Cork Online Law Review

Proudly Sponsored by

ARTHUR COX

Edition 18

2019

Cork Online Law Review

Published annually at http://www.corkonlinelawreview.com

Email: editor@corkonlinelawreview.com

This edition may be cited as (2019) 18 COLR

Submissions

The Editorial Board of the Cork Online Law Review at University College Cork, Ireland, would like to invite submissions for the 19th edition, due to be launched in March 2020.

All submissions should be on a legal topic and be between 3,000 and 9,000 words in length. Book reviews and case notes will also be considered.

All interested parties should submit their articles and enquiries to:

The Editor-in-Chief
editor@corkonlinelawreview.com

Submissions are also invited for the Letters to the Editor section. Submissions should be on a topic of current legal relevance, whether domestic or international, and should be approximately 1000 words in length. Letters are welcome in Irish, English or French.

All interested parties should submit or enquire to:

The Letters Editor
letters@corkonlinelawreview.com

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

The Editorial Board of the 18th Edition would like to extend our sincere gratitude to Dr Maria Cahill and Dr Louise Forde for their support of COLR throughout the year. Their advice and expertise has been essential to the success and production of the Law Review. We would also like to thank the members of the Faculty of the School of Law, who generously assisted us with the reviewing process.

On behalf of the Editorial Board, I would like to thank the Hon. Ms Justice Marie Baker for kindly taking the time to write the foreword for this Edition, and for doing us the great honour of launching the Law Review this year.

The Editorial Board would like to thank the Dean of the School of Law, Professor Ursula Kilkelly, for her continued help and support. We would also like to thank the Executive Committee of the UCC Law Society, who have been a constant source of support and advice over the past year.

Our sincerest gratitude also goes to our sponsors, Arthur Cox. Without their generous and continued support, COLR would not be what it is today. Run by students, for students, the backing provided enables the cultivation of student academia. In particular, I would like to thank Eimear Power for all her help and support.

I would like to congratulate the Editorial Board, for all the hard work and dedication shown throughout the year. In particular, I wish to thank our Deputy Editor, Elisha Carey. The quality of this publication is a testament to their vivacious attitude and work ethic, which never faltered.

Finally, we would like to congratulate the authors on the high-quality contributions made to the 18th Edition of COLR. Each of their articles will hopefully act as a vehicle for further discussion and development of the laws which govern our society. We would also like to thank those who contributed, and continue to contribute, to our Letters to the Editor platform, and to the inaugural Case Notes Competition.

Is mise le meas,
Eoin Doyle
Editor-in-Chief of the 18th Edition.

FOREWORD TO THE EIGHTEENTH EDITION

The dialogue between those who practice law and academic writing is important in a number of respects. The clarification and informed critique of caselaw by academic analysis furthers knowledge and understanding of the law by practitioners and the public generally. This must be seen as a benefit to the common good.

But academic writers perform another and perhaps more important and far reaching role in the development of the law. I mention, just by way of example, the important analysis of the Land and Conveyancing Law Reform Act 2009 by UCC's John Mee, which led to important case law and ultimately to the amendment of the legislation regarding the prescriptive easement, and the rights of mortgagees.

The academic can and does offer a critical perspective which imports current thinking in politics, sociology and history, perspectives apparent in the current issue of the COLR. The judge and the practicing lawyer are necessarily constrained by the facts of the conflict to be resolved and the weight of authority that informs the answer. The critical perspective and questioning of the academic writer can propose an answer and even bravely point to ways in which the jurisprudence is plainly wrong.

That this is a useful element in the dialogue is obvious.

The value of the academic commentary is apparent in the current edition, and I am gratified by the range of topics and the erudition of the writing. I was also delighted to see articles in Irish and French. Elegant and interesting pieces which I read with interest.

Two articles in particular merit comment. Anna Carroll's article on the Magdalene laundries, a dark moment in our recent history, brings together with great effect the descriptions of the drudgery, daily humiliations and pain inflicted on the women who spent years and decades behind those dark walls. In 2018, as Anna says, Dublin welcomed some of the women and opened the doors of its civil buildings to them. I was amongst the hundreds who stood and applauded, not in jubilation or in a mode of self-congratulation,

but to show those women, women of my generation whose voices, unlike mine, have long been silent, that we are ashamed and that they are respected for their courage. Anna calls for the implementation of the recommendations of my much loved colleague and friend John Quirke, not for reasons of sympathy but for reasons of rights. Her article deserves to be read.

Conversations around rights and the right to die with dignity, or what we now call 'a good death', form the backdrop of the article by Niamh O'Brien, an important contribution to the discourse. I would not perhaps share her view that Irish law 'leaves no room for mercy' and the judgment of Laffoy J in Fitzpatrick v FK [2009] 2 I.R. 7, and my analysis in Governor of X Prison v McD [2015] IEHC 254, might bear some analysis regarding the right of a person of full capacity to choose to refuse medical treatment, especially in the light of the somewhat different approach of Humphreys J in AB v CD [2016] IEHC 541.

I have been impressed by a recent book, 'The Way We Die Now', by Seamus O'Mahony, a UCC graduate and professor at CUH. His observations regarding assisted dying and those of Atul Gawande in his 'Being Mortal', illustrate the risks of a binary approach to the issue. Gawande observes that in countries where assisted dying is legally available, alternative end of life facilities, home care, hospice and well run nursing homes are underfunded, and the risk is that the elderly and frail person might chose assisted death, not because that is their personal wish, but because the choice is more socially acceptable. The Supreme Court analysis in Marie Fleming's case echoes these concerns. O'Mahony says that being a burden to those who love us is part of what makes us human: 'we should want to be a burden to those who love us, and they should want to bear that burden'. The discourse will of its nature be complex and I am certain Niamh's article will form part.

I am honoured to be asked to write the foreword to this edition. UCC was the place I learned the skills of legal analysis, and the importance of the rule of law. Garrett Barden, who continues to write around themes of law and justice, is a loved and inspiring friend, whose lectures on Aristotle and law started me on this path. I am honoured to be in the company of previous authors of the foreword, jurists who have been guiding lights in my legal career. I must give a special mention to Gerard Hogan, now Advocate General, a

person of true honour, my friend and mentor whose contribution to legal thinking has been, and will continue to be, immeasurable.

Marie Baker,
Court of Appeal
Dublin 7

22nd March 2019

Editorial Board of the Eighteenth Edition of the Cork Online Law Review 2019

Editor-in-Chief
Eoin Doyle BCL (Business) II

Deputy Editor-in-Chief
Elisha Carey BCL (International) II

Letters Editor
Sinéad Walsh BCL (Clinical) III

House Style Editor
Fiona Hughes BCL (International) IV

Languages Editior
Jack Lyons BCL (International) IV

Case Notes Editor
Liam O'Driscoll BCL (International) III

Article Editors
Honor Tuohy LLM (Candidate)
Stephen Lynch BCL, LLM (Candidate)
Ciara Woulfe BCL (Irish) IV
Ciaran Cummins BCL (Clinical) IV
Izzy Kenny BCL II
Seán Layzell BCL II
Seóna Kiely BCL (Business) II
Juliette Hanley BCL (Pathways) I
Alannah Humphreys BCL (Pathways) I
Evan McGarry BCL (Business) I

Advisory Board of the Eighteenth Edition of the Cork Online Law Review 2019

Dr Louise Forde

Dr Maria Cahill

Dr Conor O'Mahony

Dr Catherine O'Sullivan

Prof Mary Donnelly

Prof Owen McIntyre

Dr Áine Ryall

Dr Darius Whelan

Dr Dug Cubie

Dr Fiona Donson

Dr Sean O'Conaill

Dr Lawrence Siry

Dr Stephen Coutts

THE DUTY OF CONFIDENTIALITY AND GENETIC INFORMATION: WHO HAS A RIGHT TO KNOW? A RESPONSE TO *ABC V ST GEORGE'S HEALTHCARE NHS TRUST & ORS* [2017] EWCA CIV 336

Juliana Gleeson*

A INTRODUCTION

The manner in which genetic information ought to be treated by law has been considered a 'looming area of medico-legal controversy'.[1] As a unique set of data exposing a blend of personal and familial interests, it raises 'new and profound questions with regard to the … legal and moral obligations to disclose genetic information to at risk relatives'.[2] While these questions have not yet been of concern for Irish Courts, they have recently been litigated in the UK case of *ABC v St George's NHS Healthcare Trust*.[3] Here, the High Court struck out a claim for the right to be informed of a family member's genetic disorder. The recent readmission of *ABC* for trial by the Court of Appeal provides opportunity for these questions to be definitively answered in the UK.[4] The outcome of this case will likely be of significant influence for Irish Courts going forward and thus it is important that attention is paid not only to the result of the case, but to the reasoning behind it.

It will be argued that there should be a legally recognised right to be informed of a family member's genetic disorder. This right is best recognised through the creation of a legal duty on clinicians to disclose same, under the tort law of negligence.[5] This duty is ethically and legally justified where its scope is specifically limited to identifiable people, at risk of treatable genetic disorders. Section B will explore the ethical imperative for the recognition of the right, appealing to principles of autonomy and utility. Section C highlights the flexibility of the common law duty of confidentiality, such that the barrier it presents to the creation of such a right is sidestepped. Section D provides a detailed, holistic exploration of the requirements for

* BCL International (UCC), LLM Candidate (University of Edinburgh). I am grateful to Deirdre Madden and to the staff at the school of Medical Law and Ethics in the University of Edinburgh, for continuing to inspire me within the subject area. Further thanks to Cormac Hickey and to the Editorial Board for helpful comments on an earlier version.

[1] Dean Bell and Belinda Bennet, 'Genetic Secrets and the Family' (2001) 9 Medical Law Review 130.

[2] The American Society of Human Genetics Social Issues Subcommittee on Familial Disclosure, 'Professional Disclosure of Familial Genetic Information' (1998) 62 American Journal Human Genetics 474.

[3] [2015] EWHC 1394.

[4] *ABC v St George's Healthcare NHS Trust & Ors* [2017] EWCA Civ 336.

[5] The legal duty that will be discussed throughout, in recognition of a right to be informed of the genetic information of one's family member, is a legal duty on the healthcare practitioner. Separate discussions on the ethical and legal duties on the patient themselves are outside the scope of this paper.

the successful creation of a duty of care in negligence law, through the lens of the proceedings in *ABC*. It is submitted that failure to adequately consider proximity and foreseeable harm as independent criteria, resulted in confusion between the existence of a right, and the scope of that right. Finally, Section E will highlight the relevance of Human Rights Frameworks, ultimately revealing the 'incremental' rather than 'giant step' that recognition of such a right represents.[6]

B THE ETHICAL BASIS OF A RIGHT TO BE INFORMED

Our starting point in addressing the legal question is an exploration of the ethical principles and resulting tensions that underpin it. Principles of autonomy, as in respect for one's independent self-governance; and utilitarian principles or the avoidance of harm, together inform moral interests and subsequent duties in this context. When juxtaposed, these interests and duties create problematic tensions.

I Moral Rights of the Patient

The aforementioned principles amount to the ethical (and legal) duty of confidence owed to a tested patient in respect of their genetic information. Genetic test results are considered private and sensitive information for a number of reasons. Owing to its centrality in what influences one's identity or self-image, self-perception, and self-confidence; it is obvious that a patient would want to control access to this information.[7] Gilbar further emphasises that this sensitivity arises out potential feelings of guilt towards relatives or others, and implications in the realms of employment and insurance.[8] Principles of autonomy should therefore, rightly enable a tested patient to control the flow of genetic information which stems from the testing she has undergone. Non-disclosure can be articulated as an independent autonomous decision not to inform.[9]

Moreover, the trust between doctor and patient that information will remain confidential ensures that patients remain candid with their doctors, thereby seeking adequate medical

[6] *ABC* (n 3) [27].
[7] The American Society of Human Genetics Social Issues Subcommittee on Familial Disclosure (n 2) 478.
[8] Roy Gilbar, 'Patient Autonomy and Relatives' Right to Know Genetic Information' (2007) 26 Medicine and Law 677, 679.
[9] Roy Gilbar, 'The Passive Patient and Disclosure of Genetic Information: Can English Tort Law Protect the Relatives Right to Know?' (2016) 30 International Journal of Law, Policy and The Family 79, 80.

advice. Non-consensual disclosure has the potential to do irreparable harm to this relationship, and thus to the patient herself, because of a 'perceived betrayal of trust'.[10]

There are therefore clear ethical interests in genetic information remaining confidential. Where we appreciate the unique nature of genetic information however, it becomes readily apparent that interests of equal moral importance arise in respect of the tested patients' 'at-risk' relatives.

II The Unique Nature of Genetic Information

It is a truism that genetic information can reveal data of interest to persons beyond the tested patient. 'Faulty genes can promulgate through generations of a family … the presence of a deleterious gene in a patient is indicative of prospective health of blood relations'.[11] Not only is genetic information 'individually identifying' but simultaneously and 'trans-generationally familial'.[12] It has been contended therefore that given the 'joint-account' that relatives have in the one gene pool, knowledge gained through genetic testing is a familial, shared possession, rather than one belonging to the individual.[13]

III Moral Rights of the Relatives

If we accept that genetic information is familial information rather than individual, a paradigm of pure confidentiality becomes problematic.[14] Traditionally, the right to confidentiality is built on the presumption that information is relevant only to the patient, which is 'categorically untrue of genetic information'.[15] Appealing to the same principles of autonomy and utility, which inform the widely accepted moral imperative that sensitive information is kept confidential; recognition of a relative's interest in familial genetic information may also be framed as a moral imperative. Knowledge that one will develop a genetic condition 'may prompt a re-evaluation of priorities to ensure that available healthy time is maximised', or may encourage informed choice about available treatment.[16] Disclosure of genetic risk therefore not only promotes autonomous decision making, but further can encourage avoidance of unnecessary harm caused by avoidable genetic disorders. We are therefore presented with a

[10] Meredith Blake, 'Should Health Professionals be under a Legal Duty to Disclose Familial Genetic Information' (2008) 34 Commonwealth Law Bulletin 571, 575.
[11] Michael Fay, 'Negligence, Genetics and Families: A Duty to Disclose Actionable Risks' (2016) 16(3-4) Medical Law International 115, 116.
[12] The American Society of Human Genetics Social Issues Subcommittee on Familial Disclosure (n 2) 477.
[13] Blake (n 10) 573.
[14] Fay (n 11) 117.
[15] ibid.
[16] Blake (n 10) 576.

conflict of interests in autonomy and privacy on the part of the patient, and interests in autonomy and disclosure on the part of at-risk relatives.

In this regard, where 'the equal moral worth of every human being' formulates the foundation of our ethical starting point, it cannot justifiably be concluded that the interests of at-risk relatives are any less important than those of tested patients.[17]

IV Relational Autonomy

Within ethical debates in this context, a relational account of autonomy is gaining momentum; increasingly lauded as the paramount concern.[18] A relational account of autonomy perceives the individual not as an atomistic entity, but as socially embedded, 'influencing and being influenced by her significant others'.[19] Within this paradigm, 'to promote one's autonomy, one must promote the common good of the family [or community] to which one belongs'.[20] In the context of genetics, a relational account of autonomy requires that the interests of relatives be taken into account when considering disclosure, because doing so ultimately and more legitimately promotes the autonomy of that patient, given their reliance on family members 'to pursue life plans'.[21]

It is submitted however, that over-reliance on a relational account of autonomy is for a number of reasons problematic. Primarily, to rely on a relational account of autonomy to define our approach to the disclosure of genetic risks, would assume that all persons have a close, intimate relationship with their relatives. Undoubtedly, this is not true of all familial relations. Where these relationships are fraught, or defined by hostility or mere indifference, relational autonomy loses force. Further, over-emphasis of a relational account risks potential regression to outdated paternalistic tendencies under the guise of 'relational autonomy'. Dove importantly notes that relational autonomy does not dictate that clinicians must override decisions not to disclose in favour of protecting the family unit as a whole.[22] A relational account of autonomy does not, as advocates for the approach in this context suggest, automatically translate into a need to tell

[17] Sridhar Venkatapuram, 'Health Inequalities, Capabilities and Global Justice' in Patti Tamara Lenard and Christine Straehle (eds), *Health Inequalities and Global Justice* (Edinburgh University Press 2013) 67.
[18] Roy Gilbar, 'Communicating Genetic Information in the Family: The Familial Relationship as the Forgotten Factor' (2007) 33 Journal of Medical Ethics 390.
[19] Roy Gilbar and Charles Foster, 'It's Arrived! Relational Autonomy comes to Court: *ABC v St Georges Healthcare NHS Trust* [2017] EWCA 336' (2017) 26(1) Medical Law Review 125, 132.
[20] Gilbar (n 9) 83.
[21] Roy Gilbar and Charles Foster, 'Doctors' Liability to the Patient's Relatives in Genetic Medicine: *ABC v ST Georges Healthcare NHS Trust* [2015] EWHC 1394 (QB)' (2016) 24(1) Medical Law Review 112, 115.
[22] Edward Dove, '*ABC v St George's Healthcare NHS Trust and Others*: Should there be a Right to be Informed about a Family Member's Genetic Disorder?' (2016) 44 Law and the Human Genome Review 91, 105.

the family; but rather into a need to consider the effect that their knowledge would ultimately have in allowing the autonomy of the genetic patient to flourish.

In addition, most accounts of relational autonomy envisage one's ability to make decisions contrary to the values of their community. Gilbar notes that supporters of a relational approach generally concede that an individual 'must have a private space in which she can reflect on her options'.[23] If our core concept of autonomy as an ability to self-govern is to remain intact, then a relational account exclusively cannot suffice in ethically justifying any particular course of action.

Nonetheless, there are those who, in the context of genetic confidentiality, suggest a '*total* reorientation' of the unit of care from the patient to the family.[24] Arguably, such suggestions stretch the relational account further than it ought to go, and are thus unconvincing. While it is undeniable that 'humans are quintessentially relational entities', this fact is not determinative in this context.[25]

Conceptualising autonomy as an individual interest, does not operate to neglect the weight of the interests of the social unit, but rather provides scope for its consideration insofar as it is necessary for the flourishing of that individual's autonomy. This is altogether preferable to having the interests of the social unit as our starting point where, as identified, individual interests risk being neglected completely. Retention of a focus on individual interests rather than familial, therefore, provides a more robust ethical foundation on which we can build our legal considerations, to which we now turn.

C THE LEGAL BASIS FOR A RIGHT TO BE INFORMED

In the opening section, the ethical tension between varying individual interests at play was highlighted. The moral imperative to have one's medical information remain confidential is a well-accepted and fundamental legal principle. In Ireland, the duty of confidentiality is informed by a myriad of legal frameworks, the constitutional right to privacy,[26] requirements under the Data Protection and Freedom of Information Acts,[27] the right to privacy recognised under Article 8 of the European Convention on Human Rights, and the common law duty of

[23] Gilbar and Foster (n 19) 132.
[24] Gilbar (n 8) 84.
[25] Gilbar and Foster (n 19) 132.
[26] As recognised in the case of *Kennedy & Arnold v Ireland* [1987] IR 587.
[27] Data Protection Act 2003; Freedom of Information Act 2014.

confidentiality. No corresponding legal matrix currently exists which recognises the established equal imperative that at-risk relatives be informed of a family member's genetic disorder. The existing legal framework will now be examined to establish a legally grounded right to be informed which is sympathetic to the identified ethical tensions.

I The Common Law Duty of Confidentiality

Among the identified sources of patient confidentiality, the doctor's duty of confidentiality at common law is the dominating principle in the context of genetic risk.[28] The duty of confidence is considered the most important rule under traditional conceptions of the doctor-patient relationship.[29] A right to be informed of a relative's genetic disorder is however in direct conflict with this duty; a legal tension reflecting the already identified ethical tension.

II Justified Disclosure

The right to confidentiality is however far from absolute, and in certain cases disclosure of otherwise confidential information is justifiable. The main justification for disclosure of otherwise confidential information, is a requirement in the public interest; an exception notable for its extraordinary flexibility'.[30] The leading case of *W v Egdell* saw the UK Court of Appeal set out specific criteria to be satisfied in order for a breach of confidence to be justified in the name of public interest: Non-disclosure must create an urgent risk of serious harm; the extent of disclosure is of the minimum necessary to avoid said harm; and on balance, the public interest protected by disclosure outweighs the public interest in maintaining confidentiality between doctor and patient.[31]

There has been no direct endorsement of *Egdell* in Ireland. Madden notes the high probability that a similar approach would be taken by Irish Courts however, particularly in light of the

[28] Blake (n 10) 577.
[29] Anneke Lucassen, Roy Gilbar, 'Disclosure of Genetic Information to Relatives: Balancing Confidentiality and Relatives' Interests' (2018) 55(4) Journal of Medical Genetics 285, 285.
[30] Australian Law Reform Commission, *Health Professionals and Family Genetic Information* (ALRC 96-2003) <https://www.alrc.gov.au/publications/essentially-yours-protection-human-genetic-information-australia-alrc-report-96/21-heal> accessed 24 November 2018.
[31] [1990] 1 Ch 359 [364].

Medical Council guide's exception in favour of disclosure in the public interest,[32] and the recognition that constitutional rights to privacy are limited in favour of the common good.[33]

Seeking to recognise a relative's right to be informed of a family members genetic disorder as a justifiable breach of this kind is, however, problematic. Firstly, it is difficult to align heritable genetic risks with the 'urgent risk of serious harm' required in *Egdell*. Although undeniably serious, the kinds of risk associated with deleterious genes are rarely immanent, and thus lack the requisite urgency. Additionally, a justifiable breach of confidentiality fails to recognise the identified moral imperative that relatives be informed of such information. A moral imperative requires obligated disclosure: not an exception to the rule, but a rule in itself. In this context, rather than aiming at justifying the 'breach', it is more appropriate to remove genetic information from the ambit of the doctrine of confidentiality altogether, given the ethical weight the protected interests ought to be afforded. We now consider other categories of data which have been so removed from its ambit and where disclosure is mandated.

III A Duty to Disclose?

The law has already been receptive of the idea of a positive duty to disclose otherwise confidential information, by deferring to weighty ethical or policy concerns. Statutory requirements mandate disclosure of certain categories of health information. The Infectious Diseases Regulations of 1981 for example requires all medical practitioners to notify the Medical Officer of Health of certain diseases when detected among their patients.[34] The rationale behind this is to prevent the spread of infectious disease, and to facilitate the early identification of outbreaks. Genetic risk cannot reasonably be considered an infectious disease,[35] and indeed the diseases specified to be infectious diseases in the 1981 Regulations do not include genetically inherited conditions.[36]

A positive duty to disclose otherwise confidential information is also envisaged in circumstances where confidentiality poses a threat to the safety or life of another individual. In the US case of *Tarasoff v Regents of University of California*, the Californian Supreme Court

[32] Medical Council, *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (7th edn, Medical Council 2009) para 29 <https://www.medicalcouncil.ie/News-and-Publications/Publications/Professional-Conduct-Ethics/Guide-to-Professional-Conduct-and-Behaviour-for-Registered-Medical-Practitioners-pdf.pdf> accessed 15 March 2019.
[33] Deirdre Madden, *Medicine, Ethics and the Law* (3rd edn, Bloomsbury 2016) 146.
[34] Infectious Diseases Regulations 1981, SI 390/1981, s 15(2).
[35] Anne-Catherine Clark, 'Genetic Disease & Infectious Diseases' (*Venngage*) <https://infograph.venngage.com/p/106366/genetic-vs-infectious-diseases> accessed 15 March 2019.
[36] Infectious Diseases Regulations (n 34) sch 'Diseases specified to be Infectious Diseases'.

established that 'where there is a foreseeable risk of significant harm to an identified individual, doctors and other health professionals may have a duty to warn those individuals'.[37] There has been no case to this effect in Irish courts, and a somewhat alternative stance is adopted by the Irish Medical Council who maintains that disclosure in this context might be justifiable, rather than obligatory. Developments in the UK however, most notably in the case of *Palmer v Tees Health Authority*, indicate an increasing trend towards a *Tarasoff* style duty to disclose.[38] It can be assumed that Irish Courts would follow suit, again by appreciating that our constitutional right to privacy yields to the common good.

The positive duty established in *Tarasoff* has however been distinguished from a possible duty to warn at-risk relatives about potential risk, on grounds of causation. In *Tarasoff*, the Court reasoned that a medical practitioner becomes sufficiently involved with his patient, that he assumes some of the responsibility, not only for the patient, but for those who are threatened by the patient.[39] By this account, it is the patient's actions which are likely to directly harm others. Failure to disclose in this circumstance directly contributes to the risk of harm materialising. It is difficult to align this with cases concerning a pre-existing, naturally occurring deleterious gene, which cannot reasonably be said to have come about by the actions of the patient, or through non-disclosure.[40]

Given that information on genetic risk falls within neither of the identified categories of positive duty, the question we now face is whether the unique nature of genetic information, being both personal and shared, might provide a separate ground for excluding it from the ambit of the confidentiality doctrine.[41]

IV Extension to the Genetic Context?

International trends are increasingly favouring an at least limited duty on clinicians to inform at-risk relatives of a family member's genetic disorder. The World Health Organisation on their proposed guidelines on medical genetics recommend that confidentiality of genetic information be maintained 'except where there is a high risk of serious harm to a family member and the information can be used to avert this harm'.[42] The Council of Europe has echoed this

[37] [1976] 551 P2d 334 [18].
[38] [1999] EWCA Civ 1533.
[39] Madden (n 33) 139.
[40] The American Society of Human Genetics Social Issues Subcommittee on Familial Disclosure (n 2) 475.
[41] Blake (n 10) 584.
[42] 44th World Medical Assembly, 'Declaration on the Human Genome Project' (1992) 44 International Digest Health Legislation 150.

sentiment.[43] In the majority of national jurisdictions, including the UK and the Netherlands, professional and ethical guidelines encourage similar attitudes towards disclosure of genetic information.[44] Professional guidelines in Ireland are silent on the matter. By herein suggesting that this gap in guidance materials be filled for reasons of clarity, the significance of the *ABC* verdict in this jurisdiction going forward is emphasised.

In terms of case law, the US has specifically dealt with contentions for a right to be informed of a relative's genetic disorder. The Superior Court of New Jersey in *Safer v Estate of Pack* recognised the duty on clinicians to inform those 'known to be at risk of avoidable harm from a genetically transmissible condition'.[45] The matter has not yet been of concern for Irish Courts. The current case of *ABC v St George's Healthcare Trust* is the first specific consideration of these issues in the UK. The manner in which this case is decided will no doubt be of considerable guidance and influence for Irish Courts going forward.

V *ABC v St George's Healthcare Trust*

In *ABC*, the daughter of a male patient brought a claim against his clinicians for their failure to inform her about his diagnosis of having Huntington's disease. The claim was struck out by the High Court for want of a reasonable cause of action, based on her perceived failure to establish that the defendant clinicians owed her a duty of care. The matter has been readmitted for trial by the Court of Appeal, this latter court demonstrating significantly more appreciation for the moral significance of the moral interests of at risk relatives in being informed of a family member's genetic disorder. That said, both courts narrowly focused on policy considerations advanced against creation of the duty, to the exclusion of other relevant considerations required for a successful claim in negligence. It will now be shown that had all essential elements for a successful claim in negligence been properly assessed, what emerges is a duty in recognition of a right that is more specific, limited and legally palatable than that feared by the courts.

[43] Council of Europe, 'Recommendation No R(92)3 of the Committee of Ministers to Member States on Genetic Testing and Screening for Health Care Purposes' (1992) 43 International Digest Health Legislation 284.
[44] Nuffield Council on Bioethics, *Genetic Screening: a Supplement to the 1993 Report by the Nuffield Council on Bioethics* (London, Nuffield Council on Bioethics 2006) <http://nuffieldbioethics.org/wp-content/uploads/2014/07/Genetic-Screening-a-Supplement-to-the-1993-Report-2006.pdf> accessed 18 March 2019; General Medical Council, *Confidentiality: Good Practice in Handling Patient Information* (Manchester, General Medical Council 2017) <https://www.gmc-uk.org/-/media/documents/confidentiality-good-practice-in-handling-patient-information---english-0417_pdf-70080105.pdf.> accessed 18 March 2019; Regarding the Netherlands: The American Society of Human Genetics, 'Professional Disclosure of Familial Genetic Information' (2010) 62 American Journal of Human Genetics 464, 468 <http://www.ashg.org/pdf/pol-29%20.pdf> accessed 18 March 2019.
[45] [1996] 677 A2d 1188.

D TORT LAW: AN APPROPRIATE MECHANISM FOR RECOGNISING THE RIGHT TO BE INFORMED?

The aims of tort law include the deterrence of harm, corrective justice and distributive justice. If tort law is about protecting the vulnerable and the responsibility that we owe to others, then the disclosure of genetic information to family members would seem to fall within the protection it should afford. Indeed, Gilbar maintains that mandating disclosure of genetic information to at risk relatives neatly fits within the essential aims of tort law, by deterring the materialisation of avoidable risk, by rectifying an imbalance of power within familial relationships, and equal respect for one's opportunities in life, respectively.[46] Theoretically therefore, the law of negligence could be employed to promote the relatives' autonomy and utility interests in the context of genetics.

In a legal sense, however, to establish a successful claim in negligence, a claimant must establish that they were owed a duty of care, that this duty was breached in some way, and that the breach caused unto them significant harm.[47] As a right to be informed in this context cannot reasonably be said to exist without a duty to disclose, and in light of the *ABC* case, our focus turns to the first of these requirements, that being the establishment of a duty of care. Breach, causation and harm remain moot points outside of establishment of a duty.[48]

I Establishing a Duty: The *Caparo* Test

Establishing a legal duty of care must be done with appeal to the three-pronged *Caparo* test established in the UK,[49] and endorsed by the Irish Supreme Court in the 2001 case of *Glencar v Mayo County Council*.[50] The test requires: foreseeable harm; a proximate relationship between defendant and claimant; and that it is fair, just and reasonable to impose that duty. In the case of *ABC* the defendant clinicians conceded that non-disclosure would have resulted in foreseeable harm and that a relationship of sufficient proximity could be established. The upshot of this was that adequate considerations of these criteria were absent from both the High Court and Court of Appeal judgements. This proved fatal to the establishment of the duty

[46] Gilbar (n 9) 85.
[47] *Donoghue v Stevenson* [1932] UKHL 100.
[48] Fay (n 11) 142.
[49] *Caparo v Dickman* [1990] 2 AC 605 .
[50] *Glencar Exploration plc and Andaman Resources plc v Mayo County Council* [2002] 1 IR 84.

contended for, given the instrumental value that appropriate consideration of both foreseeable harm and proximity have in shaping the scope of any duty in tort law.[51]

(a) Foreseeable Harm[52]

A successful action in negligence is dependent on proof of harm. Given that, as established, non-disclosure can interfere with the autonomy of at risk relatives, it might be considered that interference autonomy alone is sufficient harm for these purposes. Chico has attempted to define harm in this manner; suggesting the courts recognise 'loss of autonomy' as a new head of damage.[53] While intuitively it seems appropriate to compensate in these 'loss of opportunity' cases, or to create 'loss of autonomy' as a new head of damage, its adoption must be aligned with the aims of tort law as mentioned above.

Tort law seeks to remedy injury, adverse outcomes, or 'legal harm' as labelled by Chico. Traditionally tort law will compensate for personal injury, psychiatric injury, and pure economic loss, therefore requiring some kind of interference with the physical or psychiatric integrity of the person.[54] In informed consent cases like *Montgomery & Chester* therefore, loss of autonomy became actionable only where interference with same implicated the physical integrity of the person.[55] It was the physical injury arising out of uninformed consent that formed the gist of the claim in these cases. Fay is appropriately concerned that to expand actionable cases in tort law to include general loss of autonomy could in this context encourage an overly-liberal disclosure of genetic risks, and an unwarranted contribution to an already over-litigious society.[56] Complimenting same therefore, a right to be informed of a relative's genetic disorder should be limited to where that risk amounts to physical and or psychiatric damage, more commonly through the eventuation of that same genetic disorder.

The ethical imperative for at-risk relatives to have their autonomy protected might appear inadequately recognised by this limitation. Our ethical concerns must however yield to practical bounds.[57] The limitation to immediate relatives contended for, restricts the huge

[51] Fay (n 11) 115.
[52] For the purpose of the present discussion, foreseeability of the harm in question will be assumed given the professional and educated position of the clinician.
[53] Victoria Chico, 'Non-Disclosure of genetic risks: The case for developing legal wrongs' (2016) 16(1-2) Medical Law International 3.
[54] Fay (n 11) 127.
[55] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; *Chester v Afshar* [2004] UKHL 41.
[56] Fay (n 11) 129.
[57] Fay (n 11) 131.

volume of cases that would arise out of a freestanding actionable interest in self-determination; while simultaneously remaining within the ambit of tort law objectives.

This logic may still be questioned however, for reasons of causation. Where we take the genetic disorder itself as the injury constituting the harm, the defendant practitioner cannot reasonably be said to have caused the harm directly. It would of course be entirely illogical to maintain that non-disclosure of one's predisposition to genetic risk had any causative role in that predisposition. Where non-disclosure of genetic risk thwarts one's ability to access early diagnosis and treatment of a manageable genetic disorder however, this can constitute actionable harm. This is distinguishable from a loss of opportunity type case previous detailed, on grounds that here the missed treatment opportunity is grounded in the increased pain and suffering that could have been avoided through early disclosure. The UK case of *McGhee v National Coal Board* saw the House of Lords receptive of this idea, holding that any material increase in the materialisation of a risk is to be treated as equivalent to a material contribution to the damage.[58] The Irish Supreme Court suggested support for this conceptualisation of causation in *Quinn v Mid-Western Health Board* in 2005.[59] Taking the BRCA gene as an example in this particular context, there are a multitude of benefits that come with early detection including preventative surgery, preventative medications and consistent monitoring and screening.[60]

Again, tort law aims at corrective justice; at putting the claimant back in their original position. Where a genetic disorder is untreatable, disclosure would not have altered that position, and thus no liability would rightly be established. Following this reasoning, genetic data should remain confidential when it reveals an inherited susceptibility to a disease that is neither preventable nor manageable.[61] When denying access to that information places family members at increased risk of harm, a right to be informed can be established.

(b) Proximity

As a general rule, tort law does not require that we be 'Good Samaritans', we owe a duty to only our 'neighbours'.[62] Proximity is established in this jurisdiction, as in *Kirby v Burke and*

[58] [1972] 3 All ER 1008.
[59] *Quinn (A Minor) v Midwestern Health Board* [2005] 4 IR 1.
[60] Mayo Clinic, 'BRCA Gene Test for Breast and Ovarian Cancer Risk' (*Mayo Clinic*) <https://www.mayoclinic.org/tests-procedures/brca-gene-test/about/pac-20384815> accessed 16 March 2019.
[61] ALRC (n 30).
[62] Fay (n 11).

Holloway,[63] where claimants are so closely and directly affected by any person's acts that they ought reasonably to be kept in contemplation by that person as being so affected.[64] In cases of omission therefore, the law of negligence has generally required that either the defendant voluntarily assumed responsibility for the care of the claimant, or that a special relationship of proximity exists between them. Working from the assumption that at-risk relatives are not patients of the clinician in question, establishing this voluntary assumption of care may be complicated (although a relational autonomy approach would suggest that a reorientation of care breaks down traditional conceptions of definition of patient).[65] In principle, however, it seems that a special relationship between a clinician and the genetic relatives of his patient can reasonably be established.

The ability to act so as to minimise harm is one criterion that is considered in determining proximity. Blake convincingly conceptualises a duty of care as an upshot of personal differences in knowledge and power'.[66] In the case of treatable genetic disorders the doctor, knowing the identity of the patient, is privy to information the knowledge of which empowers them to protect third parties at risk of harm.[67] In this case, injury can be minimised by 'timely and effective warning'.[68] In this regard, 'there is no essential difference between the type of genetic threat at issue here and the menace of infection, contagion or a threat of physical harm' and in all three contexts an element of moral responsibility derives from the ability to act.[69]

The identifiability of a potential victim of harm is one criterion repeatedly invoked by the courts in the establishment of this special relationship. In *Tarasoff* the Court relied on foreknowledge of the victim's identity to uphold a duty to warn.[70] In the US case of *Patel v Threlkel*,[71] identity was deemed 'at least necessary' to establish proximity.[72] For the sake of practicality of course, this makes sense. It could not reasonably be said that a doctor owed a duty to disclose information if those to whom he owed that duty could not be located for the purpose of

[63] [1944] IR 207.
[64] Fay (n 11).
[65] ibid 125.
[66] Blake (n 10) 587.
[67] Fay (n 11) 133.
[68] Gilbar (n 9).
[69] ibid.
[70] *Tarasoff* (n 37) 20.
[71] [1995] 661 So2d 278.
[72] ibid.

discharging that burden. Logically, indeterminate groups of people cannot be owed a duty of care.[73]

It is submitted that to focus on those known to be at risk of an inherited genetic disorder, is to limit proximity to the immediate family, who are most genetically related and alike, and therefore at the highest and risk of inheriting genetic disorders.[74] In the current context, any class of right holders beyond that scope would risk becoming indeterminate.[75]

Collectively therefore, proximity is reasonably, practically and justifiably established where potential victims of treatable genetic disorder, the potential eventuation of which is minimised by disclosure are identifiable.

Foreseeable harm and proximity therefore, where properly considered, present necessary limits on the right to be informed of familial genetic disorders, if that right is to be practicable and consistent with current tortious principles. With this appreciation lacking from the Court of Appeals paradigm on the matter in *ABC*, the in-depth focus on policy concerns under the third limb of the test was seriously inadequate.

(c) Fair, Just And Reasonable

As a test 'suffused with, if not actually composed of, policy considerations' the defendant clinicians in *ABC* advanced nine policy reasons to support the proposition that it is neither fair, just nor reasonable to impose a duty on clinicians to inform of a relatives genetic disorder.[76] The Court of Appeal, in recognising the significant moral interests that at-risk relatives have in receiving this information, considered each concern individually, concluding that the claimant's case was at least arguable. Had the limitations on the right contended for, arising out of an exploration of foreseeable harm and proximity in this context also been appreciated, rejoinders to these policy concerns of considerable more strength than those offered by the Court of Appeal would have been readily apparent.

(i) Confidentiality

In line with the requirements for a justifiable breach of confidentiality as previously identified, the clinicians in *ABC* cast doubt on whether the claimant's interests were of sufficient public

[73] Fay (n 11) 120.
[74] ibid 134.
[75] ibid.
[76] Gilbar and Foster (n 19) 114.

interest to override the public interest in maintaining confidentiality. By dismissing the claimant's interests as private interests only, the High Court failed to grasp the opportunity to promote the important social goals in eliminating or at least reducing the risk of developing hereditary disease and their consequential social damage.[77] The purpose of a right to be informed of treatable genetic risk provides this opportunity, and is thus entirely in the public interest. The Court of Appeal, lacking appreciation for the reasonable scope of the right contended for, missed this point.

The threat of this right to the public interest in confidentiality, that being its centrality to the trust on which traditional doctor-patient relationships are built, was an additional concern raised here. These concerns are assuaged with reference to case-law and professional guidance, wherein disclosure of otherwise confidential information is currently either mandated, or justified. The Court of Appeal questioned the self-evidence of a detrimental erosion of trust, given that these categories exist, with no such erosion resulting.[78] The response of the Court of Appeal here would have been greatly aided by reference to the rightful limited scope of the duty contended for. This reduces the number of cases in which confidentiality would actually be overridden, thus limiting the extent to which trust could be tampered with.

Further, it is true that complete dismissal of the interests of at-risk relatives in being informed of genetic risk would in itself act to the detriment of public trust. The Court of Appeal made note of the irrationality of protecting the autonomy of the patient (through laws on confidentiality), to the ignorance of the equal moral imperative to protect the autonomy of at risk relatives. 'To require clinicians to close their eyes to that essential characteristic of genetic information is not likely to increase public trust'.[79] This demonstrated a commendable appreciation for the unique nature of genetic information, evidently missing from the High Court judgements atomistic approach.

(ii) Conflicting Legal Duties

The fear of placing doctors in 'the invidious position of owing conflicting duties to multiple people, one or more of whom may not be his patient' was another policy concern engaged.[80] Although conceding that this would place clinicians under significant pressure, the Court of

[77] Gilbar and Foster (n 21) 119.
[78] *ABC* (n 4) [35].
[79] Gilbar and Foster (n 21) 118.
[80] *ABC* (n 4) [30].

Appeal still questioned whether it was correct to 'incentivise obligations in one direction but not the other'.[81]

With reference to the ethical principles discussed previously, it is submitted that not only are these 'conflicting duties' justifiable, but they are necessary. Primarily, it is necessary for the purpose of mirroring the ethical tension between the equally worthy individual interests of the patient and of the at-risk relative. The Court of Appeal has appeared to appreciate both sides of this tension more so than the High Court did.

Additionally, utilitarian principles, which seek to minimise harm, as is the foundational basis of tort law, require that both sides of this ethical tension be recognised by way of duty, 'to ensure that a proper balancing exercise is performed by the clinician' for the purposes of this minimisation.[82] Dove has advanced unwarranted fears that the recognition of a right to be informed of a relative's genetic disorder would allow 'another's autonomy trump the autonomy of the principle person to whom duties are clearly owed?'.[83] In light of the clear egalitarian balancing act that would arise out of the creation of two duties, contention that any one side of the scales trumps the other is regarded herein as ill-founded.[84]

Separate from ethical necessity, courts in the UK have held that 'people may be subject to a number of duties, at least provided they are not irreconcilable',[85] which Gilbar and Foster have interpreted to mean where duties differ in scope, and are independent of each other.[86] This, as evidenced, is the case in this context, where the suggested scope of the duty to disclose is significantly narrower than the scope of the duty of confidentiality.

(iii) The Burden Of A Duty

In order for any professional duty to be justifiable, it must be proportionate to the means available for its discharge. The clinicians in *ABC* expressed concern regarding the use of already limited time and resources owed to patients for the exercise of the duty contended for. The Court of Appeal, reframing this concern as a 'floodgates argument',[87] attempted a self-

[81] ibid [31].
[82] ibid.
[83] Dove (n 22) 107.
[84] It is appreciated that herein the concepts of egalitarian and utilitarian concepts are apparently conflated. The approach adopted is analogous to the approach to utilitarianism put forward by Hare in 'Utilitarianism': Richard Mervyn Hare, 'A Utilitarian Approach' in Helga Kuhse and Peter Singer (eds) *A Companion to Bioethics* (John Wiley & Sons 2013).
[85] *Lawrence v Pembrokeshire CC* [2007] EWCA Civ 446, 51.
[86] Gilbar and Foster (n 19) 116.
[87] *ABC* (n 4) [39].

declared weak and convoluted method by which to put information of genetic risk in an exclusive category of exception.[88] In doing they relied on the fact that 'it is only in the field of genetics that the clinician acquires definite, reliable and critical medical information about a third party, often meaning that the third party should become a patient'. [89] It appears that the Court of Appeal was here aiming at a restriction of the right synonymous with the limitations arising out of proximity and foreseeable harm requirements, the latter rendering the categories of claimant 'sufficiently narrow to serve the interests of justice'.[90] It is submitted therefore, if proximity and foreseeable harm were given independent and full consideration in *ABC*, concerns over the 'burden of the duty' would have been much more smoothly assuaged.

(iv) Harm to At-Risk Relatives Arising out of Disclosure

While, as has been mentioned, the establishing of two duties allows for an appropriate and necessary balancing act between potential harm, the defendant clinicians in *ABC* drew attention to 'the very real possibility that within a family group, knowledge may constitute a greater harm than non-disclosure'.[91] Psychiatric harm, and a breach of the potential 'right not to know' were the identified potential harms.

It has been shown that the creation of a duty to disclose genetic information allows for the ancillary creation of a balancing act, such that decisions on disclosure are made to minimise harm. This allows, as mentioned, for a holistic consideration of all potential harm arising out if either disclosure or non-disclosure. Further, by limiting the scope as we have to treatable conditions it is hard to deduce that more psychiatric damage would arise out of being told you have a treatable illness, than would from the eventuation of an otherwise avoidable risk.

Thus, 'recognition of the right not to know [and/or any other psychiatric damage] should not be a barrier to reform in this area but it is an important matter to be taken into account' in the balancing act that arises therefrom.[92]

It is hoped that all considerations thus far have adequately identified the far from absolute nature of the duty of confidentiality, the aims of tort law and pre-existing case law, statutory duties and professional guidelines, such that the incremental nature of the duty contended for

[88] ibid [40].
[89] ibid [43].
[90] Fay (n 11) 134.
[91] The American Society of Human Genetics Social Issues Subcommittee on Familial Disclosure (n 2) 480.
[92] ALRC (n 30).

is by now self-evident. Even if the creation of such a duty is the 'giant leap' that the defendant clinicians in *ABC* feared however, it is problematic to categorically reject such developments in the law because of earlier limitations which may no longer be logically or socially sound.[93]

II Is Tort Law the Answer?

A holistic appreciation for and exploration of all of the requirements for the creation of an actionable duty under tort law of negligence indicate that a *limited and specific* duty on clinicians to disclose genetic information, is an appropriate and necessary manner by which to recognise the right to be informed of a relative's genetic disorder. The establishment of a duty to disclose to immediate family members, where the genetic disorder in question is capable of being better managed or treated through disclosure, finds support in existing Tort law and case law. The Courts in *ABC,* for the want of an adequate exploration and appreciation of that legal framework confused the scope of the duty contended for with its general acceptance. The result was an erroneous eradication of necessary and incremental development in the law.

E HUMAN RIGHTS

It has been noted that the duty of confidentiality also falls within the ambit of Human Rights protection, under Article 8(1) European Charter on Human Rights (ECHR). Since the enactment of the ECHR Act 2003, the ECHR enjoys direct applicability in Ireland. It may therefore be questioned whether a right to be informed of a family members genetic disorder would directly undermine the right to have the privacy of one's information protected. Article 8 is not an absolute right however, and breaches of confidentiality are also justified where in accordance with law, and necessary in a democratic society. Here a 'public interest' narrative similar to that evident in tort law is gleaned. The private rights to individual privacy are amenable to the public needs of the society. The European Commission held that there was no case to answer in *Anderson v Sweden* as the disclosure in question pursued the legitimate aims of protecting 'health or morals' and the 'rights and freedoms of others'.[94] The High Court in *ABC* limited their consideration of Article 8 to this kind of analysis, seeking sufficient weight in Article 8(2) societal interest type arguments to override the patient's private Article 8(1) interests.

[93] Fay (n 11) 119.
[94] (1997) 14 EHRR 615.

This line of reasoning failed to recognise the inherent and arguably obvious individual and private interests of the at-risk relatives in Article 8(1). Article 8(1) has repeatedly been used for the protection of personal autonomy rights. In the landmark case of *Pretty v UK*[95] it was held that 'although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'.[96] As discussed, the disclosure of genetic test results offers a kind of protection to the self-determination of at-risk relatives that neatly fits within these guarantees. What ought to arise therefore, is a balancing act to be carried out between the private rights of the patient and the private rights of their at-risk relatives in decision making about disclosure. The conflict of interests at play ought to be determined based on an analysis of fact, rather than being pre-determined by the shape of the law.

Thus, a simple, conventional interpretation of Article 8 of the ECHR requires the legitimate recognition of a right to be informed of a family member's genetic disorder, even outside of the law of tort.

F CONCLUSION

The current law on confidentiality and on disclosure of genetic information has been considered 'unreasonably opaque and one area where some genetic specific regulation would be welcomed'.[97] In Ireland neither the law nor professional codes of conduct offer any guidance to medical practitioners on the matter of disclosure in the given context. The readmission of *ABC* for trial provides a valuable opportunity for necessary legal developments to be implemented in the UK. Against a backdrop of increased genetic testing and increased access to genetic information therefore, the decision reached will be of tremendous guiding value to both medical practitioners and law makers in this jurisdiction going forward.[98]

It has been argued that there should be a legally recognised right to be informed of a family member's genetic disorder. An understanding of the familial dimension of genetic information and an appreciation of the resulting conflict of individual interests that arises therefrom supports the establishment of such a right. A relative's interest in autonomy and disclosure are

[95] *Pretty v the United Kingdom* App no 2346/02 (ECtHR, 29 July 2002).
[96] Alastair Kent, 'Consent and confidentiality in genetics: whose information is it anyway?' (2003) 29 Journal of Medical Ethics 16, 61.
[97] ALRC (n 30).
[98] Fay (n 11) 141.

no less important than a patient's rights to autonomy and confidentiality, and recognition of this right would serve to ensure that a proper balancing exercise is performed.

This right is best recognised through the creation of a legal duty on clinicians to disclose genetic information to at-risk relatives, under the tort law of negligence. This positive duty can be accommodated within the existing framework of the law; where necessary limitations define its scope. The appropriate limitations become self-evident upon a holistic consideration of all three elements of the *Caparo* test, including foreseeable harm and proximity. The Courts in *ABC* failed in this regard.

Case law requires that foreseeable harm be limited to those circumstances of interference with the psychical or mental integrity of the person in a manner that would have been reduced or avoided through disclosure, i.e. to those genetic disorders that are better managed or treated upon early detection. In terms of proximity, immediate family members, by sharing the highest degree of genetic commonality with a tested patient are identifiable as those most at risk of being harmed by an identified deleterious gene. This identifiability, paired with a clinician's ability to act to minimise the materialisation of that risk, creates a special relationship between the clinician and at-risk relatives, satisfactory of existing principles of proximity. These practical limitations minimise the scope of the duty contended for, in a manner which serves only to undermine the weight of the policy considerations which preoccupied the majority of the Court's reasoning for rejecting it in *ABC.*

In creating this genetic specific right to be informed of a relative's disorder, 'care must be taken … to ensure that an appropriate balance is struck between the interest and the rights of the individual and the legitimate interests of the community to which that person belongs'. [99]The right contended for here, to be informed where one is an immediate family member, and at risk of a treatable condition, both finds support in ethical and legal principles, and is sympathetic to ethical and legal tensions that arise in the particular context of genetic information. It is hoped that the Court in *ABC* recognises previous errors if the law in this area is to adequately reflect what is fair, just, and reasonable.

[99] Kent (n 96) 18.

UN OURSE CANNELLE ET UN CUISINIER PAUVRE : UNE COURBE D'APPRENTISSAGE POUR L'ÉTAT DE NÉCESSITÉ EN DROIT IRLANDAIS

Diarmuid O'Leary*

A L'INTRODUCTION

Dans l'arrêt canadien, *Morgentaler v R*,[1] Justice Dickson dit:

> aucun système juridique ne peut reconnaître un principe qui habiliterait une personne à enfreindre la loi car, de son point de vue, la loi était en conflit avec une valeur sociale plus élevée. […] Il inviterait les tribunaux à se poser des questions sur le législateur et à évaluer les mérites des politiques sociaux sous-jacents les interdictions pénales.

Depuis longtemps, l'état de nécessité est considéré comme l'un des sujets les plus controversés dans le droit pénal.[2] Il y existe une vraie réticence de permettre l'utilisation ou d'étendre cette défense dans le *common law*, mais c'est un fait justificatif dans le droit français depuis le dix-neuvième siècle.

En 2006, la *Law Reform Commission* (LRC) a publié son rapport sur la défense de nécessité et contrainte en droit irlandais. Dans ses efforts, elle a utilisé les influences britanniques et les lois de cinq autres juridictions pour établir un chemin pour le droit irlandais. Mais, on maintient qu'elle a manqué un état important qui développe son droit sur l'état de nécessité depuis longtemps – la France. Donc, le but de cet article est d'analyser le rôle de l'état de nécessité en droit irlandais et en droit français, en analysant les origines, la jurisprudence relative et l'effet de son application. Ensuite, on discutera le futur de cette défense en droit irlandais, on utilisera l'influence français pour montre l'avantage de son application là-bas, et on parlera des réformes potentielles en trouvant un point d'équilibre entre les deux systèmes d'application. En substance, on revisite le rapport de la LRC et rajoute des influences français. Aussi, à cause de l'abondance des articles sur la défense de nécessité contre une poursuite pour le meurtre, cette dissertation essaye de discuter un rôle plus quotidien pour la défense, mais on parlera brièvement sur l'issue.

* Junior Sophister LLB (ling franc) (Sch.) (Candidate), Trinity College Dublin. The author wishes to thank Helen, Frank and Kellie for their support, and the Editorial Board for their contributions.

[1] [1976] 1 SCR 616.

[2] Conor Hanly, *An Introduction to Irish Criminal Law* (3eme edn, Gill & MacMillan Dublin 2015) 190.

D'abord, il faut qu'on définisse le terme défense en droit irlandais contre le terme fait justificatif. Pour les défenses, on parle des théories de justification et d'excuse qui veut dire soit qu'à cause des circonstances particuliers, les actions d'un délinquant sont légitimes, ou ne sont pas contraires à la loi, soit le délinquant, à cause de son capacité (un mineur par exemple), n'est pas responsable pénalement pour ses actions. Pour les faits justificatifs, l'idée c'est que dans certaines circonstances, l'infraction perd son caractère délictueux, parce que la société renonce à punir l'auteur de ce comportement, parce que ledit comportement est justifié par ces circonstances. Ils sont des circonstances objectives, indépendantes de la psychologie du délinquant (contrairement au critère plus large en droit irlandais), qui neutralisent l'élément légal d'une infraction. La conséquence, c'est que cette impunité s'étend à tous les participants à ces faits.

En pratique, la démence[3] ou la minorité, font partie de la catégorie de la défense en droit irlandais, mais en droit français, les deux choses font partie de la catégorie de l'imputabilité du délinquant (ou plus spécifiquement pour ces deux choses, la lucidité du comportement du délinquant). On ne peut pas nier que les deux critères français sont en effet des moyens de défense, et malgré le fait qu'il n'y a pas une distinction importante entre ces deux termes concernant l'état de nécessité, on continue d'utiliser des termes relatifs dans le contexte de cette dissertation pour être plus précis.

Il est important aussi d'introduire le principe de légalité en matières pénales au début, qui correspond au terme règle de droit en droit irlandais. C'est *nullum crimen, nulla poena, sine lege,* qui veut dire nulle infraction, nulle sanction, sans texte.[4] Il y a des justifications pour ce principe de légalité, par exemple l'intérêt de l'individu d'être averti par la loi avant d'agir, mais la justification le plus important dans ce contexte est le principe constitutionnel de séparation des pouvoirs: la création des infractions pénales relève du monopole du législateur (une justification qui est partagé par les deux systèmes de droit, même s'il existe des différences concernant le rôle d'un juge et le pouvoir de la jurisprudence).

[3] Dans son conception classique – dans l'ancien Code Pénal de 1810, l'article 64 prévoyait que la personne n'était pas responsable pénalement si elle était 'en état de démence au moment des faits'. Actuellement, le Code de 1994 n'utilise plus le terme de démence, mais de trouble psychique ou neuro-psychique.

[4] La traduction exacte veut dire nul crime, nulle peine, sans loi; Thierry Garé et Catherine Ginestet, *Droit pénal, Procédure pénale* (8eme edn, Dalloz 2014), maintient que cette règle est beaucoup trop restrictive, car sinon ça montrerait que le principe de légalité ne s'applique que pour les crimes et que pour les peines. Enfin, dire 'sans loi' est faux également, car il y a aussi des règlements qui sont concernés.

En droit français, on dit que le principe de la légalité s'applique aux incriminations, aux sanctions, aux procédures pénales et à l'exécution des peines. Le principe de légalité/règle de droit existe aussi en droit irlandais, mais son application est un peu moins stricte. Par exemple, un juge pénal irlandais ne peut pas créer une infraction pénale lui-même, mais la jurisprudence nous montre qu'il peut ajouter des circonstances aggravantes ou décider le standard concernant la prise des preuves (procédure pénale).[5] Mais, il faut noter aussi qu'il y a des exemples des juges français qui ajoutent des nouvelles règles, notamment dans l'état de nécessité, un exemple qu'on analysera plus tard. Néanmoins, pour le moment, c'est important de remarquer que ce principe existe dans les deux systèmes de droit, et qu'il y a des portés différents.

Finalement, il faut que l'on définisse l'état de nécessité dans un sens général. L'invocation de l'état de nécessité c'est une assertion d'un délinquant qu'il a commis une infraction dans le but d'obtenir une valeur plus haute. D'habitude, l'auteur de l'acte délictueux dit qu'il y avait un état d'urgence, et donc le droit peut (en principe) dire que ses actions sont justifiées par cet état d'urgence, ou ce but d'obtenir une valeur plus haute. Le but de cet article est donc de découvert le rôle actuel de l'état de nécessité dans les deux systèmes de droit, notamment en Irlande, les avantages de cette défense et les problèmes qui y sont associées. On essaye de conclure avec une réponse qui offrir une solution qui peut être appliqué en Irlande en utilisant l'influence britannique et français.

B DROIT IRLANDAIS

Dans son propre sens, il y a très peu des exemples des usages de la défense de nécessité en droit irlandais, et même que la *Law Reform Commission* semble d'insiste qu'elle vraiment existe dans les tribunaux irlandais, cet écrivain va essayer de montrer que la loi aujourd'hui n'est pas suffisante. Aussi, á cause du manquement de jurisprudence irlandais et le fait que dans le droit pénal on utilise beaucoup des influences britanniques, on examine les décisions des cours anglais avec un but d'établir la position actuelle en droit irlandais.

I L'Influence Britannique

On note l'origine de la défense de nécessité est trouvé dans un arrêt du dix-sixième siècle qui s'appelle *Reniger v Fogoss*.[6] Mais il n'y a aucun doute que cette affaire est éclipsée, juridiquement et non-juridiquement, par un arrêt plus récent et plus célébré – *R v Dudley et*

[5] Par exemple, *DPP v JC* [2015] IESC 31.
[6] (1552) 1 Plowd 1, 18.

Stephens.[7] La portée c'est que la nécessité n'est jamais une défense pour le meurtre, une issu qui on n'analyse pas dans cette dissertation, à cause de l'abondance des articles dans ce domaine, concernant les siamois par exemple.[8] Mais on note pour le moment une citation de cette affaire connue, celui de Lord Coleridge qui montre la vraie difficulté avec la défense: 'Qui doit être le juge de ce genre de nécessité? Par quelle mesure la valeur comparative des vies doit-elle être mesurée?'.[9]

Une ligne de jurisprudence plus intéressante, plus pratique et plus contentieux dans un monde contemporain, c'est les infractions de la route. On continue avec les influences britanniques pour le moment, en analysant une doctrine qui vient des années quatre-vingt – la contrainte des circonstances. La *Law Reform Commission* irlandais stipule que cette défense est une forme de nécessité sans en porter le nom[10] et il y a des écrivains qui sont d'accord avec cette assertion.[11] Donc, dans l'intérêt de faire une analyse cohérente entre les deux systèmes de droit, on continue d'utilise le terme nécessité. Alors, on commence avec une affaire qui s'appelle *R v Willer*[12] dans laquelle un individu est poursuivie pour mise en danger de la vie d'autrui, après avoir conduit sa voiture sur un trottoir afin d'échapper à une bande de jeunes qui voulaient faire violence à lui et à ses passagers. Le juge du fond a rejeté son application d'introduire la défense de nécessité devant le jury, mais la Cour d'Appel a cassé ce jugement, en déterminant que la question de nécessité aurait dû aller devant le jury populaire.

Cette approche a été confirmé par *R v Conway*,[13] un arrêt avec des faits similaires dans lequel Lord Justice Woolf offre les facteurs nécessaires pour introduire la défense: lorsque, selon les circonstances, il y a contraint de conduire comme il l'a fait (l'auteur de l'infraction) pour éviter des blessures graves, voire mortelles, pour lui-même ou pour une autre personne.[14] La cour a dit aussi que le standard du test est un standard objectif. Dans l'affaire *R v Martin*,[15] la cour a étendu la portée des décisions mentionné en disant que le juge du fond aurait dû permettre la question de nécessité aller devant le jury pour des faits exceptionnel – un père, qui avait son permis du conduire confisqué, a conduit son fils, qui était en retard pour travail, sous les

[7] (1884) 14 QBD 273.
[8] Par exemple, *Re A (conjoined twins)* [2001] 2 WLR 480 (Juge Walker).
[9] See (n 7) [28].
[10] Law Reform Commission, *Consultation Paper on Duress and Necessity* (LRC CP39-2006) 95-96.
[11] John Cyril Smith et Brian Hogan, *Criminal Law* (6eme edn, Butterworths 1988) 255.
[12] (1986) 83 Cr App Rep 225.
[13] [1989] QB 290.
[14] Les juges de la Cour d'appel affirme la déclaration (déjà fait) qu'il n'y a pas besoin de distinguer les termes nécessité et contraint des circonstances.
[15] [1989] 1 All ER 652.

menaces de suicide qui viennent de sa femme, qui avait lui-même des vraies tendances suicidaires. Lord Justice Simon Brown disait, définitivement, que la défense de nécessité existe vraiment dans le droit britannique dans des cas extrêmes, et on utilise un standard objectif.

Outre que ces exemples concernant les infractions de la route, on voit des élargissements dans le droit pénal,[16] mais on doit noter que les cours anglaises ont développé cette défense par analogie avec la défense de contrainte. La LRC cite Watson qui maintient que malgré le fait que la défense elle-même soit un bon développement, le phrase 'contrainte des circonstances' est 'maladroit et inapproprié',[17] et Lord Justice Rose de la Cour d'Appel a exprimé un souhait d'avoir une codification par la loi,[18] mais la LRC irlandais soutient qu'il n'y aucun doute que la défense existe.

II La Loi Irlandaise

C'est utile d'analyser la position britannique, à cause du manquement des arrêts irlandais, mais il existe des lois qui montrent l'existence de la défense dans le droit irlandais. Il est important aussi à ce point d'examiner la catégorie dans laquelle la défense de nécessité se trouve en droit irlandais, en posant la question – est-il une défense justicative ou excusatrice? Si on suivre le langage des cours anglais, il semble que, malgré le fait que la défense a le même effet n'importe quelle catégorie, l'usage de la terme 'contrainte' se place dans la deuxième théorie. La *LRC* est d'accord avec cette affirmation, et même si on sait que les faits justicatifs en droit français ont, naturellement, un effet justicatif, la discordance par rapport le droit irlandais n'est que théorique, sans effets pratiques. On soutient que la *LRC* accepte cette affirmation.

Il existe quelques exemples législatifs de la défense de nécessité. Section 6 de la Criminal Damage Act 1991[19] prévoit que c'est une défense d'une poursuite pour le dommage criminel de prouver que les dommages ou pertes causés à la propriété étaient accompagné par un but d'aider quelqu'un en danger, ou de sauvegarder une autre propriété, mais le dommage infligé aurait dû être raisonnable. Les actions des services d'urgence en cours de leurs efforts sont couvertes par la loi. Aussi, un autre exemple de l'usage de la défense est quand un médecin opère quelqu'un sans connaissance pour sauvegarder sa vie.

[16] Par exemple *R v Cole* [1994] Crim LR 582, dans lequel la cour a permis l'introduction de la défense dans une poursuite pour le vol.
[17] Law Reform Comission (n 10) 101.
[18] *R v Abdul-Houssain* [1999] Crim LR 570.
[19] Amendé par le Non-Fatal Offences Against the Person Act 1997, s 21.

Il y a aussi deux arrêts irlandais importants. Premièrement, concernant la loi d'interruption forcée de grossesse avant la rédaction du huitième amendement, il est soutenu qu'*Attorney General v X*[20] implique utilisation de la défense de nécessité. Dans cette affaire, la Cour Suprême décide que l'avortement peut être permis pour sauvegarder la vie de la mère. Hanly maintient même si l'affaire se concerne avec l'avortement (et pas le meurtre), on peut raisonner par analogie et dire que la défense de nécessité peut être développé contre une poursuite pour le meurtre dans les tribunaux irlandais.[21] Mais la deuxième affaire, un jugement de la '*Circuit Court*', offre un contre-argument concernant la disponibilité de la défense en droit irlandais.

Dans *DPP v Kelly*,[22] une délinquante est poursuivie pour avoir causé dommage à l'avion militaire des États-Unis, dans l'intérêt de sauvegarder les vies en Irak. La cour a rejeté une application d'utiliser la défense de nécessité pour empêcher un débat politique dans la cour, mais Monsieur Justice Moran offre ses réservations par rapport la défense en général: 'la société en général m'attend, en tant que juge, de mettre fin et empêcher d'anarchie sociale qui prévaudrait si les gens étaient autorisés à se faire justice eux-mêmes.' Ses sentiments reflet une citation intéressant d'un juge britannique qui dit: 'la nécessité peut facilement devenir un 'masque' pour l'anarchie.'[23] C'est intéressant de noter ce type d'argument car cela représente exactement le grand problème avec la défense de nécessité.

III La Report de la LRC

En 2006, la *Law Reform Commission* irlandais a publié son rapport sur la contrainte et la nécessité en droit pénal.[24] On a déjà mentionné quelques points fait par la Commission, donc on se concerne avec ses conclusions maintenant. Il recommande l'affirmation de l'existence de la défense de nécessité en droit irlandais et il rejette l'idée des cours britannique qui développe la nécessité par analogie avec la contrainte (comme un 'sous-section' de contrainte). On est d'accord avec cette conclusion, car, comme on verra en droit français, on peut régler la défense plus facilement dans sa propre catégorie, et on peut le développé plus succinctement dans les cours de la *common law* s'il possède son propre régime. On va élaborer cet argument à la fin par rapport de la position français. Or, Hanly note que la Commission favorise un

[20] [1992] IESC 1, [1992] 1 IR 1.
[21] Hanly (n 2) 194.
[22] *DPP v Kelly*, Unreported (CC, 1 December 2004) 'Suspended sentence for taking axe to US aircraft' *The Irish Times* (Dublin, 2 December 2004) https://www.irishtimes.com/news/suspended-sentence-for-taking-axe-to-us-aircraft-1.1168249 visité le 23 mars 2019.
[23] *Southwark London Borough Council v Williams* [1971] 2 WLR 467 (Lord Justice Edmund Davies).
[24] Law Reform Commission (n 10).

développement jurisprudentiel dans ce sujet[25] et cet écrivain n'est pas entièrement d'accord avec cette affirmation. Bien entendu, il y a des avantages associés avec le traitement d'une défense cas par cas, et on a beaucoup des influences britanniques dans ce sujet pour aider le développement. On a un fondement avec les lois mentionnées, et avec le rapport de la commission, un juge de fond peut accepter l'existence de la défense en droit irlandais. Mais, c'est clair que la nécessité est polémique, particulièrement car le droit pénal est potentiellement liberticide, et le manquement de certitude (l'idée de la règle de droit) n'est pas suffisante dans cette matière. On voit encore l'idée de Monsieur Justice Moran qui exprime ces réservations en suivant l'idée évoquée par la citation au début, et on accepte qu'un juge de fond a besoin de certitude, même qu'un délinquant l'a besoin avant d'acter. La potentielle inaction dans les situations dite dans l'état de nécessité porte des conséquences très graves, comme on a vu dans quelques arrêts britanniques. Donc, on n'est pas d'accord avec l'affirmation de la Commission, et on souligne l'importance de clarté dans ce sujet avec les lois positives. On souhaite de trouver une solution de droit positive pour le droit irlandais dans ce sujet, et en essayent de le faire, on analyse premièrement l'état de nécessité en droit pénal français.

C DROIT FRANÇAIS

L'état de nécessité est le terme utilisé par les juristes français de décrire un action normalement dite délictueux, mais à cause des circonstances exceptionnels, l'infraction perd son caractère illégal. On dit que les actions de l'auteur sont justifiées par ces circonstances. Donc, on va analyser l'origine de l'état de nécessité, son évolution d'une règle jurisprudentielle a une règle positive, son champ d'application par rapport le meurtre, et on va examiner l'effet de ce fait justicatif.

I L'Origine

L'état de nécessité n'était pas prévu par le code pénal de 1810,[26] il a été admis dans une affaire connue – L'affaire Ménard.[27] Dans ce cas, une femme vole du pain dans une boulangerie, et elle est poursuivie devant un tribunal correctionnel, devant le Juge Magnaud.[28] Elle explique

[25] Hanly (n 2).
[26] Rédacté sous l'empire de Napoléon.
[27] Mars 1898 à Château-Thierry, 'L'Affaire Louise Ménard et le « bon juge » Magnaud' (Les Archives Départementales de l'Aisne) https://archives.aisne.fr/documents-du-mois/document-l-affaire-louise-menard-et-le-bon-juge-magnaud-59/n:85. visitè le 23 mars 2019.
[28] Le 'bon juge' très connu en France, voir Pascale Robert-Diard «Le Juge Magnaud, défenseur de la cause des femmes » *Le Monde* (Paris, 1er août 2016) <https://www.lemonde.fr/festival/article/2016/08/01/le-bon-juge-magnaud_4976869_4415198.html> visité le 23 mars 2019.

qu'elle a volé et elle avait l'intention délictueuse, mais elle explique qu'elle était à la rue, avec un enfant en très bas âge, qui n'avait pas mangé depuis plusieurs jours, et qu'elle a volé parce qu'elle avait peur qu'il meure de faim. La cour[29] a admis l'existence d'un fait justificatif nouveau, celui de la nécessité. C'est une nécessité alimentaire ici et donc l'infraction pénale est commise sous des circonstances de nécessité. Ce fait justificatif a été codifié par le Code Pénal de 1994 (le code actuel), dans article 122-127.[30]

II Les Conditions de L'État de Nécessité

Il y a deux conditions qui sont prévoit par le Code Pénal et deux qui sont jurisprudentielles. Premièrement, il faut un danger actuel ou imminent. Ensuite, il faut la nécessité de l'infraction. Dans un jugement du Tribunal de Grand Instance de Paris,[31] un cuisiner est poursuivie parce qu'il a défoncé les portes d'un appartement inoccupé pour s'y installer lui-même, son épouse et son enfant que quelques mois. La ville porte plainte pour destruction d'un bien appartenant à autrui, et il invoque la nécessité. Il doit prouver le danger: il dit qu'il habite dans un studio de huit-mètres-carrés et qu'il perçoit un salaire de sept-milles-cinq-cents francs. Il expose qu'il a fait une demande de logement social au moins de mai, et en août lors des faits il n'a toujours pas de réponse à sa demande. Le juge du TGI retient l'état de nécessité, au motif que l'exiguïté du logement est objectivement constitutive d'un danger réel et actuel. Donc, il a prouvé que l'infraction est nécessaire et mesurée au danger actuel qui le menaçait ainsi que son enfant.

La troisième condition est prévue par la jurisprudence – l'utilité sociale de l'infraction. Garé remarque que la Cour de Cassation insiste sur cette règle,[32] même si ce n'est pas prévu par le Code. Ici, on trouve la même idée que celui évoquée par Juge Dickson. dans la citation au début, mais ici la cour ne le traite pas comme étant un problème. L'idée c'est que l'état de nécessité doit avoir permis de sauvegarder une valeur plus importante que la valeur que l'on sacrifice. A ce stade, c'est important de parler de l'idée des valeurs sociales, particulièrement en contexte de droit français. D'abord, les juristes français[33] insiste que les sociétés se structurent autour d'un certain nombre de principes qu'on appelle 'valeurs', qu'elles estiment

[29] Il y avait un appel fait par Le ministre public devant la CA d'Amiens, qui statue le 22 avril 1898. Elle va faire une substitution de motifs - elle confirme la relaxe (le non-punition) mais utilise pour motif qu'il n'y avait pas d'intention délictueuse. Originalement, Magnaud a considéré que la nécessité (alimentaire ici) a constitué une contrainte morale.

[30] articles 122-127 du Code Pénal 1994 – 'N'est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle-même, autrui ou un bien, accomplit un acte nécessaire à la sauvegarde de la personne ou du bien, sauf s'il y a disproportion entre les moyens employés et la gravité de la menace.'

[31] Jugement du Tribunal de Grand Instance de Paris (TGI) (le 28 novembre 2000*)*.

[32] Garé et Ginestet (n 4) 102.

[33] ibid, généralement chapitre 1 sur la principe de légalité.

essentielles à leur cohésion, à leur survie. Ces valeurs essentielles ne doivent pas être bafouées. Donc, la société les protège par des infractions pénales – c'est le moyen par lequel une société punit l'atteinte à une valeur considérée comme essentielle. Donc, le droit pénal est le protecteur des valeurs sociales fondamentales et donc, conformément au principe de légalité, les valeurs protégées sont décidées par le législateur.

En Irlande, on n'insiste pas avec la même rigueur sur les valeurs et son caractère parlementaire, après avoir vu un période comme le '*Unenumerated Rights Doctrine'*, mais aujourd'hui, à cause d'une réticence judiciaire dans ce domaine, et l'énumération des droits fondamentaux,[34] ce n'est pas vraiment un problème. Néanmoins, on retourne à ce point dans la partie dernière. Donc, par rapport ce troisième condition, pour expliquer, dans l'affaire Ménard, la valeur sacrificiée est la propriété (le pain), la valeur sauvegarder est la vie de son enfant. Donc, on voit l'idée d'hiérarchie des valeurs. Mais il existe un problème – comment faire lorsque les deux valeurs sont équivalentes? Par exemple, pour échapper une atteinte à l'intégrité physique (souvent accidents de la circulation), une personne qui crée un autre accident et donc porte atteinte à celle de quelqu'un d'autre? La jurisprudence retient qu'on peut retenir le principe de nécessité, car l'acte est socialement neutre, même si les valeurs sont équivalentes.[35]

Il existe une quatrième condition qui vient des arrêts aussi – celui de l'absence de faute antérieur. Premièrement, on voit l'affaire de l'ourse Cannelle.[36] Le caractère titulaire de cette affaire était génétiquement le dernier spécimen d'ours d'origine pyrénéenne. Cette ourse a été abattue par un chasseur, qui est poursuivi et condamné pour destruction d'un animal appartenant à une espèce protégée. Il invoque l'état de nécessité. Il a été écarté au motif que le chasseur est expérimenté et au fait de la protection des ours des Pyrénées, et qu'il savait qu'il allait croiser cette ourse et cela aurait dû entraîner la suspension de la battue. La Cour d'Appel ajoute qu'après avoir été confrontés à l'ours une première fois, et s'être cachés, avertissant aux autres chasseurs de faire une diversion pour lui permettre de s'échapper. Il s'est 'placé lui-même dans la situation de danger et son comportement fautif est antérieur au coup de feu qu'il a tiré sur l'ours.' La Cour de Toulouse a rejeté la nécessité au motif qu'il avait commis une faute antérieure au danger, en quittant la niche où il s'était réfugié, et s'est lui-même placé en danger.

[34] Les juges peuvent être guidé par le 'UN Charter' pour discuter les valeurs par rapport des droits.
[35] La Cour de cassation, chambre criminelle (8 mars 2011).
[36] La Cour de cassation, chambre criminelle (1 juin 2010) 09-87, 159, publié au bulletin.

Une autre affaire qui montre l'application de cette dernière condition est l'affaire Lesage[37] dans laquelle un couple est dans leur voiture, la passagère a sur ses genoux son jeune enfant et l'enfant s'amuse avec la poignée d'ouverture de la portière. A ce moment-là, la voiture est en virage à gauche, et la femme et l'enfant tombent de la voiture. Pour ne pas leur rouler dessus, le conducteur donne un coup de volant sur la gauchère en faisant cela il va percuter et blesser gravement les passagers d'une autre voiture qui arrivait de l'autre côté. Il est poursuivi pour les blessures involontaires occasionnées aux passagers de la voiture d'en face. Il invoque l'état de nécessité mais la Cour de Cassation écarte l'état de nécessité, au motif qu'il a commis une faute antérieure, puisqu'il a 'créé lui-même ce prétendu état de nécessité, en laissant sa femme et son enfant prendre place à ses côtés.'[38] Garé remarque que cette dernière condition est critiquée par la doctrine car elle fait intervenir des données subjectives dans un fait justificatif par définition objectif.[39] J'adresse ce critique dans la dernière partie.

IV La Défense Contre le Meurtre

Il faut noter brièvement que ce fait justificatif étend au meurtre ou homicide volontaire selon des juristes[40] et des avocats.[41] Il n'y existe pas un arrêt qui montre que la défense peut être utilisé comme une défense pour le meurtre, mais c'est accepter que le 122-127 étend au meurtre par les juristes à cause du champ large de l'article. On maintient qu'on utiliserait le fait justicatif de la légitime défense[42] dans la plupart des circonstances car on note que les faits concernant l'état de nécessité sont très rares, ou impliquent la juridiction de la Cour pénale internationale (comme on le verra plus tard).

Garé remarque que l'article 122-127 et celui qui concerne la légitime défense sont presque identiques, et donc on maintient qu'on va utiliser cette dernière la plupart de temps peut-être à cause du volume de jurisprudence qui la traite, et parce que dans beaucoup des circonstances concernant le meurtre dans les cours nationaux, il y existe un riposte qui implique l'introduction de la légitime défense. Aussi, on peut dire que la condition de l'utilité sociale serait difficile de surmonter dans le cas de meurtre, et la condition de proportionnalité sans cette première peut être moins complexe pour un délinquant de prouver. Mais l'idée d'un champ d'application

[37] La Cour de cassation, chambre criminelle (28 juin 1958).
[38] ibid.
[39] Garé et Ginestet (n 4).
[40] Voir généralement *Prosecutor v. Erdemovic* (Opinion jointe séparée de Juge McDonald et Juge Vohrah) IT-96-22-A (le 7 octobre 1997) sur l'état de nécessité dans les systèmes de droit civil.
[41] Cabinet ACI spécialiste de droit pénal, 'Le meurtre ou homicide volontaire' <https://www.cabinetaci.com/le-meurtre-ou-homicide-volontaire> visité le 23 mars 2019.
[42] articles 122-125 du Code Pénal 1994.

large qui inclut le meurtre est accepté malgré le manque de jurisprudence. Donc, on note qu'une autre condition qui existe par rapport la défense de nécessité c'est l'absence d'une faute intérieure, qui ne nécessite pas pour la légitime défense. On verra l'importance de ce fait bientôt.

Comme on a déjà mentionné, l'effet d'un fait justificatif établi s'étend à tous les participants aux actions dites délictueux. Des lorsqu'il y a un fait justificatif, les infractions vont voir leur élément légal neutralisé.

D RÉFORME ET RAPPROCHEMENT

On va établir maintenant le chemin que le droit irlandais doit suivre en contexte des avantages de l'état de nécessité en droit français. Avant de le faire, on va examiner la défense de nécessité en droit international dans le but de trouver la position la plus sage d'appliquer en Irlande.

I Le Bataille Devant la Cour Pénale Internationale

En point de vue d'établir la force des positions concernant cette défense, ce serait intéressant d'examiner la bataille entre les deux idées devant les cours de la Cour pénale internationale (CPI). On note quelques choses : que la défense est contentieuse depuis longtemps devant la CPI, mais on peut constater qu'il existe vraiment selon ses lois propres, et finalement que les conditions d'application sont vraiment proches à la position française.

Premièrement, on note que la défense de nécessité est un issu devant la CPI depuis longtemps, dès les procès de Nuremberg. Des auteurs notent que le débat est traditionnellement une bataille entre le système de droit civile, dans lequel elle existe vraiment et qui s'étend au meurtre (comme on a montré par rapport le droit français), et le système de *common law*, ou elle est limitée.[43] La défense de nécessité est prévue par le Statut de Rome de la Cour pénale internationale en 1998. L'article 31 sur les motifs d'exonération de la responsabilité pénale (1)(d) dit que :

[l]e comportement dont il est allégué qu'il constitue un crime relevant de la compétence de la Cour a été adopté sous la contrainte résultant d'une menace de mort imminente ou d'une atteinte grave, continue ou imminente à sa propre intégrité physique ou à celle d'autrui, et si elle a agi

[43]Sarah Heim, 'The Applicability of the Duress Defense to the Killing of Innocent Persons by Civilians' (2013) 46(1) Cornell International Law Journal 165-190.

par nécessité et de façon raisonnable pour écarter cette menace, à condition qu'elle n'ait pas eu l'intention de causer un dommage plus grand que celui qu'elle cherchait à éviter.[44]

Bien entendu, c'est la phrase contrainte qui est utilisé ici, mais après avoir analyser les mots, c'est clair selon Risacher,[45] que la défense prévue par le statut correspond avec la défense de nécessité. Aussi, on note que les conditions données ne sont pas le même que ceux associé avec la défense de contrainte,[46] elles sont beaucoup plus proches au ceux de l'état de nécessité. Donc, on constate qu'on peut offrir la même conclusion que l'on a donné au-dessus concernant la loi britannique et le phrase 'contrainte de circonstance', que l'article 31(1)(d) se réfère à la défense de nécessité.

Or, on doit parler de la défense dans le contexte d'un arrêt très important de la CPI qui a été donné l'année d'avant *Erdemović* 1997.[47] Dans cet arrêt très connu, la cour a rejeté l'existence de la défense pour le meurtre des civils innocents. Cet arrêt est beaucoup critiqué dans le contexte du principe de légalité, car on maintient que la majorité de la cour n'a pas suivi une approche juridique, optant pour une résolution fondée sur des politiques[48] selon l'un des juges, Cassese, qui faisait partie de la minorité. Il a dit aussi qu'en trouvant que la défense ne peut pas être utilisée, on ignore totalement la position des systèmes de droit civiles, comme la France. Dans sa décision, Cassese a décrit un modèle alternatif qui correspond à la position française avec les conditions (y compris celui de l'Ourse Cannelle). La seule condition qu'il n'inclut pas c'est celui de l'utilité sociale. On peut dire que dans des arrêts qui arrive devant la CPI, la condition d'utilité sociale servirait à empêcher la défense contre le meurtre à cause du fait que les faits devant la cour concernent d'habitude les crimes de guerre ou contre humanité, par exemple dans ce cas connu. Il semble que dans l'intérêt de maintenir la défense en droit international, on a besoin d'exclure cette condition, un chose que cet écrivain ne recommande pas pour les cours nationaux. Cependant, on remarque que la CPI a, en effet, donné la 'victoire' aux systèmes de *common law* par rapport la non-existence de la défense contre le meurtre, mais la faiblesse de son raisonnement, et le fait que le Statut de Rome de l'année suivant permettre

[44] Statut de Rome de la Cour pénale internationale 1998, art 31 (1)(d) <https://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283948/romestatutefra1.pdf> visité le 23 mars 2019.

[45] Benjamin Risacher, 'No Excuse: The Failure of the ICC's Article 31 "Duress" Definition'(2014) 89(3) Notre Dame Law Review 1403-1426, 1410.

[46]Laurens van der Woude 'The Defence of Duress in International Criminal Law: Excusing the Unjustifiable' <https://www.academia.edu/31878139/The_Defence_of_Duress_in_International_Criminal_Law_Excusing_the_Unjustifiable> visité le 23 mars 2019.

[47] Cabinet ACI spécialiste de droit pénal (n 41).

[48] ibid (Opinion dissidente de Juge Cassese) [11].

l'existence de la défense (même s'il utilise un nom différent) avec des conditions assez similaires aux ceux de Cassesse,[49] indiquent que la défense existe vraiment. Malgré le fait que la défense n'a jamais était acceptée par la Cour, Heim et des autres auteurs sont d'accord avec cette proposition.

Donc, on voit la force de la position française dans un tribunal international, car son application de la défense a effectivement gagné le débat. Mais il existe le problème d'utilité sociale, et on le discutera dans la prochaine section. On va analyser le chemin que le droit irlandais doit suivre, mais, dans l'intérêt de rapprochement des systèmes de droit.

II La Courbe D'Apprentissage pour le Droit Irlandais

Après avoir analyser le droit en Irlande et en France, et après avoir vu comment l'état de nécessité a été adopté en droit international, maintenant on montre le besoin de l'influence français pour le droit irlandais.

On a examiné le droit britannique pour deux raisons. Premièrement, pour montre les difficultés associées avec l'évolution de l'état de nécessité en droit pénal, et deuxièmement, de l'utiliser pour trouver quelques choses qui peuvent renforcer l'adoption de droit français proposé maintenant. En parlant des difficultés, la première chose identifiée est le manquement connaissance concernant l'existence de la défense. Voici le problème le plus grand dans les cours anglaises car il empiéter sur le principe de légalité mentionné au début avec le problème d'hiérarchie des valeurs. Le manque de connaissance est néfaste pour le citoyen qui se trouve dans un état de nécessité. Bien entendu, dans ces circonstances exceptionnelles, on n'a pas souvent le temps de penser sur la loi. Mais prenez l'exemple du cuisinier français,[50] le conducteur sur le trottoir anglais[51] ou même la délinquante irlandaise qui a endommagé l'avion – ces acteurs avaient le temps de penser et de considérer leurs actions. Donc, le premier objectif est d'établir si une défense existe, et la *LRC* confirme qu'il est disponible. On est d'accord avec cette conclusion car le danger associé avec l'inaction dans les cas qu'on permet la défense est trop grave. De ne pas avoir cette ligne de défense qui permettre l'action est dangereuse, on ne doit qu'examiner les affaires mentionnées pour le découvrir. Le prochain problème se concerne avec le raisonnement par analogie avec la contrainte, et la LRC rejette cette idée à cause des confusions. On accepte cette conclusion aussi car il permet la défense de nécessité de

[49] Heim (n 43) 178.
[50] Jugement du Tribunal de Grand Instance de Paris (le 28 novembre 2000).
[51] *R v Willer* (n 12).

développer sa propre doctrine, une chose qui est important à cause de la multitude des circonstances qui peuvent se produise. Le troisième problème qu'on a mentionné quelques fois est la difficulté de déterminer qui sont les valeurs qui sont plus hautes que les autres. C'est énuméré dans les citations de quelques juges dans cette dissertation, et c'est le risque le plus grand associé avec la défense de nécessité. On soutient que la solution est trouvée dans le droit français accompagné par une règle britannique.

Donc, la solution offrir par cet écrivain est d'adopter la position française. On n'est pas d'accord avec l'affirmation qu'on doit développer la doctrine avec la jurisprudence seulement. Il y a besoin d'avoir un fondement fort sur laquelle on peut construire les règles jurisprudentielles. D'abord, je maintiens que les lois irlandaises mentionnées au-dessus ne donnent pas une réponse définitive par rapport l'existence de la défense de nécessité en droit irlandais. On a besoin d'un fondement fort comme l'article 122-127 pour vérifier sa vraie existence en matières pénales. On n'a pas besoin d'une codification de toutes les règles comme Lord Justice Rose a voulu, mais contrairement aux affirmations de la LRC, on ne peut pas la développer sans un fondement fort législatif, pour éviter la confusion judiciaire comme dans *DPP v Kelly*. Mais l'avantage de développé les règles dans les tribunaux est montré dans les cours françaises, dans lesquelles, on peut examiner chaque cas dans ses propres circonstances, mais avec la certitude que la défense existe. On doit avoir confiance dans la sagesse des juges faces avec cette défense, et un arrêt de la Cour d'appel de Poitiers[52] montre un exemple d'une cour qui n'écartèle pas l'état de nécessité. Une femme a volé de la nourriture, plusieurs fois et en grande quantité, et elle est poursuivie devant le tribunal correctionnel. La prévenue a reconnu avoir commis ces vols, et le caractère volontaire, devant les services de police elle explique qu'elle a peu de ressources et deux enfants à charge, donc elle a décidé de voler ces denrées alimentaires pour ses enfants. Devant la Cour, elle ajoute qu'elle n'avait rien à donner à ses enfants, et qu'elle voulait remplir de provisions. La nécessité alimentaire peut se comprendre pour le premier vol, mais le fait de faire des provisions rejette l'état de nécessité. On croit que le fait de laisser les juges de décider des cas sans une codification serait positif pour permettre les nouveaux états de nécessité, couplé avec une réticence judicaire d'écarteler la défense.

On préconise l'adoption de la quatrième règle française concernant la faute antérieure (celui de l'affaire d'Ourse Cannelle et qui a été recommandé par le Juge Cassese dans la CPI) car il

[52] Arrêt de la Cour d'appelle Poitiers au Juris Classeur Périodique, nombre 22933 (le 11 avril 1997).

assure que l'état de nécessité ne peut pas utiliser pour protéger un délinquant contre leurs actions délictueux qui sont les produits de leurs fautes. On soutient qu'il assure l'application correcte de la défense, et on n'est pas d'accord avec l'assertion que c'est une règle subjective car même si on examine les actions préalables du délinquant, on les examine objectivement pour décider que les actions sont ou ne sont pas des fautes qui empêchent l'utilisation de la défense. Aussi, le fait que l'établissement de ce fait justificatif dans une affaire étend l'impunité de tous les participants implique qu'il porte un standard objectif, donc on favorise l'adoption de ce principe pour assurer l'utilisation d'un test objectif. Dans cette manière, on accepte la position britannique qui adopte le test objectif[53] pour l'état de nécessité pour être cohérent dans ce domaine, mais on rejette l'idée de Monsieur Justice Woolf en décidant, par exemple, une règle pour chaque domaine de la loi – il a décidé un test pour les infractions de la route[54] mais on préconise l'adoption des règles ou conditions générales, et plus spécifiquement les quatre règles françaises, car ils permettent une évolution cohérente en respectant la règle de droit. Sans aucun doute, il favorise la simplicité aussi.

Finalement, on note qu'une difficulté est acceptée par les juristes français, par exemple, André Vitu qui dit: 'La comparaison n'est pas toujours aisée : s'il est facile de mettre en balance des biens ou des intérêts de même nature (deux vies, ou bien la vie d'une personne et l'intégrité d'une autre), comment faire s'il s'agit de valeurs de nature différente?'.[55] On a noté que la condition d'utilité sociale n'existe pas en droit international, mais c'est à cause des faits qui sont trouvé dans ces cours. C'est une condition que l'on doit maintenir en droit national pour assurer que le juge n'utilise pas un champ d'application trop large. Concernant la hiérarchie des valeurs, on propose un nouveau test qui vient d'un autre domaine de droit pénal français – l'idée d'une discordance manifeste.[56] Quand on trouve deux valeurs qui ne sont pas de la même nature, on décide que si l'un de ses valeurs n'est pas manifestement plus haute que l'autre, on ne peut pas utiliser la défense de nécessité. Par exemple, dans le cas d'un cuisinier qui a défoncé la porte,[57] il doit prouver l'utilité sociale: il a porté atteinte à la propriété pour sauvegarder l'état de santé de son enfant nouveau-né. Ici, on voit une discordance manifeste entre la valeur protégée et la valeur ignorée. Cette règle n'est pas énumérée en droit français, mais c'est clair

[53] *R v Conway (*n 13).
[54] ibid.
[55] André Vitu, 'Contrainte Morale Ou État De Nécéssité' (1986-87) Revue de Science Criminelle.
[56] Ce test vient d'un autre fait justicatif, celui du commandement de l'autorité légitime, article 122-4 alinéa 2, 'N'est pas pénalement responsable la personne qui accomplit un acte commandé par l'autorité légitime, sauf si cet acte est manifestement illégal'.
[57] See (n 50).

que les juges du fond utilisent une idée comme ça dans la jurisprudence, et donc, on propose l'adoption de cette idée en droit irlandais.

E CONCLUSION

Après avoir analysé l'histoire de cette défense contentieuse, on ne peut pas nier qu'il existe des pours et des contres. D'abord, la politique qui fait l'opposition est forte, car si on ouvre la porte pour des juges d'analyser et de comparer des valeurs sociales dans une hiérarchie, on risque trop d'interprétation subjective et donc, notamment, on porte atteinte au principe de légalité. Ce problème, comme Juge Dickson a déclaré, demeure toujours. Mais on maintient que la défense de nécessité est importante dans nos tribunaux depuis longtemps. Cependant, le but de cet essai n'était pas d'analyser les fondements théoriques de l'état de nécessité (sauf que ce n'était pas possible de les ignorer), le but c'est d'établir sa position et son statut actuel dans ces deux systèmes de droit.

Il serait dommage de perdre la défense de nécessité en droit irlandais car la jurisprudence a montré qu'elle sert à protéger, inévitablement, ceux qui se retrouvent sans aucune alternative. Le fait que la LRC ait accepté son existence est favorable. Cependant, il a été soutenu que la Commission n'avait pas suffisamment examiné la nécessité. Le chemin qu'on doit suivre doit avoir des limites, des lignes directrices et de la certitude. On croit que le droit irlandais, après avoir analysé la jurisprudence, les lois positives et le report de la LRC n'a pas ceux-ci. Il faut remarquer aussi que le fait que le débat entre eux devant la Cour internationale ait été effectivement gagné par le droit civil ne dit pas que l'on devrait le suivre absolument. Or, il montre que les systèmes de *common law* peuvent appliquer quelques idées retrouvées dans des cours continentales. C'est une indication, bien sûr, que l'on devrait rapprocher les droits de défense sur la scène internationale, particulièrement par rapport à un sujet complexe et contentieux comme celui-ci.

Donc, en premier place, on a montré que le droit irlandais n'est pas suffisant actuellement. Il a été démontré que la loi française dans ce domaine avait été négligée par la Commission. Il a été noté qu'un fondement législatif est nécessaire et que la suggestion selon laquelle seulement un développement jurisprudentiel est suffisant n'est pas acceptée. Il faut un équilibre qui permet une forte base juridique pour adhérer au principe de légalité, et ensuite il faut la développer dans les cours, pour maintenir le grand avantage de la *common law*, c'est-à-dire son aptitude d'appliquer la loi plus spécifiquement aux faits particuliers. Ainsi, nous avons fourni quatre conditions qui devraient être reprises du droit français (qui sont en effet acceptées par la CPI)

avec le standard objectif britannique. Ceci fournit au juge et au citoyen un chemin clair et cohérent à suivre dans les cas et circonstances concernant l'état de nécessité. On a fini avec un soutient concernant la hiérarchie des valeurs, en introduisant un nouveau test de discordance manifeste, influencé par un autre fait justificatif français, pour avertir ‘l’anarchie’ de décider l’ordre sans certitude. Je propose que, dans l’intérêt de certitude, clarté et simplicité, c’est le chemin qu’on doit suivre en droit irlandais.

THE MAGDALENE LAUNDRIES: AN ONGOING HUMAN RIGHTS VIOLATION

*Anna Carroll**

A INTRODUCTION

This article makes the claim that the Irish State is in breach of its obligations under the UN Declaration of Human Rights (UDHR) and the European Convention on Human Rights (ECHR), among other human rights instruments, in respect of its current treatment of survivors of the Magdalene Laundries.

It addresses the assumption that this is merely a historic human rights violation, and outlines how the continuing failure of the Irish State to adequately compensate and ensure redress for victims of the Laundries, constitutes an ongoing breach of the right to a remedy guaranteed in the UDHR and the ECHR, leaving Ireland in breach of its international human rights commitments.

I History of the Laundries

The Magdalene Laundries operated in Ireland between the 1760s and 1996.[1] They were 'residential, commercial, and for profit laundries',[2] in which women and girls from the age of nine were incarcerated, attached to convents in towns and cities around the country.[3]

The laundries were run by four orders of Catholic nuns: the Sisters of Mercy (Galway and Dún Laoghaire), the Sisters of Our Lady of Charity (Drumcondra and Sean McDermott Street, Dublin), the Religious Sisters of Charity (Donnybrook and Cork), and the Good Shepherd Sisters (Cork, Limerick, Waterford and New Ross).[4] It is estimated that tens of thousands of

* BA (Law, Sociology and Politics) NUI Galway. I would like to thank Dr Maeve O'Rourke for her research recommendations; my mother, Paula Carroll, for her encouragement and support in every aspect of my education; and Elizabeth Coppin, to whom this article is dedicated, for sharing her experiences of life in the Magdalene Laundries and teaching me about the ongoing failure of successive governments to provide redress to survivors.

[1] James Smith, *Ireland's Magdalen Laundries And The Nation's Architecture Of Containment* (1st edn, Manchester University Press 2007) xiv.

[2] Maeve O'Rourke, *Justice for Magdalenes: Submission to the United Nations Working Group on the Universal Periodic Review* (Twelfth Session of the Working Group on the Universal Periodic Review, Human Rights Council, 6th October 2011) 2.

[3] Maeve O'Rourke and James Smith, 'Ireland's Magdalene Laundries: Confronting a History Not Yet in the Past' in Alan Hayes and Máire Meagher (eds), *A Century of Progress? Irish Women Reflect* (Arlen House 2016) 3.

[4] ibid.

women passed through the laundries between the foundation of the Irish Free State in 1922 and the closure of the last laundry, in Sean McDermott Street, in 1996.[5]

Women were incarcerated because they 'were unmarried mothers, were the daughters of unmarried mothers, had grown up in the care of the Church and State',[6] or were detained as part of a judicial sentence.[7]

Detainees were forced to do laundry, sewing and ironing for religious orders and for both State and private contracts.[8] Women were deprived of adequate nutrition, sanitation and medical treatment, subjected to humiliating punishments and physically abused.[9]

II State Involvement in the Operation of the Laundries

The Laundries were run by religious orders; however, State involvement occurred through commercial contracts, the judicial system, the involvement of the Gardaí and the transfer of children from industrial schools.[10] The Inter-Departmental Committee (IDC) to establish the facts of State involvement with the Magdalene Laundries 'reported that 26.5% of referrals to Magdalene Laundries were made or facilitated by the State'.[11] O'Rourke and Smith argue that the real figure may be higher, as the IDC:

> treated transfers from other Magdalene Laundries (the second most common route of entry) as non-State referrals, and treated Legion of Mary and NSPCC referrals as neither State nor non-State because they included State and non-State referrals 'in unknown proportions'.[12]

[5] ibid 5, 6.
[6] O'Rourke (n 2) 2.
[7] Department of Justice and Equality, *Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries* (February 2013) 204 <http://www.justice.ie/en/JELR/Pages/MagdalenRpt2013> accessed 13 March 2019.
[8] O'Rourke (n 2).
[9] ibid 5, 6.
[10] Maeve O'Rourke, *NGO Submission to the United Nations Committee Against Torture in Respect of Ireland* (Justice for Magdalenes Research, July 2017) 12.
[11] O'Rourke and Smith (n 3) 3.
[12] ibid.

The State was involved in the operation of the laundries through the awarding of commercial contracts. O'Rourke and Smith note that the laundry washed by women in the Magdalene Laundries:

> came not only from members of the public, local businesses and religious institutions, but also from numerous government Departments, the defence forces, public hospitals, public schools, prisons and other State entities such as Leinster House, the Chief State Solicitor's Office, the Office of Public Works, the Land Commission, CIE and Áras an Uachtaráin (to name but a few).[13]

A further aspect of State involvement occurred because women were placed in Magdalene Laundries as part of a judicial sentence. O'Rourke and Smith note that 'the State used Magdalene laundries as an alternative to prison … paying for the detention of girls and women following conviction, on probation and on remand'.[14]

The State was also involved through the actions of An Garda Síochána. O'Rourke and Smith note that 'if girls and women escaped ... they were often captured and returned by the local Gardaí'.[15]

Another element of State involvement was the transfer of children in State care to the laundries. O'Rourke and Smith note that some women incarcerated in the laundries had been children who had grown up 'in the care of the nuns, in residential schools funded and regulated by the State, and were deemed unsuited for independence and/or still in need of "protection" upon reaching the age of release' and were therefore transferred to a Magdalene Laundry.[16]

O'Rourke and Smith note that:

> the State never regulated the Magdalene Laundries, despite its use of the institutions both as places of detention and care, its commercial dealings with them, its knowledge of the detention of young girls of school-going age, and its awareness that the girls and women were working for no pay.[17]

[13] ibid 4.
[14] ibid 3.
[15] ibid 5.
[16] ibid 3.
[17] ibid 5.

III Conditions in the Laundries

The women and girls imprisoned in the laundries were detained against their will for indefinite periods of time and without a statutory basis. Women were released only to family members, or if nuns arranged alternative employment for them, often in church-run schools or hospitals. They were not free to leave of their own accord, and women who attempted to escape were returned by the Gardaí.[18]

They were forced to do hard labour in the form of laundry, sewing and ironing for religious orders and for both State and private contracts without compensation.[19] This hard labour had a severe impact on their health, with women developing varicose veins as teenagers due to lifting heavy irons[20] and suffering from 'cold water rash' when working in the laundry.[21]

Women were deprived of adequate nutrition, sanitation and access to medical treatment. They were given a poor and limited diet and an inadequate amount of food.[22] Baths were often limited to one per month, and women were not allowed to bathe while menstruating. Women report not receiving medical attention for injuries such as burns and cuts, and often contracted scabies from the close contact with others and lack of basic hygiene.[23]

Women were not allowed to communicate with each other or form personal relationships, and could be punished for talking during their work. They were also cut off from their families, with visitation rights limited and obstructed and correspondence interfered with.[24]

They were subjected to degrading treatment, such as having their hair forcibly cut, and having their names changed or replaced by numbers (often several times during their lives as they were transferred from institution to institution).[25] Some women were also subjected to physical abuse and beatings in the laundries.[26]

[18] ibid.
[19] Maeve O'Rourke, 'Ireland's Magdalene Laundries And The State's Duty To Protect' (2011) 10 Hibernian Law Journal 200.
[20] Maeve O'Rourke, *Justice for Magdalenes, Submission to the United Nations Committee Against Torture* (46th Session, 2011) 10.
[21] O'Rourke (n 2) 10.
[22] O'Rourke (n 10) 11.
[23] O'Rourke (n 21) 10.
[24] ibid.
[25] O'Rourke and Smith (n 3) 4
[26] O'Rourke (n 2) 5.

IV Ireland's International Human Rights Commitments

The last laundry closed in 1996.[27] By then, Ireland had signed or ratified: the ECHR (ratified 1953); the UDHR (UN membership 14th December 1955); the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) (ratified 1985); and the UN Convention Against Torture (UNCAT) (signed 1992; ratified 2002).[28] The State was bound by all of the aforementioned instruments except UNCAT prior to the closure of the last Magdalene Laundry in 1996.

Some of the aforementioned treaties were applicable for a sustained period during the operation of the laundries. Violations of the European Convention on Human Rights and the United Nations Declaration on Human Rights occurred for several decades after ratification, as women in the laundries were deprived of their rights to freedom, from arbitrary detention and freedom from inhumane and degrading treatment, among other rights guaranteed under these treaties, from the time of ratification of both treaties in the 1950s until the closure of the last laundry in the 1990s.[29] Justice For Magdalenes Research notes that '[o]f most relevance … given the timeframe of the Magdalene Laundries abuse. . . [are] the Universal Declaration of Human Rights (UDHR) and the European Convention of Human Rights (ECHR)'.[30]

Other instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, were implemented towards the final years of the laundries' operation, and consistent and grave violations of rights such as the right to equality before the law and the right to an education occurred post-ratification within that timeframe.[31]

A number of these treaties, such as the UDHR, UNCAT and the ECHR, are specifically applicable at the present time because of the clauses they contain on the right to a remedy.[32] The State's failure to provide adequate redress to survivors constitutes an ongoing human rights

[27] ibid 2.
[28] Irish Human Rights and Equality Commission, *IHRC Follow-up Report on State Involvement with Magdalene Laundries* (June 2013) 2.
[29] O'Rourke (n 2) 3.
[30] ibid.
[31] ibid 6.
[32] ibid;.

violation: a violation of the right to an effective remedy, which breaches its positive obligations under these binding instruments.

V Incorporation of Human Rights Commitments in Domestic Law

Ireland has a dualist legal system, meaning that international law is not incorporated directly into domestic law.[33] Article 29.6 of the Constitution states that 'no international agreement shall be part of the domestic law of the State save as may be provided by the Oireachtas'.[34]

While Ireland is bound in international law by the obligations set out in treaties that it has ratified, such as the UDHR and the ECHR, those treaties are not directly applicable in Irish law.[35] In order to be enforceable domestically, a treaty must be domestically incorporated, either through an Act of the Oireachtas or an amendment to the Constitution.[36]

The European Convention of Human Rights Act 2003 incorporates the ECHR into domestic law at a sub-Constitutional level.[37] The Act obliges all organs of the State to carry out their duties in a manner compliant with the ECHR. The Act also imposes an obligation on the Irish courts to interpret statutory provisions and rules of law in a Convention compliant manner.[38] Where it is not possible to interpret a rule of law in a Convention compliant manner, the High Court or Supreme Court may grant a declaration of incompatibility with the ECHR.[39] On exhausting all domestic remedies, it may then be open to an individual to make a complaint to a regional or international human rights body. For example, at a regional level individuals can make complaints to the European Court of Human Rights.

The UN has nine core human rights instruments, each dealing with distinct issues. Ireland has ratified seven of these treaties, including the Convention Against Torture and the Convention on the Elimination of Discrimination Against Women, but none have been incorporated into

[33] Oireachtas Library and Research Service, *International Human Rights Law: Operation and Impact* (9 June 2016) <https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2016/2016-09-28_spotlight-international-human-rights-law-operation-and-impact_en.pdf> accessed 15 March 2019.
[34] Bunreacht na hÉireann, Article 29.6.
[35] Oireachtas Library and Research Service (n 33).
[36] ibid.
[37] Suzanne Kingston and Liam Thornton, *A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review* (Law Society of Ireland and Dublin Solicitors Bar Association, July 2015) 30. <https://www.lawsociety.ie/globalassets/documents/committees/hr/echrreport30july2015.pdf> accessed 15 March 2019.
[38] European Convention of Human Rights Act 2003, s 2.
[39] European Convention of Human Rights Act 2003, s 5.

domestic law.[40] As a result, the impact of these instruments on Irish law is limited in practice. However, under international law Ireland is obliged to respect the terms of human rights treaties.[41]

Despite not being incorporated into domestic law, international human rights instruments such as CEDAW and the UDHR are of persuasive authority in the Irish courts.[42]

Each of the UN conventions to which Ireland is a party, have individual complaints mechanisms, having established 'treaty bodies' of experts to monitor implementation of the treaty provisions by State parties.[43] These bodies may receive and consider individual complaints relating to breaches of the relevant treaties.[44] Irish citizens may, for instance, take cases alleging violations of the relevant Convention rights to the Committee Against Torture or the UN Human Rights Committee.

Moreover, Ireland is reviewed by the treaty body review mechanisms of the conventions which have been ratified by the state, such as Committee on the Elimination of Discrimination Against Women and the Committee Against Torture. Ireland is also subject to a Universal Periodic Review every four years. This process monitors the compliance of States Parties with the provisions of the UDHR.[45]

Other dualist legal systems include that of the UK, where the Human Rights Act incorporates the ECHR into domestic law.[46] In monist legal systems, such as in France, international treaties are incorporated directly into domestic law upon ratification.[47]

B HUMAN RIGHTS VIOLATIONS DURING THE OPERATION OF THE LAUNDRIES

The human rights violated prior to 1996 include: the right to liberty and freedom from arbitrary arrest or detention (Article 3, 9 UDHR; Article 5 ECHR); the right to be free from slavery,

[40] Oireachtas Library and Research Service (n 33) 8.
[41] ibid 8, 9.
[42] ibid 3.
[43] Nigel S Rodley, 'The Role and Impact of Treaty Bodies', in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (1st edn, Oxford University Press 2015) 623.
[44] ibid 634.
[45] Gisella Gori, 'Compliance' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (1st edn, Oxford University Press, 2015) 896.
[46] David Hoffman and John Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (3rd edn, Pearson Education Limited) 3.
[47] Stefan Kadelbach, 'International Law and the Incorporation of Treaties into Domestic Law' (1999) 42 German Yearbook of International Law 66.

servitude and forced or compulsory labour (Article 4 UDHR, Article 4 ECHR); the right to equality, non- discrimination and equality before the law (Articles 2, 7 UDHR; Articles 2, 3, 15 CEDAW; Article 14 ECHR); the right to freedom from cruel, inhumane or degrading treatment (Article 16.1 UNCAT; Article 5 UDHR, Article 3 ECHR); and the right to a standard of living adequate for one's health and well-being (Article 25 UDHR).[48]

Women were detained in the laundries for indefinite periods of time without a statutory basis.[49] Escapees were forcibly returned by the Gardaí. Women were released only to family members, or if nuns arranged alternative employment for them, often in Church run schools and hospitals.[50] This constituted a violation of the right to liberty and freedom from arbitrary arrest or detention.

Women's physical health was harmed by continuous hard labour. Constant exposure to cold water led to 'cold water rash' and heavy lifting caused women to develop varicose veins as teenagers. Baths were often limited to one per month, and women were not allowed to bathe on their period.[51] Women report not receiving medical attention for burns, cuts and scabies contracted from close contact with others and lack of basic hygiene.[52]

Violations of the right to freedom from slavery, servitude and forced or compulsory labour occurred because women were forced to do hard labour against their will and did not receive compensation. Furthermore, O'Rourke and Smith note that 'no contributions were paid on their behalf to statutory pension schemes'.[53]

O'Rourke notes that the women's rights to equality, non-discrimination and equality before the law were violated on the basis of their gender 'because but for the fact that they were women and girls, they would not have been imprisoned'.[54]

The women's right to freedom from torture or cruel, inhumane and degrading treatment was violated because they had their hair forcibly cut and their names changed or replaced by numbers. Some women experienced physical abuse and beatings.[55] The report of the Inter-

[48] O'Rourke (n 2) 3-6.
[49] ibid 2.
[50] ibid 4.
[51] ibid 16.
[52] O'Rourke (n 20) 211.
[53] O'Rourke and Smith (n 3) 4.
[54] O'Rourke (n 2) 6.
[55] ibid 5.

Departmental Committee also records that women were forced into solitary confinement, were forced to kneel for two hours as punishment and had soiled bed sheets pinned to their backs.[56]

Women in the laundries received inadequate nutrition and access to sanitation, were denied sufficient medical attention and did not have access to pain medication.[57] This constituted a violation of the right to a standard of living adequate for one's health.

The Irish State was responsible for these human rights abuses because the State was involved in the operation of the laundries through the provision of contracts, the involvement of An Garda Síochana, the transfer of children from industrial schools and the placement of women in Magdalene Laundries as part of a court order.[58] Despite this involvement, the State failed to regulate or inspect the laundries 'to prevent arbitrary detention, slavery or servitude, forced labour, psychological or physical torture or ill treatment and denial of education to children'.[59]

I Positive Obligations on the Irish State

The Office of the High Commissioner for Human Rights notes that '[b]y becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights', going on to explain that 'the obligation to protect requires States to protect individuals and groups against human rights abuses'.[60]

Therefore, under the UDHR and the ECHR, the State had a positive obligation to prevent human rights abuses, and it failed to fulfil this obligation. Smith notes in relation to torture and inhumane or degrading treatment that 'States must take positive action to ensure that neither State actors nor private entities can subject individuals to infringing treatment'.[61]

How should the State have protected the human rights of those in the laundries? Akandji-Kombe notes that '[i]n the view of the European Court, the prime characteristic of positive obligations is that they in practice require national authorities to take the necessary measures to safeguard a right'.[62] This would indicate that under the ECHR it was incumbent on the Irish

[56] O'Rourke and Smith (n 3) 8.
[57] O'Rourke (n 11) 11.
[58] O'Rourke and Smith (n 3) 3-6.
[59] ibid 2.
[60] Office of the High Commissioner for Human Rights, 'International Human Rights Law' <https://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx> accessed 15 March 2019.
[61] Rhona Smith, *Textbook On International Human Rights Law* (6th edn, Oxford University Press 2013) 237.
[62] Jean- Francois Akandji- Kombe, 'Positive obligations under the European Convention on Human Rights' Human rights handbooks, No. 7 (Council of Europe 2007) 7 <https://rm.coe.int/168007ff4d> accessed 15 March 2019.

national authorities to safeguard the human rights of those incarcerated in the laundries, perhaps through measures such as inspection and regulation.

The Office of the High Commissioner for Human Rights notes that 'the duty to protect [human rights] requires the duty-bearer to take measures to prevent violations of any human right by third parties'.[63] Therefore, having ratified the UDHR, Ireland was obligated not only to refrain from human rights abuses itself, but also to take steps to prevent the type of human rights abuses which occurred in the laundries. Its failure to do so through regulation or inspection of the laundries constituted an infringement of its international human rights commitments.

II Redress

Some steps have been taken to provide redress to the survivors of the laundries. This section will outline the State's attempts to provide redress to survivors thus far. This author will critique these attempts at redress, explaining why they are insufficient to discharge the responsibilities of the State towards survivors of the laundries and why the State is still in violation of its international human rights commitments.

In 2011, the Government established an Inter-Departmental Committee to establish the facts of State involvement with the Magdalene laundries, which published its report (the 'McAleese Report') on the 5th February 2013.[64]

The Inter-Departmental Committee comprised representatives from the Department of Justice and Equality, the Department of Health, the Department of Environment, Community and Local Government, the Department of Education and Skills, the Department of Enterprise, Jobs and Innovation, and the Department of Children and Youth Affairs. Senator Martin McAleese was selected as the Independent Chair of the Committee.[65]

The Committee's mandate was to establish the facts of State involvement in the operation of the laundries, and therefore it was beyond its remit 'to determine individual complaints, to make recommendations or to provide redress in individual cases'.[66] The Committee examined the records of the religious congregations who ran the laundries, drawing on their entry

[63] Office of the High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies HR/PUB/06/12 (2005) 11.
[64] United Nations Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined sixth and seventh periodic reports of Ireland*, CEDAW/C/IRL/CO/6-7 (9 March 2017) para 14(a).
[65] Department of Justice and Equality, *Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries* (February 2013) ch 2.
[66] ibid.

registers in particular.[67] These records were checked against court and prison records, probation service files, Department of Justice and Equality files and records of the Department of Health.[68]

The Committee investigated the State's funding of the laundries, the State's commercial contracts with the Laundries, State and non-State referrals and routes of entry to the Laundries, and the living and working conditions in the laundries.

This inquiry 'drew no conclusions regarding the State's responsibility for abuses or failures to prevent abuse, and was not an independent, thorough investigation into the abuse itself' but nonetheless 'the report revealed significant new information regarding the State's interactions with the institutions'[69] providing statistics about the number of women who entered the laundries, their ages and their routes of entry and exit.[70]

On 19 February 2013,[71] the then Taoiseach, Enda Kenny, made a State apology in the Dáil to the survivors of residential institutional abuse 'for the hurt that was done to them, and for any stigma they suffered, as a result of the time they spent in a Magdalene Laundry'.[72] President Michael D Higgins apologised once again to survivors of the laundries at 'Dublin Honours Magdalenes', a meeting of survivors, in 2018. In March 2013, the Residential Institutions Statutory Fund was established to oversee the compensation of survivors of institutional abuse.

The report of Mr Justice John Quirke on the establishment of an ex gratia payment scheme for the benefit of women who were admitted to and worked in the Magdalene Laundries was published in May 2013. In 2015, the Redress for Women Resident in Certain Institutions Act was established, providing health services free of charge to former Magdalene women from 1st July 2015.[73]

[67] ibid ch 7.
[68] ibid.
[69] O'Rourke and Smith (n 3) 4.
[70] ibid 3.
[71] Office of the Ombudsman, *Opportunity Lost: An investigation by the Ombudsman into the administration of the Magdalene Restorative Justice Scheme* (November 2017) 9.
[72] Maeve O'Rourke, 'The Justice for Magdalenes Campaign' in Suzanne Egan (ed), *Implementing International Human Rights: Perspectives from Ireland* (1st edn, Bloomsbury 2016) 1.
[73] United Nations Committee Against Torture, *Concluding Observations on the Second Periodic Report of Ireland*, CAT/C/IRL/CO/2 (August 2017) 2.

In June 2018, the Department of Justice funded ‘Dublin Honours Magdalenes’, a weekend which allowed Magdalene survivors to meet each other and discuss the commemoration of the laundries.

III Ongoing Human Rights Violations

The survivors of the Magdalene Laundries are still experiencing continuing violations of their human rights. This includes the violation of their right to an effective remedy and the violation of their right to equality and non-discrimination.

The continuing effects of incarceration on the survivors and the failure of the State to provide adequate redress constitutes an ongoing human rights violation, particularly in respect of the right to an effective remedy.

The group, Justice for Magdalene Research (JFMR), notes that the 'government’s behaviour towards former Magdalene women ... amounts to continuing dignity violations, compounding the torture or ill-treatment which the women suffered'.[74]

C THE RIGHT TO A REMEDY IN INTERNATIONAL HUMAN RIGHTS LAW

The right to an effective remedy is guaranteed under Article 8 of the UDHR and Article 13 of the ECHR , as well as Article 14 of the Convention Against Torture.

Article 8 of the UDHR states: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'[75]

The Office of the United Nations High Commissioner for Human Rights, in describing a state’s obligations to ensure the right to an effective remedy, notes that:

> The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law ... includes ... the duty to: investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may

[74] O’Rourke (n 10) 5.
[75] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

> ultimately be the bearer of responsibility for the violation; and provide effective remedies to victims ...[76]

Therefore, four key components of the right to a remedy include the investigation of human rights violations, the prosecution of those responsible for human rights violations, equal access to justice for survivors of human rights violations, and reparations for harm suffered as a result of human rights violations.

Article 13 of the ECHR states that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.[77] The jurisprudence of the European Court of Human Rights (ECtHR) has expanded on what is meant by the right to an effective remedy. The ECtHr has ruled that the right to a remedy includes the right to a prompt, independent and impartial investigation of alleged breaches of Convention rights which is capable of leading to the identification and prosecution of those responsible. The remedy must be accessible in practice as well as in law, and may include compensation in certain circumstances.

In *Kaya v Turkey*, a case concerning a killing by security forces, the Court ruled that 'Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible'.[78] In *Kurt v Turkey*, a case concerning a breach of the right to liberty and security of the person under Article 5 ECHR, the Court found a violation of Article 13 as a result of 'the absence of an effective and independent investigation capable of leading to the identification and punishment of those responsible'.[79]

The right to a remedy may also include compensation, particularly in situations where the right to liberty and security of person (Article 5) or the prohibition on torture, inhumane and degrading treatment (Article 3) has been breached. In *Ananyev and Others v Russia*, the Court found that 'anyone subjected to treatment in breach of Article 3 should be entitled to monetary

[76] Office of the United Nations High Commissioner for Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* UNGA Res 60/ 147 (16 December 2015) <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx> accessed 15 March 2019.
[77] Council of Europe *European Convention on Human Rights* (3 September 1953).
[78] *Kaya v Turkey* App no 22535/93 (ECtHR 19 February 1998); Clare Ovey, Bernadette Rainey and Elizabeth Wicks, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, Oxford University Press 2014) 140.
[79] *Kurt v Turkey* App no 24276/94 (ECtHR 25 May 1998); ibid.

compensation'.[80] In *Torreggiani and Others v Italy*, it was ruled that 'anyone who has undergone detention in violation of his or her dignity must be able to obtain compensation'.[81]

In *McGlinchey and Others v the United Kingdom*, it was ruled that 'compensation for non material damage must, in principle, be one of the available remedies' for a violation of Convention rights.[82] In *Keenan v United Kingdom*, the Court held that 'compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies'.[83] This finding was confirmed in *Stanev v Bulgaria*, where the Court found that where a violation of Article 3 is found, compensation for the non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies.[84] Where this was not available, this constituted a violation of Article 13.[85]

Rainey, Wicks and Ovey write that in some cases, the right to a remedy must include the possibility of compensation for the non-pecuniary damages flowing from the breach of the convention. They write that this is particularly so where breaches of Articles 2 and 3 are found, but would also appear to be a requirement of the remedies available where there has been excessive delay in the administration of justice.[86]

In *Conka v Belgium*, the ECtHR ruled that 'the remedy required by Article 13 must be "effective" in practice as well as in law'.[87] In *Iovchev v Bulgaria*, the Court found that a remedy may be effective in law but not in practice.[88] The relevant Bulgarian legislation did not exclude the possibility of compensation being paid where a person had suffered inhuman and degrading treatment while in detention, but the process by which this had to be established was so onerous in the particular circumstances of the case, coupled with the delays which had occurred, that the applicant could not be regarded as having at his disposal an effective remedy for his

[80] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to access to justice* (January 2016). <https://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf> accessed 15 March 2019.
[81] *Torreggiani and Others v Italy* App no 43517/09 (ECHR 08 January 2013).
[82] *McGlinchey and others v the United Kingdom* App no 50390/99 (ECtHR 29 April 2003); ibid.
[83] *Keenan v the United Kingdom* App no 27229/95 (ECtHR 3 April 2001) [130].
[84] *Stanev v Bulgaria* App no 36760/06 (ECtHR 17 January 2012).
[85] Ovey, Rainey and Wicks (n 79).
[86] ibid 140.
[87] *Čonka v Belgium* Appno 51564/99 (ECtHR 5 February 2002); Olivier de Schutter, *International Human Rights Law* (2nd edn, Cambridge University Press 2014*)* 736.
[88] *Iovchev v Bulgaria* App no 41211/98 (ECtHR 2 February 2006).

complaint about the conditions of his detention and therefore there had been a breach of Article 13.[89]

Article 14 of UNCAT states that '[e]ach State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.'[90]

This right to redress is not time limited. The Committee Against Torture's General Comment No. 3 states that 'States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress'.[91]

In relation to historic human rights violations, the Committee Against Torture has noted in *Gerasimov v Kazakhstan* that victims who suffer breaches of the Convention Against Torture have an enforceable right to redress notwithstanding that the torture complained of occurred prior to Kazakhstan's ratification of UNCAT.[92] Kazakhstan was held to be in breach of UNCAT as a result of its failure to conduct an investigation into the complainant's allegations and to provide him with redress.[93]

O'Rourke and Smith note that: 'although the last Magdalene Laundry had closed before Ireland ratified the Convention Against Torture in 2002, the Committee accepted that the State held continuing obligations under the Convention, since ratification, to investigate allegations of and ensure redress for past torture or ill-treatment which was having significant continuing effects on survivors'.[94]

Therefore, the State has a binding obligation to provide a remedy to survivors of human rights violations under several international human rights treaties. Some of these treaties, such as the UDHR and the ECHR, were binding at the time of the human rights violations in question. However, the State is still obliged to provide a remedy under subsequent treaties, such as the

[89] Ovey, Rainey, Wicks (n 79) 135.
[90] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, 85.
[91] Maeve O'Rourke, 'Older people, dignity and human rights: towards the development of the rule against torture and ill-treatment in international human rights law' (PhD thesis, University of Birmingham 2018) 221.
[92] *Gerasimov v Kazakhstan* Complaint no 433/2010 (CAT 24 May 2012).
[93] ibid.
[94] O'Rourke and Smith (n 3) 6.

Convention Against Torture, despite the fact that Ireland was not bound by the treaty in question during the laundries' operation.

The same is true for the right to a remedy guaranteed in the International Covenant on Civil and Political Rights (ICCPR), which Ireland ratified in 1989: although the State was not bound by the ICCPR for a significant period during the laundries' operation, it is arguable that the state is still bound to provide a remedy under this treaty for actions which would constitute a violation of civil and political rights guaranteed under the ICCPR, even if those actions occurred prior to ratification.

I Violation of the Right to a Remedy

Ireland has violated the right to a remedy for survivors of the Magdalene Laundries in four ways. Firstly, the State has not thoroughly and impartially investigated the human rights abuses which occurred in the laundries. Secondly, the state has failed to prosecute the perpetrators of human rights abuses. Thirdly, the State has failed to provide survivors with equal and effective access to justice. Finally, the State has not provided effective redress to victims, given that the reparations offered were insufficient.

Human Rights NGOs and advocates for the Magdalene survivors, such as Justice For Magdalenes Research, have criticised the efforts made thus far at restitution. The State's response to the issue has also been questioned by the treaty review bodies of the United Nations, such as the UNCAT, the ICCPR, ICESCR, and CEDAW.[95]

II Lack of an Independent Investigation

The Irish State has not held an independent, effective and impartial investigation into allegations of abuse occurring in the Magdalene Laundries.

It has yet to investigate survivors' claims of cruel, inhumane and degrading treatment, despite UNCAT recommending an 'investigation into all complaints of cruel, inhumane and degrading treatment', as the Inter-Departmental Committee 'had no powers to investigate alleged abuse'.

[95] O'Rourke (n 10) 4.

Both JFMR and the IHREC have stated that the Inter-Departmental Committee to establish the facts of State involvement with the Magdalene Laundries was not an independent, thorough and effective investigation into human rights violations in the laundries.[96]

The investigation had a narrow remit and was confined to establishing the facts of State involvement in the Magdalene Laundries. Its remit did not extend to investigating allegations of human rights abuses, and the Committee did not have the power to make findings and recommendations in relation to human rights violations. Moreover, its impartiality was compromised because its membership was drawn from the government departments involved in the operation of the Magdalene Laundries.

In spite of this, the Government has claimed that the findings of the Inter-Departmental Committee demonstrated that 'systematic torture or ill treatment of a criminal nature' did not occur in the Magdalene Laundries.[97] This statement is in direct contravention of the findings of the IDC, which stated that women and girls were involuntarily detained in the laundries, were stripped of their identities, were forced to work constantly, were not compensated for their work, were subjected to degrading punishments, and were buried in unmarked graves.[98]

It also contravenes the findings of a provisional human rights analysis of the contents of the IDC Report by the Irish Human Rights and Equality Commission, which stated that women were deprived of their liberty, were deprived of their right to an education, and were subjected to ill-treatment. [99]

It further contradicts the findings of the Magdalene Commission Report, which found that forced unpaid labour, involuntary detention, degradation of detainees and denial of education to children of school going age were systemic features of the Magdalene Laundries.[100]

As a result, the Government has denied the need for an independent investigation regarding the Magdalene Laundries abuse. Consequently, the government has refused to 'compel the public production of archival evidence' concerning the operation of the laundries from the religious

[96] ibid.
[97] ibid 7.
[98] ibid 8, 9.
[99] ibid 9, 10.
[100] ibid 10.

congregations, and 'it refuses to release its own archive of State records regarding the Magdalene Laundries to the public', further hindering the possibility of an investigation.[101]

The jurisprudence of the European Court of Human Rights indicates that the right to an investigation is an integral part of the the right to a remedy for serious human rights violations. Antkowiak writes that in *Aksoy v Turkey* and in *Mentes v Turkey*, the Court 'interpreted Article 13 as guaranteeing ... in the event of very serious allegations, the carrying out of a full investigation by public authorities'.[102]

It is of particular note that '[i]n *Aksoy*, "the fundamental importance of the prohibition of torture" demanded independent action by the State.'[103] This further proves that Ireland is in breach of its commitments under the ECHR in failing to conduct a thorough and impartial investigation into the serious human rights abuses which occurred in the Magdalene Laundries. The finding in the Court is *Aksoy* is pertinent here as this treatment of women in the Magdalene Laundries constituted a breach of the non-derogable right to be free from torture, inhumane or degrading treatment as guaranteed under Article 3 of the ECHR, a circumstance in which the Court has clearly outlined the necessity of an investigation.

III Failure to Prosecute Perpetrators

The Irish state has not taken measures to ensure the prosecution and punishment of the perpetrators of human rights violations in the Magdalene Laundries. It has failed to hold the religious congregations or any individual perpetrators accountable for human rights violations in the laundries, an action which extends to a failure to compel the religious orders which ran the laundries to open up their archives for the purposes of a criminal investigation. The State has also repeatedly said that it knows of no factual evidence to support allegations of systematic torture or ill treatment of a criminal nature in the laundries.

In addition to the absence of a government initiated criminal investigation, survivors have also been unable to prosecute those responsible for the crimes against them through the criminal justice system. Justice for Magdalenes Research states that several Magdalene survivors 'have made complaints to An Garda Síochána regarding their treatment in Magdalene Laundries' and

[101] ibid 4.
[102] Thomas Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience', 2002 <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1421&context=faculty> accessed 16 March 2019.
[103] ibid.

that 'despite these complaints, no action has been taken to hold individual or institutional perpetrators of abuse accountable'.[104]

JFMR states that 'the common law crimes of false imprisonment, kidnapping, assault and/ or battery outlawed much of the treatment experienced by girls and women in Magdalene laundries', thereby providing a basis for criminal prosecution. [105]

However, the Irish government does not consider the treatment of women and girls in the Magdalene Laundries to have amounted to criminal behaviour, as is reflected in its position that it knows of 'no factual evidence to support allegations of systematic torture or ill treatment of a criminal nature'.[106] This has made it impossible for survivors to see the perpetrators of human rights abuses against them brought to justice through the criminal courts.

In its Concluding Observations on the Second Periodic Report of Ireland in 2017, the Committee Against Torture criticised the fact that Ireland 'has not undertaken an independent, thorough and effective investigation into allegations of ill-treatment of women and children in the Magdalen Laundries or prosecuted and punished the perpetrators'.[107]

IV Lack of Equal and Effective Access to Justice for Survivors

In addition to the absence of a sufficient response from An Garda Siochána, Magdalene survivors have found it impossible to access justice through the civil courts, because the government's ex gratia scheme for Magdalene survivors requires them to 'waive any right of action against the State' in exchange for payments and other supports under the scheme.[108]

In addition to this, the 1957 Statute of Limitations bars their claims due to the time period in which they occurred, despite the fact that the survivors were in no position to take a claim against those responsible for human rights abuses immediately following their release from the laundries due to their lack of education, their financial situation as a result of being subjected to forced labour without compensation, and the ongoing trauma they were enduring. O'Rourke notes that the Statute of Limitations has 'no exceptions in the interests of justice or the Rule of

[104] O'Rourke (n 10) 15.
[105] ibid.
[106] ibid.
[107] United Nations Committee Against Torture, Concluding Observations on the Second Periodic Report of Ireland, UN Doc CAT/C/IRL/CO/2 August 2017.
[108] Maeve O'Rourke, *Justice for Magdalenes Research, NGO Submission to the United Nations Committee on the Elimination of Discrimination Against Women* (2017) 12.

Law'[109] and that the State's 'established practice of pursuing litigants for the costs of failed actions'[110] further prevents survivors from accessing justice.

The government has stated that the ordinary criminal justice system is open to Magdalene survivors who wish to complain, but despite survivors having lodged complaints with the Gardaí, no large scale criminal investigation has been initiated.[111] Justice For Magdalenes Research argues that this is in part due to the government's position that no 'systematic criminal behaviour' occurred in the Magdalene Laundries.[112]

In 2017, the Committee Against Torture urged the Irish Government to 'ensure that all victims have the right to bring civil actions, even if they participated in the redress scheme, and ensure that such claims concerning historical abuses can continue to be brought 'in the interests of justice'.[113]

V Insufficient Attempts at Redress

The redress scheme offered by the State to the survivors of the laundries is insufficient. The State has not fully implemented Mr. Justice John Quirke's recommendations regarding the redress scheme, despite agreeing to accept all of his recommendations in full.[114]

In the first instance, the fact that the scheme is being provided on an ex gratia basis (as a favor or a gift), rather than 'as of right or as compensation for wrongdoing by the State', means that it does not properly constitute the type of redress which fulfil the right to a remedy.[115] O'Rourke argues:

> For a measure to count as reparation and to be understood as a justice measure, it has to be accompanied by an acknowledgement of responsibility and needs to be linked with other justice initiative such as efforts aimed at achieving truth, criminal prosecutions and guarantees of non-recurrence. Ex gratia schemes … cannot constitute reparations.[116]

[109] ibid.
[110] ibid.
[111] O'Rourke (n 10) 5.
[112] ibid 15.
[113] United Nations Committee (n 107).
[114] ibid 18.
[115] O'Rourke and Smith (n 3) 10.
[116] Maeve O'Rourke, Claire McGettrick, Rod Baker and Raymond Hill, 'Clann: Ireland's Unmarried Mothers and their Children, Principal Submissions to the Commission of Investigation into Mother and Baby Homes' (Clann Project October 2018) 140.

She further states that '[r]eparations in international practice [must be] framed under a process of acknowledgement of responsibility'.[117] Justice For Magdalenes Research has objected to the fact that the government is providing healthcare and financial payments to survivors 'on a strictly ex gratia basis and without reference to their experiences of abuse'.[118]

This payment scheme could only properly constitute reparations if it was provided in recognition of survivors' legal right to compensation for the human rights abuses perpetrated against them. Providing the redress scheme on an ex gratia basis effectively undermines the fact that the survivors are owed reparations as a legal right due to abuses perpetrated and facilitated by the State, further emphasising the State's refusal to recognise the laundries as constituting a form of systemic human rights abuse.

Moreover, the provision of the ex gratia scheme was linked to a relinquishment of survivors' legal rights against the State. In order to obtain financial payments from the Scheme, 'agdalene survivors were required to sign legal waivers, abandoning all rights of action against the State or any State agency regarding their experiences in Magdalene Laundries', before all aspects of the Scheme were explained or legislated for.[119] In effect, elderly, vulnerable, and in many cases impoverished survivors were faced with a stark choice between limited financial compensation and achieving justice through the legal system.

Aside from the issues inherent in providing compensation on an ex gratia basis, the scheme itself is insufficient to cater to the needs of survivors, many of whom are elderly and vulnerable, in poor health and financially disadvantaged. Furthermore, many women who should be eligible to participate in the scheme have been excluded, either directly, in the terms of the scheme, or due to difficulties in accessing the scheme.

The medical card scheme is not extensive enough to meet the needs of survivors. The Quirke Report recommended that Magdalene survivors be granted medical cards equivalent to the 'HAA cards' provided previously to patients who contracted Hepatitis C 'through State provided blood products'.[120] This would have enabled survivors to access a range of services beyond those available on the standard medical card, as the HAA card 'gives access to numerous private

[117] ibid 141.
[118] O'Rourke (n 108).
[119] O'Rourke (n 10) 16.
[120] ibid 18.

as well as public healthcare services and wide ranging access to medicines, drugs and appliances'.[121]

However, the Redress for Women Resident in Certain Institutions Act 2015 did not guarantee healthcare equivalent to that provided to Hepatitis C patients. Justice for Magdalenes Research states that 'the RWRCI card for Magdalene women is almost identical to an ordinary medical card, which the majority of the women resident in Ireland already hold'.[122] These cards do not enable survivors to access necessary therapeutic services, such as counselling to address trauma arising from their time in the laundries. The extension of the medical card scheme and the expansion of services provided would better fulfil their right to a standard of living adequate to one's health. The UN Committee Against Torture, in its Concluding Observations on the Second Periodic Report of Ireland, stated that Ireland should 'fully implement the outstanding recommendations on redress made by Mr Justice Quirke'.[123]

Approximately 40 women whom 'the Department of Justice has determined as having capacity issues' and who were incapable of participating independently in the restitution scheme have not been facilitated in assisted decision making and have thus been excluded from the scheme.[124] The Ombudsman found that 'a significant minority [of survivors] who faced difficulties in managing their own affairs' were not facilitated in 'assisted decision making'.[125]

Justice For Magdalenes Research has also stated that survivors who remain in the care of the orders of nuns who ran the Magdalene Laundries 'require access to personal advocacy services' in order to benefit from the scheme, as many of them 'do not have family members or others to assist or advocate for them'.[126] This means that some of the most vulnerable survivors have been excluded from the restitution scheme.

Several women who 'were sent to work in the laundries as children, from residential schools located in proximity to Magdalene Laundries'[127] have also been excluded from the restitution scheme. The scheme was defined as being for 'women who were admitted to and worked in'the Magdalene Laundries and the Department of Justice has chosen to exclude this group of

[121] ibid.
[122] ibid.
[123] United Nations Committee (n 107).
[124] O'Rourke (n 108) 11.
[125] Opportunity Lost: An investigation by the Ombudsman into the administration of the Magdalene Restorative Justice Scheme, November 2017 <https://www.ombudsman.ie/publications/reports/opportunity-lost/> accessed 16 March 2019.
[126] O'Rourke (n 108) 11.
[127] O'Rourke (n 10) 20.

survivors on the basis that these children were not 'admitted to' the laundries 'because they were on the rolls of the children's schools'.[128] For example, O'Rourke and Smith note that 'survivors of An Grianán "training centre", who were forced by the nuns to work in the High Park laundry, are deemed ineligible by the ex gratia scheme'.[129] The extension of the criteria for admission would allow these women to access compensation. In 2017, the Committee Against Torture expressed concern that 'the State party's ex gratia payment scheme does not apply to all women who worked in the Magdalen Laundries'.[130]

Furthermore, the religious orders who ran the laundries have not released their records to the public or to survivors. This has prevented survivors from accessing their complete medical records and tracing their families. If the government were to compel the religious orders to release their records to the public, this would protect survivors' rights to privacy and respect for family life.

VI Redress for Historic Human Rights Violations in an International Context

The issue of redress for historic human rights abuses has been contentious in many jurisdictions. In particular, the use of ex gratia payments has been called into question in countries such as Australia.

Tasmania, Western Australia and Queensland have introduced redress programs providing ex gratia payments for the abuse of children who were in institutional care or considered to be 'wards of the State'.[131] Winter has noted that the ex gratia character of the payments 'is mismatched with the requirements for appropriate redress'.[132] Winter notes that such ex gratia payment schemes do not acknowledge legal responsibility on the part of the State for the violations being compensated for and do not acknowledge that a victim has a prior legal right to compensation from the State. Winter also notes that these schemes 'involve claimants trading off potential legal rights to compensation in exchange for ex gratia payments'.

Other jurisdictions have made use of reparations payments in a way which more fully encompasses an admission of guilt and acknowledges the legal rights of victims. In 1988, the US Congress passed the Civil Liberties Act, which allowed the US Government to compensate

[128] ibid.
[129] O'Rourke and Smith (n 2) 12.
[130] United Nations Committee (n 107).
[131] Stephen Winter, 'Australia's Ex Gratia Redress' (2009) 13 Australian Indigenous Law Review 49.
[132] ibid.

Japanese-Americans who had been interned during World War II. This payment scheme, worth $1.25 billion, 'became a model for restitution cases and for redressing historical injustices' because the legislation 'included an apology and a declaration by the US Government that historical injustices ought to be amended'.[133]

VII Reflections on the State's Response

The inadequacies of the State's response to human rights violations which occurred in the Magdalene Laundries are not unique to this case. Similar failures to provide adequate redress can be seen in the State's treatment of survivors of other historic human rights abuses. The Committee on the Elimination of Discrimination Against Women noted in 2017, that survivors of symphysiotomy, and survivors of abuses in children's institutions and Mother and Baby Homes had not yet been granted an 'effective remedy, including appropriate compensation, official apologies, restitution, satisfaction and rehabilitative services'.[134]

The State's use of ex gratia payments has been seen in other cases involving human rights violations. The Irish State established an ex gratia scheme in 2014 for survivors of symphysiotomy.[135]

The State's failure to investigate human rights violations fully and to prosecute those responsible has been seen in other cases of historical abuse. In the case of survivors of symphysiotomy, the Committee on the Elimination of Discrimination Against Women noted in 2017 that 'no effort has been made to establish an independent investigation to identify, prosecute and punish the perpetrators who performed the medical procedure of symphysiotomy without the consent of women'.[136]

Limitations to state compensation schemes is a common issue in the State's response to human rights abuses. The Committee Against Torture has expressed its concern at the State's intention to end the provision of funding that may be required for assistance to victims of institutional child abuse in reformatory and industrial schools beyond 2019, 'at which point the redress scheme and Caranua, the State body responsible for providing assistance, will be dissolved.'[137]

[133] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices (*John Hopkins University Press 2001) 30.
[134] United Nations Committee on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of Ireland, CEDAW/C/IRL/CO/6-7 (3 March 2017).
[135] ibid.
[136] ibid.
[137] United Nations Committee (n 107).

It is arguable that the common failures in Ireland's response to human rights violations appear to stem from a desire to minimise legal liability for human rights violations which occurred in state institutions and therefore to minimise the economic repercussions for the State.

D CONCLUSION

In conclusion, it is argued that a state may be responsible for the violation of its citizens' human rights through the failure to fulfil its positive obligations to respect, protect and fulfil these rights. In such a situation, these human rights violations may be considered ongoing until such point as they are thoroughly, adequately and impartially investigated by the State, with the perpetrators held responsible, and until survivors receive adequate redress and compensation from the State.

This is because the State has positive obligations under the UDHR, the ECHR and UNCAT to provide access to justice and reparations for survivors of human rights violations. Until such time as it does so, it is violating the human rights of survivors and is in breach of its positive obligations under these treaties.

Such is the case with Ireland's Magdalene Laundries. The Irish State is responsible for the violations of the human rights of the women who were incarcerated in the laundries due to its failure to investigate or regulate the laundries despite its commercial dealings with them and its use of the laundries for the containment of women as part of a judicial sentence. The effects of these violations are still ongoing as they have not yet been adequately investigated by the State and the redress offered to the survivors thus far has not been adequate.

Therefore, it is submitted that the Irish State is currently in breach of its international human rights commitments due to its ongoing failure to fulfil the right to a remedy for survivors of historic human rights violations perpetrated and facilitated by the State.

TEANGA AN DLÍ IN ÉIRINN 1166-2019: ATHRUITHE AGUS ÚSÁID

*Cormac T Hickey**

A RÉAMHRÁ

Le teacht na Normannaigh i 1166, tháinig athrú ollmhór ar chóras an dlí in Éirinn. Roimh 1166, ba iad Dlí na mBreithiún agus Dlí na hEaglaise a raibh i bhfeidhm in Éirinn, ach leis an athrú seo tháinig dhá chórais eile ar an bhfód: an dlí coiteann agus dlí na Marchers, grúpa clainne ón Bhreatain Bheag lena dtugadh an chumhacht a gcuid dlí nósach féin a chur i bhfeidhm ina gcuid den tír. I dteannta leis an réimse leathan chórais, d'fheidhmigh an dlí trí réimse teangacha. Toisc gur córas Sasanach a bhí ann sa dhlí coiteann, ba iad na hathruithe sóisialta thall i Sasana, agus ní in Éirinn, a thug chúis leis na hathruithe sa chóras sin. Ach cad faoi na córais eile?

Cé go bhfiosróidh na hathruithe teanga an dlí le fada, níor díríodh fós ar chúiseanna na hathruithe seo. Ar aistríodh teanga an dlí ionas go dtuigfeadh na dlíodóirí í níos éasca, agus de dheasca sin, go bhfheidhmeoidh an dlí níos fearr? Nó an raibh tuiscint na ngnáthdhaoine mar chúis le teanga an dlí? Nó an raibh cumhacht níos spridiúla ag baint le teanga an dlí in Éirinn? Cuireann na ceisteanna seo ceist i bhfad níos mó in áireamh, ceist faoi fhoinse an dlí: an dtagann sé ón tsochaí, nó an gcuirfear é ar an tsochaí?

B NA hATHRUITHE ÓN gCONCAS AR AGHAIDH

I Teanga an Dlí Choitinn i Sasana

Cé gur tosaíodh an dlí coiteann mar dlí aonach, náisiúnta, le teacht na Normannaigh go Sasana i 1066, níor tugadh stádas oifigiúil mar theanga an dlí don Fhraincis go dtí beagnach dhá chéad bhliain níos déanaí. In áit na bhFraincise, d'oibrigh na cúirteanna trí mheán na Laidine.[1]

Ní mar choncaire ach mar chomharba dlíthiúil a mhaith le William I gur smaoineodh air i Sasana, agus de bharr na polasaithe sin, chinn sé go mbeadh gá ann go toghadh an Witenagamot é.[2] Sa chomhthéacs seo agus fonn William go gcoimeádfadh an dlí Sasanach faoin am sin, is mór an tseans gur fheidhmigh na *hundred courts* trí Bhéarla, fiú nuair a bhaineadh úsáid as an

* BCL (Law & French), University College Cork; LLM (R) Candidate, University of Edinburgh. Ba mhaith leis an t-údar a bhuíochas a ghabháil le Professor John W Cairns, Chair of Civil Law ag University of Edinburgh, as ucht a chomhairle ar dhréacht luath den alt.

[1] George E Woodbine, 'The Language of English Law' (1943) 18(4) Speculum: A Journal of Medieval Studies, 395, 397-398.

[2] ibid 405.

bhFraincis sa *Curia Regis* ag an am céanna.[3] Faoi stiúir a mhic, William II, d'aistrigh teanga an riaracháin ó Bhéarla go Laidin.[4] Bhí aistriú eile le teacht áfach, agus faoin am ar tháinig Henry II go hÉirinn, aistríodh cuid dlí William I go bhFraincis.[5] Ní raibh na hathruithe seo sa dhlí ionadaíoch den shochaí an am sin, ach ag an am céanna léiríonn an fhianaise gur leanadh an Béarla ar aghaidh mar theanga na ndaoine go dtí deireadh an 12ú aois agus gur múineadh an Fhraincis mar theanga eachtrannach sa ré sin.[6] Léiríonn Woodbine le scéalta cé chomh eachtrannach is a raibh an Fhraincis trí ré na hAngevins.[7]

Cé gurbh é an Béarla teanga labhartha na ndaoine, ba í an Laidin teanga scríofa an dlí sa 13ú aois.[8] Ba iad na *Provisions of Oxford 1258* (ar a bhfuil cáil orthu de bhrí gur ghlac Henry III le cumhacht na Bharúin ann) pointe tábhachtach i bhforbairt róil na teangan sa dhlí coiteann. Sa bhliain sin, d'fhoilsigh Henry III fógra inar gheall sé go n-oibreoidh sé faoi réim na *bProvisions*. An rud suimiúil faoin bhfógra seo, ó thaobh na teangan de, ná gur foilsíodh é i trí theanga – Laidin (teanga an riaracháin), Fraincis (teanga na corónach), agus Béarla (teanga labhartha na ndaoine). Dá bhrí sin, ba é seo an chéad fógra ríoga a fhoilsíodh i bhFraincis nó i mBéarla ó theacht na Normannaigh beagnach dhá chéad bhliain roimhe.[9] Sna 1270í, tosaíodh ag baint úsáid as an bhFraincise mar theanga an dlí, sa slí chéanna inar thosaigh an Rí ag baint úsáid as an bhFraincise go rialta faoin am seo freisin.[10] Léiríodh an aistriú seo i *Summa Magna*, leabhar inar foilsíodh taifead na gcúirteanna. Scríobhadh na hargóintí labhartha i bhFraincis, cé go bhfuil an chuid eile den leabhar i Laidin.[11] Arís ní hionann teanga an dlí agus teanga na ndaoine, rud a léiríonn leabhar scoile de chuid Walter de Bibbesworth sa 13ú aois,[12] agus an bhéim a chur Éadbhard I ar thábhacht an Bhéarla ina óráid chun na Pharlaiminte i 1295 agus é ag lorg breis airgid chun go leanfar leis an gcogadh i gcoinne Philippe IV na Fraince.[13] Faoi dheireadh rinne Éadbhard III iarracht an Béarla a chur i bhfeidhm mar theanga an dlí i 1362,

[3] ibid 426.
[4] ibid 405.
[5] William Rothwell, 'The Role of French in Thirteenth-Century England' (1976) 58(2) Bulletin of the John Rylands Library 445, 457.
[6] Woodbine (n 1) 415; Rothwell (n 5) 458.
[7] Woodbine (n 1) 411-415.
[8] ibid 434.
[9] ibid 422.
[10] ibid 402; As na deich litir a scríobh Henry III i bhFraincis (scríobh sé 300 litir), scríobhadh naoi dóibh tar éis 1258; ibid 423.
[11] ibid 428.
[12] ibid 424.
[13] ibid.

ach theip ar an iarracht seo.[14] Níor cinntíodh gurbh é Béarla teanga an dlí choitinn go dtí beagnach 400 bliainí níos déanaí, le hAcht George III i 1730.[15]

II An Dlí Coiteann in Éirinn

Le linn na meánaoise, ba iad an Ghaeilge, an Béarla agus an Fhraincis na teangacha ba rathúla in Éirinn, cé gur úsáideadh an Laidin freisin.[16] Ba ghrúpa cultúrtha faoi leith iad na Lochlannaigh faoi am an choncais agus fiú níos déanaí,[17] ach síltear nach raibh Ioruais á labhairt acu ag an am sin. Caitheadh leo sa slí chéanna inar caitheadh leis na nGael ar aon nós.[18] I measc na saighdiúirí a tháinig sa choncas, bhí roinnt mhaith acu ó dheisceart Pembrokeshire sa Bhreatain Bheag,[19] áit a raibh cuid mhaith de chlann Pléimeannaise ann. Ach níl aon fhianaise ann a thaispeánainn gur labhraíodh an Bhreatnais nó an Pléimeannais in Éirinn sa ré sin. Ba í an Fhraincis teanga cheannairí na harm afách,[20] agus ba í an teanga sin a raibh tionchar ar an dlí in Éirinn.

In anneoin a n-oidhreacht Fraincise, ba í an Ghaeilge an teanga a labhair roinnt mhaith do na ceannairí le linn dhá ghlúin.[21] Léiríodh tábhacht agus cumhacht na Gaeilge i 1224, nuair a bhí ar Marianus Scotus, Ardeaspag Caisil, éirí as a phost de bharr a easpa Gaeilge.[22] Ar dtús, ba í an Fhraincis teanga na huaisle agus níor glacadh leis an mBéarla go dtí réim Éadbhard I.[23] Timpeall 1350, níor úsáid an chlann de Burgo ach Gaeilge amháin agus ní raibh aon cheangail eatarthu agus an riaracháin Normannach i mBaile Átha Cliatha. Ba í an Béarla teanga mhuintir Uí Dheasmumhnaigh, Uí Rua agus Mhic Gearailt de Chill Dara ag an am seo áfach.[24] Faoi thionchar Uí Ruaidh, ba é Cill Chainnigh ceann do na bailte is Sasanaí sa tír, leis an mBéarla mar theanga labhartha na ndaoine inti.[25] Ach ní an riail ach an eisceacht a bhí ann i gCill Chainnigh, le húsáid an Bhéarla ag titim trasna na tíre ó 1320,[26] agus fiú na huaisle ag labhairt

[14] ibid 396.
[15] ibid.
[16] Edmund Curtis, 'The Spoken Languages of Medieval Ireland' (1919) 8(30) Studies: An Irish Quarterly Review 234, 235.
[17] Henry Savage Sweetman, *Calendar of Documents Relating to Ireland, 1285-1292* (London, Longman 1879) No. 622 (1290 AD).
[18] Curtis (n 16) 234.
[19] Breis agus céad bhliain is fiche tar éis na concaise, bhí saighdiúirí ón mBreatain Bheag in Éirinn, Sweetman (n 17) No. 548.
[20] Grace Neville, 'French Language and Literature in Medieval Ireland' (1990) 15(1) Études Irlandaises 23, 24.
[21] ibid 33.
[22] Curtis (n 16) 252.
[23] ibid 236.
[24] ibid 243.
[25] ibid 241-242; Neville (n 20) 26-27.
[26] ibid 244.

Gaeilge i 1400.[27] Fiú amháin sna Reachtanna Chill Chainnigh 1367, déanadh gearrán faoi úsáid na Gaeilge ag an uaisle.[28]

Sa chomhthéacs casta seo, le Gaeilge ag fanacht mar theanga na ngnáthdhaoine agus cuid de na huaisle, le Fraincis á n-úsáid ag an gcuid eile den uaisle, agus le Béarla á n-úsáid in áiteanna faoi leith amháin, lean an dlí coiteann an córas Sasanaigh. Dá bhrí sin, níor úsáideadh an Ghaeilge mar theanga oifigiúil riamh faoi na Normannaigh.[29] Cé gurbh í an Fhraincis teanga nádúrtha na Normannaigh, ní raibh sí le feiscint in Acht Éireannaigh go dtí 1310, ach leanadh ar aghaidh leis an ról seo go dtí 1508.[30] Scríobhadh Achtanna agus Reachtanna Baile Átha Cliath, Gaillimh, Luimnigh agus Port Láirge ar dtús i Laidine agus i bhFraincis, ach tar éis 1365 ba i bhFraincis agus i mBéarla a bhíodar amháin.[31] Lean an córas 'Éireannach' an bealach céanna is a lean córas an dlí choitinn i Sasana, leis an aistriú ó Laidin go Fraincis sa dhara leath den 13ú aois agus tosú an aistriú go Béarla sna 1360í.

Leanadh ar aghaidh le na hiarrachtaí úsáid na Gaeilge a laghdú trí na blianta. I 1465, cuireadh dualgas ar Ghaeil sna cheantair faoi stiúir na Sasanaigh ainmneacha Sasanacha a thógaint le hAcht de chuid Parlaimint na hÉireann.[32] Níos déanaí, cuireadh cosc ar úsáid na Gaeilge i gcúirteanna Port Láirge i 1492-1493.[33] Ach cúpla bliain níos déanaí le *Poyning's Law 1495*, athghaireadh na hairteagail sna Reachtanna Chill Chainnigh a phlé úsáid na Gaeilge.[34] Ba théama tairseach é laghdú úsáid na Gaeilge amach ansin, cé gurbh í sin teanga na huaisle fiú go dtí an 17ú aois.[35]

I ndiaidh na hathruithe sin, d'oibrigh cúriteanna an dlí choitinn i mBéarla amháin ó 1730 ar aghaidh,[36] agus tháinig laghdú ollmhór ar lucht na nGaeilgeoirí tar éis an Ghortha Mhór.[37] Chúisigh an t-athrú seo gur thuig formhór den phobal an dlí coiteann roimh Cogadh na Saoirse.

[27] ibid 251.
[28] Reachtanna Chill Chainnigh: 'A Statute of the Fortieth Year of King Edward III, enacted in a Parliament held in Kilkenny, AD 1367, before Lionel Duke of Clarence, Lord Lieutenant of Ireland' aistrithe ag James Hardiman i Cormac Mac Maoilerighde, *Tracts Relating to Ireland, Volume 2* (Dublin, Irish Archaeological Society 1843) 3–121.
[29] Curtis (n 16) 241.
[30] Neville (n 20) 25.
[31] Curtis (n 16) 237.
[32] Tony Crowley, 'Law and the Irish Language' (University of Leeds, 2014) 2.
[33] ibid 3.
[34] ibid 3.
[35] ibid 3-5.
[36] Woodbine (n 1) 396.
[37] Erick Falc'Her-Poyroux, 'The Great Famine in Ireland: A Linguistic and Cultural Disruption' in Yann Bévant, *La Grande Famine en Irlande 1845-1850* (PUR 2014).

Tar éis an chonartha a thug saoirse do Shaorstát na hÉireann i 1922, tugadh ról lárnach don Ghaeilge sa dhlí. Faoin mBunreacht a chuireadh i bhfeidhm roimh Olltoghchán 1922, cothaíodh an Ghaeilge le hAirteagal 4, ina bhfógraíodh gurbh í Gaeilge an teanga náisiúnta.[38] Arís faoin mBunreacht nua i 1937, tugadh an stádas ceannann céanna don Ghaeilge faoi Airteagal 8.[39] Is é Acht na Teangacha Oifigiúla 2003 an píosa reachtaíochta is déanaí a chothaíonn an Ghaeilge i bPoblacht na hÉireann. I dTuaisceart Éireann, tá feachtas faoi bhun chun Acht na Gaeilge a chruthú don Thuaisceart, ach sa chomhthéacs polaitiúil an Thuaiscirt ina stop an rialtas ag feidhmiú dhá bhliain ó shin, is dócha nach feicfear aon chosaint don theanga sa dhlí ann. Agus i leith dlíodóirí, tá dualgas orthu cumas sa Ghaeilge a bheith acu faoin Acht na nDlí-Chleachtóirí (An Ghaeilge) 2008, cé go cáintear é de bharr laghdú an riachtanais sin ón Acht a bhí i gceannais roimhe.[40] Ina theannta sin, is léir go mbaineann tábhacht níos lú leis an nGaeilge sa riaracháin náisiúnta. Ó 1973, cuireadh stop le riachtanais Ghaeilge sa Státseirbhís.[41] I gcomhthéacs dlí an Aontais Eorpaigh, tugadh stádas mar teanga oifigiúil don Ghaeilge i 2007 faoi Airteagal 55 de Chonradh ar an Aontas Eorpach (CAE),[42] cé nach mbeidh seirbhisí faoi leith ar fáil i nGaeilge go dtí 2022.[43] Cúisíonn an airteagal seo go mbeidh reachtaíocht an Aontais Eorpaigh ar fáil i nGaeilge. Dá bhrí sin, cé nach teanga oifigiúil í an Ghaeilge i dTuaisceart Éireann, beidh chuid dá dlí ar fáil trí mheán na Gaeilge, go dtí an Breatimeacht ar aon nós.

Is léir ó na forbairtí éagsúla tríd na céadta bliain gur i gcúpla teanga a fheidhmigh an dlí coiteann in Éirinn. Le linn ré na Normannaigh, ba i Laidin agus níos deanaí i bhFraincis a fheidhmigh é, agus níos déanaí fós i mBéarla. Tar éis Chogadh na Saoirse, cé gur fheidhm an dlí coiteann go formhór i mBéarla, ba í Gaeilge príomhtheanga an dlí, ról a choimeádann sí fós, cé gur laghdaíodh na forálacha a cothaíodh í sa dhlí.

III Ról na Teangan sna Córais Eile in Éirinn

Chomh mhaith leis an dlí coiteann, bhí cúpla córas eil á fheidhmiú in Éirinn trí na meánaoise. Sna cheantair faoi stiúir Gaelach, bhí Dlí na mBreithiún fós i bhfeidhm; i gceantair na

[38] Bunreacht na hÉireann 1922, Airteagal 4.
[39] Bunreacht na hÉireann 1937, Airteagal 8.
[40] John Walsh, 'Enactments Concerning the Irish Language, 1922-2016' (2016) 39(2) Dublin University Law Joutnal 449, 455.
[41] ibid 459, fonóta 13.
[42] An Conradh ar an Aontas Eorpach, Airteagal 55.
[43] Sam Morgan, 'Irish to be given full official EU language status' *Euractiv* (10 Nollaig 2015) <https://www.euractiv.com/section/languages-culture/news/irish-to-be-given-full-official-eu-language-status/> faighte ar 20 Márta 2019.

hEaglaise, ba é an dlí canónta a bhí ann; i gceantair na Marchers, ba é a ndlí nósach. Ba chineál meascán den dlí coiteann agus custaim áitiúla a bhí i gceist leis an dlí deireanach seo. Tháinig na Marchers ón dteorainn idir Shasana agus an Bhreatain Bheag, áit a raibh cead acu a gcuid dlí féin á chur i bhfeidhm. Leanadh an pleann céanna leo in Éirinn, ach faraor níl aon thaifead fágtha faoi in Éirinn seachas an cháineadh a dheineadh air sna Reachtanna Chill Chainnigh.[44] Dá bhrí sin ní fios cén teanga inar fheidhmigh sé.

Ó thaobh Dlí na mBreithiún de, ní raibh cúrsaí i bhfad níos simplí in aon chor. Sa chóras seo, níorbh fhéidir an dlí a athrú. Nuair a thugadh cinneadh nár leanadh le heachtraí nádúrtha diúltacha, bíodh ar na Breithimh an cinneadh sin a chur i bhfeidhm i ngach uile cás de chineál sin tar éis. De bharr an chreidimh seo, cuireadh na cinntí céanna i bhfeidhm ar feadh na céadta bliain.[45] Ní hamháin gur ghá na cinntí a choimeád, ach bhí gá gach píosa den phróiséas a choimeád, an teanga san áireamh. Ba chúis é seo don Shean-Ghaeilge sa dhlí, toisc gur scríobhadh na leabhair dhlíthe go léir as Sean-Ghaeilge go dtí an 16ú aois, cé gur úsáideadh an Mheán-Ghaeilge ón 10ú ar aghaidh, agus an Nua-Ghaeilge Mhoch ón 13ú aois ar aghaidh.[46] Ba theanga shealadach idir Shean-Ghaeilge agus an Nua-Ghaeilge Mhoch í an Mheán-Ghaeilge,[47] ach faoin am inar tháinig na Normannaigh, bhí an aistriú beagnach críochnaithe. De dheasca sin, is léir gur feidhmíodh ní hamháin an dlí coiteann ach Dlí na mBreithiún freisin i dteanga nár thuig cuid mhaith do na daoine.

San am céanna inar fheidhmigh an dlí coiteann chomh mhaith le Dlí na mBreithiún i dteangacha nár labhraíodh don chuid is mó, ba é an dlí canónta a thaispeáin beagáinín solúbthacht i leith na dteangacha – rud aisteach, tóg i gcás nár ceadaíodh aifreann i dteanga an phobail go dtí na 1960í. Thar lear, ghlac an Eaglais chomh luath le Comhairle Tours i 813 toisc gurbh í Fraincis teanga an phobail sa Fhrainc.[48] Fiú i Sasana, tugadh cead d'úsáid an Bhéarla nó na Fraincise i gcúirteanna na hEaglaise nuair nár tuigeadh an Laidin ó tosach na 13ú aoise ar aghaidh.[49] Sa slí chéanna, ceadaíodh oideachas reiligiúnach trí mheán na Fraincise in áit na Laidine faoin gCeathrú Comhairle Lateran (1215) agus Comhairle Oxford (1223).[50] Faraor níl

[44] Reachtanna Chill Chainnigh (n 28).
[45] Neil McLeod, 'The Concept of Law in Ancient Irish Jurisprudence' (1982) 17(2) Irish Jurist 356, 360; Katharine Simms, 'The Poetic Brehon Lawyers of Early Sixteenth-Century Ireland' (2007) 57 Ériu 121, 127.
[46] David Stifter, 'Early Irish' i Martin J Ball agus Nicole Müller (eagarthóirí) *The Celtic Languages* (An dara heagrán, Routledge 2009) 55, 55-56.
[47] ibid 110.
[48] Rothwell (n 5) 445.
[49] Woodbine (n 1) 428.
[50] Rothwell (n 5) 463.

aon thaifead fágtha ar Chúirteanna na hEaglaise in Éirinn,[51] ach sna blianta a lean an choncais, ní Éireannaigh ach Francaigh a bhí i gceannas ar an Eaglais in Éirinn.[52] I gcomhthéacs an thionchair Fhraincise ar an Eaglais in Éirinn tríd na meánaoise,[53] na gearán faoi úsáid na Gaeilge i measc na Dominicans chomh luath le 1285,[54] agus an tsolúbthacht a thaispeáin an Eaglais i dtreo teangacha an phobail i dtíortha eile, is dócha nár fheidhmigh cúirteanna na hEaglaise trí mheáin na Laidine sa ré seo. I dtír inar labhraíodh an Ghaeilge, an Fhraincis agus an Béarla, leanadh polasaithe Fhraincise agus polasaithe Shasanacha na hEaglaise níos fearr dá n-oibreodh na cúirteanna reiligiúnacha trí cheann amháin do na teangacha seo. Leis an easpa taifid atá ann áfach, ní féidir linn bheith cinnte faoi. Ar an lámh eile, laghdaíodh cumhacht na gcúirteanna seo i ndiaidh na concaise,[55] agus mar thoradh ar sin, ba bheag an éifeacht a bheadh ann dá bhfeidhmeodh na cúirteanna seo i dteanga na daoine.

Déanadh iarracht Éire a chur faoi stiúir Shasana le Reachtanna Chill Chainnigh 1367, inar ceanglaíodh Béarla, dílseacht don choróin Shasanach agus láidreacht an dlí choitinn sa réamhrá.[56] Faoin gcóras seo, ní raibh cead ag Sasanach aon theanga seachas Béarla a labhairt,[57] nó úsáid a bhaint as aon chóras dlí seachas an dlí coiteann.[58] Níor aistríodh teanga an dlí leis an Acht seo áfach, agus níor cinntíodh ach amháin cáilitheacht an dlí choitinn a úsáid.

Tar éis Imeacht na nIarlaí san 17ú aois, laghdaíodh cumhacht na mBreithiúna agus thit a gcóras dlí as úsáid.[59] Leis na céadta bliain faoin am seo, níl aon fhianaise go raibh an dlí canónta á n-úsáid ach amháin ag an gcléirigh agus níl aon fhianaise ann gur úsáideadh dlí na Marchers ach an oiread. De dheasca sin, ní raibh aon chóras dlí in Éirinn ag am Cogadh na Saoirse ach an dlí coiteann amháin.

Sa chomhthéacs seo, leis an réimse mór córais a bhí i bhfeidhm in Éirinn tar éis an choncais, úsáideadh réimse leathan teangan freisin. Ní fios cén teanga a úsáideadh i dlí na Marchers, agus is léir gur leanadh ar aghaidh leis an Sean-Ghaeilge i Dlí na mBreithiún ar a laghad le cúig chéad blian tar éis gur thit sí as úsáid. De dheasca sin, is dócha gurbh í an dlí canónta amháin a bhí in úsáid mar theanga na gnáthdhaoine, an Mheán-Ghaeilge agus níos déanaí an Nua-

[51] JA Watt, *The Church and the Two Nations in Medieval Ireland* (Cambridge University Press 1970) 135.
[52] Neville (n 20) 26.
[53] ibid 26.
[54] ibid 32.
[55] Watt (n 51) 125.
[56] Reachtanna Chill Chainnigh (n 28) Airteagal 7.
[57] ibid Airteagal 3.
[58] ibid Airteagal 4.
[59] Adam Donald Pole, *Customs in Conflict: Sir John Davies, the Common Law, and the Abrogation of Irish Gavelkind and Tanistry* (Máistreacht sna hEalaíona Tráchtas, Queen's University (Ceanada) 1999) 122.

Ghaeilge Mhoch. Ní fios go cinnte go ndéanadh seo, toisc nach bhfuil aon thaifead fágtha do na cúirteanna seo áfach, ach toisc gur úsáid tíortha eile an teanga labhartha san am sin, is dócha gur as Gaeilge a fheidhmigh na cúirteanna seo roimh a thit siad as úsáid.

C ÚSÁID NA dTEANGA SA DHLÍ

Cé go bhfuair roinnt mhaith staraithe agus dlíodóirí fianaise ar úsáid na dteanga éagsúla sa dhlí in Éirinn, níor fiosríodh na cúiseanna inar tugadh an fheidhm sin d'aon theanga amháin thar aon theanga eile. An é praiticiúlacht, cumhacht an rialtais, aidhm an chomhionannais nó cúis spridiúil a dhéanadh teanga an dlí as na teanga seo?

Ó thaobh praiticiúlachta de, tá an aidhm seo le feiscint i gcúpla córas. Sa dhlí canónta, ceadaíodh le próiséas i bhFraincis nó i mBéarla, le aidhm na praiticiúlachta ag imirt ról lárnach – ba mhian leis an Eaglais go dtuigfí an próiséas ina gcuid cúirteanna, agus dá bhrí sin tugadh cead an próiséas sin a rith i dteanga seachas Laidin nuair nach dtuigfí é. Tá an aidhm cheannann céanna le feiscint sa dhlí coiteann, inar aistríodh ó Laidin go Fraincis i lár an 13ú aoise. Seachas tuiscint na ngnáthdhaoine a bheith mar spreagadh don aistriúcháin seo, de réir dealraimh aistríodh teanga an dlí choitinn tar éis teacht na huaisle Fraincise isteach sa sochaí Shasanach faoin am seo, nó toisc gurbh í Fraincis a labhraíodh i measc na léannta, seachas Laidin.[60] Léiríonn an dhá shampla seo na slite inar roghnaíodh teanga an dlí de bharr praiticiúlachta.

Cúis eile inar úsáideadh teanga faoi leith thar aon theanga eile sa dhlí ná gur tugadh aithint speisialta don theanga sin. I gcás Dlí na mBreithiún, baineadh úsáid as an Sean-Ghaeilge leis na céadta bliain cé gur theanga mharbh í faoin am sin. Caomhnaíodh an stádas seo in anneoin forbairt na teangan de bharr teorice Dlí na mBreithiúna, inar úsáideadh na breithiúnais chéanna go brách muna leanadh iad le droch-thorthaí nádúrtha.[61] Ba chuid é don theoiric seo go gcaomhnaíodh an teanga chomh mhaith leis na breithiúnais. De dheasca na suntais sin, is léir nárbh praiticiúlacht ach cineál spioradáltacht a spreag úsáid na Sean-Ghaeilge i Dlí na mBreithiúna, fiú na céadta bliain tar éis forbairt na Mheáin-Ghaeilge agus na Nua-Ghaeilge Mhoch.

Le déanaí, tá cúis nua tagtha ar an bhfód chun stádas dlíthiúil a thabhairt do theangacha. Faoin Aontas Eorpach, tugadh stádas oifigiúil agus comhionann do cheithre teangacha eagsúla is

[60] Professor Vivian Hunter Galbraith, 'Nationality and Language in Medieval England' (1941) 23 Transactions of the Royal Historical Society 113, 124.
[61] McLeod (n 45); Simms (n 45).

fiche. Sa CAE, léirítear an comhionannas seo in Airteagail 55, áit a deirtear go mbeidh 'comhúdarás ag na téacsanna i ngach ceann do na teangacha sin'.[62] Cuireadh isteach an fhoráil seo toisc gurb í ceann d'aidhmeanna an Aontais Eorpaigh ná meas a thabhairt ar chultúir agus ar theangacha difriúla sna Ballstáit.[63] In ionad praiticiúlachta, nó cúiseanna spridiúil, is é cuspóir an chomhionannais ná úsáid na Gaeilge agus an Bhéarla a spreag i gcuid eile den dlí in Éirinn.

Ba iomaí cúis inar úsáideadh teangacha éagsúla sa dhlí in Éirinn. I gcórais áirithe, ba é an phraiticiúlacht a spreag úsáid teanga faoi leith. Sa dhlí coiteann, d'athraigh teanga an dlí ionas go n-úsáideadh an teanga chéanna a úsáid na huaisle. Sa dhlí canónta i dtíortha eile (agus is dócha in Éirinn freisin) athraíodh í ionas go dtuigfí an dlí tríd an sochaí. Ní hí an phraiticiúlacht ach an luach breise a thugtar don Shean-Ghaeilge a bhí mar chúis úsáid na teanga sin i Dlí na mBreithiún. Sa lá atá inniu ann, is é an comhionannas cúis le húsáid teanga i dlí an Aontais Eorpaigh.

D CONCLÚID

Mar fhocail scoir, is léir ón bhfianaise thuasluaite gur úsáideadh réimse mór teangacha faoi stiúir na Sasanach agus tar éis Chogaidh na Saoirse, faoinár dhá Bhunreacht. Ach an rud nár fiosróidh roimhe seo ná na cúiseanna inar baineadh úsáid as na teangacha seo.

Sa dhlí coiteann, tháinig na hathruithe theangacha go minic sna Mheánaois. Ag am na concaise, i 1166, ba as Laidin a fheidhmigh an dlí (is dócha, áfach, gur lean na *hundred courts* ar aghaidh i mBéarla). Le linn cúpla céadta bliain, d'athraigh an dlí go dtí an Fraincis, agus níos déanaí fós go dtí an Béarla. Tar éis Chogaidh na Saoirse, tugadh príomh-stádas don Ghaeilge faoin mBunreacht 1922 (agus níos déanaí faoin mBunreacht 1937) ach don chuid is mó úsáidtear an Béarla sna cúirteanna fós.

Ach ní raibh an dlí coiteann an córas amháin a fheidhmigh (nó a fheidhmíonn faoi láthair) in Éirinn. Suas chuig tús na 17ú aoise, d'fheidhmigh Dlí na mBreithiún freisin, agus is as an Sean-Ghaeilge a fheidhmigh an córas seo, cé nár tuigfeadh í ón 10ú aois ar aghaidh. Ní fios cén teanga a n-úsáideadh sna córais eile, dlí na Marchers agus an dlí canónta, ach is dócha gur úsáideadh teanga labhartha na ndaoine, an Ghaeilge, sa dhlí canónta, toisc gurbh í seo an nós i

[62] CAE, Airteagal 55(1).
[63] ibid Airteagal 3; An Conradh ar Fheidhmiú an Aontais Eorpaigh, Airteagal 165(2).

bhí i bhfeidhm sa dhlí canónta i dtíortha eile sna meánaoise. Anois san Aontas Eorpach tugtar stádas oifigiúil do cheithre teangacha éagsúla is fiche.

Baineadh cúiseanna éagsúla le húsáid na teangacha sa dhlí. I gcásanna an dlí coiteann agus (is dócha) an dlí canónta, spreag an praiticiúlacht úsáid na teanga, ach i mbealaí eagsúla. Sa dhlí coiteann, ba í teanga na huaisle a n-úsáideadh, ach sa dhlí canónta, ba í teanga labhartha na ndaoine a n-úsáideadh. I nDlí na mBreithiún, tugadh luach níos mó don theanga. Sa theoiric a raibh i bhfeidhm sa chórais seo, bhí dualgas na cinntí céanna a úsáid chun nach gcúiseofaí aon thorthaí nádúrtha diúltacha. Dá bhrí sin, coimeádaíodh an Shean-Ghaeilge mar theanga an dlí le cúpla céad bliana cé nár úsáideadh í go rialta. Agus i ndiaidh Chogaidh na Saoirse, ba í an náisiúnachas a chúisigh príomh-stádas na Gaeilge sa dhlí. Faoi dlí an Aontais Eorpaigh, is é comhionannas atá mar chúis le húsáid teangacha éagsúla.

Léiríonn taithí na hÉireann ón bhliain 1166 ar aghaidh go spreagann rudaí éagsúla úsáid na teanga sa dhlí. Spreagadh úsáid na teangan seo de bharr praiticiúlachta (de chineál difriúil), spídiúlachta, nó polaitíochta. Ach is é an nasc idir na teangacha seo ná gur bheag an tionchar a bhí ag nós na daoine i leith na teanga labhartha ar fhorbairt theanga an dlí, ach amháin sa dhlí canónta, nár úsáideadh ach in áiteanna faoi leith. Thosaigh an staidéar seo i 1166, nuair ba í an Laidin príomhtheanga an dlí (cé nár labhraíodh ag formhór na ndaoine), agus críochnaigh an staidéar seo i 2019, nuair is í an Ghaeilge príomhtheanga an dlí cé nach labhraítear go rialta í.

HOW ACCESSING INFORMATION ENABLES WOMEN'S EQUITABLE PARTICIPATION IN PUBLIC AFFAIRS

Honor Tuohy*

> With concerted efforts, governments and [civil society organisations] can reverse the information asymmetry and ensure that women are able to exercise their fundamental right to information with the same facility as men. When armed with power of information, women will benefit more fully from the values of openness, accountability and meaningful participation, and will use the information for economic empowerment and the fulfilment and protection of rights. A free flow of information to women will transform lives.[1]

A INTRODUCTION

Access to information has reached the level of a quasi-constitutional or constitutional right in many democratic states, a status which is referred to as the 'constitutional anchoring' of Freedom of Information (FOI).[2] It follows that this anchoring is a basis for 'judicial review of administrative actions and parliamentary legislation'.[3] Initially, this article will draw an outline of the development of regional codification around the right to information in order to highlight that the right to access information is a fundamental part of the 'proper functioning of substantive as well as procedural democracy'.[4] Access to information is thus shown as 'a necessary condition for the exercise of other human and civil rights'.[5] The reasoning given for the central importance of a right to information is that a healthy democracy requires citizens who are 'sufficiently well-informed' to enable useful participation in public affairs.[6] Thus, transparency, when applied to governmental procedure, is central to citizens' 'oversight'

* The Author is currently working towards an LLM in International Human Rights Law and Public Policy in University College Cork. She is focused on understanding current global legal systems and methods being used to reinforce oppressive governmental and organisational structures, especially in terms of women and their status within society. She has a PhD in Management from the University of St Andrews (Scotland) which studied the legitimisation of organisations and the processes used by people within them to augment their standing and legitimacy

[1] Laura Neuman, 'The Right of Access to Information: Exploring Gender Inequities' in Duncan Edwards and Rosie McGee (eds), *Opening Governance* (Institute of Development Studies 2016) 83, 95. <https://bulletin.ids.ac.uk/idsbo/article/view/38/html> accessed 23 March 2019.

[2] Roy Peled and Yoram Rabin, 'The Constitutional Right to Information' (2011) 42(2) Columbia Human Rights Law Review 357, 380.

[3] ibid.

[4] ibid 369.

[5] ibid 369, 370.

[6] Maeve McDonagh, 'The Right to Information in International Human Rights Law' (2013) 13(1) Human Rights Law Review 25, 38.

capabilities as it 'alleviates corruption' and 'ensures proper practice on a daily basis'.[7] In countries with a culture that does not support corruption, it is seen that the culture will also strongly support transparency in the state's administration.[8] Using some of the principles taken from the international human rights codification of a right to information thus far, this article will focus on inequity as regards women's ability to access information and thus their meaningful participation as a democratic citizen.[9]

The right to access information is protected through a number of regional and international treaties but the discussion here will especially point to the underpinning of a right to information through the United Nations' International Convention on Civil and Political Rights (ICCPR). It will focus on the right to information as key to participating in public affairs, as well as outlining the key regional case-law that has had influence over our present international codification. The central concepts of transparency and open government will be introduced. This will be followed by the contemporary arguments that link a lack of an effective right to information with gender inequity globally. It will show how gender analysis is missing from the development of access to information laws and codes. Women are empowered both economically and politically through their abilities to access what Neuman refers to as 'actionable' information'.[10] It has been found that lack of income, as well as a profound sense of fear, is found to maintain current levels of information inequity in Guatemala and Liberia.[11] We also see through findings in Ireland and India, that awareness of these inequities at civil service level does not necessarily motivate the generation of fair policy, and that women are kept at a political and economic disadvantage by their inability to access information in a similar fashion to men.[12] A global cultural shift is needed in order for everyone to understand that empowering women will benefit all.

B INTERNATIONAL CODIFICATION OF THE RIGHT TO INFORMATION

[7] Peled and Rabin (n 2) 366.
[8] ibid 369.
[9] For a discussion on what is meant by 'meaningful participation', please see: 'Facts and figures: Peace and security' (*UN Women*) <http://www.unwomen.org/en/what-we-do/peace-and-security/facts-and-figures> accessed 12 March 2019.
[10] Neuman (n 1) 87.
[11] For further discussion see: Neuman (n 1) ibid 89-94; Carter Center, *Women and the Right to Access Information in Liberia* (2014) <https://www.cartercenter.org/resources/pdfs/peace/ati/women-and-ati-10172014.pdf> accessed 15 March 2019.
[12] Mary Donnelly, Siobhán Mullally and Olivia Smith, 'Making Women Count in Ireland' in Fiona Beveridge, Sue Nott and Kylie Stephen (eds), *Making Women Count: Integrating Gender into Law and Policy-Making* (Ashgate 2000) 46; Rob Jenkins and Anne Marie Goetz, 'Accounts and Accountability: Theoretical Implications of the Right-to-Information Movement in India' (1999) 20(3) Third World Quarterly 603.

In relation to international human rights, the main 'foundations' for a right to information are, inter alia: the right to freedom of expression; the right to take part in public affairs; the right to respect for private life; the right to a fair trial; and the right to life.[13] The connection between Article 19 (the right to access information) with Article 25 (the right to take part in public affairs) of the ICCPR was affirmed by the United Nations Human Rights Committee in *Gauthier v Canada.*[14] The Inter-American Court of Human Rights (I-ACtHR) later 'took account of arguments concerning the role played by access to information in promoting participation' through ruling 'that the withholding of information amounted to the violation of the right to freedom of expression in the American Convention [American Convention of Human Rights (ACHR)]'.[15] In an example of how communities can be reliant on the proactive communication of information, in *Oneryildiz v Turkey* the European Court of Human Rights (ECtHR) held that the Turkish government violated the right to life as it was unable to show that any measures were taken to provide the inhabitants with information that would have put them in the position of being able to make an informed choice on how to respond and prepare for a landslide caused by a methane explosion.[16]

Via *Leander v. Sweden* in 1987,[17] *Gaskin v United Kingdom* in 1989,[18] and *Guerra v Italy* in 1998,[19] the ECtHR showed an unwillingness to grant access to information under Article 10 of the European Convention on Human Rights (ECHR) which grants a right to freedom of expression. This 'reluctance' had been understood as a result of the 'absence of the concept 'to seek' in the ECHR; a concept which is included within Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 13 of the American Convention on Human Rights (ACHR).[20] In 2009, in *Tarsasag A Szabadsagjogokert v. Hungary*, the ECtHR ruled that 'there had been interference with the applicant's rights as enshrined in Article 10', and shortly after, in a separate case, the ECtHR found 'that a refusal to allow access to state documents performed a violation of an appellant's right to freedom of expression'.[21] These rulings are understood as being influenced by two aspects:[22] a landmark ruling three years earlier in 2006

[13] McDonagh (n 6) 28-44.
[14] (5 May 1999) Communication No 633/1995 CCPR/C/65/D/633/1995.
[15] McDonagh (n 6) 39, 40 discussing *Claude Reyes v. Chile*, Inter-American Court of Human Rights, Series C 151 (19 September 2006) [86].
[16] (2004) 41 EHRR 325.
[17] (1987) 9 EHRR 433.
[18] (1990) 12 EHRR 36.
[19] (1998) 26 EHRR 357.
[20] ibid; For a full discussion on the inclusion of the term 'to seek' please see: McDonagh (n 6) 33, 34.
[21] Peled and Rabin (n 2) 388.
[22] ibid.

at the I-ACtHR in *Claude Reyes v. Chile*,[23] as well as the Council of Europe's new Convention on Access to Official Documents in 2009.[24] In *Claude-Reyes*, the I-ACtHR gave a ruling on Article 13 (right to freedom of expression) of the ACHR showing it to protect 'the rights of all individuals interested in obtaining information held by state authorities'.[25] This discussion will now look a little closer at the transparency and open governance central to the generation of gender-equitable policy and practice in relation to women's right to access information.

C EQUITABLE ACCESSING OF INFORMATION

'Proactive transparency' is important in order to guide a more 'meaningful participation', otherwise there is a lack of equitable participation. This in turn further hinders effective transparency in governance, which explains why citizens need to have access to information on a similar time-scale to civil servants.[26] Internationally, Article 25 of the ICCPR (the right to participate in public affairs) has been held by the United Nations Human Rights Committee to refer 'to attempts on the part of the individuals concerned to participate in political processes of one kind or another'.[27] Thus, we can see that the ability of a citizen to equitably participate in the governance of their country is being protected by the establishment of international precedent that protects that citizen's right to access information. The Open Government Partnership, a collective of 'government reformers and civil society leaders', is pushing for the creation of a culture whereby governments worldwide are 'more inclusive, responsive and accountable'.[28] Indeed, McGee and Edwards have said that 'open government and open data have moved to centre-stage'.[29] It is clear that there is a worldwide initiative to promote citizens' access to information and thus participation in democracy: seventy-nine countries are participating in the Open Government Partnership,[30] Canada has introduced a 'Feminist Open Government Initiative' which is working towards persuading countries to commit to considering gender throughout the process of creation and compliance of Open Government

[23] *Claude-Reyes* (n 15).
[24] Council of Europe Treaty Series No. 205.
[25] Peled and Rabin (n 2) 391; *Claude-Reyes* (n 15).
[26] Helen Darbishire, *Proactive Transparency: The Future of the Right to Information* (World Bank Institute 2010) 12.
[27] McDonagh (n 6) 48 referencing *Massera v Uruguay* (15 August 1979) Communication No. 5/1977 CCPR/C/7/D/5/1977 [2] and [10]; *Mpaka-Nsusu v Zaire* (26 March 1986) Communication No. 153/1983 CCPR/C/27/D/157/1983 [8.2], [10].
[28] 'About OGP: What is the Open Government Partnership?' (*Open Government Partnership,* 2018) <https://www.opengovpartnership.org/about/about-ogp> accessed 15 March 2019.
[29] Rosie McGee and Duncan Edwards, 'Introduction: Opening Governance – Change, Continuity & Conceptual Ambiguity' in Duncan Edwards and Rosie McGee (eds), *Opening Governance* (Institute of Development Studies 2016) 1, 1.
[30] OGP (n 28).

procedures,[31] and lastly, there has been a systematic introduction at a national level of 'Voluntary Openness Strategies (VOS) and Codes for Transparency' which is happening in the UK, for example.[32] However, Neuman and Calland warn that 'political will must be signalled clearly and from the very top, if the task of entrenching a new culture of openness is to survive beyond the implementation challenges and for the long term'.[33]

D INTERACTION BETWEEN THE RIGHT TO INFORMATION AND GENDER EQUITY

I Global Awareness

Looking at the incorporation of gender equity, and women's rights more specifically, into the development of right to information codes and practices, one is initially led to consult the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[34] Neuman suggests 'that the basic principles of CEDAW are themselves premised on the free flow of information'.[35] There is a need to raise awareness globally of the issues (such as poverty and lack of knowing where to go and who to speak to) that hinder women's equitable access to information.[36] Activism around women's right to information has had the unforeseen but beneficial consequence of showing women how democratic participation (through movements such as information activism) can lead to improved 'livelihood securities'.[37] This is a fundamentally important change as previous to these developments, women tended not to get involved in 'direct engagement with the state' due to what were seen as overwhelming barriers.[38] As Jenkins and Goetz found through their research based in community work in India, focusing on a right to information at grassroots level (understood by the IMF as being led by 'weakly organised' and 'marginalised groups', mainly 'the rural poor

[31] Open Government Partnership, *Gender Commitments Factsheet* (2018) <https://www.opengovpartnership.org/sites/default/files/OGP_Fact-Sheet_Gender_November2018.pdf> accessed 15 March 2019.
[32] Laura Neuman and Richard Calland, *Making the Access to Information Law Work: The Challenges of Implementation* (Carter Center) 11.
[33] ibid 11.
[34] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180 (CEDAW) art 27(1).
[35] Neuman (n 1) 86.
[36] ibid.
[37] Jenkins and Goetz (n 12) 616.
[38] ibid.

and women') can offer a way for people to deal with ongoing corrupt practices.[39] The focus would include enabling access to 'actionable' information.[40]

II The Barriers to Women Accessing Information

Neuman's article looking at the barriers to women's accessing information in Guatemala and Liberia found that more barriers to access existed than she originally expected. Her affirmed hypothesis that the 'most frequent challenge to women's exercise of the right to information' would be 'the seven Cs' (capacity, cash, childcare, confidence, control, consciousness and culture)',[41] further established one final factor: fear.[42] Neuman states:

> With regard to fear, the … participants … were nearly unanimous that in many cases women fear both their families and the authorities. Elements of discrimination, racism, machismo and trepidation born from the recent history of civil war were reflected when community leaders noted 'fear' as a nearly impossible obstacle to overcome.[43]

Thus, fear is a fundamental hindrance to women being in a position to act upon their right to gain access to information. It is found that it is a consequence of the very processes built to maintain the structures around participation that perpetuate fear in women and, in doing so, keep women from becoming fully immersed in the systems that are in place to serve and protect society. Open governance can generally place women in a position of having access to information and thus a means of contributing to policy, and managing corrupt practices.[44] In addition to this, although there may be greater numbers of female politicians and civil servants, this does not always directly translate into policies that create more gender-representative and gender-equitable policies.[45] And finally, it has also been shown that access to information is at the very beginning of the process of empowerment through participation in public affairs.

---

[39] ibid 615, 616.
[40] Neuman (n 1) 87.
[41] The Carter Center, *Women Exercising Their Right of Access to Information* (2012) <https://www.cartercenter.org/resources/pdfs/peace/ati/ati-women.pdf> accessed 23 March 2019; For further discussion see Neuman (n 1) 90.
[42] ibid 94.
[43] ibid 93.
[44] For full discussion see: Duncan Edwards and Rosie McGee (eds), *Opening Governance* (Institute of Development Studies 2016) 83 <https://bulletin.ids.ac.uk/idsbo/article/view/38/html> accessed 23 March 2019.
[45] Anne Marie Goetz, 'Women in Politics and Gender Equity in Policy: South Africa and Uganda' (1998) 76 Review of African Political Economy 241, 257.

III 'Actionable' Information

In her discussion on women's empowerment, Neuman refers to 'actionable information' and how it is 'critical for women's economic empowerment'.[46] Information that can be used by a woman in order to take effective action in public affairs is of chief concern here. The empowerment of women can be understood from various angles, including economic, and political. The two are inter-connected and inter-reliant. Generally, empowerment has been described as being a process people undertake when learning to 'think critically about their… circumstances and possibilities',[47] and social empowerment is understood as having a sense of ownership over a position held in society, as well as an ability to change this position.[48] Economic empowerment for women is understood as the parallel between an increase in 'income and agency', and holding independent and deep 'beliefs and understandings related to issues such as education, health, marriage, family, politics and the economy'.[49] This progression of understanding, in turn, enables women 'to take more control of their lives and make more informed decisions'.[50] Lastly, political empowerment is people's ability and sense of freedom to advocate for themselves, and having a sense of their right to participate in democracy and in public affairs generally.[51] Eyben et al tell us that 'equity of representation' in order to enable the 'voice of the least vocal' to 'engage in making the decisions that affect the lives of others like them' is important,[52] and as a counter to this positive point they add that:

> Measures for political empowerment are inadequate if they simply involve establishing quotas so that people from particular groups are officially given seats at the table because they are limited to seeking inclusion within a political system that is fundamentally hostile to historically marginalized social groups.[53]

In other words, it is one thing to create the legal environment that situates a citizen's right to access information, however, it is another issue to have that right respected in practice, when it is culturally acceptable to dismiss a citizen based on their belonging to a marginalized social group. With 'actionable' information, women are at least in the position, due to their political

[46] Neuman (n 1) 87.
[47] Rosalind Eyben, Naila Kabeer and Andrea Cornwall, *Conceptualising Empowerment and the Implications For Pro Poor Growth* (Institute for Development Studies 2008) 15.
[48] Neuman (n 1) 87.
[49] ibid.
[50] ibid.
[51] Eyben, Kabeer and Cornwall (n 47) 15.
[52] ibid 14.
[53] ibid 15, 16.

empowerment, of being able to advocate for equitable policy and, consequentially, this policy development can ensure their eventual economic empowerment. However, it could also be conjectured from this discussion that economic empowerment is necessary to initially access the 'actionable' information.

E CONCLUSION: CONTAINING WOMEN'S POVERTY THROUGH ECONOMIC EMPOWERMENT

Of central importance to women's economic empowerment, and a hindrance to it, is what Neuman refers to as the 'systematic issue' of poverty, an issue 'working in concert with the political status quo to impede empowerment of women'.[54] Chinkin, Wright and Charlesworth tell us that 'the low economic value accorded to work performed primarily by women' and the 'economic reconstruction through privatisation' has a 'gendered impact and has contributed to the feminisation of poverty'.[55] In areas where people are benefitting economically from profits received from oil, it has been found that 'gender-blind policies and practices in … decision-making processes give rise to the systematic exclusion of women and the silencing of women's voices and interests'.[56] It has also been found that systems that appear to be actively working towards gender equality in policy that affects women's income-generation abilities are still not taking the necessary steps of dedicating budgets to the work. Ireland, in 1998, started developing 'poverty proofing procedures … for all legislative and "significant" policy proposals'.[57] This proofing was being aimed at minority groups that were largely female, and poverty proofing itself was motivated by equality: 'equal access and … participation'; 'anti-discrimination measures'; and 'addressing the gender dimensions of poverty', for example.[58] However, Donnelly et al. found that 'despite the fact that participation of target groups is recognised as being essential to any mainstreaming agenda, little has been done to make the proofing process a participatory one'.[59] Chinkin, Wright and Charlesworth show women's need to be included in discussions and decision-making processes completely ignored by those in power.[60] Donnelly et al. show the failure of policy that should have finally enabled women in

[54] Neuman (n 1) 94.
[55] Christine Chinkin, Shelley Wright, and Hilary Charlesworth, 'Feminist Approaches to International Law: Reflections from Another Century' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing 2005) 30.
[56] Oxfam International, *Achieving Natural Resource Justice Oxfam International Extractive Industries Global Program Strategic Plan (2016-2019)* (2015) 24.
[57] Donnelly, Mullally and Smith (n 13) 46.
[58] ibid.
[59] ibid.
[60] Chinkin, Wright, and Charlesworth (n 55) 30.

vulnerable economic positions to have their opinion matter. This discussion requires further space and time beyond the present scope of the author, however, what is clear from the arguments posed above is that accessing actionable information is a step on the way to women becoming economically empowered.

The Mary Robinson Foundation tells us that '[p]olicies and projects produced without women's meaningful participation can reinforce, or even exacerbate, existing gender inequalities'. [61] In order to serve and enable women more generally, governments need to increase 'proactive publication', develop 'local information liaisons that disseminate information to women in their communities' and 'using community radio … to ensure that information reaches women without the need to invest time or travel long distances to access information'.[62] This would ensure equitable access to information. This year, the Carter Center has published the 'Atlanta Declaration for the Advancement of Women's Right of Access to Information', put together by one hundred participants from thirty countries, including representatives from:

> governments, multi-stakeholder initiatives, information commissions and independent oversight bodies, gender, transparency, accountability, and access-to-information civil society organisations, international institutions, donor agencies and foundations, private sector companies, media, scholars, and practitioners.[63]

The vast array of participants mentioned here shows how this Declaration can be understood to represent the most common issues regarding equitable access to information in the world at the moment. The Declaration proceeds to state what has already been mentioned above, but is useful to repeat:

Recognizing that Article 19 of the UDHR, Article 19 of the ICCPR, Article 13 of the American Convention on Human Rights, and Article 9 of the African Charter on Human and People's Rights provide for a right for all persons to 'seek, receive and impart information', and Article 10 of the ECHR establishes a similar right to 'receive and impart information'.[64]

[61] Mary Robinson Foundation Climate Justice, *Women's Participation: An Enabler of Climate Justice* (2015) 7.
[62] Neuman (n 1) 94.
[63] Carter Center, *Atlanta Declaration for the Advancement of Women's Right of Access to Information* (2018), 2.
[64] ibid.

The Declaration recommends that instead of making changes to existing FOI legislation, it would be more beneficial at this stage to look at 'implementation solutions'.[65] In relation to the same, Neuman suggests:

> [a] review of access to information statutes should be undertaken to safeguard against provisions that would unwittingly have a discriminatory impact on women … [and] public agencies should be encouraged to develop information that is meaningful to women, and to increase the amount of data disaggregated by gender.[66]

Furthermore, quite recently in 2018, the Inter-American Development Bank released a report called 'Gender Mainstreaming by Transparency Pillars'[67] stating that whereas transparency is essentially 'the disclosure of standardized information', it 'is insufficient to reduce corruption',[68] and one solution, among others, offered by the report for ensuring transparency that works for women is to 'consider reporting mechanisms that are accessible, safe, and easy to use for men and women alike'.[69] Both the review of statutes as suggested by Neuman, and the potential permeation of the conceptual pillars offered by the Inter-American Development Bank throughout their policy are useful next steps for international and national institutions to take. Equitable access to information for women throughout the world relies on these institutions working together to develop cohesive, coherent, and most importantly, honest policies that enable women's meaningful participation in their democratically governed countries.

The constitutional and quasi-constitutional status of the right to freedom of information in states around the world has the ability to enable women's rights through women's complete participation in democracy (and thus political empowerment). However, this means increasing access to 'actionable' information, and dealing with the issue of policies and legislation (that are there to serve society) being shown in practice to sometimes actually hinder women from effectively participating. It is thus suggested that creating the legal environment that confirms a woman's right to access information is only the first step. 'Actionable' information enables

[65] ibid 3.
[66] Neuman (n 1) 94, 95.
[67] Kristin Sample, *Gender Mainstreaming in the Transparency Fund* (Inter-American Development Bank 2018).
[68] ibid 2.
[69] ibid 14.

women to use policies and legislation in order to further their own political and economic power.[70]

The ECtHR and I-ACtHR decisions, as well as the UDHR and ICCPR mechanisms, show that, although the codification of the right to information has developed to further defend citizens' rights, it has a long way to go in terms of truly enabling women's full enjoyment of their rights specifically, and gender equity generally. We also saw the close link between women's rights and the codification of a right to information and thus states' (accidental) implementation of the right to participate in public affairs via FOI legislation. In conclusion, being able to access information is not just about being given information, it is about being able to interpret that information and use it to make a change of some kind. Accessing 'actionable' information is paramount in the enabling of women's equitable participation in public affairs.

> On the one hand, citizens and activists are compelled to become proficient in bureaucratic literacy in order to audit and petition the state. On the other hand, officials strategically alter the language and procedures of administration, shifting the interplay between writing and orality in their daily work and changing what they record and how they do so to avert scrutiny and preserve state secrecy in the age of transparency.[71]

[70] Neuman (n 1) 87.
[71] Aradhana Sharma, 'State Transparency after the Neoliberal Turn: The Politics, Limits, and Paradoxes of India's Right to Information Law' (2013) 36(2) PoLAR: Political and Legal Anthropology Review 308.

LE DOPAGE DANS LE SPORT : UNE COMPARAISON FRANCO-IRLANDAISE DES CHEMINS LÉGISLATIFS EN CE DOMAINE

Cormac T Hickey*

A L'Introduction

Le fléau du dopage afflige le sport depuis des décennies. Bien qu'il soit l'une des affaires de dopage les plus scandaleuses, le Tour de France de 1998 est loin d'être le premier incident du dopage dans le sport. Plus de trente ans auparavant, Tommy Simpson, un jeune cycliste britannique qui était en tête de la course, était mort sur le Mont Ventoux après avoir pris des amphétamines pour améliorer sa performance. [1] Quelques années avant cet incident, un autre cycliste, Knud Jensen, était mort lors du contre-la-montre dans les Jeux Olympiques (JO) de Rome en 1960, encore une fois après l'ingestion de drogues.[2]

En athlétisme, le dopage est interdit depuis 1928.[3] Pendant la Guerre Froide, le sport a été manipulé en tant qu'outil politique par des gouvernements des côtés est et ouest, avec les boycotts des JO de Moscou en 1980,[4] et de Los Angeles en 1984.[5] Les gouvernements de l'Union des Républiques Socialistes Soviétiques (l'URSS) et de la République Démocratique de l'Allemagne (la RDA, mieux connu comme l'Allemagne de l'Est) ont mis en place des programmes de dopage dirigés par l'état.[6] Les athlètes en provenance d'autres pays abusaient de drogues aussi, et à la suite de l'Affaire Johnson aux JO de Séoul en 1988, le Rapport Dubin effectué un changement d'attitude autour de la question du dopage.[7] L'évidence du dopage dans les années 80s est toujours claire: sur les 18 évènements féminins dans l'athlétisme aux JO (sauf le marathon et la marche), 8 des records datent toujours de cette décennie.[8] Et dans la

* BCL (Law & French), University College Cork; LLM (R) Candidate, University of Edinburgh.

[1] Paul Kimmage, 'Half a Century on from Simpson's death, Cycling's Omerta Still Rules in the Peloton' *Irish Independent* (Dublin, le 23 juillet 2017) <https://www.independent.ie/sport/other-sports/cycling/paul-kimmage-half-a-century-on-from-simpsons-death-cyclings-omerta-still-rules-in-the-peloton-35957750.html> visité le 24 mars 2019.

[2] Laura Donnellan, *Sport and the Law: A Concise Guide* (Dublin, Blackhall 2010) 100.

[3] ibid.

[4] Pat Butcher, *The Perfect Distance – Ovett & Coe: The Record-Breaking Rivalry* (Phoenix 2004) 155-159.

[5] Cian Roche, 'Empire Strikes Back: Remembering when the Soviet Union boycotted the 1984 Summer Olympics' (*Off the Ball*, le 14 aout 2016) <https://www.offtheball.com/best-of-otb/empire-strikes-back-soviet-union-boycot-1984-summer-olympics-265950> visité le 24 mars 2019.

[6] Spiegel Staff, 'The Legacy of Doping in the GDR' *Der Spiegel* (Hamburg, le 17 aout 2009) <http://www.spiegel.de/international/germany/the-price-of-gold-the-legacy-of-doping-in-the-gdr-a-644233.html> visité le 24 mars 2019.

[7] Charles Dubin, Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance (Canadian Government Publishing Centre, 1988).

[8] 'Top Lists' (*International Association of Athletics Federations*) <https://www.iaaf.org/records/toplists/middlelong/800-metres/outdoor/women/senior> visité le 24 mars 2019.

finale qui a entraîné autant de controverse, celui de 100m masculine de 1988, six des huit finalistes ont été impliqué dans le dopage pendant leurs carrières.[9]

Après l'affaire Festina dans le Tour de France de 1998,[10] le Comité International Olympique a organisé une conférence à Lausanne l'année suivante. Le résultat de cette conférence a été la Déclaration de Lausanne sur le dopage dans le sport,[11] ce qui a ainsi entraîné la création de l'Agence mondiale antidopage (l'AMA).[12] Cette organisation a pour but de garantir un sport sans le dopage, et son Code Mondial Antidopage élabore les principes de l'organisation ainsi que des règles auxquelles sont soumis les sportifs.[13]

Les règles et les obligations contenues dans le Code ne pèsent pas seulement sur les athlètes, mais aussi sur les gouvernements, qui doivent prendre toute mesure possible pour faciliter l'implémentation du Code,[14] y compris la mise en place de législation permettant la coopération entre les différentes organisations antidopage.[15] L'Irlande a ratifié la Convention UNESCO qui l'a mis en œuvre en 2008.[16] Le Sport Ireland Act 2015 adopte ce Code, en mettant l'adhérence au Code en tant que condition de recevoir des dons.[17] Son équivalent français est le Code du sport, qui est beaucoup plus étendu avec des délits de la détention des substances interdites dans le Code AMA.[18] D'autres pays, tels que le Kenya, l'Allemagne, l'Espagne et même la Russie ont toutes criminalisé le dopage, et un projet de loi plus étendu encore a été présenté devant la Chambre des Représentants des États-Unis cette année.[19]

Mais en vue du fait que le dopage dans le sport est loin d'être éliminé il, est même plus présent qu'avant (avec par exemple, la crise en Russie), il faut s'interroger sur la possibilité d'endurcir les dispositions législatives irlandaises contre cette pratique, surtout dans le cadre de l'article

[9] Richard Moore, *The Dirtiest Race in History: Ben Johnson, Carl Lewis and the 1988 Olympic 100m Final* (Bloomsbury 2012).
[10] Donnellan (n 2) 104.
[11] 'Déclaration de Lausanne sur le Dopage dans le Sport' (*L'Agence Mondiale Antidopage*) <https://www.wada-ama.org/fr/ressources/informations-generales-sur-lantidopage/declaration-de-lausanne-sur-le-dopage-dans-le> visité le 19 mars 2019.
[12] 'A Propos' *(L'Agence Mondial Antidopage*) <https://www.wada-ama.org/fr/a-propos> visité le 24 mars 2019.
[13] Code Mondial Antidopage 2015 (Code AMA) (*L'Agence Mondiale Antidopage*) <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code-fr.pdf> visité le 24 mars 2019.
[14] ibid art 22.1.
[15] ibid art 22.2.
[16] Donnellan (n 2) 104-5
[17] Sport Ireland Act 2015 (2015 Act).
[18] Code du Sport <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071318> (Code du Sport) visité le 24 mars 2019.
[19] Rebecca Ruiz, 'US Lawmakers Seek to Criminalize Doping in Global Competitions' *New York Times* (New York, le 12 juin 2018) <https://www.nytimes.com/2018/06/12/sports/american-doping-criminal-law.html> visité le 24 mars 2019.

22.1 du Code AMA, qui oblige aux gouvernements à prendre toute mesure possible afin de garantir l'implémentation du Code AMA.[20] Puisque le but du Code est de créer un sport sans le dopage,[21] il faut ainsi s'interroger sur le succès des mesures prises dans la poursuite de cet objectif. S'il est clair que ces mesures ne sont pas suffisantes pour lutter contre le dopage, il faudrait adopter de nouvelles dispositions. Dans ce contexte, l'adaptabilité des mesures françaises en Irlande sera considérée.

B L'APPROCHE ACTUELLE

En 2018, le système antidopage est géré au niveau national par d'organisations nationales. En Irlande, c'est Sport Ireland qui assume le rôle de l'organisation antidopage nationale,[22] alors qu'en France c'est l'Agence Française de Lutte Contre le Dopage qui s'en charge.[23] En conséquence du pouvoir délégué aux organisations nationales, il existe une grande disparité entre la sévérité des régimes. En 2016, l'année où la Jamaïque a gagné 11 médailles aux JO de Rio,[24] leur organisation antidopage national n'a mené que 1,472 contrôles.[25] Par contre, en Irlande où l'équipe nationale a gagné deux médailles aux mêmes JO,[26] Sport Ireland a réaslise 1003 contrôles.[27] La quantité de contrôles par médaille était beaucoup plus élevée en Irlande qu'en Jamaïque (501.5 contrôles pour chaque médaille en Irlande, face à 133.8 contrôles par médaille en Jamaïque), ce qui aurait pu favoriser le recours au dopage en Jamaïque. Ce chasme entre les deux régimes nationaux indique l'un des problèmes du système actuel.[28]

En dépit du système, de nombreuses affaires se passent chaque année. Le McClaren Report, sur le dopage dirigé par l'état en Russie, a révélé que le dopage était systématique en Russie et que ce phénomène n'a pas disparu avec la chute de l'URSS.[29] Un problème aussi sévère a été

[20] Code AMA (n 13), art 22.1.
[21] ibid 13.
[22] 2015 Act (n 17) s 41.
[23] *L'Agence Française de Lutte Contre le Dopag*e <https://www.afld.fr> visité le 19 mars 2019.
[24] 'List of Jamaica's Participation in the Olympic Games' (*Olympian Database*) <http://www.olympiandatabase.com/index.php?id=25889&L=1> visité le 19 mars 2019.
[25] 'Testing Statistics' (*Jamaican Anti-Doping Commission*) <http://jadco.gov.jm/testing/testing-statistics> visité le 24 mars 2019.
[26]'List of Ireland's Participation in the Olympic Games (*Olympian Database*) <http://www.olympiandatabase.com/index.php?id=25859&L=1> visité le 24 mars 2019.
[27] Sport Ireland, *Annual Report 2016* 71 <https://www.sportireland.ie/About_Us/Annual_Reports/2016%20Annual%20Report%20English.pdf>.
[28] L'AMA a récemment publié un nouveau standard afin d'harmoniser l'application du Code partout dans le monde : *Standard International : Conformité au Code des Signataires* (l'Agence Mondial Antidopage, 2018) <https://www.wada-ama.org/sites/default/files/resources/files/isccs_april_2018_fr.pdf> visité le 24 mars 2019.
[29] Richard McClaren, *WADA Investigation of Sochi Allegations* (L'Agence Mondiale Antidopage, 2016) <https://www.wada-ama.org/sites/default/files/resources/files/20160718_ip_report_newfinal.pdf> visité le 24 mars 2019.

découvert en Turquie, ou 31 athlètes ont été servi de sanctions la veille des Championnats Mondiaux à Moscou en 2013.[30] Ces deux affaires nous indiquent que le système géré par l'AMA n'arrive pas à éliminer le dopage dirigé (ou ignoré dans le cas de Turquie) par l'état.

De plus, l'impossibilité de donner de sanctions infinies aux athlètes qui ont violé des règles antidopage a mené à des situations où de tels athlètes gagnent des titres majeurs, un phénomène qui afflige la réputation du sport dite 'propre'. En 2017, la victoire de Justin Gatlin, deux fois condamnés aux sanctions pour avoir violé des règles antidopage, sur Usain Bolt dans les Championnats Mondiaux à Londres,[31] est un exemple pertinent. Gatlin, qui a registré 9.74s pour le 100m en 2006 (à l'époque où il a violé des règles antidopage, et a l'âge de 24), a registré 9.77s pour le 100m en 2016 (à l'âge de 34 ans).[32] Étant donné que l'âge moyen des quatre hommes qui ont registré des 100ms plus vite que Gatlin est 24,[33] ces performances de Gatlin attirent de suspicions. De plus, le consensus scientifique suggère que les sprinteurs atteignent le sommet de leurs capacités entre 24-26 ans.[34] Soit Gatlin est atypique, et n'est pas affligé par le fil de temps; soit il utilise des substances ou méthodes interdites pour la troisième fois ; soit il profite de son usage de telles substances toujours.

En tout cas, il n'est pas seul. Nombreux sont des cas où des médailles ont été gagnés par des athlètes qui ont purgé des sanctions pour des violations des règles antidopage. Par exemple, la championne de la course de 1500m féminine à Londres a purgé plusieurs sanctions avant ces JO, et n'a même pas couru sans l'aide de ces substances à Londres.[35] Cette prééminence d'athlètes qui ont violé des règles antidopage afflige le sport, mais vu qu'il n'est pas facile d'exclure ces athlètes à jamais, il faut trouver d'autres solutions à décourager le dopage.

[30]'Esref Apak among 31 Turkish athletes banned for two years' (*BBC*, le 5 aout 2013) <http://www.bbc.com/sport/athletics/23579781> visité le 24 mars 2019.
[31]Sean Ingle, 'Justin Gatlin Gatecrashes Usain Bolt's London 2017 Farewell Party in 100m' *The Guardian* (Manchester, le 5 aout 2017) <https://www.theguardian.com/sport/2017/aug/05/justin-gatlin-usain-bolt-100m-london-2017-world-athletics-championships> visité le 24 mars 2019.
[32] 'Justin Gatlin' (*International Association of Athletics Federations*) <https://www.iaaf.org/athletes/united-states/justin-gatlin-176453> visité le 24 mars 2019.
[33] 'Senior Outdoor: 100 Metres Men' (*International Association of Athletics Federations*) <https://www.iaaf.org/records/toplists/sprints/100-metres/outdoor/men/senior> visité le 24 mars 2019: Usain Bolt (22), Tyson Gay (27), Yohan Blake (22), Asafa Powell (25).
[34] Sian Allen et Will Hopkins, 'Age of Peak Competitive Performance of Elite Athletes: A Review' (2015) 45(10) Sports Medicine 1431, 1435.
[35] 'Asli Cakir Alptekin: Life ban for winner of "dirtiest race in history"' (*BBC*, le 23 septembre 2017) <http://www.bbc.com/sport/athletics/41371579> visité le 24 mars 2019.

Le système antidopage dirigé par l'AMA et par les organisations antidopage nationales n'est pas sans faute,[36] quelquechose qui est illustré par le fait que les sept victoire au Tour de France de Lance Armstrong n'ont jamais éte attribué à quelqu'un d'autre,[37] étant donné la prévalence du dopage à l'époque. Meme après lui, le titre de 2010 a été réattribué à Frank Schleck après qu'Alberto Contador a raté un contrôle anti-dopage.[38] Selon les statistiques, 2% des contrôles révèlent des indications de dopage, tandis que les études indiquent qu'entre 10-35% d'athlètes utilisent de substances ou de méthodes interdites. Si ces chiffres ont raison, nous assistons à un grand gaspillage de ressources, et nous avons ainsi besoin de renouveler notre système antidopage pour que les athlètes puissent gagner sans le besoin d'utiliser de substances ou de méthodes interdites.[39]

Par conséquent, Anderson fait l'argument pour la permission de l'usage de telles substances,[40] et Palmer parle de la nécessité de développer un système plus avancé pour agir contre le dopage.[41] L'insistance dans le Code que '[l]e dopage est contraire à l'essence même de l'esprit sportif',[42] et la nécessité des signataires (y compris les gouvernements) de faire en sorte que le Code soit appliqué au maximum, rend la réponse suggérée par Anderson impossible pour tous les états signataires. Une permission de ces substances et méthodes serait une contravention flagrante de notre adoption du Code, et alors on est amené à considérer l'approche française pour considérer comment on peut mieux lutter contre le dopage dans le sport.

C LES APPROCHES LÉGISLATIVES FRANÇAISES ET IRLANDAISES

I Les Positions Actuelles

C'est une affaire déroulée en France qui a déclenché la naissance de l'AMA à la fin des années 90s, mais la réponse législative française au problème du dopage dans le sport avait commencée bien plus tôt, avant même de la mort tragique de Tommy Simpson sur le Mont Ventoux en

[36] Par exemple, la permission donnée à la Russie de s'attacher encore à l'AMA, sans avoir complètement leur système: 'WADA meets with Russian authorities regarding Moscow laboratory access' (l'Agence Mondiale Antidopage, le 28 novembre 2018) <https://www.wada-ama.org/en/media/news/2018-11/wada-meets-with-russian-authorities-regarding-moscow-laboratory-access> visté le 24 mars 2019.
[37] 'List of Tour de France Winners' (*Topend Sports*) <https://www.topendsports.com/events/tour-de-france/winners-list.html> visité le 24 mars 2019.
[38] 'CAS Sanction Contador with Two-Year Ban in Clenbuterol Case' (*Cycling News*, le 6 février 2012) <http://www.cyclingnews.com/news/cas-sanction-contador-with-two-year-ban-in-clenbuterol-case/> visité le 24 mars 2019.
[39] Jack Anderson, 'Doping, Sport and the Law: Time for Repeal of the Prohibition?' (2013) 9(2) International Journal of Law in Context 135, 142.
[40] ibid 151.
[41] A Palmer, 'Science is Failing Athletics' (2015) 179 JPN 894.
[42] Code AMA (n 13) 14.

1967. La première loi française contre le dopage dans le sport était la loi du 1er juin 1963,[43] suivie par l'adoption d'une Convention du Conseil de l'Europe contre le dopage,[44] puis par la loi du 23 mars 1999,[45] et finalement par le Code du Sport qui est en vigueur aujourd'hui.[46] La loi de 1999 a été rédigé avant le controverse du Tour de France de 1998, mais a été édité après.[47] Puis, avec le Code du Sport, plus de dispositions punissant le trafic et la détention des substances interdites ont été instaurées.[48] Le Code du Sport dans son forme actuel adhère au Code AMA de 2015.

L'approche actuelle en Irlande est énoncée par le Sport Ireland Act 2015, qui met l'adhérence au Code AMA en position de condition de subventions publiques pour les athlètes, tandis que Sport Ireland le met comme condition de dons pour les fédérations.[49] Bien qu'il n'y ait pas un problème de dopage du type russe en Irlande, les athlètes irlandais ont été impliqués dans quelques controverses, la plus récente d'elles pendant les JO de Rio 2016.[50] De plus, l'athlète irlandaise qui a gagné plus de médailles olympiques qu'aucun autre, Michelle Smith, a provoqué beaucoup de suspicions après ses performances aux JO d'Atlanta 1996 et a purgé une suspension après avoir violé les règles antidopage en 1998.[51] Du coup, il est clair que le problème du dopage dans le sport est aussi un problème irlandais.

Étant donné que le gouvernement actuel soutient la possibilité de nouveaux initiatives antidopage,[52] il faut considérer si les provisions françaises actuelles pouvaient servir de modèle pour un endurcissement de nos lois antidopage, comme l'a proposé Anderson,[53] et pourraient ainsi limiter les effets du dopage en Irlande. De plus, Cox et Schuster parlent des bienfaits de

[43] Loi du 1er juin 1963.
[44] 'Projet de loi relatif à la lutte contre le dopage et à la protection de la santé des sportifs' (*Le Sénat National*), <https://www.senat.fr/rap/l05-012/l05-0121.html> visité le 24 mars 2019.
[45] Loi du 23 mars 1999.
[46] Code du Sport (n 18).
[47] 'World: Europe French doping crackdown' (*BBC* le 19 novembre, 1998) <https://news.bbc.co.uk/2/hi/europe/217845.stm> visité le 24 mars 2019.
[48] 'France stiffens anti-doping laws' (*Cycling News* le 30 avril 2008) <www.cyclingnews.com/news/france-stiffens-anti-doping-laws/> visité le 24 mars 2019.
[49] 2015 Act (n 17), s 44(2)(a); Irish Anti-Doping Rules 2015 (*Sport Ireland*), art 1.1.1°.
[50] 'Irish Boxer Michael O'Reilly Reported to Have Failed Drug Test' (*RTE*, le 4 aout 2016) https://www.rte.ie/sport/olympics/2016/0804/806947-irish-boxer-olympics/ visité le 24 mars 2019.
[51] Fergus Black, 'Four-year ban for Michelle' *Irish Independent* (Dublin, le 7 aout 1998) <https://www.independent.ie/irish-news/fouryear-ban-for-michelle-26176630.html> visité le 24 mars 2019; 'List of Irish Medallists in the Olympic Games (*Olympian Database*) <www.olympiandatabase.com/index.php?id=28513&L=1> visité le 24 mars 2019.
[52] 'Minister O'Donovan confirms Irish support for global anti-doping reform' (*Department of Transport, Tourism and Sport*, le 11 janvier 2017) <www.dttas.ie/press-releases/2017/minister-o'donovan-confirms-irish-support-global-anti-doping-reform> visité le 24 mars 2019.
[53] Jack Anderson, 'Ignorance of the Law is No Defence' *The Irish Times* (Dublin, 18 décembre 2004), dans Donnellan (n 2) 117.

l'harmonisation des approches antidopage avec l'avènement de l'AMA,[54] et une telle harmonisation croissante des provisions législatives nationales aiderait à la lutte contre le dopage. Si l'on adoptait une provision qui punit l'utilisation des substances ou des méthodes interdites, il serait logique de se référer au Code AMA comme le législateur français l'a fait, puisque l'Irlande est signataire, lui aussi, du Code AMA.

II L'Usage de Substances et de Méthodes Interdites

Tandis que le Code du Sport suit le Code AMA pour la plupart, la définition française d'un complice est plus étroite que son équivalent AMA. Ce dernier comprend tous qui permettent la violation,[55] alors que la version française requiert une aide donnée pour réaliser la violation.[56] Ainsi, il est clair que la loi française n'est pas aussi stricte que le Code AMA dans certains aspects.

Malgré cette divergence, les substances et méthodes interdites par le Code du Sport sont celles interdites par le Code AMA.[57] Afin de décourager la détention, la création, la distribution et l'usage de telles substances et méthodes, le législateur français a mis en place des sanctions lourdes pour ces actions. La détention (tentée ou actuelle) et l'usage (tentée ou actuelle) de ces substances et méthodes sont interdites aux sportifs,[58] à peine des sanctions imposées par l'AFLD, telles que de sanctions sportives, une amende d'au maximum 45,000€ et la publication de la décision.[59] Il existe des peines plus sévères aussi pour la détention d'une substance ou méthode interdite : un an d'emprisonnement et une amende de 3,750€.[60] Cependant, l'autorisation d'usage à des fins thérapeutiques accordée par l'AFLD, une organisation nationale antidopage étrangère, une organisation responsable d'une grande manifestation sportive international, ou une organisation internationale dont la validité conforme à l'Annexe II de la Convention UNESCO.[61] Sans doute, ce sont des sanctions lourdes, mais une baisse dans le nombre des incidents de dopage dans les années à venir les justifierait.

De plus, le Code du Sport pénalise le récidivisme, ce qui peut être considéré comme un réponse à la prééminence de sportifs avec des histoires de dopage. La deuxième violation de plusieurs

[54] Neville Cox et Alex Schuster, *Sport and the Law* (First Law, 2004) 163-164.
[55] Code AMA (n 13), art 2.9.
[56] Code du Sport (n 18) art L 230-5.
[57] ibid art L 230-2.
[58] ibid art L 230-9.
[59] ibid art L 232-23-I-1.
[60] ibid art L 232-26-I.
[61] ibid art L 232-2.

dispositions, telles que la détention d'une substance ou méthode interdite, la diffusion de telles substances ou méthodes, la méconnaissance des obligations concernant la localisation et le refus de se soumettre à un contrôle pendant une période de 10 ans à compter de la première violation sera punie d'une sanction d'entre six mois à deux fois la longueur de l'interdiction originel.[62]

Puisque l'Irlande est signataire au Code AMA, et que le gouvernement est tenu à prendre toute mesure possible pour assurer l'implémentation du Code, l'interdiction de ces substances et méthodes sera logique et possible. En ce qui concerne l'interdiction de certaines substances et méthodes, il serait utile de comparer cette interdiction avec les dispositions actuelles sur la possession et l'usage de drogues illégales. Vu que le cannabis est maintenant jugé d'avoir des bienfaits médicaux et sera ainsi permis pour l'usage médicinale en Irlande,[63] il est logique de comparer les provisions françaises sur l'usage des produits de dopage avec les provisions irlandaises sur l'usage du cannabis, puisque les deux ont des effets médicaux. D'ailleurs, ce serait plus logique qu'une comparaison avec les lois irlandaises sur la cocaïne, par exemple, qui n'a pas d'exception en fonction des propriétés médicales.

Alors, les peines pour les violations des lois contre le cannabis ne considèrent pas d'emprisonnement jusqu'à la troisième violation.[64] Cela contraste avec les provisions françaises sur l'usage des produits de dopage, qui envisage un an d'emprisonnement pour la première violation. Puisque les produits de dopage ont des effets médicaux (ce qui permet des autorisations d'usage à des fins thérapeutiques), il ne serait pas logique d'adopter complètement les peines pour la détention des substances et méthodes, mais rien n'empêche leur interdiction avec des peines plus modérées, basées sur les peines pour le cannabis. Et tel que le législateur français l'a fait, il pourrait y avoir des peines plus sévères pour le récidivisme, basées encore une fois sur les peines contre le récidivisme concernant le cannabis.

En somme, l'interdiction légale des substances et méthodes interdites dans le Code AMA sera également possible en Irlande, mais avec des peines plus légères que les peines françaises puisque les peines irlandaises seraient conformes avec celles pour le cannabis.

[62] ibid art L 232-23-3-8.
[63] Paul Cullen 'Cannabis set to be licensed for medicinal use in Ireland' *The Irish Times* (Dublin, le 10 fevrier 2017) <https://www.irishtimes.com/news/health/cannabis-set-to-be-licensed-for-medicinal-use-in-ireland-1.2970120> visité le 24 mars 2019.
[64] Misuse of Drugs Act 1984, s 6(1).

III La Création et le Trafic de Substances et de Méthodes Interdites

Si l'on pénalise la détention ou l'usage de ces produits, il faut aussi pénaliser leur création, et comme l'a fait le législateur français. La création et diffusion de ces substances et méthodes interdites sont interdites elles-mêmes,[65] ainsi que la falsification du contrôle et l'analyse ou l'interférence dans ce procès.[66]

Ces sanctions sportives doivent être imposées par la fédération chargée de l'administration du sport pratiqué par le sportif ciblé, et le procès interne (y compris) sera fini dans un délai de quatre mois de la constatation de l'infraction.[67] Toute violation de ces dispositions sera punie de cinq ans d'emprisonnement et une amende de 75,000€. Les punitions sont élevées si les violations sont commises en bande organisée ou à l'égard d'un mineur, avec 7 ans d'emprisonnement et une amende de 150,000€.[68] Ces dispositions contre le trafic des produits interdits sont conformes aux dispositions du Code AMA concernant la même activité.[69] Encore une fois, ce sont des sanctions extrêmement lourdes, mais elles seront justifiées si l'usage des produits et des méthodes interdites en France se baisse.

En droit irlandais, la création et le trafic des drogues contrôlés telles que le cannabis sont pénalisés d'une manière plus sévère que la détention ou l'usage de ces drogues, avec la possibilité d'un terme d'emprisonnement de vie pour la détention des drogues contrôlés en vue de les vendre.[70] Le même principe existe en droit français concernant les produits de dopage, et il serait logique d'adopter une telle provision dans une loi putative contre le dopage en Irlande, parce que cette action découragerait le trafic de telles substances, avec le résultat qu'il y aura moins d'incidents de dopage. Les peines étant plus élevées que celles pour la détention des substances, il serait à la discrétion du législateur de décider la sévérité de ces peines, mais une provision semblable à la Section 33 du Criminal Justice Act, qui laisse aux juges de déterminer la longueur de la peine serait logique.[71]

[65] Code du Sport (n 18) art L 232-10-1º; Code du Sport (n 18) art L 232-10-2º.
[66] ibid art L 232-10-4º.
[67] ibid art L 232-21.
[68] ibid art L 232-26-II.
[69] Code AMA (n 13) art 2.7.
[70] Criminal Justice Act 2007, s 33.
[71] ibid.

Pour conclure, l'adoption des provisions concernant la création et le trafic des substances et méthodes interdites serait possible et logique pour l'Irlande. En suivant la logique déjà détaillée, les peines pour ces violations seraient basées sur les provisions équivalentes pour le cannabis.

IV Les Obligations Pesant sur les Médecins

Il existe également de responsabilités et de sanctions pour des médecins dans le Code du Sport. Chaque médecin qui décèle des indications du dopage doit obligatoirement transmettre ses observations au médecin responsable de l'antenne médicale de l'AFLD. Toute méconnaissance de ce devoir sera punie par de sanctions professionnelles.[72] Cette obligation limite les possibilités pour les athlètes d'utiliser des substances ou méthodes interdites sans être décelé, et facilite un usage dirigé des ressources, en les dirigeant vers d'athlètes qui donnent l'impression de violer les règles, au lieu de gaspiller des ressources dans les contrôles randomisés, une pratique critiquée par Anderson.[73]

En ce qui concerne l'obligation en droit français qui pèse sur les médecins d'informer l'AFLD dans les cas où ils décèlent des indications de dopage,[74] une telle obligation serait logique en droit irlandais, et accorderait avec l'obligation d'agir pour la bonne santé du patient, puisque l'abus de ces substances de dopage nuirait à la santé. Du coup, une alerte à l'organisation antidopage (Sport Ireland dans ce cas) mettrait fin à l'abus de la substance, et donc protégerait la santé de l'athlète. Alors, cette provision en droit français serait compatible avec le droit irlandais. Le Sport Ireland Institute serait l'organisation apte à recevoir ces informations.[75]

En conclusion, l'adoption de ces obligations pesant sur les médecins d'informer l'organisation nationale antidopage lorsqu'ils décèlent d'indications de dopage serait logique, en vue du fait qu'une telle obligation chercherait à protéger la santé des athlètes.

V Conclusion sur l'Adaptabilité des Provisions Françaises en Droit Irlandais

Bien que toutes ces nouvelles dispositions aident sans doute dans la lutte contre le dopage dans le sport, elles sont inutiles si elles ne sont pas appliquées d'une manière cohérente et constante. Dans le cadre du Coupe du Monde de Rugby 2023, après qu'il ait été noté dans le rapport

[72] Code du Sport (n18) art L 232-3; Code du Sport (n 18) art L 232-4.
[73] Anderson (n 37) 142.
[74] Code du Sport (n 18) art L 232-3.
[75] Sport Ireland Institute, <http://www.instituteofsport.ie/> visité le 24 mars 2019.

préliminaire que cette loi aurait posé un problème, il a été confirmé que ces dispositions ne s'appliqueront pas aux joueurs non français qui participent dans le tournoi.[76] World Rugby insiste qu'il s'oppose au dopage dans le sport,[77] et donc il n'existe aucune raison pour laquelle la présence de lois strictes sur le dopage (qui limiteraient d'ailleurs la prévalence du dopage lors de ce tournoi) serait un problème. En effet, cette contradiction aide ceux qui utilisent des substances et méthodes interdites et non pas ceux qui n'en utilisent pas, ce qui serait contraire au but de protéger le sport sans le dopage, énoncé dans le Code AMA.[78] Si l'on adoptait une loi de ce type, il faudrait légiférer contre la possibilité qu'elle sera mise à coté lors des tournois internationaux.

En somme, le Code du Sport porte les dispositions légales françaises sur le dopage. La détention, usage, production et diffusion des substances et des méthodes interdites dans le Code AMA sont interdites (sans une autorisation d'usage à des fins thérapeutiques) à peine des sanctions sportives, de l'emprisonnement et des amendes, ainsi que le récidivisme de ces violations. Le sportif est aussi contraint de fournir des informations sur sa localisation et sa reprise de l'activité sportive, alors que le médecin qui décèle des indications du dopage doit transmettre ces informations à l'AFLD. Certes, ces dispositions aident dans la lutte contre le dopage, parce qu'elles servent de dissuader des athlètes d'utiliser ces substances ou méthodes interdites, mais leur utilité ne sert à rien si elles sont ignorées, comme dans le case du Coupe du Monde de Rugby 2023.

Ces provisions françaises endurciraient le droit irlandais si elles étaient adoptées par le législateur, et seraient conforme avec l'obligation du gouvernement de faire en sorte que le Code AMA soit appliqué dans la meilleure façon possible. Cependant, il y aurait quelques contradictions avec le droit irlandais sur les drogues contrôlées. Du coup, un lien serait fait avec le cannabis qui est permis en certains cas pour ses propriétés médicaux, puisque la majorité des substances de dopage ont d'effets médicaux. Par conséquent, les peines pour la détention et l'usage des substances et méthodes interdites et le récidivisme concernant ces dispositions ne seraient aussi sévère qu'en droit français, mais la sévérité des peines pour le

[76] Gavin Cummiskey, 'World Rugby will expect exemption on French law on doping' *The Irish Times* (Dublin, le 31 octobre 2017) <https://www.irishtimes.com/sport/rugby/international/world-rugby-will-expect-exemption-on-french-law-on-doping-1.3275672>. visité le 24 mars 2019.
[77] *Manuel Antidopage 2017* (Dublin, World Rubgy) 2.
[78] Code AMA (n 13) 16.

trafic de telles substances et méthodes pourrait être la même en droit irlandais. En plus, les obligations pesant sur les médecins en droit français pourraient être transposés en droit

irlandais, du fait qu'elles cherchent à protéger la santé des athlètes, par le biais d'interdire l'usage des substances qui pourraient nuire à la sante de ces athlètes.

D CONCLUSION

Alors, l'heure est au bilan. Dans son état actuel, les provisions législatives mondiales contre le dopage dans le sport ne fonctionnent pas. Depuis quelques années, il y a eu une succession de crises et de polémiques liées directement au dopage. Les accusations et les preuves de dopage dirigé par l'état en Russie et le dopage systématique en Turquie, ainsi que la prééminence des athlètes punis pour des violations des règles antidopage dans le passé afflige l'image de sport et même son essence, ce qu'affirme le Code AMA.[79] De plus, le statistiques indiquent que l'on gaspille de ressources dans la poursuite du sport 'propre', avec environs 2% des athlètes qui ratent des contrôles, tandis qu'entre 10-35% sont estimés de violer les règles antidopage.

De ce fait, il est clair qu'il existe un besoin de rédiger de nouvelles dispositions afin de lutter contre le dopage dans le sport. La France, dans le Code du Sport, a mis en place des peines strictes pour la détention, l'usage, le trafic et la création des substances et méthodes interdites dans le Code AMA. Puisque les peines pour le cannabis (qui est aussi médicinal dans quelques dosages) sont inférieures en Irlande, nos peines pour l'usage et la détention des substances interdites seraient probablement inférieures aux peines françaises, mais il serait logique d'adopter des peines aussi sévères pour le trafic de telles substances que celles qui existent en droit français. Quant aux obligations pesant sur les médecins d'informer l'organisation antidopage national lorsqu'ils décèlent des indications de dopage, cette provision serait utile en droit irlandais. Puisque ces règles chercheraient à garantir l'existence du sport sans le dopage, il serait logique pour le gouvernement irlandais de légiférer en ce domaine. Une telle loi serait conforme à leurs obligations dans le Code AMA, protégerait le concept du sport 'propre', et protégerait la santé des sportifs. Bien que les provisions ne soient pas aussi sévères que la législation française, ce Code serait une base logique pour l'élaboration de ces principes. En conséquence, il servirait le sport irlandais d'adopter des lois semblables aux provisions françaises, mais plus modérées pour qu'elles soient de la même sévérité que les lois contre le cannabis.

[79] ibid.

THE RIGHT TO DIE: EUTHANASIA AND ASSISTED SUICIDE FROM A EUROPEAN PERSPECTIVE.

Niamh O'Brien*

A INTRODUCTION

The purpose of this article is to examine the social history of euthanasia, and to analyse and contrast the legal attitude to 'mercy killings' and the right to die in two different European Union member states; Ireland and Belgium. This article will explore the history of euthanasia, the cultural reasons which underpin the differing approaches of these states and examine to what extent the relevant EuropeanUnion member states; Ireland and Belgium. This article will explore the history of euthanasia, the cultural reasons which underpin the differing approaches of these states and examine to what extent the relevant European policies are capable of protecting vulnerable patients and the right with which the policy intends to safeguard. It will also examine whether in this process they unintentionally curtail the right that they are meant to serve. As stated by Philippe Aries '[D]eath no longer belongs to the dying man, nor the family. Death is regulated and organised by bureaucrats whose competence and humanity cannot prevent them from treating death as a thing that must bother them as little as possible.'[1]

B EUTHANASIA: A BRIEF HISTORY

The term euthanasia derives from the Greek phrase εὐθανασία. The English translation refers to a good death, characterised by ease and absence of pain.[2] The practice of euthanasia is long established, it is woven throughout the fabric of human civilization.

One of the earliest recorded discussions of euthanasia was found in the historical records of Suetonius. Suetonius, a biographer, wrote *De Vita Caesarum* in AD 121 wherein he chronicled the life of Roman nobility. Suetonius spoke about the painless and quick death of Emperor

* Final Year BCL (International) Student, University College Cork. I would like to thank my parents for all their encouragement throughout my studies and to the members of the Editorial Board for their invaluable help with my article.

[1] Phillipe Aries, *The Hour of Our Death: The Classic History of Western Attitudes Toward Death over the Last One Thousand Years* (2nd edn, Vintage Books 2008) 588.

[2] Visnja Strinic, 'Arguments in Support and Against Euthanasia' (2015) 9(7) British Journal of Medicine and Medical Research 2.

Augustus - a passing which was the euthanasia that the Emperor had desired.[3] Euthanasia was recognised, but not always accepted as a societal practice, in many ancient cultures.

During the reign of Sparta, euthanasia was seen as a way to promote an ideal model of citizens. The Spartans believed that it would advance their society to allow invalids, citizens and infants with disabilities to pass away. The practice was often carried out irrespective of the individual's wishes in order to execute the expectation that 'a person ill-suited for health and service to the state' would be better off dead than alive.[4]

A departure from the Spartan acceptance of euthanasia can be seen in the works of Hippocrates of Kos, most notably his work on the Hippocratic Oath. The oath is estimated to have originated from the 3rd to 5th centuries BC, its code outlined ethical guidelines for medical practitioners.[5] The Hippocratic Oath required physicians to promise to uphold certain moral standards. One such moral standard was the exclusion of certain medical treatments from the practice of the physicians who swore under it, including administering poison to induce death.[6]

Although the oath originates from Roman and Grecian times, records suggest that the practice of assisting with death continued.[7] Medical practitioners would continue to administer mercy killings to those who requested it of them into the later centuries. There are several explanations; namely that the registration of practitioners was not mandatory prior to practicing on patients and there was an absence of enforcement agencies to engage with lapses of professional standards.[8] Euthanasia was both an accepted practice and an acceptable death.

The fall of the Roman Empire and the increasing importance of religion were the leading factors in the decreasing acceptance of euthanasia in the succeeding years.[9] The majority of the world religions denounced suicide and euthanasia. The teachings of Judaism and Christianity stated that to commit suicide 'violates God's authority over life', a gift which

[3] Philippe Letellier, *Euthanasia: Volume 1 – Ethical and Human Aspects* (Council of Europe 2003) 13 as cited in Soumi Biswas and Malay Mundle, 'Passive Euthanasia/Physician Assisted Suicide - Whither Indian Judicial System?' (2014) 2(1) Journal of Comprehensive Health 11, 12.
[4] Ian Dowbiggin, *A Concise History of Euthanasia: Life, Death, God and Medicine* (Rowman & Littlefield Publishers 2007) 8.
[5] ibid 10.
[6] Steve Philips, 'Physicians, the Morality of Euthanasia, and the Hippocratic Oath' (*Bioethics at Trinity International University*, 15 July 2015) <http://blogs.tiu.edu/bioethics/2015/07/15/physicians-the-morality-of-euthanasia-and-the-hippocratic-oath/> accessed 13 October 2018.
[7] Dowbiggan (n 4) 9.
[8] ibid 9, 10.
[9] ibid 16.

God bestows and only God should take away.[10] This stance is mirrored in the Islamic religion, who reiterated that the power to give and take life lies solely in the hands of Allah.[11]

During the Middle Ages the influence of religion permeated into all aspects of society, making the issue of suicide taboo, which forced academic debates on euthanasia and suicide to cease. The Medieval view of suicide is explored in Dante's 'Divine Comedy: Inferno', in which the poet describes his descent into hell. Dante describes the passing pagans victims; before reaching the seventh circle of hell which is populated by perpetrators of violence. It is here that victims of suicide are destined to spend eternity, surrounded by murderers and blasphemers.

The term 'Euthansia' was first recorded in a medical context in the 17th Century when philosopher Francis Bacon stated that the duties of a medical practitioner could be divided into three main categories: preservation of health, the curing of illnesses and the prolongation of life.[12] Bacon discussed prolongation of life as a duty to 'alleviate the "physical sufferings" of the body'.[13] He reminded the medical community of their responsibility in relation to easing the pain of those who are ill. The 18th century marked a shift in attitudes towards suicide, with respected scholars of the Enlightenment movement such as Madame de Stael beginning to recognise that suicide victims should no longer be condemned but, instead, be pitied.[14]

Acceptance of suicide and euthanasia began to grow, they were no longer regarded as committing an absolute sin. Morphine was administered to ease the pain of terminally-ill patients, and therefore arguments for the use of morphine in assisted suicide began to arise. The leading advocate for this was Samuel D Williams who proposed the use of this medication to intentionally end a patient's life. His proposal garnered attention globally with supporters describing his arguments as remarkable, plausible and forward thinking.[15] However,

[10] The New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* (1994) 80 <https://www.health.ny.gov/regulations/task_force/reports_publications/when_death_is_sought/chap5.htm> accessed 24 March 2019.
[11] Abdel Haleem MAS translator, *The Qur'an: English Translation and Parallel Arabic Text* (Oxford University Press 2010) (13:16).
[12] Brian Vickers, *Francis Bacon: The Major Works* (Oxford University Press, 2008).
[13] ibid 630.
[14] Dowbiggin (n 4) 37.
[15] Ezekiel J Emanuel, 'The History of Euthanasia Debates in the United States and Britain' (1994) 121(10) Annals of Internal Medicine 793, 794.

supporters and opponents alike rejected the implementation of Williams' views on the basis that such practices would carry too high a risk of abuse.[16]

The path for legalisation of euthanasia began in Ohio, United States of America. The proposed Bill 'An Act Concerning the Administration of Drugs etc. to Mortally Injured and Diseased Persons' was rejected by the legislature in 1906.[17] Britain became the next country to attempt to create a governing statute for euthanasia but the Bill was rejected by the British parliament in 1936, despite the growing national interest in the subject.[18]

Discourse concerning the acceptability of assisted suicide was interrupted in Europe and elsewhere in light of the scandalous discovery of Death Camps within Nazi Germany. The practice of mass murder by the Third Reich began with the 'euthanasia' of mentally and physically disabled patients, with the order justified on the basis that these citizens should be exterminated in order to 'restore the racial "integrity" of the German nation'.[19] These measures were categorized as euthanasia, but the absence of patient consent or procedures happening in the best interests of the patients shows the stark departure from the actual meaning of the term. The practice of genocide became a rehearsal for the Holocaust,[20] the systemic mass extermination of the Jewish, Gypsies, Polish and other 'racially undesirable' communities.[21]

Arguments in favour of assisted suicide emerged again in the later decades of the 20th century. An acceptance arose that the right of human integrity and autonomy should extend to matters of the individual's death. At the time of this article, euthanasia is legal in the Netherlands, Belgium, Luxembourg, Colombia, and Canada. Decriminalization of assisted suicide is seen in just over a dozen different jurisdictions.[22] Legislation varies from region to region, and both extremes of the spectrum can be observed between neighboring countries. A perfect example of this can be seen between two geographically and politically close European countries, Norway and Sweden. Euthanasia is illegal in Norway - anyone assisting in the practice

[16] ibid.
[17] ibid 796.
[18] Voluntary Euthanasia (Legalisation) Bill, 1936.
[19] 'Euthanasia Program' (*Holocaust Encyclopedia*) <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005200> accessed 24 October 2018.
[20] ibid.
[21] Dowbiggan (n 4) 92.
[22] Switzerland, the Netherlands, Luxembourg, Albania, Columbia, Canada, Japan and American states such as Oregon, Washington and Montana.

becoming liable for criminal prosecution compared to Sweden where passive euthanasia is permitted by the Courts.[23]

C IRELAND

The first jurisdiction that this article will examine is Ireland. Throughout this article an analysis will be made of how the courts have ruled upon the issue of euthanasia in the past and both the merits and faults associated with the narrow interpretation of the right in Ireland will be discussed. Firstly the sources and the historical origins of the rights in question will be examined. By providing a timeline of how the Irish Courts have interpreted the relevant rights, the evolution will be traced of the right to life and the right to personal autonomy that have been awarded to Irish citizens.

It is important to first establish where the rights of Irish citizens originate. The protection and conferment of personal rights upon Irish citizens are found in the Constitution of Ireland. These rights are outlined in Article 40.3.1° which provides that 'the State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen'. Through court interpretations these rights have been confirmed to extend to matters such as freedom of expression, the right to privacy and most importantly for the purpose of this article, the right to health and the right to life.

Few things have shaped and controlled Irish political and legal culture as decisively as the Irish Constitution.[24] Another important consideration when examining the language and the products of the Constitution is the culture of Ireland at the time when it was written. Historically, Ireland was an extremely religious state, with the main religion practiced being Roman Catholicism. The Roman Catholic Church played a dominant role in many aspects of life in Ireland including education and healthcare, where most institutions were controlled both financially and administratively by advocates of the church.[25] This influence also

[23] Norwegian Penal Code, s 276 <https://lovdata.no/dokument/NLE/lov/2005-05-20-28/KAPITTEL_2#KAPITTEL> accessed 24 March 2019; Sapa-AFP, 'Sweden has first passive euthanasia since law relaxed' *The Sunday Times* (5 May 2010) <https://www.timeslive.co.za/news/world/2010-05-05-sweden-has-first-passive-euthanasia-since-law-relaxed/> accessed 24 March 2019.

[24] Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937* (Mercier Press 2007) 13.

[25] Cliodhna Russell, 'Religion and Health Care: What Role Does the Catholic Church Play in Irish hospitals?' *The Journal* (Dublin, 30 April 2017) <https://www.thejournal.ie/religion-health-care-catholic-church-3360849-Apr2017/> accessed 19 March 2019.

extended to matters of a legal nature, with the 1937 Constitution described as a legal document which 'embodied the Catholic principles of the Irish Nation'.[26]

The influence of these Christian principles remain present in modern-day Irish society with the Supreme Court delivering judgments on constitutional rights in accordance with the Constitution. Accordingly, multiple judgments which have been delivered echo these Christian teachings, namely the more conservative judgments on cases involving the right of the unborn,[27] and more important to this article, the right to life. The teaching of the Roman Catholic Church is that the right to life must be preserved, with Pope Benedict XVI stating that the practice of abortion and euthanasia is a 'grave sin'.[28] The following examination of cases will illustrate how these teachings have been demonstrated in Irish law.

The issue of assisted suicide and euthanasia is a recent development in Irish case law. The first case concerning this issue argued before the Irish courts occurred in 2012.[29] Until 1993, attempting to commit suicide in Ireland was a crime.[30] Decriminalisation came with the enactment of the *Criminal Law (Suicide) Act 1993*, which states, in s.2(1), that suicide 'shall cease to be a crime'. Whilst this legislation removed the penalty on the individual involved in the act of suicide, it asserts that the penalty still remains for anyone aiding the individual. Section 2(2) of the *1993 Act* maintains that any person who 'aids, abets, counsels or procures the suicide of another' shall be committing a criminal offence and liable to a fourteen year prison sentence on conviction.

The first case considered is *In Re a Ward of Court*.[31] This case revolved around a 45 year old woman who had been in an almost persistent vegetative state (PVS) for 23 years. She suffered irreversible brain damage during a surgery and remained in a comatose state. The physical symptoms of the woman were described as catastrophic by the court as she did not have the capacity to communicate, swallow or move.[32] Although her condition did permit occasional minimal cognitive ability such as the ability to track visitors with her eyes, her medical team were of the opinion that this was just a reflex from the brain stem. Indeed, Mr Justice Lynch

[26] Keogh and McCarthy (n 24).
[27] *Attorney General v X* [1992] IR 1.
[28] Pope Emeritus Benedict XVI, 'Worthiness to Receive Holy Communions: General Principles' (2004) <https://www.ewtn.com/library/curia/cdfworthycom.htm> accessed 19 March 2019.
[29] *Fleming v Ireland & Ors* [2013] IEHC 2.
[30] Summary Jurisdiction (Ireland) Amendment Act 1871s 9, since repealed by Criminal Law (Suicide) Act 1993, s 3.
[31] [1996] 2 IR 79.
[32] ibid [88].

stated that if this patient had in fact retained enough cognitive abilities and was consequently aware of her condition that 'this would be a terrible torment to her and her situation would be worse than if she were fully PVS'.[33] Her nutrition was administered artificially and she required constant nursing care. As the patient had become a ward of the Irish courts, the patient's family asked the court to make an order to allow the removal of the feeding tube and to allow their loved one to 'pass[ing] into God's hand without any further intervention of humankind'.[34] Granting this order, Mr Justice Lynch stated that his role in this case should be taken from the stance of 'a prudent, good and loving parent in deciding what course should be adopted'.[35] This decision was subsequently appealed to the Supreme Court.

The panel of five judges on the Supreme Court agreed that the patient's health was in an irreversible state and that the issue of her health prospects were not up for debate. The central issue the court focused on was whether the personal right to life as protected by Article 40.3.2° in the Constitution mandates a hierarchy over all other fundamental rights.[36] The Attorney General and Counsel for the ward argued that the patient's right to life should not be 'sacrificed in favour of such other . . . rights'.[37] The court disagreed. Chief Justice Hamilton argued that the right to life implies 'the right to have nature take its course and to die a natural death.'[38] Chief Justice Hamilton stated that this right includes the right 'not to have life artificially maintained by the provision of nourishment by abnormal artificial means, which have no curative effect and which is intended merely to prolong life.'[39]

The Supreme Court upheld the right to refuse treatment by a four-to-one majority, even if the result of this meant the end of life for the patient. However, Chief Justice Hamilton stressed that this right does not include 'the right have life terminated or death accelerated and is confined to the natural process of dying'.[40] The right to die is confined to passive practices which allow nature to take its course but not to actions which constitute positive steps to end life.[41] The medical staff in the hospital argued that to take this action would be a violation of their own medical code. The only option left to the family was to take the patient home and

[33] ibid.
[34] ibid.
[35] ibid [99].
[36] ibid [93].
[37] ibid.
[38] ibid [124].
[39] ibid.
[40] ibid.
[41] Mary Carolan, 'High Court Judgment Due Over Whether Brain-Injured Man Be Allowed to Die' *The Irish Times* (Dublin, 19 September 2016) 6.

to withdraw the feeding tube themselves. Mr Justice Lynch in the High Court and Mr Justice O'Flaherty in the Supreme Court asserted that the patient had a right to die in accordance with nature and 'with all such palliative care as is necessary to ensure a peaceful and dignified death'.[42] The failure of the hospital staff to deliver this resulted in a failure of the patient's right to a dignified death.

The right to life and the corresponding right to die was debated next in the case of *PP v Health Service Executive*.[43] In this case a pregnant woman of 15 weeks gestation was admitted to hospital where her medical condition deteriorated leaving her brain stem dead. She was kept alive artificially and this was to continue until the foetus became viable. While her condition could be maintained, the patient suffered from pneumonia, fungal infections, urinary tract infections and other conditions. Her appearance was swollen due to a build-up of fluid. The patient's original head wound was infected and sepsis had developed in the wound. Dr Boylan, a consulting physician in the case, surmised that attempts to maintain life support until the foetus was 32 weeks of age would prove 'futile'.[44] When recalling past medical cases, he could not find any supporting medical evidence of a successful outcome where the the somatic support began at 13 or 14 weeks gestation. Dr McKenna, another expert witness, stated that any continuance of the patient's treatment would 'be going from the extraordinary to the grotesque'.[45] The plaintiff, who was the woman's father described these measures as 'unreasonable' and 'unlawful' and applied to the High Court for permission for the life support to be removed.[46] The argument against removing life support was based on the State's obligation to keep her alive in order to preserve the life of the foetus in accordance with Article 40.3.3°, which affords the unborn life the same right to protection as the protection given to the mother.

The High Court heard contrasting medical evidence from both sides of the case. The plaintiff's counsel argued that Article 40.3.3° should not be engaged here as the actions they requested would not constitute a 'deliberate interference' with the foetus.[47] With this Article not engaged, the patient's right to have a dignified death should take precedence and the Court should allow for the patient to pass peacefully instead of subjecting her to continued medical

[42] *In Re a Ward of Court* (n 31) 94, 134.
[43] [2014] IEHC 622.
[44] ibid [24].
[45] ibid [31].
[46] ibid [40].
[47] ibid [41].

care. The opposing counsel, who acted on behalf of the interests of the unborn, contended that even though the life of the mother had been lost, the life of the unborn could be preserved and that the life support should prevail to vindicate the unborn's right to life.

The High Court agreed with the plaintiff's case. On the issue of granting the withdrawal of treatment, the court held that as the unborn was left with no genuine prospects of life it would be 'a distressing exercise in futility' to order the continuance of life support for the mother.[48] Relying on *Re a Ward of Court,* the President of the High Court, Mr Justice Kearns affirmed that while the right to life 'ranked first in the hierarchy of personal rights', it must be subject to certain qualifications.[49] Mr Justice Kearns clarified that while the State has an interest in preserving life, this interest does not extend to prolonging life at all cost irrespective of the circumstances surrounding the quality of life. The court concluded that to continue medical care for this patient would amount to a deprivation of her right to a dignified death; a concept that Mr Justice Kearns described as the 'hallmark of civilised societies from the dawn of time'.[50] The court found that since there was no 'realistic prospect' of the foetus surviving until a point of independent viability, the right to life belonging to the mother rose above the other competing rights.[51]

Perhaps the most important case in this area is the case of *Fleming v Ireland & Ors*.[52] This case is pivotal when examining how far the right to life extends to and to what extent an individual can exercise their right to a dignified death. Marie Fleming, a 59 year old retired law lecturer, began legal action against the State in 2012. Mrs Fleming was diagnosed with Multiple Sclerosis in 1986. She wished to end her life before her condition rendered her standard of living unbearable. As her health degenerated she could no longer undertake the steps to end her life independently. She needed assistance, which her husband Paul Fleming had offered. She sought to have an order passed stating that if her husband assisted her in ending her own life that he would not be prosecuted. She challenged the ban on assisted suicide, arguing that s.2(2) of the *1993 Act*, which made assisting suicide of another individual a criminal offence, was contrary to her rights guaranteed by both the Irish Constitution and the European Convention of Human Rights.

[48] ibid [44].
[49] ibid [57].
[50] ibid [55].
[51] Ibid [65].
[52] *Fleming* (n 29).

The case was first heard in the High Court, where Mrs Fleming was described as 'one of the most remarkable witnesses which any member of this Court had ever been privileged to encounter'.[53] The court accepted that the ban on assisted suicide conflicted with Mrs Fleming's personal rights, namely the right to personal autonomy. However, the High Court was able to legitimise and justify this restriction by applying a test of proportionality.[54] For a law which has the effect of restricting a right endowed upon Irish citizens through the Constitution, it must pass a test of proportionality. The threshold for this test is whether the objective set out in the law impairs the right in question as little as possible.[55]

In the judgment delivered by Mr Justice Kearns, he stated that in order to protect vulnerable citizens and to stop abuses in regards to assisted suicide that a complete ban with no exceptions was required. A blanket ban, despite creating imbalanced obstacles for certain citizens, satisfied the threshold of the proportionality test on the basis that it was the least restrictive measure to protect citizens from abuse. The government has an interest in preserving life and lifting the ban on assisted suicide would compromise the State's interest in this preservation.[56] An interesting obiter comment from the judgment was that despite issuing a dismissal of Mrs Fleming's case, it was suggested that her husband may not face prosecution if he did assist her on the basis that the Director of Public Prosecution may choose not to prosecute. Even though the court could not absolve the act of illegality, it did pose a scenario where further legal action could be avoided.[57]

On appeal to the Supreme Court, a panel of seven judges found against Mrs Fleming and ruled that she did not enjoy any constitutional right to die. The Supreme Court reiterated that while Mrs Fleming's right to life is protected constitutionally, they refuted that the right to life implies a right 'of every citizen to terminate his or her life and to have assistance in so doing'.[58] The Court recognised that while such an assumption could be drawn on a 'level of abstract reasoning'. However, one should not draw inferences from the Constitution contrary to its

[53] 'High Court Rules Against Challenge to Ban on Assisted Suicide in Landmark Case' (*RTE*, 11 January 2013) <https://www.rte.ie/news/2013/0110/362007-high-court-judgement-due-on-suicide-case/> accessed 13 November 2018.
[54] The test for proportionality originates from *Heaney v Ireland* [1996] 1 IR 580.
[55] ibid; Conor O'Mahony, 'Some Thoughts on the High Court Decision in Fleming' (*Constitution Project @ UCC*, 11 January 2013) <http://constitutionproject.ie/?p=174> accessed 13 November 2018; Brian Foley, 'The Proportionality Test: Present Problems' (2008) 1 The Irish Judicial Studies Journal 67.
[56] *Fleming* (n 29) [73]-[77] .
[57] ibid [175]; Conor O'Mahony, 'DPP Needs Clear Protocols After Assisted Suicide Ruling' *The Irish Times* (Dublin, 15 January 2013) 14.
[58] *Fleming* (n 29) [113].

philosophy or its values.[59] The Court differentiated between certain classes of rights, explaining that, unlike the right to associate which can be logically reversed as a right to dissociate, this reasoning cannot be applied to rights such as the right to life.[60] Chief Justice Denham stated that in accordance with both the 'social order contemplated by the Constitution, and the values reflected in it,' to interpret the right to life to equate to a right to die would not only be an illogical and immoral response but the 'antithesis of the right'.[61]

The final claim that the court assessed was whether the prohibition in s.2(2) of the *1993 Act* amounted to an infringement on the rights afforded to Mrs Fleming by the European Convention on Human Rights, namely the right to self-determination encompassed in Article 8.[62] Mrs Fleming had argued that this right allowed her to determine when and how she would die,[63] a right which the European Court of Human Rights had interpreted favourably in the case of *Pretty v. United Kingdom*.[64] In the case of *Pretty*, a case with similar factual circumstances, the ECtHR dismissed an appeal to apply for prosecutorial immunity for the appellant's husband if he was to assist his wife in committing suicide. The ECtHR recognised that under Article 8, a wide margin of appreciation is left to national authorities.[65] *Pretty* offered importance guidance to the Supreme Court in *Fleming* as the factual circumstances were similar and the relevant legislation in the United Kingdom (s.2(1) of the Suicide Act 1961 (UK)) has similar wording to the *1993 Act.* The Court was not without sympathy for Mrs Fleming, but dismissed the appeal in what was described as very tragic case.[66]

The most recent development in this area of Irish law was the 2016 failed prosecution of Gail O'Rorke for attempts to aid and abet another's suicide, Ms Bernadette Forde.[67] Mrs O'Rorke was the first person to be charged under the *1993 Act* and the three charges that were listed against her included the assistance of a suicide of another by making travel plans for the pair to attend an end of life treatment facility, Dignitas, in Switzerland; helping with the resourcing of the chemical substance which was taken by Ms Forde at the time of her suicide; and a final

[59] ibid.
[60] ibid.
[61] ibid.
[62] *Fleming* (n 29) [141]–[165].
[63] ibid [147].
[64] *Pretty v. United Kingdom* (2002) 35 EHRR 1.
[65] ibid [70].
[66] *Fleming* (n 77) [166].
[67] Kathy Sheridan , 'I Wasn't Alone in Helping Bernadette to Shut Down Her Life'; Gail O'Rorke, 'Acquitted of Assisting in the Suicide of Her Friend Bernadette Forde in 2011, Tells of Her Friend's Life, Illness and Death, and the "Nightmare" it Plunged Her Into' *The Irish Times* (Dublin, 4 February 2017) 3.

charge of procuring the suicide by making funeral arrangements for Ms Forde in advance of her death.[68]

Ms Forde was diagnosed with primary progressive multiple sclerosis in 2001 and the years of her life preceding her death in 2011 saw a severe deterioration of her health. Her suicide note, recorded on her dictaphone, told the court that one of the reasons why she was compelled to make such a note was in the hope that it would make her wishes and intentions clear, stating that: 'it's me and only me, and no one else' involved in and responsible for her death.[69] At this point Ms Forde was aware that Mrs O'Rorke was under investigation from officials regarding her assistance in making their travel arrangements to Switzerland. The trial judge, Mr Justice McCartan, described Mrs O'Rorke as an 'honest, decent woman faced with a huge dilemma'.[70] Where Mr Justice McCartan's sympathies lay were highlighted in his questioning of Ms Forde's solicitor Mr Maurice O'Callaghan. Mr Justice McCartan asked Mr O'Callaghan whether he considered his actions in relation to matters with his client were ever crossing the threshold of legality, such as taking instructions for what arrangements Ms Forde wanted for her cremation. When Mr O'Callaghan explained his actions as working within the parameters of his profession, Mr Justice McCartan agreed and remarked: 'So the jury are being asked, What is the difference between you, the professional, and Gail O'Rorke, the accused?'[71] Mr Justice McCartan urged the members of the jury to 'bring common sense and their everyday experiences' into their deliberations.[72] The verdict at the end of the eight day trial was to acquit Mrs O'Rorke of all charges. Before dismissing the jury, Mr Justice McCartan told them that while the present case was not an easy one 'justice has been done at your hands'.[73]

The Irish position on euthanasia and assisted suicide is extremely restrictive. Some commentators argue a statute which was enacted with the objective of protecting Irish citizens has instead given terminally ill patients a narrative of death which cannot be escaped. Palliative care is provided by the health service in Ireland and through various voluntary community programmes with the aim of such health care to 'provide the best quality of life

[68] ibid.
[69] ibid.
[70] '"Assisted Suicide" Woman's Plea' The Belfast Telegraph (Belfast, 20 April 2015) https://www.belfasttelegraph.co.uk/news/republic-of-ireland/assisted-suicide-womans-plea-31157286.html accessed 24 March 2019.
[71] Sheridan (n 89).
[72] ibid.
[73] Dearbhail McDonald, ''Justice done' as jury acquits carer Gail O'Rorke of assisting sick woman's suicide' *The Independent* (Dublin, 29 April 2015).

possible for a terminally ill patient'.[74] Ireland, alongside the United Kingdom, has traditionally been at the forefront of palliative care development with both jurisdictions ranking highly in internal measures for the quality of palliative care.[75] The provision of this sector of healthcare is dominated by volunteers who have driven the development of specialist palliative care.[76] While Ireland boasts an excellent standard of palliative care, this does not exclude other types of end of life treatments from entering our health sphere. Irish opinion polls suggest that the Irish population is ready to accept that palliative care has its limitations, with 57% of Irish people polled agreeing that assisted suicide should be made available to the terminally-ill.[77] To use an Irish proverb: *Is maith an scéalaí an aimsir*, meaning 'only time will tell'. In this case, it seems most fitting.

D BELGIUM

The second jurisdiction to be examined is Belgium. Belgium became the second country both in Europe and in the world to legislate for euthanasia and assisted suicide in The Belgian Act on Euthanasia of May, 28th 2002.Prior to its enactment of the 2002 law, the law in Belgium regarding euthanasia and assisted suicide was in line with the conservative approach taken by the majority of the western countries.[78] Euthanasia was classified as murder, and assisted suicide was in breach of a legal obligation to assist a person in danger, inducing criminal liability.[79] The Belgian political sphere from the second half of the 20th century was dominated by Christian parties, who opposed decriminalisation of euthanasia, echoing the traditional Christian values.[80]

The elections of 1999 marked the cardinal societal change when the Belgian political status quo was 'shattered' as two parties with liberal views won the majority of parliamentary seats in Belgium.[81] The new government began to legislate on certain moral and ethical issues that the prior government had failed to act on. Under the leadership of Prime Minister Guy

[74] 'Palliative Care' (Citizen's Information, 14 September 2016) <http://www.citizensinformation.ie/en/health/health_services/cancer_services/palliative_care.html> accessed 28 November 2018.
[75] John Lombard, *Law, Palliative Care and Dying - Legal and Ethical Challenges* (Routledge 2018) 119.
[76] ibid.
[77] Carl O'Brien, 'Majority Believe Assisted Suicide Should be Legal' *The Irish Times* (Dublin, 17 September 2010) 1.
[78] Strinic (n 2).
[79] Alain Canneel, *Euthanasia and Assisted Suicide: Reflections on Experience in Belgium* (Friends at the End 2013) 24.
[80] ibid.
[81] ibid.

Verhofstadt, the Senate and the lower house of Parliament passed the Belgian Act on Euthanasia of May, 28th 2002 which decriminalised euthanasia provided that certain conditions were met.

The 2002 Act sets out certain legal requirements that must be satisfied for a death to be classified as assisted suicide or euthanasia, with a failure to meet these criteria resulting in a criminal offence and prosecution.[82] For euthanasia to satisfy this legal standard, the procedure must be carried out by a licenced doctor and carried out in accordance with governmental procedure, including informing the patient of all alternative options including palliative care and submitting the deceased's medical records to the Federal Control and Evaluation Commission.[83] In relation to the applicant, the patient must be of sound mind at the time of making the request, the request must be voluntary and recorded in writing, repeated and well considered and the patient must be suffering from a disease causing him/her constant and unbearable physical or mental suffering.[84] Other provisions of the Act mandate a consultation with an independent, second specialist doctor on the nature of the patient's condition.[85]

The practice of euthanasia was accepted by Belgian society, with surveys indicating that approximately three-quarters of the Belgian population were in favour of legalising the practice.[86] Despite general support from the people, the legislation which emerged caused concern across different sectors of society. Initially the medical community opposed the bill, arguing that the law was too broad and the absence of safeguards contained in the provision would make the law 'inadequate to protect patient rights'.[87] The attitude to the practice of euthanasia has shifted with the medical community becoming some of the loudest advocates for it, whilst the popularity of the practice has decreased in the view of the general population following certain recent developments.

The 2002 Act introduced a number of recognised circumstances of which the applicant for euthanasia is suffering from. However, the lack of stringent confinements in the legislation opened up eligibility for euthanasia to a new class of patients. An illustration of how broadly

[82] Belgian Act on Euthanasia 2002 s 3.
[83] ibid ch 2 and 5.
[84] ibid s 3(1).
[85] ibid s 3(2).
[86] Andrew Osborn, 'Belgians Follow Dutch by Legalising Euthanasia' *The Guardian* (London, 26 October 2001).
[87] Raphael Cohen-Almagor, 'Euthanasia Policy and Practice in Belgium: Critical Observations and Suggestions for Improvement' (2009) 24(3) Issues in Law & Medicine 187, 196.

the laws on euthanasia can be interpreted can be seen in the 2012 euthanasia application[88] of Marc and Eddy Verbessem.[89] Marc and Eddy Verbessem were identical twins born without the ability to hear and were diagnosed with a congenital eye disease which would lead to eventual blindness. The twins were able to live independent lives and communicated through sign language to each other and to family members. However they justified their choice of euthanasia on the basis that they feared that the 'impending blindness would lead to complete dependence and to being institutionalized'; an existence so undesirable that it would leave them with 'nothing to live for'.[90] Their decision earned them national criticism but it was supported by their family, with their elder brother Driek Verbessem explaining that his brothers lives were constantly immersed in health issues as they 'trudged from one disease to another'.[91] This was supported by Doctor Dufor who detailed debilitating back pain as one of the numerous medical conditions endured by his patients. Dr. Dufor explained that whilst their family was initially opposed to the proposed euthanasia, they had overcome their own moral ideals to help the brothers seek medical assistance, giving the brothers the 'best, but hardest gift'.[92] Their brother Driek acknowledged that many people who suffered from both hearing and eyesight deficits can lead normal lives but that his brothers were 'really worn out'.[93] The initial request for euthanasia was refused by local health care professionals on the grounds that the combination of deafness and blindness could not satisfy the legislative criterion.[94] A consulting doctor for the case stated that if the criteria of unbearable suffering could be met by the de facto conditions of blindness and deafness then the legislation is being interpreted too broadly. He stated that if the application was accepted on those grounds then 'we are far from home', inferring that that line of reasoning would stray from the opinions of the Belgian people.[95] Two years after the original request, the twins appeal was accepted by the medical staff at Brussels University Hospital. The presiding doctor, Doctor Wim Distelmans stated

[88] As Belgian patients who apply for euthanasia do not have to go through the courts, the following narratives are taken from other secondary sources such as academic journals and blogs, newspapers, and websites which will be cited accordingly.
[89] Neera Bhatia, Benjamin P White and Luc Deliens, 'How Should Australia Respond to Media-Publicised Developments on Euthanasia in Belgium?' 23(4) *Journal of Law and Medicine* 835, 840.
[90] ibid.
[91] ibid.
[92] Bruno Waterfield, 'Euthanasia Twins Had Nothing to Live For' *The Telegraph* (London, 14 January 2013).
[93] Bhatia, White and Deliens (n 89) 840.
[94] ibid.
[95] ibid.

that the knowledge of impending blindness and the resulting deprivation of their independence amounted to 'unbearable suffering.'[96]

This case was unusual for several reasons, it was the first simultaneous euthanasia carried out on brothers and in a case where neither of the patients were terminally ill or in constant physical pain.[97] Criticism of the decision to grant euthanasia for these men was widely reported. Chris Gastmans, a professor in the field of medical ethics stated that the implications of this decision will impact disabled people negatively. He denounced the government for failing to find another way to deal with human frailty.[98]

Another case that provoked debate about the euthanasia practices in Belgium was that of Hugo Claus.[99] Mr Claus was a famed Flemish writer and poet who died through the Belgian euthanasia programme. The reason underpinning the request was that Mr Claus had been diagnosed with Alzheimer's disease and he wished to die before his mental capacities succumbed totally to the illness. His decision was accepted by many, including the former Prime Minister Guy Verhofstadt who stated that the knowledge that his disease would strip Claus of his ability to 'knead his words into clear phrases, to create the right expression', an action that had cost Claus 'no effort for over 60 years' would amount to an unbearable torture.[100] The former leader of Belgium stated that Claus' decision to die when he wanted to meant that he left this world as a great glowing star, instead of waiting for death to take him when he had collapsed into the black hole that his disease would have degraded him to.[101]

Despite Claus' choice receiving positive media coverage and messages of support and solidarity from high profile Belgian societal figures, opposition was also strong. Various members of the Catholic Church denounced the action, with the Cardinal of Brussels - Godfried Danneels - reminding his congregation that avoidance of suffering is not to be considered an act of courage.[102]

[96] ibid.
[97] Waterfield (n 92) .
[98] ibid.
[99] Ron Berghmans 'Decision-Making Capacity in Patients Who Are in the Early Stage of Alzheimer's Diseases and Who Request Physician-Assisted Suicide' in Stuart J Youngner and Gerrit K Kimsma (eds), *Physician-Assisted Death in Perspective: Assessing the Dutch Experience* (Cambridge University Press 2012) 229.
[100] ibid.
[101] ibid.
[102] Jamie Smyth, 'Even in Death, Controversial Belgian Author Keeps Debates Alive' *The Irish Times* (Dublin, 1 April 2008) 8.

It is accepted that many people would wish to avoid dementia, losing their ability to recognize faces, names and words and that if offered a choice to abstain from this final stage of Alzheimer's, it would be taken. Euthanasia offers a safe and legal way to achieve a death which is desired by the individual. Following Claus' death, the Flemish Alzheimer League recognised and respected his decision but warned that the media coverage of his death presented a restricted list of options for Alzheimer's patients.[103]

As previously mentioned, euthanasia is available for a range of illnesses. One such category falling under this legislative umbrella are patients suffering from mental illness. This makes Belgium an outlier in the (albeit sparse)[104] world of euthanasia laws, as it is only one of two countries which allows the procedure to be carried out in cases of patients suffering with mental illnesses.[105] The rationale for this policy is that the rights of the mentally ill patients should equate to the rights enjoyed by physically ill patients. Perhaps the difference in the standards of difficulty between diagnosing a mental and a physical illness is what makes the issue of providing euthanasia to mentally ill patients so contentious. Dr Lieve Thienpont, a psychiatrist and euthanasia advocate, summarises the difference as an inability to see the symptoms of mental illness on a scan or through clinical tests, placing the onus on doctors to accept and recognise symptoms when patients bring them to their attention.[106]

An increasingly popular argument in relation to this area of debate is the issue of Treatment-Resistant Depression (TRD) and the call for this to be identified as a terminal illness.[107] A general definition of TRD is a type of depression that has not been induced into a state of remission despite adequate treatment,[108] a term coined to describe patients suffering from mental illnesses that are 'essentially unresponsive to conventional therapeutic efforts'.[109] Hope of symptoms easing for the patients suffering from this strain of depression is small.

[103] ibid.
[104] Biswas and Mundle (n 3) 13.
[105] Maria Cheng 'What Could Help Me to Die? Doctors Clash Over Euthanasia' *The Seattle Times* (Washington, 25 October 2017).
[106] ibid.
[107] Bonnie Steinbock 'Physician-Assisted Death and Severe, Treatment-Resistant Depression' (2017) 47(5) Hasting Center Report 30.
[108] Udo Schuklenk and Suzanne Van de Vathorst, 'Treatment-Resistant Major Depressive Disorder and Assisted Dying' (2015) 41(8) Journal of Medical Ethics 577, 578.
[109] ibid.

During the period of 2007 and 2011, 33 patients out of 100 applications for euthanasia on the basis of mental suffering were accepted.[110] However, five mentally ill patients who were denied euthanasia committed suicide after being refused medical care.[111] This shows that even where assisted suicide is denied to patients, they may still carry out the action independent of medical assistance and without the support which could have been offered. Mental illnesses, especially TRD, might be hard to comprehend and people may find it difficult to afford the same gravity to such illnesses as is given to physical illnesses. However, this is not a reason to ignore the suffering and pain associated with these illnesses.

The 'slippery slope' argument has been a compelling argument against the legalisation of euthanasia. The argument posits that if euthanasia is first introduced to a limited group only and becomes an acceptable societal procedure then the practice will expand and allow 'wider and undesirable' access to assisted suicide.[112] Opponents against the Belgian regime argue that the case of Marc and Eddy Verbessem illustrate the 'gravitational pull' of the slippery slope.[113] Statistics from the biannual report published by the Belgian Federal Commission for the Control and Evaluation of Euthanasia have shown that the numbers of recorded cases of euthanasia have increased since the implementation of the law. The statistics record an increase of deaths by euthanasia rising from 259 deaths in 2003 to 1807 deaths in 2013.[114] This increase can be used as statistical evidence supporting the argument of the slippery slope as the prevalence of the practice has increased as opponents fear that euthanasia has become an alternative to palliative care. Medical experts contradict this inference, arguing that the increasing numbers do not reflect an increase in the practice but an increase of reporting the procedure instead of carrying out the practice in secret.[115]

The law in Belgium has created a safe and legal procedure that allows patients to be prescribed a painless death when the individual is of the opinion that this is what they want. This practice is commendable and affords Belgian citizens a wider range of health care options. However, the current practice is not without faults. There is a need to increase the awareness among medical professionals of the importance of impressing all options of treatment before speaking

[110] Reginald Deschepper, Wim Distelmans and Johan Bilsen, 'Requests for Euthanasia/Physician-Assisted Suicide on the Basis of Mental Suffering Vulnerable Patients or Vulnerable Physicians?' (2014) 71(6) Journal of American Medical Association Psychiatry 617.
[111] ibid.
[112] Bhatia, White and Deliens (n 89) 844.
[113] ibid.
[114] Julia Nicol and Marlisa Tiedemann, *Euthanasia and Assisted Suicide: The Law in Selected Countries* (Parliament of Canada Research Publication No 2015-116-E, 2015) 16.
[115] Cohen-Almagor (n 87) 213.

about euthanasia to their patients. Enforcement for doctors who fail to meet the standards established in the laws should be more stringent, with licensing sanctions and fines awarded to health care professionals who fail to submit correct patient files to the relevant bodies and who engage in practices with patients who do not meet the identified criterion for euthanasia.[116] However, with the support from government, the Belgian law on euthanasia can be used as a model for end of life care throughout the world.

E CONCLUSION

The Roman scholar Pliny the Elder opined that death by one's own hand was the 'greatest advantage' given to humans by God.[117] He believed that the ability to commit suicide was a

sign of the autonomy enjoyed by humans - a show of power over the unexpected and unpredictable world and the role that each individual wished to play in it.[118]

This article studied two vastly conflicting jurisdictions of law. In terms of religion and its influence in political spheres, several parallels between Belgium and Ireland are especially evident. Both countries recorded high numbers of self-identifying Roman Catholics, with statistics showing that 70% and 95.4% of Belgian and Irish citizens, respectively, identified as Catholics in 1981.[119] While the hierarchy of Religion declined in both countries in the years after, this decline was more prominent in Belgium as decline led to a more liberal government securing seats in parliament who were responsible for introducing the The Belgian Act on Euthanasia of May, 28th 2002.[120] While Ireland also experienced a decline in the influence of religion, the legal sphere hasn't participated in the religious upheaval to the same extent in recent years.

The Irish position is extremely strict, it leaves no room for mercy, no room for individuals to control what medical care they can avail of, no room to allow for the moral obligations of the State to compliment not compete with the autonomous wishes of the individual. The Belgium

[116] ibid 216.
[117] Dowbiggan (n 4).
[118] ibid.
[119] 'Major Religions in Belgium' (*World Atlas* 2018) <https://www.worldatlas.com/articles/religion-in-contemporary-belgian-society.html> accessed 20 March 2019; Central Statistics Office, *Census of Population of Ireland 1981: Volume 5 – Religion* (Stationery Office 1981) (viii) <https://www.cso.ie/en/media/csoie/census/census1981results/volume5/C_1981_V5_Entire_Vol.pdf> accessed 20 March 2019.
[120] Patsy McGarry 'Young People in Ireland Among the Most Religious in Europe, Study Shows: Nearly a Quarter of Young Irish Catholics Attend Church Every Week, Survey Reveals' *The Irish Times* (Dublin, 27 March 2018) 2.

stance is far more liberal by making assistance to die available to all once the aforementioned pre-requisites are met. However, the framework in Belgium has the potential for abuse and foul-play, creating an atmosphere in which old age and other ailments become diseases worthy of eradication instead of ones which can be cared for palliatively. Each system has both merits and faults whereby neither jurisdiction satisfies all requirements. Instead of polarising each option, efforts should be made to compromise and create a body of law where medical care is a reflection of the needs of the individual rather than mirroring cultural and religious ideals. In *Aubade*, Larkin wrote that '[m]ost things may never happen; this one will'.[121] Death is inevitable; the ability to exercise liberty is not.

[121] Philip Larkin, 'Aubade' in Harold Pinter, Geoffrey Godbert and Anthony Astbury (eds), *100 Poems by 100 Poets*: *An Anthology* (Methuen London and Grenville Press 1986) 93.

Jury Trial Reform: Verdicts, Reasons and the Rule of Law

Cillian Bracken

Dear Editor,

In the days following the verdict of the much-publicised Jackson/Olding rape trial, it was revealed that a juror had made comments online explaining the jury's decision.[1] Though the comments were swiftly removed, they threw a spotlight on something closely guarded and sacrosanct in the criminal justice system - the reasons for a verdict. The extensive media reporting of the trial has brought unprecedented scrutiny to the intricacies and anachronisms of jury trials on the island of Ireland. It has also raised legitimate questions about the functioning of both rape trials and juries generally, many of which have been discussed in considerable detail elsewhere.[2] This letter, however, will seek to argue that due to their failure to give reasons for their decisions, juries are fundamentally contrary to the rule of law.

The modern criminal jury, that 12 ordinary citizens convene to render an impartial finding of fact, has its origins in ancient England, stretching back hundreds of years.[3] In Ireland, the role of the jury is constitutionally enshrined under Article 38.5, which provides that no person shall be tried on any criminal charge without a jury, save for summary and special charges. The role of the jury is also regulated by the Juries Act 1976 and the common law.[4] At the conclusion of the judge's charge, the jury will retire to consider the evidence, deliberate in secret and render a verdict.[5] A jury cannot be questioned subsequently or reveal how they reached this verdict.[6] The primary motivation for this is that it would end the finality of a jury verdict undermining the legal certainty of the decision and so as to preserve public confidence.[7] The necessity to

[1] Conor Gallagher and Amanda Ferguson, 'Belfast Rape Trial Juror's Online Comments Referred to AG' *The Irish Times* (Dublin, 30 March 2018).
[2] See Jack Farrell, 'Vixens, Sirens and Whore: The Persistence of Stereotypes in Sexual Offence Law' (2017) 20(1) Trinity College Law Review 30; Bryan O'Sullivan, 'Protection against Cross-Examination by the Accused in Sexual Offence Trials' (2015) 25(3) International Criminal Law and Justice 54; Ivana Bacik, Catherine Maunsell and Susan Gogan, *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre 1998).
[3] Robert Van Moschzisker, 'The Historic Origin of Trial by Jury' (1921) 70(1) University of Pennsylvania Law Review 1.
[4] See *Murphy v Ireland & ors* [2014] 1 ILRM 457 [15].
[5] Dermot Walsh, *Criminal Procedure* (2nd edn, Round Hall 2016) [22-01].
[6] Law Reform Commission, Consultation Paper on Contempt of Court (LRC, Dublin 1991) 363.
[7] ibid 363-367.

protect the independence of the jury and the need to reduce the possibility of appeals have both further been cited as motivation for maintaining the secrecy around the deliberative process.[8]

In contrast, central to the concept of procedural fairness and the administration of justice is the well-accepted principle that decision-makers, both judicial and administrative, are required to give reasons for their decision.[9] Per Shapiro, the requirement that they do so serves a vital function in constraining the judiciary's and the executive's exercise of power, particularly in cases where the grounds of decision can be debated, attacked, and defended.[10] This fulfils a normative function, that decision-makers act fairly, rationally and for proper purposes, and that their decisions are defeasible. The requirement to give reasons has been described, both philosophically and practically, as essential to the operation of the law and more fundamentally, the rule of law.[11] Raz has argued if the law is to be obeyed, then it must be capable of guiding the behaviour of its subjects; it must be such that they can find out what it is and act on it. 'This is the basic intuition from which the doctrine of the rule of law derives'.[12] As Lord Justice Bingham put it, it was the requirement to give reasons that made courts accessible to 'all persons and authorities within the state'.[13] This approach is logically consistent; the necessity to articulate reasons leads to more rational and carefully considered decision-making and it is almost axiomatic that a reasoned argument should require a reasoned response.[14] As argued by Fuller, when decisions are compelled to be explained and justified, the effect will generally be to pull those decisions towards goodness, by whatever standards of ultimate goodness there are.[15] Generally, the necessity to give reasons for decisions is accepted as a fundamental aspect of the rule of law itself.

Given that giving reasons are a necessary part of the rule of law, why then do we tolerate juries? Arguably this is primarily due to their entrenched institutionalism; they fulfil a longstanding

[8] *Bushel's Case* (1670) 124 ER 1006; *R v O'Connor; R v Mirza* [2004] UKHL 2.
[9] See *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59.
[10] David Shapiro, 'In Defence of Judicial Candor' (1987) 100 Harvard Law Review 731, 737.
[11] See Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Georgia Law Review 1, 22; Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 210.
[12] Raz ibid 214.
[13] Tom Bingham, *The Rule of Law* (Allen Lane 2010) 37.
[14] Charles P Curtis, 'The Trial Judge and the Jury' (1951) 5 Vanderbilt Law Review 150, 163; Frederick Schauer, 'Giving Reasons' (1994) 47 Stanford Law Review 633; Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353.
[15] Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) Harvard Law Review 630, 636.

and necessary function and are simply culturally accepted. But there are alternatives to the current regime. First, criminal trials could simply go the way of civil trials whereby judges are both the legal and factual arbiters since the abolition of juries in most cases, which would require constitutional change. In the alternative, juries could be required to give reasons for their decisions. There is a long line of Irish constitutional and international jurisprudence on the duty to give reasons for administrative and judicial decisions,[16] and there has been a tentative movement toward the same for jury trials. In 2009, in *Taxquet v Belgium*,[17] the European Court of Human Rights held that the conviction of a man for murder was a breach of Article 6, the right to a fair trial, of the Convention on the basis that the verdict given was not understandable to the Applicant.

> [F]or the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness. ... [T]he rule of law and the avoidance of arbitrary power are principles underlying the Convention.[18]

Admittedly, whilst the Court did not go as far as to say that Article 6 imperilled all jury trials, it held where it was not possible for the applicant to ascertain which evidence and factual circumstance had caused the jury to find him guilty, Article 6 was violated.[19] Whilst it is extremely unlikely the Court would require juries to give reasons any time soon, the judgment goes some way to demonstrate indirectly the logical inconsistency of not giving them, when compared to the same requirements of administrative and judicial decision-makers.

Requiring juries to give reasons is by no means a step into the dark; certain jurisdictions such as Spain and previously Switzerland require they do so.[20] Introducing such a requirement in Ireland would certainly necessitate some change, perhaps more cultural than anything else. However, it would inject some much needed clarity into an inaccessible and, to many, obscure facet of criminal justice, as well as reinvigorating the application of the rule of law. Since the

[16] See Gerard Hogan and David Gwynn Morgan, *Administrative Law in Ireland* (Round Hall 2010) [14-108].
[17] App No 926/05 (ECtHR, 13 January 2009).
[18] ibid [90].
[19] ibid [97].
[20] Stephen Thaman, 'Should Criminal Juries Give Reasons for Their Verdicts: The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v Belgium*' (2011) 86(2) Chicago-Kent Law Review 613.

Jackson/Olding trial and ensuing protests throughout Ireland, the Minister for Justice Charlie Flanagan announced he would review the legal protections for complainants in sexual assault trials,[21] perhaps too it is time to review one of the oldest and most opaque aspects of the justice system.

Is mise le meas,
Cillian Bracken

[21] Sarah Bardon, 'Flanagan to Review All Aspects of Sexual Assault Trials' *The Irish Times* (Dublin, 2 April 2018).