions. The Commission’s Rule of Law Report from 2021, for example, noted that “The rule of law is not only an integral part of the democratic identity of the EU and of the Member States, but also essential for the functioning of the EU, and for citizens and businesses to trust public institutions.” The intention behind Art-

icle 2 is to retain the diverse range of legal orders in the Union while creating a basis of commonality on which the free movement of people, goods, and services can operate effectively between member states. For example, the European Arrest Warrant system and Dublin System for refugees depend on the existence of trust that all member states are on a qualitatively equal playing field.

Hungary and Article 7 TEU

Rule of law(lessness) issues have been sprouting in Hungary for some time. Nearly ten years ago the 2013 Tavares Report identified risks to judicial independence, media pluralism, the electoral system, religious freedom and minority rights in Hungary. More recently, the Grand Chamber of the European Court of Human Rights and the Court of Justice of the EU (CJEU) heard cases regarding the deplorable conditions of reception, detention, and processing of migrants in the Hungarian Röszke transit zone.

In 2018, the Article 7 TEU procedure was triggered against Hungary on the basis of alleged breaches of core EU values. This procedure is the legal process for the Commission to (a) identify a risk of a breach of Article 2 by a member state and give them an opportunity to reverse the risk and (b) issue a declaration that there has been a breach of Article 2 values and order rectification of the breach by means of fines and penalty payments. The Commission initiated the second infringement action against Hungary in November 2021. They referred Hungary to the CJEU over their alleged failure to comply with the first judgement of 2020 ordering the rectification of Article 2 breaches. This was the first opportunity for the EU administration to issue Hungary with financial sanctions as per Article 260(2) Treaty on the Functioning of the European Union (TFEU).

However, the process of imposing sanctions on Hungary was stalled in the Council due to the veto power held by Poland - Hungary’s oldest ally - on approving matters relating to the Union budget. The 2020 Regulation on a general regime of conditionality for the protection of the Union budget, was an

attempt by the EU to impose financial restrictions on Hungary for its continued breaches of the rule of law. In addition to challenging the legality of the 2020 Regulation in the CJEU, Poland and Hungary threatened to veto the Own Resources Decision which sets out the EU budget, unless the 2020 Regulation was amended or abandoned. Their efforts were successful, and after tense negotiations in the European Council between heads of state, the 2020 Regulation and Own Resources Decisions were adopted with amendments with regards the rule of law compliance mechanism.

The tide is nonetheless turning. 81 per cent of MEPs agreed to issue Resolution of the 15 September 2022 on the proposal for a Council decision determining the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded pursuant to Article 7(1) of the Treaty on European Union. The resolution outlines a comprehensive list of rule of law concerns involving, amongst other things, the constitutional and electoral system, the independence of the judiciary, corruption, privacy, freedom of expression and media pluralism. Academic and religious freedoms, LGBTIQ and minority rights, rights of migrants, asylum seekers and refugees are also at risk.

It is hoped that this crackdown attempt by the European Parliament will invigorate the Article 7 process and motivate more stringent actions. It will make it more difficult for the Hungarian government to unfreeze their €4.6 billion entitlement from the Next Generation EU recovery funds, and to receive their full slice of the €392 billion cohesion fund pie.

Italy

Italian matriarch Giorgia Meloni has thus far been careful to avoid Viktor Orbán-like critiques by cultivating a palatable political image in the media. The Italian public generally see her as a comfortable return to traditional values and rules regarding immigration, family rights and economic security. While she abandoned her Eurosceptic rhetoric in the run-up to the elections, her “true political identity” in relation to Europe is yet to be unveiled. Meloni’s party, the Fratelli d’Italia (Brothers of Italy) was one of the two parties to vote against the recent EU Parliament resolution that determined Hungary under Orbán to be an electoral autocracy. As one of the

founding members of the European community and the 3rd largest economy in Europe, Italy’s loyalty to the European agenda has never been doubted before. What is clear is that Meloni will fulfil her vow to ‘put Italy first’ - even if this is to the detriment of Europe.

“ [R]ule of law concerns no longer attach to just one country in isolation, but are developing into a concerted political position in relation to the essential values of the European legal order. ”

Conclusion: plugging the hole on “systemic threats”

An attitude of contempt is growing in Europe. It is evident that rule of law concerns no longer attach to just one country in isolation, but are developing into a concerted political position in relation to the essential values of the European legal order. If we can not retain this nucleus of commonality in Europe, arguably the legal procedure in Article 7 TEU will be rendered utterly meaningless. The Parliamentary resolution of the 15th of September provides some hope, but it is submitted that more fundamental legal changes are required.

Last May, European Commission President Ursula von der Leyen expressed her opinion in favour of abolishing the unanimity requirement in the Council for certain legislative proposals. This would potentially increase the capacity of the EU to respond effectively to crises such as the rule of law emergencies in Hungary by overriding Eurosceptic voices. Such a change would require an overhaul of the EU’s constituent treaties. It remains to be seen whether the conflict between those who want Europe to do more and those who want it to do less will paralyse these efforts, or if trust in our common Article 2 values will prevail.

Unacceptable Risks: Europe's Defence against Social Credit Schemes

by Kyle Egan, JS Law

The concept of social rating often condemned as a dystopian media. While social rating schemes take many forms, they share some common elements. These schemes see a person's conduct judged to be either acceptable, or unacceptable, with each action contributing to their own personal score. This score will then impact a person's ability to access services.

In *Black Mirror*'s episode "Nosedive," characters rate each other out of 5 stars, based on the positivity of their interaction. The show also explains how falling below a certain rating can result in becoming barred from entering a building, even if this is your place of work, while extremely low rating can result in arrests. While *Black Mirror*'s iteration of social rating is entirely fictitious, it is not too dissimilar from a scheme that is currently under development in China.

China and Social Credit Scoring

The Chinese social credit system is not yet near completion, and the final form which the system will take is not yet known. However, pilot launches of systems on both extremes have been reported across the country. On one hand, there are schemes which are, in practice, little different to credit worthiness checks: under these schemes late payment of debts or fines will affect one's ability to access further credit. On the other hand, there are schemes which provide that individuals accused of unfavourable conduct will be penalised. Such conduct could be as simple as jaywalking or refusing to give your seat up for another person on a train. Conduct which is deemed favourable, on the other hand, such as donating to charity, raises one's social credit score. However, China refutes the suggestion that the social credit scheme will punish individuals for behavioural or personality traits, emphasising that the scheme is intended to monitor the marketplace behaviour of businesses, with the data of individuals only recorded

where it concerns the repayment of debt.

It is uncertain to what extent China currently utilises Artificial Intelligence (AI) in the execution of these schemes. Some commentators, such as Vincent Brussee of the *Mercator Institute for China Studies*, argue that China's social credit scheme is operated almost entirely through human input. However, China possesses some of the most advanced facial recognition technology in the world. It is submitted that if this technology were to be utilised for the purpose of the social credit scheme, human input may quickly become redundant.

“ It is uncertain to what extent China currently utilises Artificial Intelligence in the execution of these schemes. ”

China has also centralised much of its power to collect facial recognition data from citizens. In 2018, the Supreme People's Court of China held that businesses must seek customers' permission to collect such data. The same ruling also holds that businesses must provide alternate means of access to those who refuse for their facial data to be collected.

The United Kingdom and Social Credit Scoring

Whilst much of the criticism for the operation of social credit schemes has been directed at China, many other jurisdictions also fall foul of this practice. In the United Kingdom, the Department of Health launched a pilot scheme in 2021 where individuals wear a wristband that tracks and offers financial incentives for those who perform what the NHS deem to be "healthy behaviour." These behaviours include completing a certain amount of exercise a day and achieving a certain step goal.

While this scheme is currently being operated by the UK government, its potential application to the insurance sector is apparent. It is suggested that this technology could easily be used by insurance firms to reward “healthy behaviour,” offering reduced premiums to those who consistently hit certain health and fitness goals.

On the other hand, this technology could also be used to penalise those who lead sedentary lifestyles or those who fail to meet certain health and fitness standards. These penalties could include an increased premium, or the total barring of a person from seeking insurance. As AI technology improves, such a scheme could utilise facial recognition technology to reward those who regularly attend the gym whilst penalising those who purchase takeaway or fast-food. Such infringements to an individual’s privacy ought not to be tolerated by regulators, thus it is crucial that comprehensive and future-proof regulation draws clear boundaries of where AI may operate and to what extent.

It is troubling to see the United Kingdom condone the use of such a scheme. The risks for abuse of this technology are apparent, yet it is the government itself which is encouraging the very technological innovation which may infringe deeply upon their citizens’ rights to privacy.

The European Reaction: Artificial Intelligence Regulation

According to Mason Hayes & Curran, 31 percent of insurance firms operating in the EU were utilising AI to some extent by 2018. Thus, it is essential that the Commission ensures that its use remains ethical and consistent with the values of the European Union. With this potential for abuse in mind, the European Commission proposed their “Artificial Intelligence Regulation” in April of 2021.

In practice, the AI Regulation would prohibit the use of AI in all social credit schemes. This unequivocal prohibition illustrates the risk which the Commission believes AI and social credit schemes pose. This bracket of AI which the Commission suggests holds an “unacceptable risk” also includes AI that can cause psychological or physical pain, as well as real-time,

remote biometric identification systems used for law enforcement.

The Commission intends for this Regulation to be future-proof, through what Eoghan Doyle of Phillip Lee describes as a “technologically neutral” definition of what constitutes AI. This concept of future-proof terminology emanated from the GDPR and has carried through into this regulation.

Crucially however, the Commission also provides for a review of what constitutes “high-risk” AI every two years, thus further enhancing the future-proof ability of the regulation.

Artificial Intelligence and Ireland

Such comprehensive regulation concerning the use of AI ought to be welcomed in this jurisdiction. For individuals, this regulation provides security for those concerned about how AI might infringe upon their right to privacy, whilst also ensuring that AI can be used productively for the benefit of society.

On a national level, the comprehensive nature of the regulation provides certainty for businesses seeking to innovate through the use of AI. Strong, fair, and transparent regulatory framework is essential for Ireland to execute its National AI Strategy published in July of 2021. This Strategy intends to place Ireland as a global leader in AI research and innovation, by utilising the heavy investment already placed in IT talent and entrepreneurship. The European Regulation thus ensures that Ireland can achieve this objective ethically.

“...infringements to an individual’s privacy ought not to be tolerated by regulators, thus it is crucial that comprehensive and future-proof regulation draws clear boundaries of where AI may operate and to what extent.”

Contextualising the Results of the Chilean Constitutional Referendum

by Matthew Keeley, *SF Business and Spanish*

On 4 September 2022, the populace of Chile took to the polling stations to vote on whether to approve a new draft of the country's constitution. With voting mandatory for all those on the electoral roll, the result was a resounding "no:" 62 per cent voted against the draft. This was approximately double the margin that most polling had suggested. Although the verdict may appear decisive, its repercussions for the political landscape of Chile remain unclear. In order to fully appreciate the significance of the result, it is imperative that one understands the context surrounding the referendum, in particular the political climate in which it was called, and the storied history of Chilean constitutional reform.

The proposed draft would replace the 1980 Constitution of Chile which was enacted while the country was under the rule of a brutal military dictatorship headed by Augusto Pinochet. This document was ratified by the Chilean citizenry in a strictly controlled and highly controversial referendum, one held without an electoral roll due to the lack of a register under Pinochet's rule. This allowed for cases of double voting with an estimated 3000 agents of the Central Nacional de Informaciones (the political police and intelligence body of the dictatorship) having done so.

However, since the country's transition from dictatorial rule to democracy in the 1990s, the Constitution has been amended over 50 times. A notable example of this was the removal by Ricardo Lago's government in 2005 of a considerable amount of the most undemocratic dispositions of the text,

including a clause guaranteeing lifelong tenure to senators as well as the armed forces' warranty of the democratic regime. The most recent call for constitutional reform came during a wave of anti-government protests in 2019, under the presidency of Sebastián Piñera. This political frustration was successfully channelled by current president, Gabriel Boric, and his contemporaries into negotiations for a potential constitutional vote. In a referendum in October 2020, 78% of Chileans voted in favour of replacing the old Pinochet-era document.

Following his inauguration as president in March 2022, Boric and his left-wing Apruebo Dignidad coalition government began composing a new draft that would make Chile one of the most progressive states in the world. This draft Constitution would have declared Chile a "plurinational" state and recognised the rights of the country's indigenous peoples, which make up about 13 per cent of the population. The now-rejected draft also included measures such as the replacement of the Senate with a "Chamber of Regions", the increasing of the state's obligations to provide social goods such as health care and housing, and the mandating of the state to ensure women hold at least 50 per cent of positions in all official institutions. The document would have almost certainly legalised abortion in Chile, a country which between 1989 and 2017 had one of the most restrictive abortion policies in the world.

Upon the publishing of the draft Constitution, the public reception was mixed and sometimes critical. Some political commentators argued that the content of the draft Constitution with its many ambitious social policies could jeopardise the country's many achievements over the past decade, particularly within the economic realm. Others pointed to the 155 constituent assembly members, many of whom had limited political experience, as a possible hindrance to the efficacy and legitimacy of the proposed document. Commenting on the progressiveness of the draft, Lucas Perelló and Will Freeman, writing for

“ What remains unclear is ... whether Boric's government can provide a text that satisfies each of the diverse sections of Chilean society, and how long this government has until the Chilean people lose patience. ”

“Foreign Policy,” noted that while Chileans wanted change, the draft would introduce “change to the extreme.”

In addition, the sheer length of the proposed document (388 articles and 57 transitional clauses) seemed to invoke a sentiment of incertitude and confusion within ordinary citizens, as did terms such as “neurodiversity” and “digital disconnection” that were enshrined in the draft. Analysts also highlighted the fact that mandatory voting was implemented for the referendum. It was thought that this requirement may have resulted in Chileans who had even minor doubts about the text, choosing to reject the draft in the hope that a new and improved version would be more to their liking. This tendency may have been exacerbated by statements of Boric which revealed his openness to discussing a potential alternative constitutional draft, if the one presented by the constituent assembly was rejected.

However, the influence that misinformation and fake news had upon the electorate cannot be understated. During the weeks prior to the constitutional referendum, social media sites in Chile were flooded with misleading information, including false claims that the new constitution would legalise abortion up to the ninth month of pregnancy and abolish private property rights in the country. Rose Cartrilio, an assembly member of the Indigenous Mapuche community, linked poor communication and online

disinformation with scepticism towards the draft Constitution in her community. Although the draft promised a plethora of measures designed to protect indigenous communities, Catrileo told CNN Chile that some members of her community were misguided by false claims, for example that the expansion of housing rights under the draft Constitution would allow the government to confiscate private property.

The result of the referendum now leaves Boric’s government in a precarious position. The 36-year-old leader and his government were elected on the promise of delivering an improved and reformed constitution but have now fallen short of that pledge. One of the founders of Boric’s far-left Frente Amplio coalition, economist Noam Titelman, in a tweet, characterised the rejection of the proposed constitution as “the first big political failure” of his generation. Boric has now pledged to deliver a new draft that will “fill...with confidence and unite” the Chilean people, further commenting that his government will work to deliver a “text that will incorporate the lessons of the process and win over a broad majority of citizens.” What remains unclear is how long this recontinued drafting process will take, whether Boric’s government can provide a text that satisfies each of the different and diverse sections of Chilean society, and how long this government has until the Chilean people lose patience.



Photo courtesy of Mark McGrane, JS Law



In Defence of Rupture: Reframing the Narrative in International Criminal Trials

by Sam Walsh, *JS Law and French*

A creeping sense of déjà vu began to take hold as reports appeared in the media covering the opening day of the trial of Mahamat Saïd Abdelkani, an ‘alleged senior leader of a rebel group’ in the Central African Republic (CAR). On Monday the 26th of September, Saïd pleaded not guilty to seven counts of war crimes and crimes against humanity before the International Criminal Court (ICC) in The Hague. In the reports, the CAR is described as being ‘mineral-rich but impoverished’ and the Seleka rebel group with which Saïd was involved is said to have ‘seized power’ during fighting in 2013. These are phrases which even the casual observer of international criminal trials will be familiar with, and which cast Saïd’s case into a well established mould. Crimes against humanity have become inextricably linked to conflict stricken post-colonial territories which seem unable to use their material resources to alleviate their economic and political instability. It is in this setting that tragedy all too often unfolds. These features also tend to arise within particular geographic boundaries: as of today, the ICC has heard a total of 31 cases, all of which have involved crimes perpetrated on the African continent, a large portion of which targeted members of insurgent groups or the leaders against whom they struggled.

Another familiar aspect of these reports is the abundance of incriminating evidence available to the prosecution. Thanks to photographic evidence and eye-witness testimony, chief prosecutor Karim Khan appears to have all he needs to inflict a life sentence on Saïd for his role in the running of ‘a torture center’ in the city of Bangui. In response, Counsel’s opening speech for the Defence insists that the prosecution’s case is based on a ‘sketchy narrative,’ ‘hearsay,’ and the findings of a ‘poor investigation.’ They also make the seemingly semantic claim that fighting in the CAR in 2013 ‘did not rise to the level of war’ thus Saïd’s actions can not engender the successful prosecution of war crimes. In other words, the defence’s strategy throws the facts into question, but

leaves the underlying structure untouched. This piece will attempt to challenge the deeply embedded narrative at the heart of international criminal trials by closely examining the context in which Saïd is alleged to have committed his crimes and by suggesting the use of an approach known as the ‘rupture defence.’ This approach would be employed by Counsel for the Defence with the aim of painting a wider picture of the circumstances surrounding the crimes in question and, it is suggested, would allow for a more holistic approach to international criminal trials.

The Central African Republic

The recent history of the CAR is not dissimilar to that of many post-colonial African states, yet this does not make its nuances any less important. Having gained independence from France in 1958, the country spent the subsequent decades under a series of dictatorships propped up by its erstwhile colonisers who were keen to retain control of the country’s lucrative diamond mining industry. Following the French withdrawal in 1997, the United Nations increased its presence in the country, stepping in to restore order after a dubious electoral victory by the unpopular government of Angé-Felix Patasse. Unrest continued under the presidency of General François Bozizé, culminating in the Seleka rebellion in 2012. The multi-party peace agreement reached in 2019 has since crumbled and the chaos surrounding the country’s 2020 elections has left its political trajectory uncertain.

Beneath this complex mess of political actors is a nation brought to its knees economically. The CAR has been weakened by the slow withdrawal of the French investment which it was forced to rely so heavily on in the decades following independence. The country remains highly dependent on European trading partners which purchase timber, diamonds, cotton and coffee from the African nation. In 1986, with the encouragement of the World Bank, the country began privatising major industries and liber-

-alising commodity prices, subjecting them to the whims of global markets. The subsequent devaluation of the country's currency at the behest of the International Monetary Fund (IMF) has made it extremely difficult for Central Africans to afford crucial imported goods such as fuel and medicine. These events go some way in explaining why the CAR currently ranks 188th out of 191 countries on the UN's Human Development Index. As it happened, none of this arose in the reporting of the opening of Saïd's trial in The Hague.

The rupture defence

Setting aside any question of the defendant's guilt, and without wishing to diminish in any way the suffering of the victims, one wonders in cases such as Saïd's whether international criminal trials are being put to best use? Are these crimes being tried in a way which maximises justice and serves the best interests of the victims, the people of the CAR, and the international community at large? Saïd's portrayal as a depraved perpetrator by the prosecution and as the victim of a shoddy investigation by the defence both conceal more than they reveal about the atrocities in question. By focusing its attention on the individual, the prosecution succeeds as much in hiding the role actors such as France, the UN and the IMF played in shaping the backdrop to these horrific events as it does in establishing the defendant's personal culpability. It encourages both the Court and those observing its work to look at Saïd's actions in a highly artificial vacuum. The defence's approach meanwhile, tacitly accepts this narrow version of events and refuses to engage with the possibility that responsibility for these crimes may extend beyond Saïd himself. Both narratives focus exclusively on the individual sitting in the courtroom rather than the context surrounding his crimes.

The problematic aspects of this kind of narrative were recognised by notorious international lawyer Jacques Vèrges, who gained a reputation as 'the ultimate devil's advocate.' Vèrges defended criminals such as former Cambodian politician Khieu Samphan and Tariq Aziz, Iraq's deputy Prime Minister under Saddam Hussein. To counterbalance the narrow version of events often presented at trials of this kind, Vèrges would employ what he termed the 'rupture defence.' His method involved using the courtroom as a platform to publicly denounce the injustices comm-

-itted by the prosecuting authorities. For Vèrges, the real question to be considered in defending people like Saïd was whether the judges handing down the verdict had a legitimate basis upon which to do so. Thus, in the course of presenting his defence, Vèrges would focus less on the immediate circumstances of the alleged crimes and instead seek to highlight the hypocrisy and double standards inherent in the accusations made by ex-colonial states, dominant global powers, or even, international human rights organisations.

While the judges in Saïd's case may come from a variety of nations, they are working within the same international legal system and political structure which has historically favoured western interests, often at the expense of developing nations. Nowhere is this more evident than in the CAR. Were one to walk into a courtroom in the Hague with the intention of applying Vèrges' 'rupture defence' to Saïd's case, one would need to look no further than the imposition of disastrous fiscal policies by the IMF and the propping up of successive brutal dictatorships first by France and, arguably, the UN, to find the contextual injustices with which to build one's argument.

Conclusion

The Saïd case illustrates that despite its uncomfortable implications and unorthodox characteristics, the 'rupture defence' still has a place in international criminal trials. Today, seventy years after Vèrges' first employed the tactic, the ICC is still judging defendants without acknowledging the factors at play in the regions where these crimes are committed. The use of the courtroom by lawyers as a platform to both defend the innocence of their client (whose guilt is often more a question of degree) and to publicly expose the often damaging role played by international actors in the regions they come from should be welcomed. What emerges may not be pretty - it may not be what the judges at the ICC want to hear - but if we want the trials at the Hague to be anything more than a pedantic distinguishing between shades of grey, then defence lawyers would be well advised to take a page from Vèrges' book.



An Obstacle to Justice: The Extent of International Criminal Immunities for the Political Elite

by Christopher McCay, SS Law and French

The existence of criminal immunities is a relatively unknown protection for the political elite in international law. In essence, it removes criminal responsibilities from those at the top of government and makes them criminally untouchable. While different levels of criminal immunities exist, this article will focus solely on the personal criminal immunities attached to those customarily recognised by international law, as decided in the Arrest Warrant of 11 April 2000 (Republic of the Congo v. Belgium) case - the Head of State, the Head of Government, and the Minister for Foreign Affairs for any given 'recognised' state.

The Definition and the Rationale for Criminal Immunities

Criminal immunities are justified by the principle of *ratione personae*, which is intended to protect those who, by virtue of their high rank in their state and their representative role in international relations, embody the State and its constituents abroad. In essence, it is the pinnacle of state sovereignty. It makes sense when we consider the principle of non-interference – states cannot, or should not, interfere in the internal affairs of states out of respect. Nevertheless, the reasoning of this rationale does not take away from the fact that it is an obstacle towards the promotion of criminal justice.

If we consider the stance of the international community, the legal basis remains focused on sovereignty. Article 2 of the United Nations Charter specifically mentions the importance of state sovereignty as it is the basis that solidifies the idea that all states are equal under international law.

Article 2 contends that judicial decisions and common state practice accumulate into international customary law, which is a set standard in international law that

most states respect in relation to these immunities. This is used to justify its infringement on international justice. These immunities are further supported by the theory of representation and the theory of functional necessity. The theory of representation proposes that since those customarily recognised are at the top level of government, then it surely stands that they are the epitome of their state abroad – and essentially if you attack the individual, you will *ipso facto* attack the state. The theory of functional necessity is similar on the point that it relies on mutual respect between states, but this theory contests that anyone in either of these three roles will need diplomatic protection if they are to successfully perform their functions abroad.

The Excessive Scope of these Immunities:

It is the acts covered by this principle which provoke the most criticism as there is seemingly no limit to the applicable acts. In the Arrest Warrant case, the International Court of Justice (the "ICJ") established that there are no distinctions between acts made in a personal matter or in a functional matter to use these immunities. Furthermore, the ICJ referred to the fact that there was no distinction made between acts done before the titular had taken office. The precedent established here is that those customarily recognised have absolutely no criminal responsibility for any acts that they commit while representing the state abroad.

If we acknowledge that there is complete protection for the titular in terms of criminal procedures, there is an obvious infringement of justice. Typically, one is subject to the search for justice before the judgement, during the judgement, and after the judgement of any case. For those who have personal immunities in international criminal law, they are protected at every stage. The principle of inviolability, immunity from

jurisdiction and execution, from which those given these immunities are protected from, all ensure that there is no way justice can be sought if personal immunities are established. There seems to be absolutely no balance between the justifications for personal immunity and the insatiable need to seek justice, and thus it is often that justice is sacrificed to protect those customarily recognised.

The Problem of ‘Automatic Attachment’ for these Immunities

As mentioned, immunities for those customarily recognised by international law are attached to the state just as much as the person; in fact, these immunities are only attached to the person if the state is recognised by the international community. However, this automatic attachment has some serious issues. Primarily, considering that there is an automatic attachment, any person who is in one of the 3 roles recognised by international customary law will be protected for as long as they are in the role. This raises a problem for states where the ‘democratic’ process is far from democratic.

“ There is no justification to allow immunity from acts committed during and, to a much more worrying extent, before a person's term in office. ”

In states where the political system is one of a dictatorship, it stands to reason that if the people, or in some cases a singular person, occupy any of these three roles, they will be protected from international prosecution indefinitely. The implications of this have had profound consequences on the protection and safeguard of human rights in the international context. For example, if a domestic court were to try and prosecute the Supreme Leader of North Korea, Kim Jong-un, for the heinous acts committed against human beings under his regime, they would be breaking customary international law and would be open to scrutiny on the international stage. In any instance, there is no dispute that North Korea is a recognised state, and therefore any person occupying the three main roles, to which Kim Jong-un occupies both Head of State and Head of Government, are protected against any persecution from any acts committed before and during their terms.

Conclusion

There is no question that criminal immunities for those customarily recognised in international law have their basis as a political manifestation of mutual respect between recognised states. But this basis offers no justification nor safeguards in terms of the scope of these immunities. The scope is undoubtedly too excessive, even if we consider the application of the functionality theory. There is no justification to allow immunity from acts committed during and, to a much more worrying extent, before the person's term in office. There is an obvious lack of criminal responsibility. Even more worrying, the immunities can, and do, extend to dictators. A principle that protects tyrannical individuals from prosecution, especially from acts that disregard human rights, is not a principle that should be enforced in international law.



Photo courtesy of Matthew O'Shea, LLM International and European Law

“ A principle that protects tyrannical individuals from prosecution, especially from acts that disregard human rights, is not a principle that should be enforced in international law. ”

Plundered African Gold: Putin's Unforeseen War Chest

by Nazar El-Basheir, *JF Law and Political Science*

While the West has had its eyes on the Swiss bank accounts and high-end London real estate of Russia's elite, the Kremlin had already looked south for a far more eccentric source to bolster their finances. Putin's war in Ukraine began in February of this year and has seen Russia face more severe sanctions than ever before. Although the West has frozen the assets of Putin's allies and imposed strict economic sanctions on Russia's financial institutions and corporations, the Kremlin is still funding the war with essentially un-dented oil and gas revenues of which Europe relies on. However, Putin's black gold is far from the only type of gold financing his crusades in Ukraine.

Sudan is Africa's third largest exporter of gold, yet it is the continent's thirteenth poorest nation according to GDP per capita. This is primarily due to widespread corruption under the Bashir Dictatorship (1960-2019) and the current military government of General Al-Burhan following Sudan's brief stint of civilian rule. Both regimes exchanged gold for political support, arms, and military training from the Russian government and the companies of Moscow's oligarchy. Estimates place the amount of gold pillaged in the hundreds of tonnes in the last few years alone, with a Sudanese gold executive placing the figure at around 30 tonnes per annum. At current exchange rates, that will be an astonishing €9,977,580,000 by December and an average of €1,629,300,00 per year. This same executive stated that "Russia has a lot of operations in Sudanese gold and a lot of it is smuggled in small planes from military airports dotted across the country to Russia."

Mining by Russian companies began back in 2014 following Russia's invasion and subsequent annexation of Crimea. This agreement was further affirmed in a meeting between then-Sudanese Dictator Omar Al-Bashir and Russian President Vladimir Putin in 2017. Bashir exchanged access to Sudan's vast gold deposits and a proposed naval base on the Red Sea for "protection from aggressive US actions" despite a general opening up of Sudan-US

relations and the revocation of sanctions.

The Russian company M-Invest and its subsidiary Meroe Gold were the first to begin mining and are run by Russian oligarch and Putin confidant Yevgeny Prigozhin. Although the rule of Bashir did end, Meroe Gold has continued mining, reportedly under an agreement made with the leader of the Rapid Support Forces (RSF) turned government leader Mohammed 'Hemedti' Dagalo. In exchange for continued control of rural gold mines and operations of Russian gold mining companies, the Wagner Group has been providing military training for Hemedti's RSF. The Wagner Group — who began in 2014 as Russian-backed mercenaries in Ukraine — is a paramilitary organisation run by Prigozhin that is allegedly responsible for mass killings, torture, and atrocities in several African nations.

“ In some regard, history has repeated itself and continues to repeat itself: a European superpower pillaging the continent of resources to fund conflict and expansion in Europe and abroad ”

Although it is difficult to gauge the exact extent to which the Russian purse has prospered from African gold, it is undeniable that Russia has benefited massively from it. The White House estimates Russia's gold reserves to be a staggering \$140 billion. Taking the most conservative estimate of gold pillaged from Sudan, that is at least 5 per cent and up to 7 per cent of all Russian reserves. Russia, however, is not the only foreign agent at play and is only one of many parties plundering Sudanese gold. The Central Bank of Sudan estimates that 70 per cent of Sudanese gold is smuggled through airports and ports each year, crippling the nation's economy and robbing its citizens of billions in government revenue.

Although Russia's illegal and illicit looting of Sudanese gold is of significant concern, it is unfair to consider Russia as the sole proponent of exploiting African natural resources. One hundred and one companies listed on the London Stock Exchange control more than \$1 trillion worth of mineral resources, of which 36 control 371,132 square km of land in Sub-Saharan Africa. Although this is very much legal, a quarter of these companies are incorporated in tax havens across the globe, despite operating out of London, driving concerns that very little of the revenue generated by these companies ever greets the pockets of some of Africa's poorest people. Estimates state that Africa loses \$35 billion annually in illicit financial flows and \$46 billion in profits from multinational companies.

It is evident that the scars of colonialism will never heal in Africa, and its vast wealth will never escape the tight grasp of European powers.

In some regard, history has repeated itself and continues to repeat itself: a European superpower pillaging the continent of resources to fund conflict and expansion in Europe and abroad is a frankly clichéd tale. The British, French, and Spanish prospered from their pillaging, and now the Russians have stepped in for a share of the pie. This deeply ingrained truth of perpetual colonialism and exploitation of the continent sees no clear end for both young and old Africans. The organisation *War on Want* flawlessly delineates this tragedy, "The continent of Africa is today facing a new colonial invasion, no less devastating in scale and impact than that which it suffered during the nineteenth century. As before, the new colonialism is driven by a determination to plunder the natural resources of Africa, especially its strategic energy and mineral resources. At the forefront of this 'scramble for Africa' are British companies, actively aided and abetted by the UK government."

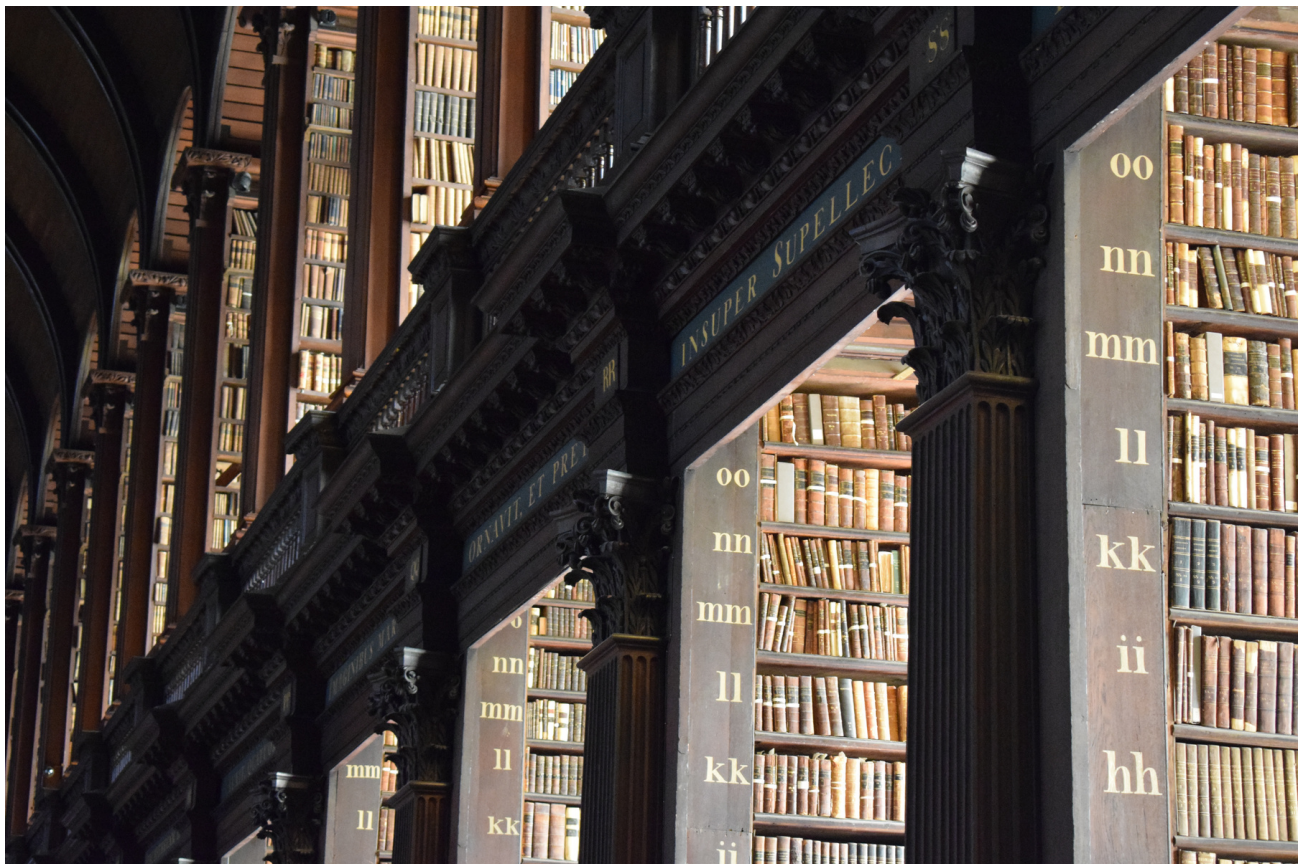


Photo courtesy of Matthew O'Shea, LLM International and European Law

Misapplied, Misinterpreted, Ignored: International Instruments Governing International Commercial Contracts

by Jana Gerks, SS Law

With rising globalisation, the demand for laws governing international commercial contracts has increased. There are a number of sources which international contract law may be derived from, including international treaties, model laws and standardised terms, *lex mercatoria* ('merchants law'), and domestic law. Despite the variety of options available, courts and tribunals struggle to make reference to, correctly apply and interpret these instruments, leading to inefficient dispute resolution processes in international trade. The result is often the domestic law of either of the parties, which is not only unsuitable for international commercial contracts, but also puts one of the parties at a huge disadvantage.

The most noteworthy instrument governing this area of law is the 'United Nations Convention on Contracts for the International Sale of Goods' (hereafter referred to as 'CISG'). It is the only international treaty governing this sector and is becoming frequently cited in case law. However, it is criticised due to the fact that the drafters and parties to the convention have fundamentally different legal systems, values and socio-economic structures, the articles are 'compromised' solutions and are vague and fragmentary in nature. Furthermore, several important aspects of international sales contracts are not covered by the CISG, such as validity of the contract, liability for personal injuries or contracts for the sale of securities or negotiable instruments for example, creating a need for domestic legislation to cover these areas.

The UNIDROIT Principles are another medium which is believed to be more promising. These principles are a type of *lex mercatoria*, based on usages and customs developed and codified through

international commerce. They are essentially a formation of general principles which also function as model laws to be used by nation states in order to harmonise their contract law. They are non-binding, but cover more detail than the CISG and may also be selected in the choice-of-law clause by parties.

The gaps in the CISG can be problematic, as the articles are given a different meaning and interpretation, based on which domestic law or other international instrument the court or tribunal used to supplement them. In *Scafom International v. Lorraine Tubes* for instance, the Supreme Court of Belgium interpreted Article 79 of the CISG to implicitly include hardship and used the UNIDROIT principles to fill the gap. This decision was widely criticised, and scholars have argued on the basis of the CISG's drafting history that there is an explicit rejection of hardship under this article. In addition, due to the lack of other treaties governing this area the CISG has wrongly been applied outside its scope.

“Despite the variety of options available, courts and tribunals struggle to make reference to, correctly apply and interpret these instruments, leading to inefficient dispute resolution processes in international trade”

A problem with the UNIDROIT principles is the fact that they are rarely explicitly chosen by parties - even though they have been recognised as a valid choice of law in arbitration, there has not been a decision on this in litigation. The Swiss Bundesgericht in particular stated that parties may not choose non-state

law to govern their contract in relation to FIFA rules, however, it is uncertain whether a different conclusion might be reached regarding the UNIDROIT principles. Similarly to the CISG, the diversity of the drafters makes it difficult to find common ground which often leads to vague clauses and gaps, which are filled with different sources of law by arbitrators leading to unpredictability and uncertainty. The UNIDROIT principles on the other hand, are praised for their simplicity, concise and straightforward language, and the flexibility which makes them more fit for use in international contract disputes.

Model laws and standardised contracts such as 'Incoterms' which may also be used as *lex mercatoria* for judges seeking guidance, are similarly criticised for their shortcomings and bias. It is argued that because these were developed by enterprises or national organisations, they can be one-sided and influenced by legal traditions of those countries (often Western legal concepts). Some nations prefer general principles to a detailed contract, follow different negotiation styles and dispute resolution processes, making it difficult to draft an instrument uniting these interests. These terms may be directly inserted into the contract, however, are also rather vague and fragmentary in nature and require more detail for an efficient use.

In the absence of a choice-of-law clause, the decision of which law is applied is done with a conflict-of-law analysis by the court or tribunal. Unfortunately, the way in which this analysis is conducted is also problematic in itself. Courts have taken different approaches to this analysis or have even entirely abandoned it in some cases, leading to unpredictability. Furthermore, if parties have made references to 'general principles' in their contract, the courts have not always taken this into account for their analysis and applied domestic law instead.

If the courts reach the conclusion that a certain domestic law should be applied, it leaves one party at a disadvantage and also makes the outcome of cases highly unpredictable, given that they may have to deal with the domestic law of a foreign state which may be unsuitable for the efficient resolution of international

disputes. This problem could easily be diminished by using neutral domestic law or international instruments. It is worth noting however, that domestic law can be practicable, for instance countries such as Germany and China have adapted the UNIDROIT principles in the writing of their contract law and therefore share a number of principles.

How can this situation be improved? It has been established that the international instruments share the same problems of vague clauses, limited scope and the misinterpretation, misapplication or pure disregard of courts and tribunals. A possible solution for this problem could be supplemental principles for use in combination with an instrument without being binding in nature. Problems and misinterpretations by judges and arbitrators could be easily avoided and the growing body of case law in domestic courts and international arbitration tribunals surrounding the CISG would allow for predictability and certainty. The Association of Corporate Counsel for Incoterms have recommended a similar solution, supplementing Incoterms with non-binding codifications of other popular trade usages to avoid misinterpretation and uncertainty. Correspondingly, standardised terms should possibly come in different variations adopting different legal traditions, in order to be more regularly used in different regions of the world.

In addition, international instruments need to be more actively applied and referred to and lawyers need to start advising their clients to avoid domestic law, in order to benefit from the more tailored legislation and efficiently solve international disputes. The model laws and clauses have been a big step towards harmonising international contract law and should be further promoted to guide courts and tribunals.

Overall, we have seen positive developments with the introduction of the UNIDROIT principles, harmonising domestic law and being used by parties as their choice of law. It is highly necessary that this is further supported and pushed, and more model laws are developed in order to help tribunals and courts in building their expertise and confidence in applying these principles correctly. Parties would also be able to resolve international conflicts more efficiently and appropriately in line with modern developments and needs.

Spotting the Hand on the Shoulder: Corporate Groups and Regulatory Pressure

by Cormac Donnelly, SS Law

On the evening 8th of March, 2022, the London Metal Exchange (LME) cancelled all trades that had been executed in relation to nickel that day, sparking uproar and accusations of favouritism from many traders. Traders had built up significant positions in nickel expecting a price rise (and subsequent profit) while its main institutional suppliers had entered into short positions expecting the price to collapse. When the price skyrocketed on the 8th, institutional suppliers were faced with catastrophe before quickly being insulated by the reversal. The explanation given to traders was that the LME was obliged to protect the market and traders from unrealistic or extreme fluctuations in price resulting from financial manipulation. This article suggests an alternative explanation, which cuts through to the core failures of company law in identifying and differentiating corporate groups. In revolving corporate group policy around taxation and competition, and adopting strict definitions of control and ownership, all while failing to police conflicts of interest in corporate groups, English company law has failed to address the nuances of regulatory and soft-power pressure on corporate groups. This leaves markets open to further intervention on dubious grounds.

“ **... English company law has failed to address the nuances of regulatory and soft-power pressure on corporate groups** ”

Identifying Corporate Groups

English company law has traditionally shied away from both identifying and reacting to the presence of corporate group structures. The legacy of the Saloman principle remains strong in the currents of company

law – courts are unwilling to pierce or lift veils to lay bare (and act against) the reality of the management or direction of a company, maintaining the relative inviolability of a separate legal personality which permits the proliferation of shell companies and purpose-built vehicle companies in the corporate world. The UK Companies Act 2006 and Corporate Governance Code do not mention corporate groups, and the courts have similarly been disinterested in identifying links between companies or differentiating between corporeal and incorporeal shareholders.

The corporate group, representing as it does an often-complicated web of shareholdings and subsidiaries, is thus largely identified for the purposes of assigning responsibility in tort, or in order to more efficiently gather information on taxation and avoid the proliferation of group structures as tax-avoidance measures. Company law rarely ventures into regulating the decisions of constituent elements of a corporate group, relying upon the market to starve of success those corporate groups which exercise an inefficient use of resources and ultimately to scatter the subsidiary elements thereof to spin-offs or into the arms of other corporate groups. For the purposes of this article, we will consider corporate groups as networks of parent-subsidary relationships largely centred around share ownership ergo directorial control of a company.

Corporate Structures - LME

London Metal Exchange Holding (LMEH) is a fully-owned subsidiary of the Hong Kong Exchange & Clearing House (HKEX) Group. The share structure of LMEH is bifurcated: class A voting shares are held by the HKEX Group. Class B shares, which entitle holders to a share of the assets held on wind-up sans associated voting rights, are held by important trad-

producers and financiers in the metals market as a requirement of their activities. LMEH in turn holds two fully-controlled subsidiaries; the London Metal Exchange and LMEClear, which perform the practical business of facilitating the trade of metals. Altogether, this constitutes the London Metal Exchange.

As a result of this structure, the Board of the HKEX Group effectively exercises total control over the appointment of directors to the boards of LMEH, the LME and LMEClear. There is also a great degree of overlap in the boards of all four companies, with six different individuals holding multiple concurrent directorships across the group. The HKEX structure could therefore be described as a tightly-controlled corporate group, wherein the subsidiaries' activities are overseen and influenced by the head of the group.

Corporate Structure - HKEX

Tightly controlled corporate groups are not unheard of. What sets this group apart from the norm is the nature of the HKEX group at its head. The director's handbook of the HKEX group lays out the structure of the group's board of directors and contains several salient provisions. The executive in Hong Kong, through the Financial Secretary, retains the power to appoint 6 of the 13 board members directly to the



Photo courtesy of Ciara Hogan, JS Law and Political Science

HKEX board. They also retain a power to dismiss these members, and hold this power over the chair of the board of directors, granting them an effective veto on the chair. Finally, for the purposes of anti-corruption and bribery legislation, all members of the Board can be considered public servants by the financial secretary in relation to investigations into such matters.

A majority of the Board members of the HKEX group then are effectively chosen by the executive in Hong Kong, and the threat of anti-corruption probes combine with this to produce a board structure that is vulnerable to both retaliatory intervention and reverse regulatory capture by the Hong Kong executive. The effect of this regulatory pressure has naturally shifted with the changing circumstances of governance in Hong Kong. The great degree of control in Hong Kong which has increasingly been exercised by mainland Chinese political structures in turn opens the HKEX group to greater pressure from Chinese political figures. By extension, this exposes the LME to regulatory pressure from the Chinese political establishment.

Captured Interests

This regulatory pressure on the corporate structure which belies the London Metal Exchange is significant due to the distribution of producers who feed into the metals market; in this case, the nickel market is a critical element of stainless steel production. Both of these heavy industries are important economic players in mainland China. The Tsingshan Holding Group, the leading global producer of nickel and steel, faced perhaps the greatest loss as a result of the chaos in the nickel market: its owner, Xiang Guangda, left the company in a position where it would suffer billions of dollars of losses owing to the increasing price of nickel. The company had shorted its own product in expectation of a fall in the price, and as the value of nickel continued to rise in the face of institutional expectations, it was left to producers of nickel to foot the bill.

Further complicating matters, the grade of nickel which was to be traded in the LME in order to satisfy the short positions taken by Tsingshan was higher than the nickel that they had to hand. This meant that the group was left unable to close their position by

supplying nickel directly to the markets, and would be obliged to provide billions of dollars to prevent further losses.

And then, just as the price of nickel began to skyrocket and the Tsingshan group faced disastrous losses, the LME/HKEX decision-making apparatus stepped in and reversed the market. To many, this decision seems irrational, or at least contrary to the traditional free-market principles to which the City of London subscribes. Some traders involved proposed a conflict of interest between the LME's roles as both a public market and private membership based company, with the suppliers' membership granting them greater sway in crucial decisions. Other commentators have pointed to broader lessons to be learned from price fluctuation in markets.

What traders and commentators have failed to focus on is the tight level of control exercised by the HKEX group over the LME and the pressure that the Hong Kong executive and now, by extension, the wider Chinese political establishment, can exert upon the group. That the Chinese state intervened to open its nickel reserves in the State Reserves Bureau to Tsingshan group is proof of a vested interest in maintaining the status quo in metal markets. Alongside this release of reserved metals, the state also had the option to exert pressure on a vulnerable corporate group in order to force a decision which would benefit Chinese metal companies.

Conclusion

Many commentators have jumped to criticise the leadership of the LME for their decision in intervening in the market to benefit suppliers over traders. Their criticism is valid, but it falls into the same trap that legislators and courts continue to wander into when examining corporate groups and subsidiary actions. Where subsidiaries make decisions contrary to the interests of consumers, traders or suppliers, particularly where they are acting as a semi-public body such as an exchange of commodities, the decision-making body must be scrutinised in its entirety. When the full corporate group is examined and the position of directors laid out, significant questions are left as to the level of regulatory pressure placed upon these groups by vested interests and phantom hands placed on subsidiary shoulders.

Where subsidiaries make decisions contrary to the interests of consumers, traders, or suppliers - particularly where they are acting as a semi-public body such as an exchange of commodities - the decision-making body must be scrutinised in its entirety



Overruling *Roe*: A House Built on (Theoretical) Sand

by Dearbhla O'Regan, *SF Law and Political Science*

In June 2022, the US Supreme Court decision in *Jackson Women's Health Organization v Dobbs*, overturned *Roe v Wade*, ending constitutional protection for the right to terminate pregnancy. Leading medical and political groups have also condemned the decision. While the decision is clearly contentious, it is not surprising. The weaknesses of *Roe v Wade* have been visible since the publication of the judgment in 1973. This piece will analyse *Roe*'s weaknesses, which contributed to it being overturned, before briefly comparing the Irish legal position with that of the US.

Abortion and the Constitution

In the aftermath of the ruling, the reasoning in *Roe v Wade* was criticised by pro-choice members of the legal profession. Former Watergate prosecutor Archibald Cox observed in *The Role of the Supreme Court in American Government* that "neither historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution." He argues that the decision of Blackmun J, the judge who wrote the decision in *Roe*, failed to provide strong textual anchoring in the Constitution, a necessity to command legitimacy and staying power.

As noted by Alito J in his decision in *Dobbs*, the US Constitution does not directly address abortion. This does not mean that there is no constitutional protection of abortion, as the doctrine of implied, or unenumerated, rights has been used both in Ireland and the US to provide constitutional protection for rights not explicit in the constitutional text, such as the right to travel and the right to vote. However, this doctrine is controversial and criticised by originalists - who subscribe to a theory of judicial interpretation that aims to interpret the Constitution in the manner it was intended to be understood at the time it was written - thereby enabling the Court to engage in illegitimate judicial activism. The Court in *Roe* chose

to anchor the constitutional protection of abortion in the constitutional right to privacy, itself an unenumerated right. It logically follows that an unenumerated right grounded in another unenumerated right lacks textual anchoring, and is therefore vulnerable to accusations of judicial overreach.

“[A]n unenumerated right grounded in another unenumerated right lacks textual anchoring, and is therefore vulnerable to accusations of judicial overreach.”

Right to Privacy

The right to personal privacy, which the decision in *Roe* was grounded in, is not explicitly mentioned in the Constitution. Instead, the right to privacy is implied in the Fourteenth Amendment, which provides that "no state shall... deprive any person of life, liberty or property without due process of law." The implied right to privacy had been found to protect marital privacy, encompassing the right to use contraceptives, in *Griswold v Connecticut*. This decision was heavily relied on in *Roe*, despite the weak jurisprudence in *Griswold* being described as "difficult to take seriously" by Currie in his 1990 book *The Constitution in the Supreme Court*. It is reasonable to suggest that such an anchoring of the right to termination is unconvincing. In his dissent in *Roe*, Rehnquist J objected to the contention that "the right of privacy is involved... (in) a transaction resulting in an operation such as this." It is submitted that Blackmun J's invocation of the right to privacy as a basis upon which to rest his decision was problematic and forced - the Court's decision to anchor the right in the liberty stemming from

substantive due process was akin to, as described by Kelly in his article ‘RBG ‘I told you so’ Re: Roe v Wade,’ “building a house on theoretical sand.”

Judicial Activism

The decision to anchor Roe in the right to privacy was not only criticised by those opposed to abortion. Ruth Bader Ginsburg and other prominent feminist advocates drew attention at the time to the decision’s weak anchoring and advanced accusations of judicial activism. They argued anchoring the right to terminate a pregnancy in the equal protection clause explicitly guaranteed by the Fourteenth Amendment would enshrine the right in the text of the Constitution in a way that *Roe*, by grounding it in privacy, simply failed to do. Such an anchoring would give the decision, and thus the right to terminate pregnancy, greater staying power. The failure to give the decision effective textual anchoring also doomed Roe to accusations of judicial activism. In his dissenting opinion, White J described the majority decision as an “exercise in raw judicial power.” The criticisms of Roe in this regard were not reserved to originalists - Ginsburg criticised the decision in her 2013 speech to Harvard Law School as too sweeping and hindering “the momentum on the side of change.” She criticised the Court for failing to simply invalidate the Texas law and proceed incrementally, a path of judicial restraint that had the potential to strengthen the decision.

Roe has been consistently criticised for representing judicial overreach into an area that should have been left to states to regulate. While many decisions are accused of representing judicial activism, the weak reasoning in *Roe*, the failure to anchor it in the explicit text of the Constitution, and the ‘sweeping’ nature of the judgment left the decision vulnerable.

Effect of these Weaknesses

The weaknesses of *Roe*, as described above, deprive the decision of legitimacy, strength, and credibility. Given the decision’s lack of credibility, it never obtained true staying power, instead being consistently described as the Court’s most controversial decision. Therefore, a Court composed of justices willing to depart from *stare decisis* - the doctrine of precedent - was capable of overruling it on the basis that it had been wrongly decided in the first

place. A decision that was better reasoned and given stronger anchoring would not have been so vulnerable to such an action.

Ireland

The Irish Supreme Court’s 1973 decision in *McGee v Attorney General* has reasoning similar to that of *Griswold*. In *McGee*, the Court found that the right to marital privacy protected the right to use contraceptives. However, this is where Irish and US policy differ. It has been suggested by MacCormaic in his 2016 book *The Supreme Court* that an Irish case analogous to *Roe* never presented itself before the superior courts, as *McGee* represented a catalyst for the campaign to insert a pro-life amendment, which feared that without an explicit pro-life provision, the Court might follow in the footsteps of its US counterpart. As a result of the 1983 referendum, the Eighth Amendment was inserted into the Constitution. This removed the issue from the jurisdiction of the Court, preventing them from finding a constitutionally protected right to termination. The fact that the Court did not issue such a decision protects both the Court’s legitimacy and the legitimacy of the right to have an abortion. The Eighth Amendment was repealed in 2018 by 66 per cent, giving the legalisation of abortion democratic legitimacy in Ireland. As the right is not merely judicially recognised, it is protected from accusations of judicial activism, thereby ensuring its authority and legitimacy. Reproductive rights in Ireland are, it is submitted, secure precisely because they did not follow the process of the USA.

Conclusion

For pro-choice advocates, the overturning of *Roe* is devastating. For pro-life advocates, it is vindication. *Dobbs* will undoubtedly be as controversial as the decision it overrules. The overturning of *Roe*, regardless, is not surprising. It is submitted that its vulnerability, owing to the lack of effective textual anchoring, has been visible since the decision was first issued. The weakness of the decision deprived *Roe* of the legitimacy and authority it needed to have staying power, and contributed to the erosion of the Court’s legitimacy. The fact that the path to legalisation in Ireland did not stem from the courts gives both the courts and the right to termination a legitimacy and authority that the US lacks.



Iranian Protests and the Death of Masha Amini

by Sam Lett, *SS Philosophy, Political Science, Economics and Sociology*

In 1978, Iranian women from all walks of life assembled in Tehran alongside millions of others to march against the Shah dictatorship in the Ashura protests. The women wore the veil as a symbol of defiance against the liberal reforms of the Shah. The leaders of the Iranian Revolution used the hijab as a symbol of resistance, embodying a stand against a dictatorial regime. For these women, wearing the veil represented overcoming discrimination and was a public symbol of their Muslim identity.

Under the Shah, the hijab was originally banned – a policy known as compulsory unveiling. For religiously observant Iranian women, this policy meant that their presence in the public sphere was completely eradicated. This policy was overturned in 1941, however social discrimination was still rife against those who wore the attire. Hence, the hijab was a core symbol of reclaiming power and recreating an identity. It was not necessarily the idea of a return to old traditions that stirred this passionate defiance but more so the creation of a new order. 44 years on from the Ashura protest, the hijab has regained its significance as a symbol of defiance, but it is the removal of the garment that is propagating a new revolution.

In 1983, the Guardian Council – the body responsible for dictating and enforcing Sharia law within the Islamic Republic of Iran – introduced Article 102 of the Law of Islamic Punishments. This provision made a woman's appearance in public without a hijab a punishable offence. The scholastic understanding of hijab is to be found in the Fiqh texts which outlines rulings for covering the body during prayer. Ultimately, it is forbidden for a man to observe an uncovered female body with the exemption of relatives. This ban is lifted prior to marriage when inspection of the female is required.

Until 1996, the punishment for breaking the compul-

-sory hijab ruling was 74 lashes in Iran. Reformists introduced a new sentencing of between 10 days and 2 months imprisonment or a fine of 50,000 to 500,000 rials (\$1.2 to \$11.20). The morality police are the institutional branch designated with the enforcement of Article 102. They regularly patrol streets inspecting women for signs of improper hijab amongst other contraventions of law. Interestingly, the intensity of morality police presence is contingent on the regime in power. Enforcement and punishment were lenient during the reformist era of the 1990s, whilst the presence of morality police and prosecution has intensified throughout the presidency of ultraconservatives like Raisi and Ahmadinejad.

Under the current presidency of Raisi, the morality police detained 22-year-old Masha Amini. The young Kurdish-Iranian was brought to an education centre for retraining purposes after being found in breach of Article 102. She collapsed upon arrival at the centre. It took 20 minutes for police officials present to escort Amini to an ambulance on standby. Masha spent 3 days in a coma before she passed away on the 16th of September. Evidence of physical violence committed against Masha was found in medical scans. This corroborates eyewitness reports that the morality police beat her in the back of the police truck.

“By contrast to the Iranian Revolution of 1978-79, the symbol of these protests has been the unveiling of the hijab.”

The Iranian regime denies this and claims that her cause of death was a sudden heart attack. In disbelief of these claims, mourning spread across Tehran and Kurdish-populated western Iran. However, sadness

soon turned to anger as protests and vigils were met with a heavy-handed response from security forces. By contrast to the Iranian Revolution of 1978-79, the symbol of these protests has been the unveiling of the hijab. Women have cut their hair and burnt their hijab to express solidarity with women across Iran who are required to adhere to Sharia law. These acts of defiance also embody the current political climate of Iran: an atmosphere not too dissimilar to that of the frustrated population weary of repression and oppression emboldening themselves through collective action and solidarity in 1978.

While protests were initially directed specifically against hijab laws and oppression against women, they quickly escalated to an outright condemnation of the regime itself. This brought together a wide body of actors from students, labour groups, human rights groups, and women. These cleavages have distinct issue preferences. However, they united in a common struggle against the cause of their grievances – the Islamic Republic regime. The recent protests have spread to over 80 cities and have emerged in towns in which contention has never been seen before. The Amini demonstrations are likely to be the largest that Iran has seen since 1979.

This instance of resistance cannot be understood in isolation. Iran has been undergoing continuous waves of protest over the past 22 years from the same actors mentioned above. This highlights the fact that their demands have routinely gone unheard. Women brazenly raised their voices during the ‘I am Neda’ protests of 2009, the One Million Signatures campaign and the ‘Girls of Englab Street’ protest who also unveiled in defiance, foreshadowing the Amini protests. Students led protests in 1999, 2005, and 2009 whilst the working class have shown face to dissent to the cost of living crisis, fuel price hikes, and water shortages across the last 5 years. With each wave, the size and intensity of demonstrations grow, and different social groups increasingly see each other as allies, showing support for one another, united against the Supreme Leader.

The regime appears to meet protests with a comparative measure of state repression using tactics such as arbitrary arrests, torture, maltreatment of political prisoners and the incarceration of prisoners of conscience.

Furthermore, capital punishment can be administered to dissenters. Protestors are imprisoned on vague charges such as “acting against state security”, “propaganda against the system”, or “insulting the holy sanctities.” The Iranian Constitution includes several vague articles that allow for this suppression to be justified. Ultimately, within the inquisitorial judicial system of Iran, sentencing is at the discretion of a judge who holds absolute power. This structure ensures that anyone can be charged for standing up against the state. The Iran Human Rights group has estimated that 233 people have been killed since the protest began, alongside thousands of arrests. Furthermore, Iran has bombed the Iraqi Kurdistan region for 6 consecutive days, killing 13 people and wounding 61 more. This aggression has been condemned by the Kurdish Regional Government and Iraqi State, likely a result of Amini’s Kurdish ethnicity – a minority which has been systematically targeted by the Islamic Republic for decades.

The outcome of the Amini protests is likely to be yet another successful quelling of unrest. However, the fervour of this round of demonstrations highlights that with each round of state suppression, protesters are growing more frustrated, hatred for the regime is mounting and the disaffected are becoming emboldened. The Islamic Republic regime refuses to adapt and develop policies such as the liberalisation of Sharia law as reformists have suggested. Relenting to the demands of women and their co-protestors in the past may have allowed the regime to maintain power. Instead, they have chosen to meet their grieving citizenry with violence. The Islamic Republic has repeatedly signed its own death warrant over the past 20 years. Chants of “death to the dictator” will grow louder with each protest until one day this becomes a reality.

“The regime appears to meet protests with a comparative measure of state repression, using tactics such as arbitrary arrests, torture, maltreatment of political prisoners and the incarceration of prisoners of conscience.”

The Musical Magpie: An Analysis of Plagiarism in the Music Industry

by Hannah Hendry, SF Law

In recent years, plagiarism has been plaguing the music industry. According to Universal Music Group CEO and Chairman Sir Lucian Grainge, an estimated 60,000 songs are uploaded to Spotify every day, amounting to almost 22 million songs a year. Amongst these songs, cracks begin to appear - magpies swoop in from their nests, collecting nuggets and trinkets for their treasure chests, borrowing and stealing from unassuming victims. As a result, the courts have become increasingly inundated with copyright infringement and plagiarism cases.

The notorious case of *Williams v Gaye* opened the floodgates for many music plagiarism cases. Proceedings began in 2013 when Gaye's family alleged that Thicke and Williams' song 'Blurred Lines' was similar to Gaye's song 'Got To Give It Up.' In 2018, the Central District of California ordered Thicke and Williams to pay €4.4 million to the family of Gaye. Fear began to spread in the music industry. In 2016, 212 artists signed an open letter stating that "the verdict, in this case, threatens to punish songwriters for creating new music that is inspired by prior works." This amicus brief was filed with the 9th Circuit Court of Appeals in support of Thicke and Williams.

But what exactly constitutes plagiarism in the world of music? This article will examine how music plagiarism can occur, the relevant legal framework and the consequences of breaking copyright laws.

Music Plagiarism

Music plagiarism is broadly defined as the use or close imitation of another artist's music, while presenting it as their own work. It can occur in two instances: by appropriating a musical melody, or through sampling, which occurs when an artist takes portion of another's recording and incorporates it into their own work without obtaining legal permission.

Failing to assure consent from the legal copyright holder will result in a breach of copyright law. Aggrieved litigants, who have suffered an attack on their intellectual property rights, possess the right to take legal action in the form of a 'copyright infringement' or a 'trademark infringement.' While copyright refers to the protection of the distribution of your creative works, trademarks protect the distinctiveness between your logo and your brand, and require more extensive registration through the government. Within this however, a dilemma can arise whereby an artist unknowingly plagiarises another.

The Quiet Beetle

Melodies are created through the use of phrases, motifs, rhythms and patterns. All melodies and harmonies in Western music are typically made up of 12 notes (one scale from C to B, with five equivalent flats and sharps in between). This limited scope can result in what is called unconscious, or subconscious, plagiarism.

George Harrison, a member of the Beatles, was nicknamed the 'quiet Beatle.' In 1976 his name hit headlines when he was found guilty of subconsciously plagiarising the 1962 John Mack song 'He's so Fine' in his first solo single, 'My Sweet Lord.' Judge Richard Owen (who was notably a composer in his own right), maintained that while Harrison was guilty of plagiarism, the trial evidence established that he did not copy the song deliberately. Harrison was ordered to pay \$587,000 for his subconscious plagiarism. In his autobiography, he confided that he was unaware that he was plagiarising and that the song was "more improvised and not fixed." This case demonstrates that a musician can be liable for plagiarism even if they have not acted intentionally. It is submitted that this can inhibit a musician's creative process when distributing music.

However, these are necessary precautions to take. In 2022, a study found that plagiarised songs acquire 211.3 times more views on YouTube than their original counterparts. Bruno Mars and Mark Ronson's 'Uptown Funk' has a staggering 4.7 billion views on YouTube, compared with The Gap Band's 'Oops Upside Your Head' which has 7.5 million views. It was established that 'Uptown Funk' shared similarities with The Gap Band's song. While the case was never litigated, the Gap Band's Charlie, Ronnie and Robert Wilson, as well as two band members, were given writing credits on 'Uptown Funk'. The balance between drawing inspiration from a song and blatantly copying an artist's works is evidently a hard line to toe.

Copycat: The Legal Framework

Copyright is a form of intellectual property that grants exclusive rights to the creator of an original work for a fixed number of years. These include the right to print, publish, publicly perform, film, distribute, and adapt their work. These rights can be licenced and transferred and are regulated under the Copyright and Related Rights Act 2000 in Ireland.

In Ireland, the copyright in a literary, dramatic, artistic or musical work expires seventy years after the death of the creator. After such time, a work may be altered or reproduced without fear of retribution. The Berne Convention for the Protection of Literary and Artistic Works is one of the most significant documents relating to the protection of copyright. Article 2(3) of the Convention explicitly protects the artistic merit of translations or arrangements of works without prejudice to the copyright of the original work. It allows an entirely new copyright to be created for the arrangement. However, the copyright of the original work has not been altered and remains free of copyright control. The issue of copyright only emerges in the case of an arrangement of that work, introducing new originality. In Irish traditional music for example, no such issues can arise, as traditional music is passed to the next generation orally. The origins of the music composer are anonymous and lost to time, and the copyright term has expired.

The EU provides protection for copyright through the EU copyright law. It consists of eleven directives and two regulations to maintain a high level of protection

for artists. The EU laws reflect member states' obligations under the Rome Convention and the Berne Convention. Furthermore, the EU has signed such international treaties as the Marrakesh Treaty to facilitate access to published works for persons who are blind, and the Beijing Treaty on the protection of Audio-Visual Performances. These international agreements and treaties are administered by the World Intellectual Property Organisation (WIPO).

Ed The Magpie

In 2018, legal proceedings were initiated by Ed Sheeran in relation to copyright infringements of his hit song 'Shape Of You.' He was accused, by Sami Chokri and Ross O'Donoghue's barrister, of being a "magpie" who "borrows" ideas from other artists for his songs. Chokri and O'Donoghue contended that certain lines and phrases of their 2015 song 'Oh Why' were plagiarised by Sheeran. Chokri claimed that the 'Oh I' hook in Sheeran's song was almost identical to the 'Oh Why' chorus of his own song. Following the allegations, Sheeran, along with his co-writers John McDaid and Steve McCutcheon, were barred from £20 million in royalties arising from performances and sales of 'Shape Of You.' In 2022, Judge Antony Zacaroli of the UK High Court ruled that Sheeran had "neither deliberately nor subconsciously copied" Chokri and O'Donoghue's song. The Court analysed the musical elements and similarities between the two songs. They acknowledged that while these two phrases were similar, they each evoked different purposes. The 'Oh Why' hook of Chokri's song is the central part of the chorus. In 'Shape Of You', the 'Oh I' phrase is a captivating bar intended to fill the space before the chorus line 'I'm in love with your body.' The Court held that as the first four notes of the melody's rising minor pentatonic scale were so short and simple, it was simply speculative to declare that Sheeran accessed Chokri's song as inspiration for it.

One For Sorrow, Two For Joy

There are multiple plagiarism allegations within the music industry. Musicians must be wary of their actions. The above cases demonstrate that there is a thin line between overt copying, technical limitation and cultural interaction. The legal system strives to find the balance between these competing needs, and in doing so, endeavours to determine the real magpie.

Interview with Senator Tom Clonan

by Laoise Murray, SS Law



Senator Tom Clonan is originally from Finglas, Dublin. He completed a Bachelor's Degree in Education at Trinity College, Dublin. After graduating in 1989, he served as a member of the Armed Forces in the Middle East and in former Yugoslavia. During his time in the army, he embarked on a PhD to investigate the experi-

ences of his female colleagues. It revealed shockingly high levels of bullying, harassment, sexual assault and rape of female colleagues. Unfortunately, the findings were not well received by his superiors and Senator Clonan was subjected to a whistleblower reprisal campaign. The General of Staff alleged that the findings has been falsified. After a legal battle, Clonan managed to persuade the Government to conduct an independent government inquiry ('the Study Review Group') to investigate the research. In 2003, the Group fully vindicated him and the report, and thus he was allowed to continue with the PhD and pursue an academic career. Clonan has worked as a lecturer at Technological University, Dublin for the past 22 years and as a journalist with the Irish Times and The Journal. He is regularly involved in broadcasting, working on radio and TV documentaries for RTE and the BBC, Sky News and international media. He has visited and reported on the conflicts in Syria and Iraq, in Guantanamo Bay and most recently, the war in Ukraine. He is the father of four children. His experience of the challenges in dealing with his twenty-year-old son who has a neuromuscular disease is the reason he became involved in disability advocacy and lobbying for the rights of children and adults with disabilities and additional needs.

Q1: Your pathway into politics has been quite unique, and not to mention, impressive! After your initial bachelor's degree in education at Trinity, what pushed you to join the Armed Forces?

A: There was a tradition of public service in my family; my dad and grandfather were Gardaí and my brother was a Naval Officer. But the biggest influence on me was my grandmother who lived with us. She was born in 1900 in Killorglin in County Kerry and she came to Dublin in 1916 to become a primary school teacher. Obviously, the events in 1916 had an effect on her, particularly the execution of the leaders of the 1916 Rising. She joined Cumann na mBan and was attached to the South Dublin Brigade of the IRA. In 1919 when the War of Independence started, she got a job as a teacher in Scoil Bhríde on Stephen's Green, which was Ireland's first-ever Gaelscoil. During the day she was a schoolteacher and, in the evenings, as part of the South Dublin Brigade of the IRA, she was involved in the arson attacks on police stations all over South County Dublin. She fought all through the war of independence, right up until 1922. I would say she was a typical multitasker woman: a schoolteacher by day and a freedom fighter by night.

Q2: What motivated you to research gender-based discrimination and sexual harassment in the Irish Defence Forces for your PhD?

A: My grandmother retired in 1965 and came to live with us in Finglas. I was born in 1966 and she looked after me as a child. She told me many stories about what women did during the War of Independence and so I knew the critical role women had played in the liberation of the state, even though the history books only focused on the men involved. I came from a very strong matriarchal household; she was a real feminist and imparted a lot of those values to me. That's why when I was in the army, I decided to do my PhD to focus on the experiences of female soldiers. I knew the role women had played in the liberation of the state and I was curious to explore their present-day experiences. My female colleagues had been soldiers in Óglaigh na hÉireann in the 20th Century and unfortunately, there was a lot of discrimination, bullying, harassment, and sexual violence against women. Of course, misogyny is a persistent, and profound problem throughout Irish society.

Q3: As an experienced journalist with the *Irish Times* and *The Journal*, what do you think the media has to offer to aid social causes such as gender or disability-based discrimination?

A: Traditional media, like print, electronic and broadcast media, play a huge role in framing public discourse. The media should be a mirror to those in power, to interrogate the status quo and to challenge power relationships in society. Yet sometimes, the media can act as an extension of the establishment. You'll find in some areas of journalism, such as political correspondence, that very often, even though more and more young female journalists are getting involved, there is a cohort of older male journalists who will simply restate and reinforce the prevailing views of those in power. But there's a huge responsibility for journalists to educate themselves.

You'll often find the echoing media narratives of the entitled "snowflake" generation. But actually, your generation has been completely locked out of social and affordable housing, and you are denied the very modest ambition of having a secure affordable place to live.

For example, in relation to your generation, you'll often find the echoing media narratives of the entitled "snowflake" generation. But actually, your generation has been completely locked out of social and affordable housing, and you are denied the very modest ambition of having a secure affordable place to live; whether to rent or to have the ambition of buying a house so that you can make all of the life decisions that you would like to make as a citizen of this Republic ... I think journalism has a really important role to play in challenging all those things.

I don't know whether as journalists we have risen to that challenge. There are reasons for this; the business model of journalism is failing, fewer and fewer newspapers are being sold and advertising revenue is down so it's very difficult to resource journalists to be independent and provocative and truth-seeking. When I was writing for the *Irish Times* in the early noughties, I think the paper

was selling 130,000 copies a day and I don't think they sell even a fraction of that now ... Sources have become very powerful and are probably more powerful in framing the narrative than the journalists themselves. Digital and social media mean that people are publishing every day on Twitter and Instagram which has created a whole new area of our public narrative and discourse. This can be very polarising. There are loads of challenges, but we're in a moment of really profound and accelerating change.

Q4: Before your appointment to the Seanad, you were very engaged with social and political activism, advocating for the rights of young people with disabilities and victims of sexual violence in the armed forces. As an elected representative, has your perception of the relationship between media and politics changed in any way?

A: I am still a journalist in practice but it was a culture shock to walk down the corridor of the Oireachtas and note that quite a number of the newer, younger political correspondents in the press gallery are former students of mine. After President Zelensky's address to both Houses of the Oireachtas in April, I met seven or eight former students of mine who congratulated me. I said, "Well now, you'll keep me out of trouble won't you!" Immediately, without a blink, one of them said "Keep yourself out of trouble Tom." I realised that as an elected representative, you become public property; you are amenable to public scrutiny and can be held to account in a way a private citizen is not.

It is a great privilege to be here as a Trinity Senator and for the graduate community to have voted for me ... I want to make a tangible, measurable and quantifiable contribution. My area of special interest is helping our most vulnerable citizens, people with additional needs. The clock is ticking; I have got to find ways to do something constructive. I have great role models in Lynn Ruane, Ivana Bacik and David Norris. I see the work that Lynn Ruane does and if I could do a fraction of what she does in the time I have left I would be happy. The community of Trinity Senators have been very generous in terms of their mentorship and giving help, advice, and support to learn how the place works. Lynn has been particularly collegial and friendly and supportive and I really am grateful for that.

Q5. Finally, what advice would you give to undergraduate students who are looking to pursue a career in politics or journalism?

I am part of a generation that really benefited from the efforts of people like my parents and my grandmother. My grandmother contributed to the liberation of the state. My parents made sure we got free education at Third Level and when I was 21 or 22 years old I was able to get a mortgage and buy a house. I would characterise my generation as generation 'F for Fail' because we have taken all of the advantages that we enjoy and through successive governments and neo-liberal political philosophy have commodified housing, health and education which made it really difficult for your generation.

So my advice to young people is: don't accept it. Get involved in politics, in the student's union, in trade unions in professional associations. Organise and make the changes that are necessary for you. I am very angry about what has happened; I see my own adult children and the huge challenges they face - climate change, homelessness, and affordable housing to name but a few

My advice to young people is: don't accept ... Organise and make the changes that are necessary for you

The answer is not to throw your hands up and say we can never change things - you are the most powerful resource that this Republic has.

Journalism is a really tough environment to earn a living and to really have a full professional actualisation because of the pressures on the industry. But if you are interested in it, you need to specialise in an area. Because of my military background, I have been able to write about terrorism and now, the threat of escalation of nuclear war in Ukraine. But if I could go back and be 21 years old again, I would travel and work with international organisations. Discover yourself and on those strengths, do something journalistic or political. You'll find your cause.



Photo courtesy of Matthew O'Shea, LLM International and European Law

Interview with Environmental Solicitor Andrew Jackson

by Laoise Murray, SS Law & Ciara Hogan, JS Law and Political Science



Photo courtesy of Ciara Hogan, JS Law and Political Science

Andrew Jackson is an environmental lawyer. He practised law in the UK for many years working for the UK Government's Department for Environment. Ever since moving to Ireland 15 years ago, he has practised as a solicitor, focusing on public interest environmental cases. He is also an academic at UCD law school, where he teaches and researches in environmental and planning law.

Q1: Your peers in the climate action sphere have described you as “a hero of environmental law in Ireland” with an amazing ability to construct water-tight legal arguments - but the route into an environmental law career is rarely a smooth one. What prompted you to make the radical transition from practising corporate law to environmental law?

A: I qualified as a trainee in a corporate law firm in London and practiced post-qualification for between two and two and a half years. As time went on I just realised it wasn't for me. I didn't enjoy the subject matter and I didn't really enjoy the lifestyle either. I had a think at that point and I realised that the next career move was going to be an important one. I wanted to set myself up on a path, doing something that I knew would motivate me. I thought about what I was interested in outside of work, and that had always been environmental issues, wildlife, and sciences. I grew up in Scotland but I studied biology, chemistry, and physics at A-level. I thought I would like to work in the field of environmental law and so I started to look around for what was available. At the time I was living in London, and by chance the UK Government's Department for Environment was advertising for lawyers.

a I applied and got a job there and I loved the work from the word "go" and also the change of lifestyle: I had a sense of a work-life balance, I could start making plans to meet people and not have to cancel them, and start doing sports again and things that I hadn't done for many years. That's how I got into environmental law really and I've never looked back since then. I find it really aligns with what I'm interested in outside of work so I kind of love what I do and don't really consider it a job as such.

Q2: Your research experience has covered a wide range of disciplines from science to law and policy. In your experience, does the judiciary appreciate the gravity and complexity of environmental and climate science? How can scientific evidence be effectively communicated in a court of law?

A: I suppose it's always a challenge in environmental cases. If the scientific issues are central to the case, as they were in 'Climate Case Ireland' (*Friends of the Irish Environment v Government of Ireland* [2020] IESC 49), then it is really important to try to make sure that the judges hearing the case fully understand what is being discussed. With Climate Case Ireland, we always felt that the factual side of the case was really powerfully on our side. Setting the law to one side, if we could tell the story effectively and communicate the issues clearly, we felt we already had one step ahead. The facts were so compelling that if you could bring the court with you, the weight of the issues and the seriousness, and the urgency would be very clear. We spent a good deal of time thinking about how to present the science in a way that was readily understandable but also that could be grasped relatively quickly because time in court is quite compressed, particularly as you move up to the higher courts. In the High Court we had several days to present the case so there was more space to open the science and to get into the detail[s]. In the Supreme Court we had just two days and obviously part of that time was given over to the respondent, so really the time was very compressed. Luckily we had put a lot of the thought in at the High Court stage as to how to distil the information... so that when the case came to be presented in court, there was a narrative running...

[I]t was very effective I think. When you look at the transcript of how the science was presented at the start of the High Court hearing, it was a very compelling story.

One of the important things about the way in which the science was presented was we focused and built the case on the science of the Intergovernmental Panel on Climate Change (IPCC) which was the same as "Urgenda" had done in the Netherlands (*State of the Netherlands v Urgenda Foundation* 19/00135). We knew that if we based the case on the science of the IPCC, and if we put in as exhibits, the summaries for policy-makers of the IPCC reports, there was absolutely no way that the government could contest the evidence because they had literally agreed the documents line-by-line... We used other authoritative sources that we knew that the government wouldn't and could not contest: reports by the World Bank, the International Energy Agency, and Ireland's own Environmental Protection Agency (EPA). That strategy worked very well because the government did not contest any of the scientific evidence in the case or any of the claims that "Friends of the Irish Environment" was making about the science of climate change and the projected impacts. That meant we started off in the strongest possible position, because in an action for judicial review, the last thing you want to do is to start to get involved in a dispute over expert evidence. You can't be sure that the judges are going to be trained in science or knowledgeable about climate science.

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Q3: What, if any, are the pertinent lasting effects of the Supreme Court decision in *FIE v Ireland*, considering the court declined to recognise an implied constitutional right to a healthy environment? Do you think that the judicial branch will take the lead and build on this rights-based approach if similar challenges are brought in the future, or is it a 'locked door' in that respect?

A: No, I don't think it's a locked door. If there is a rights-based challenge brought by an individual or individuals in the future, then those issues around the sort of interaction of environmental harm and human rights, constitutional rights, would come to the fore again. But as to the specific issue of an implied or a derived constitutional right to a healthy environment, the Supreme Court was pretty clear on that. They clearly felt, and it was spelled out pretty clearly in the judgement, that it would be more appropriate for a right of that nature to be subject to debate and democratic agreement via constitutional amendment than for it to be thread into the Constitution by a small number of individuals in the form of the Supreme Court. But interestingly, there have continued to be international level developments in terms of the potential recognition of a right to a healthy environment....[E]ven very recently there seems to be a move towards the potential recognition of such a right at [the] international level. There is also potential for that type of right to be discussed in the context of the ongoing discussions relating to the "Citizens' Assembly on Biodiversity Loss" where they effectively had a public consultation to ask people to suggest ideas and I think...[it] has been suggested, that it would be an appropriate moment to talk about constitutional rights in the context of the environment, in the context of that Citizens' Assembly.

For me, the interesting thing about Climate Case Ireland is there were sort of always two parts to it. There was the element of the case that was about the "Climate Act" (Climate Action and Low Carbon Development Act 2015) ...That was the statutory part of the case. And then the other part, which was sort of emulating *Urgenda* if you will, was the rights-based

[part] (rights under the European Convention on Human Rights). Then there was the constitutional element, kind of building on the Dublin Airport case (*Friends of the Irish Environment CLG v Fingal County Council* [2017] IEHC 695) ...A lot of the focus afterwards (after Climate Case Ireland), some commentary I saw, was on the fact that the Supreme Court refused to recognise a derived right to the environment. I think the statutory part is equally interesting. As you know, most of the environmental law in Ireland derives from EU sources. EU environmental law has given quite a prominent role to plan-making in all sorts of sectors of environmental law...

When I was in the very early days thinking about the possibilities for climate litigation in Ireland, a kind of systemic type of case, *Urgenda* was one inspiration on the rights-type side, but the other group of cases that inspired Climate Case Ireland were brought by "ClientEarth" in the UK to do with air quality. They had a series of successes in the UK, challenging inadequate air quality plans, which, pursuant to EU law under the Ambient Air Quality Directive, required the making of plans to deal with exceedances of limit values for different air pollutants. Looking at the "ClientEarth" repeated successes, they kept going back to the court and winning on the basis that these plans that had been made didn't do what they were meant to do essentially, that was quite an inspiration for the statutory part of Climate Case Ireland because of course, we are both common law jurisdictions with, in particular, a tradition of judicial review. It just seemed like there was a potential to win a case in that way...It wasn't necessarily a simple case to present, but there was a compelling argument. If you had to design a poster you could say "This isn't a national mitigation plan at all, it's a national rising emissions plan." This case succeeded in overturning a plan on the basis that it didn't comply with the underlying statutory obligations. In that sense it goes to the heart of what EU environmental law does. Although this wasn't an EU case, it goes to the heart of an approach to environmental law that is very common today.

Q: The framework approach?

... you never really know how far a case is going to travel, but I think the ripple effects of Climate Case Ireland are becoming visible now. ”

A: Yes exactly. You get these framework directives requiring the making of national plans. What is interesting to me is to trace what has happened after (the judgement). There have been some policy changes and legislative changes in Ireland, some of which are directly attributable to the case, and some of which the case probably played some part in. But if you trace what's happened after the judgement - the judgement is really beginning to travel quite far now. First there was the German Neubauer case (*Neubauer et al. v Germany*), which was a decision of the highest court, Germany's equivalent to the Supreme Court (the Federal Constitutional Court of Germany), where the court cited the Supreme Court in Climate Case Ireland several times, and at one point said the judgement is of prime relevance to one of the German court's findings. The German court found in favour of Luisa Neubauer and the other litigants in that case. That is a very significant judgement...[M]ore recently, the High Court in England and Wales ruled that the UK's net zero strategy was unlawful and in so doing, they cited Climate Case Ireland and the Supreme Court quite extensively: they said, 'We gratefully adopt the reasoning of Chief Justice Clarke of the Irish Supreme Court' ...

[Y]ou never really know how far a case is going to travel when it starts but I think the ripple effects of Climate Case Ireland are becoming visible now. The fact that it succeeded on quite traditional grounds, traditional in the context of our common law judicial review system (it succeeded on the basis of failure to comply with the statutory obligation to make a plan in a particular way), that has undoubtedly helped in terms of UK courts relying on the jurisprudence. The Canadian system too might be one where you might expect that there would be a commonality ... Who

knows what will happen with the judgement in Canada but both the German and the UK case were successful and that's two years of the judgement. My hope would be that these early systemic cases like *Urgenda* and *Climate Case Ireland*...will provide quite a strong foundation and will continue to have these kind of ripple effects that we see elsewhere.

Q4: Is there potential for a subsequent legal action to be brought in Ireland with respect to the government's failure to submit a long-term climate strategy as is their duty under Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action? Do you think this is going to be a part of the next few years, will we see this being played out in courts?

A: Absolutely, it's certainly a live legal issue. The deadline under EU law was the 1st of January 2020, and now that's almost three years [sic] gone, and there is still no long-term strategy. We are one of only 4 EU member states that hasn't submitted its long-term strategy. The European Commission, in its September infringement package announcements, of its infringement decisions, has issued a letter of formal notice under article 258 of the Treaty (Treaty on the Functioning of the European Union) against Ireland and the other member states who haven't submitted these long-term strategies...A lot of the debates that play out in the press and in the Oireachtas at the moment over environmental issues, whether it's agricultural emissions, or peat extraction, a lot of the contentious argument that is happening, is enabled by the absence of a long-term strategy. If the debates all focus on 2030, there is a sense in which it almost feels like some sectors feel like 2030 is the end of history. That's all they're being asked [about], and everyone fights for what has to be done by 2030 as if that is the end of the story, rather than 2030 being the first ask of increasingly ambitious asks ... **[W]e need to reduce emissions to get to net zero.**

Reflections on ‘The Academy and the Judiciary’ by Lord Andrew Burrows

by Isabelle Healy, SS Law and French and Managing Editor of TCLR



On the 21st of September, DU Law Society, Trinity College Law Review (TCLR), and the Trinity Centre for Constitutional Law and Governance (TriCon) were delighted to ring in the new academic year with a visit from Lord Burrows as part of TCLR’s Distinguished Speaker Series. The Right Honourable Lord Burrows is a justice of the Supreme Court of the United Kingdom, having taken the rather unusual route of initially working as an academic, rather than as a practitioner, before his appointment to the bench. After receiving the Praeses Elit award from the Law Society, he shared his insights on the transition between these positions and was interviewed by Professor Aileen Kavanagh, the director of TriCon.

Lord Burrows offered some keen reflections into the difference between life as an academic and his position as one of the UK’s foremost judges, identifying the need to work collaboratively as one of the main points of divergence between the two

careers. He noted that judges give oral arguments and justifications to each other before a decision is written, which are later circulated for general approval or disapproval. The extent to which judges can criticise each other in public, or disagree outside of the writing of a dissent, is usually quite limited. The restriction on possible avenues for research and scholarship one encounters as a member of the judiciary is also extreme compared to academia. This may not be too pressing a concern for Lord Burrows, who opined that there is currently too great a weight on deep theory within the academy and not enough emphasis on practical legal scholarship, the latter being of most benefit to practitioners and the judiciary.

[Lord Burrows] opined that there is currently too great a weight on deep theory within the academy and not enough emphasis on practical legal scholarship, the latter being of most benefit to practitioners and the judiciary. ”

He agreed that the kind of brilliance or originality which is valued within academia may create a certain tension with the predictability and reliability needed to sit on the highest court in the land. What may have bridged this gap for him personally was his small practice at the Commercial Bar in London, which although only occupying some of his time, allowed him to progress to the Law Commission and later to the judiciary. Interestingly, he found that being a judge did not really contribute to his academic work but seemed to be stimulating in a different way.

As someone who took a slightly different path to the Supreme Court, he was asked by an audience member how his approach to decision-making differed from some of his colleagues. The agreement was that while he sometimes had different reasons for reaching a certain conclusion, there was a large degree of consensus among different members of the bench. The main difference seemed to be that Lord Burrows is conscious of writing for an academic audience. In lower courts, this is less of a concern as the parties to the case are of central concern. However, at the appellate level there is an awareness that judgements will be read by the wider legal community. In his opinion, judges that ascended to the Supreme Court through the usual route of practising at the bar considered the impact on practitioners to a larger extent.

One development that he emphasised was the increased citation and referencing of academics' work by the judiciary. He stressed the role of dialogue between academics and members of the judiciary, touching on his own utilisation of such works and his broader experience in the field. He spoke to the mutually beneficial relationship that does and should exist between the academy and the judiciary. As a former lecturer, he strongly believes that all material judges rely upon should be expressly cited, and to do otherwise would constitute judicial plagiarism.

He also spoke earnestly about his genuine love for law, and that despite being a renowned expert in private law, he may have ended up a public lawyer had he been asked all those years ago to teach a constitutional law module. While he reflected on the process of becoming a generalist by profession, where he had originally built his reputation as a specialist, he seemed comforted by this fact.

As questions were opened up to the floor, it was generally agreed that the comparative study of law is a very useful form of scholarship often aligned with the productive doctrinal work Burrows prefers. When asked about the differences between studying law now and when he was a student, he emphasised the need to move forward with the times both intellectually and technologically. Being selective in research and reading is a skill that will become more and more valuable as more materials become available through libraries and databases.

His final piece of advice may be more universally relevant - he wishes for all law students (and one may extend this to any discipline without too much concern) to make efficient use of their time in university and take advantage of as many opportunities as possible. With this in mind, one should consider submitting to student publications including the Trinity College Law Review!



From left to right: Hugh Gallagher, Editor-in-Chief of TCLR; Eoin Ryan, Secretary of DU Law Society; Dr Aileen Kavanagh, Director of TriCON; Lord Andrew Burrows; Ruth Brady, Auditor of DU Law Society, Sam Carthy, Managing Editor of TCLR

Trinity FLAC x Trinity Access Programme Rights Education Workshop

by the FLAC Committee

On Wednesday 12th October, Trinity FLAC and the Trinity Access Programme (TAP) hosted the first 'Know Your Rights' workshop with school children from the local community. This initiative was created by our Chairperson, Georgia, to further public legal education and access to education more broadly. For this workshop we worked with 45 students in fifth and sixth class from City Quay National School.



*Neville Cox lectures local school children
on their human rights!*

The day started with an introduction to what we do in Trinity FLAC and Law at Trinity. We discussed our favourite subjects and how they might relate to the law. We spoke about the differing approaches and perspectives brought to law and the value of these in legal education. This was followed by a wonderful lecture by Professor Neville Cox on human rights. Some of the children's favourite rights on the day were the right to self expression, to love who you want to love, and safety. Other children favoured 'the right to go home' and 'the right to go back to school for PE.' It was an engaging discussion to construct an understanding of rights in

context. Following a short break, we took the students on a tour of the Trinity College campus. We then hosted a problem question workshop in which the students acted as young lawyers to solve an administrative law case. Our Treasurer, Hugh, explained administrative law to the students followed by a lesson from Georgia on the ILAC method while working through some case law. We had students act out the obligation to give reasons, the potential necessity of representation and reasonable fairness in decision making, likening administrative law principles to being expelled by a principal. They then broke up into small groups and solved the problem question, with help from our lovely committee members Fiona, Sorcha, Hugh and TAP representative Barry. The students picked up on the law so quickly, impressing us, the TAP representatives, and their lovely teachers who were present with us on the day. They showed skills in advocacy as they worked through the material, reflecting on what fair treatment meant for them and how it related to the law.

We finished the session with a quick introduction to the Trinity Access Programme by Dr Becky Long, the TAP Primary & Junior Cycle Coordinator. She introduced the students to TAP and spoke about how college isn't the be-all and end-all for careers, but can be a great opportunity for students. She spoke about the work that TAP does with schools like City Quay and the hope that students will be involved in their future programmes. Dr Long was incredibly enthusiastic about teaching the students about law, helping to organise and facilitate the event which enabled us to work towards our mission of making law accessible for all.

