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Editorial

Welcome to the first volume of the 2026 edition of the Irish Judicial Studies Journal.

First published in 2001 as the Judicial Studies Institute Journal, in 2026 we celebrate the 25th anniversary of the publication of the Journal. In this period, while the Journal has undergone some significant changes, not least the change of name, the core purpose of the Journal has remained the same. The first Editor of the Journal, Rónán Kennedy, stated in his first Editorial in 2001:

> The purpose of the Journal is to enable the judges to hold a learned conversation on topics of interest, both between those on the bench and those outside the judiciary (be they academics, practitioners or other professionals).[1]

These learned conversations have continued over time, with dialogue and discussion between judges, academics, and practitioners on a huge variety of topics. It is a particular delight be Editor of the Journal, which provides an opportunity to review and consider articles on such a wide variety of issues across law and legal practice.

It was through the support of Chief Justice Ronan Keane that the Journal came into being, and with the support of Chief Justice Donal O'Donnell that the Journal has become a stalwart in legal publishing in Ireland today. Over its 25-year history, it has been cited by academics, practitioners, and judges in textbooks, scholarly articles, and judgments, a testament to the success it has had in enabling and generating learned conversations on legal issues in Ireland today.

One of the most ardent supporters of the journal over the last number of years has been Mr Justice Peter Charleton, and so it is only fitting that this issue includes a tribute by the Chief Justice to Mr Justice Charleton and his extraordinary contribution to Irish law. The tribute includes a reference to Mr Justice Charleton's role in reviving and restoring the Journal, and I can say with confidence that he brought the same energy, enthusiasm, and good humour to this role as he brought to all other aspects of his work. His commitment to and championing of the Journal was, I think, key to the success of its regeneration, and I am delighted that we include not just a tribute to

[1] Editorial [2001] 1(1) Judicial Studies Institute Journal iv, v.

Judge Charleton but also a very interesting contribution from him on the topic of judging and judgment writing.

Our second piece in this issue is an article which explores whether a 'constitutional tort' could be used as a basis for climate litigation against high-emitting corporations. In the piece, Calum MacLaren considers the horizontal application of constitutional rights in Ireland as a means of addressing the rates of greenhouse gas emissions from private actors, concluding that there may be an advantage in what Hogan J has called the 'Joycean circular meandering' of constitutional tort actions to a climate litigant.

Next, we have the article from Peter Charleton, 'Discipline and Focus in the Art of Judging' which is a reflective piece which suggests ways in which discipline, clarity, and focus can be brought to judgment writing. Cautioning against treating judgments as literary works, he advises practical measures which can be taken to ensure that the task of writing a judgment is direct, disciplined, and effective.

In the piece that follows, Rory Kelly's article, 'Sentencing Rioters' considers the sentencing principles which apply to those convicted of offences committed during a riot. In this context, he then explores how to distinguish between protesters and riots at sentencing, and examines the issues posed in the piece through three hypothetical examples developed for this purpose. He concludes that sentencing 'at the boundaries of rioting and protest' is particularly difficult given that the distinction between the two can be blurred and contested in practice.

In the next article, Anthony Kennelly reviews a celebrated case in Irish law, *Buckley v Attorney General,*[2] also known as 'the Sinn Féin Funds case'. Most will know the decision for its importance in relation to the operation of the doctrine of separation of powers in Irish law. Kennelly considers the decision in terms of its impact on 'jurisdiction stripping', and the rule of law more generally, concluding that the decision should be recognised as having had significant impact in this context.

We then have a case note by Louise Wright, who considers the decision in *RGRE Grafton Limited v Bewley's Café Grafton Street Limited & Bewley's Limited.*[3] This piece was originally planned for our previous Special Issue dedicated to exploring

[2] [1950] IR 67.
[3] [2026] IESC 10

contemporary conflicts and challenges in Irish land law. Louise had presented at the conference, but very kindly agreed to delay publishing her contribution until the decision of the Supreme Court in the case was published. In the case note, she reviews the history and context of the case, and then details the decision of the Supreme Court. She finally comments on the implications of the case, not just as to how future disputes might be considered, but also advises that the status of fixtures and fittings should be recorded in a lease, to prevent such disputes from arising in the future.

Finally, Niamh Maguire has reviewed Diarmuid Griffin's book, *Sentencing Serious Sex Offenders: How Judges Decide when Discretion is Wide.*[4] Maguire begins by noting that while the focus of the book appears to be on a relatively narrow topic, it nonetheless provides valuable insights into sentencing practices in Ireland. Griffin's achievement in this regard, she says, is particularly commendable due to the fact that the 'dearth of official sentencing data undoubtedly makes it almost impossible to examine any sentencing matters in evidenced informed ways.' The book, she concludes, provides valuable insights and will be of interest to practitioners across sectors, students, and academics.

In my first editorial, I published the gender breakdown of authors and peer reviewers.[5] From now on, we will run a cumulative total of both authors and reviewers.

	Women	Men	Other, including Non-Binary
Authors	11	10	0
Reviewers	26	21	0

As all contributing authors to the IJSJ will know, articles published in the Journal are subject to a meticulous copyediting and proofing process by a team of Judicial Assistants. For this issue, the team was once again led by Carrie Anne O'Kelly who did

[4] Diarmuid Griffin, Sentencing Serious Sex Offenders: How Judges Decide when Discretion Is Wide (Bristol University Press, 2025).
[5] Gender will be assigned in line with fundamental principles of human rights and personal dignity, and the IJSJ will respect the principle of self-identification in this regard. Thus, 'women' includes those who identify as women; 'men' includes those who identify as men; and 'other, including non-binary' includes those who identify outside the first two categories. The number of reviewers does not include review decisions by the Editorial team that the article should not be sent for peer review.

an outstanding job of ensuring that the work was reviewed in a timely and consistent manner. This edition of the journal was proofed and copyedited by Carrie Anne, along with John Blundell, Adam Connolly, Ryan Greaney, Alessandra Grosariu, Adam O'Carroll, Eoin D Ryan, and Majella Votta.

I would also like to particularly thank Deputy Editor, Dr Una Woods, and Book Review Editors Mr Justice Max Barrett and Professor Susan Leahy for their assistance in preparing this edition for publication, as well as Declan Calpin of the Courts Service for his assistance and endless patience in editing the journal website. Thanks as always go to our Editorial Board at the University of Limerick, our Judicial Board and in particular Mr Justice Brian Murray of the Supreme Court, all of the authors who contributed to this edition and all of the reviewers who supported it in giving so generously of their time.

Professor Jennifer Schweppe

Editor in Chief

Tribute to Mr Justice Peter Charleton

Delivered by Mr Justice Donal O'Donnell, Chief Justice, in the Supreme Court on 27 March 2026

Welcome and Opening Remarks

I would like to welcome all the family, friends and colleagues of Mr Justice Peter Charleton to the Supreme Court today for his final official sitting as a Judge. In particular, I would like to welcome Peter's family, his sister Georgina, his wife and our friend Fiona, their children Clara, Anna-Rose and Maitiú, and last but by no means least, Peter's grandson Eli.

In years to come when legal historians are scouring old Supreme Court social media messages for some clue as to the evolution of the thinking of Mr Justice Charleton, they will be surprised how many messages are photos of Eli.

I would also like to particularly welcome Annick McDermott, wife of Peter's devil and great friend Paul Anthony McDermott, whose forceful advocacy illuminated this courtroom and many others during his too short career. Finally, I would like to welcome Mr Justice Fred Morris joining us remotely from his home. Even a quarter of a century on, the knowledge that we are appearing before Mr Justice Fred Morris makes everyone sit up a little straighter in their seats.

You are all very welcome.

A Momentous Day

Today is a truly momentous day in Irish legal history. It may be the first example in almost 20 years of a judicial career and a 47-year legal career of Peter Charleton being persuaded to change his mind. Since becoming a judge, Peter has maintained that like General de Gaulle, he would like to quietly slip away without any monument or record. His prodigious work ethic is matched with his dislike of fuss. Left to his own devices, I think Peter would have chosen to spend this morning fitting in one or two last AFLs[1], putting the final touches to an article for the Cambridge Law Journal and playing classical music. But in the end, he recognised the truth of John McGahern's observation that rituals are important in marking life events, and he has been prevailed upon to permit a few words to be said to mark the end point of a remarkable judicial career. But I should warn everyone here that we are all on the clock, and Peter will expect us all to be back at work and indeed to make up for any court time lost.

Origins and Early Life

A conventional account might start with Peter's birth almost exactly 70 years ago in Dublin but that would risk being boring, and as Peter has said on a previous occasion, the worst sin is to be boring.[2] In any event, I am not sure that Peter did anything as conventional as being born: it wouldn't surprise me if, like the Goddess Athena he had sprung straight from the forehead of Zeus fully-grown wearing a full suit of armour, speaking Greek, playing music, and issuing judgments in impenetrable 8 point Garamond. So, a starting point which is perhaps truer in psychology than in chronology, is the early part of the 20th century in Belfast.

Family History

It is a sign that partition was not just physical but also psychological, that so little is known in Irish history about the events of 1922 in Belfast. In what was to become the Free State, that was a period of uneasy peace, but in Northern Ireland, and in particular in Belfast, there was an epidemic of sectarian violence, the brunt of which fell on the Catholic community.

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[1] Applications for leave to appeal to the Supreme Court.

[2] Declan Budd and Ross Hinds, *The Hist and Edmund Burke's Club: An Anthology of the College Historical Society, the Student Debating Society of Trinity College Dublin, from its Origins in Edmund Burke's Club 1747-1997* (Lilliput Press, 1997) 385.

Charleton is one of those unusual names in Northern Ireland, in that it does not immediately announce its tribal allegiance and might force you to ask the second question in any conversation 'where did you go to school?' But Daniel Charleton was by the standards of his time a relatively prosperous Catholic in Denmark Street in North Belfast with his family of 11, and was a publican. One of the worst incidents in what was known as the Belfast Pogrom, occurred less than a mile away, when a very similar family, the McMahons, also Catholic publicans, were attacked and murdered in their own home. The immediate aftermath was that almost 8,000 people left Belfast, becoming refugees and moving south to make a new home: among them the entire Charleton family. Many of those who came south to start a new life had a fierce work ethic and developed a very strong sense of loyalty to the New State and real patriotism, and that is certainly something that Peter acquired through his family. Peter's father John came first in history in his Leaving Certificate, a feat equalled by Peter's son Maitiú. It was Peter's own misfortune that he did the Leaving at a time where misplaced egalitarianism had temporarily abolished the system of ranking people in particular subjects, otherwise there could have been a real 'triple crown' of achievement.

Education and Trinity College

It is part of the function of an event like this to reveal something hitherto unknown about the subject of the celebration. In 1975 a key event occurred in Peter Charleton's life: he did not just go to university — he went to TCD. I don't know how you could be expected to know that, but the reverential tones with which he informs anyone who will listen of his newly acquired @tcd email might be a clue. But since we are on the clock, I will save time by taking the traditional jokes as read and leave for another day the integrity of that local squabble.

The mid-1970s were a very exciting time to go to Trinity. Peter's generation was part of an important development in Ireland's social history. The great literary scholar and social and cultural historian, Professor Terence Brown, wrote that the election as Provost of the great historian F.S.L. Lyons marked a significant turning point in the history of the

University.[3] It was, he said, a sign that the college was opening out to Irish society and that Lyons was determined to make it clear Trinity would take its place as a university for all.[4] And that was something particularly important for somebody like Peter with his strong sense of patriotism and attachment to Irish language and culture. It is hard to think that he would have been comfortable at Trinity say 20 years earlier.

Peter became a star of the Law School, and in due course Auditor of the Hist.[5] I do remember a thin young man in a long, long overcoat with a taste for dramatic entrances, and a sonorous almost sepulchral voice that captivated the audience. It was clear even to a visitor that he was recognised as a star.

Early Legal Career

Peter came to the Bar in 1979 and immediately developed a strong practice, both civil and criminal. But, unusually for those times, he also showed an immediate facility for academic study and writing. I think his first article was published a year later in 1980, prophetically on the topic of improperly obtained evidence and the Constitution.[6] But perhaps even more remarkably, in 1986 when he already had a very busy practice, he took up the Reid Professorship of Criminal Law in Trinity, which is a professorship designed to be held by a practising lawyer, but rarely by a practitioner as busy as Peter was then.

Peter's practice at the Bar involved prosecuting some of the most significant criminal trials in the history of the State but he managed to combine that practice with an extraordinary range of publications, firstly of scholarly articles, then of the first and leading book on the Misuse of Drugs Acts 1977 to 1984[7], subsequently a book on the Offences Against

[3] Terence Brown, *Trinity Tales: Trinity College Dublin in the Seventies* (Kathy Gilfillan ed, Lilliput Press 2011) xii.
[4] ibid.
[5] College Historical Society, Trinity College Dublin.
[6] Peter Charleton, 'Improperly Obtained Evidence and the Constitution – The Rule in O'Brien's Case (1965)' (1980) 74 Law Society Gazette 169.
[7] Peter Charleton, *Controlled Drugs and the Criminal Law* (An Cló Liúir 1986).

the Person Act,[8] and then successive editions of the magisterial *Charleton, McDermott and Bolger on Criminal Law*.[9] All these books are written with admirable clarity, and technical excellence. In 2006, just as he was appointed a Judge, he published a book, *Lies in a Mirror: An Essay on Evil and Deceit* which contains really fascinating and thoughtful reflections on evil in the world.[10]

One thing that was apparent even then was that Peter did not subscribe to conventional groupthink about the criminal law, or the roles of prosecutors and defendants. And if he considered that at times the law did not strike a fair balance between the rights and interests of victims, and those of persons accused of crime, then he said so. But he was equally hard on Gardaí who tried to bend the rules, and he was one of the reasons why the Morris Tribunal was such an efficient exposé of years of malfeasance in Donegal.

High Court Appointment

After serving as counsel on the Morris Tribunal he was appointed to the High Court in 2006. It might have been expected that with his wealth of experience and his academic record, he would have settled into becoming a key member of the judiciary in the Central Criminal Court. Instead, he took the course of sitting in the Civil Courts, and particularly the Commercial Courts, where he mastered some really difficult and technical legal issues, such as that raised by the long drawn out and hard-fought pyrite litigation, and he presided in a number of complex pharmaceutical patent cases, which probably present the maximum technical difficulty and the most complex law. But he also relished dealing with issues of criminal law and his brave decision in *DPP v Cash*[11] was the forerunner to the major change which occurred with this Court's decision in *DPP v JC*.[12] And if this was not enough, in addition to mastery of detail, he also developed a deserved reputation for the speedy production of judgments.

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[8] Peter Charleton, *Offences Against the Person* (Round Hall Press 1992).
[9] Peter Charleton, Paul A. McDermott and Marguerite Bolger, *Criminal Law* (Tottel Publishing 1999).
[10] Peter Charleton, *Lies in a Mirror: An Essay on Evil and Deceit* (Blackhall Publishing, 2006).
[11] [2007] IEHC 108.
[12] [2015] IESC 31, [2017] 1 IR 417.

Supreme Court Career

He was appointed to the Supreme Court in 2014. Over the last 11 years, he has shown himself capable of writing judgments on all topics that come before this Court. But his role in this Court has allowed him to return to his area of first expertise and write a number of very significant judgments for the Court to clarify the criminal law on the defence of provocation in murder, self-defence, and the use in evidence of information obtained from mobile phones and personal computers. But while this mountain of judgments is an impressive achievement in its own right, I would suggest that with his taste for icons and iconoclasm, you can perhaps learn most about his approach to the task of judging from his dissenting judgments. Peter has dissented, and sometimes been the lone dissenter in a seven-person court, in some of the most important cases in recent times, such as *Costello v The Government of Ireland*,[13] *Dwyer v Commissioner of An Garda Síochána*,[14] and *Heneghan v The Minister for Housing and Ors*,[15] and he wrote one of the dissenting judgments *Zalewski v Adjudication Office and Ors*.[16] He was the *ad hoc* judge in the European Court of Human Rights in *O'Keeffe v Ireland* and, true to form, delivered his own thoughtful dissenting judgment.[17]

The Value of Dissent

A famous quotation about the value of dissent which we like to comfort ourselves with in the Supreme Court is that of Charles Evans Hughes, the Chief Justice of the US, who said that: '[a] dissent in a court of last resort is an appeal to the brooding spirit of law, to the intelligence of a future day.'[18] But as a matter of fact, there are relatively few dissents which are triumphantly vindicated in a later case, and if that was the only value of a dissenting judgment then a lot of ink has been wasted in other cases. The value of the

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[13] [2022] IESC 44.
[14] [2020] IESC 4.
[15] [2023] IESC 7, [2023] 3 IR 419.
[16] [2021] IESC 24, [2022] 1 IR 421.
[17] (2014) 59 EHRR 15.
[18] Charles Evans Hughes, *The Supreme Court of the United States* (Columbia University Press, 1928) 68.

dissent is not merely that it might one day persuade some future court. Most dissents are probably wrong. The value of a dissent, whether right or wrong, is in the present, not in the future. The poet and lawyer Archibald MacLeish came closer to it when he said that 'the dissenter is every human being at those moments of his life when he resigns momentarily from the herd and thinks for himself.'[19]

Every collegiate court needs consensus builders, needs people who ruminate and sometimes reconsider their initial views, discuss and adjust and compromise, but a court also needs those who think completely for themselves and deliver their judgments, whatever the consequences. That is sometimes a real benefit to the rest of the court in having their thinking and perhaps their assumptions challenged. It would be easy to say that Peter was fearless in the delivery of his judgments whether dissenting or a majority, but in truth I don't think he found it difficult at all. One of his strongest features is that he simply comes to his own analysis, sets it down and moves on.

Tribunals and Judicial Education

While a member of the Supreme Court, Peter returned to the field of garda malpractice and took on the very onerous obligation of chairing the Disclosures Tribunal, and produced a report very speedily.[20] And in the last three years, he has taken on the role of the judge responsible for judicial education. It was originally understood that the judge taking on that role would be expected to devote half their time to that, and that they therefore should only be assigned by their president work representing roughly half the normal traditional workload. Peter took up the role, threw himself into it and produced a number of significant innovations. The 'Green Street Lectures' are now an established feature on the judicial calendar. But it was impossible for me or any other Chief Justice to keep up our end of the bargain: Peter kept volunteering for work and sometimes volunteering to

[19] Archibald MacLeish, 'In Praise of Dissent' *New York Times* (New York, 16 December 1956).
[20] Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters *First Interim Report* 2017.

help out in the Court of Appeal and latterly the High Court even when producing a stream of bench books for circulation to other judges in all jurisdictions.

During all this time when driving himself very hard and expecting the same work ethic from others, he built up a strong rapport with his judicial assistants and their loyalty to him is very clear. One sign of Peter's thoughtfulness is that he made a practice of publishing learned articles jointly with his judicial assistants giving those that were interested in academic publishing a start and, if not, a useful entry on their CV. Peter revived and restored the Irish Judicial Studies Journal and turned it into a well-respected publication containing an invaluable mix of academic and judicial writing, a significant portion of which, as you might by now have guessed, was produced by Peter himself.

Legacy

I said at the outset that the Charleton name can be traced back to the North, and to both communities there. And in truth there's always been I think something of the flinty principled Presbyterian with a sometimes-biting sense of humour in Peter, maybe mixed with some Clint Eastwood in Gran Torino. And I think then of the great poem by John Hewitt published in 1972, when once again, violence was flaring in Northern Ireland. In his poem, *Neither an Elegy Nor a Manifesto,* the poet repeats the haunting refrain: 'but … bear in mind these dead'. It's easy to be dazzled by the output, the knowledge and the varied interests (and I haven't even mentioned music), but it would be a mistake to miss the sensitivity. I think in his career it can be said that Peter, more than most, bore in mind the dead, the injured, the wounded, the hurt, the poor and those struggling with debt, and tried to make the law more sensitive to them. He did it all with a fierce sense of patriotic duty and some sardonic humour. And as John Hewitt says in the poem: '[p]atriotism has to do with keeping the country in good heart, the community ordered with justice and mercy'. If that is a definition of true patriotism, and I think it is, it is one that Peter Charleton has lived up to.

Conclusion

It was in his entry in the bicentenary history of the Hist, that Peter wrote that the only sin is to be boring[21] – well he needn't have worried, it has been brilliant, it has been exciting, and sometimes a roller coaster, but it has never been boring. And given his energy, ability and interests none of us think this is the end or the beginning of the end – like a good singer Peter is just pausing for breath.

[21] Budd and Hinds (n 2).

Climate Litigation Against Corporations and the Irish Constitutional Tort

Calum MacLaren*

Abstract: This article examines the merits and efficacy of the Irish 'constitutional tort' as a basis for climate litigation against high-emitting corporations. The overwhelming majority of greenhouse gas emissions stem from private actors, yet climate litigation to date has been primarily directed at public bodies, leaving the threat posed by high-emitting corporations unchecked. The horizontal application of Irish constitutional rights represents a unique and potentially powerful tool to address this threat, by allowing litigants to fashion a sui generis claim potentially absent some of the limitations of nominate torts.

Keywords: Constitutional Law, Climate Litigation, Corporations, Tort Law

Introduction

The horizontal application of constitutional rights in Ireland has occupied a curiously neglected jurisprudential space since the doctrine's inception in the 1960s. This article seeks to elucidate how this seemingly anodyne doctrine, virtually unaltered in the past four decades, represents a unique and potentially powerful legal mechanism to adjudicate climate change. In Ireland, constitutional rights vindication and tort law mechanisms have grown increasingly concomitant, with the latter assuming the role of the presumptive remedial instrument for the former. The extension of this nexus to novel and complex threats seems intuitive; especially given the Constitution's natural law origins, and the failure of traditional tort law mechanisms to adequately respond to the exigencies of climate-related harms.

The overwhelming majority of greenhouse gas emissions ("GHGs") stem from private actors, yet climate litigation has to date been primarily directed at public bodies.[1] This is particularly the case in actions invoking constitutional rights, a trend that reflects the

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[1] Climate Accountability Institute, *Carbon Majors Launch Report* (2024)<https://carbonmajors.org/site/data/000/027/Carbon_Majors_Launch_Report.pdf> accessed 8 July 2025.

broader discourse on climate change, wherein state responsibility is foregrounded while corporate emissions, though significant, often remain less directly scrutinised in litigation. The success of constitutional and human rights-based claims against states, as exemplified by *State of the Netherlands v Urgenda Foundation*[2] and *Neubauer et al v Germany*,[3] has prompted litigants to transpose these arguments into the private sphere, targeting high-emitting corporations through tort mechanisms such as negligence and nuisance. Ordinarily, such cases seek to establish liability in tort by grounding claims in the breach of constitutional rights. However, the Irish constitutional framework presents a different possibility: the invocation of a *sui generis* horizontal constitutional claim or constitutional tort. Such an approach permits arguments that extend beyond the rigid confines of nominate torts, which have thus far demonstrated significant limitations in addressing the complexities of climate change litigation.

Whether a constitutional tort would provide a more effective mechanism for adjudicating climate-related claims requires an examination of the modest constitutional tort case law, which tentatively suggests a more expansive framework for the vindication of some rights (in certain contexts) than the narrower doctrinal constraints imposed by nominate torts.

The Irish 'Constitutional Tort' Doctrine

The Constitution makes no mention of the repertoire of torts, yet an intricate relationship between the two has developed over the past 60 years. The development of this nexus has culminated in tort law assuming the role of the 'presumptive remedial instrument for vindicating constitutional rights.'[4] This extends to the infringement of constitutional rights horizontally, allowing the Constitution to give 'rise to a cause of action against a private individual or organisation in the form of the "constitutional tort" action, and the rights it protects can be applied directly to regulate the conduct of private actors.'[5] At the heart of the judicial analysis in this area is the 1973 judgment in *Meskell v Córas Iompair Éireann*, wherein the Supreme Court (Walsh J) observed that,

[2] ECLI:NL:HR:2019:2007 (HR 20 December 2019).
[3] 1 BvR 2656/18 (BVerfG, 24 March 2021).
[4] William Binchy, '*Meskell*, the Constitution and Tort Law' (2011) 33 DULJ 339, 339.
[5] Colm O'Cinneide, 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights' (2003) 4 Hibernian Law Journal 77.

> [A] right guaranteed by the Constitution … can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of constitutional right … that person is entitled to seek redress against the person or persons who have infringed that right.[6]

This raised clear questions as to the scope of this new innominate right of action, especially whether it would replace extant nominate 'torts like assault, battery, libel and false imprisonment'.[7] Binchy concludes that the courts have 'answered that question in the negative; they explained that tort law had not been replaced by a new remedy, or set of remedies, expressed exclusively in constitutional terms. A more modest, but complicated, outcome was envisaged.'[8]

It is worth making note of the composition of the Supreme Court at the time, with Walsh J's progressive attitudes reinvigorating previously quiet points of law. In his effusive account of Walsh J's activism, Gerard Hogan suggested that 'of all the decisions which Walsh J authored, [*Meskell*] may well be the most radical and, indeed, in the long run, internationally influential.'[9]

This decision was followed by *Educational Company of Ireland Ltd v Fitzpatrick (No 2)* in which the Supreme Court held that 'constitutional rights cast correlative duties of non-interference on citizens'.[10] Therefore, 'a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it.'[11]

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[6] *Meskell v Córas Iompair Éireann* [1973] IR 121, 132.
[7] Robert Heuston, 'Personal Rights under the Irish Constitution' (1976) 11 University of British Columbia Law Review 11(2) 294, 314.
[8] Binchy (n 4) 339, 340.
[9] Gerard Hogan, 'Mr Justice Brian Walsh: The Legacy of Experiment and the Triumph of Judicial Imagination' (2017) 57 Irish Jurist 1.
[10] [1961] IR 345; Guatam Bhatia, *Horizontal Rights: An Institutional Approach* (Hart Publishing 2023), 67.
[11] *Meskell* (n 6).

The broad implications of *Meskell*, were circumscribed by the Supreme Court in its 1988 decision in *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd*, a case in which the Court 'evinced great reluctance' to reshape tort law to accommodate this constitutional tort.[12] Henchy J's solution was to posit that this cause of action only be available when particular torts were 'basically ineffective' to protect the constitutional right in question. He stated that when an action is founded on an existing tort, one 'is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right.'[13]

The most prominent recent invocation of the *Meskell* principle was doubtless in *McGee v Governor of Portlaoise Prison*, wherein the Supreme Court affirmed that the constitutional tort is indeed an 'action founded on tort' within the meaning of section 11(2)(a) of the Statute of Limitations 1957.[14] The Supreme Court reasoned that the purpose of the constitutional tort was principally the same as the essence of torts in general, to address private wrongs and to remedy the violation of individual rights.[15]

The Basic Ineffectiveness Problem

Concrete definitions of the terms 'basically ineffective' and 'plainly inadequate' have not been reached; in fact, few terms in tort law have proven less amenable to a consensus definition. It is perhaps due to this interpretive intransigence that scholars in this area find themselves proposing working definitions in order to adequately understand and explain the divergent judicial dicta.[16] It could be argued that the high 'basically ineffective' threshold serves as a judicial filter, limiting intervention and liability. It could also be suggested that it was never meant to heighten the bar for direct horizontality but rather to promote indirect horizontality by attaching constitutional claims to existing torts. Either way, the threshold remains central, and courts have been reluctant to meet it. The following cases illustrate this reluctance by contrasting those that failed to meet the threshold and proceeded under tort law with

[12] *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd.* [1988] ILRM 629; Binchy (n 4) 340.
[13] ibid.
[14] [2023] IESC 14.
[15] Daniel Gilligan, 'Constitutional Torts as Private Wrongs: *McGee v Governor of Portlaoise Prison*' (2024) 6 ISCR 181.
[16] See Sibo Banda, 'Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance' (2009) 31 DULJ 263, Binchy (n 4), and O'Cinneide (n 5).

those warranting a *sui generis* constitutional action. Vertical cases where the doctrine has been discussed are also considered.

In *Hanrahan*, Henchy J's intention that courts strive to assure the protection of a constitutional right through extant common law mechanisms before allowing a *sui generis* constitutional claim to be formulated was made clear. The failure to meet the 'basically ineffective' threshold in the case itself was due to the extensive protections against damage to property afforded by the nominate tort of nuisance. The claim under the constitutional right to property was, therefore, superfluous. This rationale was reinforced in *W v Ireland (No 2)*, where Costello P refused to allow a constitutional claim for bodily integrity, citing existing common law safeguards and the absence of a duty of care.[17] Public policy concerns, particularly the common good, were also invoked to justify limiting constitutional rights.[18]

A similar approach was taken in *McDonnell v Ireland*, wherein Barrington J observed that 'constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules.'[19] If the general law provides an adequate cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the court to devise a new and different cause of action.' This has been described by Hogan as the 'Barringtonian wildcard' approach and reiterates the courts' reluctance to invoke a secondary cause of action without clear evidence of the ineffectiveness of existing causes of action.[20] The High Court in *Sweeney v Duggan* saw no need to deviate from this emerging norm. Here the plaintiff argued that the defendant was in breach of his right to bodily integrity protected under Article 40.[21] Interestingly, the High Court held that Article 40 merely provided the plaintiff with a 'guarantee of a just law of negligence, which in the circumstances exist[ed]' and the provision was therefore of no assistance to him. Furthermore, the High Court (Barron J) did not participate in any judicial assessment of the tort of negligence in light of the constitutional 'framework of rights-protection.'[22]

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[17] [1997] 2 IR 141

[18] ibid 158.

[19] *McDonnell v Ireland* [1998] 1 IR 134.

[20] Gerard Hogan, 'The Farthest – December 1972' (2019) 62 Irish Jurist 1 14.

[21] [1997] 2 IR 531.

[22] Binchy (n 4) 348.

The cases following *Hanrahan* arguably display a judicial inclination to consider existing protection of constitutional rights in a vacuum. The question was whether common law or statutory protection *exists* that overlaps with the constitutional right in question, not whether, in the particular context, the right is being *adequately vindicated* by said laws.

Some cases have satisfied this threshold, although this has tended to occur more commonly in vertical claims against state bodies. Meeting the threshold does not always result in a new constitutional action; courts may instead modify existing torts to incorporate constitutional principles (more of this anon). In *McKinley v Minister for Defence*, the Supreme Court, applying Article 40.1, modernised the loss of consortium tort to extend eligibility to wives.[23] The court split 3-2, with Finlay CJ and Egan J favouring abolition of the tort over its adaptation. The inconsistency between the tort and the Constitution made its reshaping more palatable, satisfying the 'basically ineffective' requirement without creating a *sui generis* constitutional claim.

In *Walsh v Ireland*, a case concerning wrongful arrest and detention, the Supreme Court treated the claim as a breach of the constitutional right to personal liberty, making no reference to potential tortious overlap.[24] A similar case is *Shortt v Commissioner of An Garda Síochána*, however, here the court saw no reason to parse out the constitutional action from a myriad of tort actions.[25] In addressing the exemplary damages in the case, the Supreme Court was content to treat the constitutional claim in the exact same manner as the traditional torts (as was the case in *Conway v Irish National Teaching Authority*).[26]

The picture arising from this case law is more of a smattering of judicial indeterminacy than a masterpiece of constitutional and tortious interpretation. Binchy concludes that deciding whether an infringement of constitutional rights comes within the remit of existing torts through partial protection or falls outside of it 'is a matter of intuition (or oversight) rather than jurisprudential analysis.'[27] He notes that if a victim were to fall within the former category, the consequences are stark, since they are forced to

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[23] [1992] 2 IR 333.
[24] *Walsh v Ireland* (HC, 30 November 1994). Some torts would have provided some protection such as negligence and battery.
[25] [2007] IESC 9, [2007] 4 IR 587.
[26] [1991] 2 IR 305.
[27] Binchy (n 4), 353.

prove to the court that 'the particular tort or torts, providing some but less than plenary protection to the constitutional right in question, should be stigmatised as "basically ineffective" in that regard.'[28]

From the analysis above, three conclusions emerge for the prospective climate litigant. First, courts exhibit a strong deference to private law where it exists, even if its efficacy is questionable. Cases such as *Hanrahan* and *McDonnell* illustrate the judiciary's willingness to uphold private law protections where there is even minimal overlap with constitutional rights.[29] Second, direct horizontality is likely to be recognised only in the absence of any relevant private law mechanism, a threshold that remains exceptionally difficult to meet. Third, the concept of 'inadequacy' is still imprecise and subject to judicial discretion. This suggests that a constitutional tort plaintiff must demonstrate not just the insufficiency of existing private law but its outright absence as a means of rights protection.[30] The task for a climate litigant, therefore, is to construct a case in which a constitutional cause of action is not perceived as a Barringtonian wildcard but as a necessary judicial step to vindicate constitutional rights.

Climate Change and Constitutional Rights

There is what might be described as a generally relaxed approach to standing in constitutional cases in Ireland in comparison to other jurisdictions; the central requirement being a demonstration of an 'injury of prejudice which the plaintiff has either suffered or is in imminent danger of suffering'.[31] In *Friends of the Irish Environment CLG v Government of Ireland* the High Court found that the interests of its [FIE's] members and the public at large were or would be adversely affected by the consequences of climate change.[32] The reason the constitutional rights aspects of this case failed on standing grounds was due to the action being taken by an NGO that was a body corporate, rather than by a private individual. In fact, in the subsequent Supreme Court decision, Clarke CJ went on to state that 'had standing been established… it would have been necessary for this Court to consider the circumstances in which climate change measures (or the lack of them) might be said

[28] ibid.
[29] *Hanrahan* (n 12); *McDonnell* (n 19).
[30] O'Cinneide (n 5).
[31] *Cahill v Sutton* [1980] IR 269, 284.
[32] *Friends of the Irish Environment v The Government of Ireland* [2019] IEHC 747 [132].

to interfere with the right to life or the right to bodily integrity'. [33] The breadth of standing for individuals in constitutional cases was emphasised in *Horgan v An Taoiseach*, wherein the court held that a plaintiff had standing in a constitutional case by virtue of their being a citizen of Ireland, relying on the approach adopted by the Supreme Court in *Crotty v An Taoiseach*, *McKenna v An Taoiseach (No 2)* and *McGimpsey v Ireland*.[34]

Standing, therefore, would not be an overly onerous hurdle in the case of a constitutional tort. The fundamental purpose of tort law is corrective justice. At its core, it is a 'fault-based compensation system for vindicating individual rights.'[35] Despite what some authors have called the 'anti-tort' structure of climate change, in at least this sense, climate change-caused damage is well-suited to a tort action; wherein standing, damage and remedies are easily identifiable.[36] The first step in applying a constitutional tort approach would be identifying which constitutional rights are under threat.

One issue worth addressing at this juncture is the judicial practice of constitutional avoidance, whereby courts will, where possible, resolve cases on non-constitutional grounds to avoid unnecessary interference with the legislative domain. This principle was explicitly articulated in *M v Bord Uchtála*, where O'Higgins CJ stated that when multiple avenues for granting relief are available, the court should, as a general rule, 'consider first whether the relief sought can be granted on the ground which does not raise a question of constitutional validity.'[37] However, this doctrine only applies in situations where both a constitutional cause of action and an alternative (statutory or common law) cause of action are available. Constitutional tort actions, by their nature, arise only where existing nominate torts or statutory remedies have proven inadequate or unavailable. In such cases, the court is not choosing between alternative grounds for relief but is instead presented with a constitutional claim as a last resort, with no viable non-constitutional alternative.

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[33] *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 [170].
[34] *Horgan v An Taoiseach & ors* [2003] IEHC 64, [2003] 2 IR 468; *Crotty v An Taoiseach* [1987] IR 713; *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10; *McGimpsey v Ireland* [1990] 1 IR 110.
[35] Nathan Isaacs, 'Fault and Liability: Two Views of Legal Development' (1918) 31 Harvard Law Review 954, 965.
[36] Douglas Kysar, 'What Climate Change Can Do About Tort Law' (2010) 41(1) Environmental Law 1, 8.
[37] [1977] IR 287, 293.

Article 40 of the Constitution sets out the personal rights of citizens, a number of which are arguably being infringed and will continue to be infringed in future by environmental harm as a result of climate change; including, *inter alia* the right to life and the right to bodily integrity. This argument was buoyed by Clarke CJ's statement in the *Friends of the Irish Environment* judgment that constitutional rights and obligations could be engaged in an appropriate environmental case in the future.[38]

The Right to Life

In 2007, the Malé Declaration became the first intergovernmental statement to explicitly recognise that 'climate change has "clear and immediate implications for the full enjoyment of human rights", including the right to life'.[39] Years later in Ireland, the High Court in *Friends of the Irish Environment v Fingal County Council* 'agreed that the scientific evidence, including the IPCC's 2014 report, 'can in truth leave no doubt but that climate change poses a real and immediate risk to citizens.'[40] Moreover, the UN Special Rapporteur on Human Rights and the Environment David Boyd, wrote candidly about the Irish government's responsibility to protect the right to life against climate change-caused threats in a 2018 report. In his consideration of the impact of climate change on the right to life in Ireland he asserted that:

> [t]here is no doubt that climate change is already violating the right to life and other human rights today. In the future, these violations will expand in terms of geographic scope, severity, and the number of people affected unless effective measures are implemented in the short term to reduce greenhouse gas emissions and protect natural carbon sinks.[41]

The right to life protected under Article 40.3.2° of the Constitution has been interpreted to be further protected by a positive obligation imposed upon the state to vindicate said right.[42] The Supreme Court has previously stated that 'the nature of the

[38] *Friends of the Irish Environment* (n 33).
[39] Malé Declaration on the Human Dimension of Global Climate Change (2007).
[40] [2017] IEHC 695, [244].
[41] David Boyd, 'Mandate of the Special Rapporteur on human rights and the environment: Statement on the human rights obligations related to climate change, with a particular focus on the right to life' (UN, 25 October 2018).
[42] It is worth caveating this by noting that in *Fleming v Ireland* [2013] IESC 19, the Supreme Court held that an asserted constitutional right cannot be established merely by deriving it from a particular political or moral philosophy and must instead be justified by reference to the text, structure and values

right to life and its importance imposed a strong presumption in favour of taking all steps capable of preserving it, save in exceptional circumstances'.[43] Moreover, this appears to have been interpreted in *Ryan v Attorney General* to inhere a right to a minimum standard of living.[44] This interpretation is due to the High Court's acceptance that water was an indispensable prerequisite for the enjoyment of the right to life and therefore there probably existed a 'right of access to a supply of water.' This has interesting implications for the state, particularly pertaining to a known risk, such as climate change. If this line of reasoning is followed, it seems reasonable to suggest that other 'indispensable prerequisites' to the enjoyment of rights exist. Accepting, as the court did in *Ryan*, that the adequate enjoyment of the right to life is contingent upon the protection of certain indispensable prerequisites, it seems reasonable to suggest that other prerequisites not only exist but are under severe threat by climate change. Take clean and breathable air for example. If this prerequisite were shown to be under threat, it seems a cause of action under the right to life could follow against the party responsible provided such an issue was not adequately protected in tort.

The Irish Supreme Court dealt directly with a constitutional cause of action based on the right to life in the controversial *Attorney General (SPUC) v Open Door Counselling Ltd* case, in which the constitutional right to life of the unborn child was used to 'restrain the private activities of the defendants.'[45] This case demonstrates the Court's consideration of the fundamental nature of the right to life and the ability to recognise its impingement by private actors. This article does not seek to examine the minutiae of derived protections from the right to life but rather to highlight the Irish courts' recognition that the fundamental nature of the right to life impels the court to consider a number of crucial prerequisites to its full enjoyment. A straightforward argument can then be made that the prerequisites immanent to this right are clearly being violated by climate change.

The Right to Bodily Integrity

The right to bodily integrity is an unenumerated right first recognised in the High Court decision of *Ryan v Attorney General*, wherein Kenny J stated that 'one of the personal

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of the Constitution itself. The task of the climate litigant would be to demonstrate that the protection of the right in this instance would overcome this hurdle.

[43] *Re a Ward of Court (withholding medical treatment) (No 2)* [1996] 2 IR 79 82.

[44] [1965] IR 294, 315 (Ó Dálaigh CJ).

[45] [1988] IR 593.

rights of the citizen protected by the general guarantee is the right to bodily integrity.'[46] Ó Dálaigh CJ further asserted that the State, 'organised for the common welfare of all its citizens' had 'the duty of protecting' them from 'dangers to health in a manner not incompatible or inconsistent with the rights of those citizens as human persons.'[47] The right to bodily integrity has been accepted to extend to a more general right to have one's health protected against violations from the State.[48] A 2019 Department of Health Report on the health impacts of climate change outlined a suite of climate change caused health risks affecting the Irish population.[49] As bodily integrity has been interpreted to extend to health, in some settings, the infringement of the right by climate damage becomes clearer. Mention should also be made of the *McDonagh v Frawley* case, wherein the right not to have one's health endangered by the state was first recognised. When referring to the right to bodily integrity, Finlay P asserted that there existed 'no reason why the principle should not also operate to prevent an act or omission of the Executive which, without justification, would expose the health of a person to risk or danger.'[50]

The complexity and universality of the damage in this context was examined by Clarke CJ in *Friends of the Irish Environment*, wherein he asserted that 'if an individual with standing to assert personal rights can establish that those rights have been breached [or]…the Constitution is not being complied with in some matter that affects every citizen equally…then the Court can and must act to vindicate such rights and uphold the Constitution'.[51] Moreover, he stated that the complexity of such an issue does not change the court's obligation to vindicate this right.

Though not used in this specific context, Ó Dálaigh CJ's comment in *Ryan* is a unique endorsement of intergenerational health protection and is apt in the context of

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[46] *Ryan* (n 44), 295; It is worth noting that the preferred terminology in more recent case law is 'derived' rights. Following criticism of the unenumerated rights doctrine as insufficiently anchored in the constitutional text, the Supreme Court in *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 endorsed an approach whereby rights are derived from the text and structure of the Constitution rather than identified by reference to external values.
[47] ibid, 348.
[48] Gerard Hogan et al, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) 1692; In more recent decisions, the right to bodily integrity is increasingly presented as derived from the textual right to the person rather than as an autonomous unenumerated right.
[49] Department of Health, *Health Impacts of Climate Change and the Health Benefits of Climate Change Action: A Review of the Literature* (Research Paper, Department of Health 2019)
[50] [1976] IR 365, 372.
[51] *Friends of the Irish Environment* (n 33) [8.16].

environmental damage. 'Dental caries … has adversely affected generation after generation and will continue to do so if measures are not taken. This constitutes the type of danger from which the State has not merely the right but the duty to protect its citizens.'[52] Here the former Chief Justice seems to argue that positive state action to vindicate a constitutional right is needed.

The cases discussed thus far have been public in nature, involving the vertical application of constitutional rights; the enforcement of such rights in horizontal actions has proven more difficult. As discussed in the preceding section, *Hanrahan*, *W v Ireland* and *Sweeney* all concern claims of infringement of the right to bodily integrity. In each instance, the court found it unnecessary to engage in a full debate on the issue, satisfied that this right was adequately protected by such torts as negligence, trespass to the person and nuisance. The case of *Walsh v Family Planning Services Ltd* is worth mentioning.[53] Here MacKenzie J explicitly referenced a violation of the plaintiff's right to bodily integrity, noting that the damages awarded were 'of his constitutional rights'.[54] Bizarrely, the Supreme Court 'treated the award as having been for a technical trespass', and thus tried it on strict liability terms.[55]

This judicial reluctance to extend a direct cause of action to bodily integrity poses a serious threat to the climate litigant. In order to overcome this, the difference between these cases and a climate case must be emphasised. As will be discussed in the following section, the torts of nuisance and trespass do not adequately protect against climate damage and the courts' deference to the use of these torts will not suffice. Furthermore, an assumption needs to be made that the court's finding that bodily integrity may be protected under tort in some contexts does not create a *de facto* rule for *all* cases of infringement of the right to bodily integrity.

Adequacy of Tortious Protection

Constitutional rights do not inhere a right of action in a plaintiff unless the tortious protection provided by the common law is found ineffective. The question we must now turn to is whether existing tort law provides effective protection against the impingement of the constitutional rights discussed above. If such protection exists

[52] *Ryan* (n 44) 348-349.
[53] [1992] 1 IR 496.
[54] ibid 504.
[55] Binchy (n 4), 357.

then there is no need for a *sui generis* constitutional claim. A crucial distinction exists between an action for the breach of a constitutional right that would fail in tort, due to an inability to establish the elements of tort, and an action for a breach of a constitutional right that is not adequately protected by tort law itself. It is still possible to bring a claim for breach of a constitutional right and 'fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence.'[56] The reasoning in *MC v The Clinical Director of The Central Mental Hospital & Anor* is worth considering.[57] Here, Baker J delivered a judgment in which she referenced the 'evolution of the principle' established in *Meskell* in considering 'whether the existing remedies can or are capable of providing a remedy for breach.'[58] Baker J also paraphrased the language used in *Blehein v Minister for Health and Children* when noting that 'it is only if an action at common law is not available, or does not provide an adequate vehicle by which to vindicate the antecedent constitutional breach … and if, as a result, the right may not be effectively, effectually, or adequately vindicated, that a court will fashion a remedy deriving from the breach of constitutional rights.'[59] What exactly an 'effective remedy' entails was taken to mean 'not tested by reference to whether a plaintiff can establish the case, but whether the elements of the tort or what McKechnie J calls its 'parameters', are present, and would establish a cause of action.'[60] Echoing this rationale, this section asks whether the alleged infringements of constitutional rights by climate damage contain the 'parameters' of a tort, in order to fit within a traditional cause of action.

Doubtless, a climate-based action under nominate torts in Ireland would face a myriad of hurdles, as has been the case in analogous litigation, such as establishing a duty of care, causation and material damage. There is nothing to suggest that an Irish case on similar grounds would fare differently. However, these hurdles are not enough to justify the use of a *sui generis* constitutional cause of action as an alternative. They merely demonstrate that a nominate tort action would be very difficult to win. For a *sui generis* constitutional tort action to be justified, it must be shown that the issue in

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[56] *Hanrahan* (n 12) 636.
[57] [2020] IESC 28, [2021] 2 IR 166.
[58] ibid [133].
[59] ibid, [2020] 2 IR 164 [57].
[60] *MC* (n 57) [134].

question is not protected in any significant manner by a nominate tort, and the necessary tortious parameters are absent.

The statement of Hogan J in *Sullivan v Boylan (No 2)* is prescient; while it is 'far from clear that the existing law of torts sufficiently or adequately protects the constitutional interests' in question, 'it is true that, as might be expected, there are *features* of tort law which *to some degree* cover *some* of the interests' which the potential plaintiff seeks to vindicate.'[61] To date, private climate litigation in common law jurisdictions has primarily relied on the nominate torts of negligence, trespass, and nuisance. However, this article contends that the doctrinal elements required to ground a tortious claim capable of protecting fundamental rights, such as the rights to life and bodily integrity, are absent in the type of case under consideration. As such, traditional nominate torts appear ill-suited to support such claims. Furthermore, the absence of any climate tort case previously in Irish law suggests a structural inadequacy in the current tort framework to accommodate this form of damage. To substantiate this, it is now worth examining each of the nominate torts available in turn and examining whether they provide a plausible cause of action for the specific harm in question, and whether that harm can be meaningfully situated within their conceptual limits.

Negligence

A climate case premised on the tort of negligence would likely argue that fossil fuel companies have acted negligently by failing to take reasonable care to avoid a foreseeable risk. This argument was trialled in early US climate tort cases, with the majority of cases failing on justiciability grounds.[62] Such an argument has also featured, in a more limited sense, in some European climate cases such as *Milieudefensie v Royal Dutch Shell*, though merely used as a feature of a broader argument based on statutory authority, inapplicable to Irish law.[63] Negligence appears to be much better suited to claims for demonstrable damage to property, as opposed to damage to the right to life or bodily integrity. This is due to the fundamentally different functions performed by constitutional rights and negligence law. Doubtless, it is arguable that tort law in general seeks to uphold and vindicate personal rights in

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[61] [2013] IEHC 104, [2013] 1 IR 510 [25].

[62] For an exploration of early private climate litigation see Geetanjali Ganguly et al, 'If at First You Don't Succeed: Suing Corporations for Climate Change', (2018) 38(4) OJLS 841.

[63] District Court of the Hague (DC), 26 May 2021, ECLI:NL: RBDHA:2021:5337.

the same vein as constitutional law; negligence is a straightforward compensatory model, seeking to quantify losses and remedy damage.

A further issue is temporality. Negligence asks for proof of when a duty attaches and when harm becomes reasonably foreseeable. This is not the case in constitutional rights actions. In the case of climate change, identifying these temporal aspects is an extraordinarily difficult task, as this effectively asks the plaintiff to establish 'when a duty to avoid emissions attached and when their particular harm became reasonably foreseeable. Both of these analyses will work to shorten the time period within which defendants' harmful emissions were culpably harmful.'[64] Fossil-fuel companies have been emitting GHGs into the atmosphere for decades, making pinpointing an exact moment a duty attached and when harm became foreseeable an onerous task. The benefits of a rights-infringement cause of action are therefore strengthened by the ability to avoid this issue of temporality by applying a different form of liability. As we know, in a negligence case it is not enough for the plaintiff to demonstrate that the harm was caused by the defendant, they must also show that this occurred due to the defendant's *negligence*, which would result from breaching these duties.

Furthermore, there exists significant difference between actionable damage in the two fields. All of negligence (with the exception of medical monitoring) is concerned with actual damage that has already occurred. Doubtless, climate change is already causing damage that threatens the effective enjoyment of the rights to life and bodily integrity; however, the most significant damage is yet to come. The sole focus on compensating past damage makes this tort ill-fitting. The form of damage suffered can also vary between negligence and constitutional rights, with the former recognising a much smaller group. Constitutional rights damage, like some other torts, can extend to harms such as distress.[65] This was outlined by Carroll J who held that '[a] plaintiff who establishes unlawful interference with a constitutional right must be in as strong a position as a plaintiff whose statutory rights have been infringed and is entitled to recover damages for injury suffered by him.'[66] This followed the precedent set in *Cosgrove v Ireland*, wherein the infringement of a plaintiff's statutory rights led to an award of damages for foreseeable mental distress, anxiety and inconvenience.[67]

[64] Kysar (n 36) 41.
[65] The tort of intentional emotional harm can cover the imposition of distress.
[66] *Hayes v Ireland* [1987] ILRM 651, 655.
[67] [1982] ILRM 48.

Nuisance

To quote Hogan J, 'it must be recalled that the law of nuisance complements ownership of land and the scope of that tort requires to be understood in that historical context.'[68] In *Sullivan*, Hogan J quotes a surprisingly apropos article by Professor Newark:

> In true cases of nuisance the interest of the plaintiff which is invaded *is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner.* A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens. It is for this reason that the plaintiff in an action for nuisance must show some title to realty.[69]

It is clear that a claim in nuisance, be it public or private, is not ideal to protect the right to life or to bodily integrity as it relates to land use. The tort of private nuisance is a fitting example of a tort which is basically effective in vindicating the right to property and if a claim for damage to the right to property were to arise, this would be the appropriate mechanism under which to try it. An example of a nuisance-based climate case in an analogous jurisdiction is currently playing out in New Zealand's *Smith v Fonterra*.[70] Here the plaintiff has established a *prima facie* case to bring a public nuisance claim based on 'special damage' he has suffered due to damage to coastal land in which he, and others he represents, claim legal and distinct tikanga interests.[71] The famous case of *Lliuya v RWE* also made arguments under nuisance law, though its cause of action was derived from the German Civil Code.[72] Furthermore, despite an affirmation that a more direct claim could succeed, the OLG Hamm noted that the damage in question was too unlikely and too mild to form a substantive claim. As yet, there have been no successful nuisance-based private climate cases, and there is little to suggest an Irish nuisance-based case would fare any better.

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[68] *Sullivan* (n 61) [26].

[69] Francis Newton, 'The Boundaries of Nuisance' [1949] 65 Law Quarterly Review 480, 488.

[70] [2024] NZSC 5, [2024] 1 NZLR 134.

[71] [2021] NZCA 552.

[72] *Lliuya v RWE AG* (2015) Case No 2 O 285/15 (Essen Oberlandesgericht).

Trespass Against the Person

Trespass against the person is a tort that protects one:

> not only against hurt and violence, but against every kind of bodily interference and restraint not justified or excused by allowed cause, and against the present (immediate) apprehension of any of these things.[73]

While the traditional torts that form a part of this are battery, assault, intentional or reckless infliction of emotional suffering and false imprisonment, whether 'these torts will continue to be the principal avenues of recovery for such types of interference remains to be seen.'[74] McMahon and Binchy note the 'real possibility' that these forms of action will be 'supplemented by a jurisprudence of constitutional infringement.' They argued that the court may supplement particular torts 'with a parallel remedy for infringement of a constitutional right.'[75] They further note the capacity for this approach to allow compensation for non-imminent violence 'under the rubric of infringement of the constitutional rights to health and bodily integrity.'[76]

Despite this promising statement, it is important at this point to note that a crucial element of the tort of trespass is that the interference alleged must be direct, thus the test employed is of directness and not foreseeability. A further element worth bearing in mind is that the onus of proof is shifted onto the defendant to show that he acted neither negligently nor intentionally. Moreover, this tort is actionable *per se* and proof of damage is not needed. It remains clear, however, that the tort of trespass to the person was never intended to regulate a problem as complex as climate change. The directness of causation needed for this tort alongside the focus on negligence/intention on the part of the defendant would cause further issues in the case of the potential climate case under consideration here. Furthermore, the implications of using a tort that is actionable *per se* is unfavourable in this context, as there exists a considerable degree of nuance in understanding which level of emissions ought to be defined as tortious.

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[73] *Dullaghan v Hillen* [1957] Ir Jur Rep 10.
[74] Bryan McMahon and William Binchy, *The Law of Torts* (4th edn, Bloomsbury Professional 2013) [22-10].
[75] ibid.
[76] ibid.

Determining Liability

Let us assume that the above arguments were accepted, and the lack of adequate protection of the constitutional rights to life and bodily integrity under traditional tort law were to be established; a discussion of how liability ought to be determined in this instance is now warranted. As aforementioned, under a *sui generis* constitutional cause of action, the determination of liability is broadly contextual and the context of climate change is uncharted territory. Liability in this instance would be premised on the nature of the conduct that led to the infringement of a constitutional right. What behaviour specifically constitutes 'infringing conduct' remains a grey area, however, there is evidence that courts will look to the traditional model of torts in making this decision and in determining the liability attaching to this behaviour. As the infringement of the aforementioned constitutional rights to bodily integrity and life constitutes torts, then it seems reasonable to adopt the traditional 'ingredients of liability' in tort law.[77] It is worth noting however, if a claim fails due to the particulars of a classic tort case, it does not necessarily follow that a constitutional claim should fail on the same grounds.

A number of cases have sought to import the traditional tort liability steps into constitutional tort claims, though this is not universally lauded.[78] In *Mulligan v Governor of Portlaoise Prison & Anor*, the court, relying on *W v Ireland* argued that the bringing of a constitutional tort action carries with it other incidents of tort such as foreseeability and contributory negligence.[79] The court stated that 'a citizen may not precipitate a cause of action for a wrong involving aspects of a duty of care without a defendant being able to rely on the defences that might normally arise with regard to the imputation of such a duty.'[80] In *An Blascaod Mór Teoranta v Commissioner of Public Works* Budd J expressed doubts about using a test based on negligence or intention, citing the possibility for difficulties in establishing these elements and that this might impede the protection of the constitutional right.[81] Budd J then outlined the three principal approaches to determining the infringement of constitutional rights. The first is 'to proceed on the basis that the definition of the scope of a right prescribes the circumstances in which the right may be exercised instead of the focus being put on

[77] Binchy (n 4) 355.
[78] T.A.M. Cooney and Tony Kerr, 'Constitutional Aspects of Irish Tort Law' [1981] 3 Dublin University Law Journal 1.
[79] *Mulligan v Governor of Portlaoise Prison & Anor* [2010] IEHC 269, [2013] 4 IR 1.
[80] ibid [24].
[81] [2000] 3 IR 565, 585.

the question of the carelessness or intention of the infringer of the right.'[82] This right-specific approach stresses the need to understand that the 'detrimental effect on a person's right may have to be balanced against others' rights and the needs of the common good'.[83]

Under this approach, the common good of protecting the rights to life and bodily integrity is clear, as is the fundamental nature of these rights and their placement above countervailing rights. The second approach is to require proof of intent or negligence on the part of the infringer of the right. Binchy highlights Budd's identification of the difficulty that could arise in 'establishing culpable intent of negligence' and that 'there may be difficulties in deciding whether the infringement was intentional and the need for these ingredients might impede the protection for a constitutional right.'[84] The adoption of this approach regarding the potential climate case under consideration would pose issues as establishing negligence or intention would perhaps seem unlikely.[85] The third approach, dubbed the 'pragmatic' approach, stresses the importance of dealing with rights in the factual context of each case.[86] In considering the same topic, Henchy J deliberately avoided general consideration of broad questions and stated that 'experience has shown that such constitutional problems are best brought to solution, step by step, precedent after precedent, and when set against the concrete facts of a specific case.'[87]

The picture thus emerging is that the courts will loosely follow traditional tort models in determining liability. Binchy has expressed hesitancy in the 'over-reliance on tort law to provide the substantial incarnation' of the *Meskell* doctrine, citing the simplistic nature of foreseeability when it comes to constitutional rights.[88] Negligence and intention will of course feature in many applications of the doctrine but they need not form a universal test. Furthermore, what behaviour is defined as infringing constitutional rights remains largely up to judicial discretion, with the most recent cases stressing the need for a pragmatic case by case analysis. The lack of an explicit

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[82] ibid 585.
[83] ibid 586.
[84] Binchy (n 4) 356, citing Budd J in *An Blascaod Mór* (n 81) 586.
[85] David Hunter and James Salzman, 'Negligence in the Air: The Duty of Care in Climate Change Litigation' (2007) 155(6) University of Pennsylvania Law Review 1741.
[86] *An Blascaod Mór* (n 81).
[87] ibid 588.
[88] William Binchy, 'Constitutional Remedies and the Law of Torts' in James O'Reilly (ed), *Human Rights and Constitutional Law* (Round Hall Press 1992).

rule that negligence or intention need be present can only be a benefit to the potential climate constitutional tort litigant. If the seemingly favoured 'pragmatic approach' were to be adopted, the climate litigant would find themselves in a strong position, set against the factual context of the severity of harm posed and the impetus to take action. It was earlier argued that climate change damage does not fit neatly within the repertoire of nominate torts. It seems that the bespoke nature of the determination of liability in this context could even result in less onerous liability hurdles than traditional nominate torts.

Remedies

The next question that arises is whether the remedies available through the constitutional tort mechanism befit a climate case. Case law in this area has made it clear that the award of damages is the most common remedy available to those who suffer an infringement of a personal right, and are the principal manner in which these rights are vindicated. According to Binchy, 'courts appear to proceed on the basis that compensatory principles applicable to torts should govern claims for infringements of constitutional rights.'[89] Binchy notes that in *Grant v Roche Products (Ireland) Ltd*

> the Supreme Court was anxious to emphasise that there was authority for the proposition that the law of tort "is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority whatever for the proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever."[90]

In *Conway v Irish National Teachers Organisation*, Finlay CJ set out the types of damages awardable for a breach of constitutional rights: Ordinary compensatory damages, Aggravated Damages, Exemplary Damages / Punitive Damages.[91] In this discussion he considered whether exemplary / punitive damages could correctly be awarded for a breach of constitutional rights. He stated

> [i]t seems clear to me that the Court could not be availing of powers as ample as the defence of the Constitution and of constitutional rights requires unless, in the case of the breach of those rights, it held itself entitled to avail of one of

[89] ibid 358.
[90] ibid 358 citing Hardiman J in *Grant v Roche Products (Ireland) Ltd* [2008] 4 IR 679, 701.
[91] *Conway* (n 26).

> the most effective deterrent powers which a civil court has, the awarding of exemplary or punitive damages.[92]

He further stressed that exemplary damages should not be awarded if the compensatory damages 'constituted a sufficient public disapproval of and punishment for the particular form of the wrongdoing.'[93] This was reiterated in *Shortt v Commissioner of An Garda Síochána.*[94]

Returning to climate litigation, we must now ask which form of damages would be appropriate for the infringement of the constitutional rights to life and bodily integrity. Looking first at ordinary compensatory damages: this form of damages seeks to

> recompense a wronged plaintiff for physical injury, mental distress, anxiety, deprivation of convenience, or other harmful effects of a wrongful act and/or for monies lost or to be lost and/or expenses incurred or to be incurred by reason of the commission of the wrongful act.[95]

In this instance, compensatory damages may be awarded for almost every one of those criteria. Satisfied that compensatory damages can be awarded, the question that follows is whether there is cause for the additional award of aggravated or exemplary damages. Much of the criteria pertaining to aggravated damages surrounds the behaviour of the defendant and is therefore of little relevance to this article. Exemplary damages, however, are an opportunity for the court to express particular disapproval of the defendant's conduct, arising out of the nature of the wrong. The broad implications and universality of the harm perpetrated by the defendants certainly makes for a strong argument in favour of the award of exemplary damages.

Conclusion

Since its inception, the *Meskell* doctrine has evolved; having begun life as a bold encapsulation of Walsh J's constitutional rights activism it has grown into a largely peripheral legal afterthought. This article has argued that the doctrine is not moribund, but rather awaiting legal reinvigoration, which may come in the form of climate litigation.

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[92] ibid 320.
[93] ibid.
[94] [2007] IESC 9; [2007] 4 IR 587.
[95] *Conway* (n 26) 317.

In many respects, tort and environmental protection are at theoretical odds. The liberal individualist foundations of tort law contrast to the collective, communitarian focus of environmentalism. Tort's reliance on fault and blame, seeing damage as a monetary function make it ill-suited to remedy the diffuse, polycentric issues posed by climate change. Perhaps this is why successful private climate litigation has taken place at the fringes of law, in the reinterpretation of unremarkable heuristics, or anodyne procedures; no better demonstrated than by the Dutch doctrine of *betamelijk* (to act decently) which crested the second wave of climate litigation.[96] In a similar way, the constitutional tort is at the fringes of Irish law, and represents a potentially powerful bulwark against the rising tide of private emissions.

To conclude, there are many elements immanent to the constitutional tort doctrine that may prove beneficial to the potential climate litigant, such as the straightforward standing requirements, the avoidance of nominate tort hurdles, and the wide array of possible damages. However, it is clear that constitutional tort actions are far from an exact science, and in what Hogan J calls a 'Joycean circular meandering',[97] one finds the courts returning time and again to the recurring theme of judicial discretion. The climate litigant may yet find strength in this indeterminacy, and a horizontal climate case could prove the harbinger of an entirely new method of litigating rights breaches and climate change.

[96] For further discussion of *betamelijk* and its use in Dutch climate litigation see Benoit Mayer, 'The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation: *Milieudefensie v. Royal Dutch Shell*: District Court of the Hague (The Netherlands)' (2022) 11(2) Transnational Environmental Law 407; Laura Burgers, 'An Apology Leading to Dystopia: Or, Why Fuelling Climate Change is Tortious' (2022) 11(2) Transnational Environmental Law 419.

[97] Hogan (n 20) 16.

Discipline and Focus in the Art of Judging

Peter Charleton*

Abstract: This article argues that the core virtues of good judgment writing are discipline, clarity, and focus. Rather than treating judgments as literary works, it presents them as practical decisions intended to resolve disputes clearly, efficiently, and without unnecessary delay. It emphasises the importance of controlling hearings, identifying the real issues in dispute, organising facts chronologically, applying settled legal principle, and giving intelligible reasons that lead to a definite result. Ultimately, the article suggests that when a case is properly managed and the essential question is kept in focus, the task of writing a judgment becomes more direct, disciplined, and effective.

Keywords: judgment writing, judicial reasoning, case management, clarity, discipline, fact-finding, court efficiency, precedent

Introduction

Discipline and focus are the essential attributes of the art of judgment writing. While Max Barrett's *The Art and Craft of Judgment Writing*[1] draws lessons from the beautiful judgments that great common law judges of the past have created, in this article, the attention is on the more mundane task of managing a court so that the point to be decided comes into focus. Achieve that and a judgment practically writes itself.

People who are litigating are drawing on a public service. They are entitled to an answer. For Hamlet, the troubles of the world that were unbearable included 'the law's delay,/ The insolence of office'.[2] Both ills may be avoided; but focus on the essence of what a case is about is inescapable. To borrow again from Shakespeare, if a judgment falls to be written 'then 'twere well/It were done quickly'.[3] Judges are public service

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[1] Max Barrett, *The Art and Craft of Judgment Writing* (Globe Law and Business 2022), and (2nd edn, Globe Law and Business 2025).
[2] William Shakespeare, *Hamlet*, act 3, scene 1.
[3] William Shakespeare, *Macbeth*, act 1, scene 7.

providers, and the public do not expect perfection, but they do, legitimately, expect a certain swiftness of action.

A caution

The task of judging is in giving decisions as between disputing parties, and offering clear and intelligible reasons that lead to a definite result. Judges are not creating masterpieces that will long outlast generations. As King Solomon observes in the Book of Ecclesiastes, 'One generation passeth away, and another generation cometh'.[4] Each new generation will have ideas and ideals of its own. Those will inform its judgments and those of the current generation of judges will soon gather dust on bookshelves, rarely read and almost entirely forgotten. This is reality. What matters is avoiding what is unclear, undisciplined, or unending.

Reserving decisions

The judicial oath requires judges to act without fear or favour, affection or ill-will towards any person. In truth, however, judges' responsibilities go far beyond that. Judges are tasked with making decisions that are always difficult; sometimes because both parties have evoked ordinary sympathy regarding their predicament, sometimes because the existing law is unclear, sometimes both. There is a reason cases come to court: there is often no easy or clear answer. So, judges may need time to think through where law and justice meet. But there is no excuse for putting off the evil day beyond what is reasonably required to arrive at a decision. It is always easier to write a judgment if one approaches it with a decision already made, at least tentatively. Judicial responsibility is to make a decision and, in doing so, to apply the law as it is. A judge may often be able to give an oral decision at the end of a hearing, just as she or he will give oral decisions on issues of procedure and evidence during a case. In general terms, a reserved judgment is only needed when encountering some or all of the following: a novel point of law that will operate as a precedent going forward; some uncertainty in the law that requires additional thought; or, some evidential issue that is particularly complex or so finely balanced that more time is required to consider it. Time for consideration also helps where a judge finds that they need to let things

[4] Ecclesiastes 1:4-11 (King James Version).

settle to arrive at a coldly logical decision away from the sometimes-fraught emotions at play in the courtroom.

For a lot of cases, a written judgment will be needed. There will also be many cases in which it is not. Everything should have already happened in court, and every authority should have been opened or referenced. So why wait? Delay may increase the burden of decision-making. When time intervenes between a hearing and writing a decision, the burden of formulating a result can weigh more heavily. A hearing is successful if it achieves clarity.

Between what counsel have said and what the stenographer and/or the digital audio recording have recorded, judges have a lot of material on which to construct a judgment at some speed. But that material can slow them down. Delay is not a necessary part of the legal system. Judges should solve people's problems; not add to them by extending their worries unnecessarily. Sometimes the answer to a case may not be to write a judgment, but to simply tell the parties that a little more time is needed to think matters through and that you will then respond with an oral judgment.

Cardinal rules

As with any craft, there are guide points: 'dos and don'ts'. There are things to be borne in mind when writing a judgment. Some considerations for a judge might be:

1) your key responsibility is to make a decision;
2) use existing precedent;
3) state law as a principle;
4) do not self-refer;
5) do not cite so many cases that you obscure a decision;
6) make clear findings of fact.

Most usefully, a judge is not required to review law that is already settled, where they are not re-inventing the judgment-wheel. The maxim must be: find the principle and apply the principle. A judge writing a judgment might usefully ask himself or herself the following questions:

1) Have you told the reader what you are now going to decide?
2) Have you clearly stated the facts and the law?

3) Have you precisely stated the issue that arises for decision?
4) Have you said why there is a disagreement on the facts?
5) Have you concluded where the facts lie by reference to the evidence?
6) As between experts, have you given a reason to prefer one over the other?
7) Regarding legal principle, have you said how it bears on the facts?
8) Have you concluded who wins?
9) In more complex cases, after your more detailed reasoning, have you summarised where you are and why you are there?

When it comes to the last of these questions, a judge might ask, first, could they briefly say what has been decided in terms of fact and law and, secondly, if a friend who is not a lawyer were to ask what has been decided, could the judge briefly answer that question in ordinary language? The answers to these two questions can be useful to include at the outset of a judgment or at the end. Where there is a clear issue, or clear issues, whether of fact or of law, where the judgement poses what is to be decided and then gives the answer, clarity illuminates the decision.

Starting

A good first question is: what order do the respective parties seek from the court? The judge's task is then to explain why the court will grant the order or refuse it. If the judge is satisfied that he or she knows what the case is about – and sometimes it can help to ask counsel what they each consider to be the key issue/s of focus to be – then a judge may confidently grapple with defined issues. Everything is about focus. But a judge has to start writing the solution to the parties' problems with an initial sentence. Where does one start? Surely it is better to begin with the core issue, with what divides the parties? Legal language deploys a fog of obscurity over issues and it is better not to start with simply repeating that by a statement of claim the plaintiff sought a range of reliefs. Judges know that those drafting a legal claim are terrified of leaving out any tenuous argument. When it comes to the hearing, dozens of points can be reduced to an essence. The fear of the advocate in leaving out anything that might be argued on behalf of a litigant is reduced through face-to-face analysis of what really is being asserted. Hence, a scheme of repetition of what was in the pleadings is a scheme for sewing confusion as to the nature of what has to be decided. There should be a thread of logic which takes a judgment from the reality of a dispute to the conclusion. It is unhelpful to simply reproduce the arguments in their unrefined form and to cite the cases referred to by each side and then leave the actual decision in the form of a short paragraph or two that purports to be a discussion and decision.

The difficulty with this form of judgment is not just that it is a less than informative read. It also has the potential to cause difficulty in the future. This is because the lack of clarity in what is said yields a situation in which counsel in future cases can simply quote such elements of the judgment as it suits them to mention. The reason they are able to do so is because no one, perhaps not even the judge who wrote it, is entirely certain what the key points are and what the case decided and did not decide. Pages of reproduced arguments may become confused for judicial analysis.

Is there a solution? A summary at the end of such a judgment would likely not fully redeem it, but it would certainly go a long way. Another way of making clear what is being decided is to set out the key problem in the opening paragraph of the judgment. A model might be this approach:

> The Enniscorthy Fianna Fáil Cumann is the local branch of the Fianna Fáil Party. It decided to apply to the Enniscorthy District Court for a licence for the promotion of a series of periodic lotteries. It would have been entitled to such a licence if, *inter alia*, in compliance with the conditions laid down in section 28(2) of the Gaming and Lotteries Act 1956, it derived no personal profit from the lotteries and if the lotteries were 'for some charitable or philanthropic purpose'. It is the latter condition that has led to the present case … [5]

Suppose that this imagined case came before the High Court as a case stated from a District Court judge. Judges will be aware that cases stated embody one or more questions and those questions can provide a useful skeleton on which to construct the meat of a judgment. A model might be as follows:

> What is a 'charitable and philanthropic purpose' for the purposes of the Gaming and Lotteries Act 1956? This issue arises as a result of a lottery that was operated by the Enniscorthy Cumann of the Fianna Fáil Party…

[5] This is an imagined case but the reader may have a clue as to the model used.

Then, because the writer already has the issues set out, he or she may know where to go. A useful focus is on first defining or describing unambiguously what a lottery is, what a 'charitable and philanthropic purpose' is; and why this is significant. If a lower court has made a finding of fact that some form of purpose is 'charitable and philanthropic' and the writer disagrees, then they explain why this is the case. The full result can be seen in the judgment of Henchy J in the real case on which the model is based: *Gurhy v Goff*.[6]

Where the issue is primarily one of fact, with law mixed in, with the result that a decision can only be made on the tramlines that the law allows you to drive on, a judge could for example commence as follows:

1) In a case where the Financial Services Ombudsman has adjudicated on a complaint and has ruled that the service provider acted in accordance with the terms of the underlying contract or otherwise did not act unfairly, can the complainant then subsequently sue the service provider for breach of contract directly in the High Court where no appeal has been taken against the decision of the Financial Services Ombudsman? That, in essence, is the principal issue which arises in this application brought by the financial service provider to have the proceedings struck out on the grounds that the matter is res judicata.

2) The issue arises in the following way: At some time in 2002, the plaintiff, Mr Digby, effected a 'Life and Serious Illness' policy with the first defendant's predecessor, ABC Ltd. This policy was subsequently taken over by XYZ Ltd, but nothing turns on this. There is no dispute but that the plaintiff discharged all premium payments under the policy thereafter.

3) The policy became due on the happening of certain critical events, including coronary catheter treatment. This was defined more formally as: The undergoing of any interventional technique on the advice of a cardiologist that has been appointed as a consultant physician that involves the use of transluminal coronary catheters. The procedure must be to correct at least

[6] [1980] ILRM 103.

50% diameter narrowing of two or more coronary arteries. Angiographic evidence to support the necessity for the above operations is required.

4) By early 2025, it was clear the plaintiff needed surgical treatment for a serious heart condition. In April 2025, he underwent coronary angiography. As a result of this procedure, it became clear that surgery was necessary, and he underwent an angioplasty stenting of the lower anterior descending artery ("the LAD artery"). It appears that three sequential lesions were stented. Although narrowing was found in a diagonal branch of the artery which was subtended by the stent, this was left alone and not stented. On 19 May 2025, Mr Digby completed a 'Serious Illness Claim Form' in the wake of this surgery and this was submitted to XYZ. Medical details were supplied by Dr John Murphy, Mr Digby's general practitioner, and by his consultant cardiologist, Dr Michael Brent. The application was considered by XYZ with the assistance of its Chief Medical Officer. On 8 July 2025, XYZ wrote to Mr Digby declining the claim. [7]

A litigant can like or dislike the result, a reader can disagree with the reasoning, newspapers can claim that judges like or do not like insurance companies, but everyone taking the trouble to read will know, at least, where the judgment is going and what has to be decided.

Self-indulgence

'Vanity of vanities, saith the Preacher, vanity of vanities; all is vanity. What profit hath a man of all his labour which he taketh under the sun?'[8] There is nothing wrong in human endeavour trying to reach a high point of excellence. Max Barrett's book on the ideals of judgment-writing (from which much of this exercise derives inspiration) while suggesting many things, never suggests that judges should be merely smart. There is the inevitable temptation to start a judgment in the punchy style of Lord Denning. But Lord Denning was in every way an exceptionally talented judge and his most memorable openings tend to come from a time when he had in every way established himself to possess an outstanding judicial intellect. Throughout a

[7] This, again, is an imagined case, not a real one.

[8] Ecclesiastes 1:2-11 (King James Version).

judgment the duty of a judge is to apply, and maintain the impression of bringing, a neutral mind to bear; and neutrality is easier to convey when a judgment is not painted in brash colours.

One judge used to offer this advice to newly-minted colleagues: the day after you have written your judgment, read through it again and cross out the best line. That was 30 years ago. Nowadays, the advice might be to cross out any personal observation that may bring a judge outside the realm of deciding fact and law and into the expression of a personal opinion.

Control of the hearing

There are many eminent books on advocacy which suggest writing everything down, highlighting points in red and green ink and using highlighters etc. Everyone works out their own system. Some judges rely primarily on a stenographic record, occasionally jotting down points of especial note; and perhaps noting the time when it was said to reference the digital audio recording. Using the margins of a notebook to highlight an issue or what it was that the witness was addressing can be useful; for example, 'the red light' or 'the December meeting'. These can be readily cross-checked at a later stage. When witnesses contradict, then perhaps 'John R x Pat McD' is useful shorthand. When, in a civil or criminal case a judge gets to the point where an actual defence is put to a witness, that can be written down and underlined with a big 'D': as the judge now knows the defendant claims that the goods were defective, or that the accused asserts that he was defending himself in killing the victim. Likewise, more for civil cases, a judge might note that 'John R's understanding was always that he might be cut in on the deal but there was no agreement as such.' It is in this way that a court builds up a real understanding of where the evidence is going.

If experience teaches anything it is that a judge should always search for fundamental reality, always ask herself or himself: has the case that the witness/party must meet been actually put? Central to this focus is the following question: are advocates challenging the witness on the core point. If they are, a judge's task is in putting whatever contradictions arise. Fundamentally, that enables the judge to actually write down what the case is. Advocates cannot, however, be allowed to stray into irrelevancies. While that is bad enough, it is worse still to allow them to shy away from putting the opposing facts that their instructions say contradict a witness's testimony.

Who is in charge?

The judge alone is in charge. Courts do not have to tolerate parties going down rabbit holes and asking the judge to follow. 'I almost wish I hadn't gone down that rabbit-hole—and yet—and yet—it's rather curious, you know, this sort of life!'[9] Alice was, after all, half in a dream and a court is far from a dreamlike experience. The rules of procedure and evidence are designed to get a court to the point where the judge is deciding the core issues.

A judge should constantly ask: what are the building blocks for each side of this case? There are never very many. The key to managing a case is to expose these, to make sure that the parties address them, and to keep focus. Questions as to credit may be limited to what is relevant and issues of credit can never be addressed by calling evidence, only by asking questions on a take-it-or-leave-it basis. Judges, whether operating under Commercial Court or Chancery rules, can also ask, at the start of an examination or cross-examination, for a time estimate and they are entitled to gently lead people into concision and focus. The principle stated in *Talbot v Hermitage Golf Club & Ors* ("*Talbot*")[10] is of general application to criminal and civil cases:

> As the Chief Justice points out … the delivery of this judgment will constitute the 83rd day that the resources of the High Court and the Supreme Court have been directed towards this claim. This was, in essence, a very simple case: was it defamatory to say of an amateur golfer that he was "handicap building"; was that statement published to anyone other than the maker of the statement and the subject of it; and if yes was the answer to these two questions, was publication on an occasion of qualified privilege not undermined by malice? The conspiracy claim was also straightforward. Complication is perhaps inherent in the law of defamation …. Focus, however, is far from impossible even in the most difficult case … Mr Talbot pleaded this case himself without legal counsel or assistance over 20 days in the High Court. Numerous motions were brought to the High Court … Several appeals were heard by the Supreme Court. The

[9] Lewis Carroll, *Alice in Wonderland* (first published 1865, Walker Books 2009) 58.

[10] [2014] IESC 57 (Charleton J).

necessary observations which follow on what the Chief Justice has said are a criticism of no-one.

Among the unenumerated rights in Article 40.3 of the Constitution is the right to have access to the courts for the purpose of litigation ... Those resources are not, however, unlimited. No litigant is entitled to more than what is reasonably and necessarily required for the just disposal of a case within the context of the other demands on court time ... Courts are entitled, and indeed are required, to foster their resources. This is both a matter of public and private interest. Court resources used in litigation are funded by public money. In addition, the parties pay for legal representation. Litigants should not be faced with cases that are longer or more expensive than they need to be for a fair resolution. In many instances, costs if awarded against a losing party may not be recovered. In that regard, putting reasonable limits on submissions in terms of time and allowing a measured number of hours or days for each side to litigate their case is both right and appropriate. The calling of repetitive expert evidence may and should also be curtailed. Many motions can be brought in apparent aid of certainty as to nature of each side's case. This needs to be vigilantly watched by the courts. The Rules of the Superior Courts are there to aid in the just disposal of litigation and are not to be over-used in such a way as to overwhelm the central core of what a case is actually about. Clear focus on that is required from the start ...

There can be problems beyond what are usual in litigation. Where a lay litigant is involved, pleadings may be confused. Traditionally ... judges have done all that they can constitutionally do to assist. It would help in many cases, both with lay litigants and in complex cases where the parties are represented, for a case management hearing to take place before a judge who, after hearing the parties, can have the parties agree the issues for trial or can set these. This can avoid the unnecessary use of discovery and particularisation as the judge may then and there make such orders as are necessary for the just disposal of the case. The core purposes of case management are that it allows the court to focus on necessary issues and to set fair limits as to the resources of the courts that can be allocated to litigation.[11]

[11] ibid 7-8.

A judge is empowered to give people definite limits. A judge can allot, on a consideration of the papers, and with due flexibility and openness to listening to reasons for more or less time, 50 hours each. There is no reason for a three-week case to run for six. Judges are not just dealing with these parties, for whom costs double, but on the basis of the reasoning in *Talbot*, every other litigant who is waiting while a court is tied up. A judge can give litigants a fixed allocation and each side may use it as they wish, cross-examining, examining, making submissions. It may be useful for a judge to have *Defender Ltd v HSBC France*[12] to hand because this gives an analysis of the rules but, as *Talbot* makes clear, these rules merely express the powers that a judge already has. These are, in essence: to require an agreed set of issues (an issue paper); to set time limits within which each party may present its own case and challenge the opposing case; to guide examination and cross-examination to what is relevant; and to set the time within which submissions should be completed, whether orally or in writing. All these powers, however, must be used flexibly and as an aid to getting to the core of the case. They are not an end in themselves. We have moved from an adversarial system where parties can be left without guidance and enabled to effectively run the case as the mood takes them. In short, a judge has an entitlement to control a case, criminal or civil, in the interests of justice, and a wide measure of appreciation ought to be given to rational and reasonable attempts to rein in sprawling pleadings, pre-trial motions, examinations in court and to encourage focus on the issues; see *The People (DPP) v VE*.[13]

The point of control is this: if there is a focused hearing, a judge will know what the case for each side is, they will also know what is being asserted and what is being denied, they will be appraised of any counter-assertion that is made and, consequently, they can identify the pivotal points on which the case will turn. A judge will then know where to concentrate to make a decision. Let the case go out of control and the task of deciding matters becomes infinitely more challenging, perhaps even impossible, to do well.

Where notes are kept, these are best kept in a form that renders their translation into a judgment as seamless as possible. So, on the first day of the hearing, a judge might

[12] [2020] IESC 37, [2021] 1 IR 516.

[13] [2021] IECA 122, [2023] 1 IR 376.

have a document that approximates to a first draft of the non-contentious parts of the judgment. Where this is kept up day-by-day, a judgment builds up. This is not deciding matters in advance. It is helping a judge to decide matters when the case has ended and highlighting points that do and do not need to be included in an eventual judgment.

Assuming one is going the route of a written decision, the biggest thing that will speed matters up is to eschew perfection. A good decision is the ideal. A perfect decision is unattainable in a human system of justice. In this regard, there is something to be said for what might be described as a 'painting-by-numbers' approach. If a judge has a framework in mind for her or his judgment; facts, law, submissions of parties, application of law to facts, conclusion (commonly known as the 'FLAC' approach) – and what the template is may legitimately vary from judge to judge – then when he or she has populated the various sections, the judgment may well write itself. The parties can be asked during the hearing, if necessary, to prepare an agreed chronology of facts or anything else that the court thinks would be helpful, even after reserving judgment. But an ordered approach is essential, and chronology is of the essence for such an approach.

Chronology and order

Almost always, it is what happened yesterday, or in yesteryear that influences and informs what happens today. So, trying to sort facts into a chronology is important: from the first thing that happened to the last. In the appendix to the Maurice McCabe matter contained in the Disclosures Tribunal Report, there is a chronology of every relevant document relating to a fact and what was said in it.[14] That really helps. The more complex a case gets, the more crucial it is to have some kind of a map, by way of a note that puts one thing before another. That map may show a judge where they are going. During the hearing, build that chronology up with names, dates and

[14] Third interim report of the tribunal of inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters, *Third Interim Report* (2018) 361 <https://www.disclosuretribunal.ie/third-interim-report-of-the-tribunal-of-inquiry-into-protected-disclosures-made-under-the-protected-disclosures-act-2014-and-certain-other-maters-dealing-with-the-conduct-of-the-health-service-executi/> accessed 29 October 2025.

occurrences. If a judge has that to hand in a marked part of his or her notebook, they will be unlikely to ever get a name or date wrong.

Judging facts

Judging facts is not an easy business. Reading demeanour has long been recognised as unwise. As Shakespeare wrote in *Macbeth*: 'There's no art/ To find the mind's construction in the face.'[15] Nor can truth be distinguished from falsehood just by looking at a document. Experience suggests that more certain tests for ascertaining the validity of an account include:

- how testimony fits into the background against which it is given;
- how what a witness says corresponds with what is likely or expected, or if unexpected, the reason behind such a twist of events;
- whether there are indisputable or highly reliable facts on the ground, such as forensic evidence, or basic circumstances such as the layout of a premises;
- how what is said sits with other facts;
- how likely/unlikely it is that people confide in each other based on their mutual experience;
- whether facts are reported as such at a time that would be appropriate.
- how memory can be fallible;
- considerations of the flow of conversation and how remarks rarely appear without context;
- whether, in reporting something, ordinary or sober language is used as opposed to indications of self-promotion;
- if detail is sparse or apparently constricted to events or conversations that are essential to a result sought, as against the normal experience that those who are genuine witnesses tend to report details beyond what is essential;
- whether a witness seems to be re-living an event, turning inwards for memory as opposed to stonewalling questions or blustering away from awkward issues;
- if there is appropriate affect at times where emotion may emerge, noting that people often approach a court hearing in as detached a frame of mind as can be summoned.

[15] *Macbeth* (n 3), act 1, scene 4.

These considerations apply to live testimony and are also useful in analysing documents. What a judge is looking for is what can be relied on. That can be built up slowly. For instance, a judge knows there was a traffic light, is aware that traffic lights are presumed to work, has experience that people often go through a light that has just gone red, has found out that a witness is not connected to any party, that they do not want to be there, and hence they likely have 'no axe to grind'. Or, the judge knows that cattle repeatedly died of unexplained illnesses, so asks 'is the farmer competent or incompetent?' Or, the court knows that before the accident the plaintiff had a number of other accidents, so could an underlying condition have been exacerbated? And so on.

A judge ideally starts from the facts that are certain. As a judge gets more and more facts, the background for a decision will emerge. For every fact a judge decides, the ideal, if not always the legal imperative, is to give a reason.

Repetition

It is not necessary to record the submissions of the parties. This has never been required as a matter of Irish law or practice. If a judge considers that it must be done, they might consider whether this is useful only as an *aide memoire* and does not need to appear in a judgment. If it must be included in the judgment, then it is best done precisely and in a clear way that highlights that this is what was asserted to the court and is not what the judge thinks. It does not help to have many pages of submissions covering all the issues on one side and then the other. If a judgment deals with a multi-issue case, the best approach is to headline the issue, state what each side contends on that issue within a sentence each, and then proceed to an analysis of the principle, setting out case law on each side. Putting the case citations as part of the submissions of the parties confuses the reader. If the submissions are to be included, a sometimes useful approach can be to insert a section heading in the judgment and begin that section with what each side says. By splitting up the issues, greater clarity ensues.

What should not be done is to recite arguments as if the judge is a note-taker. It is not necessary. It gives the impression that the judge does not understand the issues. Further, it is often unclear that the recitation of arguments over pages is not analysis of legal principles but a stenography job. What is important is for each argument to be precisely stated: the judge puts it in the form of 'The DPP contends that …' or 'The argument of the applicant is that …' or 'It is asserted by the plaintiff that the case of *Nook v MacMathúna* governs this point …'.

Never be long or late in a judgment

At the level of a trial court, a judge should not be tempted to try to write the ultimate word. If ever, that is for the Supreme Court or for the Court of Appeal when cases end up there. They should seek, instead, to draw on existing principle and authority. Is not everything already decided or set out in a textbook? Hence, they should make a decision that is based on principle and is backed up by reasons. A judge should seek to get a judgment out in weeks rather than months. If the production of a judgment has become protracted, a judge may reasonably ask why this has happened and seek to address it. A judge has a responsibility to give a decision to the parties in dispute. And, if there is one thing that all judges can take from the exceptional career of Lord Denning, it is this: he was never long or late in a judgment.[16] A discipline that can be useful is that when a case ends the judge announces that the decision will be given on a date perhaps a month hence.

The rule for judges is that once a decision is made, that is it. It is pointless to have second thoughts. It is not appropriate to issue a second judgment on an application for costs or for leave to appeal (where applicable) qualifying what has come before: 'What I really meant in paragraph [58] of my principal judgment was …'. A court should not change reasoning or explain extra-judicially that a judgment meant something that contradicts its text. What a judge can do is correct errors of grammar, spelling or expression in an unapproved judgment, but not substance.

Ending off

At the end it is imperative for a judge to say what the order of the court is because that is what a clearly-stated decision demands. That is the ultimate discipline. For some written judgments on criminal law, the challenge is to sum up the law in such a way as

[16] Michael Kirby, 'On the Writing of Judgments' (Australian Conference on Literature and the Law, Sydney, April 1990) <https://www.michaelkirby.com.au/images/stories/speeches/1980s/vol21/829-Aus_Conf_on_Literature_and_the_Law_-_On_the_Writing_of_Judgments.pdf> accessed 5 February 2024.

will enable a judge to take that judgment and read a passage to a jury as representing the law.

In civil cases, writing down a number of questions that a judge has to answer to complete a judgment assists that process.[17] That forces a judge to ask: what am I really deciding here? Is it really based on principle? In a judgment on criminal law, a judge should ask: can the principle be put in such a way as a judge can instruct a jury? In civil cases, by a judge forcing a summary on themselves at the end is to require the judge to state the logic of a decision. The end is about the end. And it is useful for a judge to self-interrogate:

- What principle of law have I divined, if there have been submissions that the law is unclear?
- Have I stated that principle of law clearly?
- Have I reached a clear conclusion on the facts?
- Have I applied that conclusion to the law?
- Has that conclusion led to a result?
- Can people understand that result?

If judges avoid that approach, the reality is that people will be left swimming around searching for a platform of ease on which to rest their weary minds. If there are four points in a case and a court decides the first so the second, third and fourth are not necessary of decision, it may help an appeal court to have a summary judgment on those points rendered redundant by your decision on the first point.

This is about clarity. Without clarity, a judgment is not precedent and it is not of use. While the ultimate aim is to give a decision, sometimes, but rarely, that decision requires legal analysis that leads to a decision on law as well as just applying law. If, at the end, a judge can say what has been decided and what legal principle has been applied they have achieved the ultimate aim. Is there a path towards that?

[17] Jack Healy, 'Route(s) to Verdict – The clear path forward in criminal jury trials' (2023) 7(1) IJSJ 40 <https://www.ijsj.ie/assets/uploads/documents/pdfs/2023%20edition%201/3.%20Routes%20to%20Verdict.pdf> accessed 29 October 2025.

Maybe this path should be followed: if a judge thinks of writing the summary first, or having written it at the end of a judgment by going back over what has been written, what is then unnecessary can be excised.

Sentencing Rioters

Rory Kelly*

Abstract: This article examines the possible justifications for heightened sentences for those who commit offences during a riot. The topic is of salience given recent incidents in Dublin and developments in the sentencing of rioters in England and Wales. The article argues that there is compelling reason to avoid deterrence-based justifications for increases to sentence length in this jurisdiction, but that proper consideration of proportionality can justify elevated sentencing levels. The article then turns to the difficulties of distinguishing between protesters and rioters at sentencing. Here it examines the case for reduced culpability for protesters before addressing practical examples of borderline cases.

Keywords: Sentencing; Riot; Protest; Freedom of Assembly; Guideline Judgments; Criminal Law.

Introduction

In November 2023, there was large-scale public disorder in inner city Dublin to include alleged offences of assault, violent disorder, riot, intimidation, harassment, arson, criminal damage, theft, and public disorder. An Garda Síochána has reported that the disorder from the night resulted in dozens of vehicles damaged or destroyed (including a Luas tram destroyed by fire and 15 Garda vehicles damaged); dozens of businesses damaged; and 13 injured Gardaí.[1] Significant sentences have been reported for those involved in the 2023 riots. Reported sentences include two years' imprisonment for an offender who pleaded guilty to theft and rioting related to looting

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[1] An Garda Síochána, 'update in advance of 1st Anniversary of Serious Public Disorder, Dublin City Centre, November 23rd, 2023' (*An Garda Síochána*, 19 November 2024)<www.garda.ie/en/about-us/our-departments/office-of-corporate-communications/press-releases/2024/november/update-23-an-garda-siochana-update-in-advance-of-1st-anniversary-of-serious-public-disorder-dublin-city-centre-november-23rd-2023.html> accessed 9 December 2025.

cigarettes and gathering rubbish that was subsequently set on fire.[2] Another person was sentenced to five and a half years for assaulting a Garda amongst other offences related to the riot.[3] A further person was sentenced to two and a half years' imprisonment for assaulting three Gardaí and throwing a gas canister at a Garda van having been 'swept up in the frenzy' of the riots.[4] In the aftermath of the unrest, the Policing Authority documented two important trends. First, a substantial increase in protests across Ireland, from approximately 375 protests in 2022 to more than 700 in 2023.[5] Secondly, that there has been 'growing public expression and manifestation of hatred, xenophobia, negative stereotyping…[i]ncluding in the format of protest activity.'[6]

In October 2025, following the alleged sexual assault of a 10-year-old, a protest group called 'Stop Citywest Hotel' called for a protest in front of the hotel, which had recently been purchased by the state to provide accommodation to those seeking international protection. That protest went ahead without major incident. The following evening, after a swell of online activity, large crowds gathered outside the hotel and reportedly threw fireworks, bottles, and bricks at Gardaí. A Garda van was burnt out and two officers were hospitalised.[7]

With this context it is of clear contemporary relevance to ask how should those who commit offences in a riot be sentenced? What of those who commit an offence during a protest? And what is the difference between a riot and a protest? The topics are not only of practical importance considering the above-described incidents in Dublin, but also due to a lack of direct Irish appellate authority, and recent comparative case law,

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[2] Isabel Hayes, 'Man who helped gather rubbish to set on fire during Dublin riots jailed for two years' (*Western People*, 18 November 2025) <www.westernpeople.ie/man-who-helped-gather-rubbish-to-set-on-fire-during-dublin-riots-jailed-for-two-years_arid-78119.html> accessed 9 December 2025.

[3] Paul Reynolds, 'Man jailed over attack on garda during Dublin riots' (*RTÉ*, 8 October 2025) <www.rte.ie/news/courts/2025/1008/1537515-dublin-riots-thomas-fox/> accessed 9 March 2026.

[4] Fiona Ferguson, 'Man jailed for assaulting three gardaí after being "swept up in frenzy" of Dublin riots' (*The Journal*, 5 December 2025) <www.thejournal.ie/man-who-assaulted-three-gardai-after-being-swept-up-in-frenzy-of-dublin-riots-jailed-6895094-Dec2025/> accessed 9 December 2025.

[5] Policing Authority, *Assessment of Policing Performance 2023* (Policing Authority, March 2024) 16.

[6] ibid 17.

[7] Jack McCarron and Kate McDonald, 'From outrage to unrest: How the clashes in Citywest unfolded' (*RTÉ*, 25 October 2025) <www.rte.ie/news/primetime/2025/1024/1540424-from-outrage-to-unrest-how-the-clashes-in-citywest-unfolded/> accessed 9 December 2025 and Jackie Fox and Paul Reynolds, 'Two gardaí hospitalised, 23 arrested at Citywest protest' (*RTÉ*, 23 October 2025) <www.rte.ie/news/dublin/2025/1022/1539883-citywest-dublin/> accessed 9 December 2025.

which indicates that the seriousness of an offence may be increased by a context of riot and decreased by a context of protest. Here, I first consider the arguments for a sentencing uplift for rioters drawing on authority from England and Wales. I then address how well these arguments transfer to this jurisdiction in principle before engaging with some possible risks when sentencing rioters both where guideline judgments are available and where they are not. I then take three examples of plausible sentencing exercises in the context of riot. The final substantive section engages with the further difficulties which arise at the borders of riot and protest. It first engages with the case for reducing the sentences of offenders who are partaking in non-violent protest before taking practical examples of how riots and protests can interact and drawing out lessons for sentencing.

Justifying an uplift for riots

Assume that an offender on a night out has committed criminal damage by breaking the windows of a commercial premises in Dublin. Now assume that the unfortunate shop owner suffers the same fate when a different offender commits the same offence in the same manner, during a later riot. In both cases, the direct damage to the shop is the same, but should the sentencing for the standard incidence of criminal damage and the damage during a riot differ?

The context of rioting was considered by the Court of Appeal of England and Wales in *R v Blackshaw*, a conjoined appeal following the August 2011 Riots.[8] The Criminal Division noted that both it and the Sentencing Guidelines Council had prepared guidelines on relevant offences (theft, handling stolen goods, and burglary), but that these guidelines did not account for offending during a riot and, as such, an upward departure from those guidelines was 'inevitable.'[9] The degree of uplift for offences during the riot was considerable. It has been documented that the immediate custody rate in magistrates' courts increased more than threefold and that the average sentence length for offences committed during the riots was over double that for comparable offences committed in 2010.[10] In the Crown Court, the immediate custody

[8] [2011] EWCA Crim 2312, [2012] 1 WLR 1126.
[9] ibid [16].
[10] Julian V Roberts, 'Points of Departure: Reflections on Sentencing Outside the Definitive Guidelines Ranges' (2012) 6 Criminal Law Review 439, 440-441. See also, Jose Pina-Sánchez, Carly Lightowlers and

rate for relevant offences rose from 33% to 85%, and the average length of custodial sentences increased by 50%.[11]

The Court in *Blackshaw* placed emphasis on two rationales in justifying uplifts for offences committed during the riots: deterrence and heightened culpability. On deterrence, Judge LCJ wrote:

> There is an overwhelming obligation on sentencing courts to do what they can to ensure the protection of the public, whether in their homes or in their businesses or in the street and to protect the homes and businesses and the streets in which they live and work … [T]he imposition of severe sentences, intended to provide both punishment and deterrence, must follow … They must be punished accordingly, and the sentences should be designed to deter others from similar criminal activity.[12]

Deterrence continues to play a role in the sentencing of rioters. In *R v Cush*, the Court of Appeal recently addressed the sentencing of those who had taken part in violent disorder across England in the summer of 2024 following the tragic killing of three children at a dance class in Southport.[13] The Court reaffirmed *Blackshaw* writing:

> If public safety is under threat because of the potential spread of violence across the nation, then deterrence may be of the *highest importance* … Defendants who choose to involve themselves in activity which threatens the safety and well-being of communities across the nation must therefore expect *severe sentences* designed not only to punish them but also to deter others.[14]

Blackshaw has attracted notable criticism in general and specifically with reference to its reliance on a logic of deterrence.[15] Deterrence may be individual, aiming to affect the offender, or general, aiming at other people. As will be clear from the above paragraphs, the Criminal Division's focus has been, and remains, on general deterrence. There are numerous normative and empirical arguments against placing

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Julian Roberts, 'Exploring the punitive surge: Crown Court sentencing practices before and after the 2011 English riots' (2017) 17(3) Criminology and Criminal Justice 319.

[11] Roberts (n 10) 441.

[12] *Blackshaw* (n 8) [4].

[13] [2024] EWCA Crim 1382, [2025] 1 WLR 387.

[14] ibid [11] (emphasis added).

[15] See, for instance, Roberts (n 10); Barry Mitchell, 'Sentencing Riot-related Offending: Considering *Blackshaw and Others*' (2011) 10 Archbold Review 4.

weight on general deterrence at sentencing. Perhaps foremost amongst these is that '[t]here is not robust evidence to show that harsher sentences generally produce greater marginal deterrent effects.'[16] Without such evidence, general deterrence appears to be punishment without purpose. There is thus reason to be sceptical of deterrent sentencing of rioters. Do potential rioters know of the sentencing increases that would apply? Would deterrence-based increases affect their decision-making? Would concern for arrest be a weightier factor? Is it right to instrumentalise offenders by punishing them above that which would be proportionate in order to send a message to others?[17]

It may also be asked whether reference to deterrence is necessary in the context of riots. The other strand of justification for an uplift in *Blackshaw*, heightened culpability, is more compelling and, as will be seen, more transferable to this jurisdiction. Offences must not be assessed in isolation, but in their context. Those who undertake a mercy killing share an intent, conduct and a caused outcome with those who kill for revenge or profit. But our instinct is that a lower sentence for the mercy killing can be justified. This is due to the reduced culpability of that offender: whereas wider purpose is largely irrelevant for establishing criminal liability, it can be integral to sentencing where courts look to impose a punishment proportionate to the particular wrongdoing before them.

In *Blackshaw*, the then Lord Chief Justice wrote to this effect as follows:

> It is elementary that sentencing courts cannot ignore the context in which the crime or crimes for which sentence is to be passed was committed. It is an essential feature in the assessment of culpability … In other cases, including the present appeals, the context hugely aggravates the seriousness of each individual offence. None of these crimes was committed in isolation. Eight of them were intrinsic to or arose from the widespread lawlessness and two more were intended to contribute to or aggravate it at a time when the disorders were at their most disruptive and alarming.[18]

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[16] Jay Gormley, *Reconceptualising the effectiveness of sentencing: four perspectives* (Sentencing Council 2024) 16.
[17] See further, Andrew Ashworth, 'The Common Sense and Complications of General Deterrent Sentencing' (2019) 7 Criminal Law Review 564.
[18] *Blackshaw* (n 8) [8].

In *Cush*, Carr LCJ accepted that where an offence is committed during a riot, its seriousness is heightened, but the *dictum* here is somewhat less clear on the rationale for the uplift:

> In the context of widespread and significant public disorder, it is not only the precise individual acts of an offender that matter. It is the fact that the offender is taking part in violent disorder, threatening violence against other people and/or property, and is part and parcel of widespread threatening and alarming activity. That is the gravamen of the offending: being one of those who, by weight of numbers, pursues a common and unlawful purpose. Thus, whilst what an individual offender may have done themselves is of relevance, their acts must not be taken in isolation; rather the court must look at the whole picture.[19]

The paragraph may be read as supporting a focus on culpability with its reference to 'the gravamen of the offending' stemming from a common *purpose* and its citation of the preceding paragraph from *Blackshaw*.[20] It may also be read as indicating consideration of the increased harm posed by offenders during a riot due to their contributions to a wider state of unlawfulness. Both possibilities merit consideration and will be addressed in the context of this jurisdiction below.

It should also be noted that in 2020 the Sentencing Council published a guideline for the offence of riot, which took the unusual step of detailing a general aggravating factor, applicable to all other offences.[21] Where an offence was committed in the context of a riot this would be 'a severely aggravating feature'.[22] What we can discern from the authorities from England and Wales then is that, first, deterrence remains a fundamental justification for increasing the sentences of those who offend during a riot. Secondly, there has been a consistent call for higher sentences in pursuit of proportionality, but these calls have been framed in different ways, be it higher culpability, the contribution to wider harms, or serious aggravation.

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[19] *Cush* (n 13) [8].

[20] ibid [8] citing *Blackshaw* (n 8) [8].

[21] Sentencing Council, 'Riot' (Sentencing Council, 2020) <https://sentencingcouncil.org.uk/guidelines/riot/> accessed 25 March 2026. Perhaps the unusual placement of a general factor in an offence specific guideline explains why that guideline is not mentioned in *Cush* (n 13).

[22] ibid. *Cush* also refers to a context of rioting as aggravating in its discussion of general principles and the specific applicants: (n 13) [19], [43], and [54].

Application in Ireland

What lessons can be drawn from the above for the sentencing of those who offend during a riot in Ireland? In this section, I consider existing authorities on sentencing in context and violent disorder as an aggravating factor. Having noted the limits of existing authorities, I examine whether sentencing judges may draw on the rationales in the above comparative authorities with respect to deterrence sentencing or increases based on offence severity. I then offer comment on sentencing rioters both where there is an available guideline judgment from a superior court and when there is not. Lastly, I take three brief indicative examples of plausible sentencing exercises to draw out the individual nature of sentencing in this context.

In *People* (*DPP) v Smith*, the Court of Appeal reaffirmed that participation in violent disorder may be an aggravating factor for another offence, there manslaughter.[23] The requirements to prove violent disorder are specified in section 15(1) of the Criminal Justice (Public Order) Act 1994:

> (*a*) three or more persons who are present together at any place … use or threaten to use unlawful violence, and;
>
> (b) the conduct of those persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or another person's safety …

Riot is also criminalised in the 1994 Act, section 14 of which specifies:

> (1) Where—
>
> (*a*) 12 or more persons who are present together at any place … use or threaten to use unlawful violence for a common purpose, and
>
> (*b*) the conduct of those persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or another person's safety …

By extension from *Smith*, a context of the offence of riot too would function as an aggravating factor. This appears beyond doubt as the Supreme Court has made clear

[23] [2024] IECA 184.

in both *People* (*DPP) v FE* and *People (DPP) v Faulkner* that where the event of a crime also includes another crime this will function as an aggravating factor. In the former case, Charleton J specified:

> In so far as a problem in relation to separate crimes and whether these are part of and should inform the same incident, the following may be stated: where the event involves an aggravating factor which is also a crime, the admission of the accused to the event, or conviction on the event, as including the aggravating factor informs the seriousness of the offence.[24]

Later, in *Faulkner*, Charleton J detailed 16 propositions related to sentencing a crime as an event. Perhaps the foremost proposition was as follows:

> When embarking on a crime, it is commonplace that several offences may be committed. As well as sentencing for a crime, a judge is sentencing for the event that makes up a sensible, or commonsense, view of the crime. A crime should not be split up into sections which render it no longer an event.[25]

Where a person was sentenced for a serious offence and they had also committed the offence of riot, the latter offence would be an aggravating factor.[26] For present purposes though, we are still left with important queries. First, to what degree should a context of riot aggravate an offence and why? Secondly, what of the situation where a person commits an offence during what is as a matter of fact a riot, but the offence of riot is not proven? In light of these uncertainties, this section will draw on the above comparative authorities to establish how a context of riot ought to affect sentencing in Ireland.

Before considering matters of substance, it should be asked how can a context of riot affect a sentence if the offence of riot is not proven or not charged?[27] The former

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[24] [2019] IESC 85, [2021] 1 IR 217 [29].
[25] [2024] IESC 16 [9].
[26] In the other direction, where a court is sentencing riot and takes a less serious offence into consideration, say assault, the latter offence should increase the total punishment to reflect 'the overall seriousness of the offending'. It would be insufficient to merely state that the less serious offence had been taken into consideration without uplifting the sentence for the principal offence: *People (DPP) v Mountassir* [2025] IESC 53 [161] (O'Malley J).
[27] An argument that there can be no possibility of aggravation for a factual context of riot where the offence of riot has not been proven is unlikely to succeed. By analogy, in *Mountassir* (n 26) [134] (O'Malley J) the Supreme Court made clear that there may be heightened sentences for offending in

circumstance may arise because, for example, the offender does not use violence themselves but does engage in criminal damage, or there is no clear common purpose between the participants. The latter would, of course, arise where the DPP chooses to prosecute an alternative overlapping offence. Relevant guidance can be drawn from the principles detailed in *Faulkner*, especially that a person cannot be sentenced for a crime of which they have not been found guilty; a judge is to sentence for a crime in context; and that a judge may need to make findings of fact related to the seriousness of the offence.[28] One way of doing this may be for the judge to take judicial notice of a clear context of factual rioting, but, and as will be seen, there can be significant contestation over what constitutes a riot because of its possible overlap with protest. As such, a more appropriate fact-finding mechanism would be for counsel to present evidence with the prosecution bearing the burden of establishing the context of rioting beyond a reasonable doubt.[29]

We may now turn to how well the sentencing logics adopted in England and Wales might transfer to Ireland. As a starting point, there is good reason to avoid a deterrence rationale for the sentencing of rioters due to the empirical and normative difficulties with the theory noted above. In this jurisdiction, there is particular need to be cautious of a deterrence logic due to the constitutional requirement to impose a proportionate sentence when sentencing for an offence that is not subject to a mandatory penalty.[30] As Henchy J held in *State (Healy) v Donoghue* in light of Article 38(1), read alongside other provisions of the Constitution, 'where guilt has been established or admitted' the offender must receive 'a sentence appropriate to his degree of guilt and his relevant personal circumstances.'[31] This has recently been reaffirmed in the Supreme Court in *People (DPP) v Mountassir* where O'Malley J specified that it is a 'constitutional principle that in all sentencing decisions other than those involving a mandatory penalty the sentencing judge must impose a sentence that is proportionate to the gravity of the offence and to the personal circumstances of the offender.'[32]

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the context of relationships, which do not fall within the statutory aggravation prescribed by the Domestic Violence Act 2018, s 40.

[28] *Faulkner* (n 25) [9].

[29] See further, Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016) 31.31-31.38; Dermot PJ Walsh, *Walsh on Criminal Procedure* (3rd edn, Round Hall 2024) 57.07-57.15.

[30] *Lynch v Minister for Justice* [2010] IESC 34, [2012] 1 IR 1.

[31] [1976] IR 325 (SC) 353.

[32] *Mountassir* (n 26) [92].

Appellate judgments have also clarified the process of imposing a proportionate sentence.[33] It is best practice to first impose a headline sentence based on the gravity of the offence.[34] At this stage, the judge appraises the culpability of the offender and the harm done. Having established a headline sentence, the judge will then account for any personal mitigation such as a guilty plea or remorse. If a judge were to conclude that an offence deserved a sentence of two years, but that in pursuit of general deterrence, they would make the sentence three years, that would clearly be susceptible to challenge as unconstitutional. Exorbitant sentences justified by reference to deterrence, above that which is proportionate, must be avoided.

Against this, it may be said that the appellate courts have acknowledged deterrence as a legitimate principle of sentencing in Ireland. For example, in *DPP v DO'S* a wholly suspended sentence for child cruelty was criticised for its failure 'to send a deterrent message'.[35] More recently, in *People (DPP) v Crotty*, the Court of Appeal likewise held that a three year suspended sentence was unduly lenient because it 'gave undue weight to the mitigating factors and did not properly take account of general deterrence.'[36] Yet it is open to question whether appeal to deterrence is having an effect on sentencing or whether it is a rhetorical device applied in a context where proportionality dictates that a more severe sentence ought to be imposed.[37] If deterrence has an independent effect on the severity of the sentence, it may be queried how proportionality is respected. If it does not have such an effect, it may be queried why such reference is needed. As the Court of Appeal has itself acknowledged, the engagement with deterrence in appellate judgments has been 'superficial'.[38]

Any limits on the capacity of deterrence to justify sentencing uplifts for rioters are not the end of the matter. If the actions of an offender in a riot cause wider harm, a wider risk of harm or if they are more culpable, there is good, and constitutionally sound, reason for an increased sentence. That is not to increase the sentence to deter, but to recognise the seriousness of the offence in context. There are good reasons stemming

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[33] See, for instance, the statement of Edwards J in *People (DPP) v Byrne* [2017] IECA 97 [26]-[27].
[34] *Mountassir* (n 26) [98]-[102].
[35] [2019] IECA 307 [26].
[36] [2025] IECA 33 [46].
[37] Ashworth (n 17) 567-568.
[38] *People (DPP) v DW* [2018] IECA 143 [63]. In keeping with this remark, neither of the sentencing exercises undertaken by the Court of Appeal in the above-mentioned cases engaged with deterrence: *DO'S* (n 35) [28]-[29]; *Crotty* (n 36) [49]-[54].

from harm and culpability to elevate sentences for rioters. With respect to harm, where a person engages in offending during a riot, they not only commit an offence of, say, criminal damage, but they also *contribute to the wider state* of lawlessness. The harms done during a riot are greater than the sum of their parts; it is the combination of offending that can lead to widespread fear, the need for significant state intervention, and the more limited capacity to respond to other emergencies. In *R v Keys*, following the Broadwater Farm Estate riots, Lane LCJ acknowledged that even where the actions of a participant were peripheral, '[h]e must … take some share of the blame for the overall picture' because 'he … help[ed] to promote the totality of the affray'.[39] Rioters should be accountable for their contribution to this wider state of affairs as much as for the direct harm that they have caused.[40] In addition, rioters impose a further *risk of harm* by perpetuating the riot.[41] The comparison of the harm done in criminal damage before and during a riot at the start of the previous section was thus not wrong, but it was incomplete.

With respect to culpability, the concept is not precisely defined in Irish law, but is broader than an assessment of *mens rea* and encapsulates wider notions of blameworthiness.[42] A person who offends during a riot will not only have the required *mens rea* for the offence but will have *knowingly contributed* to a situation where harm to others and their property is more likely and which, due to its scale, is harder to police. It would be remarkable if an offender could successfully claim that they did not know they were contributing to a wider state of unlawfulness. *Blackshaw* was right then to hold that those who offend during riots are more culpable, but the offending is also of higher harm. Given that offences during a riot are more serious with respect

[39] (1987) 84 Cr App R 204, 207. See also, *R v Fox* [2005] EWCA Crim 1122, [2006] 1 Cr App R (S) 17 [16]; *Cush* (n 13) [8].

[40] The Supreme Court has recognised that social harm is an important facet of assessments of offence gravity: *Mountassir* (n 26) [105] (O'Malley J).

[41] The point was mentioned in the individual sentencing exercises in *Cush* (n 13) [25] and [28]. In this jurisdiction, the possibility of provoking others to engage in unlawfulness has been accepted as a factor speaking against the availability of a reasonable excuse defence for a charge of wilful obstruction contrary to section 9 of the Criminal Justice (Public Order) Act 1994: *DPP (Coffey) v Bennett* [2018] IECA 9 [16]-[18]. More generally, an increased risk of harm has been accepted to increase the gravity of an offence: *Mountassir* (n 26) [102] (O'Malley J). There is notable criminal law theory scholarship on liability for risked harms to include Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (OUP 1987) ch 5; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) ch 5. In the context of sentencing, see Thomas O'Malley, *Sentencing: A Modern Introduction* (Clarus Press 2025) 136-138.

[42] *Mountassir* (n 26) [116]-[118] (O'Malley J).

to the two core aspects of sentencing, harm and culpability, there is good reason for heightened sentences in this context. This may in a particular case take the sentence outside the norms or any guidance that has been offered for standard instances of the offence.

Roberts has argued that where a court must sentence rarer forms of offences, such as offending during a riot, it could pose threats to proportional sentencing.[43] The first threat may be referred to as a within offence category threat. As a norm, causing serious harm should attract a higher sentence than assault causing harm and significantly more than assault. But if rioting provides undue weight, the risk is that an assault aggravated by riot would receive a sentence more comparable to what tends to be appropriate for a more serious type of assault offence. The second suggested threat is an across offence category; violent offending should receive higher sentences, as a rule, than property offences. As with the offence-type criticism, if a judge places too much weight on deterrence or a riot as aggravating, it may lead to 'proportionality being trumped' where, for instance, a crime of criminal damage received a similar sentence to what tends to apply in the context of serious violence.[44]

Judges will, of course, need to be mindful that any appeal to the seriousness of a riot does not lead to the imposition of sentences out of keeping with proportionality within, or across, offence types. A reasonable litmus test once the judge has arrived at a presumptive headline sentence may then be comparison to standard instances of the same offence and/or more serious offences. Assume a judge is to sentence a person for criminal damage during a riot. They may then say to themselves, 'I had intended to impose X years, and that would be notably higher than for a standard criminal damage, is that justified in the circumstances?' And, likewise, they may pose, 'the proposed sentence would be comparable to that for a serious instance of assault causing harm. Is that proportionate or worthy of reconsideration?' If such exercises were undertaken, the particular wrongs of offending during a riot would have to be kept firmly in mind. Criminal damage during a riot, to continue the example, is a

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[43] Roberts (n 10) 443. For wider consideration of proportional sentencing theory see e.g., Andrew von Hirsch, *Censure and Sanctions* (OUP 1993); Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (7th edn, Hart Publishing 2021) ch 4; O'Malley (n 41) 125-146.
[44] Roberts (n 10) 443.

property offence, but it is also an intentional contribution to widespread unlawfulness where others are put at risk.

Having established a proportionality-based case for heightened sentences for offences committed during a riot, we can now assess a couple of possible complexities in the process of sentencing rioters. Certain offences likely to be completed in the context of a riot are the subject of guideline judgments such as burglary[45] and assault causing harm.[46] Guideline judgments provide sentencing bands, usually at three levels, for the relevant offence based on existing practice and proffer factors which speak to a particular offence coming within each band.[47] When an offender is sentenced with reference to a guideline judgment, the judge will use the guideline to set a headline sentence, which accounts for the harm, culpability and aggravating factors in the case. The judge will then account for any mitigating factors.

As an example, the Court of Appeal developed guidance for burglary in *People (DPP) v Casey*.[48] An offence in the low range of seriousness would receive a headline sentence of up to four years' imprisonment; with the middle range being four to nine years; and the high range at nine to 14 years.[49] Where a number of aggravating factors were present it would indicate that the offence was one of midrange.[50] Where a large number of factors were present or one or more of the factors was particularly serious, the offences would fall into the high range.[51] The factors identified by the court included targeting of residential properties of vulnerable persons; ransacking a dwelling; taking a weapon; injuring the victim; and taking items of high monetary value.[52] Guideline judgments are a means to assist in the structuring of sentencing so as to ensure proportionality; they are not to be applied in a mechanical or artificial

[45] *People* (*DPP) v Casey* [2018] IECA 121, [2018] 2 IR 337.
[46] See the informal guidance in *People* (*DPP) v McGrath* [2020] IECA 50. The maximum sentence for the offence has since been increased to ten years by the Criminal Justice (Miscellaneous Provisions) Act 2023, s 20.
[47] For recent appellate discussion see *Faulkner* (n 25) [34]-[37]; *Mountassir* (n 26) [92]-[125] (O'Malley J). For commentary, see O'Malley (n 41) 525-528.
[48] *Casey* (n 45).
[49] ibid [49] as approved in *Faulkner* (n 25) [26]-[33]. The low range is not explicitly referred to in *Casey* but extends to four years by implication. This was later made explicit in *Faulkner*.
[50] ibid [48].
[51] ibid [48].
[52] ibid [40]-[47].

manner.[53] In other words, the appropriate headline sentence follows not from matching facts to indicative factors listed in guideline judgments but from assessing the gravity of the offences in all the circumstances.[54] Where a commercial burglary occurs in the context of a riot, it may need to receive a sentence at the upper end of that range or indeed higher depending on the circumstances of the case.

Many other offences likely to be completed in the context of a riot, such as criminal damage and theft, have not been the subject of a guideline judgment.[55] Where a rioter is convicted of an offence without such guidance, the judge, in setting a headline sentence, will have to consider (1) their contribution to the total harm of the riot; (2) the increased risk of harm by encouraging others; and (3) the offender's knowing contribution to a situation where harm to others and their property is more likely.

One important complexity here is that judges must be mindful of avoiding the risk of double counting for certain offences. Double counting occurs when one sentencing factor affects the sentence more than once; the concern frequently arises where the offender is sentenced for multiple offences.[56] However, double counting may also arise when sentencing for a single offence where what is usually an aggravating factor is inherent to the offence. For example, it may constitute double counting to aggravate an offence of driving whilst intoxicated with reference to intoxication as an aggravating factor.[57]

This raises the question of whether an offence of violent disorder or even riot can be aggravated by the wider context of a riot. This is not as straightforward as it may appear. It may be argued that the strictures of both offences do not require a context of widespread riot to be completed and that the offences are thus not comparable to the above example of double counting for intoxication. Violent disorder requires only that three people use or threaten unlawful violence in a manner that would cause a

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[53] *People (DPP) v O'Byrne* [2013] IECCA 93 [18] (O'Donnell J); *Mountassir* (n 26) [136] (O'Malley J).
[54] *O'Byrne* (n 53) [18]; *Mountassir* (n 26) [98] and [136] (O'Malley J); *Casey* (n 45) [49]; *People (DPP) v Mahon* [2019] IESC 24, [2019] 3 IR 151 [48]; *Faulkner* (n 25) [9].
[55] Criminal Damage Act 1991, s 2(1); Criminal Justice (Theft and Fraud Offences) Act 2001, s 4(1).
[56] *People (DPP) v Connors* [2018] IECA 227 [26]. For critical analysis of totality and double counting, see Rory Kelly, 'Totality: Principle and Practice' (2022) 7 Criminal Law Review 562, 568-570.
[57] It would not be double counting to elevate the offence because of the *degree* of intoxication. It would be double counting to set a high initial sentence due to the degree of intoxication and then to aggravate for the presence of intoxication. On intoxication as a sentencing factor in Irish law, see O'Malley (n 41) 159-164.

reasonable person to fear for their or another's safety.[58] Riot requires 12 or more people to use or threaten 'unlawful violence for a common purpose,' causing the same reasonable fear for safety.[59] The core wrongs required to establish both offences, inevitably, overlap with the reasons why a context of wider rioting should aggravate other types of offence. In consequence, when sentencing for violent disorder or riot it may be simpler, depending on the particular facts, to avoid attempting to account for any additional wrongs associated with the broader riot separately. Instead, it may be preferable to treat the particular instance of the offence as one occurring at the more serious end of the spectrum. In sum, and regardless of method used, where the judge is sentencing for rioting or violent disorder, care will be needed so as to avoid double counting harm or culpability factors that are constitutive of the offence.[60]

I now take three examples of plausible sentencing exercises that may arise in the context of a riot and give some indication as to how they may be resolved. First, how should a judge sentence a person who has not only attended, but organised a riot? If a person can be shown to have organised a riot, there is a case for a considerable increase to their sentence because they are central to bringing about a widespread state of unlawfulness, and they will have done so deliberately. This corresponds to wider and established case law demonstrating the heightened culpability of those who take on a leading role in offending.[61] One point that will require particular care in practice is the question of fact as to whether a person is in fact an organiser of a riot, or whether they have merely messaged about a prior planned riot through social media or messaging services. Support for a planned riot may increase culpability, but it should not do so to the same degree as being an organiser. A further difficulty will be as to whether a person has planned a riot or a protest that became a riot. The distinction between riots and protests will be discussed further in the next section.

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[58] Criminal Justice (Public Order) Act 1994, s 15.
[59] ibid s 14.
[60] A comparable warning against double counting is contained in Sentencing Council (n 21): 'Care should be taken not to double count aggravating factors which were relevant to the culpability assessment, particularly in cases where culpability is assessed as high.'
[61] *People (DPP) v Fitzpatrick* [2025] IECA 20 [31]; *People (DPP) v O'Reilly* [2023] IECA 66 [33]; *People (DPP) v Samuilis* [2018] IECA 316 [41]. The factor is included in O'Malley's list of general aggravating factors: O'Malley (n 29) 7.06.

Secondly, assume that a person commits an offence during a riot but does not care much for the riot; it is just a useful distraction.[62] Say, an opportunist thief who would have been equally content if the commotion had been caused by a parade or peaceful protest. Such an offender would still have knowingly contributed to widespread unlawfulness and would have done so for personal gain. They would still have taken the same risks as a rioter with respect to stimulating further harm and they should still be accountable for contributing to the total state of unlawfulness. The opportunist would thus share the harm and culpability factors that make offending as part of a riot so serious. It is thus suggested that sentencing judges should give little weight to arguments to the effect that a person was committing the offence during a riot, not as part of the riot.

Thirdly, what of a judge who is to sentence a 17-year-old who pleaded guilty to criminal damage during a riot who has underlying mental health problems and no previous convictions? The sentencing of children and young people involved in a riot is likely to give rise to considerable difficulties with respect to accounting for their culpability in arriving at an appropriate headline sentence. It is also far from fanciful to imagine such cases progressing to the Superior Courts given Gardaí indications of the notable involvement of young males in public disorder at Citywest.[63]

A 17-year-old who committed an offence during a riot would share the risk of stimulating wider harms and the contribution to the total state of unlawfulness. But what of their comparative culpability? It is likely that they would have knowingly contributed to widespread unlawfulness. Yet culpability extends beyond matters of *mens rea* and purpose. It is commonly recognised that children are not as developmentally mature or as morally blameworthy as adults, and that they are more easily influenced than others.[64] The Supreme Court has recently captured the point

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[62] See, likewise, O'Malley (n 29) 7.23.

[63] Gardaí specifically appealed to young males to avoid becoming involved in public disorder at Citywest: An Garda Síochána, 'Update 5 and Notice of Media Briefing - Serious Public Disorder, Saggart, Co Dublin – 21st/ 22nd October 2025' (*An Garda Síochána*, 23 October 2025) <www.garda.ie/en/about-us/our-departments/office-of-corporate-communications/press-releases/2025/october/update-5-and-notice-of-media-briefing-serious-public-disorder-saggart-co-dublin-21st-22nd-october-2025.html> accessed 9 December 2025.

[64] *People* (*DPP) v BM* [2025] IECA 185 [49]; O'Malley (n 41) 306-309; Sentencing Council, *Sentencing Children and Young People* (Sentencing Council, 2017) <https://sentencingcouncil.org.uk/guidelines/sentencing-children-and-young-people> accessed 9 April 2026; Ashworth and Kelly (n 43) 377.

well, stating that young age 'can reduce culpability' because it 'affect[s] the level of insight and control that a person has over their choices and actions, and [it] therefore affect[s] the level of responsibility that can fairly be attached to the offender.'[65]

For these reasons, it is suggested that the extent of any uplift arising from the context of a riot should be, at least, reduced due to the offender's status as a child. It would feel somewhat jarring to mitigate for immaturity whilst also aggravating sharply for rioting when immaturity may be the underlying cause of participating in the riot. That is, children may be more easily influenced to participate in the riot and some may not think consciously about the decision before participating.[66] In *Blackshaw*, the Court of Appeal of England and Wales gave short shrift to the argument that the offending was 'mindless' and followed widespread offending by others.[67] But even in this case that promoted the condign punishment of rioters, the Court did acknowledge that none of the appellants were children, young offenders or had 'significant mental health problems.'[68] It thus left a space for a more parsimonious approach to the sentencing of children.

It is here important to recall that the Children Act 2001 makes explicit reference to age and level of maturity as factors to consider in the sentencing of children and specifies that 'in particular, a period of detention should be imposed only as a measure of last resort.'[69] Judges should make every effort to avoid custodial sentences for children who commit offences during a riot and where such a sentence must be imposed, it should be deferred unless there is a compelling case for immediate detention.[70] Though the example considers a child, many of the same considerations should apply when sentencing a young adult.[71]

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[65] *Mountassir* (n 26) [121] (O'Malley J).
[66] Gareth Morrell, Sara Scott, Di McNeish and Stephen Webster, *The August riots in England: Understanding the involvement of young people* (NatCen 2011) ch 4.
[67] *Blackshaw* (n 8) [9] (Judge LCJ).
[68] ibid [9] (Judge LCJ).
[69] Children Act 2001 s 96.
[70] Compare to (1) the suspending of Dylan Willis's sentence in *Cush* (n 13) [39]-[48]; and (2) the comment as to the position of children, young people and those 'with significant mental health problems' in *Blackshaw* (n 8) [9] (Judge LCJ).
[71] See further O'Malley (n 41) 346-349.

Riot or protest?

Riots and protests may overlap in numerous ways. As described in the introduction, the Citywest Hotel riots followed protests at the same location the day prior, which had passed with little trouble.[72] The riots that gave rise to the Court of Appeal decision in *Blackshaw* had begun as protests outside Tottenham Police Station, after the shooting of Mark Duggan, which became violent.[73] This overlap creates difficulties at sentencing because there is an argument that those who commit certain offences during a protest should receive lesser sentences. If that is correct, there is a clear practical need to be able to distinguish between rioters and protesters at sentencing. In this section, I engage with the rationale for reduced sentencing for protesters before dealing with a series of hypotheticals that illustrate the difficulties in distinguishing protesters from rioters at sentencing.

Absent direct Irish authority, a useful starting point on the reduced culpability of those who commit offences whilst engaged in civil disobedience was provided by the Court of Appeal in England and Wales in *R v Trowland*, which concerned a Just Stop Oil protest that closed a major road for around 40 hours.[74] Giving judgment, Carr LJ observed that protesters may, in some cases, have lesser culpability than other offenders:

> a conscientious motive on the part of protesters may be a relevant consideration, in particular where the offender is a law-abiding citizen apart from their protest activities. In such cases, a lesser sanction may be appropriate: a sense of proportion on the part of the offender in avoiding excessive damage

[72] McCarron and McDonald (n 7).
[73] *Blackshaw* (n 8) [24].
[74] [2023] EWCA Crim 919, [2024] 1 WLR 1164. There has been a wider stream of case law concerning penalties for protesters in the United Kingdom and before the European Court of Human Rights. See, for instance, *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 [97]-[99]; *R v Hallam* [2025] EWCA Crim 199, [2025] 4 WLR 33; *Kudrevičius v Lithuania* (Judgment) [GC] App No 37553/05 (15 October 2015) *Bodson v Belgium* (Judgment) ECtHR App No 35834/22 (16 January 2025) [119]-[121]. For brief comment, see Brian Christopher Jones, 'The Recent Civil Disobedience Fidelity to Law' (2025) 96(3) The Political Quarterly 538, 542-543.

> or inconvenience may be matched by a relatively benign approach to sentencing.[75]

There may indeed be good reason for the reduced sentencing of protesters based on culpability where such protest is non-violent, in furtherance of a genuinely held belief,[76] and the interference with others' rights is no more than is necessary to engage in the act of civil disobedience.[77] In the same direction, the European Court of Human Rights has an established jurisprudence to the effect that where an offence limits freedom of assembly, there is a need for parsimony in punishment due to the risk of 'a chilling effect on the legitimate exercise of the right'.[78] The Cout has held that the more severe the relevant sanction imposed, the less likely that an interference with the right to assembly will be proportionate and that criminal sanctions 'require particular justification.'[79]

Returning to *Trowland*, the court also placed two important limits on this principle. First, the more serious the offence, the less likely that a conscientious motive will reduce culpability.[80] This is a sensible limitation. Mass protest will almost inevitably

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[75] *Trowland* (n 74) [50]. See also, *R v Jones* [2006] UKHL 16, [2007] 1 AC 136, 177 (Lord Hoffmann). The judgment in *Trowland* (n 74) [50] also notes deterrence as a possible rationale for reduced sentences for protesters. That rationale is of less relevance in this jurisdiction as discussed above.

[76] The court in *Trowland* was quite clear that it is not for the judiciary to judge the merits of particular causes: (n 74) [50]. There has been some criticism of this in commentary querying whether every belief will be and should be equally important at sentencing: Lyndon Harris, 'Sentencing: *R v Trowland (Morgan)* Court of Appeal (Criminal Division): Carr LJ, Cutts and Thornton JJ: 31 July 2023; [2023] EWCA Crim 919' (2023) 12 Criminal Law Review 800, 803-804. Here it should be noted that the European Court of Human Rights has a developed case law concerning how the protections of freedom of assembly in Article 11 of the ECHR do not apply to assemblies which 'deny the foundations of a "democratic society"'. See, eg, *Fáber v Hungary* (Judgment) ECtHR App no 40721/08 (24 July 2012) [37].

[77] By comparison, in this jurisdiction there is clear authority that the policing of a riot must be proportionate: *Lynch v Fitzgerald* [1938] IR 382 (SC). The focus in the context of sentencing will be proportionality in the sentencing law sense of the term; that is between the offence and the sentence imposed: *Lynch* (n 30) [54]. It may also be argued that lower culpability may follow from recent Supreme Court *dicta* to the effect that culpability may be increased where an offender 'intentionally maximised the harm done': *Mountassir* (n 26) [122] (O'Malley J). By extension, if an offender has intentionally minimised harm done, this would seem to indicate lesser culpability.

[78] O'Malley (n 41) 190-191. See, for example, *Nemtsov v Russia* (Judgment) ECtHR App no 1774/11 (31 July 2014) [77]; *Balçik v Turkey* App (Judgment) ECtHR App no 25/02 (29 November 2007) [41].

[79] *Kudrevičius* (n 74) [146]. There is limited Irish case law concerning freedom of assembly: Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Publishing 2018) para 7.6.138.

[80] *Trowland* (n 74) [50].

cause disruption by the fact that a large group has gathered in a place and indeed this is often an intentional means of achieving the protest's aim.[81] By comparison, more serious offending risks losing the protesters message in the means of communication. Rawls draws distinctions between violent and non-violent offending, and between behaviours that affect other's civil liberties and those which do not:

> To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address. Indeed, any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act.[82]

In fact, those who commit serious violent offences may have their culpability *increased* by a political motivation. For example, schedule 21 to the Sentencing Act 2020 of England and Wales, imposes a whole life starting point for murder committed 'for the purpose of advancing a political, religious, racial or ideological cause'.[83]

As a second limitation, the court in *Trowland* specified that although a conscientious motivation may reduce culpability, an offender can remain highly culpable due to other factors.[84] This is, again, a reasonable limit because culpability may be raised by significant premeditation, sophisticated planning and the offender taking on a leading role.[85] It would go too far to say that all protesters *must* automatically be regarded as offenders of low culpability.

Even if the reader is not satisfied that protesters should sometimes receive lesser sentences on the basis of reduced culpability, there remains good reason to distinguish between protesters and rioters. Protest-related offending may or may not be of lower culpability, but riot-related offending will generally justify higher sentences as discussed above. In broad terms, rioters' sentences should be increased whereas

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[81] See further Illan rua Wall, 'The right to protest' (2024) 28(8–9) The International Journal of Human Rights 1378, 1383.

[82] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 366 as cited in Kimberley Brownlee, "Features of a Paradigm Case of Civil Disobedience" (2004) 10(4) Res Publica 337, 349. Brownlee provides a limited defence of some forms of violence constituting civil disobedience at pp 348-350.

[83] See, likewise, Kimberley Brownlee's claim that 'modest coercion does not muffle disobedients' moral plea in the way that radical protest does, and so its use can be consistent with the persuasive aims of civilly disobedient communication': Kimberley Brownlee, 'The communicative aspects of civil disobedience and lawful punishment' (2007) 1(2) Criminal Law and Philosophy 179, 181.

[84] *Trowland* (n 74) [72].

[85] See generally, O'Malley (n 41) 139-140. Note 'extensive planning' is recognised as a factor increasing culpability in *Trowland* (n 74) [72].

protesters' sentences may, in some circumstances, be decreased. Yet drawing the line between a protest and riot for the purposes of sentencing is more challenging than may be expected.[86] A core facet of the distinction is whether those in attendance engaged in violence.[87] However, it would be overly simplistic to assume that the presence of violence renders an entire gathering a riot and all participants rioters.[88] I will take a series of examples to illustrate the complexities.

First, assume that D attends a planned protest concerning a perceived social injustice. The plan, which D knows and intends to follow, is to spray paint a slogan drawing attention to state inaction onto a government building.[89] D spray paints the building as planned. The event later becomes more aggressive with shouting at Gardaí followed by the lobbing of rocks and other projectiles and, ultimately, a full-scale riot ensues.

On these facts, assume that D sees what is happening, decides this is not what they wanted to participate in and leaves. On such facts, D should be sentenced as a protester and not a rioter. The sentencing judge would need to scrutinise the timelines and D's state of knowledge because violence may have started elsewhere before D became aware of it. But if D withdraws as soon as they become aware of violence, an elevation of sentence would be inappropriate. This is, of course, on the assumption that D did not contribute to the escalation either through their offence or more generally. It is wholly conceivable that the build-up to spray painting (say by shoving past Gardaí to get to the building) or the message spray painted (an incendiary slogan) could be seriously aggravating.

Now assume on the same starting facts that D instead stays, participates in the riot and throws a rock at a Garda. D would be sentenced for (1) criminal damage during the protest, and (2) assaulting a peace officer during the riot.[90] The severity of the latter offence would be increased by the riot context. The criminal damage offence is more

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[86] cf *Hyland v Dundalk Racing (1999) Ltd* [2014] IEHC 60 [73].

[87] For clarity, a person may still commit an offence where their conduct is non-violent protest: *Bennett* (n 41). For comment on the limitations of the right to assembly in Article 40.6.1.ii of the Constitution, see Niamh Barry and Macdara Ó Drisceoil, 'Constitutional Right to Protest and the Freemen on the Land Movement' (2017) 1 IJSJ 40.

[88] For comment on violence and the limits of Article 11 of the ECHR, see David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart Publishing 2010) ch 3.

[89] Contrary to Criminal Damage Act 1991, s 2(1).

[90] Contrary to Criminal Justice (Public Order) Act 1994, s 19.

difficult and fact contingent. If D had attended the protest without knowing or believing that it may become a riot, there is a case to be made that they should still benefit from any reduction in culpability for protesters with respect to the criminal damage. On such facts, it seems likely that the less serious protest offence would be taken into account when arriving at an appropriate sentence for the assault offence.[91]

As a final alternative, assume that D is the first to shout at and hurl items at Gardaí. Here, D's assault would be significantly aggravated because they played a central role in turning a peaceful protest into a violent riot. They would bear significant responsibility for the wider risk of harm this transition entails. Again, the criminal damage would likely be taken into account when sentencing for the assault. The key difference lies in the markedly increased seriousness of the offence, which here triggered the riot.

The first example allows for an assessment of the relative seriousness of offending as a protest becomes a riot. The second set of starting facts will help to draw out the difficulties related to what may be described as 'mixed crowd cases' in which some in attendance are protesting and some are rioting. Assume that D attends a largely peaceful event at which they commit a non-violent protest offence: blocking a road as part of a climate change protest.[92]

As a first extension, assume that a small minority (five out of 200) of participants behave violently, throwing projectiles at motorists trying to go around the blockade. On such facts, D should still benefit from any reduction in culpability associated with civil disobedience. D intended to engage in non-violent protest and they neither participated in nor supported the minority's violence.[93] Useful comparison can be made to the *dictum* of Hogan J in *Hyland v Dundalk Racing (1999) Ltd* concerning the lawfulness of a protest:

> The right of free speech and free assembly are critical constitutional rights and they are vital to the functioning of the free and democratic society posited by

[91] Per proposition 3 in *Faulkner* (n 25) [9].

[92] Contrary to Criminal Justice (Public Order) Act 1994, s 9. For discussion of the reasonable excuse defence in that context see *Bennett* (n 41).

[93] See, likewise, the case law on the applicability of Article 11 of the ECHR: the 'sporadic violence' of others does not remove a non-violent protester's Convention rights eg, *Russ v Germany* (Judgment) ECtHR App no 44241/20 (20 May 2025) [36].

> Article 5 of the Constitution. The principle of proportionality comes into play here and the right of protest is not to be lost *merely* because of the regrettable lapses on the part of an undisciplined minority.[94]

The question in the context of sentencing is, of course, not one of lawfulness: D has committed an offence, but Hogan J's point cross-applies. The actions of a minority should not result in D being sentenced as a rioter as opposed to a protester.

More challenging sentencing exercises would arise where a protester continued to protest knowing this was encouraging the violent behaviour of the others.[95] In such cases, D's culpability may be both (1) increased, for knowingly encouraging the more serious offending through their wilful obstruction and (2) decreased for acting within a protest context. The precise balance of these culpability factors would depend on the particular facts.[96]

As another extension, assume that about half those in attendance, including D, are there to obstruct a road for a short period, but the other half are rioters attacking motorists and emergency workers. In such genuinely mixed crowd cases, Hogan J's *dictum* is less applicable. If D knew or believed that a significant portion of the crowd intended to commit violent offences, their sentencing profile would have features associated with standard cases of both rioters and protesters. On the one hand, they have committed a minimal non-violent act in keeping with a genuinely held political belief. On the other, their presence may knowingly embolden the rioters or lend social cover to violence.

Where the vast majority of attendees are peaceful, and D neither supports nor contributes to the violence, aggravation for a rioting context is difficult to justify. By contrast, where the majority are rioting and D knows this and knows their conduct risks emboldening the rioters, aggravation becomes more likely. Inevitably, there will be

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[94] *Hyland* (n 86) [88] (emphasis in original). See, likewise, in the context of the European Convention on Human Rights: *Primov v Russia* (Judgment) ECtHR App no 17391/06 (12 June 2014) [155]; *Shmorgunov v Ukraine* (Judgment) ECtHR App no 15367/14 (21 January 2021) [490]-[491]. Note that *Hyland* was appealed to the Court of Appeal: [2017] IECA 172.

[95] cf Hogan et al (n 79) para 7.6.163.

[96] It is far from unusual to have culpability factors that point in opposite directions. Consider, for instance, an offender who led and planned an offence but who had a very sympathetic underlying motivation.

testing borderline cases concerning very mixed crowds. Here, D's knowledge and belief will be central. A guiding principle, or at least a starting point, may be: did D knowingly contribute to a riot, or did D intend to contribute to a peaceful protest? Little more than a starting point can be offered as so much will be fact specific. In practice, any given case may be a mixed crowd case *and* involve a transition from a protest to a riot.

What is more, questions will arise as to what on the facts constitutes an effective withdrawal by a protester when violence arises. Will this require leaving the relevant location? What of the protestor who moves away from the violence to rejoin a part of the protest that has remained non-violent? Could non-assistance to a violent minority be sufficient? Would disavowal ever be required? At a level of generality, perhaps it can be said that the greater the degree of violence and the greater the individual's connection to that violence, the greater the action that would be required for there to have been an effective withdrawal.[97]

Added to these complexities, there will be any other number of offence- and offender-related factors such as the scale and severity of the riot, previous convictions, plea, intoxication and age. The purpose of the above examples is twofold. First, to demonstrate that a simple distinction cannot be drawn between riot and protest with reference to violence. Secondly, to draw out some of the complexities which may arise where it is contestable as to whether a person has committed a criminal offence during a protest (which may reduce culpability) or a riot (which will increase harm and culpability).

Conclusions

The riots in 2023 and 2025 give rise to questions across the criminal justice system. How should Gardaí respond to such offending both during the riot and in its aftermath? How should the DPP select an offence with which to charge? This latter question is pertinent given the overlap between numerous offences that may occur during a riot.[98] The focus in this article has been on sentencing. When sentencing

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[97] As above, the European Court of Human Rights has held that the 'sporadic violence' of others in attendance will not result in a peaceful protestor forfeiting their Article 11 protections nor will a real risk of violence caused by those outside the organiser's control: *Laguna Guzman v Spain* (Judgment) ECtHR App no 41462/17 (6 October 2020) [34]; *Primov* (n 94) [155]. For comment, see Mead (n 88) 69.

[98] As in other contexts, decisions earlier in the criminal justice system may have significant ramifications for the sentencing of rioters. See generally Ashworth and Kelly (n 43) 57-61; O'Malley (n 41) 11-13.

rioters, there are sound reasons to impose elevated penalties. These reasons are the rioter's contribution to the wider harms associated with the riot; the risk of further harms by perpetuating the riots; and a heightened culpability for contributing to these wider harms knowingly or intentionally. Of course, every sentencing exercise will be fact specific, as was demonstrated by the three brief examples of issues which may arise when sentencing rioters in practice. Those exercises related to sentencing young people; those who have messaged about attending riots online; and those who commit offences during a riot unrelated to the riot.

Sentencing at the boundaries of rioting and protest also raises numerous difficulties. There are plausible arguments for imposing shorter sentences on those who offend as part of a non-violent protest due to their lower culpability. The underlying question of fact for the judge, therefore, will be as to whether they are sentencing a rioter or a protester, a distinction that may become blurred and contested in practice. Both the sentencing of rioters in general and the distinction between rioters and protesters at sentencing are ripe for appellate consideration. It is hoped that if and when such cases arise, the analysis in this article will assist.

The Rule of Law Legacy of *Sinn Féin Funds*

Anthony Kennelly*

Abstract: The High Court and Supreme Court decisions in Buckley v Attorney General (commonly known as 'the Sinn Féin Funds case'), though celebrated ever since, are significant for an overlooked reason. Although the decision is celebrated for asserting the importance of the separation of powers, this article takes a broader view, arguing that in the early decades of the State's history, a practice here described as 'jurisdiction stripping' presented a serious challenge to the rule of law. The article contends that, in defending the separation of powers, the High Court and Supreme Court decisions in Buckley v Attorney General overcame this challenge to the rule of law and deserve praise for this overlooked success.

Keywords: Rule of Law, Separation of Powers, Jurisdiction Stripping, Ouster Clauses

Introduction

This article considers the wider legacy of the High Court and Supreme Court decisions in *Buckley v Attorney General*,[1] commonly referred to as 'the *Sinn Féin Funds* case.' *Buckley v Attorney General* has rightly been celebrated for decades for its role in upholding the separation of powers.[2] This article, however, argues that this celebrated case was not only pivotal in resisting infringement of the separation of powers in one particular case. In fact, the case and its consequences were also a landmark in the development of the rule of law in Ireland, because it very effectively ended a practice, referred to in this article as 'jurisdiction stripping', which was a significant challenge to

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[1] [1950] IR 67.

[2] Gerard Hogan, 'The Sinn Fein Funds Judgment 50 Years On' (1997) 2 The Bar Review 375; Ronan Keane, 'Across the Cherokee Frontier of Irish Constitutional Jurisprudence. The Sinn Féin Funds Case: *Buckley v Attorney General* (1950)' in Eoin O'Dell (ed), *Leading Cases of the Twentieth Century* (Round Hall Sweet and Maxwell 2000).

the rule of law in the early decades of the State. The article argues that this practice emerged in the 1920s, persisted after the introduction of Bunreacht na hÉireann, and was only meaningfully confronted by the judiciary in *Buckley v Attorney General*.

Given their wide range of potential meanings, the article will first explicate what is meant by 'jurisdiction stripping' and 'the rule of law'. It will then explain how jurisdiction stripping manifested in Ireland following independence and why this practice was detrimental to the rule of law in the early decades of the history of the State. The next section will discuss how this was resisted in *Buckley v Attorney General*, followed by analysis of the long-term impact of the decision. By analysing its impact on subsequent cases and legislation, the article will show how the decision ended jurisdiction stripping in Ireland, and in the process strengthened the rule of law in the State.

Defining 'Jurisdiction Stripping' and 'the Rule of Law'

Jurisdiction Stripping

The term 'jurisdiction stripping,' more commonly associated with debates about the separation of powers in the United States, is used in this article instead of terms such as 'ouster clauses' or 'ouster of jurisdiction,' which are more familiar to public lawyers in Ireland and the United Kingdom. This is because, in my view, the broader remit of the term jurisdiction stripping makes it more appropriate to describe the practice at issue in *Buckley v Attorney General* and earlier cases.

In the UK and Ireland, ouster clauses refer to provisions in legislation which remove (i.e. 'oust') or at least restrict the jurisdiction of courts to review decisions by other bodies,[3] or to regulate the exercise of court jurisdiction generally. While Hogan, Morgan and Daly have doubted the constitutionality of 'full' ouster clauses in Ireland,[4] more limited ouster clauses can be semi-acceptable in Ireland,[5] depending on their

[3] Mark Elliott and Robert Thomas, *Public Law* (4th edn, Oxford University Press 2017) 570.
[4] Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019) [11.02] - [11.04].
[5] ibid [11.05] - [11.18].

breadth and effect. Legislative provisions which the Irish courts have regarded as acceptable uses of 'partial ouster clauses'[6] include:

- Time-limitation periods for commencing legal action;[7]
- Stipulations that certain items or actions may be deemed conclusive evidence of some fact;[8] and
- Requirements for substantial grounds.[9]

As Epps and Trammel define it, jurisdiction stripping in the US refers (at the federal level at least) to attempts by Congress to distribute power between courts and other decision-making bodies, or to remove such power entirely.[10] They note that Congress can do so by transferring jurisdiction between courts and tribunals.[11] It is submitted by the present author that this regulation of court jurisdiction is similar to what occurs in the UK and Ireland with ouster clauses. However, the definition of jurisdiction stripping can also include statutes which attempt to decide the outcome of a pending case before the federal courts, whether directly or indirectly. For example, Epps and Trammel's discussion of jurisdiction stripping refers to cases concerning statutes which amended the law as it applied to specific pending or ongoing cases, in order to directly decide the outcome of those cases.[12] In all such cases, the manner in which the US Congress sought to intervene in legal proceedings to decide outcomes has been reminiscent of *Buckley v Attorney General*, and similar earlier Irish decisions.

[6] Hogan, Morgan and Daly (n 4) [11.05].
[7] ibid [11.05] - [11.11]. Key cases discussed by the authors in this regard include *Brady v Donegal County Council* [1989] ILRM 282; *In Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Kelly v Leitrim County Council* [2005] IEHC 11, [2005] 2 IR 404.
[8] ibid [11.12] - [11.16]. Key cases discussed in this regard include *Lombard and Ulster Banking Ltd v Amurec Ltd* (1978) 112 ILTR 1 and *Sloan v The Special Criminal Court* [1993] 3 IR 528.
[9] ibid [11.17] - [11.18]. For example, applicants for judicial review must have substantial grounds when applying for leave. Key cases discussed in this regard include *McNamara v An Bord Pleanála (No. 1)* [1995] 2 ILRM 125 and *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* .
[10] Daniel Epps and Alan M Trammell, 'The False Promise of Jurisdiction Stripping' (2023) 123 Columbia Law Review 2077, 2085.
[11] ibid.
[12] These cases include but are not limited to *Ex Parte McArdle* 74 US 506 (1869); *US v Klein* 80 US 128 (1872); *Battaglia v. Gen. Motors Corp.* 169 F.2d 254, 255 (2d Cir. 1948); *Hamdan v Rumsfeld* 548 US 557 (2006); *Boumedienne v Bush* 553 US 723 (2008); *Bank Markazi v Peterson* 578 US 212 (2016); *Patchak v Zinke* 583 US 244 (2018). See Epps and Trammel (n 10) 2092-2149 for discussion of these cases.

As we will see, this article is concerned with illegitimate limitation of court jurisdiction, in a way that compromises judicial independence by deliberately interfering in specific cases, and hence compromising relevant principles of the rule of law in Ireland. For this reason, it is submitted that jurisdiction stripping is the most appropriate term to describe the practice seen in *Buckley v Attorney General* and similar cases, as it can refer to a practice distinct from the ordinary ouster of jurisdiction seen more routinely in Ireland and the UK, and offers more ready comparison with relevant precedents from the United States.

The Rule of Law

Describing the rule of law with precision can be difficult at times, as there are a wide variety of definitions. There can also be a disconnect between scholarly work, some of which views the rule of law as a vague and contested concept,[13] and other perspectives both inside and outside the academy which view it as a concept whose essential principles are defined and shared, at least across the membership of the Council of Europe.[14]

As to the utility of a definition, Krygier argues that the rule of law must be understood fundamentally as a 'cultural achievement',[15] in that the rule of law ultimately consists of a culture in which the exercise of power is 'well-tempered',[16] to achieve the ultimate

[13] Jeremy Waldron, 'The Rule of Law as an Essentially Contested Concept' in Martin Loughlin and Jens Meierhenrich (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021); Robert A Stein, 'What Exactly Is the Rule of Law?' (2019) 57 Houston Law Review 185; Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 312–314; Martin Loughlin, 'The Rule of Law: A Slogan in Search of a Concept' (2024) 16(3) Hague Journal on the Rule of Law 509.
[14] Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14(2-3) Hague Journal on the Rule of Law 107; 'Further Strengthening the Rule of Law within the Union: State of Play and Possible next Steps (COM/2019/163 Final)' (2019) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>(last accessed 4 May 2026); 'The Updated Rule of Law Checklist' (Venice Commission of the Council of Europe, 2025) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2025)002-e> last accessed 4 May 2026; Tom Bingham, *The Rule of Law* (Penguin 2011); Jørgen Møller and Svend-Erik Skaaning, 'Systematising Thick and Thin Conceptions of the Rule of Law' (2012) 33 The Justice System Journal 136.
[15] Martin Krygier, 'Well-Tempered Power: "A Cultural Achievement of Universal Significance"' (2024) 16 (3) Hague Journal on the Rule of Law 479.
[16] ibid 487.

goal of preventing its arbitrary use.[17] This is preferable, as Krygier notes, to merely defining the rule of law using laundry lists of features, as these can easily be abused by bad-faith actors to dubiously claim that they do in fact uphold the rule of law.[18]

Another potential difficulty with defining the rule of law, especially for the purpose of analysing historical practices, is that understandings of the rule of law change over time.[19] This is not, however, a significant concern for this article. It is submitted that analysis of the health of the rule of law is an exercise in applying a set of criteria to a given situation, as well as taking account of the overarching cultural factors at play. This analysis can take place regardless of what understanding (if any) influential figures in that situation have of the rule of law concept. As a result, while Irish jurisprudence on the rule of law began after the period in which jurisdiction stripping was relatively common, using relevant contemporary criteria is justified, as this article evaluates the impact of jurisdiction stripping on the rule of law from a contemporary perspective.

So, how is the rule of law understood in an Irish context? Where the health of the rule of law in Ireland has been analysed from an academic standpoint, it has often been evaluated[20] using criteria such as Fuller's eight desiderata[21] of the inner morality of law, and the application of Fuller's desiderata to the administrative state.[22] These desiderata are:

(1) Generality (laws must consist of general rules and not individual directives);[23]

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[17] ibid 486-487.

[18] ibid 483-484, 501-504. See also David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis Law Review 189; Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal globalization and the subversion of liberal democracy* (Oxford University Press 2021).

[19] See, for example, Loughlin's discussion of the evolution of this concept in the legal systems of England, Germany and France in Chapter 11 of *Foundations of Public Law*. Loughlin, 'Rechtsstaat, Rule of Law, l'État de droit', *Foundations of Public Law* (n 13) 299 - 307.

[20] Oran Doyle, 'Administrative Action, the Rule of Law and Unconstitutional Vagueness', in Laura Cahillane, Tom Hickey and James Gallen (eds) *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 237, 238; Conor Casey, Oran Doyle and David Kenny, 'The Irish State's COVID-19 Response and the Rule of Law: Causes for Concern' (2021) 110 Studies: An Irish Quarterly Review 446, 448–449.

[21] Lon Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969) 46–91.

[22] Doyle (n 20); Conor Casey and David Kenny, 'The Risk and Rewards of Ireland's Leviathan: Rule of Law Values and the Irish Executive's Crisis Response to Covid-19' (2023) 70 The Irish Jurist 242, 258-259.

[23] Fuller (n 21) 46 – 49.

(2) Promulgation (rules must be published and ascertainable by the public);[24]
(3) Non-retroactivity (laws should apply to the future rather than the past);[25]
(4) Clarity (laws must meet a minimum threshold of clarity and comprehensibility);[26]
(5) Consistency (legal rules should not contradict each other);[27]
(6) Possibility of Compliance (laws should be capable of being complied with by those subject to them);[28]
(7) Constancy (there should be limits to how regularly laws are changed);[29] and
(8) Congruence (laws should be applied the way they are written).[30]

It is worth noting that Fuller's principles are also referenced by Collins J as defining the rule of law, along with Bingham's *The Rule of Law*,[31] in *Conway v An Bord Pleanála*.[32] In addition to these principles, it is possible to identify a consistent understanding of the rule of law among the Irish judiciary. The centrality of the doctrine in Irish law was acknowledged by Denham J in *Maguire v Ardagh* who described it as 'a cornerstone of the Irish legal system'.[33]

In addition to the Fuller principles, an independent judiciary is considered by the Irish courts to be crucial for the respect of the rule of law. Murray CJ stated in *Curtin v Dáil Éireann*, that 'an independent judiciary guarantees that the organs of the State conduct themselves in accordance with the rule of law.'[34]

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24 (n 21) 49 – 51.
25 ibid 51 – 62.
26 ibid 63 – 65.
27 ibid 65 – 70.
28 ibid 70 – 79.
29 ibid 79 – 81.
30 Ibid 81 – 91.
31 Bingham (n 14).
32 [2024] IESC 34 [9]. O'Donnell CJ also refers to the works of Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) and Suetonius *The Lives of the Twelve Caesars*, at [24]-[25] of his judgment.
33 [2002] 1 IR 385, 567.
34 [2006] IESC 14 [96], [2006] 2 IR 556, 617. Similar points about the centrality of an independent judiciary to the rule of law have been echoed by former Attorney General Paul Gallagher SC. See Paul Gallagher, 'Challenges to the Rule of Law in 21st Century Ireland' (2018) 41 Dublin University Law Journal 1, 2–4.

A corollary of this is arguably the right of access to the courts, with Keane CJ emphasising in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999*:

> It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights.[35]

Hogan J, writing extra-judicially, has also identified several overarching principles in the Irish courts' treatment of the rule of law which are relevant for our purposes.[36] A non-exhaustive list of these includes:

- The principle of legality;[37]
- Prohibition of 'arbitrary or autocratic' behaviour by the executive, even if such powers are conferred by statute.[38]
- Access to the courts.[39]
- Legal certainty.[40]

Most of these principles overlap directly with Fuller's desiderata. For example, the principle of legality to a greater or lesser extent implicates all of Fuller's criteria, as arguably does the principle that law must be certain and accessible. As another example, the principle that the executive cannot constitutionally be given the power

[35] *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* (n 7) 385. This quote was cited approvingly in *Mallak v Minister for Justice* [2012] IESC 59 [46], [2012] 3 IR 297 and echoed in the same judgment at [1] and [52] in relation to the importance of access to the courts.
[36] Gerard Hogan, 'Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country', *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Asser Press 2019) 1336-1337. Aside from the principles discussed in this analysis, Hogan also identifies other principles associated with the rule of law in Ireland but which are less relevant here, namely non-retroactivity of criminal offences, fundamental rights and creation of vague offences. It should be noted that this last point on vagueness overlaps with the principle of legality.
[37] ibid 1336.
[38] ibid 1337; Hogan J cites in that regard *Mallak* (n 35) and *Waterville Fisheries Development Ltd v Aquaculture Licensing Appeals Board (No.2)* [2014] IEHC 381.
[39] Hogan (n 36) 1337; Hogan J cites in that regard *Murphy v Greene* [1990] 2 IR 566; *In Re MJBCH Ltd* [2013] IEHC 256, [2013] 1 IR 407; *Macauley v Minister for Posts and Telegraphs* [1966] IR 345; *Blehein v Minister for Health and Children* [2008] IESC 40, [2009] 1 IR 275.
[40] Hogan (n 36) 1337.

to act in an arbitrary or autocratic fashion invokes points three to eight of the desiderata, as a prohibition on arbitrary executive action requires that laws be prospective, clear and comprehensible, consistent, capable of being complied with, stable and reflected in actual practice by the State, rather than merely theoretical.

From the foregoing analysis, we can therefore identify several key criteria for assessing whether a particular action interferes with the rule of law in Ireland, based on how it is understood in this jurisdiction. These are:

- Independence of the judiciary;
- Ability to benefit from judicial independence through reasonable access to the courts;
- Prohibition of arbitrary action, whether by legislation or executive action;[41] and
- Clarity and stability of legal rules, and corresponding rights and liabilities.[42]

It is submitted that these criteria are also not merely a 'laundry list' of rule of law features, conformity against which can be gamed. In fact, it is contended here that these criteria describe a political and legal culture in which power is restrained by the ability of the judiciary to adjudicate independently, prohibit arbitrary action, and demand clarity and stability of legal rules.

With both jurisdiction stripping and the relevant rule of law criteria defined, it is therefore possible to look at how jurisdiction stripping in Ireland up to and including the decision in *Buckley* impacted on the rule of law, as it is understood in contemporary Ireland.

The Impact of Jurisdiction Stripping on the Rule of Law in Ireland

As Coffey has noted, undermining the jurisdiction of courts was a persistent practice on the part of the legislature from the beginning of the Irish Free State, dating back

[41] It is submitted that legislation is also covered by this principle. Likewise, executive power vested in the Government usually coincides with control of the Oireachtas by the same persons and parties, with the same governing agenda. As will be seen in the cases of jurisdiction stripping analysed later in this article, this can result in arbitrary executive action being effected with the help of enabling legislation.
[42] Hogan (n 36) 1337.

even to the days of the Republican courts during the Civil War period.[43] Arguably, the main motivator for the first notable cases of jurisdiction stripping was frustration by the government of the Irish Free State at appeals being made of Irish Supreme Court decisions to the Judicial Committee of the Privy Council in London, as provided for under the Anglo-Irish Treaty (hereafter 'the Treaty') in 1921.[44]

The first example of this behaviour post-Civil War can be seen, as Coffey notes,[45] in *Lynham v Butler*,[46] which it is submitted here was an example of jurisdiction stripping. In *Lynham*, the original dispute between the parties related to the ability of the defendant to purchase lands from the Irish Land Commission. Section 24 of the Land Act 1923 provided for the vesting of certain interests in lands in the Land Commission, enabling the holders of such interests, which included the defendant, to purchase those lands from the Land Commission at a price set by the Act. The plaintiff disputed the validity of the defendant's interest and brought an action to recover possession of the lands from the defendant. The Supreme Court dismissed an appeal by the plaintiff of a High Court decision that the lands in question were covered by the 1923 Act. The Privy Council's granting of leave to appeal resulted in the passing of the Land Act 1926,[47] the provisions of which precluded any possibility of a successful appeal. In particular, section 2(a) of the Act provided that relevant provisions of the 1923 Act would 'be construed and have effect and be deemed always to have had effect' in such a way as to fatally undermine any appeal to the Privy Council. This is a classic case of jurisdiction stripping, as the Oireachtas legislated to pre-determine an appeal of a specific case to a court with competent jurisdiction, thereby denying one party an impartial adjudication of their dispute.

Jurisdiction stripping was, it is submitted, seen again in the Privy Council decision in *Performing Right Society Ltd v Bray Urban District Council*.[48] On this occasion, the plaintiff appealed an earlier Supreme Court decision, in which it was held that the

[43] Donal Coffey, 'Comparative and Institutional Perspectives on the Exercise of Judicial Power in the Irish Free State' in Eoin Carolan (ed), *Judicial Power in Ireland* (Institute of Public Administration 2018) 26, 32-35.
[44] ibid 34-35.
[45] ibid 33.
[46] [1925] 2 IR 231.
[47] Coffey (n 43) 33.
[48] [1930] IR 509.

Copyright Act 1911 did not continue in force after independence and hence did not protect their intellectual property rights.[49] Here, as Coffey notes,[50] the Copyright (Preservation) Act 1929 was passed in order to render moot the appeal to the Privy Council.[51]

While one could argue that attempts to frustrate the jurisdiction of the Privy Council reflected attempts by the Oireachtas to establish an 'Irish rule of law' by protecting the finality of the jurisdiction of the Irish Supreme Court,[52] it remains the case that following the Treaty, the Privy Council had proper jurisdiction to hear appeals from Ireland until the Oireachtas formally abolished the right of appeal to the Privy Council in 1933.[53] It is submitted, therefore, that any attempts at using legislation to frustrate appeals to the Privy Council were a form of jurisdiction stripping, as they involved attempts to prevent the free and impartial determination of cases by a court with proper jurisdiction over those cases, effectively removing its jurisdiction by directing a particular outcome. As Coffey has argued,[54] these tensions should not be seen as merely part of a struggle between an imperial institution and a dominion government, but also as forming part of a pattern in which the Executive of the Free State was 'not prepared to countenance any meaningful form of judicial review,'[55] or 'any meaningful opposition.'[56]

Likewise, the Land Purchase (Guarantee Fund) Act 1936 conforms to this pattern. The background to this Act, as noted by James Dillon TD in the debate of the first stage of the Bill,[57] was the initiation by local authorities of proceedings to challenge the legality of a funding decision by central government. As noted by Deputy Dillon,[58] the legislation was introduced to undermine these proceedings by changing the legal

49 [1928] IR 506.
50 Coffey (n 43) 33–34.
51 Copyright Preservation Act 1929 s 4.
52 Coffey (n 43) 34-35.
53 Constitution (Amendment No. 22) Act 1933, s 1(b).
54 Coffey (n 43) 35.
55 ibid.
56 ibid.
57 See the contribution of Deputy Dillon during the first reading of the Bill, Dáil Debates (27 November 1935, Vol. 59 No. 9).
58 ibid.

position the subject of the action to one desired by the Government. This Act was retrospective in effect, as it stipulated that its provisions were to be deemed to apply from 1 April 1932.[59] As with the earlier cases, this amounted to an act of jurisdiction stripping, by virtue of its pre-determination of a specific case already pending in the courts, to achieve the Government's desired outcome.

The Land Purchase (Guarantee Fund) Act 1936 was followed by the Accidental Fires Act 1943. This was alleged in *Buckley v Attorney General* to have been passed in an attempt to stymie pending actions for damages following an accidental industrial fire,[60] and this claim is corroborated by evidence from Dáil Debates on the legislation.[61]

These occasions of jurisdiction stripping had a detrimental impact on the rule of law in Ireland. While they did not occur on a constant basis, involving interference in every other dispute before the courts, jurisdiction stripping did occur at least twice in less than a decade in relation to the Privy Council appeals,[62] and on three other known occasions not connected to the Privy Council prior to *Buckley v Attorney General*. It also occurred within a broader context in which successive governments following the Civil War were reluctant to accept legal restraint on them by courts, and in which there were numerous other autocratic tendencies displayed, with concerning effects on the rule of law.[63] As one anonymous commentator (perhaps somewhat hyperbolically) stated in the 1942 *Northern Ireland Legal Quarterly*:

[59] Land Purchase (Guarantee Fund) Act 1936, s 2.
[60] Hogan (n 2) 379.
[61] See the contribution of then Minister for Industry and Commerce, Seán Lemass TD, at the second reading of the Bill, Dáil Debates (24 March 1943, Vol. 89 No. 11).
[62] A third dispute between the Irish government and the Privy Council, relating to *Wigg and Cochrane v Attorney General of Ireland* [1927] UKPC 45, is not discussed here for the sake of brevity and clarity. See Thomas Mohr, 'Lord Cave, the British Empire and Irish Independence - A Test of Judicial Integrity' (2012) 12 Commonwealth Law Journal 229.
[63] These include the restriction of civil liberties, including the establishment of military tribunals under the Public Safety Acts 1923 to 1933. They also include frequent amendment of the Constitution by simple parliamentary majority, to enable measures such as the Public Safety Acts, or to secure short-term political advantage. See *R (O'Brien) v The Military Governor of the Military Internment Camp* [1924] 1 IR 32; *The State (Ryan) v Lennon* [1935] IR 170; Laura Cahillane, 'An Insight into the Irish Free State Constitution' (2014) 54 American Journal of Legal History 1; Eoin Daly, 'Reappraising Judicial Supremacy in the Irish Constitutional Tradition', in Cahillane, Hickey and Gallen (eds) (n 20); Oran Doyle, *The Constitution of Ireland - A Contextual Analysis* (1st edn, Hart Publishing 2018) 8-11; Donal Coffey, 'The

> Thus there is no rule of law in Éire, theoretically or in fact. The principle was broken with straight away. Then the fundamental law was flouted and when the Courts struggled to support it a new Constitution was issued. The Executive were given wide powers, but when these were not wide enough they legislated to make legal prohibition ineffective. Finally, to ensure the ineffectiveness of law they established a Court of their own with powers to deal with 'any offence whatsoever.' Is there any more that tyranny can do? So far these powers have been cautiously used, but the powers are there and the rule of law is gone.[64]

Turning to the effect of jurisdiction stripping on specific aspects of the rule of law, its impact on the right of access to the courts, highlighted as noted above by Hogan as a key pillar of the rule of law in Ireland,[65] is obvious. A person cannot be said to have had their right of access to the courts upheld if, having initiated proceedings, legislation is passed to make that outcome impossible. While in such scenarios people may formally have a right of access to the courts by being able to initiate proceedings, being unable to receive any benefit from a judgment in their favour makes a mockery of that right. This issue with access to the courts arises not only in relation to individual cases where access to the courts is prevented, but also from the cumulative effect of litigants being repeatedly deprived of such access.

The impact of jurisdiction stripping on legal certainty and accessibility, also central to the rule of law in Ireland, is considerable. If legal certainty is understood as the quality of predictability and clarity in law, jurisdiction stripping undermines that by creating a situation where individuals cannot predict when considering their legal rights whether their case will be decided according to the law that applies at the time they initiate proceedings, or by a new law passed arbitrarily at a later point to frustrate their case or the judgment they receive. This also impacts on legal accessibility, as the retroactive nature of jurisdiction stripping in these situations creates a situation where the laws applicable to the determination of the issue were not in existence at the time of the

Need for a New Constitution: Irish Constitutional Change 1932-1935' (2012) 48(2) The Irish Jurist 275, 289-292, 294, 300-302.

[64] Anonymous, 'Law in Eire' (1942) 5(2) Northern Ireland Legal Quarterly 84, 96.

[65] Hogan (n 36) 1337.

act or failure to act which gave rise to the proceedings, or of the determination by the litigant to proceed with an action.

It is also arguable that, given the significant role of the Government in initiating and passing legislation in Ireland, jurisdiction stripping also constitutes a form of arbitrary action by the executive, given the ad hoc way in which jurisdiction stripping is deployed.

Many of these issues for the rule of law were appreciated at the time such jurisdiction stripping legislation was introduced. For example, although he did not specifically reference the rule of law, Senator Ernest Blythe pithily summarised the problematic nature of this practice in relation to the Land Purchase (Guarantee Fund) Act 1936:

> This coming in the middle of litigation has a peculiarly objectionable flavour. It is much more objectionable than if the Government had waited until the courts had given their decision and then frankly reversed it on the basis of the various arguments the Minister has used. I think when the case is at hearing in the courts, when the contest has begun. as it were, for the Minister to step in to alter the rules in his own favour is something that is going to have very many reactions, and is going to tend very seriously to undermine the respect in which the courts ought to be held, and is going to undermine the reputation of the State for fair play.[66]

In light of the problems for the rule of law that jurisdiction stripping creates, it is in some ways remarkable that the judiciary did not push back more against the practice in the 1920s and 1930s. Whatever the reasons for this reticence, as will be seen, the judiciary finally put an end to jurisdiction stripping in *Buckley v Attorney General*.[67]

The *Buckley v Attorney General* Decision

The facts of *Buckley v Attorney General* are well known, but worth summarising briefly. The original dispute at the heart of the matter was the rightful ownership of a sum of £8,663 12s 2d previously held by trustees of what the judgment called the 'Sinn Féin

[66] Seanad Debates (1 January 1936, Vol. 20 No. 22).
[67] *Buckley* (n 1).

Organisation' or the 'Organisation'.[68] As a result of 'the split' of the Organisation due to Treaty negotiations, these funds had been lodged in the High Court by the Trustees of the Organisation in 1924, because of difficulty in determining who should be entitled to them. In 1942, the plaintiffs brought an action against the Attorney General and the personal representative of the last surviving trustee, claiming first, that the funds in question were the property of the extant Sinn Féin Organisation; and secondly, that the funds in question should be paid to them 'or to two of them as honorary treasurers of the Organisation.'[69]

After proceedings were initiated in the High Court, the Oireachtas passed the Sinn Féin Funds Act 1947. The Act provided for the establishment of a Board, *Bord Cistí Sinn Féin*,[70] with authority to establish and manage a trust of funds paid into it.[71] Section 10(1) of the Act provided for a stay to be placed on all further proceedings upon the passage of the Act. Section 10(2) further required that the High Court dismiss the action in question, without costs, on application by the Attorney General. Finally, section 10(4) together with section 11 provided that no other action could be brought in relation to the funds in question, except where required for subsequent payment of the moneys to the Board.

When the Attorney General brought the *ex parte* action contemplated in section 10, the High Court ruled section 10 to be unconstitutional, with the Supreme Court upholding this finding on appeal.[72] Section 10 was found to be unconstitutional on two grounds, the first being the right to property under Article 43, which the Supreme Court found to be the principal ground.[73] The second ground was the finding by the Court that the Act violated the separation of powers which in fact proved over time to be the more consequential ground. In the High Court, Gavan Duffy P stated: 'This Court cannot, in deference to an Act of the Oireachtas, abdicate its proper jurisdiction to administer justice in a cause whereof it is duly seized.'[74]

[68] ibid 67.
[69] ibid.
[70] Sinn Féin Funds Act 1947, s 2.
[71] Sinn Féin Funds Act 1947, s 9.
[72] *Buckley* (n 1) 67-68.
[73] ibid 81.
[74] ibid 70.

While the issue regarding the separation of powers was addressed briefly by the Supreme Court, O'Byrne J made a succinct but landmark statement:

> There is another ground on which, in our view, the Act contravenes the Constitution. We have already referred to the distribution of powers effected by Art 6. The effect of that article and of Arts 34 to 37, inclusive, is to vest in the Courts the exclusive right to determine justiciable controversies between citizens or between a citizen or citizens, as the case may be, and the State. In bringing these proceedings the plaintiffs were exercising a constitutional right, and they were, and are, entitled to have the matter in dispute determined by the judicial organ of the State. The substantial effect of the Act is that the dispute is determined by the Oireachtas, and the Court is required and directed by the Oireachtas to dismiss the plaintiffs' claim without any hearing and without forming any opinion as to the rights of the respective parties to the dispute. In our opinion this is clearly repugnant to the provisions of the Constitution, as being an unwarrantable interference by the Oireachtas with the operations of the Courts in a purely judicial domain. For these reasons we are of opinion that the decision of the President of the High Court was correct. This application will be dismissed.[75]

It is notable that neither the High Court nor Supreme Court judgments made explicit reference to the rule of law. In setting out robust defences of the separation of powers, however, and explaining the danger of the Act to it, they of course addressed many of the specific issues that the practice of jurisdiction stripping poses for the rule of law. For instance, Gavan Duffy P in the High Court, paraphrasing Daniel Webster, stated:

> Justice involves due process of law and that law … is the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial, so that every citizen shall hold his life, liberty, and property and immunities under the protection of the general rules which govern society; arbitrary executions of power under the forms of legislation are thus excluded

[75] ibid 84.

> and no organ of the State can deny to the citizens the equal protection of the law.[76]

Interestingly, as Hogan notes, in advising the Government that the legislation itself was permissible, the Attorney General had felt his position was supported by reference to US case law,[77] and in particular the decision in *Ex Parte McArdle*.[78].

It is clear that the intent and effect of the Sinn Féin Funds Act 1947 was similar to previous instances of jurisdiction stripping in its impact on the rule of law. For that reason, the pushback by the courts is to be lauded. However, to truly understand the long-term benefits of *Buckley v Attorney General* for the rule of law, it is necessary to consider its impact on subsequent case law, and on the behaviour of the executive and legislative branches of government.

Assessing the Impact of Buckley v Attorney General

The decision in *Buckley v Attorney General* virtually ended jurisdiction stripping and the resulting issues it presented for the rule of law. It did this by (i) allowing the judiciary to be assertive in defining acceptable and unacceptable limitations of their jurisdiction; and (ii) requiring the Oireachtas to exercise greater restraint in their attempts to regulate the jurisdiction of the courts. To see how the decision impacted the rule of law in these ways, these two will now be considered in turn.

Encouraging Judicial Assertiveness

The first major impact of *Buckley v Attorney General* was its encouragement of judicial assertiveness. It would not be true to say that there has been no legislation since 1947 that strayed into the territory of jurisdiction stripping, as will be discussed below. However, what *Buckley v Attorney General* undeniably established is that the Oireachtas could no longer pass legislation to directly settle the outcome of a case which had been initiated, as it had done in decades prior. *Buckley v Attorney General* had further far-reaching consequences in protecting the jurisdiction of the courts in

[76] ibid 70.

[77] See Hogan (n 2) 377-378.

[78] *Ex Parte McArdle* (n 12). It is notable that, as discussed earlier, counsel for the Attorney General referred during the *ex parte* application to there being precedent for such a measure, in an apparent attempt to justify its constitutionality. See Hogan (n 2) 379.

less extreme scenarios, by making the courts more assertive in defending against more subtle encroachments on judicial power, and hence in cementing the rule of law.

This impact can be seen in the precedent it created, developed in subsequent cases, of courts defining more clearly the boundary between legitimate *regulation* of their jurisdiction by the Oireachtas and illegitimate *interference* in their jurisdiction. This has not only had the benefit of striking down legislation which has crossed that boundary, but also in proactively signalling to the Oireachtas what the courts would and would not accept, with attendant benefits in strengthening the rule of law.

It is possible to identify four key principles from *Buckley v Attorney General* and subsequent case law demarcating the boundary between acceptable and unacceptable involvement in the judicial arena. These principles have strengthened the rule of law by clarifying when a particular legislative provision does or does not constitute an improper encroachment on the judicial power. Most of the legislation considered in this line of case law was passed after *Buckley v Attorney General*, but some of it was passed before.

The first and most straightforward principle, beginning with *Buckley v Attorney General*, is prohibition of what Morgan calls *ad hominem* legislation,[79] that is, legislation like the Sinn Féin Funds Act 1947 which is targeted at a specific party or case of which a court is already seised in order to dictate the outcome. As we will see below, blatant attempts at interference in specific cases have hardly been attempted since.

The second principle is that legislation which is not *ad hominem* but changes the law affecting a particular case is acceptable, provided it is passed before a court is seised of a matter.[80] Once a court is seised of a particular matter, legislation which changes the law affecting pending cases is only acceptable if the legislation itself is general in nature rather than targeted.[81] For example, in *The State (Divito) v Arklow Urban District Council*,[82] at issue was an application for the issue of a gaming licence under the

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[79] David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet and Maxwell 1997) 136–138, 145-147.
[80] ibid 138–142.
[81] ibid 139-141.
[82] [1986] ILRM 123.

Gaming and Lotteries Act 1956. In this case, Arklow UDC had revoked, amended and re-issued a previous resolution which brought into force in its area Part III of the 1956 Act, which related to Licensing of Amusement Halls and Funfairs. The effect of this action was to disentitle the applicant to a gaming licence under the Act. The Council did this after a notice by the applicant of intention to apply for a gaming licence under the Act was published, but crucially, did so before the application was issued in the District Court. The Court found that this was acceptable and not a breach of the separation of powers. Likewise, in *Re Camillo*,[83] which concerned the same legislative provision, it was held that a revocation of a resolution before the hearing of a Circuit Court appeal was acceptable, provided it was of general effect, rather than targeted at a specific case.[84]

Similarly, in *Minister for Justice v Tobin*,[85] the appellant successfully challenged a second attempt at extradition to Hungary, where the first attempt to extradite him had failed based on interpretation by the Court of extradition legislation. Subsequent legislation changed the extradition criteria, resulting in the second extradition proceedings which were the subject matter of the case. The Supreme Court, in allowing the extradition, held that the subsequent legislative amendments were not an unconstitutional interference due to their generality, noting that the Oireachtas did not demonstrate any 'clear intention' that the appellant's rights as a result of the previous court proceedings were to be interfered with.[86] This line of case law protects a key principle of the rule of law by prohibiting legislation which, as in pre-*Buckley v Attorney General* cases, deprives parties of the substance of access to the courts, as well as compromising legal certainty.[87]

The third principle of post-*Buckley v Attorney General* case law is the prohibition of unwarranted legislative interferences in the judicial domain, that is in relation to how judges decide cases. This has several aspects, the most important of which relates to

[83] [1988] IR 104.
[84] See Morgan (n 79) 139 – 141; Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [6.1.71].
[85] [2012] IESC 37, [2012] 4 IR 147.
[86] ibid [448], [451].
[87] The importance of this line of case law for protecting against arbitrary executive action, and thus the rule of law, was also highlighted in *Gorman v Minister for the Environment and Local Government* [2001] 2 IR 414 (discussed further below).

how the courts have defined an unwarranted interference. In *Gorman*,[88] before considering *Maher v Attorney General*,[89] the Court restated the test in *Buckley* as to what constitutes an unwarranted interference as:

> (a) whether the substantial effect of the legislation or executive action was such that the justiciable controversy was determined by the legislator or executive and
>
> (b) whether the court was required or directed by the legislator or executive to dismiss the plaintiff's claim or appeal without any hearing and without forming any opinion as to the rights of the respective parties to the dispute.[90]

This definition underpins key requirements for the rule of law in Ireland by not only protecting judicial independence, but also protecting against arbitrary executive action.

The prohibition of unwarranted interference has been particularly important in cases concerning due process in criminal justice.[91] One of the earliest examples of this prohibition in relation to criminal cases is *State (C) v Minister for Justice*.[92] In *C*, the Supreme Court held, 'the exercise of the judicial power of the State is confined by the Constitution to the Courts' and that 'the doing of any act or the taking of any step by any non-judicial authority in the State, which interferes with, restricts or prevents the District Court from deciding the particular case before it in accordance with the law applicable to it, is an infringement of the judicial power.'[93] Another key case is *Maher v Attorney General*,[94] which considered section 44(2)(a) of the Road Traffic Act 1968.[95] In *Maher*, FitzGerald CJ held that this provision was an 'invalid infringement of the

[88] ibid.
[89] [1973] IR 140.
[90] *Gorman* (n 87) 421.
[91] The independence of the courts in relation to criminal trials is considered comprehensively in Hogan et al (n 84) 979-810.
[92] [1967] IR 106. Delany has noted the similar vein of this decision to the *Buckley v Attorney General*. See Hilary Delany, 'Interference by the Legislature in the Judicial Domain' (2003) 21 Irish Law Times 272, 272.
[93] ibid 122.
[94] *Maher* (n 89).
[95] Section 44(2)(a) provided that a certificate (issued under section 43(3) of the Act) stating a particular blood-alcohol concentration based on a sample taken from a person would be conclusive evidence of that person's blood alcohol level at the time the sample was taken.

judicial power,'[96] as it precluded judges or courts from determining 'all the essential ingredients' of the offence it related to.[97]

The State (O'Rourke) v Kelly, on the other hand, provides an example of a statutory procedural provision which was not an unwarranted interference, by establishing that it is permissible for legislation to direct a court to make a particular order if satisfied that certain criteria and evidence are established, provided the court is still free to decide whether it is in fact so satisfied.[98] *O'Rourke* concerned the constitutionality of section 62(3) of the Housing Act 1966, which required a District Judge to issue a warrant to a housing authority where satisfied that a demand referenced in section 62(1) of the Act had been made. This requirement to decide in a particular way was constitutionally acceptable because, according to O'Higgins CJ, the court was only required to make the order following the establishment of specified matters.[99] O'Higgins CJ stated that 'it is only when the provisions … have been complied with and the demand duly made to the satisfaction of the District Justice that he must issue the warrant.'[100] In his view, such a provision was 'within the competence of the Oireachtas',[101] and hence the section was constitutionally acceptable.[102] This would seem to be a reasonable decision, as it still prevents the legislature or executive from deciding the substantive aspects of a case, hence protecting access to an independent judiciary and courts, and protecting against arbitrary actions.

Similar to *O'Rourke*, the Court in *The State (McEldowney) v Kelleher* confirmed that it is acceptable for legislation to direct particular orders or decisions by courts once particular points have been proved, but only if the court retains discretion to determine whether those proofs have actually in fact been established.[103] *McEldowney* considered the constitutionality of section 13(4) of the Street and House to House Collections Act 1962, which governed appeals to denials of collection permits. It was found that the effect of section 13(4) of that Act was to require a District Judge to disallow an appeal

[96] *Maher* (n 89) 146.
[97] ibid.
[98] [1983] IR 58.
[99] ibid 61.
[100] ibid.
[101] ibid 61.
[102] ibid.
[103] [1983] IR 289.

by someone denied a collection permit if a Garda Chief Superintendent gave certain evidence on oath, namely that there were reasonable grounds for believing that the proceeds of a collection would be used to benefit an illegal organisation.[104] Walsh J distinguished the facts in that case from those in *O'Rourke,* noting that,[105] in the present case, section 13(4), in requiring a judge to disallow an appeal, left no discretion to determine whether the grounds were in fact reasonable. Walsh J stated:

> In the opinion of the Court, the present case falls squarely within the principles enunciated in those decisions. The statute creates a justiciable controversy and then purports to compel the court to decide it in a particular way upon a particular statement of opinion being given upon oath as to whether or not a statutory reason for refusing the permit exists, whatever opinion the court may have formed on the issue in question, or might have formed if it had heard any evidence upon it.[106]

Likewise, in *Cashman v Clifford,*[107] Barron J granted a declaration that section 13(5)(a) of the Betting Act 1931 was inconsistent with the Constitution. Though the legislation did not seek to impose a particular decision on the court, the Court found that it did constitute interference with the judicial process by limiting 'the persons who may be heard or adduce evidence.'[108] Here again we see the concern in the post-*Buckley v Attorney General* case law for ensuring access to the courts.

Another important aspect of the prohibition against unwarranted interference in commenced proceedings is that the courts will not tolerate any legislation which, as in *Buckley v Attorney General*, grants the Attorney General as a party to a case the power to block the hearing of the case by the court.[109] This point was reiterated in *Macauley v Minister for Posts and Telegraphs*,[110] and the boundaries of the rule were elucidated in *Fitzgerald v Director of Public Prosecutions*.[111] In the latter case, the Supreme Court

[104] ibid 293, 305.
[105] ibid 306.
[106] ibid 306.
[107] [1989] IR 121.
[108] ibid 124.
[109] Morgan (n 79) 138.
[110] *Macauley* (n 39).
[111] [2003] 3 IR 247.

held that legislation requiring a court not to accept an appeal from law officers such as the Attorney General or the DPP is acceptable. This further strengthens protections for the key rule of law principles of access to the courts and prohibition of arbitrary executive action.

The prohibition of unwarranted interference principle is echoed in jurisprudence by the court in relation to ouster clauses. As discussed earlier in this article, the validity of such clauses depends on their breadth and effect, with partial ouster clauses such as time-limitation periods, substantial grounds requirements and conclusive evidence provisions being found to be acceptable, as they are regulations rather than exclusions of judicial oversight.[112]

The fourth and final key principle is that where a case has already been decided by a court, legislation should not deprive parties of the benefit of the judgment. The implications of this principle in strengthening the rule of law are clear, given its importance in ensuring that parties are genuinely able to benefit from an impartial hearing of their case. Examples of this includes the legislative savers introduced in the wake of *Howard v Commissioners of Public Works in Ireland (No 1)*,[113] and in the *Pine Valley* series of litigation, both discussed further in the next section.[114] As we will see, in both sets of litigation savers were included in legislation enacted in reaction to court decisions, to avoid interfering with the outcomes of specific cases.

From the above principles, we can see that the judiciary have gradually clarified the boundaries of the *Buckley v Attorney General* principles, thereby helping to strike down existing violations of these principles, and signalling the acceptable limits to the other branches of government regulating the courts' jurisdiction. In so doing, they have clarified the difference between acceptable regulation of court jurisdiction and unacceptable jurisdiction stripping. The effect of this can be seen in the responding behaviour of the Oireachtas and the Government, to which we turn next.

[112] See fn 4–9 above.
[113] [1994] 1 IR 101.
[114] See discussion in Keane (n 2) 192–193; Morgan (n 79) 144–145.

Impact on the Oireachtas

Since *Buckley v Attorney General*, there has been no attempt at the kind of blatant jurisdiction stripping seen in *Buckley v Attorney General* and earlier cases, though one might point to *Gorman v Minister for the Environment and Local Government* as a possible partial exception to this general statement.[115] In *Gorman*, the Minister for the Environment introduced Regulations to effect deregulation of taxi licensing.[116] These had been found by Murphy J in the High Court to be *ultra vires* in *Humphrey v Minister for the Environment*.[117] An appeal from the decision in *Humphrey* had been taken to the Supreme Court but, before it was heard, the Minister introduced a second set of Regulations repealing the earlier Regulations. In *Gorman*, Carney J found this repeal to be invalid, being in his view 'an unwarrantable interference arising in the unique circumstances of this case in the applicants' appeal'.[118]

While the actions of the Minister for the Environment in *Gorman* could be seen as of a piece with pre-*Buckley v Attorney General* jurisdiction stripping, it must be noted, as Carney J did, that the interference, while unwarranted, was inadvertent, as 'the Minister of State was concerned that if the appeal succeeded there would be two regimes in place side by side and his repeal of the first Regulations of 2000 was to guard against that situation.'[119] It was, however, a way of quickly dispensing with a legal liability. *Gorman* could arguably be categorised as a partial exception proving the general rule that, as Keane points out, governments since *Buckley v Attorney General* have been 'punctilious in the extreme' when drafting legislation to ensure they do not violate the separation of powers.[120]

Keane is undoubtedly correct on this point. Since *Buckley v Attorney General*, it has become common practice for legislation which has potentially limited access to the courts, or to remedies, to specifically rule out application of its provisions to persons who might be deprived of the benefit of a judgment, where proceedings have already been issued or judgment delivered. By way of example, the Local Government

[115] *Gorman* (n 87).
[116] ibid 414.
[117] [2001] 1 IR 263.
[118] *Gorman* (n 87) 424.
[119] *Gorman* (n 87) 425.
[120] Keane (n 2) 192.

(Planning and Development) Act 1982 was passed as part of what Keane calls the '*Pine Valley* saga.'[121] A set of grants of planning permission had been deemed unlawful by the Supreme Court in *The State (Pine Valley Developments Limited) v Dublin County Council*.[122] Section 6(1) of this Act provided that planning permissions granted prior to 15 March 1977, (before the decision at issue), 'shall not be, and shall not be regarded as ever having been, invalid by reason only of the fact that the development concerned contravened, or would contravene, materially the development plan' of the relevant local authority. Section 6(2) provided:

> if, because of any or all of its provisions, subsection (1) of this section, would, but for this subsection, conflict with a constitutional right of any person, the provisions of that subsection shall be subject to such limitation as is necessary to secure that they do not so conflict but shall be otherwise of full force and effect.

Section 6(2) was found by Lardner J in subsequent litigation to be 'included by the Oireachtas for the purpose of respecting and not interfering with the determination by the Courts of the justiciable controversy' in the earlier decision.[123]

The series of litigation concerning *Howard v Commissioners of Public Works* also saw legislative savers being used to respond to the general implications of the original decision,[124] without, as Hogan et al note, depriving any litigants of 'the fruits of their victory'.[125]

Another example is the Health (Amendment) (No. 2) Bill 2004, the constitutionality of which was considered in *Re Article 26 and the Health Amendment Bill*.[126] While many aspects of the Bill were at issue, the most relevant for this analysis is section 1(b), which amended section 53 of the Health Act 1970 by the insertion of two new subsections, the text of which stated:[127]

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[121] ibid.
[122] ibid; [1984] IR 407.
[123] *Pine Valley Developments Ltd v Minister for the Environment* [1987] IR 23, 46.
[124] *Howard* (n 113).
[125] Hogan et al (n 84) [6.1.184].
[126] [2005] IESC 7, [2005] 1 IR 105.
[127] Health Amendment No. 2 Bill 2004, s 1(b).

> (5) Subject to subsection (6), it is hereby declared that the imposition and payment of a relevant charge is, and always has been, lawful.
>
> (6) Subsection (5) shall not apply in the case of a relevant charge which is the subject of civil proceedings—
>
>> (a) instituted on or before 14 December 2004, and
>>
>> (b) for the recovery of the relevant charge.

In light of this wording, the Supreme Court noted in *Re Article 26 and the Health Amendment Bill* that the 'obvious purpose' of section 1(b) was 'to avoid any unconstitutionality which would arise from legislative interference with existing litigation,' based on the *Buckley v Attorney General* principles.[128]

Section 3 of the Landlord and Tenant (Ground Rents) Act 2005 inserted a saver in the below terms,[129] which has been acknowledged as a type of saver commonly used to avoid running afoul of the principles in *Buckley v Attorney General*.[130] It provides:

> The amendment of section 4 of the Act of 1978 effected by section 2 of this Act shall not apply to—
>
>> (a) an application to the Registrar of Titles under Part III of the Act of 1978 *made before the passing of this Act*,
>>
>> (b) a notice of intention to acquire a fee simple under section 4 of the Act of 1967 *served before the passing of this Act*… (emphasis added)

It is submitted that the fact that there have been no subsequent controversies on this specific point is testament to the clarity and effect of *Buckley v Attorney General*. As the above examples of legislative drafting show, the decision can be said to have undeniably ended the kind of blatant undermining of the separation of powers, and the interference in judicial processes which was a major weakness in the rule of law in Ireland in the State's first generation of existence. As a result of this, blatant jurisdiction

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[128] *Health Amendment Bill* (n 126) [80].
[129] Landlord and Tenant (Ground Rents) Act 2005, s 3.
[130] Siobhán Stack SC, 'Applicability of Landlord and Tenant Acts to the State' [2019] 1 Conveyancing and Property Law Journal 9, 11.

stripping no longer poses the same challenge highlighted earlier for the right of access to the courts, or indeed legal certainty and accessibility. It also indicates a refraining by successive Governments from engaging in the kind of arbitrary executive action which jurisdiction stripping arguably is in an executive dominated, Westminster-style parliamentary system such as Ireland. Combined with the clarity provided by the courts in later decisions, this underlines the long-term effects of *Buckley v Attorney General* in strengthening the rule of law, by effectively ending jurisdiction stripping in Ireland, and hence the rule of law issues it raised.

Conclusion

This article began by defining 'jurisdiction stripping', in addition to 'the rule of law' in an Irish context. It then showed how jurisdiction stripping is distinct from ordinary regulation and indeed ouster of jurisdiction, and how it presented a real challenge to the rule of law in Ireland in the early decades of the State's history. This is evident from its compromising of judicial independence, access to courts, legal certainty and legal predictability, in addition to constituting arbitrary action by the executive.

The decision of *Buckley v Attorney General* can be said to have thrown down a gauntlet to the Oireachtas and the Government. This assertion of the judiciary's independence sent a very clear message to the other branches of government about what would be tolerated in regulating the proper jurisdiction of the courts. It is submitted that in doing so, *Buckley v Attorney General* not only set an important precedent for judicial independence (which it is most often praised for) but that the decision, and subsequent rulings, through development of jurisprudence on what constitutes infringement of the judicial power, significantly changed the behaviour of the Oireachtas by making it extremely cautious about encroaching on that power. In so doing, the decision greatly strengthened the rule of law in Ireland. That is indeed worth celebrating.

Case Note: RGRE Grafton Limited v Bewley's Café Grafton Street Limited & Bewley's Limited [2026] IESC 10

Louise Wright*

Introduction

This case was an appeal by the defendants against the decision of the Court of Appeal (Costello J, Pilkington J concurring; Whelan J dissenting).[1] Costello J, delivering the majority decision of the Court of Appeal, found in favour of the plaintiff (the Landlord), upholding McDonald J's finding in the High Court in respect of the Four Orders windows, namely that they were 'part and parcel' of Bewley's Café (the Café) on Grafton Street.[2] However, Costello J reversed the finding that the Swan Yard windows (which were said to form part of a double fenestration arrangement) were the defendants' tenant's fixtures. Instead, she held that they also formed 'part and parcel of the premises' and were the property of the Landlord.[3]

Bewley's Café Grafton Street Limited (the Tenant)[4] had been in continuous occupation of the Café since 1927 pursuant to a lease granted in 1928 for a term of twenty-one years (the 1928 Lease). A new lease was granted for a further term of one hundred years in 1949, which was subsequently replaced (following a sale and leaseback) by another lease granted in 1987 for a term of 35 years (the 1987 Lease).[5]

In December 2020, the Tenant entered into an agreement with Bewley's Limited (its parent company) (collectively the Respondents) for the transfer of ownership of the Four Orders and Swan Yard windows (the Windows) to the parent company. The parent

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[1] *RGRE Grafton Limited v Bewley's Café Grafton Street Limited & Anor* [2024] IECA 199.
[2] [2024] IECA 199 [140].
[3] ibid [141].
[4] Following a change of ownership in 1987, it was previously known as Bewley's Oriental Cafés Limited.
[5] See [2023] IEHC 25 [80]-[100].

company then licensed the Windows back to the Tenant, permitting their continued use in the Café. The Landlord challenged the validity of the transfer, instigating the High Court proceedings against the Respondents on the basis that it was the owner of the Windows.[6]

The Respondents were granted leave to appeal to the Supreme Court on the basis that the intended appeal raised significant and complex issues of law relating to fixtures.[7] As succinctly described by one commentator:

> this apparently simple distinction between fixture and chattel has, nonetheless, given rise to hundreds of years of confused and, at times, unhelpful case law, has vexed some of the greatest legal minds and, consequently, has failed to result in a clear or coherent legal 'test'.[8]

The Respondents submitted that the Court of Appeal's conclusion was incorrect and invited the Supreme Court to adopt the reasoning in Whelan J's dissenting judgment, in which she found that the Windows were tenant's fixtures because they were readily removable and were essentially decorative and ornamental.

History

Bewley Heritage

The legacy of the Bewley family, renowned for coffee and tea, is notable. Mr Joshua Bewley founded the Bewley enterprise, initially operating from premises comprising three houses on Sycamore Street, off Dame Street, beside the Olympia Theatre, where he sold tea, sugar, and small amounts of coffee. His son, Charles, was involved in the business in its early days before emigrating to New Zealand. Mr Ernest Bewley (Mr Bewley) later joined the business after leaving school in 1876. Mr Bewley developed the Bewley's brand by acquiring 19/20 Fleet Street in 1900, which he converted into a café, and then acquired 12 Westmoreland Street in 1916, converting the front into a

[6] ibid [1]-[3].
[7] See [2025] IESCDET 15.
[8] Chris Bevan, 'The law of fixtures and chattels: recalibration, rationalisation and reform' (2022) 42(2) Legal Studies 358, 358. This passage is also quoted in footnote 6 of *RGRE Grafton Limited* [2026] IESC 10.

shop and the back into a café. However, his trophy acquisition was the premises on 78-79 Grafton Street which he acquired in 1926. There, he commissioned the construction of the flagship Café, which was opened for business on 27 November 1927.[9] The Café is an architectural masterpiece which was designed by Millar & Symes Architects. The design was bespoke, with a distinct Art Deco style, featuring an iconic and rare Egyptian Revival-inspired mosaic façade and incorporating stained glass windows, six of which were designed and made by the renowned stained-glass artist and illustrator, Harry Clarke.

The windows

The Windows were commissioned by Mr Bewley in 1927 as part of the construction of the Café from Joshua Clarke & Sons (the firm of Harry Clarke's father) and were the responsibility of Harry Clarke. In 1927, the openings for the Windows were installed with clear glass and were then replaced with the Windows in March/April 1928. The Four Orders windows (cost £280.00), represent four of the orders of classical architecture. The Swan Yard windows (cost £180.00) derived their name from the fact that they were originally set into the window openings overlooking Swan Yard at the rear of the Café. The sashes in each of the Windows could open inwards and were designed with a 'hopper mechanism' to enable the sashes to open in tandem in order to ventilate the Café. The Windows were removed for safekeeping during World War II and were also removed to facilitate refurbishment works in 1998. The location and arrangement of the Swan Yard windows were the subject of significant dispute. The window opening for one of the said windows was blocked up between 1928 and 1986 with one of the Swan Yard windows placed behind the blocked opening. The remaining opening contained clear glass inside of which the remaining Swan Yard window was placed. The Swan Yard windows were relocated to a new internal wall within the Café in 1986, following the installation of a fire escape staircase in the Café.[10]

The judgment

The Supreme Court began by setting out as the starting point 'the general well known rule that whatever is fixed to the freehold of land becomes part of the freehold or

[9] Fiona Murdoch, *Victor Bewley's Memoirs* (2nd edn, Veritas Publications 2021) 53-55.
[10] [2023] IEHC 25 [4]-[11], [24].

inheritance'.[11] This rule is frequently expressed by referring to the Latin maxim *quicquid plantatur solo, solo cedit* and was outlined by Lord Cairns LC in *Bain v Brand*.[12]

The law traditionally provided a twofold classification between chattels and fixtures. The threefold classification recorded in Woodfall, *Landlord and Tenant* ((i) a chattel, (ii) a fixture, or (iii) part and parcel of the land (with categories (ii) and (iii) treated as forming part of the land)) was adopted by the House of Lords in *Elitestone Ltd v Morris*.[13] The reformulated classification was adopted by the parties in this case.

Collins J highlighted that it is a question of fact whether a chattel is attached to the land or premises, turning on two issues: (i) the mode of annexation and (ii) the purpose of annexation.[14] The purpose test is assessed objectively: *Ardfert Quarry Products v Moormac Developments Limited* (In Receivership).[15] As outlined by Collins J, although there is a substantial body of case law in relation to these tests, it can be difficult to determine what amounts to annexation in any given case.[16] Collins J referred to *Holland v Hodgson,* where Blackburn J set out the 'true rule' in relation to (i) the degree of annexation (an item attached to the land, even slightly, is presumed to be a fixture, while items resting by their own weight are generally treated as chattels) and (ii) the purpose of annexation (if an item is affixed to better enjoy the land or building, it is a fixture; if it is attached for a temporary purpose or for the better use of the item itself, it remains a chattel).[17] The 'true rule' places a strong emphasis on where the burden of proof lies. The onus of proof was a key factor in the resolution of this appeal, as discussed later.[18]

Returning to Lord Cairns' judgment in *Bain v Brand*, Collins J recognised the common law exception for items annexed to the property for trade purposes: they may be

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[11] *RGRE Grafton Limited* (n 1) [30] (Collins J, citing *Bain v Brand* (1876) 1 App Cas 762, 767).
[12] (1876) 1 App Cas 762.
[13] [1997] 1 WLR 687, 691 (Lord Berwick, citing Lewison et al, *Woodfall: Landlord and Tenant* (Vol 1, Sweet and Maxwell, 1994) [13.131]).
[14] *RGRE Grafton Limited* (n 1) [36].
[15] ibid [36] *Ardfert Quarry Products v Moormac Developments Limited (In Receivership)* [2013] IEHC 572 [24].
[16] ibid [37].
[17] *Holland v Hodgson* (1872) LR 7 CP 328, 335-336.
[18] *RGRE Grafton Limited* (n 1) [38].

severed and removed by a tenant during the tenancy.[19] As outlined in Halsbury and as stated by Collins J: '[the] right of removal is subject to the article or item being capable of being severed without causing irreparable damage to the demised premises'.[20]

Collins J referred to the statutory reformulation of the common law exception set out in section 17 of the Landlord and Tenant Law Amendment Act, Ireland 1860 (Deasy's Act)[21] which confers a statutory right to remove tenant fixtures where the requirements of the section are satisfied. One of the fundamental preconditions is evidence that the tenant was solely responsible, at its own expense for constructing and affixing the item to the premises. This featured 'as a threshold issue' in submissions made on behalf of the Tenant and is discussed later.[22]

A review of the authorities on windows and tenants' fixtures

Numerous window cases were opened to the Court[23] including: (i) *R v Hedges*[24] (the court concluded that the windows were not fixed into the freehold because the sashes were not fixed into the window frames); (ii) *Burt v Haslett*[25] (the court held that the plate-glass window installed by the tenant, which replaced the old shop window, belonged to the premises and was to be yielded up to the landlord); (iii) *Easton v Isted*[26] (opening a window is not an essential function of a window – nor is ventilation); (iv) *Climie v Wood*[27] (although the matter involved an engine and boiler, Willes J highlighted a distinction between chattels that retained their character as chattels after annexation (for example, a picture on a wall) and those that, once annexed, became an essential part of the land (for example '*doors or chattels*')); (v) *Boswell v Crucible Steel Company*[28] (although the case related to the scope of a repairing covenant in a commercial lease the Court of Appeal held that the landlord's fixtures did not include windows that formed part of the structure of the premises); and (vi) *Holiday Fellowship*

[19] ibid [39].
[20] ibid [40].
[21] ibid [41].
[22] ibid [42].
[23] ibid [45]-[51].
[24] (1779) 1 Leach 201.
[25] (1856) 18 C B 162.
[26] [1903] 1 Ch 405.
[27] (1868-69) LR 4 Exch 328.
[28] [1925] 1 KB 119.

Ltd v Hereford[29] (this case concerned the meaning of a repairing covenant in a lease and whether the 'main walls', which the tenant was excluded from repairing, included the windows; the High Court held in favour of the landlord, ie that the windows were not part of the 'main walls', and thus the tenant was obliged to repair them).

Collins J found that the cases most helpful in resolving the appeal were *Boswell v Crucible Steel* and *Climie v Wood,* which McDonald J had also relied upon as significant authorities in his High Court decision when determining that the Four Orders windows were part and parcel of the Café and not fixtures. These authorities were also considered important by Costello J in the Court of Appeal.[30]

Several trade fixtures cases were also referred to[31] including (i) *Climie v Wood;* (ii) *Re Ross and Boal Limited*[32] (the Court of Appeal affirmed the High Court's decision that the sewing machines had not passed as fixtures to the bank and were available to the liquidator); (iii) *Lombard and Ulster Banking Limited v Kennedy*[33] (Gibson J concluded that the automatic car wash machine was a 'tenant's trade fixture' and was removable by the tenant); and (iv) *In re Galway Concrete Ltd* (in liquidation)[34] (the plant and machinery installed on the land for the purposes of cement production was in the nature of a tenant's fixture). Collins J noted that *In re Galway Concrete Ltd* was of limited relevance, as there appeared to have been no dispute between the landowner and the company regarding the removal of the plant and machinery.[35]

A number of ornament cases were drawn to the Court's attention reflecting the emphasis the Tenant placed on the ornamental/artistic character of the Windows, including: (i) *In re De Falbe*[36] (seven tapestries of high value were acquired by the tenant and fixed to the walls of the drawing room; upon the tenant's death, the remainderman claimed that the tapestries were attached to the freehold; the Court of Appeal reversed the decision of the High Court and held that the tapestries formed

[29] [1959] 1 WLR 211.
[30] ibid [50], [53].
[31] *RGRE Grafton Limited* (n 1) [54]-[58].
[32] [1924] 1 IR 129
[33] [1974] NI 20.
[34] [1983] ILRM 402.
[35] *RGRE Grafton Limited* (n 1) [58].
[36] [1901] 1 Ch 523.

part of her personal estate; the remainderman's appeal to the House of Lords was unsuccessful; the tapestries were purely ornamental); and (ii) *Spyer v Phillipson*[37] (the tenant without the landlord's consent, installed valuable antique panelling that was readily removable without causing significant damage to the area demised; the function was entirely ornamental; the Court of Appeal concluded that the items could be removed subject to the executor making good any consequential damage to the premises).[38]

Collins J held that these ornament cases did not assist the Tenant's case, given that the Tenant did not assert that the Windows were purely ornamental; instead, it characterised them as trade fixtures that also served an ornamental purpose.[39] In addition, there was certainty as to payment for the items in those cases, which was not the position here.[40]

Elliot v Bishop[41] was cited by the Tenant as authority for the proposition that functional items which also serve an ornamental function can be removed by the Tenant. As a matter of principle, this was not disputed by the Landlord. Collins J noted that over time in the case law, there has been an observable trend towards relaxing the full purview of *quicquid plantatur solo, solo cedit* with increasing emphasis on the purpose, rather than the mode of annexation.[42]

In the cases referred to above, Collins J pointed out that there was a clear distinction between the landlords and tenants, which is not the position in this case. Mr Bewley occupied a dual role: he not only owned the Café but was also the chairman, director and shareholder of Bewley's Oriental Cafés Limited (as the Tenant was then called).[43] This significantly contributed to the complexities and uncertainties surrounding the resolution of the issues.[44] In addition, it was self-evident that the Windows 'were commissioned and designed, if not installed, before a lease was ever granted and were

[37] [1931] 2 Ch 183.
[38] *RGRE Grafton Limited* (n 1) [61]-[64].
[39] ibid [65], [110].
[40] ibid [67].
[41] (1854) 10 Ex 496.
[42] *RGRE Grafton Limited* (n 1) [66].
[43] ibid [70].
[44] ibid [2].

(or so at least the Landlord says) always intended to be a part of the demised premises.'[45] This, Collins J noted, was a further point of distinction between the present case and the cases referred to above.

Supreme Court Decision

The Supreme Court held that McDonald J in the High Court correctly found that the Four Orders windows were 'part and parcel' of the Café. However, the Court held that McDonald J was incorrect to conclude that the Swan Yard windows were the Tenant's fixtures and were removable pursuant to section 17 of Deasy's Act. Instead, the Court held that the Swan Yard windows were equally 'part and parcel' of the Café and, accordingly, the property of the Landlord. The Supreme Court thus affirmed the Order made by the Court of Appeal. The Supreme Court considered several factors in arriving at its decision. These are addressed in the paragraphs below.

Lack of evidence

The significant challenge for the High Court, the Court of Appeal and the Supreme Court in reaching their decisions arose from a lack of evidence and the scarcity of information, which was fragmented and uncertain. No witness could give first hand evidence of what occurred between 1927-1928 and 1928-1986, with the exception of Mr Ebbs (a witness for the Tenant who was contracted by it for the ongoing maintenance of the stained glass from 1972 -1988). In addition, the correspondence from the Architects' (Messrs Millar & Symes and McDonnell & Dixon) to Joshua Clarke & Sons was lost. Central to the case, was the weight placed on the board minute of a meeting of the Tenant (which was held to agree the rent payable under the 1928 Lease) on 9 March 1928 (Board Minute). The Board Minute was fragmented: the recorded minute of a meeting held on 30 June 1927 was not available, nor did the recorded letter from Mr Bewley to his fellow directors (which was read at the meeting and referred to 'expenditure on 78-79 Grafton Street, Dublin')[46] survive. The Board Minute is examined in further detail later.

[45] ibid [69].
[46] ibid [12]-[13].

Difficulties with the findings of fact

The High Court, the Court of Appeal and the Supreme Court acknowledged that the absence of evidence created difficulties in making findings of fact.[47] Collins J noted that this led to the High Court reaching conclusions that 'were largely a matter of inference'.[48] In deciding the case in the absence of the required evidence, Collins J placed particular emphasis on which party bore the burden of proof. Furthermore, in considering whether that party had discharged its burden, the court had to consider whether the available evidence was adequate to permit any reliable finding.

Collins J relied on an analysis by George Leggatt (Lord Leggatt)[49] who expressed the view that it is fair for the party seeking the court's determination to bear the responsibility of ensuring that there is sufficient evidence of adequate quality. He also maintained that '[d]ischarging the burden of proof requires evidence of sufficient adequacy to enable a reliable assessment of probability'.[50] In support of that analysis, Collins J referred to the decision of the House of Lords in *Rhesa Shipping Co SA v Edmunds (The Popi M)*,[51] a marine insurance case concerning a vessel's sudden loss at sea, which confirms that a claimant must prove causation on the balance of probabilities. Lord Brandon in that case rejected the 'Sherlock Holmes' approach of accepting the remaining theory (even though improbable) once other impossible theories have been eliminated. He confirmed that where competing theories are inherently improbable or unsupported by evidence, a court is not obliged to select the least improbable. In such circumstances, the proper (and sometimes only) course is to conclude that the claimant has failed to discharge the burden of proof. Furthermore, an assessment of whether a case has been proved on the balance of probabilities must be grounded in common sense.[52] Lord Brandon's approach was also cited with approval in *Quinn v Mid-Western Health Board*[53]and *James Elliot Construction Ltd v*

[47] [2026] IESC 10 [88]; [2024] IECA 199 [7] (Costello J); [2023] IEHC 25 [27], [37].
[48] *RGRE Grafton Limited* (n 1) [72].
[49] George Leggatt, 'Black marbles, Blue Buses and Yellow Submarines: an Essay on the Civil Standard and Burden of Proof' (2024) 140 Law Quarterly Review 570-594 at 592.
[50] *RGRE Grafton Limited* (n 1) [83].
[51] [1985] 1 WLR 948.
[52] ibid 955-956.
[53] [2005] IESC 19, [2005] 4 IR 1.

Irish Asphalt Ltd.[54] Collins J held that the burden of proof doctrine as set out in *The Popi M* was not limited to cases of causation.

Issues to be considered by the Supreme Court

Who paid for the windows?

There was uncertainty as to who paid for the Windows and on what basis. This was a significant issue in determining whether the Swan Yard windows were the Tenant's fixtures. A failure by the Tenant to demonstrate that it had paid for those windows would prevent it from satisfying section 17 of Deasy's Act, thereby rendering the Swan Yard windows the Landlord's property. The Tenant relied on the Board Minute as evidence that it had discharged the payment. McDonald J stated that it was 'unsafe' to rely on the Board Minute (acknowledging that it did not refer to the Windows) unless other circumstances supported that inference.[55] McDonald J nevertheless found that the Swan Yard windows were the Tenant's fixtures, and, as the said minute recorded payments for 'café fixtures and fittings' on behalf of the Tenant, he accepted on the balance of probabilities that the Board Minute could be relied upon as evidence of payment.[56]

However, Collins J stated that the key issue was whether the Board Minute was capable of constituting a sufficient basis for a finding on the balance of probabilities.[57] Applying the burden of proof doctrine outlined by Lord Leggatt and adopted by Lord Brandon in *The Popi M*, Collins J found that the Tenant had failed to discharge its burden of proof on its submission that the Board Minute evidenced payment for the Windows. The said minute did not refer to the Windows. Although it referred to costs for the account of Mr Bewley, it was not intended to be comprehensive. Moreover, the items recorded as being for the account of the Tenant referred to trade fixtures only. Collins J. stated that 'it was entirely speculative to attribute the source of the payment

[54] [2011] IEHC 269.
[55] [2023] IEHC 25 [79].
[56] ibid [189]-[193].
[57] *RGRE Grafton Limited* (n 1) [94].

to the Tenant and then infer from that that the payment was made on the Tenant's behalf.'[58]

Ownership of the Swan Yard windows

In addressing this issue, Collins J referred to McDonald J's approach in which he placed the burden of proof on the Landlord, stating:

> That the burden of proof was on the Landlord was crucial to the Judge's conclusion on this point: if the burden had been on the Tenant, the evidence might not have been sufficient to prove that the *Swan Yard* windows never formed part of the external skin of the Café building.[59]

Collins J referred to the 'true rule' articulated by Blackburn J in *Holland v Hodgson:* once it was shown that the Swan Yard windows were 'affixed to the land even slightly',[60] the onus was on the Tenant to establish that the said windows were not intended to function as windows but were merely 'mock windows', as outlined by McDonald J.[61] There were also inconsistencies in the evidence of the Tenant's witnesses as to what was in, and/or outside, the window openings (particularly the remaining Swan Yard opening) in 1986/1987. Notwithstanding McDonald J's criticism of the approach taken by Mr O'Connell (the Tenant's Architect) in relation to his evidence regarding the Four Orders windows, McDonald J appeared to prefer his evidence to that of Mr. Slattery (the Landlord's Architect).

There was no direct evidence as to how the Swan Yard windows (which formed part of the same commission as the Four Orders windows, and which were designed with a requirement for ventilation) were installed in 1928. Collins J found that McDonald J's suggestion that ventilation was unnecessary because it was outweighed by the need for security and the hoisting of flour bags to the first floor (which may have caused damage to the Swan Yard windows) was speculative and without any evidential basis. He noted that McDonald J asked the wrong question by 'asking whether there were possible reasons for the different treatment of the *Four Orders* and *Swan Yard*

[58] ibid [98].
[59] ibid [15].
[60] ibid [102].
[61] [2023] IEHC 25 [186]-[187].

windows' and was thereby drawn into speculation, while failing to place the required weight on the need for ventilation.[62] Collins J held that the theorisation of a double fenestration arrangement was 'highly implausible', lacked any rationale, and offered no reason why the design would have differed from the Four Orders windows.[63] He stated that '[a]ny such inference flies in the face of both the available evidence and common sense'.[64] He found that the Windows were commissioned and designed as windows and fulfilled the functions of windows.

The required weight was not given by McDonald J to the evidence provided by Dr Caron (who had never come across a double fenestration arrangement) or Ms Lucy Costigan (who confirmed that there was no evidence in the Harry Clarke archives of a double fenestration arrangement), both of whom gave evidence on behalf of the Landlord.[65]

As noted above, the circumstances in this case differ from the ornament cases, *In re De Galbe and Spyer v Phillipson*, in which the objects in dispute were purely ornamental and there was certainty as to payment. Furthermore, the evidence did not permit any inference that the Swan Yard windows 'were intended solely for the benefit of the café business.'[66]

Ownership of the Four Orders windows

Collins J upheld the finding in the High Court and the Court of Appeal that the Four Order windows formed part and parcel of the Café from their installation, admitting light, providing ventilation, and weathering the Café. Physical evidence from a 1998 video (taken when those windows were removed during works) showed that they were flush against the bullnose brick façade, with no space to accommodate the theorised double fenestration arrangement. As noted above, the High Court and the Court of Appeal placed particular emphasis on *Climie v Wood* and *Boswell v Crucible Steel*. Mr Ebbs submitted, on behalf of the Tenant, that there was no evidence of weathering on the windows. This was rejected.

[62] *RGRE Grafton Limited* (n 1) [20].
[63] ibid [104].
[64] ibid [107].
[65] ibid [103].
[66] ibid [110].

Conclusion

While the law on fixtures is relatively clear, its application in individual cases often raises difficulties. This case illustrates that the law and case law relating to fixtures is complex and multi-layered. However, the outcome provides key points that can be applied in similar disputes, including: (i) identifying whether the party bearing the burden of proof has discharged that burden, having regard to whether the available evidence was adequate to permit any reliable finding; (ii) applying the burden of proof doctrine, as outlined by Lord Brandon in *The Popi M* with reference to the earlier analysis of Lord Leggatt, so that evidence is adequate to enable a reliable assessment of probability, in the interests of reaching a just and fair decision and avoiding speculation or inference without a reliable basis; and (iii) applying common sense and logic when determining the issues.

Where there are inconsistencies in the evidence of witnesses called by an appellant/respondent, these should be thoroughly investigated, assessed and given the appropriate weight. When relying on case law, decisions should be correctly applied to the facts before the court, to avoid misconstruing their application. The court should also avoid framing questions in a manner that invites speculation.[67]

The Law Reform Commission's *Consultation Paper on General Law of Landlord and Tenant* (published in December 2003), and the Report on The Law of Landlord and Tenant (published in November 2007), recommended the enactment of new statutory provisions to replace both the common law rules and section 17 of Deasy's Act.[68] They would designate as 'tenant's property' any property whether affixed or not brought onto, erected on, or installed in on or under the premises by the tenant or the tenant's predecessor in title, and would give the tenant a 'right of removal' in respect of such property.[69] Although the heads of the Landlord and Tenant Law Reform Bill were published by the Minister for Justice in 2011,[70] to date, the proposed legislation has not been enacted and so the proposals have yet to be implemented. It is improbable

[67] See the comments above under the heading 'Ownership of the Swan Yard windows'.
[68] Law Reform Commission, *Consultation Paper on General Law of Landlord and Tenant* (LRC CP 28—2003) [4.19]; Law Reform Commission, *Report: The Law of Landlord and Tenant* (LRC 85—2007) 62.
[69] (LRC 85—2007) 63-66.
[70] JCW Wylie, *Wylie on Irish Landlord and Tenant Law* (4th edn, Bloomsbury 2022) [9.25].

that the said statutory provisions, if enacted, would have had any impact on the outcome of this case as the Windows did not fall within the category of a 'tenant's property'. It was held that the Windows formed part and parcel of the Café and were owned by the Landlord for reasons already outlined including the fact that the Windows were commissioned and paid for (on the balance of probabilities) by Mr Bewley. As recommended by Wylie, the status of fixtures and fittings should be recorded in the lease. This is of particular significance where unusual arrangements have been agreed between the landlord and the tenant. He stated '[a]ll too often this is not done and the parties find to their cost that the failure is a recipe for disputes.'[71]

[71] ibid [9.01].

Book Review: Diarmuid Griffin, Sentencing Serious Sex Offenders: How Judges Decide when Discretion Is Wide (Bristol University Press 2025)

Dr Niamh Maguire*

Sentencing is often described as a very complex area of the law and therefore not easily accessible for ordinary members of the public. Diarmuid Griffin's book on the sentencing of serious sex offences in Ireland adopts a clear, almost conversational tone, de-mystifying complicated legal concepts such as discretion and guideline judgments in a very accessible way that provides great clarity and insight for legal practitioners and ordinary members of the public alike.[1] The focus of the book is an in-depth analysis of sentencing outcomes in 108 serious sexual offence cases over the period of 1985 to 2022 by the Central Criminal Court and the Court of Appeal in Ireland.[2] The analysis examines the most serious sexual offences dealt with by the courts, including rape, rape under section 4, aggravated sexual assault and defilement of a child, where long custodial sentences were imposed ranging from 15 to 21 years and up to life imprisonment. The cases examined can be broken down into two further sub-categories: sexual offences committed against adult females (45 cases) and sexual offences committed against children (63 cases).[3]

Although the focus of the book appears relatively niche, Griffin's analysis provides valuable insights into how sentencing operates more generally in Ireland. It also provides an important opportunity for us to reflect on how the courts have responded to some of the most serious and damaging forms of sexual offending in Irish society. Before highlighting some of the more general insights that emerge from the analysis of the sentencing of these cases, this review will first briefly explore the book's

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[1] Diarmuid Griffin, *Sentencing Serious Sex Offenders: How Judges Decide when Discretion Is Wide* (Bristol University Press, 2025).
[2] ibid 2.
[3] ibid 10.

structure and the methodology underpinning the study it reports. For context, the review will then provide a summary of the main characteristics of sexual offence cases examined, as well as the general trends observed in terms of sentencing outcomes. The review then turns to a brief exploration of some of the major insights the book offers from this reader's perspective.

Outline of the structure of the book

Chapter One sets the scene by describing the main aims of the book and what Griffin hopes to achieve by deconstructing the sentencing outcomes of very serious sexual offences. The primary aim Griffin pursues is to 'broaden and deepen the discourse on sentencing'[4] by shining a light on the serious sexual offences that rarely make their way through the criminal justice system to be sentenced. These offences have some of the highest levels of non-disclosure and of attrition thus leading to a significant 'justice gap'.[5] Griffin hopes to shed light on how judges identify the most serious and aggravated versions of these offences and thus provide society with an opportunity to reflect on the cultural significance of the 'hierarchy of harms in sexual offending'.[6] Chapter One then provides a brief outline of the prominent features of the Irish sentencing system followed by an overview of the types of serious sexual offence cases the study examined, as well as context for some of the key sentencing patterns. In Chapter Two, Griffin takes us through the mechanics of how judges approach the sentencing decision, the evolution of the superior courts' approach to the issuing of guideline judgments and a brief overview of the international sentencing guidelines movement. The chapter also deciphers the last decade of sentencing guidance jurisprudence whereby sentencing bands have been identified for most major criminal offences. Griffin then closely examines the most relevant sentencing guideline judgments in Ireland in relation to the sentencing of serious sexual offences. The study's methodological approach is outlined in Chapter Three, which also deconstructs the selection of determinate and life sentences to understand why one is chosen over the other in relation to very serious sexual offence cases. Chapter Four is devoted to an in-depth exploration of the sentencing patterns and trends that emerged in relation

[4] ibid 2.
[5] ibid.
[6] ibid 3.

to 45 cases of serious sexual offences involving adult women. Chapter Five examines how the courts have sentenced the most serious crimes of sexual abuse against children. Griffin then turns his analysis to the judges in Chapter Six and provides an interesting exploration of the nature of the environment of sentencing – both micro and macro influences – including the composition of the Central Criminal Court which is tasked with sentencing these very difficult and extremely serious offences, the role of the guidance emerging from the appellate courts and the influence of judges' own practical or experiential wisdom. Concluding the book in Chapter Seven, Griffin draws together the key insights from the study, noting that an important driver of sentencing in these types of cases is the sheer multiplicity of offending they involve, and the role of wider social and cultural factors in determining the types of cases that make it to the sentencing stage at all.[7]

Methodology and sources of data

The methodology employed is both a strength of the study and a reflection of a weakness in our current sentencing system — the failure to collect accurate and examinable data that would allow ongoing analysis, reflection and accountability. Griffin diligently collected and rigorously compared as much available data as possible on the 108 cases examined from two key sources. Appeal court decisions provided the main source of data for 45 cases and details on the remaining cases were sourced from the media. The dearth of official sentencing data undoubtedly makes it almost impossible to examine any sentencing matters in evidenced informed ways and Griffin is to be commended for collecting so much information about so many truly egregious cases over the three-decade period. He constructed a 93-item scale[8] to harvest information on each case yet certain gaps in data were unavoidable. For example, information on the headline sentence imposed was only available for one third of the 108 cases examined. Pre-sentence reports were available for some cases but not others. Indeed, Griffin notes that pre-sentence reports (or pre-sanction reports, as they are also known as) first became available to the courts in 1999,[9] whereas courts have

[7] ibid 126-127.
[8] ibid 40
[9] ibid 24.

been availing of these reports as sentencing aides at least since the 1970s,[10] with risk assessments included in reports from 2005[11] onwards. Although risk is identified as an important factor for judges sentencing these cases, Griffin did not have access to these reports and had to rely on information on risk contained in sentencing remarks when available. Apart from the 45 cases where an appeal was lodged, Griffin's main source of information is drawn from the sentencing remarks of sentencing judges as recorded by journalists who attended the sentencing hearings. Analysis of these remarks allowed Griffin to identify which factors were associated with which sentencing outcomes. Indeed, he notes the enormous detail provided by court reporters on cases with excerpts not only from judicial remarks explaining their sentence and reasons for the sentence but also on victim impact statements. It reminds us of the important contribution made by court reporters without whom we would truly be in the dark about most of the decisions examined in this study.

Arguably access to the Digital Audio Recording ('DAR') for the whole data set would have provided Griffin with a much more complete and reliable set of data on the decisions in question. The Courts Service has a procedure for accessing DAR which involves making an application before the judge who heard the case in question (the court in which the case was decided) on a sworn affidavit[12]. The judge has discretion to decide which elements of the proceedings may be released and applicants must pay the transcription fee which is €200 per hour of audio recording. This seems an unnecessarily restrictive approach to apply especially when procedures have been simplified elsewhere (see the procedure in England and Wales which requires filling in a form and submission of a small fee).[13] DAR have been used by Judicial Researchers in the past when analysing a body of sentencing decisions and it would appear that they could be very usefully employed in the future to replicate studies like Griffin's in areas that are particularly understudied.

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[10] Niamh Maguire and Nicola Carr, *Individualising Justice: Pre-Sentence Reports in the Irish Criminal Justice System* (The Probation Service 6 July 2017).

[11] ibid.

[12] Courts Service, Access to court Recordings (DAR) and transcripts (*Courts Service*, 18 September 2025) <https://courts.ie/guides/access-to-court-recordings-and-transcripts> accessed 26 March 2026.

[13] HM Courts & Tribunals Service, 'Form: Order a transcript of court or tribunal proceedings: Form EX107' (*GOV.UK*, 1 June 2017) <www.gov.uk/government/publications/order-a-transcript-of-court-or-tribunal-proceedings-form-ex107> accessed 19 March 2026.

Characteristics of sexual offences cases and main sentencing trends

A full account of Griffin's findings is beyond the scope of this review, but a summary is provided for context. As noted earlier, of the 108 cases examined, 45 related to serious sexual offences committed against adult females, and the remaining 63 cases involved sexual offences committed against children.[14] In relation to the cases involving adult victims, all were female, mostly young adults, all perpetrators were male and most were strangers to the victims, and most offences occurred in public spaces. Griffin notes that many cases in the adult victims data set of his study are consistent with the 'real rape'[15] myths stereotype and the significance of this is explored in some detail in Chapter Four.[16] Two thirds of the 63 cases involving child victims were females with one third males and all perpetrators were male.[17] The perpetrator in almost half of these cases was identified as a father or step-father or trusted friend of the family.[18] Almost all of the 108 cases (94 per cent), involved multiple offences, and some exceeded 100 offences.[19] Half of the cases examined involved multiple victims of sexual violence and 63 per cent involved multiple incidents. In total, 230 victims were involved in the 108 cases examined.[20]

In terms of the main sentencing trends, custodial sentences ranging between 15 and 21 years were imposed in most cases examined. A small number of cases attracted 15-year sentences and 20 per cent of cases received life sentences.[21] Most sentences were imposed concurrently and judges imposed suspended sentences as part of the custodial sentence in just over half of the determinate sentences as a way of reducing risk on release.[22] Life sentences were reserved for exceptional cases where offenders were identified as a danger to the public.[23] Unsurprisingly, the main form of mitigation was the guilty plea although this did not always lead to a reduction in sentence. While

[14] Griffin (n 1) 10.
[15] Susan Leahy, 'Bad laws or bad attitudes? Assessing the impact of societal attitudes upon the conviction rate for rape in Ireland' (2014) 14(1) *Irish Journal of Applied Social Studies* 18.
[16] Griffin (n 1) 83.
[17] ibid 12.
[18] ibid 12.
[19] ibid 8.
[20] ibid 8.
[21] ibid 55.
[22] ibid 9.
[23] ibid 8.

there was an overlap in terms of the important aggravating factors between the two groups of cases, the level of violence and the multiplicity of offences, a previous record was more relevant in relation to sexual offences committed against adults than children because in the latter cases the offending behaviour typically took much longer to come to the attention of the authorities.[24] Sentences were appealed in 43 per cent of cases examined and 50 per cent of appeals resulted in sentence reductions.[25]

Consistency in sentencing

Griffin notes that there is considerable consistency in how these cases were sentenced by the Central Criminal Court over the period of the three decades examined. This is not surprising given the homogeneity of the cases and their extreme level of seriousness. Similarly, as he observes, judges sentencing these types of cases do so in a type of 'echo chamber'[26] created by a combination of *inter alia* sentencing guideline judgments and oversight by the appellate courts. Indeed, the practical impact of appellate oversight in these cases is illustrated by the finding that almost half of the cases sentenced were subject to review and of those, half resulted in sentence reductions. In these circumstances, a high level of consistency would be expected. Indeed, socio-legal research that has empirically examined the exercise of discretion in legal decision-making has concluded that legal discretion is usually exercised in a much more orderly, patterned and predictable way than might be expected.[27] The level of consistency in relation to the sentencing of cases of this gravity is not really as big a concern for the public as issues stemming from the lack of ordinal proportionality between different types of criminal offences. Public attention tends to be focused on the seemingly inexplicable variations in the sentencing of offences that at least from the layperson's perspective may appear to be very different in terms of seriousness. For example, much newspaper wordage has been devoted to public disquiet about why property offences get punished with relatively long prison sentences when

[24] ibid 13.
[25] ibid 15.
[26] ibid 121.
[27] Keith Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press 1992) 11, 38.

possession of child abuse material is met with relatively light sentences including suspended sentences.

The 20-year threshold for determinate sentences

Griffin's analysis of the sentencing outcomes of the most serious sexual offending over three decades leads him to identify that Irish courts have informally arrived at approximately 20 years as the current threshold of determinate sentences in Ireland, after which the appropriate sentence is then considered to be life imprisonment.[28] He speculates that the reason the threshold is set at 20 years is most likely related to the fact that life-sentenced prisoners typically serve approximately 19 years (up from 12 years between the period 1985-2000) in prison before being released.[29] One should not expect, therefore, to see determinate sentences of 25 years or 30 years imposed in Ireland because sentences of this length would make a nonsense of the sentence of life imprisonment.[30] Sentences of longer than 20 years – like the recent 30 year sentence for multiple rapes imposed in the Central Criminal Court – may be the exception that proves the rule.[31]

Nevertheless, the observation that the courts have identified a maximum determinate sentencing threshold is noteworthy as it allows us to reflect on what this means for sentencing and punishment more generally in Ireland. One point of reflection is the extent to which this threshold interacts with informal sentencing thresholds that have emerged in relation to other criminal offending. In other words, if a 20 year determinate prison sentence is the maximum sentence that judges feel should be imposed on the most serious level of sexual offending before a life imprisonment is appropriate, how does this compare with the maximum levels of punishment imposed on other offences (for example manslaughter, property offences or subversive

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[28] Griffin (n 1) 7.
[29] ibid 51.
[30] While this logic makes perfect sense, it also understates the qualitative differences between life imprisonment and determinate sentences: life sentenced prisoners are never fully free, even after release, and may be returned to prison at any point through the remainder of their natural life.
[31] 'DRCC welcomes 30-year jail term for rapes' (*The Law Society of Ireland Gazette*, 25 July 2024) <www.lawsociety.ie/gazette/top-stories/2024/july/drcc-welcomes-30-year-jail-term-for-rapes#:~:text=Trend,lengthy%20imprisonment%2C%E2%80%9D%20she%20added> accessed 19 March 2026.

offences) and how does it compare to informal maximum thresholds for similar offences in other countries? While these observations are not necessarily relevant to sentencing judges, they are highly relevant to penal policymakers, penologists and, one would assume to the Judicial Council, whose function it is to issue sentencing guidelines and to be concerned with ordinal proportionality. On the other hand, the consistently long custodial sentences imposed on the most serious sexual offences that come before our courts also serve to indicate that the criminal courts in Ireland regard serious sexual offending amongst the most serious forms of harm that can be committed against citizens, a point which undoubtedly reflects public opinion and should provide some level of reassurance for victim-survivors.

Global sentencing and multiple offences

A key finding from Griffin's analysis is that in the majority of the 108 cases sentenced, judges faced the task of sentencing multiple offences in one sentencing hearing. The approach adopted in most cases, in line with Irish sentencing law, is that judges imposed concurrent sentences. In some cases, this inevitably led to a bulk sentencing discount.[32] Acknowledging this, Griffin notes that a practice has emerged whereby judges look at the totality of offending and impose a sentence that adequately reflects the overall gravity of the offence. He notes that although it is 'not the preferred approach, it is possible for a judge to select a global headline sentence that reflects the offending as a whole before working backwards to determine the headline sentence for each individual offence.'[33] However, the law regarding the global sentencing approach has since been updated by the Supreme Court case of *DPP v Faulkner*,[34] in which Charleton J officially endorsed the global offence as the preferred approach to sentencing without any indication of the appropriate methodology to be applied in the totality of punishment calculation.[35] As Griffin rightly asserts, judges must always ensure that the final sentence is proportionate to the gravity of the offending having considered the totality of offending and adjusting the sentence accordingly. How judges should go about this in practice has not yet been fully worked

[32] Griffin (n 1) 45.
[33] ibid 46.
[34] [2024] IESC 16.
[35] Niamh Maguire, 'Sentencing Multiple Offences: How Much is Too Much?: *The People (DPP) v Faulkner*' (2025) 7 Irish Supreme Court Review 191.

out by the appellate courts and thus the legitimacy of the global sentencing approach is arguably undermined.

Protecting the public from risk

Risk of reoffending and the need to protect the public are identified by Griffin as important factors for judges when deciding between a very long determinate sentence or life imprisonment. Judges are aware, Griffin writes, of the greater level of scrutiny and supervision imposed on life-sentenced prisoners and that they are generally not released by the Parole Board until the level of risk has been reduced.[36] Yet, since the introduction of the Sex Offenders Act 2001, judges have been keeping the public safe post imprisonment by the imposition of post-sentence supervision requirements, sometimes for long periods of time, on serious sex offenders. Perhaps for this reason, Griffin notes that in the cases in which the risk of reoffending was identified as relatively high, there were few differences between the cases that judges sentenced to very long determinate sentences accompanied by post-sentence supervision requirements and those that they imposed a life sentence on.

Elsewhere,[37] Griffin highlights the incompatibility of sentencing aims such as incapacitation or prevention of future crime with the Constitution noting that these considerations (risk of reoffending, incapacitation) may only be considered once the overall sentence imposed complies with the proportionality principle. He notes that this incompatibility has formed the basis of a number of appeals against sentence severity and creates a difficult position for judges considering their genuine desire to protect the public against future harm that may be caused by known sex offenders and the need to comply with the constitutional ban on incapacitation and preventative imprisonment. In Ireland the life sentence has been identified as wholly punitive without any incapacitative element by the Supreme Court.[38] Griffin's book highlights that how we manage serious sexual offenders who continue to present risks, even after serving their 'punitive' determinate sentence, remains an unresolved problem in Ireland that was not in any way ameliorated by the introduction of enhanced statutory

[36] Griffin (n 1) 58.
[37] ibid 58.
[38] *Lynch and Whelan v Minister for Justice, Equality and Law Reform* [2010] IESC 34, [2012] 1 IR 1.

sentencing powers to impose longer sentences on persons who repeatedly commit sexual offences.

'Rape myths' and the sentencing of serious sexual offences in Ireland

Griffin compares the factors noted as important by judges in their sentencing of the 45 cases involving serious sexual offences committed against adult women with what is known from the literature about 'rape myths' – including the perception that 'real rapes' occur between strangers, in public spaces and involve significant violence.[39] He finds that there is some overlap between the description of factors highlighted by judges as important in their sentencing outcomes and those highlighted in the literature. He notes that this might account for why these types of cases make it all the way to sentence whereas the much higher rate of rapes which occur between parties known to each other have a much lower rate of successful prosecution and thus rarely make it through to the sentencing stage. These are useful and important insights that highlight the fact that 'rape myths' potentially impact the types of cases that are prosecuted in Ireland and account for the high levels of attrition of cases which do not align with these myths in our system.

Conclusion

Attempts to analyse any empirical aspect of sentencing in Ireland in 2026 face two main challenges. First, the sentencing data that is currently available has 'profound limitations'.[40] Second, we are unlikely to rectify these limitations any time soon as 'substantial data deficits appear at every level and progress linking systems from the different agencies is slow.'[41] This book provides valuable insights into how serious sexual offences were sentenced in Ireland over the last three decades. It will appeal to a wide and varied audience. The explanations of sentencing law and practice are lucid and provide a good introduction to how sentencing in Ireland works for non-specialists. From this perspective, the book will be useful for students, policymakers

[39] Griffin (n 1) 83.

[40] Jay Gormley, Tom O'Malley, Julian Roberts, Cassia Spohn and Cyrus Tata, *Assessing Approaches to Sentencing Data Collection and Analysis* (Judicial Council of Ireland, Dublin, 2022).

[41] Ian O'Donnell, 'Penal Policy in Ireland: The Malign Effect of Sustained Neglect', *Studies: An Irish Quarterly Review* 102, no. 407 (2013): 315, 319.

and non-legal sentencing experts. There is also plenty here for legal practitioners to draw upon. The in-depth analysis of sentencing factors provides a very insightful overview of this body of case law that goes beyond the applicable sentencing principles. This book provides a much needed and timely opportunity for victim-survivors, NGOs, academics, judges and policymakers to reflect on how serious sexual offences have been sentenced in Ireland over the last three decades and whether change is needed.