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Submissions

The Editorial Board of the Cork Online Law Review at University College Cork, Ireland, would like to invite submissions for the 20th edition, due to be launched in March 2021.

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

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ACKNOWLEDGEMENTS

On behalf of the Editorial Board of the 19th Edition, I would like to extend sincere gratitude to Dr Maria Cahill for her support of COLR throughout the year. Her advice and expertise have been essential to the success and production of the Law Review. I would also like to thank the members of the Faculty of the School of Law, who generously assisted us with the reviewing process.

I would like to thank the Dean of the School of Law, Professor Mark Poustie, for his help and support. I would also like to thank the Executive Committee of the UCC Law Society, who have been a constant source of support and advice over the past year.

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

I would like to congratulate the authors on the high-quality contributions made to the 19th Edition of COLR. Each of their articles will hopefully act as a vehicle for further discussion and development of the laws which govern our society. I would also like to thank those who contributed, and continue to contribute, to our Letters to the Editor platform.

Finally, as Editor-in-Chief, I would like to congratulate the Editorial Board for all the hard work and dedication shown throughout the year. In particular, I wish to thank our Deputy Editor, Evan Mc Garry. The quality of this publication is a testament to their vivacious attitude and work ethic which has never faltered, even in the challenging surrounding context of a global pandemic in which this edition has been published.

Is mise le meas,

Sinéad Walsh
Editor-in-Chief of the 19th Edition.

FOREWORD TO THE NINETEENTH EDITION

On behalf of the Dean, Professor Mark Poustie, and on behalf of the School of Law at University College Cork, I warmly congratulate Sinéad Walsh and the members of the Editorial Board who have prepared this 19th volume of the Cork Online Law Review, bringing it to publication amidst the very challenging circumstances of a global pandemic.

As I have affirmed many times in the past, the academic contribution that COLR makes is dependent on the intellectual ambition of the authors who submit their work to COLR. The authors featured in this collection have each chosen to wrestle with an important legal question of our times in a truly academic way and to engage constructively with the editorial process in order to raise the quality of their submission even further. For their evident commitment to academic quality, they are to be commended.

COLR's academic contribution is also dependent on the dedication and diligence of the members of the Editorial Board, whose industry, behind the scenes and away from the spotlight, deserves to be recognised and applauded. It is through their efforts that this important platform for legal scholarship is maintained and that rigorous academic standards are upheld, year after year.

For the sake of both the authors and the editors, I am very sorry that the launch of the 19th edition is to be accomplished virtually this year, thereby depriving the legal community of an important moment (in real life) to acknowledge and pay due respect to those who have brought this edition of COLR to fruition. However, the virtual launch of the 19th edition in these times is a particular testament to fortitude and resilience, as well as being, like every edition of COLR, a testament to how a small group of dedicated students and scholars can make a contribution to legal scholarship of which the Law School is rightly proud.

Professor Maria Cahill
26th March 2020

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THE ROLE OF MARKET EXCLUSIVITY IN INCENTIVISING RESEARCH AND DEVELOPMENT OF ORPHAN MEDICINAL PRODUCTS IN EUROPE: A CRITICAL ANALYSIS

Julie Mac Namara*

A INTRODUCTION

According to the European Commission, orphan diseases affect between 27 million and 36 million people in the European Union (EU).[1] Well-known examples include cystic fibrosis and Gaucher disease. In essence, orphan diseases are life-threatening or chronically debilitating diseases with very low prevalence.[2] As neatly summarised in recital 1 of the preamble to Regulation 141/2000 EC (the Regulation) on orphan medicinal products:

> Some conditions occur so infrequently that the cost of developing and bringing to the market a medicinal product to diagnose, prevent or treat the condition would not be recovered by the expected sales of the medicinal product; the pharmaceutical industry would be unwilling to develop the medicinal product under normal market conditions; these medical products are called 'orphan'.[3]

In such circumstances, the lack in returns on investment has the effect that there is little incentive to invest in the research and development of medicinal products treating orphan diseases under normal market conditions.[4] The importance of access to such medicines for patients suffering from orphan diseases may be regarded as axiomatic.

Prompted by such concerns, and in light of existing similar legislation in other developed economies, the pharmaceutical acquis expanded with the introduction of the Regulation on orphan medicinal products in 2000, entering into force in January of that year.[5] The raison d'être of the Regulation is explicitly economic in nature, as detailed by recital 1 and article 1,

* BCL International (UCC), LLM Candidate (University of Groningen). I am grateful to the staff at the Faculty of Law at the University of Groningen for their guidance. Further thanks to Rob van der Laan and to the Editorial Board for their helpful comments in respect of an earlier version of this article.

[1] European Commission, 'Rare Diseases' (*European Commission*) <https://ec.europa.eu/health/non_communicable_diseases/rare_diseases_en> accessed 3 March 2020.

[2] ibid.

[3] Council Regulation (EC) 141/2000 of 16 December 1999 on orphan medicinal products [2000] OJ L 18/1, recital 1.

[4] Laëtitia Bénard, Jacqueline Bore and Eveline Van Keymeulen, 'Rewarding Innovation: Pharmaceutical Incentives as a Crucial Instrument to Foster Public Health' (2018) 2 European Pharmaceutical Law Review 72, 78.

[5] ibid.

the latter of which provides that the purpose of the Regulation is 'to provide incentives for the research, development and placing on the market of designated orphan medicinal products.'[6]

While it has been lauded as a very successful piece of legislation by many commentators, such an assessment is tempered by a closer analysis of the intricacies of the market exclusivity regime under the Regulation, in light of its stated objective.[7]

Indeed, in spite of the fundamental nature of access to healthcare, this does not preclude the operation of economic considerations in relation to the orphan medicinal product market. As Nordberg states:

> a non profit activity is not synonym of non economic. Law and economics scholars have since long proved that any human activity can be studied by in economic theory; even non commercial activities can be submitted to a cost/benefit analysis and obey to the supply/demand paradigm.[8]

This article seeks to analyse the effectiveness of market exclusivity, a core component of the Regulation, as a mechanism for incentivising the research and development of orphan medicinal products in the EU. Section B begins with an introduction to the economic rationale underlying the Regulation, followed by a detailed examination of the market exclusivity regime in Section C. Section D delves into an analysis of market exclusivity as a key tool for incentivising investment under the Regulation, outlining its attributes and its shortcomings, followed by an in-depth exploration of potential means of addressing the issues described, in Section E. Section F describes the current position and whether it accommodates change, before providing a brief conclusion in Section G.

B ECONOMIC CONCERNS UNDERPINNING REGULATION 141/2000/EC

Firstly, it is necessary to outline the economic rationale that underlies the Regulation. Orphan diseases affect only a very small proportion of the population; for example, 'Hutchinson–Gilford progeria syndrome' is an orphan disease with a frequency of 1 in 4 to 8 million,

[6] The Regulation (n 3) recital 1, article 1.
[7] Laëtitia Bénard, Jacqueline Bore and Eveline Van Keymeulen, 'Has the Orphan Regulation Met its Aims?' (2018) 2(4) European Pharmaceutical Law Review 179, 192.
[8] Ana Nordberg, 'Economic Justification of Patents and Exceptions to Patentability' (2012) 3 Nordic Intellectual Property Law Review 316, 326.

according to Eurordis.[9] A parallel consideration is the cost of bringing a pharmaceutical product to market.[10] Therefore, the sphere of research and development of medicines treating orphan diseases is not commercially interesting, and fails to attract investment.[11] In the absence of intervention, patients suffering from orphan diseases would be, in effect, deprived of access to treatment.[12] Naturally, the fundamental nature of such issues adds much weight to the objective pursued by the Regulation.

The term 'orphan disease' itself is a reference to a defining characteristic of such ailments, as orphan diseases have historically eluded categorisation within a parent category of diseases. However, there is no catholic epidemiological criterion employed to define an orphan disease; this varies with jurisdiction. Regarding prevalence, in the EU an orphan disease must not affect more than five in 10,000 people; in Japan, such illnesses are defined as affecting not more than 50,000 Japanese patients.[13] In the United States (US), the threshold is set at not more than 200,000 Americans.[14]

The key instrument adopted in the EU to address this market failure is the Regulation on orphan medicinal products. Market exclusivity is the key tool for incentivisation introduced by the Regulation as noted by Garcia.[15]

Those tasked with drafting the Regulation on orphan medicinal products had the benefit of fifteen years of experience of the US regime, and the former echoes the latter in many respects.[16] The Orphan Drug Act 1983 is the key piece of legislation establishing the framework for the regulation of orphan medicinal products in the US.[17]

C MARKET EXCLUSIVITY

I Contextualising Market Exclusivity for Orphan Medicinal Products

A brief overview of the broader regulatory framework governing pharmaceutical products contextualises the background against which market exclusivity operates. It is helpful to

[9] Paloma Tejada, 'Global Campaign to Find All Children With Progeria' (*Eurordis Rare Diseases Europe*, 6 August 2013) <https://www.eurordis.org/content/global-campaign-find-all-children-progeria> accessed 3 March 2020.
[10] Bénard, Bore and Van Keymeulen, 'Has the Orphan Regulation Met its Aims?' (n 7) 181.
[11] The Regulation (n 3).
[12] Bénard, Bore and Van Keymeulen, 'Has the Orphan Regulation Met its Aims?' (n 7) 179.
[13] The Regulation (n 3) article 3; Pharmaceutical Affairs Law (Law No 145, 1960) (Japan), article 77-2.
[14] Orphan Drug Act, Public Law No 97-414, 96 Stat 2049 (1983) (Orphan Drug Act 1983 (US)).
[15] Anton Leis Garcia, 'Is the Copy Better than the Original? The Regulation of Orphan Drugs: A US-EU Comparative Perspective' (Master Thesis, Harvard University 2004) 8.
[16] Bénard, Bore and Van Keymeulen, 'Has the Orphan Regulation Met its Aims?' (n 7) 182.
[17] Orphan Drug Act 1983 (US).

consider market exclusivity as a further layer of protection afforded to orphan medicinal products, in addition to the wider protection from which they benefit by virtue of their status as medicinal products more generally. There is a significant degree of protection afforded to pharmaceutical products through the application of many intellectual property rights in this sphere, such as patents or data exclusivity, for example.[18]

Market exclusivity is widely regarded as the core component of the regime set out under the Regulation.[19] While market exclusivity is not an intellectual property right per se, in the context of the orphan medicinal product market, the function of the former mirrors that of the latter, insofar as it has an exclusive effect. Indeed, Deboyser, the Head of Pharmaceuticals and Cosmetics at Directorate General III of the EU Commission, has likened the orphan 'exclusivity bargain' to 'a new type of intellectual property right.'[20]

As evidenced in recital 1, the focal point of the regulation of orphan medicines is the antagonistic relationship between attracting investment and incentivising innovation in the pharmaceutical sector.[21] As market exclusivity is only one of a range of protections afforded to orphan medicinal products, its effect, combined with other intellectual property rights, results in a very high degree of protection for a particular pharmaceutical product, in order to incentivise investment.[22] When a firm secures a patent for a medicinal product, the exercise of this intellectual property right results in the exclusion of others, effectively creating barriers to entering the market.[23] As noted by Drahos, '[a]s the range and frequency of these acts increase, the intellectual commons ends up being underutilised,' which he describes as 'the tragedy of the intellectual commons,' also recognised as a tragedy of the anti-commons. [24] This concern is especially valid in respect of the market for orphan medicinal products, considering that these products benefit from such high protection. While this issue is one which is not unique to orphan medicinal products, and affects the pharmaceutical industry more broadly, it warrants mention nonetheless as a valid consideration. There is an appreciable body of support on either

[18] For example, a patent may be secured over a pharmaceutical product; See World Trade Organisation, 'Agreement on Trade-Related Aspects of Intellectual Property Rights' (15 April 1994) <https://www.wto.org/english/docs_e/legal_e/27-trips.pdf> accessed 3 March 2020; Data Exclusivity may be granted under Council Regulation (EC) 726/2004 of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency [2004] OJ L 136/1.
[19] Kerstin Westermark, 'European Regulation on Orphan Medicinal Products: 10 Years of Experience and Future Perspectives' (2011) 10 Nature Review Drug Discovery 341, 343.
[20] Bénard, Bore and Van Keymeulen, 'Has the Orphan Regulation Met its Aims?' (n 7) 185.
[21] The Regulation (n 3).
[22] Nordberg (n 8) 327.
[23] Peter Drahos, 'The Regulation of Public Goods' (2004) 7(2) Journal of International Economic Law 321.
[24] ibid 326.

side of the debate of whether a narrower or broader scope is more favourable in respect of the application of intellectual property rights in the pharmaceutical sphere, as exhibited by Nordberg.[25]

II The Market Exclusivity Regime under Regulation 141/2000/EC

Thus, it is against this background of tension between incentivising research and securing investment that market exclusivity must be viewed.

Article 3 of the Regulation sets out the three criteria that must be satisfied in order to secure designation as an orphan medicinal product for the purposes of the Regulation.[26] Firstly, the medicinal product must be intended for the treatment of a disease that is life-threatening or chronically debilitating.[27] The second criterion is that the disease must affect no more than 5 in 10,000 persons or it must be unlikely that marketing the medicine would generate sufficient returns to justify the investment needed for its development.[28] Lastly, there must be no satisfactory method of diagnosis, prevention or treatment for the disease that has already been authorised.[29]

Under article 8(1), upon designation as an orphan medicinal product, the product shall benefit from market exclusivity for a period of ten years.[30] During this period:

> The Community and the Member States shall not … accept another application for a marketing authorisation, or grant a marketing authorisation or accept an application to extend an existing marketing authorisation, for the same therapeutic indication, in respect of a similar medicinal product.[31]

Under article 8(2), this period may be reduced to 6 years where the criteria under article 3 are no longer met, inter alia where it is shown that the product is sufficiently profitable not to justify maintenance of market exclusivity.[32] As Garcia observes, this potential to reduce the

[25] Nordberg (n 8) 328.
[26] The Regulation (n 3) article 3.
[27] ibid.
[28] ibid.
[29] ibid.
[30] ibid article 8(1).
[31] ibid.
[32] ibid article 8(2).

period of market exclusivity may offset the benefits enjoyed by developers of orphan medicinal products upon securing market exclusivity for a period of ten years.[33]

Article 8(3) allows for derogation from article 8(1) in certain circumstances.[34] Marketing authorisation may be granted for the same therapeutic indication to a similar medicinal product where the holder of the marketing authorisation for the original orphan medicinal product gives consent to the second applicant. This may occur when the marketing authorisation holder is unable to supply sufficient quantities of the medicinal product, or where the application for marketing authorisation for the second medicinal product establishes that the second medicinal product is safer, more effective or otherwise clinically superior.[35]

While market exclusivity has been hailed as the 'North Star in the constellation of incentives' provided under the Regulation, it is important to appreciate that there are additional incentives from which sponsors of designated orphan medicines are eligible to benefit.[36] These incentives include protocol assistance with the development of the medicine, access to a centralised procedure and incentives in Member States.[37] However, as market exclusivity is widely regarded as the core element of the Regulation, the other incentives are somewhat peripheral to the present discussion and their mention is included only for the purposes of ensuring a comprehensive approach.[38] A more rigorous analysis of these would not lend itself to brevity nor should it properly form the focus of this discussion.

D ANALYSING REGULATION 141/2000/EC

I Market Exclusivity as an Effective Incentive

There are several elements of the Regulation that warrant mention on the basis of the effective manner in which they handle issues at the heart of the regulation of orphan medicinal products. Before delving into the aspects of the Regulation that have been the subject of criticism, it is necessary to explore the praiseworthy aspects of the Regulation.

The Regulation has been the subject of much praise on the basis of the increase in orphan medicinal product designations in Europe since it entered into force in January 2000.[39] It has

[33] Garcia (n 15) 16.
[34] The Regulation (n 3) article 8(3).
[35] ibid.
[36] Garcia (n 15) 8.
[37] The Regulation (n 3) article 6; Regulation (EC) 726/2004 (n 18); The Regulation (n 3) article 9.
[38] Garcia (n 15) 8.
[39] Bénard, Bore and Van Keymeulen, 'Rewarding Innovation' (n 4) 78.

been described by the Committee for Orphan Medicinal Products and the European Medicines Agency Scientific Secretariat as having 'surpassed expectations' in terms of improving health outcomes and transforming the lives of patients in the EU.[40] As outlined in a 2019 Briefing Document Reviewing Orphan Medicinal Products in the European Union, while there were eight orphan medicinal products on the market in 2000, between the date of the introduction of the legislation and 2018, there have been approved some 2,121 orphan medicinal product designations.[41] The European Medicines Agency has relied on this increase in substantiating its assertion that the Regulation has been largely successful in achieving its objective.[42]

In addition to the increased number of designations that have followed the introduction of the legislation, of further note is the tactful inclusion of provisions in response to the issues faced by the US regime. As noted by Garcia, the potential for reduction of the period of market exclusivity where the orphan medicinal product becomes profitable, under article 8(2), is praiseworthy for its avoidance of the issues to which the US regime is susceptible, by virtue of its failure to offer any such opportunity to reduce the period where profitability occurs.[43] This possibility for reducing the duration of market exclusivity illustrates the value of the insight gained from the US experience, which informed the drafting process of the EU Regulation.[44]

It is of interest to note that, in respect of the two criteria which form the basis on which to apply for designation as an orphan medicinal product under article 3, namely the prevalence criterion or the economic criterion, the former has been heavily favoured over the economic criterion by developers of orphan medicines.[45] As Bénard and others observe, this could be reflective of fear on the part of medicine developers that the market exclusivity period may be reduced, in accordance with article 8(2) in the event that the chosen criterion is no longer fulfilled after five years.[46] The Commission Notices on article 8(2) published in 2008 and 2016 offer guidance that is somewhat nebulous, and Bénard and others suggest that this may be a reason for reluctance on the part of the industry to engage with the economic criterion.[47] Note that the

[40] Westermark (n 19) 349.
[41] Medicines Law and Policy, 'Orphan Medicinal Products in the EU: Briefing Document' (*Medicines Law and Policy*, June 2019) 14 <https://medicineslawandpolicy.org/wp-content/uploads/2019/06/European-Union-Review-of-Pharma-Incentives-Orphan-Medicinal-Products.pdf> accessed 3 March 2020.
[42] 'Emainfo,' 'Medicines for Rare Diseases' (16 May 2012) <https://www.youtube.com/watch?time_continue=217&v=z-5UTc0OlHQ&feature=emb_logo> accessed 7 March 2020.
[43] Garcia (n 15) 15.
[44] Bénard, Bore and Van Keymeulen, 'Has the Orphan Regulation Met its Aims?' (n 7) 182.
[45] ibid 180.
[46] ibid 184.
[47] European Commission, 'Guideline on aspects of the application of article 8(1) and (3) of Regulation (EC) No 141/2000: Assessing similarity of medicinal products versus authorised orphan medicinal products benefiting

reassessment of orphan designation after five years is equally applicable to designations secured on the basis of the prevalence. However, the prevalence of a disease is unlikely to change over time, and is perhaps viewed as a more stable option from the perspective of applicants for orphan medicinal product designation.[48] This calls into question the value or contribution of the economic criterion under article 3 of the Regulation. Further engagement with the intricacies of article 8(2) is detailed below.

II Issues Presented by Market Exclusivity

Firstly, it is essential to adopt a critical approach in evaluating the effectiveness of the Regulation. For instance, there may be other factors that have had the effect of increasing the number of orphan medicinal product designations in the EU since the entry into force of the Regulation. One such example may be the evolution of categorisation of diseases within the medical sphere. Bénard and others state that:

> Diseases, particularly cancers, that had once been regarded as homogeneous and organ specific are now being shown at the cellular level to be constellations of different diseases that respond to different treatments' and that '[i]ncreasing numbers of such conditions now qualify for orphan designation.[49]

While there has been a clear increase in the number of orphan medicines available in the European Union since the introduction of the Regulation, it is important to weigh this against the further observation of Bénard and others that '[a]ttributing changes in the behaviour of investors, researchers and pharmaceutical companies to a single legislative act such as the Orphan Regulation is challenging.'[50]

Indeed, a rigorous analysis of the effects of the Regulation reveal some issues that may detract from its perceived success on the basis of its objective. There are several issues posed by the market exclusivity regime that warrant further attention.

III Monopolistic behaviour and Excessive Pricing

from market exclusivity and applying derogations from that market exclusivity' (Communication) COM (2008) 4077 final; European Commission, 'Commission notice on the application of Articles 3, 5 and 7 of Regulation (EC) No 141/2000 on orphan medicinal products' (Notice) COM (2016) 424/03; Bénard, Bore and Van Keymeulen, 'Has the Orphan Regulation Met its Aims?' (n 7) 184.

[48] Bénard, Bore and Van Keymeulen (n 7).

[49] ibid 180.

[50] ibid.

The effect of affording orphan medicinal products such a high degree of protection and preventing the entry of competitors may be to afford a monopolistic position to the developer of the medicinal product in question, with consequent potential for the setting of unprecedentedly high prices.[51] Much as this may be a key feature of market exclusivity, it raises several issues nonetheless. As a monopolist, a firm is a 'price maker' and is in a position to choose a price which maximises profits, whereas, a firm in a competitive market is a 'price taker'. An issue that has emerged, since the introduction of specific orphan drug legislation, is that a monopolist firm may set the price very high for orphan medicines.[52] This means that consumers will realise a lower welfare, as there is a difference between their willingness-to-pay and the price they will have to pay for the product in question.

The ten-year period of market exclusivity for orphan medicinal products acts as a barrier to entry to other firms. While it is possible to reduce this period to six years if, at the end of the fifth year, it is established that any of the criteria under article 3 are no longer met, there is nonetheless scope for exorbitant pricing.[53] This concern retains its validity in spite of the fact that the EU Commission has recommended systematic review of orphan medicinal products at the end of their fifth year of market exclusivity; as at this point the firm will have benefited from a monopolistic position for the first five years of market exclusivity anyhow.[54]

The potential for exorbitant pricing in respect of orphan medicines is perhaps the most controversial issue associated with market exclusivity for orphan medicinal products. Andonova describes one such example of perceived excessive pricing, with an Irish flavour.[55] She describes the heated interactions between Vertex Pharmaceuticals and Ireland's National Centre for Pharmacoeconomics, concerning the medicinal product Orkambi, which is used for the treatment of the underlying cause of cystic fibrosis for patients with two copies of the F508del mutation. As Andonova notes, the discourse was centred on the pricing of the Orkambi orphan medicinal product, which was estimated to cost €159,000 per patient per year, leading to a potential allocation of €400 million from the healthcare budget to tackling cystic fibrosis alone.[56] In light of concerns around pricing, paired with evidence which suggested that the Orkambi medicinal product was an efficient means of treatment for only 25% of the patients

[51] Medicines Law and Policy (n 41) 22.
[52] Medicines Law and Policy (n 41) 22.
[53] The Regulation (n 3) article 8(2).
[54] COM (2008) 4077 final (n 47).
[55] Angelina Andonova, 'Regulation 141/2000-The Bitter Pill for Consumers' Welfare and Competition in the Field of Orphan Medicinal Products' (Master Thesis, University of Amsterdam 2017) 13.
[56] ibid.

using it, the Irish Centre for Pharmacoeconomics advised Ireland's Health Services not to reimburse the medicinal product Orkambi at the price submitted by Vertex Pharmaceuticals.[57] It would appear the ignominy of excessive pricing in respect of medicines for patients with illnesses such as cystic fibrosis, for which the average life-expectancy is mid-30s at present, does little to deter developers from engaging in such practices.[58]

IV Potential Competition Law Infringements

The nexus between competition law and the pharmaceutical industry is well established. Article 102 of the Treaty on the Functioning of the European Union (TFEU), prohibiting the abuse of a dominant position, is particularly relevant in relation to the market for orphan medicinal products in light of the monopolistic position afforded to developers of such products through market exclusivity.[59] Excessive pricing was recognised as a key concern in the afore-mentioned Medicine and Policy Briefing Document, sparking competition law concerns.[60]

In recent years there is increasing concern arising from the potential competition law infringements in this area, as noted by Roos and others.[61] As stated in an EvaluatePharma Report in 2017, orphan drugs are set to represent 21.4% of worldwide prescription sales by 2022, signalling significant growth predicted in this area.[62] At a time when the echoes of the *Lundbeck* case are still heard, any competition law issues in the orphan medicinal product would likely have considerable consequences and should be guarded against.[63]

As illustrated in the earlier reference to the interactions between the Irish Centre for Pharmacoeconomics and Vertex Pharmaceuticals, market exclusivity may produce situations where intervention by competition law appears to be desirable.[64]

However, it is not clear from the caselaw what constitutes 'abusive' behaviour. In light of the fact that 'abuse' within the meaning of article 102 lacks a clear definition, this presents some challenges in respect of any alleged excessive pricing on the part of developers of orphan medicines. As summarised by Bénard and others, in Case T 80/16, 'the General Court rejected

[57] ibid.
[58] ibid.
[59] TFEU, article 102.
[60] Medicines Law and Policy (n 41) 22.
[61] Jonathan C P Roos, Hanna I Hyry, and Timothy M Cox, 'Orphan Drug Pricing May Warrant A Competition Law Investigation' (2010) 341 BMJ 1084.
[62] EvaluatePharma, 'Orphan Drug Report 2017' (*Evaluate Group*, February 2017) <http://info.evaluategroup.com/rs/607-YGS-364/images/EPOD17.pdf> accessed 4 March 2020.
[63] Case T-472/13 *Lundbeck v Commission* [2016] OJ C402/27.
[64] Andonova (n 55).

submissions by the European Medicines Agency… that orphan status should not be conferred on different formulations of a medicinal product even where the second formulation enabled a neglected population of patients to benefit from treatment with it.'[65] Yet the Court did not find any justification grounding the submissions of the European Medicines Agency that such an interpretation of the Regulation would be 'abusive.'[66] Thus the circumstances in which behaviour in respect of market exclusivity for orphan medicinal products will be regarded as 'abusive' remains somewhat unclear.

V The 'Race' to Secure Designation as an Orphan Medicinal Product

A further issue highlighted in respect of the present system is whether it is in fact successful in incentivising the research and development of medicines that can truly be regarded as 'orphan medicines.'[67]

Where multiple firms carry out research on a particular orphan illness, the first to secure designation as an orphan drug effectively 'wins' the race, and will benefit from the market exclusivity that acts as a barrier to entry of the other firms.[68] As Bénard and others observe, 'the orphan reward is fragile as it only rewards the 'fastest to finish' with 10 years of market protection and leaves runner-up companies empty-handed despite significant R&D investments.'[69]

Nonetheless there have been several cases that have come before the European Court of Justice (ECJ), illustrating that the 'fight' over orphan medicine product designation is an issue in this jurisdiction also. One such case illustrating tensions between two firms is *Teva v EMA*, where Teva sought to assert that Novartis was effectively obtaining more than 10 years market exclusivity.[70] This illustrates the competition for the space occupied by an orphan medicine on the market.

VI Inequality Among Orphan Illnesses Based on Prevalence

A further interesting issue that emerges upon closer evaluation is the apparent variance, as regards the effects of the Regulation, depending on the prevalence of orphan diseases. As

[65] Case T-80/16 *Shire Pharmaceuticals Ireland v EMA* [2018] OJ C166/34; Bénard, Bore and Van Keymeulen, 'Rewarding Innovation' (n 4) 79.
[66] Bénard, Bore and Van Keymeulen, 'Rewarding Innovation' (n 4).
[67] ibid.
[68] Gary A Pulsinelli, 'The Orphan Drug Act: What's Right with It' (1999) 15(2) Santa Clara Computer High Technology Law Journal 299, 304.
[69] Bénard, Bore and Van Keymeulen, 'Rewarding Innovation' (n 4) 79.
[70] Case T-140/12 *Teva Pharma and Teva Pharmaceuticals Europe v EMA* [2015] OJ C81/16.

Gamba and others observe, orphan diseases with a higher prevalence have, in particular since the introduction of the Regulation, benefitted from a greater investment.[71] One must remain critical of any tendency to correlate a trend with the introduction of regulatory legislation in respect of orphan medicinal products. Nonetheless, the observations of Gamba and others are deserving of consideration.

Gamba and others conducted a study on how the impact of different types of incentives is affected by the prevalence of an orphan disease, focusing on the heterogenous impact of the legislation across different orphan diseases.[72] Based on the theoretical model they used, it was concluded that while both output-related incentives and input-related incentives have an unambiguously stronger effect on less rare diseases among orphan diseases meaning that the impact on the probability of having any investment is larger for less rare orphan diseases among orphan diseases. However, they found that the advantage of less rare diseases is greater when output-related incentives are in place.[73] In the case of the European legislation, Gamba and others observe that by relying almost exclusively on output-related incentives, this gap between the treatment of less rare and more rare orphan diseases may have been exacerbated.[74] This is supported by the conclusion arrived at by the Committee for Orphan Medicinal Products and the European Medicines Agency Scientific Secretariat that there is a higher frequency of orphan drug designations observed for lower prevalence diseases in the US than in the EU.[75]

The inequality in terms of the incentivising effect depending on the prevalence of the illness in question would indicate that the effects of the Regulation are perhaps less effective in respect of 'true orphans', instead favouring the more prevalent illnesses within the category of orphan illnesses. This issue is also closely related to that of the 'race' to secure orphan designation for a medicinal product, raising some concern as to whether these drugs ought to be afforded such a high degree of protection to begin with.

E ADDRESSING THE ISSUES IDENTIFIED

As neatly summarised by Andonova, '[t]here is no straightforward solution to the rather complicated situation arising from the application of Regulation 141/2000 and its

[71] Simona Gamba, Laura Magazzini and Paolo Pertile, 2019, 'R&D and market size: who benefits from orphan drug regulation?,' (June 2019) University of Verona, Department of Economics Working Paper <www.law.northwestern.edu/research-faculty/clbe/events/innovation/documents/gamba_magazzini_pertile.pdf> accessed 7 March 2020.
[72] ibid.
[73] ibid.
[74] ibid 4.
[75] Westermark (n 19) 342.

consequences for consumer welfare and competition in the sphere of orphan medicinal products.'[76] A review of the academic discourse on the theme of market exclusivity for orphan medicinal products yields a wealth of critical perspectives on market exclusivity, yet reveals a dearth of discussion as to how such issues may be addressed. Nonetheless, there emerge from the discourse several potential responses the issues resulting from market exclusivity.

Firstly, it is proposed to outline the various suggested approaches to resolve the above-mentioned issues associated with market exclusivity. This will incorporate an assessment of which aspects of these approaches are best facilitated by the current legal landscape governing orphan medicinal products, as outlined above. While each solution presented offers unique treatment of the issues associated with market exclusivity, any assessment as to the effectiveness of these solutions must remain cognisant of the feasibility of their introduction at EU level. As evidenced below, there are various obstacles to the potential implementation of any such suggested changes. For example, important actors in this sphere may not exhibit any appetite for change, or perhaps the introduction of change may be rendered infeasible by virtue of the limitations imposed on the EU under the TFEU. In all circumstances, the adoption of a pragmatic approach in evaluating the material is favourable.

I Shared Market Exclusivity

Though perhaps more commonly raised in respect of the US regime, it is interesting to consider the potential value of this thought-provoking alternative approach. Unsurprisingly, this concept has met with much resistance from the industry.[77] As Garcia notes, shared market exclusivity would allow greater scope for reward for sponsors who have developed orphan medicinal products in the same time frame.[78] Amongst other benefits, this would result in greater efficiency, which is of particular value in light of the small patient population. Further, in focusing on the advantages of an approach involving sharing between industry members, Garcia notes the success of joint ventures and other collaborative schemes within the industry as a means of minimising the risk of the investment.[79] Much as this introduces an interesting perspective into the academic debate, it is unlikely to appease the industry.

While shared market exclusivity may ameliorate the issues outlined above, in particular the issue of the 'race' to secure designation, the ECJ has on several occasions reaffirmed the value

[76] Andonova (n 55) 26.
[77] Garcia (n 15) 14.
[78] ibid.
[79] ibid.

of market exclusivity, and does not appear to exhibit any tendency towards a differing approach, having 'vigorously' defended the orphan exclusivity incentive.[80] Indeed, in *Teva v EMA*, the General Court emphasised the importance of benefitting from market exclusivity in relation to the aim of the Regulation where a sponsor has secured designation under the Regulation.[81] The Court further held that a decision not to grant market exclusivity in cases where a product has been given marketing approval would 'jeopardise the objective of the Regulation… and run counter to its spirit.'[82] Thus, it does not appear that the notion of shared exclusivity would be welcomed by the ECJ, taking into consideration the high degree of support it expresses in respect of the market exclusivity incentive for orphan medicinal products.

II Tax Related Incentives

While tax related incentives may contribute to handling each of the issues in question, it is worth noting that they may be particularly helpful in respect of the potential prevalence-based inequality amongst illnesses targeted, based on the considerations below.

Though it must be weighed cautiously, there is evidence to suggest that the regime under the Regulation may possibly result in inequality in respect of illnesses based on prevalence, as outlined above.[83] Ultimately Gamba and others conclude that '[i]f the reduction of inequality in the distribution of R&D efforts is an objective of European policy makers, then the weight of input-related incentives should be increased.'[84] This may entail the introduction of input-related incentives, such as tax credits, as per the US regime.[85] However, in the European context, several difficulties arise in this regard, hampering the ability of the EU to employ such an approach. Primarily, under the TFEU the EU has limited competence in respect of taxation matters of Member States, with the result that any such change will have to take place at a national level.[86] Thus, the European regime lacks these important tools employed under the US regime, owing to limitations on its competence under the TFEU. Equally, this precludes the

[80] Bénard, Bore and Van Keymeulen, 'Rewarding Innovation' (n 4) 79.
[81] Case C-138/15 *Teva Pharma and Teva Pharmaceuticals Europe v EMA* [2016] OJ C156/22; Bénard, Bore and Van Keymeulen, 'Has the Orphan Regulation Met its Aims?' (n 7) 189.
[82] Bénard, Bore and Van Keymeulen (n 7).
[83] Gamba, Magazzini and Pertile (n 71).
[84] ibid.
[85] ibid.
[86] Dario Paternoster, 'Factsheet on General Tax Policy' (*European Parliament Fact Sheets on the European Union*, May 2019) <http://www.europarl.europa.eu/factsheets/en/sheet/92/general-tax-policy> accessed 4 March 2020.

EU from adopting any measures such as a 'windfall profit' tax, as has been considered in respect of the US regime.[87]

Thus, it is evident that the nexus between the sovereignty of Member States and their tax systems presents an obstacle to resolving issues associated with market exclusivity at the level of the EU. Therefore, the role of individual Member States in respect of such matters is highlighted.

III Measures to Address the Issues at National Level

While a detailed analysis of measures employed at national level in respect of orphan medicinal products would be beyond the scope of this article, with its European focus, it is nonetheless helpful to provide a brief outline of the role of individual Member States. As concluded above, it appears that the role of individual Member States is somewhat more appreciable than may be understood from a superficial analysis of the regulatory framework in respect of orphan medicinal products, considering their regulation of taxes. It is helpful to highlight the extent to which the effectiveness of the regime is influenced by decisions at national level. For example, as noted by Drummond, the incentive effect of market exclusivity is rendered meaningless if the orphan medicinal product, once developed, is not reimbursed.[88] As earlier referenced, article 9 of the Regulation seeks to ensure that national incentives are made by Member States. Compassionate use schemes and early access programmes are two examples referenced by Andonova which are employed at national level in an effort to ensure greater access to treatment for patients suffering from orphan diseases.[89]

IV Targeting Excessive Pricing through Reform of Article 8 (2)

Amongst other recommendations set out in the 2019 Briefing Document issued by Medicines and Policy there is one suggestion of particular note that is deserving of attention. It is conceivable that this consideration would benefit from a more central position in the discourse than that which it is afforded at present, considering the greater exposure to debate it would receive. In essence, it the suggested change entails that 'a mechanism similar to the 'withdrawal clause' from the early drafts of the Regulation should be re-introduced to the present article

[87] Garcia (n 15) 15.
[88] Michael F Drummond, 'Challenges in the Economic Evaluation of Orphan Drugs' (2007) 14(2) Eurohealth 16, 17.
[89] Andonova (n 55) 28-29.

8(2).'[90] It is helpful to refer to the formulation of article 8(2) as originally presented in the European Commission's 1998 draft Proposal for the Regulation, which provided that:

> This [ten-year market exclusivity] period may however be reduced to six years if, at the end of the fifth year, a Member State can establish that the criteria laid down in Article 3 are no longer met in respect of the medicinal product concerned or that the price charged for the medicinal product concerned is such that it allows the earning of an unreasonable profit.[91]

In effect, this would have resulted in two independent grounds on which to withdraw the market exclusivity. The first of these would be in circumstances where the criteria under article 3 on which basis marketing authorisation had been obtained, or market exclusivity could be withdrawn where the high price charged for the medicinal product would result in an unreasonable profit being earned.[92] Interestingly, this formulation of article 8(2) remained unchanged in the 1999 Amended Proposal, but was not ultimately included in the Regulation.[93]

The recommendation to reintroduce this formulation of article 8(2) is a valuable point indeed, given that concerns around high prices for orphan medicinal products continue to dominate the discourse around market exclusivity.[94]

F POTENTIAL FOR CHANGE: THE CURRENT POSITION

Given that the Court of Justice of the European Union has exhibited little appetite for anything other than enforcement of the full rigours of the market exclusivity regime, as detailed above, and taking into consideration the limited ability of the EU to intervene in respect of taxation matters, there appears to be limited scope for change. While these factors represent obstacles, there may be greater scope for change at the level of individual Member States. Equally, due regard must be had for the Council and Commission's renewed efforts to tackle issues in relation to the regulation of orphan medicinal products in recent times, as demonstrated by decision C 269/31.[95] Thus, concerns around high pricing have not gone unnoticed, and while

[90] Medicines Law and Policy (n 41) 23.
[91] ibid 12.
[92] ibid.
[93] ibid.
[94] ibid.
[95] Council of the European Union, 'Council Conclusions on Strengthening the Balance in the Pharmaceutical Systems in the EU and its Member States' (*European Council*, 17 June 2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/06/17/epsco-conclusions-balance-pharmaceutical-system/> accessed 4 March 2020.

efforts to tackle the various issues associated with market exclusivity face several obstacles, a pragmatic approach to the current position is not inconceivable.

What is evident from several perspectives however is the desire for, and significance of, greater coordination or cooperation in relation to the various actors, as a means of achieving progression. This has the advantage that it avoids the issue of resistance from industry. Andonova suggests greater cooperation through participation in working groups, such as the Process on Corporate Responsibility in the Field of Pharmaceuticals, created by the Commission in 2010.[96] She proposes that the participation in such forums would be more effective if compulsory as opposed to merely voluntary, and notes the potential role of the Commission in coordinating the process under article 152 of the TFEU.[97] She further highlights the value of a 2013 decision by the Commission to establish an expert group to advise the EU Commission in respect the Union's tasks in relation to rare diseases, as well as to assist the transfer of information about policies and practices between Member States and other parties concerned. The further endorsement of such measures would be in line with observations made by the Committee for Orphan Medicinal Products and the European Medicines Agency Scientific Secretariat that organisations that provide support for patients with rare diseases seek a centralised system in relation to information on orphan medicinal products across the EU.[98]

In the 2019 Medicine and Policy Briefing Document, the key theme underlying the recommendations made in respect of the Regulation was to reduce 'the possibility for excessive or abusive exploitation of the incentives provided under Regulation 141/2000 by increasing the transparency of the orphan medicinal product regime and therefore being better able to match commercial reward with development risk and cost.'[99] In this connection, greater coordination would contribute to the achievement of transparency through exchange of material between various actors. Garcia has also highlighted the need for cooperation on an even broader level, stating that '[t]he pharmaceutical market has become more and more globalised, while the responses from the regulatory sphere remain basically state-based.'[100] Thus it would seem that regardless of the broader approach employed, coordination and cooperation are recognised as fundamental aspects in the evolution of the regulation of orphan medicinal products.

[96] Andonova (n 55) 26.
[97] ibid 27.
[98] Westermark (n 19) 345.
[99] Medicines Law and Policy (n 41) 23.
[100] Garcia (n 15) 22.

G CONCLUSION

In light of the foregoing considerations, it would appear that while Regulation 141/2000/EC has resulted in a greater number of orphan medicinal product designations, the impact of the incentives under the Regulation is Janus-faced.[101] The Regulation has been described as 'arguably one of the biggest success stories in terms of improving health outcomes and transforming the lives of patients in the EU.'[102] However, such an assertion is tempered by an appreciation of the issues that emerge upon closer analysis of the intricacies of the regulatory approach employed, in addition to the more obvious concerns around monopolistic behaviour. An evaluation of the potential solutions to these issues reveals that the limited competency of the EU to intervene in respect of taxation and pricing matters may serve to deprive it of an opportunity to modify its regulatory approach. Further, taking into consideration the significant predicted growth of the orphan drug market in the future, there is some question as to whether the high degree of protection associated with market exclusivity is warranted in this area, where already there have begun to emerge concerns surrounding potential competition law infringements.[103]

[101] Medicines Law and Policy (n 41) 22.
[102] Bénard, Bore and Van Keymeulen, 'Has the Orphan Regulation Met its Aims?' (n 7) 192.
[103] EvaluatePharma (n 62); Medicines Law and Policy (n 41) 22.

THE CASE FOR LEGAL INTERVENTIONISM – THE GUIDING LIGHT OF THE COURT OF JUSTICE IN THE EU RULE OF LAW CRISIS:

A STUDY OF THE APPROACHES OF THE COURT OF JUSTICE AND THE COMMISSION OF THE EUROPEAN UNION IN RESPONDING TO RULE OF LAW BACKSLIDING IN THE REPUBLIC OF POLAND

Kate Frisby*

A INTRODUCTION

The European Union is founded on the values laid down in Article 2 of the Treaty on European Union (TEU), amongst them respect for human dignity, democracy, equality, the rule of law and human rights.[1] The Court of Justice of the European Union ruled in its seminal judgment, *Associação Sindical dos Juízes Portugueses*, that these values are common to the constitutional traditions of the Member States in a society in which justice prevails.[2] Mader has also noted that these values form the constitutional identity of the European Union.[3] For many years, little attention was paid to the foundational values of the Union, as many presumed that compliance with these values was a given in most Member States as European integration steadily progressed to new levels. However, in recent years, we have witnessed the gradual erosion of respect for these foundational values, in particular democracy and the rule of law, and have discovered how much compliance with these values has been taken for granted in some Member States, as the rise of illiberal, populist and authoritarian political regimes across Europe becomes undeniable.[4] Respect for the rule of law is one of the preconditions for membership of the Union as laid down in Article 49 TEU and further specified by the

* Kate Frisby is currently an FE-1 Candidate with the Law Society of Ireland and will soon be taking up a position as a trainee at the European Parliament in Brussels. She graduated from University College Cork in 2018 with a First Class Honours Bachelors degree in Law and French and graduated from Leiden University with an LLM in European Law in 2019. Her main areas of interest are EU law and corporate law.

[1] Consolidated version of the Treaty on European Union [2012] OJ C326/01.

[2] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117, para 30.

[3] Oliver Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law' (2018) 11 Hague Journal on the Rule of Law 113, 118.

[4] For a review of the rise of the illiberal regime in Hungary see Bojan Bugaric, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge' The London School of Economics and Political Science Europe in Question Discussion Paper 79/2014 <http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper79.pdf> accessed 24 February 2020; for an overview of the political challenges facing Poland, see Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' (2018) Sydney Law School Research Paper 18/2018, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491> accessed 24 February 2020.

Copenhagen Criteria.[5] However, there seems to be little active supervision of rule of law compliance in the Member States once they have acceded to the Union and indeed, it has been contended that 'the Copenhagen criteria used in accession negotiations are largely insufficient to provide legal guidance on adherence to EU values'.[6] Mader contends that it is important that the Union not only enforce the Article 2 TEU values against offending Member States, but also that they actively supervise and encourage respect for the rule of law.[7]

At the outset, the concept of the rule of law should be explained, as much of the paper will focus on the ways in which it is being undermined by the Polish authorities and how the EU can respond to this situation. The rule of law within the EU legal order was traditionally a vague notion and these vague norms set out in Article 2 TEU lacked the legal implementation which would allow them to be fully justiciable principles which could be ruled upon by the Court.[8] Therefore, the question of rule of law enforcement was always going to be 'a hard nut to crack' due to the values' lack of specificity and absence of clear implementing principles which would make them fully justiciable.[9] However, in recent years the Court of Justice has taken steps to define and operationalise this value within the EU legal order so that the Commission can more easily enforce the rule of law against backsliding Member States. The Venice Commission lays out certain benchmarks of the rule of law, namely, legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination, access to justice and the right to a fair trial.[10] While there is no specific definition of the rule of law provided by the Court of Justice within the EU legal order, it came close to articulating a definition of the rule of law when it stated that the European Community is 'a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic

[5] Copenhagen European Council Meeting Conclusions 1993.
[6] Michael Blauberger and Roger Daniel Kelemen, 'Can Courts Rescue National Democracy? Judicial safeguards against democratic backsliding in the EU' (2017) 24(3) Journal of European Public Policy 321; see also, Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2004).
[7] Mader (n 3).
[8] Kim Lane Scheppele and Laurent Pech, 'Is the Rule of Law Too Vague a Notion?' (*Reconnect Blog*, 1 March 2018) <https://reconnect-europe.eu/featured/is-the-rule-of-law-too-vague-a-notion> accessed 24 February 2020; see also, Luke Dimitrios Spieker, 'From Moral Values to Legal Obligations: On how to activate the Union's common values in the EU rule of law crisis' (2018) Max Planck Institute for Comparative Public Law & International Law Research Paper 24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249021> accessed 25 February 2020.
[9] Bugaric (n 4) 6.
[10] European Commission for Democracy Through Law (Venice Commission), 'Rule of Law Checklist' (Study 711/2013, Council of Europe 2015).

constitutional character, the Treaty.'[11] We have recently seen this definition being expanded by the Court, as it has dictated the constituent elements of the rule of law such as the separation of powers,[12] the principle of effective judicial protection[13] and the effective application of EU law,[14] in order to create specific binding obligations for the Member States.

While it is noted that rule of law backsliding is currently taking place in other European countries, this paper wishes to focus on the Polish situation due to its rapid progression in recent years.[15] Indeed, it has been noted that 'the case of Poland has become the archetype of a Member State failing in its obligations to uphold the rule of law under Article 2 TEU'.[16] The Polish political landscape has changed massively since the double presidential and parliamentary victory of the Law and Justice Party (hereinafter PiS) in 2015. PiS has brought about many significant changes in how Polish political and legal life functions and European dismay has resulted from reforms made to the organisation of the Polish judiciary, which can be seen as a concerted government effort to weaken the independence of the judiciary, a constituent element of the rule of law, in order to undermine independent institutions and eliminate effective judicial review of governmental decisions by bringing the judiciary under political control.[17] In particular, the Polish government has issued legislation which lowered the retirement age for judges of the Supreme Court and the ordinary courts, resulting in the premature retirement of many of these judges, including the First President of the Supreme Court whose mandate was constitutionally guaranteed.[18] The Polish government has also made reforms threatening the independence of the National Council of the Judiciary (NCJ) which is responsible for the appointment and management of the Polish judiciary, and that body has recently established a new disciplinary chamber of the Supreme Court, which has created

[11] Case 294/83 *Les Verts v European Parliament* [1986] ECLI:EU:C:1986:166, para 23.
[12] Case C-477/16 PPU *Openbaar Ministerie v Ruslanas Kovalkovas* [2016] ECLI:EU:C:2016:861.
[13] Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] ECLI:EU:C:2017:236.
[14] Case C-441/17 R *Commission v Poland* [2018] ECLI:EU:C:2018:255.
[15] Daniel Sarmiento, 'Interim Revolutions: The CJEU Gives Its First Interim Measures Ruling on the Rule of Law in Poland' (*EU Law Analysis Blog*, 22 October 2018) <http://eulawanalysis.blogspot.com/2018/10/interim-revolutions-cjeu-gives-its.html> accessed 24 February 2020; for an analysis of the issues which have brought Poland under EU scrutiny see Commission, 'Reasoned Proposal in Accordance with Article 7(1) Treaty On European Union Regarding The Rule of Law in Poland' COM (2017) 835 final.
[16] Matthias Schmidt and Piotr Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis: How to make effective use of Article 258 TFEU' (2018) 55(4) Common Market Law Review 1061, 1061.
[17] For an account of the Polish judicial reforms, see Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Government Enabler' (2019) 11(1) Hague Journal on the Rule of Law 63.
[18] Law of 8 December 2017 on the Supreme Court (ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym), and Law of 12 July 2017 amending the Law on the Organisation of Ordinary Courts (Ustawa z dnia 12 lipca 2017 r. o zmianie ustawy — Prawo o ustroju sądów powszechnych).

considerable tension amongst the judiciary and has even lead to a preliminary ruling from the CJEU.

Much discussion has ensued as to how the European Union should respond to this undermining of the Article 2 values, in particular the rule of law. Some have argued that it is perhaps not appropriate for the Union to intervene in this matter, which could be characterised as an issue of internal Member State competence where the Union has no place to interfere.[19] Some argue that the rule of law is too vague a notion to be effectively enforced on the EU level in the first place.[20] There is also significant divergence as to whether political or legal enforcement of Article 2 TEU is the most appropriate path to follow.[21] However, this paper seeks to highlight how such developments within the internal institutional organisation of certain Member States threaten to undermine the unity and authority of the EU legal order. Compliance with EU law is the cornerstone of the European integration project.[22] Member States voluntarily agree to apply EU law within their national territories and a system of mutual trust operates between them, particularly their judiciaries, in readily assuming that they have high standards of protection for the rights of their nationals.[23] However, when certain Member States infringe the independence of their judiciaries, they remove the guarantee of effective judicial protection and with it, threaten the uniform application of EU law. Such a situation exposes threats to the foundations of the EU legal order and therefore, this paper contends that it is crucial for the Union to intervene and seeks to demonstrate that, in light of the recent jurisprudence of the Court of Justice, legal enforcement through the Article 258 Treaty on the Functioning of the European Union[24] (TFEU) infringement procedure is one of the most effective ways to achieve this.

[19] Maia de la Baume and Aleksandra Wrobel, 'Frans Timmermans: Poland's Rule of Law Paper "Not the Answer"' (Politico, 20 March 2018) <https://www.politico.eu/article/frans-timmermans-mateusz-morawiecki-poland-rule-of-law-paper-not-the-answer/> accessed 24 February 2020; See also Jan-Werner Müller, 'Should the EU protect Democracy and the Rule of Law inside Member States?' (2015) 21(2) European Law Journal 141.

[20] Scheppele and Pech (n 8).

[21] Mader (n 3); See also Femke Gremmelprez, 'The Legal vs. Political Route to Rule of Law Enforcement' (*Verfassungsblog*, 29 May 2019) <https://verfassungsblog.de/the-legal-vs-political-route-to-rule-of-law-enforcement/> accessed 24 February 2020.

[22] The Court stated that 'The effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded.' Case C-441/17 *Commission v Poland* [2018] ECLI:EU:C:2018:255**,** para 102.

[23] The Court emphasised the importance of the principles of mutual trust and mutual recognition in the EU legal order in Case C-216/18 PPU *Minister for Justice v LM* [2018] ECLI:EU:C:2018:586, para 36.

[24] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

In the context of the EU rule of law crisis, the European Commission has a specific legal mandate to enforce Member State compliance with EU law and values, and as such to protect the rule of law in its role as 'Guardian of the Treaties'.[25] Many believe that the enforcement of EU values is a political issue which should be tackled by the Commission, the Council of Ministers and the European Council, and in which the Court should play a limited role.[26] However, it can be observed that the political institutions have not been responding effectively to this crisis and their efforts of political dialogue with Poland under the Rule of Law Framework and the activation of the Article 7 TEU procedure have not produced effective results.[27] Therefore, this paper seeks to propose that a better approach would be to afford a greater role to the CJEU in complementing and contributing to the Commission's efforts to preserve the rule of law in Poland through legal means. An analysis of the recent case law shows that the Court has indicated its willingness to respond to the rule of law crisis and has provided the Commission with jurisprudence which could assist it in bringing more specific, rule of law targeted Article 258 TFEU infringement proceedings. While it is noted that the Court cannot solve this problem single-handedly,[28] it is recommended that the Court take on a more active role in operationalising the rule of law value in Article 2 TEU and in guiding the Commission in responding to this crisis.

The first section of this paper will highlight the political role which the Commission and other EU institutions have played in responding to the rule of law crisis, namely through the Article 7 TEU procedure and the Rule of Law Framework, and examine why their efforts have not produced many positive results. The second section shall examine the recent case law of the CJEU and in doing so shall demonstrate how such jurisprudence has been carefully crafted by

[25] Consolidated version of the Treaty on European Union [2012] OJ C326/01, article 17.

[26] Jacob van de Beeten, 'Rule of Law Enforcement in the EU: The Limits of the Legal Enforcement of Values' (*KSLR EU Law Blog*, 27 November 2018) <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1333#.XQNq5yN97jC> accessed 24 February 2020; See also, Jakob Cornides, 'The European Union: Rule of Law or Rule of Judges?' (*EJIL:Talk!*, 11 November 2013) <https://www.ejiltalk.org/the-european-union-rule-of-law-or-rule-of-judges/> accessed 24 February 2020.

[27] Laurent Pech and Kim Lane Scheppele, 'Poland and the European Commission, Part I: A Dialogue of the Deaf?'(*Verfassungsblog,* 3 January 2017) <https://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/> accessed 29 February 2020; Laurent Pech and Kim Lane Scheppele, 'Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law' (*Verfassungsblog,* 6 January 2017) <https://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/> accessed 24 February 2020; See also Laurent Pech and Kim Lane Scheppele, '1095 Days Later: From Bad to Worse regarding the rule of law in Poland (Part I)' (*Verfassungsblog,* 13 January 2019) <https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-i/> accessed 24 February 2020.

[28] Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14(3) European Constitutional Law Review 622, 641.

the Court in order to give the Commission a better legal basis for taking action against Member States, in particular through the Article 258 TFEU infringement procedure. As such, this section outlines how legal intervention on the part of the Court may be the best way to deal with this crisis, particularly in light of recent developments which have provided the Commission with specific legal bases upon which to pursue Poland. The third section will illustrate that due to the political nature of this problem, there is only so far the Court can participate in this matter without the political support of the member states before accusations of judicial activism and excessive legal interventionism arise.[29] Finally, the paper shall conclude that the Court and the Commission should continue to work together through the infringement procedure in responding to this crisis, with the Commission actively implementing the Court's judgments, and attempting to bring rule of law backsliding to an end in Poland, thereby ensuring compliance with EU values and protecting the very foundations of the EU legal order. Attention shall also be drawn to the fact that all EU actors will have to take action in order to effectively respond to this crisis, and that a political response is also necessary from the Member States acting in the European Council in order to give increased authority and legitimacy to the Court's approach.[30] The judgment of the Court of Justice in *Commission v Poland* [31] could pave the way for more effective enforcement of the rule of law in the context of the Polish judicial reforms, including through political avenues, as the Court found that Poland infringed the principle of effective judicial protection in Article 19(1) TEU, a development which could finally incentivise the European Council to make a political determination under the Article 7 TEU procedure.

B THE ROLE OF THE COMMISSION IN RESPONDING TO THE RULE OF LAW CRISIS

It has been noted that the rule of law crisis is predominantly a political issue and that the Commission's power to address the failure of the Member States to comply with EU law through the infringement procedure is the 'embodiment of its overall role as "Guardians of the Treaties" under Article 17(1) TEU'.[32] However, while it is the legal mandate of the Commission to enforce EU law and values, this paper seeks to contend that the Commission

[29] Blauberger and Kelemen (n 6); see also Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47(1) International Organisation 41.
[30] ibid 332.
[31] Case C-619/18 *Commission v Poland* [2019] ECLI:EU:C:2019:531.
[32] Schmidt and Bogdanowicz (n 16) 1073.

should focus its efforts on legal enforcement through the Article 258 TFEU procedure as opposed to political enforcement through the Article 7 TEU procedure and the Rule of Law Framework due to recent developments in the use of legal enforcement mechanisms. Some scholars have argued that Article 7 TEU, a predominantly political procedure, is the lex specialis for the enforcement of EU values contained in Article 2 TEU, and that consequently EU values should not be enforced by legal or judicial means such as Article 258 TFEU infringement proceedings.[33] However, Kochenov has contended that despite its lex specialis characterisation, Article 7 TEU does not preclude the applicability of Article 258 TFEU in the enforcement of EU values.[34] While this paper acknowledges that legal interventionism in the political process, particularly in the protection of democracy and the rule of law against illiberal tendencies, cannot address the whole situation,[35] the fact is that the self-proclaimed 'Political Commission'[36] has failed in responding adequately to the rule of law crisis in Poland through political enforcement mechanisms such as the Rule of Law Framework and Article 7 TEU procedure.[37] While it must be acknowledged that the Commission has made many attempts to communicate with the Polish authorities in order to address rule of law backsliding, the political dialogue process carried out in the context of the Rule of Law Framework has been described as a 'dialogue of the deaf', due to its unsuccessful attempts to prompt a satisfying response from Poland.[38] The Article 7 TEU procedure also seems to be politically infeasible due to the intention expressed by Hungary to protect Poland[39] in any vote which may come before the European Council, which requires unanimity, and therefore this leaves space for the Court of Justice to intervene in this area, particularly in light of the recent jurisprudence relating to the protection of EU values, and the increased effectiveness which has been seen in the Commission's use of Article 258 TFEU.

[33] Mark Dawson, Elise Muir and Monica Claes, 'A Tool-Box for Legal and Political Mobilisation in European Equality Law' in Dia Anagnostou (ed), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System* (Hart Publishing 2014) 116–117; For a thorough counter-argument to this assertion see Schmidt and Bogdanowicz (n 16).

[34] Dimitry Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (2017) European University Institute Working Paper Law 2017/10, 7.

[35] Blauberger and Kelemen (n 6); See also Jelena Von Achenbach, 'No Case for Legal Interventionism: Defending Democracy through Protecting Pluralism and Parliamentarism' (*Verfassungsblog,* 12 December 2018) <https://verfassungsblog.de/no-case-for-legal-interventionism-defending-democracy-through-protecting-pluralism-and-parliamentarism/> accessed 24 February 2020.

[36] For the concept of Juncker's political Commission, see 'Political Guidelines for the next European Commission, Opening Statement in the European Parliament Plenary Session, Strasbourg, 15th July 2014' <https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf> accessed 24 February 2020.

[37] Pech and Scheppele (n 26).

[38] ibid.

[39] Both Poland and Hungary are subject to ongoing proceedings under Article 7 TEU.

I The Article 7 Procedure

It is not the intention of this paper to provide a detailed analysis of the processes of Article 7 TEU, which have been mapped out in great detail by Besselink[40] and Kochenov.[41] It is, however, this author's intention to illustrate that, due to the highly sensitive political process of Article 7 TEU and the onerous procedural requirements which must be met before a determination can be made and sanctions can be imposed, such a mechanism is insufficiently expediate or effective to respond to Member States who infringe fundamental values, such as the rule of law. The practical difficulty of applying Article 7 TEU was recognised before the current crisis began, with the Article 7 TEU procedure being described as the 'nuclear option'.[42] Commission First Vice-President Timmermans has also noted that the Article 7 TEU procedure is not always suited to swift and effective intervention due to the intricacies of political negotiations and compromises inherent in the process.[43]

Firstly, Article 7(1) TEU provides for the determination of a clear risk of a serious breach of the values contained in Article 2 TEU. This is carried out by the Council acting by qualified majority after a proposal has been made either by the European Commission, the European Parliament or one-third of the Member States of the Union. This process has been labelled by many as the preventative mechanism, which allows the Union to identify the risk of a serious breach and prevent it from devolving into a more serious situation.[44] Secondly, the European Council acting unanimously may determine the existence of a serious and persistent breach of Article 2 TEU values by the Member State concerned.[45] Once this determination has been made, the Member States acting within the European Council may decide upon appropriate sanctions, which may take the form of a suspension of the voting rights in the Council.[46] Bogdanowicz and Schmitt describe the Article 7 TEU procedure as having an ultima ratio character, which establishes a 'judgment by peers upon the Member State' in question as to

[40] Leonard Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives' (2016) Amsterdam Law School Legal Studies Research Paper 2016/02.
[41] Kochenov (n 34).
[42] Jose Manuel Barroso, 'State of the Union Address 2012' (European Parliament, Strasbourg, 12 September 2012) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596> accessed 29 February 2020.
[43] Frans Timmermans, 'Commission Statement: EU framework for democracy, rule of law and fundamental rights' (European Parliament, 12 February 2015) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596> accessed 29 February 2020
[44] Besselink (n 40) 15.
[45] See Consolidated version of the Treaty on European Union [2012] OJ C326/01, article 7(2).
[46] Besselink (n 40) 15.

their breach of fundamental values.[47] Therefore, the Member States at European Council level take this decision in a very political context. This can be contrasted with the Article 258 TFEU infringement procedure, in which the Court is the final arbiter in the decision of whether a Member State has breached EU values and therefore one could argue that this procedure is more impartial and objective than a purely political process. Varol notes that political actors may be hesitant to condemn democratic backsliding 'if such practices enforce laws that exist in their own legal systems, lest they be criticised as hypocritical'.[48] Therefore, we see that the political sensitivity of this issue may frustrate the enforcement of EU values through this mechanism. It has also been noted that the Article 7 TEU procedure can be characterised as a sanctioning and containment mechanism for a 'rogue' member state who has been found guilty of a serious breach of the Union's values,[49] whereas the infringement procedure is focused less on punishment and more on resolving the violation and enforcing EU law.

II The Rule of Law Framework

It was becoming a commonly held view amongst academics and practitioners that the Article 7 TEU procedure was ineffective in practice to respond to and, if necessary, sanction Member States who violated the foundational values of the Union, and that other avenues would need to be explored to effectively address emerging systemic deficiencies in the rule of law within the Member States. Therefore, in March 2014, the Commission launched its 'Rule of Law Initiative', which set out a new EU framework to strengthen the Rule of Law.[50] Besselink notes that 'the Rule of Law Framework ... aims to fill the gap between triggering Article 7 TEU and the normal instruments for infringement proceedings' when a member state has violated their obligations under the Treaties.[51] However, there is a significant degree of deterioration which would have to take place between a serious and systemic situation which could trigger Article 7 and an ordinary infringement proceeding which targets specific, singular failures of the Member States to fulfil their Treaty obligations. Therefore, the Commission specified that the Rule of Law Framework would only be triggered 'in situations where the authorities of a Member State are taking measures ... which are likely to systematically and adversely affect

[47] Schmidt and Bogdanowicz (n 16) 1072.
[48] Ozan Varol, 'Stealth Authoritarianism' (2015) 100(4) Iowa Law Review 1673, 1734.
[49] Schmidt and Bogdanowicz (n 16) 1072.
[50] Commission, 'Communication from the Commission to the European Parliament and the Council: A new EU Framework to Strengthen the Rule of Law' COM (2014) 158 final.
[51] Besselink (n 40) 19.

the integrity, stability or proper functioning of the institutions ... established at national level to secure the rule of law.'[52]

The Rule of Law Framework is comprised of three stages, the first being the Commission's assessment of the situation within a particular Member State. During the first stage, the Commission gathers evidence of a systemic threat to the rule of law and enters into a political dialogue with the Member State with a view to resolving the issues which the Commission has identified.[53] The second stage comprises the Commission Recommendation. If the issues identified by the Commission in its assessment have not been resolved, the Commission will issue its Recommendation which proposes methods of action which the Member State could follow in order to alleviate the Commission's concerns.[54] Finally, there is the follow-up stage in which the Commission will monitor how the Member State has implemented the Commission's suggestions. If insufficient action has been taken to remedy the systemic threat to the rule of law identified by the Commission, the Commission can then proceed to activate one of the mechanisms of Article 7 TEU in order to ensure compliance with Article 2 values, or alternatively, commence infringement proceedings against the Member State concerned.[55]

The Rule of Law Framework has not been very effective for a number of reasons. Firstly, it would appear that the Polish authorities are not willing to cooperate with such political dialogue as they have been unwilling to accept the Commission's concerns that the contested judicial reforms pose any threat to the rule of law in Poland.[56] Secondly, many scholars have criticised the Commission for its hesitation in pursuing more serious methods of redress when it became obvious that the Polish government was not cooperating.[57] Despite the relative ineffectiveness of the Rule of Law Framework, one of its advantages is that it has allowed the Commission to compile a large database of evidence and information regarding the rule of law infringements in Poland, and which can subsequently be used by the Commission in its infringement proceedings. Therefore, on the basis of the analysis as to the ineffectiveness of the Commission's political approach, this paper will now seek to explore a more effective means of responding to the crisis through legal enforcement mechanisms, particularly through Article

[52] Besselink (n 40) 6.
[53] Commission (n 50) 7.
[54] ibid.
[55] ibid 8.
[56] De la Baume and Wrobel (n 19).
[57] Scheppele and Pech (n 8); See also, Dimitry Kochenov and Laurent Pech, 'Better late than never? On the European Commission's Rule of Law Framework and its first activation' (2016) 54(5) Journal of Common Market Studies 1062.

258 TFEU and in view of the jurisprudence of the Court on the rule of law, which will be analysed below.

III Article 258 TFEU Infringement Procedure

The Article 258 TFEU infringement procedure is one of the Commission's primary mechanisms for centralised enforcement of EU law and takes place on a discretionary basis when the Commission considers that a Member State has failed to fulfil its obligations under the Treaties. There have traditionally been misgivings regarding the use of infringement proceedings in the enforcement of EU values given the fact that this is not their intended use under the Treaties and that some consider the political procedure envisaged in Article 7 TEU to be the lex specialis for the enforcement of EU values.[58] A number of weaknesses have also been identified in the use of the infringement procedure due to the specificity of the case-by-case enforcement mechanism provided for in Article 258 TFEU and its inability to identify and target connected infringements which depict a more systemic compliance problem in the Member State in question.[59] However, Scheppele has put forward an argument which seeks to broaden the scope of application of infringement proceedings to target not just specific violations of EU law, but which could take into account a series of violations which indicates a more systemic compliance problem in the Member State.[60] This proposal has its merits due to the fact that it proposes to bundle similar cases together so as to illustrate a prevailing compliance problem. While we have not yet seen the infringement proceedings used in this way, it is noted that the jurisprudence of the Court is expanding the possibilities for the Commission to address wider systemic problems within the Member States by bringing the national organisation of the judiciary, in particular, within the scope of EU law and providing an appropriate legal basis for the Commission to bring such complaints. While the infringement procedure still targets specific violations and not wider systemic issues, the recent string of infringement proceedings brought against Poland in relation to the reforms made to the judiciary illustrate how the Commission is seeking to target the systemic threat which has been made the rule of law in Poland and has been aided in this challenge by the Court.[61] Bogdanowicz and Schmitt observe that the infringement proceedings are 'supervisory in

[58] Kochenov (n 34).
[59] Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).
[60] ibid.
[61] See Case C-192/18 *Commission v Poland* [2019] ECLI:EU:C:2019:924 and Case C-619/18 *Commission v Poland* [2018] ECLI:EU:C:2018:910.

character and aim not at isolation and curtailment of the offending Member State, but at rectification, by bringing a Member State back in line'.[62] Recent developments in the use of infringement procedure by the Commission also show that this existing legal mechanism can be used in a more effective manner, such as the possibility to request an expedited procedure under the Rules of Procedure of the Court, an order for interim measures under Article 279 TFEU and the possibility of imposing penalty payments on non-compliant member states under Article 260 TFEU. While it would be naive to think that infringement proceedings alone could fully rectify the social and political issues which led to the democracy and rule of law crisis within the Union, this author contends that the Article 258 TFEU procedure, supported by the recent jurisprudence of the Court, is a good starting point to end infringements and ensure compliance with EU law.

C THE ROLE OF THE COURT IN RESPONDING TO THE RULE OF LAW CRISIS

The Court of Justice has often been described as a primary actor in the integration process of the European Union and has issued many revolutionary judgments throughout the years which have led to major developments in the legal fabric of the Union. Taborowski notes that 'it is remarkable how quickly and flexibly the CJEU has reacted in its legal decisions to the rule of law crisis in certain EU Member States'.[63] However, the Court is a legal actor, despite often showing impressive political awareness in its judgments, and therefore many believe that dealing with political issues such as the infringement of the EU values contained in Article 2 TEU should be left to the political institutions such as the Commission and the European Council.[64] This view is further compounded by the fact that there is no explicit competence in the Treaties for the Court in the enforcement of EU values and that rule of law enforcement has thus far mainly taken place in the context of the political enforcement mechanisms of Article 7 TEU and the Rule of Law Framework.[65] However, two issues inform the conclusion

[62] Schmidt and Bogdanowicz (n 16) 1073.

[63] Maciej Taborowski, 'CJEU Opens the Door for the Commission to Reconsider Charges Against Poland' (*Verfassungsblog*, 13 March 2018) <https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland/> accessed 24 February 2020.

[64] Paul Blokker, 'Systemic Infringement Action: An Effective Solution or Rather Part of the Problem?' (*Verfassungsblog,* 5 December 2013) <https://verfassungsblog.de/systemic-infringement-action-an-effective-solution-or-rather-part-of-the-problem/> accessed 24 February 2020; See also Cornides (n 26).

[65] Article 269 TFEU only provides for a procedural review of the Court in the context of Article 7 proceedings, and does not provide for a substantive review; See also Femke Gremelprez, 'Does Poland Infringe the Principle of Effective Judicial Protection? Recent developments in the CJEU' (*EU Law Analysis*, 15 April 2019) <http://eulawanalysis.blogspot.com/2019/04/does-poland-infringe-principle-of.html> accessed 24 February 2020.

that the Court is well placed to intervene. Firstly, in light of the jurisprudence of the Court in operationalising the rule of law and associated principles, thereby creating positive obligations on Member States to respect these principles, the Court has provided the Commission with a clear legal ground of action upon which to pursue Poland and other Member States who infringe the rule of law by undermining the independence of their judiciaries. The analysis of the Court's case law below shows how the Court has clarified the content and scope of the rule of law and has brought Member State action which may infringe this value within the scope of review of the Court so that infringements of this type can be dealt with judicially. Secondly, this paper seeks to illustrate that, in the absence of an effective response through political means from the Commission and other EU institutions, the Court has taken on the role of EU value enforcer through its politically sensitive and well-reasoned judgments. Despite the lack of a specific competence for the Court in enforcing EU values, this paper seeks to illustrate that the most effective way for enforcing EU values is through the Article 258 TFEU infringement procedure, which can be used by the Commission and can build upon the jurisprudence of the Court in order to better frame its actions and attempt to specifically address rule of law backsliding. While the Article 7 TEU procedure should not be abandoned, it is contended that the Commission should pursue Poland through Article 258 TFEU proceedings alongside the ongoing Article 7 procedure. It should also be noted that a finding of failure on the part of Poland to fulfil its obligations under the Treaties, particularly a foundational value such as the rule of law, in the context of infringement proceedings, could incentivise the European Council and the Council of Ministers to pursue Poland politically under the Article 7 TEU procedure and ensure the complementarity of both political and legal enforcement of values.[66]

I Setting the Scene

Throughout the years, the Court has been carving out the definition of the rule of law in its jurisprudence. It has been contended that the foundational values contained in Article 2 TEU, particularly the rule of law, are too vague for proper enforcement at the EU level.[67] However, the Court has made impressive inroads in its jurisprudence in operationalising these values in the EU legal order. The first prominent statement made in this regard came in the judgment of *Les Verts* where the Court stated the European Community is 'a community based on the rule of law', and that Member State and institutional measures can be reviewed to ensure

[66] Besselink (n 40).
[67] Scheppele and Pech (n 8).

compliance with the Treaty.[68] This principle however, related to the action of an EU institution, not a Member State, and so there was uncertainty as to the applicability of this statement as a means of review of Member State action.[69] However, in *Kovalkovas,* the Court attempted to expand upon the definition of the rule of law so as to make it a 'self-standing organisational requirement' for the Member States which could be reviewed by the EU institutions.[70] The Court held that 'the term "judicial authority" ... cannot be interpreted as also covering an organ of the executive of a Member State.'[71] The Court continued 'that term refers to the judiciary, which must ... be distinguished, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, from the executive.'[72] It appeared that the Court sought to take action relating to the institutional organisational structure of a Member State reviewable against a Union value, while also highlighting the importance of an independent judiciary which is distinct from the executive for the proper functioning of the rule of law.[73]

The Court dealt with the independence of public institutions in a case concerning Hungary, however this time not within the context of the judiciary. In *Commission v Hungary*,[74] the Commission brought infringement proceedings against Hungary for a failure to fulfil its obligations under EU law as it had prematurely terminated the duration of office of the Data Protection Commissioner in Hungary, an office established under Directive 95/46/EC. The Court stated:

> If it were permissible for every Member State to compel a supervisory authority to vacate office before serving its full term, ...the threat of premature termination to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence.[75]

Therefore, we see that the Court was essentially laying out the requirements which a Member State must fulfil in order for its institutions to be considered independent. Although this case related to the Data Protection Supervisor in Hungary, if we consider this in the context of the

[68] Case 294/83 *Les Verts v European Parliament* [1986] ECLI:EU:C:1986:166.
[69] Schmidt and Bogdanowicz (n 16) 1092.
[70] ibid; See also Case C-477/16 PPU *Openbaar Ministerie v Ruslanas Kovalkovas* [2016] ECLI:EU:C:2016:861
[71] Case C-477/16 PPU *Openbaar Ministerie v Ruslanas Kovalkovas* [2016] ECLI:EU:C:2016:861, para 35.
[72] ibid [36].
[73] Schmidt and Bogdanowicz (n 16) 1092.
[74] Case C-288/12 *Commission v Hungary* [2014] ECLI:EU:C:2014:237.
[75] ibid [54].

Polish judicial reforms, we see that lowering the retirement age of judges and making the extension of judicial tenure dependent upon discretionary executive approval could force the judiciary into compliance with political authority and infringe the principle of irremovability, which would imply that this institution is no longer independent. Therefore, this judgment is a useful precedent upon which the Commission could build in order to specifically target the aforementioned reforms.

In 2018, the Court issued another important judgment where it dealt with the concept of judicial independence, which we now know is an essential prerequisite for ensuring effective judicial protection and compliance with the rule of law.[76] The Court stated in its *Wilson*[77] judgment that the notion of judicial independence includes both internal and external independence.[78] The external aspect of judicial independence 'presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them.'[79] While this judgment did not relate specifically to rule of law backsliding in Poland, it could be particularly relevant for the recent Commission infringement proceedings[80] and the preliminary reference sent by the Polish Supreme Court to the CJEU inquiring about the compatibility of national measures which lower the retirement age of Supreme Court judges and which makes the possibility of the extended tenure of a forcefully retired judge dependent upon discretionary approval from the President of Poland.[81] The Polish Supreme Court contends that such a measure infringes EU law as it makes the judiciary dependent upon approval from an executive body which is liable to impair its independence, arguments which appear to be based on the reasoning in previous judgments such as *Wilson* and *Commission v Hungary*. This paper will now analyse three judgments in particular which illustrate how the Court has carefully planned and developed its jurisprudence in order to offer the Commission a line of case law upon which to build its infringement proceedings.

II Associação Sindical dos Juízes Portugueses:

[76] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117, para 41.
[77] Case C-506/04 *Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECLI:EU:C:2006:587.
[78] ibid [51-52].
[79] ibid [51].
[80] Case C-619/18 Commission v Poland [2019] ECLI:EU:C:2019:531.
[81] Robert Grzeszczak and Ireneusz Pawel Karolewski, 'The Rule of Law Crisis in Poland: A New Chapter' (*Verfassungsblog,* 8 August 2018) <https://verfassungsblog.de/the-rule-of-law-crisis-in-poland-a-new-chapter/> accessed 24 February 2020.

In *Associacao Sindical dos Juizes Portugueses,*[82] which has been described as the most important judgment for the definition of the rule of law since the seminal 1986 judgment of the Court in *Les Verts*[83], the Court was presented with the opportunity to indirectly comment on rule of law backsliding in certain Member States. This case has garnered significant attention due to the fact that neither its context nor its outcome relate to the ongoing rule of law crisis, however, the reasoning used by the Court in clarifying the principle of effective judicial protection was revolutionary, and many believe that it was indirectly intended by the Court to offer the Commission a helping hand in responding to the threat posed to the Polish judiciary. This case came before the Court in the context of a dispute between the Tribunal de Contas of Portugal due to a pay decrease in the public sector, including the judiciary, which had been imposed in the context of austerity measures implemented by the Portuguese Government in order to be granted financial assistance from the EU. The Tribunal de Contas argued that such a reduction in remuneration constituted an infringement of the principle of judicial independence and the Portuguese Supreme Administrative Court referred a question to the CJEU in this regard.[84]

(a) Operationalising the Rule of law Through Article 19(1) TEU

In this case, the Court stated that the principle of effective judicial protection contained in Article 19(1) TEU gives concrete expression to the rule of law value in Article 2 TEU and that an independent judiciary was a precondition for ensuring effective judicial protection and review of the rights granted to the nationals of the Member States by EU law.[85] The Court stated:

The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law ... It follows that every member state must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection .....[I]n order for that protection to be ensured, maintaining a court or tribunal's independence is essential.[86]

[82] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117.
[83] Sébastien Platon and Laurent Pech, 'Judicial Independence under threat: The Court of Justice to the rescue in the ASJP Case' (2018) 55 Common Market Law Review 1827, 1827.
[84] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117.
[85] ibid [32-42].
[86] ibid [36-41].

The Court could have delivered this judgment without discussing Article 19(1) TEU, but chose to do so in order to operationalise and give concrete expression to the rule of law value in Article 2 TEU through the principle of effective judicial protection in Article 19(1) TEU. Therefore, we see the Court explicitly laying out the components of the rule of law, and indicating to the Commission a specific and justiciable legal basis upon which to ground their action. As noted, it was claimed that the rule of law value in Article 2 TEU was too vague for proper enforcement and lacked expression through a specific legal norm which could be relied upon. Here, however, the Court has seemingly responded to this criticism by making Article 2 TEU legally operational through the norm of effective judicial protection in Article 19(1) TEU and thus creating a specific obligation for the Member States to ensure that their judiciaries are independent.

(b) Expanding the Scope of Application of Article 19(1) TEU to National Judiciaries

The Court also introduced another development with this judgment, as it extended the principle of effective judicial protection to national judiciaries which are called upon to interpret and apply EU law.[87] The Court noted that while the organisation of the national justice system falls within the competence of the Member States, this competence must be exercised in accordance with Member State's obligations under EU law, according to the principle of sincere cooperation in Article 4(3) TEU.[88] The Court stated that 'Member States must ensure that the bodies which, "as courts or tribunals" within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirement of effective judicial protection.'[89] This judgment extended the reach of Article 19(1) TEU and brought the organisation of national judiciaries within the scope of EU law, therefore rendering national measures which threaten the independence of the judiciary susceptible to the scrutiny of the Court of Justice. Von Danwitz has noted that 'any disrespect of the guarantee of judicial independence will have to be considered an infringement [of Article 19 TEU] if the judicial body in question is likely to be confronted with questions of Union law.'[90] In theory, any Member State court is capable of being confronted with questions of Union law, therefore this obligation of effective judicial protection can apply to all national courts within the Union, which broadens the scope of review of the Court over national judiciaries when accusations that their independence has been

[87] ibid [37].
[88] ibid [34].
[89] ibid [37].
[90] Thomas Von Danowicz, 'Values and the Rule of Law: Foundations of the European Union - an Inside Perspective from the ECJ' (King's College London, 2 March 2018) 11.

undermined arise.[91] Before this judgment, both the Commission and the Court faced difficulties in enforcing EU values through the legal enforcement mechanism of Article 258 TFEU due to the fact that this was aimed at particular failures of the Member States to fulfil specific obligations under EU law and not the wider context of a systemic threat to EU values which multiple singular failures can entail. Also that the scope of Article 19 TEU was hitherto unclear in its application to national judiciaries, and therefore the competence of the Union to intervene, cast doubt over the legal ability of the Commission to respond. A prime example of this difficulty can be seen in *Commission v Hungary*,[92] in which the Commission based its legal action on Directive 2000/78/EC relating to age discrimination in employment, as there was not yet a specific legal basis upon which they could confront a Member State for reforms undermining judicial independence, which Hungary claimed to be a matter of internal Member State competence. While the Court found in favour of the Commission in this case, it did not address the actual systemic problem which informed the action, namely national reforms which were liable to undermine the independence of the judiciary and the irremovability of judges, not age discrimination in relation to the premature retirement of judges. There was a positive finding for the Commission but many of the members of the judiciary who had been forcefully retired were not reinstated and simply offered compensation instead, which did not solve the issue of the potential political pressure which could be exerted on judges and the threat to judicial independence which this posed.[93] However, since the Court in the ASJP case operationalised the rule of law value through Article 19(1) TEU and brought the organisation of national judiciaries and, therefore, national measures undermining the independence of the judiciary within the scope of EU law, it has been easier for the Commission to bring infringement proceedings in order to protect and enforce EU values. It is interesting to note that following this judgment, the Commission jointly based infringement proceedings against Poland in relation to the law amending the retirement age of Supreme Court and ordinary court judges on Article 19(1) TEU, clearly showing that the Commission saw the potential lifeline which the Court offered it in its interpretation of Article 19(1) TEU.[94]

III The Bialowieza Forest Case

[91] Laurent Pech and Sebastien Platon, 'Rule of Law Backsliding in the EU: The Court of Justice to the Rescue?' (*EU Law Analysis*, 13 March 2018) <http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html> accessed 24 February 2020.
[92] Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687.
[93] For an analysis of this case, see Scheppele (n 58) 109-110.
[94] Case C-619/18 *Commission v Poland* [2018] ECLI:EU:C:2018:910 and Case C-192/18 *Commission v Poland* [2019] ECLI:EU:C:2019:924.

The ruling of the Court in the *Bialowieza Forest* Case emphasised the importance of ensuring compliance with EU law by Member States demonstrating illiberal tendencies and systemic rule of law deficiencies.[95] Many scholars advocate for the increased use of infringement proceedings in responding to the rule of law crisis due to the procedure's flexibility and effectiveness,[96] while it has also been noted that Article 258 TFEU has been 'given teeth' with the inclusion of the sanctions procedure under Article 260 TFEU and the ability of the Court to issue interim measures under Article 279 TFEU.[97] In the context of infringement proceedings, the Commission can request the Court to grant interim measures under Article 279 TFEU, which are exceptional means to ensure the effectiveness of a procedure. This case involved infringement proceedings brought against Poland by the Commission for logging in the Bialowieza Forest which infringed EU environmental protection standards. The Commission asked the Court to order Poland to cease the forest management operations. The Vice President of the Court granted the provisional order for interim measures but despite this order, the logging in the Bialowieza forest continued.[98] This was a serious development as Poland was deliberately refusing to comply with an order of the Court, standing openly in defiance of the authority of the ruling.[99] Given the importance of compliance with EU law, this development revealed the onus on the Court to respond effectively to a Member State refusing to respect its authority. Again, we see here that the subject matter of this case had no substantive link to the ongoing rule of law crisis, but the Court took the opportunity to indirectly include in its judgment an interpretation which could help to bolster the effectiveness of the Commission's attempts to pursue Member States through infringement proceedings. The Court, in interpreting Article 279 TFEU, ruled that that article confers on the Court the power to prescribe any interim measures which it deems necessary in order to ensure that a decision is fully effective.[100] The Court provided for the imposition on Poland of a periodic penalty payment in the event of non-compliance with the interim measures ordered. The Court stated that:

[95] Case C-441/17 *Commission v Poland* [2018] ECLI:EU:C:2018:255.
[96] Petra Bard and Anna Sledzinska-Simon, 'The Puissance of Infringement Procedures in Tackling Rule of Law Backsliding' (*Verfassungsblog*, 3 June 2019) <https://verfassungsblog.de/the-puissance-of-infringement-procedures-in-tackling-rule-of-law-backsliding/> accessed 24 February 2020.
[97] Schmidt and Bogdanowicz (n 16) 1073.
[98] Case C-619/18 *Commission v Poland* [2018] ECLI:EU:C:2018:910.
[99] Tomasz Tadeusz Koncewicz, 'The Bialowieza Case. A Tragedy in Six Acts' (*Verfassungsblog*, 17 May 2018) <https://verfassungsblog.de/the-bialowieza-case-a-tragedy-in-six-acts/> accessed 29 February 2020.
[100] Case C-441/17 *Commission v Poland* [2018] ECLI:EU:C:2018:255, para 99.

> The purpose of seeking to ensure that a member state complies with interim measures adopted by the Court hearing an application for such measures by providing for the imposition of a periodic penalty payment in the event of non-compliance with those measures is to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded.[101]

The severity of the refusal to comply with the Court's order in this judgment must not be underestimated. We have already seen that the Polish authorities have rejected the authority of their own national courts when they refused to publish certain judgments of the Constitutional Tribunal and subsequently introduced reforms lowering the retirement age of judges. If the Polish government can disrespect the authority of their national courts, then it must be ensured that they cannot do the same to the Court of Justice.[102] The Court's interpretation of Article 279 TFEU so as to allow it to impose periodic penalty payments on non-compliant Member States is an innovative legal solution to a politically sensitive problem and shows that the Court has the means to respond to Member States who disrespect the rule of law. Therefore, we can see that if the Commission or the Court is faced with a similar situation in the future, in which a Member State refuses to comply with an order for interim measures, heavy financial penalties can be applied to ensure that they comply and deter them from non-compliance in the future. Koncewicz has noted the importance of the political implementation of judicial decisions in order to ensure that they are respected.[103] He highlights the relationship between the Court and the Commission, in which the Court lays down legal precedent which should be implemented by the Commission in ensuring that the effects of the decision are felt and that an adequate response follows.[104] While the Court's judgment in the ASJP case was indeed implemented by the Commission in the subsequent infringement proceedings against Poland, the Commission has not as of yet requested the Court to impose periodic penalty payments on a non-compliant Member State in the context of an order for interim measures, but it remains a viable option for the Commission nonetheless. This case shows the willingness of the Court to grant interim measures in the context of infringement proceedings to ensure compliance with EU law, and

[101] ibid [102].
[102] See worrying comments made by Polish officials in relation to Commission infringement proceedings concerning the New Law on the Supreme Court – Patrick Smyth, 'Poles Open New Line of Attack on Eu Rule of Law Complaint' *The Irish Times* (Dublin, 30 August 2018) <https://www.irishtimes.com/news/world/europe/poles-open-new-line-of-attack-on-eu-rule-of-law-complaint-1.3611744>.
[103] Koncewicz, (n 99).
[104] ibid.

the potential deterrent effect of periodic penalty payments under Article 260 TFEU when a member state refuses to comply with the Court.

IV *Commission v Poland*

Building upon the previous judgments of the Court discussed above, the Commission now seemed determined to specifically address the issue of the threat to judicial independence and the rule of law posed by the Polish reforms, and the Court, through its inventive jurisprudence, ensured that this could happen. The *Commission v Poland* case can be seen as one of the most promising implementations of the Court's jurisprudence by the Commission.[105] The Commission initiated infringements proceedings against Poland and contended, firstly, that in issuing the Law on the Supreme Court of 3rd April 2018 which lowered the retirement age of judges, the Republic of Poland infringed the principle of irremovability of judges and therefore failed to fulfil their obligations under the second subparagraph of Article 19(1) TEU.[106] An amendment to that Law further lowered the retirement age of female judges which resulted in 27 of the 72 sitting judges of the Court having to retire prematurely from their positions.[107] The Commission also contended that by granting the President of Poland the discretion to extend the judicial service of sitting judges, Poland allowed political pressure to be exerted on the judiciary, thereby undermining judicial independence and failing in its obligation to ensure effective judicial protection under Article 19(1) TEU.[108]

The Commission requested both an expedited ruling under the Rules of Procedure of the Court and an Order for Interim Measures under Article 279 TFEU in its infringement proceedings against Poland. On October 19th 2018, the Vice President of the CJEU granted the interim measures requested by the Commission and ordered that the Polish government immediately suspend the application of the provisions of the national legislation lowering the retirement age of judges of the Supreme Court and did so without first hearing the Polish government in view of the immediate risk of serious and irreparable damage for the principle of effective judicial protection.[109] This serious and irreparable damage resulted from the discretionary power granted to the President of Poland to extend the active mandate of judges which could exert

[105] Case C-619/18 *Commission v Poland* [2018] ECLI:EU:C:2018:910.
[106] ibid.
[107] Maciej Taborowski and Pawel Marcisz, 'The first judgment of the ECJ regarding a breach of the rule of law in Poland?' (*Verfassungsblog*, 29 May 2019) <https://verfassungsblog.de/the-first-judgment-of-the-ecj-regarding-a-breach-of-the-rule-of-law-in-poland/> accessed 29 February 2020.
[108] Case C-619/18 *Commission v Poland* [2018] ECLI:EU:C:2018:910.
[109] Case C-619/18 *Commission v Poland* [2019] ECLI:EU:C:2019:531.

political pressure on judges and put the rights contained in Article 19 TEU,[110] such a risk too serious to ignore as the independence of national courts is crucial for both the operation of the preliminary reference procedure and judicial cooperation in the Union.[111] Poland complied with the order for interim measures, perhaps as it was aware that the Court could now impose penalty payments upon it for not complying with an order of the Court in the wake of the *Bialowieza Forest* judgment.

The Court reiterated its findings in the *ASJP* Case, as well as referring to the *LM* and *Wilson* judgments, in stating that the principle of effective judicial protection in Article 19(1) TEU applied to all Member State courts who interpret or apply EU law, and that judicial independence was a fundamental requirement in ensuring effective judicial protection.[112] Furthermore, the Court recalled that judicial independence consists of an internal and external element, with the Court particularly focusing on the external element when it stated 'that freedom of judges from all external intervention or pressure, which is essential, requires ... certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office.'[113] The Court held that 'the requirement of independence means that rules governing the disciplinary regime and any dismissal ... must provide the necessary guarantees in order to prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions.'[114] The Court went on to concede that certain measures which pursued legitimate objectives may be deemed acceptable, however, these measures would have to comply with the requirements of pursuing a legitimate objective, proportionality and 'that it does not raise reasonable doubt as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it'.[115] The Court noted that the combination of the measures lowering the retirement age of judges of the Supreme Court and the measure granting the Polish President the discretionary power to extend judicial mandates, was 'such as to reinforce the impression that the aim of the measures might be to exclude a predetermined group of judges of the Sad Najwyzszy'.[116] The Court referred to the Advocate General's Opinion in observing that 'such a major restructuring of the composition of a Supreme Court

[110] ibid.
[111] Renata Uitz, 'The Perils of Defending the Rule of Law through Dialogue' (2019) 15(1) European Constitutional Law Review 1, 6.
[112] Case C-619/18 *Commission v Poland* [2018] ECLI:EU:C:2018:910, para 71.
[113] ibid [75].
[114] ibid [77].
[115] ibid [79].
[116] ibid [85].

through a reform specifically concerning that court, may itself prove to be such as to raise doubts as to the genuine nature of such a reform and the aims actually pursued by it.'[117] Due to the absence of a clear logic in the pursuit of a legitimate objective by these measures and the absence of a transitional period or means by which to appeal the decision of the President, the Court found that Poland had failed to comply with the principle of irremovability of judges in relation to the measures lowering the retirement age of judges[118] and had failed to comply with the principle of judicial independence in subjecting the judiciary to political control by granting the President of Poland the discretionary power to extend judicial mandates, thereby infringing the principle of effective judicial protection in Article 19(1) TEU, which gives concrete expression to the rule of law value as contained in Article 2 TEU.[119]

From the above analysis of the case law, we see that the Court has given concrete expression to the rule of law value contained in Article 2 TEU so as to operationalise it and to make it more readily judicially enforceable. *Commission v Poland* is the product of this judicial construction, in which the Court had the opportunity to consolidate this case law and specifically address the undermining of judicial independence and rule of law backsliding by the Polish authorities. The argument for utilising the infringement procedure more frequently in the rule of law crisis is complemented by the fact that national authorities and media are usually aware of any ongoing infringement proceedings and these are often accompanied by preliminary reference requests from national courts. *Commission v Poland* is an illustrative example of this, as certain Polish courts have referred preliminary questions to the CJEU concerning the compatibility of the national judicial reforms with EU law. Support from national courts in the form of preliminary references can indeed bolster the effectiveness and legitimacy of the rulings of the Court in responding to measures which may violate EU law and which may be politically sensitive, as is the case here. This case is an example of how the Commission and the Court can coordinate their actions in order to target systemic deficiencies in a Member State which seek to undermine the foundational values of the Union. It is also an impressive illustration of the Commission implementing the jurisprudence of the Court through subsequent infringement actions which are more specific and better framed.

D LIMITATIONS TO THE LEGAL ENFORCEMENT OF EU VALUES

[117] ibid [86].
[118] ibid [96].
[119] ibid [124]; See also Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117, para 32.

Thus far we have analysed the approaches taken by the Commission and the Court of Justice in responding to the rule of law crisis and have noted the attempts to coordinate their action so as to ensure increased effectiveness of the Article 258 TFEU procedure. However, a number of issues arise when discussing how the Union can respond to democratic and rule of law backsliding and the enforcement of EU values. Firstly, there is the issue of whether legal or political enforcement of values is the most appropriate method for responding to systemic deficiencies in the rule of law at Member State level. This also raises concerns around legitimacy and undue depoliticisation of conflict which can arise and the potential unburdening of political actors which such an approach entails.[120] Moreover, the Court must be mindful that undue politicisation of the judiciary can lead to a situation in which the ultimate authority of the Court becomes weakened and the legitimacy of its rulings can be contested, leading to a situation of legal uncertainty as regards the interface between the authority of EU law and national law. Secondly, there is the issue of the EU's competence to regulate the organisation of national judiciaries, traditionally assumed to be an exclusive area of Member State competence.[121] This is coupled with the lack of implementation of Article 2 TEU's foundational values through more specific legal norms so as to make them applicable to, and in cases of non-compliance, enforceable against the Member States. It is contended that while legal efforts of the Commission and the Court in responding to rule of law backsliding through the infringement procedure are commendable, this means of enforcement alone cannot solve this issue, and a more rounded political response is needed in order to effectively address this crisis.

I Depoliticising Conflict through Judicial Intervention

An issue which arises in this context is the desirability of legal enforcement of EU values and the appropriateness of the technocratic Commission and the judicialised Court being afforded a primary role in responding to rule of law backsliding given their disconnect from any national legitimising factor. It has already been noted that the infringement procedure is a legal mechanism for the enforcement of EU law, whereas the Article 7 TEU procedure is a politicised mechanism aiming to quarantine and sanction offending Member States[122] and can be complicated by the political sensitivities which such an approach entails. It has been noted that a purely legal mechanism is insufficient to solve 'an essentially political problem', while others

[120] Blauberger and Kelemen (n 6) 332.
[121] Blauberger and Kelemen (n 6).
[122] Schmidt and Bogdanowicz (n 16) 1072.

have questioned the possibility of the legal enforcement of fundamental values, such as democracy and the rule of law, at all.[123] Therefore, many have advocated for a political solution to a political problem and, while noting the advantages of legal instruments in responding to such matters, have ultimately contended that they are not sufficient to fully address such issues and that a political response is also necessary.[124]

Given the apparent lack of political motivation to pursue Poland through the Article 7 TEU procedure and the ineffectiveness of the political dialogue carried out through the Rule of Law Framework, it would appear that this form of depoliticisation of political conflict through judicial intervention could unburden the political institutions and dis-incentivise them to act decisively to resolve this matter, a matter which can only effectively be dealt with by both legal and political intervention.[125] The Court of Justice is a legal actor, but like many national constitutional courts, it also has a political role to play and cannot avoid being embroiled in certain political conflicts due to its authority as the ultimate arbiter in the interpretation and application of EU law. The depoliticisation of certain political conflicts through the judiciary may be desirable in that legal procedures may be viewed as more impartial and objective than political decisions, and it has been contended that 'the advantage of judicial tools lies in their depoliticising effect'.[126] However, if the Court moves too far ahead in the legal enforcement of EU values without the political support of the Member States, this could lead to a situation in which the rulings of the Court lose their authority to enforce compliance with EU law. Rasmussen observes that when the Court moves too far beyond the scope of its role in the Treaties, this can create a dissociation between legal and political reality,[127] which can cause 'disruptions and stoppages in the political decision making process and endanger the Court's judicial authority and legitimacy'.[128] Although there have been many examples of judicial policy-making throughout the history of the Union, Member State acceptance of this judicial

[123] Wojciech Sadurski, 'Rescue Package for Fundamental Rights' (*Verfassungsblog*, 24 February 2012) <https://verfassungsblog.de/rescue-package-fundamental-rights-comments-wojciech-sadurski/> accessed 24 February 2020; See also Matej Avbelj, 'The Inherent Limits of the Law - the Case of Slovenia' (*Verfassungsblog*, 6th December 2013) <https://verfassungsblog.de/the-inherent-limits-of-law-the-case-of-slovenia-2/> accessed 24 February 2020.

[124] Wojciech Sadurski, 'Rescue Package for Fundamental Rights' (*Verfassungsblog*, 24 February 2012) <https://verfassungsblog.de/rescue-package-fundamental-rights-comments-wojciech-sadurski/> accessed 24 February 2020.

[125] ibid.

[126] Kim Lane Scheppele, 'What can the European Commission do when Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions' (Assises de la Justice conference, Brussels, November 2013).

[127] Hjalte Rasmussen, *On Law and Policy at the European Court of Justice - A Comparative Study in Judicial Policy Making* (Martinus Nijhoff Publishers 1986) 13.

[128] Burley and Mattli (n 29) 48.

activism always depended on the perception of the Court as a non-political actor and the fact that the Court rulings aligned with the wishes of the majority of the Member States.[129]

However, judicial enforcement of EU values alone will not be sufficient to solve the rule of law crisis and political intervention by the Member States and EU institutions is necessary in order to provide a comprehensive response to democratic and rule of law backsliding in the EU.[130] While judicial mechanisms can and should be used in responding to the rule of law crisis, Kelemen has noted that the over-reliance on courts to defend democracy and the rule of law risks unduly politicising the EU judiciary.[131] Cornides has noted that expanding the competence of the Court to enforce the fundamental values of the Union would overemphasise the role of the Court in responding to such a situation and would ultimately threaten the division of power between the Member States and the Union.[132] Finally, if the authority of the Court is weakened, a more fundamental question arises in the sense that national constitutional courts may begin to doubt the authority and legitimacy of the Court's judgments and consider not applying such judgments. Such a situation of non-compliance would have disastrous consequences for the EU legal order as, if national constitutional courts no longer respect the judgments of the Court of Justice, we are faced with a situation in which the ultimate legal authority of the Union could come into conflict with the ultimate legal authority of the national constitutional orders.[133] Therefore, it is suggested that the European Council and other political actors continue to exert political pressure on Poland through the Article 7 TEU procedure so as to bolster the legitimacy and authority of the Court's ruling in *Commission v Poland*, in order to create a more rounded response.

II The Competence Question

There is a strict delimitation of competences between the European Union and the Member States provided for in the Treaties so that areas of national law which do not fall within the scope of EU law are outside the remit of Union action and remain the competence of the Member States.[134] It has been contended that constitutional prerogatives, such as the

[129] Rasmussen (n 127) 8.
[130] Blauberger and Kelemen (n 6) 331.
[131] ibid.
[132] Cornides (n 26).
[133] Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47(1) International Organisation 41; See also Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65(3) Modern Law Review 317.
[134] Article 5(2) TEU contains the principle of conferral whereby 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.

organisation of the national judiciary, are an exclusive Member State competence in which the Union has no power to interfere.[135] This led to the unsatisfactory position whereby the competence of the Union was doubted in situations such as the present case, where Member State governments reform the organisation of the national judiciary in such a way that undermines the independence of that branch, and thus union values, and the Union appears powerless to stop it. Some claim that the ASJP case 'reconfigured the constitutional organisation of the Union',[136] by its interpretation of Article 19(1) TEU which extended the scope of application of the principle of effective judicial protection to all national Member State courts when they interpret or apply EU law.[137] This means that, in principle, every Member State court can come within the scope of Article 19(1) TEU. The Court, in stating that the principle of effective judicial protection is applicable to all national courts, has therefore brought the organisation of the national judiciary within the scope of EU law and has allowed the Court to review national measures which seek to undermine the independence of the judiciary, measures which hitherto were thought to be outside the remit of Union influence. Therefore, it would appear that the Court has extended the competence of the Union to review national measures in the context of the constitutional organisation of national institutions. We must ask what does this mean for the division of competences between the Union and the Member States, and whether the Court should be allowed to extend the scope of application of EU law to such an extent? It has been noted that 'with stronger intervention in the rule of law crises, the Court might open itself up to the criticism that it is interfering with Member States' retained competences, with little or no legal basis in the Treaties.'[138] While some would say that this apparent extension of competence is outside the power of the Court, others have justified it on the basis of the need to ensure the effet utile of Union law and to strengthen respect for fundamental values within the EU legal order.[139] Additionally, the principle of sincere cooperation in Article 4(3) TEU requires Member States to exercise their exclusive competence in accordance with their obligations under the Treaties so as to avoid discordance between Member State action and the aims of the Union. Indeed, Hillion has noted that:

[135] Baume and Aleksandra Wrobel (n 55).
[136] Michal Ovadek, 'Has the CJEU just reconfigured the EU Constitutional Order?' (*Verfassungsblog,* 28 February 2018) <https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/> accessed 24 February 2020.
[137] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117, para 37.
[138] Bonelli and Claes (n 28).
[139] Luke Dimitrios Spieker, 'Commission v. Poland - A Stepping Stone towards a Strong Union of Values?' (*Verfassungsblog,* 30 May 2019) <https://verfassungsblog.de/commission-v-poland-a-stepping-stone-towards-a-strong-union-of-values/> accessed 24 February 2020.

> As an objective of the Union, ... respect for the values of Article 2 TEU in general, and of the rule of law in particular, entails obligations of conduct for the Member States. Following the principle of sincere cooperation enshrined in Article 4(3) TEU, they shall 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. Such an obligation of cooperation is all the more significant since the European Court of Justice acknowledges it as a self-standing requirement, which applies irrespective of the nature of EU and Member States' competence.[140]

Therefore, while the Court does not have a specific competence to enforce EU values, it is the responsibility of the Member States to comply with their obligations under EU law and to facilitate the aims of the Union by not enacting national policies which contravene the foundational values of the Union. The fact that the rule of law value has now been operationalised through the principle of effective judicial protection and extended to apply to Member State courts also means that the Court of Justice can legitimately review Member State action which threatens to undermine the independence of their judiciaries and provides a better legal framework to ensure that Member States respect Union values. While we must be cognisant of the limitations of legal enforcement, this paper contends that due to the ineffectiveness of political enforcement seen thus far, and the developments in the recent case law of the Court, the legal enforcement of values through the Article 258 infringement proceedings and existing Treaty mechanisms are the best way to ensure compliance with EU law and protect the values on which the union is founded.

E RECENT DEVELOPMENTS

It is, however, important to note that since *Commission v Poland*, there have been a number of judgments released which complicate the situation. The ability of national courts to refer preliminary questions to the Court of Justice is an essential component of the judicial cooperation mechanism provided for in Article 267 TFEU which has allowed national courts to play an indispensable role in the judicial protection and enforcement of EU law. However, the recent preliminary reference of the Polish Supreme Court and the subsequent reaction of the Polish authorities, shows the fragmentation of the Polish judiciary caused by the governmental interference and the potential for non-compliance with EU law which this entails.

[140] Christophe Hillion, 'Overseeing the Rule of Law in the European Union: Legal Mandate and Means' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 62.

The Court of Justice issued its judgment in the *AK* case in November 2019, on foot of a preliminary reference from the Polish Supreme Court.[141] The Court found that it was for the Polish Supreme Court to decide the dispute on the legality of the National Council of the Judiciary (NCJ), and the fact that disputes concerning the early retirement of judges automatically fell within the jurisdiction of the disciplinary chamber established under national legislation by the NCJ did not prevent the Supreme Court from determining whether this chamber had been lawfully established, given concerns relating to the independence of the NCJ.[142] The Polish Supreme Court subsequently ruled that judicial benches appointed by the NCJ and the newly established disciplinary chamber were unlawfully constituted.[143]

However, tensions have increased significantly since this judgment, with the Polish government passing new legislation in December 2019 which made it illegal for national judges to question the legitimacy of judicial appointments by the NCJ, which effectively prevents Polish judges from complying with the ruling of the CJEU and the Supreme Court. It has been noted that the Polish judiciary has been split apart, with one side adhering to the ruling in the *AK* case and the subsequent Supreme Court decision, and the other side rejecting it and complying with the new legislation.[144] The actions of the government in introducing this legislation stand openly in defiance not only of the Polish Supreme Court's judgments, but also those of the Court of Justice. These recent developments undermine the authority of the Court's rulings, expose the lack of respect for and compliance with EU law in Poland and threaten even further the foundational values of the union, particularly the rule of law. While the judgments of the Court in *Commission v Poland* and the *AK* case could be seen as an attempt by the Court to protect the independence of the Polish judiciary, and represent a judicial stepping stone toward a stronger union of values,[145] the national reaction to those judgments illustrates the belligerence of the Polish authorities in complying with EU law and implementing the judgments of the Court of Justice which shows that the EU response thus far has not produced the desired effects and that the situation risks unravelling into a serious threat to the rule of law. Therefore, the Union should consider a more coordinated response through continued, specific

[141] Joined Cases C-585/18, 624/18 and 625/18 *A.K & Ors v Sad Najwyzszy* [2019] ECLI:EU:C:2019:982.
[142] ibid.
[143] Resolution of the Civil, Criminal and Labour & Social Insurance Chambers of the Supreme Court of Poland (23 January 2020) <https://www.iustitia.pl/en/activity/informations/3635-resolution-of-the-civil-criminal-and-labour-social-insurance-chambers-of-the-supreme-court-of-23-january-2020> accessed 24 February 2020.
[144] Witold Zontek, 'You Can't Forbid Judges to Think' (*Verfassungsblog*, 5 February 2020) <https://verfassungsblog.de/you-cant-forbid-judges-to-think/> accessed 24 February 2020.
[145] Spieker (n 139).

rule of law based infringement actions with heavy penalties for non-compliance, as well as a political response through the Article 7 procedure and intergovernmental political pressure.

F CONCLUSION

This paper has sought to examine the potential effectiveness which legal means of enforcement, namely the Article 258 TFEU infringement procedure, alongside the innovative jurisprudence of the Court, could have in addressing the EU rule of law crisis. In order for the potential of this procedure to be realised, the Commission must actively cooperate with the Court of Justice and ensure the necessary implementation of the Court's innovative judgments with regard to EU value enforcement, and the rule of law more particularly. The Court's approach in operationalising the rule of law and bringing the organisation of the national judiciary within the scope of EU law so as to be reviewable by the Court in the *ASJP* judgment was a very promising development which has been implemented by the Commission in their recent infringement proceedings against Poland. Even more promising is the recent judgment of the Court in *Commission v Poland* which found that Poland had failed to fulfil its obligation to ensure effective judicial protection under Article 19(1) TEU due to its infringement of the principles of irremovability of judges and judicial independence. The progression of the case law outlined above shows an auspicious trajectory for the Court and the Commission's response to rule of law backsliding in the Union, however the limitations of the institutions competences in using their powers in novel ways in order to respond to this crisis should be noted and it is important that in seeking to respond to such developments, the Union institutions themselves should be mindful of the limitations upon their own powers so as not to violate the very principles which they seek to protect. Most importantly, however, these developments on the part of the Court and the Commission should be carefully noted and followed up by other EU actors to provide an effective political response to the crisis, which is necessary to complement the action of the Court and the Commission and to fully address rule of law backsliding in the European Union. While it has been analysed above that the political response of the Union has been far from satisfactory, the recent judgment of the Court in *Commission v Poland* finding that Poland has failed to fulfil its Treaty obligations and the reaction of the Polish authorities to the *AK* judgment may give the Union's political actors the incentive they need to pursue Poland through political means and finally resolve this issue, which has the potential to damage the very foundations of the EU legal order if left unchecked.

IRISH DEFAMATION LAW AND THE JURY: A BEHAVIOURAL ECONOMIC PERSPECTIVE

*Ruadhán Ó Gráda**

A INTRODUCTION

Ireland has earned an international reputation for its defamation laws, under which claimants from around the world have been awarded millions of euros.[1] This article will, in light of potential law reform, discuss damages awarded by Irish juries in defamation cases from a behavioural economic perspective.[2] The focus of this article is on juries in defamation trials in the Republic of Ireland, but a considerable amount of the behavioural and legal points made apply to jury-awarded damages generally. I propose to consider whether the Irish legislature intends damages in defamation cases to be unpredictable, a pro-plaintiff stance, or whether it wishes for parties to be on equal footing, both in the courtroom and in conducting settlement talks, the results of which are heavily related to the current position of the law. As I outline in what follows, if the legislature is in favour of the former, the law is currently serving its purpose. However, if the law seeks to equally balance the competing constitutional rights of plaintiffs and defendants in defamation trials, there is more that could be done to fulfil that objective.

It is an objective of the Irish legal system, like many others, to optimally balance the right to a good name with the right to freedom of expression.[3] Each of these rights is protected by the Constitution of Ireland. Freedom of expression is expressly protected under the European Convention on Human Rights (ECHR).[4] The right to a good name is not expressly mentioned under ECHR law but the case of *Fürst-Pfeifer v Austria* suggests that there is some protection afforded to one's reputation at ECHR level.[5] The relatively recent Defamation Act 2009

*Ruadhán Ó Gráda is a final year BCL (Law with Economics) student at University College Dublin. He completed an exchange semester at the University of Texas School of Law, where he wrote the first draft of this paper. Work experience at the Central Bank of Ireland and a small law firm in Princeton, New Jersey has inspired him to pursue an international legal career on completion of his degree. The comments and support of Professors Sean H Williams and Liam Delaney are gratefully acknowledged. Thanks also go to his family and to the editors and reviewers of the Cork Online Law Review.

[1] Kate Beioley, 'Buzzfeed Case Shows Dublin's Draw for Foreign Libel Claimants' *The Financial Times* (London, 5 December 2019).

[2] Department of Justice and Equality, 'Review of the Defamation Act 2009 - Public Consultation: Invitation for Submissions' (2016) <http://www.justice.ie/en/JELR/Pages/Review_of_the_Defamation_Act_2009_Public_Consultation> accessed 5 March 2020.

[3] Constitution of Ireland, Art 40.6.1°; Constitution of Ireland, Art 40.3.2°.

[4] European Convention on Human Rights, art 10.

[5] *Fürst-Pfeifer v Austria* App Nos 33677/10 and 52340/10 (ECtHR, 17 May 2016).

retained the role of the jury in determining injury to one's good name 'in the eyes of reasonable members of society' and to award an appropriate amount of damages to those injured by a defamatory publication.[6] Recent appellate hearings have confirmed that this position has been accepted by the courts.[7]

This legal position has been subject to significant scrutiny in recent years, following abnormally high awards of damages, which according to some, are a result of poor jury decision-making.[8] Cases such as *Leech v Independent Newspapers (Ireland) Ltd* exemplify Irish juries' ability to award massive amounts in damages.[9] In that case, the jury awarded €1.87 million in damages to Leech, who sued following a series of articles posted about her claiming that she was having an extra-marital affair with the Irish Minister for the Environment at the time. Factors considered in awarding damages included Leech being married with children and that it harmed her profession as a businesswoman.

It was noted that the jury returned with a verdict on damages within minutes.[10] The Supreme Court, considering the speed of the jury's deliberation and the extremely high sum awarded, decided to use its powers under section 13 of the 2009 Act to substitute the jury's award of €1.87 million with what the court believed to be a more reasonable award of €1.25 million. It is worth considering for comparative purposes that this award is far higher than the maximum award in such cases of £200,000 (approximately €237,000) in England and Wales, $250,000 (approximately €155,000) in Australia and $100,000 (approximately €69,000) in Canada.[11]

This article will conduct a behavioural analysis of decision-making in Irish defamation trials. Juries will be given particular weight in this analysis due firstly, to their central role in awarding damages and secondly, to the controversy surrounding their role and decisions. The susceptibility to bias of judges, the obvious alternative to juries in this case, will also be

[6] Defamation Act 2009, s 31 (2009 Act).
[7] *White v Sunday Newspapers Ltd* [2018] IESC 29, [2018] 3 IR 374; *Higgins v The Irish Aviation Authority* [2016] IECA 322, [2016] 3 IR 308.
[8] David Ward, 'Let Judges, Not Juries, Decide Libel Damages' *The Sunday Times,* (London, 23 August 2015); Shane Phelan, 'Time to Scrap Juries in Defamation Cases - Law Conference Told' *The Independent,* (Dublin, 26 May 2018); Eoin O'Dell, 'It's Time to Abolish Juries in Defamation Cases'(*Cearta.ie,* 28 September 2017) <http://www.cearta.ie/2017/09/its-time-to-abolish-juries-in-defamation-cases/> accessed 5 March 2020.
[9] *Leech v Independent Newspapers (Ireland) Ltd* [2007] IEHC 223.
[10] Mary Carolan, 'Monica Leech Libel Award Cut to €1.25m by Supreme Court' *The Irish Times* (Dublin, 19 December 2014).
[11] Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report' (2010) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> accessed 5 March 2020;See discussion of legislation in Alastair Mullis and Andrew Scott, 'Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation' (2009) 14(6) Communications Law 173; *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229 (Can); *Arnold v Teno* [1978] 2 SCR 287 (Can); *Thornton v Prince George School District No 57* [1978] 2 SCR 267 (Can).

considered. This article will then list a number of amendments that could be made to Irish defamation law, considering the biases discussed.

B PROBLEMS WITH JURY DELIBERATION

Group deliberation in the form of a jury has been central to legal systems across the world. However, the practical benefits of deliberation, particularly with regard to complicated questions, are unclear according to recent psychological research. Instead of producing near-optimised solutions to problems, as they should in theory, deliberating groups are often subject to a series of decision-making biases. The end of this section will address why defamation juries might be especially susceptible to the following biases.

Several behavioural phenomena that apply to jury deliberations have been identified in behavioural law and economics research. Group deliberators are generally averse to being the sole dissenter or among a minority in a group.[12] They will be less likely to contribute to a deliberation if their opinion is socially unpopular or if they are of a lower social status than their peers.[13] Group deliberations also lead to decision-making cascades: the tendency of a decision-maker to make the same decision as a group member on the same matter because other members made the same decision, rather than act on one's own information. This cascade will lead to decision-makers giving important decisions less consideration and disclosing less potentially valuable information, leading to under-considered damages awards.

Salganik, Dodds and Watts captured the effect of cascades in a simple, yet effective experiment.[14] The test subjects were divided into different groups and were told that they could listen to and download from a range of songs. One control group did not receive any information on the preferences of their fellow group members. Subjects from other groups could see what music their fellow group members were listening to and downloading. Subjects from the group which received information about their peers' downloads were highly influenced by their peers' choices and tended to download music that was popular in the group, far more than those in the control group. One might imagine how this could apply to

[12] Andrew Caplin and John Leahy, 'Miracle on Sixth Avenue: Information Externalities and Search' (1998) 108(466) The Economic Journal 60.

[13] Cass R Sunstein, 'Group Judgments: Deliberation, Statistical Means, and Information Markets' (2005) 80(3) New York University Law Review 962, 985-986; Caryn Christenson and Ann Abbott, 'Team Medical Decision Making,' in Gretchen B Chapman and Frank A Sonnenberg (eds), *Decision Making in Health Care* (Cambridge University Press 2000) 267, 273-276.

[14] Matthew J Salganik, Peter Dodds and Duncan Watts, 'Experimental Study of Inequality and Unpredictability in an Artificial Cultural Market' (2006) 311(5762) Science 854.

deliberating juries. Jurors who can see what their fellow jurors are deciding will be likely to join their opinion. This extends to damages; if one juror who proposes a sum of damages early on in the deliberation gets the others' attention, it is highly possible that other jurors will concur with this proposal.

C GROUP POLARISATION

Group polarisation is a phenomenon strongly connected to cascades, by which deliberators within a group arrive at a more extreme decision as a result of the group deliberation than they would have before the deliberation had taken place. Deliberators are likely to sway even further in the direction to which they were tending before deliberations began.[15] In a 2002 article, 'The Law of Group Polarization', Sunstein predicted that a jury tasked with awarding punitive damages in a tort case, after deliberating, would award punitive damages significantly higher than the median damages chosen by each individual member before trial, where the average sum chosen by the jury members before the trial was higher than the median.[16] This could be a result of social influence, the tendency of individuals to conform their actions to those of others around them or a lack of heterogeneity in the deliberating group, which results in undesirably narrow discussions of issues at hand, and enforcement of extreme views which garner support through a snowball effect of congregating similar views.

An experiment by Schkade, Sunstein and Kahneman captures this effect.[17] Paid, jury-eligible participants were asked to consider a case, award punitive damages in dollars and judge punishment ratings (based on the severity of the case), both individually and as a jury. 401 juries out of 509, each assigned one case out of 15 used in the experiment, managed to reach both a unanimous punitive damages award and a punishment rating for their respective cases.

The results of the experiment found that juries, deliberating as groups, tend to polarise damages, particularly in what seem like more egregious cases. Awards for the five cases with the lowest levels of damages awarded were slightly lower. Awards for the middle and upper five cases in terms of damages were twice and five time as large, respectively. A tendency to polarise damages results in more unpredictability; the standard deviation of the amount

[15] John C Turner, Michael A Hogg, Penelope J Oakes, Stephen D Reicher and Margaret S Wetherell, *Rediscovering the Social Group: A Self-Categorization Theory* (Wiley-Blackwell 1987).
[16] Cass R Sunstein, 'The Law of Group Polarization' (2002) 10(2) The Journal of Political Philosophy 175, 176-178.
[17] David Schkade, Cass R Sunstein and Daniel Kahneman, 'Are Juries Less Erratic than Individuals? Deliberation, Polarization, and Punitive Damages' (1999) University of Chicago Law School, *John M Olin Law & Economics Working Paper No 81* <https://ssrn.com/abstract=177368> accessed 5 March 2020.

awarded by juries was over five times greater than the standard deviation of the median juror. The standard deviation of the punishment ratings by juries was 1.2 times larger than that of the median juror; a considerable but far smaller margin of difference. These results suggest that jury deliberations on damages will rarely be predictable.

However, when the jury is asked to produce a rating of the severity of damage to the injured party, rather than a number, the outcome of the deliberation will be more predictable. A solution to group polarisation and cascades could be to isolate members of the jury as they make their initial decisions, free from the influence and the judgment of the entire deliberating group. To compel jury members to reason independently could lead to deeper reflection of the evidence presented in the case. Each jury member could then present their independent findings to the group after a period of time. The loudest voice in the room is not always the smartest, and this proposal would allow all voices to be heard to a greater degree than they currently are in Irish law.

D ANCHORING

Anchoring is a bias heavily discussed in behavioural economics. Kahneman and Tversky, who discussed the concept in their 1974 paper, describe it as an estimate of a figure, which is made by adjusting an initial value.[18] A famous example of anchoring by Kahneman and Tversky involved asking two groups of people effectively the same question, but framed differently. One group was asked to estimate the value of 1x2x3x4x5x6x7x8 and the other was asked to estimate the value of 8x7x6x5x4x3x2x1. Although the answer to both problems was the same, the median estimates from both groups were very different. The median estimate of the first sum was 512 and the median estimate of the second was 2,250. The correct answer is 40,320.[19]

Another experiment in this Tversky and Kahneman paper asked participants to estimate the proportion of UN countries that are from Africa. Before the participants answered the question, they watched a wheel of fortune being spun and land on either the number 10 or 65. The participants then gave their estimate of the proportion. They were offered a payoff for accurate guesses. However, the payoff had little impact as the anchoring effect of the values that appeared on the wheel of fortune was significant: for the groups that observed the fortune wheel land on the number 10, their median estimate for the proportion of African countries in the UN

[18] Amos Tversky and Daniel Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185(4157) Science 1124.
[19] ibid.

was 25%. Those who observed the number 65 appear on the wheel of fortune prior to making their estimate had a median estimate of 45%.[20]

Anchoring, in itself, is not necessarily bad and will never be avoided – precedent is an example of anchoring deeply ingrained in common law legal systems. However, it is possible for certain anchors to unsettle the balance between freedom of expression and the right to a good name. The 2009 Act allows parties to make submissions to the jury with respect to damages, presumably to guide the jury to make more accurate assessments.[21] These submissions, by their very nature, act as anchors leading the jury to a final estimate. There is nothing in section 31 of the 2009 Act that limits the amount a party can submit to the jury, which presents the possibility for plaintiffs to make unreasonably high submissions for damages and for defendants to suggest unreasonably low amounts. Data from the United Kingdom (which no longer uses juries in defamation trials) suggests that the average award for defamation in that jurisdiction is under £38,000 or €43,000, similar to many other personal injury claims.[22] Therefore, it is easier for plaintiff's counsel to submit amounts far above the average award than amounts far below, given the damages cap in place in that jurisdiction. In jurisdictions with no cap on damages, there is little to prevent submissions for massive amounts of damages.

Research by Chapman and Bornstein suggests that plaintiffs have nothing to lose by requesting massive amounts rather they will benefit from doing so.[23] This research included an experiment in which a plaintiff lawyer requested either $20,000, $5 million or $1 billion. The amount of compensation recommended by the test subjects increased with the numbers.[24] The effect of submissions on damages has yet to be observed. Future legislation could aim to regulate the amount of damages requestable by counsel. A cap on damages awardable in defamation trials would have a similar effect.

I think it is important to note that the test participants in these experiments were not experts. An experiment by List showed that the probability of people becoming prone to behavioural biases (in this case, the endowment effect) depended largely on market experience and

[20] ibid.
[21] 2009 Act (n 6) s 31(1).
[22] See appendix schedule of awards of damages in libel actions in the years 1951-2010 in Cameron Doley and Alastair Mullis, *Carter-Ruck on Libel and Privacy* (5th edn, Butterworths 2010).
[23] Gretchen B Chapman and Brian H Bornstein, 'The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts' (1996) 10(6) Applied Cognitive Psychology 519.
[24] ibid.

knowledge.[25] The subjects in the Kahneman and Tversky experiment had little experience in making the estimations with which they were presented. Additionally, research has shown that experience reduces the effect of anchoring, as does explaining one's decision.[26]

Judges, based on this theory, are less biased, more consistent and more effective decision makers than juries when it comes to awarding damages in defamation trials. However, a look at decisions such as *Leech*, in which the Supreme Court exercised its power to substitute damages, along with research I will outline, may suggest otherwise.[27]

E SUSCEPTIBILITY OF DEFAMATION CASES TO BIAS

These studies are based largely on jury deliberations in tort cases other than defamation, which begs the question of how such biases might affect defamation juries. Defamation is a highly controversial tort, treated differently by many jurisdictions. The intangibility of reputation, the term used in Irish law, complicates the assessment of damages. It is therefore understandable that juries struggle to deliver consistent, predictable awards of defamatory damages.

Furthermore, it will be difficult for a jury to explain how it arrived at a particular figure, as was the case in *Leech*, where the jury provided no explanation for its €1.87 million award.[28] Requiring an explanation for such decisions could lead to more reasoned figures being awarded and added predictability in the law.

Additionally, framing questions to the jury in a different way could prove effective. According to section 31 of the 2009 Act, there are eleven factors that judges must direct juries to take into consideration when determining general damages. Perhaps, if juries are to remain fully involved in defamation proceedings in the coming years, this list of factors should be scaled down or simplified. An amendment to the law allowing the judge to direct a jury to give factors of particular relevance to the case more weight than others, and potentially to disregard factors

[25] John A List, 'Does Market Experience Eliminate Market Anomalies? The Case of Exogenous Market Experience' (2011) 101(3) The American Economic Review 313.
[26] Andrew R Smith, Paul D Windschitl and Kathryn Bruchmann, 'Knowledge Matters: Anchoring Effects Are Moderated by Knowledge Level' (2013) 43(1) European Journal of Social Psychology 97; Philip E Tetlock and Richard Boettger, 'Accountability: A Social Magnifier of the Dilution Effect' (1989) 57(3) Journal of Personality & Social Psychology 388.
[27] *Leech* (n 9); 2009 Act (n 6) s 13.
[28] *Leech* (n 9).

of minimal or no relevance, could be helpful to juries struggling with the complicated task of awarding proportionate damages.

F ARE JUDGES BETTER PLACED TO AWARD DAMAGES?

One could easily propose the complete abolition of juries based on the assumption that judges, as trained professionals, are immune to the biases discussed so far in this article. However, as much of the following research indicates, if a juror is subject to a certain bias (except for group deliberation biases), judges' decision-making is also likely to be affected. Therefore, in determining whether juries should be abolished, it should be considered how much better the alternative to a jury is and how much less it is affected by biases.

Judges have the power under section 31(2) of the 2009 Act to give directions to the jury with respect to damages. Section 13 of the 2009 Act also gives the Supreme Court the power to substitute such amount as it considers appropriate for any amount of damages awarded to the plaintiff by the High Court. These powers would suggest that the Irish legislature places trust in judges to award appropriate damages where juries will not, and to lead juries in the right direction. The broadening of judges' powers in 2009 could even be seen as the first step of phasing juries out of defamation cases entirely.

A 2015 article by Rachlinski, Wistrich and Guthrie discusses the effects of biases on judges' judgments in considerable detail.[29] It finds, despite being highly qualified and having expertise in applying the law, that judges are not perfect decision-makers. There are in fact many biases to which they are subject. Judges judge the harm done to women as opposed to men differently,[30] as they do the correct punishment to assign to members of different races.[31] Ireland does not publicly elect its judges, but concerns have recently been raised regarding the manner in which judges have been and will be appointed in the country.[32] Suboptimal judicial appointment procedures undoubtedly lead to a greater probability of suboptimal candidates being appointed to the judiciary, thus creating a greater probability of errors being made in the application of the law. Some jurisdictions in the United States publicly elect their judges, which

[29] Jeffrey J Rachlinski, Andrew J Wistrich and Chris Guthrie, 'Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences' (2015) 90(2) Indiana Law Journal 695.
[30] Jane Goodman, Elizabeth F Loftus, Marian Miller and Edith Greene, 'Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards' (1991) 25(2) Law & Society Review 263.
[31] Jeffrey J Rachlinski, Sheri Lynn Johnson, Andrew J Wistrich and Chris Guthrie, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84(3) Notre Dame Law Review 1195, 1221–1226.
[32] The Irish Times View, 'Irish Times View on the Judicial Appointments Bill' *The Irish Times* (Dublin, 17 November 2018) <https://www.irishtimes.com/opinion/editorial/irish-times-view-on-the-judicial-appointments-bill-1.3700432> accessed 5 March 2020.

leads to concerns in relation to judges being overly partisan and politically oriented.[33] There are similar concerns about the Irish judicial appointments process.[34] All of the above raises questions over how much more reliable judges are in making legal decisions than randomly selected juries.

As noted, in *Leech* the Supreme Court substituted the initial award presented by the High Court jury of €1.87 million with a smaller but still very high sum of €1.25 million, but this figure was several times higher than the maximum amount of damages a court in the English and Welsh jurisdiction could.[35] The European Court of Human Rights noted that the award was fifty times higher than the national average wage at the time.[36]

It is highly possible that the Irish Supreme Court was anchored by the jury's High Court award when calculating the amount of damages with which it would substitute the High Court's award. There was very little explanation for the substituted award being so high. The European Court of Human Rights, when it was tasked with reviewing the *Leech* decision, found no 'relevant and sufficient' explanation by the Supreme Court for its award, which violated Article 10 the ECHR.[37]

This is somewhat troubling for the argument that judges are far more reliable than juries in terms of assessing damages in defamation cases. Several other points made by Rachlinski, Wistrich and Guthrie outline further challenges to this school of thought.[38] Anchoring has a major effect on decision-making in the law, which may extend to Supreme Court's substitution of High Court damage awards.[39]

In an experiment conducted by Rachlinski, Wistrich and Guthrie, judges were asked to review a hypothetical case and provide a numerical judgment.[40] Some judges in the experiment were

[33] John R Lott Jr, *Dumbing Down the Courts: How Politics Keeps the Smartest Judges Off the Bench* (Bascom Hill Publishing Group2013).
[34] The Irish Times View, 'Judicial Appointments: The Farce Goes On' (The Irish Times, 26 April 2018) <https://www.irishtimes.com/opinion/editorial/judicial-appointments-the-farce-goes-on-1.3474040?mode=sample&auth-failed=1&pw-rigin=https%3A%2F%2Fwww.irishtimes.com%2Fopinion%2Feditorial%2Fjudicial-appointments-the-farce-goes-on-1.3474040> accessed 5 March 2020.
[35] Lord Justice Jackson (n 11). Note that this comparison is of limited relevance, given that there was, and still is, not any cap in Ireland on damages in a defamation case. Nevertheless, it accentuates the difference between the jurisdictions' legal positions; Carolan (n 10); Phelan (n 8).
[36] *Independent Newspapers (Ireland) Limited v Ireland* App No 28199/15 (ECHR, 15 June 2017).
[37] ibid [105].
[38] Rachlinski, Wistrich and Guthrie (n 31).
[39] Yuval Feldman, Amos Schurr and Doron Teichman, 'Anchoring Legal Standards' (2016) 13(2) Journal of Empirical Legal Studies 298.
[40] Rachlinski, Wistrich and Guthrie (n 31) 718.

informed of damage caps before delivering their judgment of a case the researchers estimated would produce an award between $30,000 and $50,000. The only issue the judges were faced with was determining the amount of damages that should be awarded to the hypothetical plaintiff for pain and suffering. The caps mentioned to some of the judges ranged from $332,236 to $750,000.

For the judges to whom $332,236 was mentioned as a damage cap for the action, the reference to the cap was statistically significant. Their median award was $85,000, as opposed to $57,500 for the judges who were not informed of the cap. For the judges to whom $750,000 was mentioned, the effect of the reference to the cap was even stronger. The median award for that group was $250,000 as opposed to $100,000 for the judges who were not reminded of the cap before making their judgment.

These results show that judges are very much prone to biases. The judges who were part of the group to which $332,236 was mentioned were all likely aware of the damages cap as it had existed in their jurisdiction since 1978.[41] Yet, a mere reference to the cap before making their judgments had a significant effect on their judgments compared to other judges who had constructive knowledge of the cap, but were just not reminded of it directly before their judgments were made. In theory the reference should not have had an effect on the judgments, but the reality was very different.

In another experiment by Rachlinski, Wistrich and Guthrie, the effect on judgments of the order in which information is presented to judges was tested.[42] Three groups of judges from various parts of the world were asked to determine appropriate sentences for two crimes. The first crime was assault and the second was voluntary manslaughter. These crimes were intended to contrast each other in terms of seriousness.[43] Half of the judges decided on the less serious case first and the other half decided on the more serious one. This affected the sentences decided on by the judges. After reviewing the less serious case first, judges were inclined to believe that a long sentence for the more serious crime was inappropriate and after reviewing the more serious case first, judges felt that a short sentence for the second case was insufficient, despite

[41] *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229 (Can); *Arnold v Teno* [1978] 2 SCR 287 (Can); *Thornton v Prince George School District* No 57 [1978] 2 SCR 267 (Can).
[42] Rachlinski, Wistrich and Guthrie (n 31) 724.

[43] ibid.

the offence being far less severe. The order in which judges reviewed the cases, therefore, had an anchoring effect on their next decision.

This leads to the conclusion that, despite their training and knowledge of the law, judges are capable of being, and often are, biased. It suggests that the benefits of abolishing juries in favour of judge-only trials, based on the idea that judges are far more reliable, unbiased decision-makers, are not as clear as they may seem at first. This should be seriously considered when discussing defamation law reform with respect to abolishing juries. Although juries' lack of experience could cause them to be more erratic than judges at times, it could be argued that this trade-off is justified by the unique insight a jury can bring to a decision.[44]

G EFFECTS OF UNPREDICTABLE DEFAMATION AWARDS

Juries' awarding of unpredictably high damages affects freedom of expression, which is protected by the Irish Constitution and the ECHR.[45] It has been acknowledged by McKechnie J of the Supreme Court of Ireland that large awards positively encourage publishers to ensure the 'truth and veracity of their content' before publishing injurious material.[46] Furthermore, it is possible that the law seeks to be unpredictable to deter defamation, in which case it is fulfilling its objective.

Unpredictable defamation awards are harmful to the media, the organs of public opinion and informers of current affairs. The media has perhaps suffered the most at the hands of Irish defamation law, as seen from the cases of *Leech* and *McDonagh v Sunday Newspapers*. The media has no special protection in Irish law comparable to that of the US media established in *New York Times Co v Sullivan*.[47] US law gives the media special protection; plaintiffs in defamation cases are required to prove with 'convincing clarity' 'actual malice' on the part of the media in its publication.[48] Irish media outlets enjoy no such protection under law and therefore must exercise greater caution with regard to their publications than, for example, their American counterparts might. The validity of this legal position is entirely subjective; it depends on the level of accountability the legislature wants the media to carry.

[44] Donald C Nugent, 'Judicial Bias' (1994) 42(4) Cleveland State Review 1.
[45] ibid; See also Constitution of Ireland, Art 40.6.1° and European Convention on Human Rights, art 10.
[46] See McKechnie J's judgment in *McDonagh v Sunday Newspapers Ltd* [2017] IESC 59, [2018] 2 IR 1 [50].
[47] *New York Times Co v Sullivan* 376 US 254 (1964).
[48] ibid 280, 285-286; See also *Gertz v Robert Welch Inc* 418 US 323 (1974) where discussion took place regarding limiting recovery to actual damages for falsity in cases by private plaintiffs and allowing punitive damages only when actual malice can be proven in John L Diamond, 'Rethinking Media Liability for Defamation of Public Figures' (1996) 5(3) Cornell Journal of Law and Public Policy 289.

Another effect of unpredictably high damages is the creation of asymmetry in ambiguity aversion between the plaintiff and the defendant. Ambiguity aversion is the tendency of a person to bet on a future event for which the probability is known over a future event for which the probability is unknown and difficult to predict.[49] An asymmetry of ambiguity aversion can occur in the law where one party is far more willing, usually because they have less to lose, to take a chance on the outcome of a case.[50] Unfairness in the law can arise where one party is highly ambiguity averse and the other party is relatively unconcerned.

In a defamation trial, due to the uncertainty of juries' decisions, the defendant will find themselves in a difficult position. By going to trial, even if they believe that they have a strong case, they will risk losing, consequently having to pay an unpredictable sum of damages, many of which have been very high in recent years.[51] This puts the defendant in a position of ambiguity. The plaintiff, on the other hand, has relatively little to lose other than legal fees (generally including the reasonable legal costs of the winning party). Plaintiffs will likely be more willing to go to trial in the hope of a high damages award.

As a result of this, an asymmetry in ambiguity aversion arises. The defendant is in an inferior bargaining position approaching settlement talks and may settle to pay above what the average result of a case decided by an impartial judge would be because they cannot afford the risk of allowing the jury to decide their fate. This would be unduly damaging to the defendant and would have chilling effects on the freedom of expression. The point also has a potential gender aspect. If as often claimed, women are more risk-averse than men they will be less likely to go to trial.[52] Defendants, male and female, would benefit from added predictability in the law in these circumstances.

Media outlets in Ireland, due to their involvement in many defamation suits, are what Stein and Segal refer to as 'repeat players'.[53] Due to their involvement in many defamation suits, they should, in theory, be willing to take a chance on the outcome of a given case by refusing a

[49] Daniel L Chen and Martin Schonger, 'Is Ambiguity Aversion a Preference? Ambiguity Aversion without Asymmetric Information' (2019) TSE Working Paper 16 703<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2928126> accessed on 5 March 2020.
[50] See also Alex Stein and Uzi Segal, 'Ambiguity Aversion and the Criminal Process' (2006) 81(4) Notre Dame Law Review 1495.
[51] For examples of recent instances of extremely high damages awards, see *Leech v Independent Newspapers (Ireland) Ltd* [2007] IEHC 223; *McDonagh v Sunday Newspapers Ltd* [2017] IESC 59, [2018] 2 IR 1; *Kinsella v Kenmare Resources Plc* (HC, 17 November 2010) see judgment of De Valera J.
[52] Alison L Booth and Patrick Nolen, 'Gender Differences in Risk Behaviour: Does Nurture Matter?' (2012) 122(558) Economic Journal 56; Muriel Niederle and Lise Vesterlund, 'Why Do Women Shy Away from Competition? Do Men Compete Too Much?' (2007) 122(3) Quarterly Journal of Economics 1067.
[53] Stein and Segal (n 50) 1507.

settlement offer if the plaintiff is demanding a sum higher than the average defamation award of its kind. Criminal prosecutors in the US are able to manipulate their repeated involvement in similar cases by concerning themselves mainly with the average outcome of many cases rather than a single outcome of one.[54] However, the reality of defamation law in Ireland is that it is far more difficult to predict than criminal proceedings in the United States. Awards are erratic and given the recent awards in *Leech* and *McDonagh*, newspapers will surely be more reluctant to gamble on a case in the short run, relying on the possibility that awards will balance themselves out in the long run. The reality is that it is too great a risk to go to trial in some situations, which is why media outlets might feel obliged to settle for damages higher than the average figure awarded in courts for a similar case. If there were a damages cap in place, for example, the media might be willing to take more risks by refusing bad settlement offers, as their risk would be limited.

H LAW REFORM

It is clear that the biases discussed so far in this article have the potential to affect Irish defamation judgments and it is probable that they have done so. In this section of the article I will consider how the law could be amended to limit the effects of these biases. In doing so I will discuss the kinds of laws other common law jurisdictions have introduced to deal with unpredictable defamation trials.

One straightforward measure that could be taken is to abolish juries altogether from defamation trials. The removal of juries has been heavily advocated in Ireland in recent years.[55] This would mirror the recent legislative change made by England and Wales, which abolishes the presumption of a trial by jury in defamation cases.[56] The English and Welsh High Court adopted this change with enthusiasm, stating that judges are more reasoned decision-makers than juries, who provide comprehensive explanations for their decisions and that judges are capable of managing cases swiftly and economically.[57] The circumstances in which a jury will decide on a case are narrow, according to Justice Warby, who wrote the High Court's decision

[54] ibid.

[55] McCann Fitzgerald, 'Submission to the Department of Justice and Equality, Review of the Defamation Act 2009' (Department of Justice and Equality, March 2015) <http://www.justice.ie/en/JELR/McCann_FitzGerald.pdf/Files/McCann_FitzGerald.pdf> accessed 5 March 2020; NewsBrands Ireland, 'Submission on Review of the Defamation Act 2009' (Department of Justice and Equality, January 2017) <http://www.justice.ie/en/JELR/NewsBrands_Ireland.pdf/Files/NewsBrands_Ireland.pdf> accessed 5 March 2020.

[56] Defamation Act 2013 (England and Wales), s 11.

[57] *Yeo MP v Times Newspapers Limited* [2014] EWHC 2853 (QB) [60], [2015] 1 WLR 971.

in 2013; 'a simple libel action concerning a single factual allegation in which meaning is not in dispute and the sole issue is truth'. He asserted his satisfaction with the change four years later in an address to the Annual Conference of the Media Law Resource Centre in London.[58] This legislative change is an obvious measure that could be taken to reduce the unpredictability of juries.

The advantages of such an amendment to the law would be that the jury, which has caused controversy over its tendency to award high sums of damages in Ireland and prolong trials, would no longer have an effect on defamation law in Ireland.[59] With full control over the assessment of damages, judges could explain in greater detail how a particular figure was reached, which in itself acts as a debiasing technique.[60]

In theory, the advantages of making such changes to the law should be clear. Judges should be far more reliable decision-makers than juries as a result of their training and experience. However, considering the previously discussed research regarding judicial bias, it is possible and indeed likely that biases would affect the outcome of cases, even without juries being present.

Therefore, if juries were to be abolished entirely from Irish defamation law, a number of debiasing measures could be adopted to limit the probability of judges making biased decisions. Firstly, the ability of counsel to make submissions to the court which exists under section 31 of the 2009 Act could be retained. As will be later discussed, this ability could be subject to certain caps. This provision, if used reasonably, will suggest a range of damages for judges to take into consideration in awarding suitable damages to the plaintiff.

Of course, it is possible that submissions could distort judgments, if they are too high or too low. However, if a damages cap is in place, submissions may not be higher than that cap. With respect to counsel still being able to submit extremely low damages submissions with a cap in place, the anchoring effect of the damages cap will tend to limit the tendency of extremely low sums being awarded. Additionally, if counsel realises that the other party has the ability to make outrageous damages submissions to the judge, it may result in both parties making

[58] Mr Justice Warby, 'Media Litigation in the High Court Doing Justice in the Media and Communications List' (Address to the Annual Conference of the Media Law Resource Center, London, 26 September 2017) <https://www.judiciary.uk/announcements/speech-by-mr-justice-warby-media-litigation-in-the-high-court/> accessed 24 February 2020.
[59] ibid at 2-3; the decline in defamation litigation in the United Kingdom since 2013 has been, in part, attributed to the abolition of jury trials.
[60] Rachlinski, Wistrich, and Guthrie (n 31).

reasonable requests as a compromise. Therefore, it is possible for there to be an equilibrium in the law where judges, not juries, award damages with the aid of submissions from counsel and with the restriction of damages caps.

Without juries sitting on defamation trials, it could be possible for comprehensive damage-awarding guidelines to be established as a debiasing strategy. Such guidelines have not been applied expansively in Irish law, considering the difficulty of their application to each unique and subjective defamation case that arises. Guidelines could also be introduced if juries retain their role in defamation trials. However, they would not be as technical – and perhaps effective – as guidelines targeted at legal professionals.

In contrast to the English and Welsh approach, 90% of the United States' defamation cases are heard before a jury, which has the right to determine the meaning of the publication and award damages.[61] However, as previously mentioned, in the United States, the media is better protected from defamation suits owing to the decision of *New York Times Co v Sullivan*, which requires actual malice on the part of the media publisher for liability to arise.[62] This legal position is therefore arguably friendlier to defendants than the Irish position is.

If, like common law countries such as the United States and Australia, the Irish legislature insists on retaining juries in defamation trials, there are several measures that could be taken to mitigate unpredictability. A straightforward way to do so would be to introduce a damages cap. This is a policy present in England and Wales, Australia and Canada which cap damages at roughly €237,000, €155,000 and €69,000 respectively.[63] Such caps would have limited abnormally high damages awarded in recent cases such as *Leech v Independent Newspapers* (€1.25 million) and *McDonagh v Sunday Newspapers* (€900,000).[64] As noted, defamation is subjective in comparison to other torts and it is therefore difficult to pinpoint what a very high or low award should be, other than scrutinising precedent and the circumstances of the case, which provide limited guidance. A cap on damages would be a relatively straightforward amendment to the 2009 Act to pass (referring to the English, Welsh and Australian positions) and would be highly effective in preventing future cases with abnormal damages awards. Introducing a cap would therefore be one of the first measures I would propose to remedy the

[61] Steven Pressman, 'An Unfettered Press: Libel Law in the United States' (United States Information Agency, 1994) <https://usa.usembassy.de/etexts/media/unfetter/press08.html> accessed 5 March 2020.
[62] *New York Times Co v Sullivan* 376 US 254 (1964).
[63] Lord Justice Jackson (n 11); Mullis and Scott (n 11); See cases (n 11).
[64] *Leech v Independent Newspapers* [2007] IEHC 223; *McDonagh v Sunday Newspapers Ltd* [2017] IESC 59, [2018] 2 IR 1.

issue of unpredictability in defamation damages. The effect of the introduction of a damages cap in 2002 in England and Wales was significant. The average award between 1997 and 2003 was £61,000 (€72,000). This figure decreased to £38,000 (€45,000) between 2004 and 2009.[65]

A problem with capping damages is that the cap itself acts as a bias in the form of an anchor.[66] Although a cap prevents the awarding of massive damages, it has the effect of raising the lowest amounts awarded.[67] Therefore, the legislature should consider whether this trade-off is justified. For those who argue that the highest awards in defamation cases are too high and the lowest awards are insufficient to compensate plaintiffs and deter defendants, this could be an ideal solution. Another potential problem with damage caps is that they theoretically allow defamers to calculate that the profit to be made from a defamatory publication exceeds the capped maximum. With this in mind, one could publish defamatory material, resting assured that even if a court awards the maximum amount in damages, the publication is likely to be profitable. Bearing in mind the success with which other jurisdictions have introduced damages caps, this kind of opportunism is unlikely to be a major issue. Given that the press in those jurisdictions is better resourced than the Irish press, those caps perhaps offer an upper bound of what might be appropriate in Ireland.

Another way to control unpredictability would be to introduce a punishment rating scale such as in the aforementioned study conducted by Schkade, Sunstein and Kahneman.[68] The jury through this method would rate the severity of the defamation suffered by the claimant on a scale of one to ten. The judge would then award a sum of damages consistent with the severity rating of the jury. By allowing the judge the final say on the matter of damages, a check is created on the jury to prevent disproportionate damages from being awarded as a result of the jury becoming subject to any of the biases already mentioned in this article. The judge of course cannot be presumed to be entirely unbiased but could use experience and qualifications to assess damages, adding a second check to the judgment process to limit biases as much as possible.

Australia, and in particular, New South Wales, took an approach similar to this in their Defamation Act 2005. The case is decided by a judge by default but the plaintiff or defendant

[65] Mullis and Scott (n 11) 181; Cameron Doley and Alestair Mullis (eds) *Carter Ruck on Libel and Privacy* (5th edn, Butterworths 2010).
[66] Jennifer K Robbennolt and Christina A Studebaker, 'Anchoring in the Courtroom: The Effects of Caps on Punitive Damages' (1999) 23(3) Law & Human Behaviour 353.
[67] ibid.
[68] Schkade, Sunstein and Kahneman (n 17).

may elect for proceedings to be tried by jury if suitable.[69] This is a form of libertarian paternalism which minimises the overall amount of cases in which juries are present, whilst still retaining the possibility for a jury to be present in a defamation case if the defendant so elects. If the plaintiff succeeds in their claim to the jury, it is up to the judge and not the jury to determine an appropriate amount of damages to award.

This legal position is similar to that proposed by Schkade and others in that the judge has a certain amount of independence from the jury in awarding damages. A punishment rating scale allows a jury to play a greater role in awarding damages whilst limiting damages decisions subject to substantial bias. A jury can give its perspective on the circumstances and the severity of the case, but the judge is left with the part of the decision demanding of greater experience and knowledge; the quantification of damage done to the plaintiff's reputation.

I CONCLUSION

Defamation's complexity makes the balance between the right to a good name and freedom of expression difficult to establish. There is often no directly applicable precedent that can be used to simply determine an appropriate award. As a result, cases must be scrutinised to the same level, individually, which uses significant resources and leads to damages being difficult to determine.

However, the law in Ireland has not made it easy on itself. Damages in recent cases have been massive compared to other common law jurisdictions, particularly England and Wales, Australia, and Canada, all of whom have introduced damages caps far below what the highest damages awards in Ireland were in recent years. With this in mind, it would be reasonable to argue that the Irish law on defamation should be amended. Plenty of proposals have been made in recent years, outlining ways in which the law could be improved.

Equally, one could validly argue that the right to a good name should be vigorously protected at whatever cost the jury may suggest. Perhaps publishers should indeed take greater care of the material they publish and pay a high price if they act recklessly or maliciously. If so, Irish juries are performing their roles well in deterring publishers from defaming in the future by awarding unpredictable sums.

[69] Defamation Act 2005 (New South Wales) s 21.

In determining whether the law should be amended or not, it is necessary to ask whether it is the aim of the law to deter defamatory publications through unpredictability. If it is, based on the studies discussed in this article, juries should be retained, and they should continue to perform their role as they are currently doing and permitted to do by the law. If, however, the law seeks to be predictable and place opposing parties on an equal footing, measures should be taken to limit the unpredictability of juries as described in this article or otherwise, or perhaps remove them from defamation trials altogether, as the English and Welsh legislature has already done.

AN MITHID DÚINN AN TRUICEAR A THARRAINGT AR AIRTEAGAL 8.3 DE BHUNREACHT NA HÉIREANN 1937?

*Ciara Woulfe**

A RÉAMHRÁ

Tá an Ghaeilge ar cheann de na teangacha is sine ar domhan.[1] Tháinig sí slán ó iliomad réabadh pholaitiúil agus réabadh sóisialta. Labhraítear í fós in Éirinn,[2] agus mar thoradh ar dhiaspóra na nGael ar fud an domhain, labhraítear í in áiteanna áirithe mar atá Sasana, Meiriceá, Ceanada agus an Astráil.[3] Nuair a bhí Bunreacht na hÉireann 1937 á dhréachtú ag Éamonn De Valera agus a chomhghleacaithe, tuigeadh tábhacht na teangan don tír agus do mhuintir na hÉirinn. Tá an tuiscint seo le fheiscint in Airteagal 8 ar dá réir 'is í an Ghaeilge an teanga náisiúnta is í an phríomhtheanga oifigiúil í.' Beidh an tAirteagal suntasach seo ina chuid bunúsach an ailt seo. Déanfar mionscrúdú ar na cearta a thugann sé do Ghaelgóirí chomh maith leis na dualgais choibhneasta a fhorchuireann sé ar Rialtas na hÉireann. D'fhonn é sin a dhéanamh i gceart, is fiú cur síos a dhéanamh ar chúlra Bhunreacht na hÉireann 1937, ó thaobh an tsuímh pholaitiúil agus sóisialta de. Caithfear gné shanasaíoch Airteagail 8 agus a fhoclaíocht a imscrúdú go géar freisin. Ar léamh simplí an Airteagail, is cosúil go bhfuil an-chuid chirt bhunreachtúil ag duine chun Gaeilge a úsáid nuair atá sé nó sí ag plé gnóthaí leis an Stát. Ach léireofar nach fíor an ráiteas sin nuair atá duine ag iarraidh a chúrsaí dlíthiúla a stiúradh i nGaeilge. Sa dara chuid den ailt seo, pléifear cásdlí a léiríonn nach ceart iomlán é. Déanann na Cúirteanna iarracht cothromaíocht a fháil idir cearta an duine aonair chun Gaeilge a úsáid agus na dualgais coibhneasta a bhíonn ar an Stát. Dhealródh an scéal nach féidir leis an Stát a chuid dualgas a chomhlíonadh sa chomhthéacs seo. Sa triú chuid den ailt, déanfar argóint ar leith go bhfuil féidearthacht ann go bhféadfaidh duine giúiré dátheangach a fháil i gcás coiriúil. Ina dhiaidh sin, caithfear sracfhéachaint a thabhairt ar stádas na Gaeilge san Aontas Eorpach. Ón bhliain

* BCL Law and Irish, University College Cork. I would like to thank my parents for their continued support and encouragement throughout my studies. I am grateful for the helpful contributions of the Editorial Board and for the many oppurtunities which UCC Law School has afforded me.

[1] 'The 10 Oldest Languages still spoken in the World Today' (*Lingual Consultancy Service*, 11 January 2019) <https://lingualconsultancy.com/oldest-languages-still-spoken-in-world-today> faighte ar an 2 Feabhra 2020.

[2] De réir an daonáirimh is déanaí, tá cumas sa Ghaeilge ag 39.8% muintir na hÉireann agus labharíonn 1.7% muintir na hÉireann an teanga go leathúil. Féach ar Preasráiteas ón Príomh-Oifig Staidrimh ar an 23 Samhain 2017 <https://www.cso.ie/en/csolatestnews/pressreleases/2017pressreleases/pressstatementcensus2016resultsprofile10-educationskillsandtheirishlanguage/> faighte ar an 2 Feabhra 2020.

[3] Áine Lally, Interview with Declan Kelly, Irish Ambassador to Canada (Ontario, Canada) <https://www.rte.ie/archives/2017/0613/882483-gaeltacht-in-canada/> faighte ar an 2 Feabhra 2020.

2007 tá an Ghaeilge ina teanga oifigiúil agus ina teanga oibre an Aontais Eorpaigh.[4] Tráth scríobh an ailt seo, tá ceist le haghaidh réamhrialaithe i nGaeilge tarchurtha ag Ard-Chúirt na hÉireann.[5] Ciallaíonn sé sin go mbeidh cás i nGaeilge i gCúirt Breithiúnais an Aontais Eorpaigh don chéad uair riamh. Pléifear na himpleachtaí a eascraíonn as seo don teanga, do dlíodóirí Éireannacha agus don Stát freisin. Ba chúis náire í don Stát dá mbeidh an Chúirt Breithiúnais in ann deileáil le cás i nGaeilge i mbealach níos éifeachtaí agus níos tapúla, ná mar is féidir leis na cúirteanna in Éirinn.

Mar sin, le linn an phlé seo, is fiú machnamh a dhéanamh ar an gceist: cé gur maith an rud í go bhfuil an Ghaeilge ina príomhtheanga oifigiúil in Éirinn, muna féidir leis an Stát comhlíonadh leis na dualgais coibhneasta, an fiú Airteagal 8.3 a úsáid agus 'socrú a dhéanamh le dlí d'fhonn ceachtar den dá theanga sin a bheith ina haonteanga le haghaidh aon ghnó nó gnóthaí oifigiúla ar fud an stáit ar fad nó in aon chuid de'?

B AN GHAEILGE AGUS BUNREACHT NA HÉIREANN 1937

Dé réir na teoirice seanbhunaithe, is conradh sóisialta é bunreacht idir saoránach agus rialtas stáit. Tugtar cearta do shaoránaigh agus cuirtear dualgais choibhneasta ar an stát.[6] Is minic a scríobhtar bunreachtanna ilteangacha ar fud an domhain. Scríobhadh Bunreacht na hÉireann 1937 i nGaeilge agus i mBéarla. Ach is bunreacht eisceachtúil í sa chaoi is a dhéanann sí iarracht cliarlathas teangach a bhunú idir an dhá theanga. Tugtar an lámh in uachtar don Ghaeilge mar 'an teanga náisiúnta is í an phríomhtheanga oifigiúil'. Ach cad ba chúis leis seo?

Nuair a bhí Bunreacht na hÉireann 1937 á chur le chéile, bhí an Ghaeilge in áit imníoch. Rinneadh neamhshuim ar an teanga leis na céadta bliain roimhe sin, mar gheall ar teacht na Sasanach, coilíniú, na Péindlíthe, agus an gá eacnamaíochta chun Béarla a fhoghlaim. Ach é sin ráite, níor cailleadh an teanga go huile is go hiomlán. I dtreo deireadh an naoú haois déag cuireadh tús le athbheochan na Gaeilge agus an chultúir Ghaelaigh freisin.[7] Thuig Eamon De Valera agus a chomhghleacaithe stair agus tábhacht na teangan nuair a bhí Bunreacht na

[4] Rialachán ón gComhairle (CE) 920/2005 [2005] OJ L 156/3.
[5] *Mac Fhlannchadha v an tAire Talmhaíochta* (neamhfhoilsithe um scríobh an ailt seo. Ard-Chúirt, 24 Deireadh Fómhair 2019); Mary Carolan, 'European Court of Justice to hear first case in Irish' *The Irish Times* (Baile Átha Cliath, 25 Deireadh Fómhair 2019) <https://www.irishtimes.com/news/crime-and-law/courts/high-court/european-court-of-justice-to-hear-first-case-in-irish-1.4062533> faighte ar an 2 Feabhra 2020.
[6] Féach go ginearálta ar Thomas Hobbes, *Leviathan* (1651, Penguin 1985), inar scrúdaigh sé nadúr an chine dhaonna.
[7] Garvan Grant, 'Birth of the cúl: how Irish became hip in the late 19th century' *The Irish Times* (Baile Átha Cliath, 20 Aibreán 2015) <https://www.irishtimes.com/culture/books/birth-of-the-c%C3%BAl-how-ireland-became-hip-in-the-19th-century-1.2182255> faighte ar an 2 Feabhra 2020.

hÉireann 1937 á dhréachtú acu. Bhí siombalachas agus maoithneachas ag baint léi. Go deimhin, mar a d'aithin Ní Dhrisceoil '[f]or revolutionary nationalists, political independence withoutout cultural independence was seen as worthless and, this being so. The Irish language became central to the political campaign for independence.'[8] Is iomaí foráil i mBunreacht na hÉireann 1937 a léiríonn an toill pholaitiúil chun an Ghaeilge a chosaint agus a chur chun cinn. Cé nár tír saibhir í Éire san am sin (go háraithe i ndiaidh an Cogadh Sibhialta) ó thaobh cúrsaí airgid de, theastaigh ó bhunaitheoirí an Stáit an teanga a chosaint agus a chothú. Mar a dúirt de Valera 'we cannot fulfil our destiny as a nation unless we are an Irish speaking nation'.[9]

Ach ag an bpointe seo, caithfear sracfhéachaint a thabhairt ar Bhunreacht an Saorstáit 1922, agus ar Airteagal 4 ach go háraithe, a bhí ann roimh Bhunreacht na hÉireann 1937. D'fhogáir Airteagal 4 '[s]í an Ghaedhilg teanga Náisiúnta Shaorstáit Éireann, ach có-aithneofar an Béarla mar theanga oifigiúil.'[10] Is léir go raibh stádas bunreachtúil comhionann ag an nGaeilge agus ag an mBéarla. Ach i mBunreacht na hÉireann 1937, tugadh stádas bunreachtúil níos airde don Ghaeilge. Dar le Ní Dhrisceoil, chuaigh Bunreacht na hÉireann 1937 'a step further'.[11] Fógraíonn Airteagal 8.1 gurb í 'an Ghaeilge an teanga náisiúnta is í an phríomhtheanga oifigiúil í'. Ina dhiaidh sin, deir Airteagal go '[n]glactar leis an sacs-Bhéarla mar theanga oifigiúil eile.'

De bhun fhoclaíocht Airteagail 8, tá tuaraimí agus barúlacha suimiúla ann maidir leis na difríochtaí sanasaíocha idir an dhá theanga. Úsáidtear an focal 'príomh' chun cur síos a dhéanamh ar an nGaeilge. Ciallaíonn an focal sin 'primary' nó 'foremost' agus leis sin ní hamháin go dtugtar príomhaíocht bhunreachtúil don Ghaeilge, ach tugtar tábhacht di freisin.[12] In Airteagal 4 de Bhunreacht an tSaorstáit 1922, dúradh gur 'có-aithneofar' an Béarla leis an nGaeilge. Ach anois in Airteagal 8.2, deirtear go '[n]glactar leis an Sacs-Bhéarla'.[13] Dearbhú níos laige atá ann. Tá gné lamháltais agus gné dhofháilteach le brath ann i gcomhar an Bhéarla. Spéisiúil go leor, baintear úsáid as an téarma 'Sacs-Bhéarla' nuair a thagraíonn Airteagal 8 don Bhéarla. An bhfuil aon rud intuigthe leis sin? I gnáthchaint Ghaeilge, baintear úsáid as an téarma 'Béarla' amháin. D'fhéadfaí a rá gurb é a bhí i gceist acu ná an dhá theanga a idirdhealú. Theastaigh uathu a chur in iúl go mbaineann an 'Sacs-Bhéarla' leis na hAngla-Sacsannaigh

[8] Verona Ní Dhrisceoil, 'Antipathy, Paradox and Disconnect in the Irish State's Legal Relationship with the Irish Language' (2016) Irish Jurist 55 (ns) 45, 55.
[9] Maurice Moynihan (ed), *Speeches and Statements by Eamon de Valera 1917-73* (St. Martin's Press 1980) 1965.
[10] Bunreacht Shaorstáit Éireann 1922, Airteagal 4.
[11] Ní Dhrisceoil (n 8) 49; Dar le Dr Seán Ó Cónaill, 'the position of the Irish language was strengthened' in 'The Irish Language and The Irish Legal System: 1922 to Present' (PhD Thesis, Cardiff University 2013) 59 – 60.
[12] Micheál Ó Cearúil, *Bunreacht na hÉireann – A Study of the Irish Text* (Government of Ireland, Stationery Office 1999) 82.
[13] Mo bhéim curtha leis.

amháin, agus baineann an Gaeilge leis na Gael amháin. Mar a nótáil Ó Conaill agus é ag plé Airteagail 8, 'it is possible that such terminology was used for nationalistic or political reasons.'[14]

É sin ráite, is é tuairim an Constitutional Review Group ná nach bhfuil aon difríocht shuntasach nó phraiticiúil le léamh sna miondifríochtaí foclaíochta in Airteagal 8.[15] Ach ní sheasann an tuairim sin i bhfianaise Airteagal 25.4.6°. Is foráil thábhachtach eile don Ghaeilge í Airteagal 25.4.6° ar dá réir **'**i gcás téacs Gaeilge agus téacs sacs-Bhéarla de dhlí a chur isteach ina n-iris faoin alt seo agus gan an dá théacs sin a bheith de réir a chéile, is ag an téacs Gaeilge a bheidh an forlámhas'. Cé go scríobhadh an téacs Gaeilge agus an téacs Béarla ag an am céanna, ní féidir a shéanadh ach go bhfuil udarás agus cliarlathas bunreachtúil ag an nGaeilge leis an bhforáil seo. Mar sin, d'fhonn forálacha an Bhunreachta a léamh go comhfhreagrach, ní sheasann tuairim an Constitutional Review Group. Cáipéis fhíorthábhachtach agus cháiréiseach í Bunreacht na hÉireann 1937. Tá tábhacht nach beag ag baint le gach focal agus ba cheart na hAirteagail go léir a léamh go comhfhreagrach. Is léir go bhfuil difríocht shuntasach agus phraiticiúil intuigthe i bhfoclaíocht Airteagail 8.1 agus 8.2. Tugtar an lámh in uachtar don Ghaeilge.

C AN GHAEILGE AGUS RIARADH AN CHEARTAIS

De bhrí go bhfuil duine i dteideal a gnóthaí a dhéanamh i nGaeilge nó i mBéarla, tá duine i dteideal a chúrsaí dlíthiúla a dhéanamh i nGaeilge nó i mBéarla. Ar léamh dromchlach an chirt seo, is cosúil go dtugtar cearta teangacha fairsinge don duine chun Gaeilge a úsáid i gcomhthéacs riaradh an cheartais. Ach de réir mar a léiríonn cásdlí na cúirteanna in Éirinn, níl an ceart chomh fairsing mar a cheapfá. Tá cáilithe déanta ag na Cúirteanna ar an gceart seo thar na blianta. Tugann siad dá haire ar na dualgais choibhneasta atá ar an Stát. Dar le Nic Shuibhne 'contemporary judgments tend to dilute rather than enunciate state duty'.[16] Déanfaidh an chéad cuid eile den alt seo iarracht pictiúr a chruthú ar cad atá ceadaithe do dhuine ag iarraidh a chás cúirte a stiúradh i nGaeilge.

Sa chás *An Stát (Buchan) v Coyne*, d'aithin an Ard-Chúirt an prionsabal seanbhunaithe dlí nádúrtha agus dlí idirnáisiúnta go féidir le duine imeachtaí dlí a bhaineann leis a thuiscint.[17] Chinn an Príomh-Bhreitheamh Kennedy sa chás *People (Attorney General) v Joyce and Walsh*

[14] Ó Conaill (n 11) 61.
[15] Constitution Review Group, *Report of the Constitutional Review Group* (1996) 11.
[16] Niamh Nic Shuibhne, 'State Duty and the Irish language' (1997) 19(1) Dublin University Law Journal 33, 36.
[17] *An Stát (Buchan) v Coyne* [1936] 70 ILTR 185.

go bhfuil 'double right' ag duine chun Gaeilge a úsáid i gcúirt Éirinneach, mar gheall ar a cheart dlí nádúrtha agus a cheart bunreachtúil.[18] Sa chás *Stát (MacFhearraigh) v Gamhnia*,[19] rinne Breitheamh O'Hanlon achoimre ar na cearta atá ag duine ag iarraidh Gaeilge a úsáid sa chúirt. Is féidir le duine a chás a phléadáil i nGaeilge. Is féidir leis ateangaire a hainmniú. Is féidir leis a fhianaise a chur isteach i nGaeilge. Agus is féidir leis croscheistiú na bhfinnéithe a dhéanamh i nGaeilge. Ach ní féidir le duine a rogha teangan a fhorchur ar pháirtí eile sa chás. Shoiléirigh Breitheamh O'Hanlon freisin nach féidir ceist a chur ar chumas sa Ghaeilge an duine ar mhian leis Gaeilge a úsáid. Ach is cosúil go ndearnadh neamhshuim ar an gcosc seo sa chás *Ó Cadhla v an tAire Dlí agus Cirt*.[20] Theastaigh ón iarratasóir breitheamh le Gaeilge a fháil. Ach sa Chúirt Dhúiche, dúirt an Breitheamh Kelleher go raibh a fhios aige go bhfuil Béarla ag an iarratasóir. Ritheadh an cás i mBéarla ansin. Rinne an t-iarratasóir achomharc go dtí an Ard-Chúirt. Dhírigh breithiúnas na hArd-Cúirte ar an dualgas atá ar an Stát breitheamh le Gaeilge a sholáthar seachas ar cheart an iarratasóra. Chinn Breitheamh Ní Raifeartaigh go bhfuil dualgas ar an Stát 'iarrachtaí réasúnacha a dhéanamh chun Breitheamh Dúiche dátheangach (Gaeilge Béarla) a shannadh'.[21] Cé go bhfuil líon na mbreithiúna le Gaeilge ag maolú, ach fós ba cheart go ndéantar iarracht éigin.

Tá an-chuid chásdlí ann mar gheall ar sholáthar reachtanna, doiciméid dlí, agus rialacha cúirte i nGaeilge. Le fada an lá achtaítear dlíthe i mBéarla ar dtús agus ansin soláthráitear an leagan Gaeilge. Ní foráiltear go sonrach i mBunreacht na hEireann 1937 cé chomh fhada atá ag an Stát chun an leagan Gaeilge a chur ar fháil. Thar na blianta, is cosúil go ndearna an Stát faillí ar an aistriúcháin seo. Dá bhrí sin tá an-chuid reachtanna, doiciméad dlí agus rialacha cúirte ar fáil i mBéarla ach amháin. Is minic a deirtear nach bhfuil go leor achmhainní Stáit ann chun na haistriúcháin a dhéanamh. Sa chás *Delap v An tAire Dlí agus Cirt*,[22] cinneadh go gcaithfí Rialacha na Cúirte a chur ar fáil i nGaeilge 'as soon as may be practicable'. Dúirt an Chúirt go raibh an méid seo i dteideal leis an iarratasóir de bhun a chirt rochtana ar na cúirteanna. Is cás tábhachtach eile ar an gceist seo é *Ó Beoláin v Fahy*.[23] Rinne an Chúirt Uachtarach athdhearbhú ar an dualgas bunreachtúil atá ar an Stát chun aistriúcháin i nGaeilge d'Achtanna an Oireachtais a chur ar fáil. Tagann an dualgas seo ó Airteagal 25.4.4º de Bhunreacht na h Éireann 1937, ar dá réir 'i gcás an tUachtarán do chur a láimhe le téacs Bille i dteanga de na teangacha oifigiúla

[18] *People (Attorney General) v Joyce and Walsh* [1929] IR 526.
[19] *Stát (MacFhearraigh v MacGamhnia* [1980–1998] TÉTS 29.
[20] *Ó Cadhla v an tAire Dlí agus Cirt* [2019] IEHC 503.
[21] ibid.
[22] *Stát (Mac Fhearraigh)* (n 19) 46.
[23] *Ó Beoláin v Fahy* [2001] IESC 37, [2001] 2 IR 279.

agus sa teanga sin amháin, ní foláir tiontú oifigiúil a chur amach sa teanga oifigiúil eile.' De bhrí nár aistríodh achtanna ó shin na 1980idí, theip ar an Stát a dualgas bunreachtúil a chomhlíonadh agus sáraíodh Airteagal 25.4.4º. Dúirt an Chúirt go gcaithfeadh an Stát aistriúcháin a dhéanamh agus é a chur ar fáil 'within a reasonable period of time'. Dar le O'Mahony agus Ó Conaill, Hardiman J's decision is often 'cited as the impetus the State needed to take the rights of Irish speakers seriously'.[24] Is iomaí cás eile ina dhéanann duine iarracht reachtanna, doiciméid dlí, rialacha cúirte a fháil i nGaeilge, i gcomhréir lena cheart bunreachtúil.[25] Is truamhéalach an scéal é nach bhfuil siad ar fáil cheana féin. Fiú le deanaí, dúirt Breitheamh Ní Raifeartaigh go léiríonn an cásdlí ar an ábhar seo go bhfuil sé 'necessary for Irish-speaking court users to resort to litigation to compel the translation of key sources of law'.[26]

D'fhéadfaí a rá nach bhfuil cainteoirí Ghaeilge ag fáil córa comhionainne faoin dlí i gcomparáid le cainteoirí Bhéarla. Dar le Airteagal 40.1 is 'ionann ina bpearsain daonna na saoránaigh uile i láthair an dlí'. Cuireann an prionsabal seo de chomhionannas faoin dlí cosc ar idirdhealú idir dhaoine de bhrí a rogha teangan. Ach toisc nach bhfuil an-chuid dlíthe ar fáil i nGaeilge agus go minic go bhfuil ar chainteoir Gaeilge imeachtaí dlí a thionscnaimh chun aistriúcháin i nGaeilge a fháil, an bhfuil sárú á dhéanamh ar phrionsabal na córa comhionainne? Is cosúil go bhfuil.[27] Go deimhin, is fíor an ráiteas de Whyte 'in some recent cases the courts have shied away from a full-blooded commitment to equality between speakers of Irish and speakers of English'.[28]

Léiríonn an cásdlí thuasluaite go bhfuil cainteoir Gaeilge i dteideal cearta ar leith ach nach sé i dteideal cearta eile agus é ag stiúradh cás cúirte i nGaeilge. Tá castacht ag baint leis an ábhar seo. Cé go bhfuil na Cúirteanna toilteanach cearta bunreachtúla an cainteoir Gaeilge a aithint, ag an am céanna is cosúil go bhfuil drogall orthu dualgais throma a chur ar an Stat.[29] Tá sé de nós ag na Cúirteanna cearta an duine chun Gaeilge a úsáid a mheas mar cearta as eascraíonn as próis chuí seachas as cearta teangan, rud a déanann dochar don theanga. Ach dá mba rud é go

[24] Dr Conor O'Mahony agus Dr Seán Ó Conaill, 'Mr Justice Adrian Hardiman 1951-2016' (*Constitution Project at UCC*, 7 Márta 2016) <http://constitutionproject.ie/?p=573> faighte ar an 2 Feabhra 2020.
[25] Féach ar *Ó Murchú v An Taoiseach & Eile* [2010] IESC 26, [2010] 4 IR 484, [2010] 4 IR 520; *Ó Cuinn v An Taoiseach & Eile* [2018] IEHC 816.
[26] *Ó Cadhla* (n 20).
[27] Nic Shuibhne (n 16) 36-37.
[28] Gerry Whyte, 'Litigating Constitutional Policy on the Irish Language' (Coláiste na Tríonóide, Baile Átha Cliath) 1 <https://www.academia.edu/5720554/Constitutional_protection_for_the_Irish_language_in_Ireland> faighte ar an 2 Feabhra 2020.
[29] ibid 14.

bhfuil na Cúirteanna agus an Stát chomh buartha agus chomh dírithe ar chostais agus ar ghanntanas achmhainní Stáit, an bhfuil baol ann go ndéantar measúnú ar cheart an duine chun Gaeilge a úsáid i mbealach ar nós foirmle mhatamaitice? An déantar díghrádú agus ísliú ar an gceart bunreachtúil chun Gaeilge a úsáid? Más amhlaidh an cháis, ar cheart Airteagal 8.3 a úsáid agus socrú a dhéanamh chun úsáid a bhaint as an mBéarla amháin i gcomhthéacs riaradh an cheartais? Is iomaí buntáiste a bhainfeadh leis. Ní bheadh an Ghaeilge ina cnámh spairne i gcásanna cúirte. Ní bheadh am agus achmhainní na gcúirteanna á chaitheamh ag argóint faoi cearta teangan an duine nó faoi faillí an Stáit. Thabharfaí soiléireacht don duine maidir le cad is féidir leis bheith ag tnúth le ón Stát agus ó na Cúirteanna. Ach d'ainneoin sin, is é barúil an údair seo ná nár cheart Airteagal 8.3 a úsáid chun socrú den sórt sin a dhéanamh. Nuair a scríobhadh Bunreacht na hÉireann 1937, bhí bunaitheoirí an Stáit sásta forálacha a dhéanamh don Ghaeilge, i tréimhse mhíchorraitheach nuair nach raibh mórán airgid nó achmhainní ag an Stáit i ndiaidh an Chéad Chogadh Domhanda agus an Chogaidh Chathartha. Mar sin cén fáth nach féidir leis an Stát é sin a dhéanamh anois? Anuas ar sin, ag féachaint ar Acht na dTeangacha Oifigiúla 2003,[30] dealraíonn sé nach bhfuil fonn polaitiúil ann chun Airteagal 8.3 a úsáid. Tugann Acht 2003 bunús reachtaíochta do na dualgais atá ar an Stát ó thaobh na teanga Ghaeilge de. Mar sin, cé go mbíonn deacrachtaí ag an Stát cearta bunreachtúla an chainteoir Ghaeilge a shásamh i gcomhthéacs riaradh an cheartais, ní chiallaíonn sé sin go bhfuil fonn ann chun an truicear a tharraingt ar Airteagal 8.3 go fóill.

D GIÚIRÉ DÁTHEANGACH

Ag an bpointe seo, caithfear imscrúdú níos géire a dhéanamh ar gné amháin de riaradh an cheartais ó thaobh an Ghaeilge de. An bhfuil ceart ag duine triail le giúiré dátheangach a fháil? Ní haon ionadh é go bhfuil tábhacht nach beag ag baint le cumas duine chun cumarsáid a dhéanamh ina theanga féin i gcás triail le giúiré. Fiú d'aithin an Chúirt i gCeanada an méid seo nuair a dúradh:

> [i]f the right of the accused to use his or her official language in court proceedings was limited because of language proficiency in the other official language, there would in effect be no distinct language right … there is a natural relationship between the ability to express oneself and taking full advantage of the possibility of convincing the court of the merits of one's case.[31]

[30] 'Acht 2003' as seo amach.
[31] *R v Beaulac* [1999] 1 SCR 768, [47].

Ach go dtí seo, níl ceart ag cainteoir Gaeilge giúiré dátheangach a fháil. Sa chás *Mac Cárthaigh v Éire*,[32] ba chainteoir Gaeilge é an t-iarratasóir atá ina chónaí i mBaile Átha Cliath. Theastaigh uaidh giúiré le cumas sa Ghaeilge, gan cúnamh ateangaire, dá thriail. Ach chinn an Ard-Chúirt nach bhféadfaí é sin a sholáthar. D'fhonn dáréag giúróirí le cumas sa Ghaeilge ar leibhéal a bheadh oiriúnach do chás chúirte a rollú, bheadh móramh an phobail eisiata ón tseirbhís ghiúiré. Ar achomharc, d'aontaigh an Chúirt Uachtarach le cinneadh na hArd-Cúirte. Mar thoradh air sin, níor deonaíodh an t-iarratas seo do Mac Cárthaigh. Tháinig an cheist seo os comhar na gCúirteanna arís sa chás *Ó Maicín v Éire*.[33] Cinneadh nach raibh ceart ag an duine ciontach giúiré dátheangach a fháil ar eagla go sárófaí ceart bunreachtúil an duine chun a gnóthaí leis an Stát a dhéanamh i mBéarla agus ar eagla go sárófaí 'prionsabal de Búrca'. Dar leis an bprionsabal seo, tá riachtanas bunreachtúil ann go mbeadh an giúiré ionadaíoch den sochaí.[34]

É sin ráite, is é barúil an údair ná gur féidir argóint a dhéanamh go bhféadfadh duine giúiré dátheangach a fháil sa todhchaí. Sa lá atá inniu ann, is tír ilchultúrtha í Éire, le daoine ó anchuid tíortha éagsula atá ina gcónaí anseo anois. Is saoránaigh Éireannacha an-chuid dóibh freisin. I gcomhréir le hAcht na nGiúiréithe 1976,[35] is féidir leo bheith ina ngiúiré. Dar le alt 6 den Acht 1976, 'every citizen aged eighteen years or upwards and under the age of seventy years who is entered in a register of Dáil electors in a jury district shall be qualified and liable to serve as a juror'. Fiú rinne An Coimisiún um Athchóiriú an Dlí moladh go mba chóir go féidir le daoine nach saoránaigh iad ach atá ina gcónaí in Éirinn le cúig bliana, bheith ina ngiúróir.[36] Go minic, labhraíonn siad teangacha iasachta agus ní bhíonn ardchaighdeán Bhéarla acu. Mar sin, ardaítear an cheist an bhfuil a gcuid Bhéarla maith go leor chun cás coiriúla a thuiscint agus chun a bheith ina ngiúróir? Thug An Coimisiún um Athchóiriú an Dlí dá haire nach bhfuil aon riachtanas dlíthiúil ann go bhfuil giúróir líofa i mBéarla.[37] Ach dá m ba rud é go nglaofaí ar duine chun a bheith ina ghiúróir agus braitheann an duine sin nach bhfuil a Bhéarla oiriúnach chun cás cúirte a thuiscint, tá sé de dhualgas air an méid seo a chur in iúl don tSeirbhís Chúirte agus díbhe a fháil. Sa chaoi seo, déantar 'fluency screening' i mbealach neamhoifigiúil agus neamhfhoirmiúla ar bhonn teangan. Thairis sin, mhol An Coimisiún um Athchóiriú an Dlí go mba chóir go gcoimeádtar an 'fluency screening' seo d'fhonn cumas sa Bhéarla an duine a fháil

[32] *Mac Cárthaigh v Éire* [1998] IESC 11, [1999] 1 IR 200.
[33] *Ó Maicín v Éire* [2010] IEHC 179; [2014] IESC 12.
[34] *de Búrca v Attorney General* [1976] IR 38.
[35] 'Acht 1976' as seo amach.
[36] An Coimisiún um Athchóiriú an Dlí , *Consultation Paper Jury Service* (LRC CP 61—2010).
[37] ibid 112.

amach.[38] Ach cén fáth nach féidir an cleachtas seo de 'fluency screening' a dhéanamh chun giúiré le Gaeilge a rollú? Fiú sa chás *Ó Maicín* d'aithin an Chúirt 'the existence of this practice [for English speaking juries] renders it quite impossible for the State to say that one cannot select an Irish speaking jury because that would interfere with the random nature of the process'.[39] Féadfaidh an tSeirbhís Cúirte glaoigh ar dhaoine chun seirbhís ghiúiré a dhéanamh agus a chur in iúl dóibh go mbeadh Gaeilge ag teastáil. Má ghlaofar ar dhuine agus má bhraitheann sé nach bhfuil ardchaighdeán Ghaeilge aige a bheadh oiriúnach do chás cúirte, is féidir leis é sin a chur in iúl don tSeirbhís Cúirte agus díbhe a fháil. Sa chaoi seo bhainfí úsáid as an gcleachtas neamhoifigiúil agus neamhfhoirmiúil de 'fluency screening' mar atá ag tarlú cheana, chun giúiré le cumas Gaeilge a rollú.

Is iomchuí breathnú ar Cheanada chun treoir a fháil ar an gceist seo. Is tír dhátheangach í agus tá stádas comhionann ag an mBéarla agus ag an bhFraincis mar theangacha oifigiúla.[40] De réir na staitisticí, labhraítear Béarla i bhfad níos minice ná Fraincis.[41] D'ainneoin sin, tá toil pholaitiúil ann chun an dhá theanga a chóiméad agus a chur chun cinn. Baineann Ceanada úsáid as 'positive rights' chun é sin a dhéanamh. Is éard atá i gceist ná go dtógann an Stát ról réamhghníomhach agus cuireann an Stát bearta réamhghníomhacha i bhfeidhm.[42] Bunaíonn an Canadian Criminal Code go bhfuil ceart ag duine triail cúirte a dhéanamh i gcibé teanga agus breitheamh agus giúiré le cumas i gcibé teanga a fháil freisin.[43] Fiú tá ceart ag duine giúiré measctha a fháil, a bhfuil Béarla agus Fraincis acu. Tá córais éagsúla ag na 'provinces' éagsúla chun giúirí a rollú.[44] Tóg Ontario mar shampla. Iarrtar ar dhaoine ceistiúchán 'Qualifications for Jury Service' a dhéanamh.[45] Sa chaoi seo is féidir leis an tseirbhís chúirte a chinneadh cé hiad na daoine le cumas sa Bhéarla, le cumas sa Fhraincis agus le cumas sa dhá theanga. Tá

[38] ibid 117.
[39] *Ó Maicín* (n 33) 77-78.
[40] Official Languages Act 1969 (CA).
[41] Labhraíonn 75.4% den daonra Béarla agus labhraíonn 22.8% den daonra Fraincis, 'Fast figures on Canada's official languages (2016)' (*Office of the Commissioner of Official Languages,* 2016*)* <https://www.clo-ocol.gc.ca/en/statistics/canada> faighte ar an 2 Feabhra 2020.
[42] Déanann Nic Shuibhne idirdhealú idir 'positive rights' agus 'negative rights'. Mar a dúradh, is éard atá i gceist le 'positive rights' ná go dtógann an Stát bearta réamhghníomhacha agus ról réamhghníomach ar son na teangan. Is éard atá i gceist le 'negative rights' ná lámhaltas Stáit. Niamh Nic Shuibhne, *Language Rights as Human Rights?* (Dublin, Bord na Gaeilge 1999) 6.
[43] Criminal Code RSC (1985) c C - 46, Part XVII Language of Accused, mír 530. Deimhnigh *R v Beaulac* (n 31) an ceart seo freisin.
[44] Féach ar Natacha Bourgon, *Access to Justice in Both Official Languages: Jury Recruitment* (Department of Justice of Canada 2018) <http://www.ncscjurystudies.org/~/media/Microsites/Files/CJS/Other/Bilingual%20Juries.ashx> faighte ar an 2 Feabhra 2020.
[45] ibid 8, 19; Ministry of the Attorney General, 'Jury duty in Ontario' <https://www.ontario.ca/page/jury-duty-ontario#section-1> faighte ar an 2 Feabhra 2020.

córas eile i bhfeidhm i Nova Scotia ina bhaintear úsáid as bogearraí córais darb ainm 'Jury Selection Software'.[46] Cuirtear ainmneacha na ndaoine ar bhunachar agus leis sin is léir cé hiad na daoine le hainmneacha i mBéarla agus cé hiad na daoine le hainmneacha i bhFraincis. Ansin is féidir giúiré a rollú de réir na teangan roghnaithe. Foráiltear leis an gCanadian Criminal Code, dá ma rud é nach bhfuil dóthain daoine ar fáil le cumas sa teanga roghnaithe sin, is féidir leis an triail a haistriú go háit eile ina bhfuil dóthain daoine ann.[47] Is maith an córas é chun cothromaíocht a thabhairt don dhá theanga agus chun cearta teangan an duine a shásamh. Nach bhféadfaí córas mar sin a chur i bhfeidhm in Éirinn ionas go féidir giúiré dátheangach a rollú? D'fhéadfaí triail a aistriú go Gaeltacht áirithe, áit ina mbeadh daoine le cumas sa Ghaeilge ann. Fiú sa chás *Ó Maicín*, d'aithin an Chúirt go raibh 'ample evidence that a representative cross-section of a jury panel drawn from the Gaeltacht districts would be able to follow the legal proceedings in Irish.'[48]

Mar sin, d'ainneoin ratio *Mac Cárthaigh* agus *Ó Maicín*, d'fhéadfaí argóint a dhéanamh go bhfuil poitéinseal ann go bhféadfaidh duine giúiré dátheangach a fháil sa todhcaí. D'fhéadfaí úsáid a bhaint as an gcleachtas 'fluency screening' chun cumas sa Ghaeilge a chinneadh, díreach mar a bhaintear úsáid as an gcleachtas sin ar son an Bhéarla. Dá mba rud é nach féidir dóthain daoine le cumas sa Ghaeilge a aimsiú, d'fhéadfadh an triail a haistriú go dtí Gaeltacht ar leith, mar a mhol an Breitheamh Hardiman agus mar a dhéantar sna 'provinces' ar leith i gCeanada.

E AN GHAEILGE SAN AONTAS EORPACH

Is institiúid ilteangach í an Aontas Eorpach le seacht mBallstát is fiche.[49] Tá ceithre theanga oifigiúil is fiche san Aontas agus tá gach teanga comhbharántúil.[50] Tháinig Éire isteach san Aontas sa bhliain 1973. Bhí stádas Chónartha ag an nGaeilge ó 1973. Ach rinneadh teanga oifigiúil agus teanga oibre den Ghaeilge san Aontas Eorpach sa bhliain 2007.[51] B'iontach an gradam é chun an Ghaeilge a chur chun cinn ar leibhéal Eorpach. Ciallaíonn sé sin go gcaithfidh gach dóiciméad dlí an Aontais Eorpaigh a bheith ar fáil i nGaeilge, mar atá breithiúnais, fógraí,

[46] Bourgon (n 44) 8; Juries Act (1998) c 16, ss 5-6 (CA) <https://nslegislature.ca/sites/default/files/legc/statutes/juries.htm> faighte ar an 2 Feabhra 2020.
[47] Criminal Code (n 43) mír 531.
[48] *Ó Maicín* (n 33).
[49] Féach ar 'The 27 member countries of the EU' (*Europa*) <https://europa.eu/european-union/about-eu/countries_en> faighte ar an 2 Feabhra 2020.
[50] Féach ar 'EU Languages' (*Europa*) <https://europa.eu/european-union/about-eu/eu-languages_en> faighte ar an 2 Feabhra 2020.
[51] Rialachán an Chomhairle (CE) 920/2005 [2005] OJ L 156/3. Áirítear maolú leis sin agus ní mór é a hathbhreithniú gach cúig bliana.

rialacha, treoracha. Is féidir le hAirí agus Feisire de Pharlaimint na hEorpa Gaeilge a úsáid le linn cruinnithe an Chomhairle. Dar le hAirteagal 24 Conradh ar Fheidhmiú an Aontais Eorpaigh (CFAE), tá ceart ag duine scríobh chuig ceann d'institiúidí an Aontais Eorpaigh ina rogha teangan agus freagairt a fháil sa theanga sin.[52] Tá an-chuid deiseanna ann sna hinstitiúidí Eorpaigh do daoine le Gaeilge chun obair mar ateangairí agus aistritheoirí in institiúidí an Aontais Eorpaigh freisin.

I Méan Fómhair 2019, rinne Ard-Chúirt na hÉireann an chéad ceist le haghaidh réamhrialaithe i nGaeilge chuig Chúirt Bhreithiúnais an Aontais Eorpaigh sa chás *Mac Fhlannchada v an tAire Talmhaíochta*.[53] Is í seo an chéad uair a ndearnadh ceist le haghaidh réamhrialaithe i nGaeilge. Ciallaíonn sé sin go mbeidh éisteacht i nGaeilge sa Chúirt Breithiúnais i Lucsamburg. Baineann an cás le Treoir 2001/82/AE.[54] Is é argóint an iarratasóra ná nár thrasuigh Éire an Treoir seo i gceart. Dar leis an Treoir, caithfidh teorainneacha tréidliachta bheith ar fáil ar tháirgí tréidliachta sna teangacha oifigiúla an Bhallstáit ina bhfuil siad ar díol. Ach dar leis an reachtaíocht lena trasuítear an Treoir, arna déanadh ag an tAire Talmhaíochta, caithfidh na teorainneacha tréidliachta bheith ar fáil i gceann amháin de na teangacha oifigiúla. Dá thairbhe sin, cuireann na déantóirí tairgí tréidliachta na teorainneacha i mBéarla amháin. San Ard-Chúirt, cinneadh gur theip ar an Stát chun an Treoir a chur i bhfeidhm i gceart. Ach tá sé i gceist an Aontas Eorpaigh treoir nua a chur i bhfeidhm sa bhliain 2022, ar dá réir caithfidh na teorainneacha tréidliachta a chur ar fáil i dteanga oifigiúla amháin. Anois baineann an tarchuir le discréid an Bhallstáit i gcásanna athbhreithniúcháin chun faoiseamh a dhiúltiú nuair a bhaineann na cearta atá i gceist le dlí an Aontais Eorpaigh. Ag an am scríofa, níl dáta don éisteacht socruithe fós ag an gCúirt Breithiúnais. Ach is fiú súil a chóiméad ar na himeachtaí dlí agus ar chumas na Cúirte Breithiúnais chun an éisteacht a dhéanamh i nGaeilge. Bheidh ar an gCúirt aistriúcháin a dhéanamh ar gach cáipéis dlí agus ar an mbreithiúnas sna ceithre theanga oifigiúil is fiche eile. Caithfí ateangaireacht a dhéanamh sna ceithre theanga oifigiúil is fiche eile le linn an éisteachta freisin. Dá mba rud é go bhféadfaí cás a dhéanamh i nGaeilge i mbealach níos éasca agus ní b'éifeachtaí thall i Lucsamburg ná mar atá sé sna cúirteanna in Éirinn, ba chúis náire í don Stát seo.[55] Léireofaí míchumas an Stáit chun riaradh

[52] Leaganacha comhdhlúite den Chonradh ar an Aontas Eorpach agus den Chonradh ar Fheidhmiú an Aontais Eorpaigh 2012/C 326/01.
[53] *Mac Fhlannchadha* (n 5).
[54] Treoir Chomhairle agus Pharlaimint na hEorpa 2001/82/CE an 6 Samhain 2001 maidir leis an gcód AE a bhaineann le táirgí íocshláinte tréidliachta [2001] OJ L 311/67 ('an Treoir' as seo amach).
[55] Karen Ní Bhuacháin, 'Acht na dTeangacha Oifigiúla 2003' (2005) 4 Cork Online Law Review <https://www.corkonlinelawreview.com/edition-iv> faighte ar an 2 Feabhra 2020.

an cheartais a dhéanamh i nGaeilge. Chuirfí níos mó brú ar an Stát chun a dualgais bhunreachtúla a chomhlíonadh, agus an mhéid céanna a sholáthar dá shaoránaigh féin ina bpríomhtheanga náisiúnta agus oifigiúil.

Os rud é gur teanga oifigiúil an Aontas Eorpaigh í Gaeilge anois, d'fhéadfaí a rá go bhfuil an Stát i bhfad ó an truicear a tharraingt ar Airteagal 8.3 Bhunreacht na hÉireann agus socrú a dhéanamh chun Béarla amháin a úsáid i gcúrsaí dlí. Anois tá brú eachtrach ar an Stát chun a dualgais mar tír dhdátheangach a chomhlíonadh. Más féidir leis an Aontas Eorpach cearta an chainteora Ghaelaigh a shásamh, ba chóir gur féidir le hÉire cearta an chainteora Ghaelaigh a shásamh freisin.

F CONCLÚID

Léiríonn an plé seo gur Airteagal casta agus trombhríoch é Airteagal 8 de Bhunreacht na hÉireann 1937. Nuair a scríobhadh Bunreacht na hÉireann 1937 b'Airteagal fíorthábhachtach é mar chuid de 'De Valera's grand vision' don tír, don chultúr agus don theanga. Tugann Airteagal 8 cearta teanga do mhuintir na hÉireann chun Gaeilge a úsáid agus iad ag plé le gnó oifigiúla leis an Stáit. Cuireann sé dualgais choibhneasta ar an Stát chun na cearta seo a chomhlíonadh agus chun an teanga a chosaint. Léiríonn cásdlí thar na blianta go ndéanann na cúirteanna iarracht cearta bunreachtúil an duine chun Gaeilge a úsáid a shásamh ach gan an iomarca oibleagáidí troma a chur ar an Stát. Mar thoradh ar sin, i gcomhthéacs riaradh an cheartais, tá duine i dteideal cearta áirithe ach níl sé i dteideal cearta eile. Um an dtaca seo, níl ceart iomlán ag duine chun Breitheamh le Gaeilge a fháil, ach ní mór don Chúirt 'iarracht réasúnta' a dhéanamh chun Breitheamh le Gaeilge a chur ar fáil, má iarrtar sin.[56] Níl ceart ag duine giúiré dátheangach a fháil le linn triail le giúiré.[57] Ach i bhfianaise an 'fluency screening' atá ag tarlú inniu agus ag féachaint ar na bearta atá i bhfeidhm i gCeanada, d'fhéadfaí a rá go bhfuil poitéinseal ann chun an ceart seo a bhunú sa todhchaí. Is fiú na córais atá i bhfeidhm i gCeanada a leanúint mar fasach oiriúnach agus úsáideach. Spéisiúil go leor, d'ainneoin na deacrachtaí a bhíonn ag an Stát chun a ndualgais faoi Airteagal 8 a chomhlíonadh, níor baineadh úsáid as Airteagal 8.3 d'fhonn socrú a dhéanamh chun úsáid a bhaint as an mBéarla amháin go fóill. A mhalairt ar fad. Achtaíocht Acht na dTeangacha 2003 agus rinneadh teanga oifigiúil den Ghaeilge san Aontas Eorpach sa bhliain 2007. Is léir mar sin nach bhfuil an fonn pholaitiúil chun an trucair a tharraingt d'Airteagal 8.3. Mar sin, ba chóir don Stát a ndualgais

[56] *Ó Cadhla* (n 20).
[57] *Ó Maicín* (n 33); *Mac Cárthaigh* (n 32).

bhunreachtúla a ghlacadh go huile is go hiomlán agus bearta réamhghníomhacha a thógáil chun an Ghaeilge a chosaint agus a chur chun cinn. De réir mar a dúirt Breitheamh Hardiman go críonna:

> If a government no longer wishes to be bound by the words of the Constitution as it is, that government is in a uniquely strong position to promote a change in those words. But, until then, the government must abide by the terms of the Constitution, just as it expects the ordinary citizen to obey the law.[58]

[58] Breithiúnas easaontach arna thabhairt Breitheamh Hardiman in *Ó Maicín* (n 33).

UNE ÉTUDE COMPARATIVE DE LA GESTATION POUR AUTRUI EN EUROPE

Campbell Whyte *

A INTRODUCTION

La gestation pour autrui (GPA), définie comme le fait d'avoir recours à une mère porteuse pour que l'enfant né de la mère porteuse soit remis aux parents d'intention, devient de plus en plus commune et connue. On remarque même les couples célèbres qui ont eu recours aux mères porteuses. Les premières instances de la GPA ont eu lieu pendant les années 1970s et 1980s, et bien que ce développement médical puisse être fortement souhaitable pour les personnes infertiles ou les couples de même sexe, les législateurs européens répugnent encore en général à élargir la légalité de la GPA et à admettre les droits des parents d'intention. Beaucoup de législateurs européens maintiennent que la commercialisation de la grossesse et le fait d'enlever un enfant de la femme qui l'a porté présentent de nombreux problèmes éthiques, notamment l'exploitation des mères porteuses et la commercialisation des enfants et du corps humain. La loi régissant la GPA dans certains pays peut avoir des effets nuisibles sur les familles qui ont eu recours à la GPA, et en particulier sur les enfants nés de la GPA à l'étranger, et certains législateurs ont donc commencé des efforts de réforme. On analysera dans un premier temps la loi irlandaise concernant la GPA avant d'analyser la loi en France et d'autres juridictions européennes. On analysera ensuite les questions éthiques relatives à la GPA et les raisons valables pour laquelle elle est souvent interdite avant de donner quelques suggestions de réforme. Cet auteur est favorable à la légalisation de la GPA avec beaucoup de réserve, et cet article tiendra compte des dangers significatifs de l'ouverture de la GPA.

B LA GPA EN IRLANDE

La loi irlandaise ne régit presque pas du tout la gestation pour autrui, et les litiges sont tranchés à l'égard des principes généraux de la filiation. Selon le droit irlandais général de la filiation, la maternité appartient à la femme qui accouche et la paternité appartient à l'homme dont les gamètes ont contribué à l'existence de l'enfant et qui a donc un lien génétique avec l'enfant. Si une femme (y compris une mère porteuse) est mariée, tout enfant dont elle accouche est présumée l'enfant de son mari. Ces principes sont rigidement appliqués même aux enfants nés

de la GPA, et on a donc constaté la nécessité de la réforme. En octobre 2017 le gouvernement irlandais a approuvé un nouveau projet de loi qui laisse encore beaucoup de lacunes.[1]

I Les dispositions principales du projet de loi

Ce qu'on remarque tout d'abord en lisant le projet de loi, c'est le contrôle d'une autorité régulatrice régissant la procréation médicalement assistée et la GPA.[2] Tout accord de GPA doit être soumis à cette autorité.[3] En outre, la GPA doit être altruiste- tout accord commercial de la GPA est prohibé, sauf le défraiement des dépenses raisonnables.[4] Cette exigence vise à exclure l'exploitation des mères porteuses pauvres et la marchandise du corps humain. L'enfant doit avoir un lien biologique avec au moins un des parents[5] et la mère d'intention doit être incapable de porter l'enfant elle-même pour des raisons médicales.[6] La GPA doit être gestationnelle au lieu d'être traditionnelle,[7] c'est à dire que le projet de loi exige l'implantation des embryons au lieu de l'insémination de la mère porteuse. Tout accord de la GPA qui ne remplit pas ces exigences serait illégal.

La reconnaissance légale de la filiation entre l'enfant et les parents d'intention est soumise au contrôle du juge.[8] Il faut attendre six semaines après la naissance de l'enfant avant de comparaître devant un juge pour faire reconnaître le lien de filiation entre l'enfant et les parents d'intention,[9] et on verra que cette exigence est empruntée de la législation anglaise. Le projet de loi ne fait pas mention de la GPA procurée à l'étranger.

II Les lacunes et les inconvénients de cette réforme

Cette réforme a suscité de nombreux critiques. Une première critique est l'omission de la GPA procurée à l'étranger, car le projet de loi dit simplement que tout accord de la GPA doit être passé en Irlande. Le manque de clarté en ce qui concerne les enfants et les parents dans cette situation n'est pas du tout souhaitable. Il faut déplorer que des enfants soient peut-être laissés

* Junior Sophister Law and French Candidate, Trinity College Dublin. The author graduated from Emma Willard School in New York in 2017 before studying Law and French at Trinity College Dublin. The author is currently a third year student on Erasmus in the University of Strasbourg.

[1] General Scheme of the Assisted Human Reproduction Bill 2017 <https://assets.gov.ie/19004/d250693cb05d44e2b2c45d7cf26614d3.pdf> accédé le 26 février 2020.

[2] ibid, section 8.

[3] ibid, section 8, tiret 67-10.

[4] ibid, section 6, tiret 40.

[5] ibid, section 6, tiret 39.

[6] ibid.

[7] ibid, section 6, tiret 36.

[8] ibid, section 6, tiret 47.

[9] ibid, section 6, tiret 40-6.

sans droits et sans citoyenneté irlandaise, dans une situation de précarité. Il peut arriver pour ces enfants qu'un parent légal, la mère porteuse, habite à l'étranger, et qu'un parent d'intention qui habite avec l'enfant et qui s'occupe de l'enfant n'est pas reconnu comme parent légal pendant très longtemps. On peut aussi remarquer qu'il existe toujours beaucoup de difficultés pour les parents d'intention même si les enfants sont nés de la GPA en Irlande. Ils sont obligés de suivre de longues démarches légales pour réclamer les effets légaux de la garde et tutelle de l'enfant, car la présomption de la responsabilité parentale de la mère porteuse est très lourde.

L'exigence d'un lien biologique avec au moins un des parents empêche les couples infertiles d'avoir recours à la GPA, et la loi n'énumère pas les raisons médicales qui justifieraient ou non le recours à la GPA.[10] L'exigence de la GPA gestationnelle suscite aussi des critiques. Bien que la loi est censée mettre le bien-être de la mère porteuse en avant, l'implantation des embryons exigée par le projet de loi est beaucoup plus ardue pour la mère porteuse que l'insémination.[11] Cette exigence vise à assurer un lien biologique entre le(s) parent(s) d'intention et l'enfant et à réduire l'importance de la mère porteuse dans le processus biologique. Un lien biologique entre les parents et l'enfant n'est certainement pas sans effet, et il se peut que l'encouragement de la séparation du lien biologique de filiation du lien social de filiation soit nuisible en soi-même. Cependant, une fois la GPA permise, même sous certaines conditions strictes, on cède à une conception plus sociale de la filiation. Si la GPA est permise, peut-être qu'il vaut mieux donc faire face à la réalité de la filiation sociale que d'imposer des conditions qui peuvent nuire aux intérêts de la mère porteuse en adhérant à une conception biologique de la filiation.

On peut critiquer un autre article du projet de loi irlandais à travers l'argument du bien-être de la mère porteuse. L'article 48(2) du nouveau projet de loi donne au juge le pouvoir d'écarter la nécessité du consentement de la mère porteuse au transfert d'autorité parentale si la mère porteuse est morte, si elle n'est pas juridiquement capable de consentir, si elle a disparu où pour une autre raison pertinente.[12] Le projet de loi n'explicite pas ce qui pourrait constituer une raison pertinente. On peut donc craindre qu'une mère porteuse qui change d'avis découvre que son refus de donner son consentement à l'ordre parental est inefficace devant un juge qui considère qu'il est dans l'intérêt supérieur de l'enfant d'être remis chez les parents d'intention.

[10] Claire O'Connell, 'The Aspirational Shortcomings of the Irish Legislative Proposals in Assisted Human Reproduction—Part 1' (2018) 21(4) Irish Journal of Family Law 91.
[11] ibid.

[12] General Scheme of the Assisted Human Reproduction Bill 2017 (n 1), section 6, tiret 48(2).

Cet article donne un pouvoir redoutable au juge d'obliger une mère porteuse qui ne consent pas à l'ordre parental à renoncer à son enfant.

Les Cours irlandaises n'ont pas beaucoup traité de ce problème. La Cour Suprême a jugé d'un arrêt en 2014[13] dont les requérants ont demandé l'inscription du nom de la mère d'intention sur l'acte de naissance. La Cour a simplement conclu que la législation irlandaise actuelle nécessitait l'inscription du nom de la femme qui avait accouché sur l'acte de naissance. La Cour s'est délibérément abstenue de toute ingérence dans la sphère législative, et il est clair que la réforme, si elle arrive, émanera de la législature.

C LA GPA EN EUROPE

I La GPA en France

Tout d'abord, la législation concernant la gestation pour autrui est très simple en France. Tout accord passé pour la gestation pour autrui est nul conformément à l'article 16-7 du Code Civil,[14] et les moyens d'établir la filiation laissent peu de place pour la GPA.[15] Cependant, la stricte application de ces articles a abouti aux recours devant la Cour européenne des Droits de l'Homme, ce qui montre que les pays européens ne sont pas complètement libres d'agir contre la GPA par tout moyen qu'ils estiment juste. L'élément international joue un rôle dans la matière aussi.

(a) L'affaire Mennesson

Il ressort d'un arrêt récent concernant l'étendue de cet article que la Cour européenne des Droits de l'Homme (CEDH) a répondu en juin 2014 à la plainte des Mennessons, un couple français. Les Mennessons avaient légalement procuré la GPA en Californie en 2000 avant de ramener leurs enfants en France, et ils se sont vu refuser la transcription des actes de naissance américains des enfants sur les registres français. Les Mennessons avaient déposé plainte contre la France qui aurait violé le droit à la vie privée et familiale.

En juin 2014, la CEDH a estimé que ce refus portait atteinte aux droits des Mennessons conformément à l'article 8 de la Convention européenne des Droits de l'Homme,[16] selon

[13] *MR v An tArd-Chláraitheoir* [2014] IESC 60.
[14] Code Civile article 16-7.
[15] ibid article 310-3.
[16] *Mennesson c France* requête no 65192/11 (CtEDH 26 juin 2014).

laquelle 'Toute personne a droit au respect de sa vie privée et familiale.'[17] Les Mennessons ont demandé le réexamen de leur pourvoi en France et en février 2018, la Cour française de réexamen des décisions civiles a fait droit à cette demande. Le 4 octobre 2019, l'Assemblée plénière de la Cour de Cassation a statué en faveur des Mennessons en énonçant que l'avis consultatif de la CEDH accordait une importance capitale, en premier, à l'intérêt supérieur des enfants lorsqu'il s'agissait de la GPA réalisée légalement à l'étranger, et en deuxième, au droit de respect de la vie privée. L'arrêt de la Cour de Cassation du mars 2010 refusant la transcription a été donc cassé et annulé en toutes ses dispositions.[18] L'arrêt donne de l'espoir aux couples français qui ont eu recours à la GPA à l'étranger, mais on verra que la GPA est très loin d'être légale en France.

(b) L'arrêt du 12 septembre 2019

L'affaire Mennesson n'ouvre toutefois pas la voie à la GPA pour tous les Français. La Cour de Cassation a très récemment rappelé et appliqué l'interdiction absolue de l'article 16-7 du Code civil. Dans l'espèce,[19] deux hommes français avaient contracté avec une mère porteuse. Selon le contrat, la mère porteuse serait rémunérée de leur porter un enfant conçu à l'aide des gamètes de l'un des deux hommes. La femme a donné l'enfant à un autre couple qui lui avait offert davantage et a faussement informé le premier couple du décès de l'enfant. Lorsque le premier couple a appris que l'enfant était en vie, les deux ont mené une action en justice contre la mère porteuse et contre l'homme qui avait établi un lien de filiation avec l'enfant par reconnaissance. La Cour de Cassation a constaté que le lien biologique prétendu découlait d'un contrat prohibé, et a débouté les deux hommes de leur demande pour deux raisons: en premier, l'intérêt supérieur de l'enfant exigeait que l'enfant continue à connaître la stabilité établie avec le deuxième couple, et en deuxième, seul le Procureur de la République est compétent pour contester un lien de filiation frauduleusement établi, ce qu'il n'avait pas l'intention de faire en raison de l'origine illégal du lien biologique avec le requérant.

(c) Conclusion

Si l'affaire Mennesson semble ouvrir la porte en France à la GPA, l'arrêt de la Cour de Cassation du 12 septembre 2019 devrait fortement nous détromper de cette idée. Il ne s'agit pas du tout dans ces arrêts d'une libéralisation de la loi concernant la GPA. La GPA reste strictement interdite et toute convention passée à cette fin est nulle, en France comme dans

[17] Charte des droits fondamentaux de l'Union européenne, article 8.
[18] Assemblée plénière, 4 octobre 2019 no 10-19.053.
[19] Cour de cassation I, 12 septembre 2019 no 18-20 472.

beaucoup d'autres pays. ll s'agissait seulement dans l'affaire Mennesson d'une amélioration des effets draconiens de la loi française. Si cette jurisprudence fait des concessions aux juridictions étrangères, il y a des auteurs qui considèrent que cette divergence de traitement entre les enfants nés de la GPA à l'étranger et les enfants nés de la GPA en France n'est cohérente ni juste.[20] Le débat entourant les enfants nés de la GPA à l'étranger est un débat très sérieux et difficile, car la législation étrangère régissant la GPA peut déroger fortement à l'ordre public français. C'est une grande question à la fois éthique et légale à laquelle les législateurs français devront faire face, et cet auteur essaiera d'apporter une réponse possible à la GPA procurée à l'étranger plus tard dans cet article.

II La Jurisprudence Européenne Portant sur la GPA

L'interdiction de la GPA en France n'est pas un phénomène français, et une autre décision récente de la CEDH[21], rendue en réponse à un pourvoi contre l'Italie, mérite la discussion. Il s'agit dans l'arrêt Paradiso et Campanelli d'un couple italien qui a eu recours à une mère porteuse russe. L'enfant est né en Russie en février 2011 et après la rentrée du couple en Italie, le parquet italien a ouvert en mai 2011 une procédure pénale contre le couple en raison de leur altération d'état civil et l'usage de faux ainsi que l'infraction d'avoir amené l'enfant en Italie en mépris de la procédure prévue par les dispositions sur l'adoption internationale. L'enfant était mis à la charge du service social, et après saisine de l'affaire par les parents d'intention, la Grande Chambre de la Cour européenne des Droits de l'Homme a refusé de reconnaître une vie familiale. La Cour a déclaré qu'il n'y a pas eu violation de l'article 8 de la Convention.

Une raison probable pour cette déclaration est qu'il existait de graves indices que les autorités italiennes avaient agi en accordance avec l'intérêt supérieur de l'enfant. L'enfant tout simplement a été acheté dans un pays où la GPA est une vraie industrie, les parents d'intention avaient délibérément contourné la loi par dissimulation, et la Cour a estimé en outre 'que l'enfant résultait d'un désir narcissique du couple ou qu'il était destiné à résoudre des problèmes de couple'. Le cas traité dans cet arrêt est un exemple des pires effets de la GPA, et il n'est pas donc difficile de comprendre pourquoi la décision des autorités italiennes de mettre l'enfant à la charge du service social n'était pas une violation de la vie privée et familiale selon

[20] Laurence Brunet, François Chénedé et Pascale Salvage-Gerest 'GPA : les toutes dernières decisions !'(2019) (10) Actualité Juridique Famille 531.

[21] *Affaire Paradiso et Campanelli c Italie* requête no 25358/12 (CtEDH 24 janvier 2017).

la Cour européenne des Droits de l'Homme, mais une décision nécessaire pour le bien-être de l'enfant.

La Cour européenne des Droits de l'Homme s'octroie le pouvoir de condamner les pires effets d'une interdiction de la GPA, mais elle considère à bon droit que l'interdiction elle-même relève de la compétence du législateur national, et elle n'hésite pas à avoir recours à cette interdiction lorsqu'il n'existe pas de raisons importantes pour considérer que l'interdiction et ses effets nuisent à l'intérêt supérieur de l'enfant. La difficulté pour la Cour européenne des Droits de l'Homme est de discerner la différence entre ce qui relève de la souveraineté nationale et ce qui constitue une violation de la vie privée apte à faire l'objet d'une condamnation. Il sera intéressant de suivre la jurisprudence à cet égard.

III La GPA en Suisse

L'interdiction de la GPA en Suisse est très forte et elle a même une valeur Constitutionnelle. Selon la Constitution fédérale de la Confédération suisse, 'le don d'embryons et toutes les formes de maternité de substitution sont interdits'.[22] Selon l'article 31 de la Loi fédérale sur la procréation médicalement assistée, une peine privative de liberté de trois ans et une peine pécuniaire sont prévues pour ceux qui appliquent une méthode de procréation médicalement assistée à une mère de substitution et pour ceux qui servent d'intermédiaire.[23] La mère porteuse n'est pas punie, et l'absence de sanction pour la mère porteuse, qui est susceptible d'abus et que la loi est censée protéger, est souhaitable même si l'interdiction complète est critiquable aussi.

IV La GPA au Royaume-Uni

Au Royaume-Uni, la GPA est tout d'abord régie par une loi de 1985[24] qui a été modifiée par des lois de 1990 et 2008.[25] La GPA n'est pas interdite mais la GPA commerciale l'est.[26] Aucun accord de la GPA n'est opposable contre la mère porteuse et elle a toujours le droit de garder l'enfant,[27] mais les effets de cette nullité ne sont pas les mêmes que ceux qu'on voit en France.[28] Les parents d'intention anglais peuvent devenir les parents légaux d'un enfant né d'un accord

[22] Constitution fédérale de la Confédération suisse du 18 avril 1999, RS 101, article 119(2d).
[23] Loi fédérale du 18 décembre 1998 sur la procréation médicalement assistée, RS 810.11, article 31.
[24] Surrogacy Arrangements Act 1985.
[25] Human Fertilisation and Embryology Act 1990; Human Fertilisation and Embryology Act 2008.
[26] Surrogacy Arrangements Act 1985 section 2.
[27] Human Fertilisation and Embryology Act 1990 modification dans la section 36 du Surrogacy Arrangements Act 1985.

[28] Code Civile (n 14).

de GPA au Royaume-Uni, mais le processus est assez ardu. Les parents doivent demander un ordre parental avec le consentement de la mère porteuse, qui ne peut pas consentir jusqu'à six semaines après la naissance, et au moins un parent d'intention doit avoir un lien génétique avec l'enfant. Il faut aussi que l'enfant réside avec les parents d'intention.[29]

Si la loi est plus libérale par rapport aux autres pays européens, elle est encore très critiquable. Les difficultés légales à l'encontre des parents d'intention anglais peuvent être nuisibles aux familles, parce que le long processus légal coûte, en termes du temps et de l'argent. En outre, un parent d'intention qui n'est pas reconnu comme un parent légal n'est pas habilité à prendre les décisions pour la santé et le bien-être de l'enfant. La mère porteuse, reconnue comme parent légal, aura ce pouvoir quand bien même elle est peut-être prête à renoncer à l'enfant et n'a donc pas intérêt à exercer ce pouvoir. L'exigence d'un lien génétique avec au moins un des parents empêche les couples complètement infertiles d'avoir recours à la GPA. Ces critiques entre d'autres ont amené des auteurs à éditer un ouvrage des suggestions pour une nouvelle loi modernisant la GPA au Royaume-Uni,[30] et la recommandation la plus importante est celle concernant l'établissement d'un moyen de reconnaître les parents d'intention avant la naissance de l'enfant, ce qui n'est pas possible selon la loi actuelle. La loi actuelle gouvernant la GPA au Royaume-Uni, et *a priori* les suggestions trouvées dans le projet de loi, sont donc relativement favorables à la GPA par rapport à la loi française et Suisse.

V Des remarques sur le droit européen de la GPA

Bien qu'on remarque quelques différences selon les lois nationales concernant la GPA, les lois suscitent toutes des critiques. Au Royaume-Uni et en Irlande, on remarque tout d'abord l'incertitude légale et la charge excessive incombant aux parents d'intention qui souhaitent devenir les parents légaux de l'enfant. En France les effets draconiens de l'interdiction de la GPA ont même incité des couples d'aller devant la Cour européenne des Droits de l'Homme. Si la Cour européenne des Droits de l'Homme se montre prête à adoucir les pires effets de l'interdiction, elle se tait toujours au sujet de l'interdiction elle-même. Il s'agit d'une question de souveraineté législative: dans une domaine où la législature, comme voix du peuple, devrait protéger fortement les valeurs et l'ordre public nationaux, il ne convient pas d'attendre et de

[29] UK Government, 'Surrogacy: Legal Rights of Parents and Surrogates' <https://www.gov.uk/legal-rights-when-using-surrogates-and-donors/become-the-childs-legal-parent> accédé le 26 février 2020.
[30] Law Commission Consultation Paper, *Building Families through Surrogacy: A New Law* (Law Com No 224, 2019) para 7.78 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/Surrogacy-consultation-paper.pdf> accédé le 26 février 2020.

suivre aveuglément les jugements des Cours européennes, comme remarque le Professeur Chénedé.[31] Il y a un équilibre à respecter entre la modernisation, l'harmonisation avec la jurisprudence antérieure de la Cour européenne des Droits de l'Homme qui peut évoluer, le respect des mœurs nationales et la considération des questions éthiques relatives à la GPA telles qu'on a vues dans l'arrêt *Paradiso*.[32]

D LA POSSIBILITÉ DU CHANGEMENT

I Les objections à la GPA

Il y a une école de pensée courante qui considère la GPA comme libérale, moderne, conforme à l'éthique sous certaines conditions, et surtout un moyen souhaitable d'encourager la vie familiale. Cependant, avant d'envisager la réforme, il faut être conscient des dangers que la GPA pose en vue de former une opinion cohérente et informée.

(a) Les effets sur la mère porteuse

Il existe de graves considérations qui portent sur la santé et la dignité de la mère porteuse. La Thaïlande et l'Inde ont interdit la GPA pour les étrangers parce que la GPA commerciale pratiquée dans ces pays menait aux abus déplorables des femmes.[33] Pour la plupart des accords de GPA conclus dans ces pays entre les femmes originaires et les parents d'intention étrangers, le déséquilibre significatif des moyens économiques se traduisait par un déséquilibre significatif de pouvoir. La mère porteuse est donc vue comme un simple incubateur et exploitée. On imagine les pires cas où l'accord de GPA est opposable à la mère porteuse et elle peut se voir l'objet d'une demande d'exécution forcée du contrat même si elle découvre que la grossesse sera dangereuse pour elle. La GPA commerciale peut mener aussi aux cas horrifiants où un enfant atteint d'un handicap est considéré comme un 'produit défectueux', ce qui est très contraire à la morale parce que cette conception porte atteinte à la fois à la dignité de la mère porteuse et aux intérêts de l'enfant, qui pourra être abandonné.

[31] Brunet *et al* (n 20).
[32] *Paradiso et Campanelli c Italie* (n 21).
[33] Reuters, 'Thailand Bans Surrogacy for Foreigners in Bid to End "Rent-A-Womb" Tourism' <https://www.reuters.com/article/us-thailand-surrogacy/thailand-bans-surrogacy-for-foreigners-in-bid-to-end-rent-a-womb-tourism-idUSKBN0LO07820150220> accédé le 3 mars 2020; Telegraph, "India bans commercial surrogacy to stop 'rent a womb' exploitation of vulnerable women" <https://www.telegraph.co.uk/news/2018/12/20/india-bans-commercial-surrogacy-stop-rent-womb-exploitation/> accédé le 3 mars 2020.

On pourrait dire aussi que contraindre une femme à renoncer à un enfant qu'elle n'a jamais vu est la manifestation de la pire variété de l'influence indue. Par exemple, il y avait un cas célèbre aux États-Unis d'un 'Baby M' pendant les années 1980. La mère porteuse anéantie, après avoir changé d'avis, était obligée à donner son propre enfant qu'elle voulait garder. Il est tout simplement impossible de demander à une mère de ne pas aimer son enfant, et même dans la plupart des cas de la GPA altruiste, une mère porteuse qui change d'avis et qui veut garder son enfant après sept mois de grossesse ne se sentira pas vraiment libre d'exprimer ce désir. Il y a des critiques qui nous avertissent que la GPA est assimilable à une forme d'esclavage.[34]

La GPA altruiste n'évite jamais complètement l'élément de contrôle implicite sur le corps d'une autre personne. La mère porteuse est toujours consciente que l'enfant qu'elle porte est censé être remis chez quelqu'un d'autre. Si la GPA commerciale impose un élément de contrainte qui empêche une mère porteuse d'analyser clairement les conséquences de ses actes, la GPA altruiste oblige la mère porteuse à subir la même épreuve considérable sans rien recevoir en retour sauf un sentiment de satisfaction. Même si la loi interdit la GPA commerciale, il existe toujours des contre-lettres entre les mères porteuses et les parents d'intention, et l'interdiction de la GPA commerciale est donc inefficace pour ceux qui ont intérêt à la pratiquer. Une fois l'enfant né et donné, les parents d'intention s'inquiètent probablement très peu de la santé de la mère porteuse et des soins physiques et psychologiques dont elle aura besoin. Les conseils indépendants légaux et les soins psychologiques, quelquefois considérés comme de grands garants des intérêts de la mère porteuse, peuvent avoir pour seul but de convaincre à la mère porteuse de renoncer à l'enfant. D'un ton cynique on peut dire qu'il est peu probable qu'un professionnel payé par les parents d'intention essaie de dissuader la mère porteuse.

(b) L'eugénisme et les intérêts de l'enfant

Il y a aussi un élément d'eugénisme en ce qui concerne la gestation pour autrui, ce qui a abouti aux cas horrifiants où les enfants ont été abandonnés parce qu'ils n'étaient pas 'conformes' aux désirs des parents d'intention.[35] Il faut dire en plus que l'adoption est un bon moyen de remettre des enfants déjà vivants aux foyers des personnes méritantes qui sont incapables d'avoir des

[34] Dr Gary Lilienthal, Dr Nehaluddin Ahmad et Dr Zainal Amin bin Ayub, 'Policy Considerations for the Legality of Surrogacy' (2015) 21(2) Medico-Legal Journal of Ireland 88-99.

[35] Lindsay Murdoch, 'A Mother's Anguish as Baby Gammy Celebrates Fourth Birthday' *Sydney Morning Herald* (23 décembre 2017) <https://www.smh.com.au/world/a-mothers-anguish-as-baby-gammy-celebrates-fourth-birthday-20171223-h09mem.html> accédé le 26 février 2020.

enfants biologiques, sans aucun élément d'eugénisme et pour la plupart des cas sans aucun contrôle sur la mère qui a déjà fait le libre choix de renoncer à l'enfant.

Cependant, l'adoption présente ses propres inconvénients qui nous éclairent sur la GPA aussi. Bien que l'adoption nous montre que les parents qui n'ont pas de lien génétique avec leur enfant peuvent très bien donner à l'enfant un foyer stable et aimant, les études[36] montrent que n'accorder aucune valeur au lien génétique entre une mère et un enfant est une erreur grave. L'adoption est très souvent dans l'intérêt supérieur de l'enfant, en considération des raisons qui ont obligé la mère à renoncer à son enfant ou des raisons qui ont obligé l'État à remettre l'enfant à la charge des services sociales. Cependant, les enfants adoptés souffrent quand même des conséquences de la séparation de la filiation biologique de la filiation sociale. On remarque que les enfants adoptés sont plus susceptibles d'avoir des problèmes, de développement et ils ressentent tous un degré de perte de leur famille biologique.[37] Il faut peut-être conclure que si cette séparation est presque toujours nécessaire pour les enfants adoptés, les effets sur les enfants adoptés nous montrent qu'encourager activement cette séparation par la GPA n'est pas souhaitable. S'il existe beaucoup de parents des enfants adoptés qui aiment fortement leurs enfants, il faut malheureusement prendre en compte l'argument que le lien biologique de filiation est un sauvegarde des intérêts de l'enfant, et que les enfants qui n'ont pas ce lien avec leurs parents sont peut-être plus facilement abandonnés ou négligés.

(c) La GPA à l'étranger

L'acceptation des accords de GPA conclus légalement à l'étranger pose des problèmes aussi, d'une part parce que les parents d'intention ont délibérément et sciemment contourné la loi de leur propre pays, et d'autre part parce que les accords de GPA conclus à l'étranger sont souvent très contraires à la morale. L'accord de GPA examiné dans l'arrêt *Mennesson*[38] peut paraître comme un exemple de la GPA éthique parce que la mère d'intention en Californie n'a reçu que le remboursement des dépenses raisonnables, et il n'y avait pas d'indices évidents de dol ou d'abus en l'espèce. Cependant, l'arrêt *Paradiso*[39] nous montre l'étendue des horreurs qui

[36] Docteur Cecilia Baxter, Edmonton (Alberta) 'La compréhension de l'adoption: Une méthode axée sur le développement' (Paediatrics Child Health, 2001); 6(5) Paediatrics Child Health mai-juin 6(5) 289–291 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2804559/> accédé le 25 février 2020

[37] Docteur Cecilia Baxter, 'La compréhension de l'adoption : Une méthode axée sur le développement' (2001) 6(5) Paediatrics Child Health 289–291 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2804559/> accédé le 25 février 2020.

[38] *Mennesson c France* (n 16).

[39] *Paradiso et Campanelli c Italie* (n 21).

peuvent arriver à l'étranger. L'enfant tout simplement a été acheté dans un pays où la GPA est une vraie industrie.

Une réponse possible est d'interdire tout accord de GPA domestique ou étranger, remettre tout enfant né de la GPA à la tutelle de l'État dès que la GPA est découverte et condamner pénalement les parents d'intention qui ont délibérément eu recours à la GPA à l'étranger. Cependant, cette pratique n'est pas sans inconvénients non plus pour les enfants déjà établis dans un foyer stable, et vue la jurisprudence *Mennesson*, cette pratique susciterait certainement de fortes condamnations devant la Cour européenne des Droits de l'Homme pour violation de la vie privée.

Pour mieux comprendre les dangers que pose la GPA en réalité, il suffit de regarder les réformes importantes que beaucoup de pays ont mises en oeuvre pour interdire la GPA. En Thaïlande[40] et en Inde,[41] les ravages qu'avaient produites le tourisme de GPA ont obligé les législateurs à interdire la GPA pour les étrangers. On remarque un élément raciste dans la pratique des citoyens des pays riches européens d'utiliser la Thaïlande et l'Inde comme les usines d'enfants, et l'exploitation des femmes de ces pays était affreuse. La Suède a interdit en 2016 la GPA commerciale ainsi que la GPA altruiste.[42] Il y a des arguments très convaincants qui ont poussé ces pays à agir contre la GPA, et il ne faut pas oublier ces arguments.

(d) Conclusion

Il y a beaucoup d'arguments forts contre la GPA qui s'appliquent à la GPA toute entière, même si un cas spécifique d'un accord de GPA montre toutes les indices de la conformité à la morale. Certains de ces arguments sont l'absence de rémunération, non-opposabilité de l'accord, soins physiques et psychologiques ainsi que les conseils légaux indépendants donnés à la mère porteuse, relation familiale ou intime entre la mère porteuse et les parents d'intention. Cependant, cet auteur n'est pas en faveur d'une approche trop restrictive. La GPA conforme à l'éthique est possible sous certaines conditions, et elle peut bénéficier aux personnes qui en ont besoin. En outre, ceux qui veulent conclure un accord illégal de GPA trouvera toujours des

[40] Agence France-Presse, 'India Bans Foreigners from Hiring Surrogate Mothers' *The Guardian* (28 October 2015) <https://www.theguardian.com/world/2015/oct/28/india-bans-foreigners-from-hiring-surrogate-mothers> accédé le 26 février 2020.

[41] Jonathan Head, 'Thailand Bans Commercial Surrogacy for Foreigners' *BBC News* (20 February 2015) <https://www.bbc.com/news/world-asia-31546717> accédé le 26 février 2020.

[42] Kajsa Ekis Ekman, 'All Surrogacy is Exploitation – the World Should Follow Sweden's Ban' *The Guardian* (25 February 2015) <https://www.theguardian.com/commentisfree/2016/feb/25/surrogacy-sweden-ban> accédé le 26 février 2020.

méthodes de contourner la loi, et une approche trop stricte à la GPA peut nuire aux enfants nés de la GPA. À l'échelle nationale, l'arrêt Mennesson démontre qu'une telle approche est susceptible d'entraîner des sanctions de la Cour de Justice de l'Union européenne et d'attirer l'attention des autres pays. Le gouvernement irlandais montre la volonté de mettre en oeuvre des réformes portant sur la GPA, et il reste donc à considérer comment les réformes peuvent prendre en compte toutes les objections valables à la GPA.

II Les Réformes Recommandées

Quelles réformes sont donc nécessaires, en Irlande et d'ailleurs, pour bien faire face à ces problèmes éthiques en modernisant la GPA? Il faut réfléchir en premier aux moyens de protéger les intérêts de la mère porteuse. Des auteurs[43] ont suggéré que les contrôles raisonnables tels que l'aide psychologique et le conseil légal indépendant peuvent assurer que la mère porteuse ne fait pas l'objet d'une contrainte illicite, qu'elle soit consciente de ses droits, et qu'elle soit psychologiquement prête à remettre l'enfant au foyer des parents d'intention. Cet auteur suggère que les psychologistes et les avocats qui conseillent la mère porteuse doivent rester anonymes à l'égard des parents d'intention pour ne pas avoir un conflit d'intérêts, et qu'ils doivent ne pas avoir de préjugés portant sur la GPA.

Les mêmes auteurs[44] considèrent quelquefois que si on institue des sauvegardes suffisantes pour protéger les intérêts de la mère porteuse, on peut reconsidérer l'interdiction de la reconnaissance prénatale. Au Royaume-Uni par exemple, les parents d'intention ne peuvent pas être reconnus avant 6 semaines post partum, et le nouveau projet de loi irlandais envisage cette exigence aussi. Selon le Professeur Tobin, cette exigence est plus souvent un obstacle inutile qui nuit aux intérêts de l'enfant qu'un sauvegarde des droits de la mère porteuse, et on peut trouver le bon équilibre entre les intérêts de tous si on permet la reconnaissance prénatale de l'enfant en exigeant l'aide psychologique et le conseil légal de la mère porteuse et en lui permettant de changer d'avis.[45] Il est vrai que la certitude que crée cette reconnaissance est très bénéfique aux parents d'intention et aux enfants nés de la GPA, et que le régime actuel très formaliste au Royaume-Uni présente un obstacle aux parents d'intention qui doivent prendre les décisions importantes concernant l'enfant dans les jours qui suivent la naissance. Il est aussi vrai que l'exigence du délai de 6 mois post partum ne protège pas nécessairement les mères

[43] Dr Brian Tobin, 'The General Scheme of the Assisted Human Reproduction Bill 2017: A Hybrid Model for the Regulation of Surrogacy in Ireland' (2017) 20 (4) Irish Journal of Family Law 83.
[44] ibid.
[45] ibid.

porteuses contre les accords abusifs de GPA. Cependant, la reconnaissance prénatale de l'enfant renvoie au problème de demander à une mère porteuse de renoncer à un enfant qu'elle n'a jamais vu. Les législateurs pourraient peut-être instaurer un moyen de reconnaissance prénatale d'essai qui donne aux parents d'intention le pouvoir de prendre les décisions importantes concernant l'enfant dès la naissance sauf désaccord de la mère porteuse. Pour que la reconnaissance prénatale soit conforme à l'éthique, il faudrait que la mère porteuse dispose d'un délai pour changer d'avis après la naissance et que le libre consentement de la mère porteuse soit bien assurée.

Il faut aussi écarter l'exigence de la GPA gestationnelle et l'interdiction de la GPA traditionnelle qui en découle. La GPA gestationnelle ne suscite pas nécessairement d'arguments éthiques supplémentaires si la mère porteuse y consent librement, mais la GPA traditionnelle est souvent moins éprouvante pour les mères porteuses. Il semble que cette exigence vise à assurer que les enfants nés de la GPA ont un lien plus fort avec les parents d'intention et un lien moins fort avec la mère porteuse. Cependant, cela semble inutile quand on considère que le fait de porter un enfant est un lien incommensurablement fort en soi. L'exigence de la GPA gestationnelle oblige la mère porteuse à subir une épreuve plus considérable sans lui offrir une protection supplémentaire, et la GPA traditionnelle devrait être permise si toutes les parties y consentent librement.

Il faut enfin considérer l'autorité régulatrice suggérée dans le nouveau projet de loi irlandais. L'adoption est soumise au contrôle étatique, et l'existence d'une telle autorité pour la GPA n'est donc pas déraisonnable. Cette autorité, compétente pour évaluer les accords de la GPA et pour établir la reconnaissance prénatale, empêcherait idéalement l'abus des mères porteuses et la GPA commerciale et assurerait l'accueil de l'enfant dans un foyer stable. Les officiers de cette autorité effectueraient un contrôle sur tous les accords de GPA. En premier, ces officiers poseraient des questions de base, telles que la nécessité de l'accord et la raison du choix de GPA plutôt que l'adoption. Ces officiers assureraient que la mère porteuse reçoit les conseils indépendants légaux et les conseils psychologiques. Les professionnels donnant ces conseils resteraient anonymes à l'égard des parents d'intention. Les officiers interdiraient tout élément d'eugénisme dans la GPA, notamment par le choix des embryons ou par l'abandon d'un enfant atteint d'une condition imprévue. Il va sans dire qu'en raison des questions du bien-être de l'enfant et du bien-être de la mère porteuse énoncées dans cet article, l'interdiction de la GPA commerciale est absolument nécessaire à l'établissement de la GPA légale et éthique, et

l'autorité mentionnée annulerait tout élément donnant à l'accord une nature commercial en considérant les actions appropriées pour la protection de la mère porteuse et de l'enfant.

Il serait en outre bénéfique que cette autorité soit compétente pour évaluer les requêtes de reconnaissance des accords de GPA conclus à l'étranger. Cette compétence comprendrait le pouvoir de donner un avis favorable sur les actes de naissance des enfants nés de la GPA à l'étranger, ainsi que le pouvoir de constater la non-conformité de l'accord à la loi nationale et le contournement de la loi par les parents d'intention. Les parents d'intention qui contournent la législation de leur propre pays en concluant un accord de GPA illicite à l'étranger devraient être soumises à de nombreux sanctions, y compris une amende significative et la mise en charge de l'enfant par l'État si et seulement s'il paraît qu'une telle approche est dans l'intérêt supérieur de l'enfant. Cet auteur croit que cette autorité régulatrice améliorerait considérablement la loi irlandaise par rapport à son état actuel.

E CONCLUSION

La GPA est souvent un moyen souhaitable pour les personnes infertiles ou les couples de même sexe d'avoir des enfants, parce que le processus long et coûteux de l'adoption peut décourager les personnes méritoires d'avoir une famille. Cependant, la GPA est aussi très souvent contraire à la morale et à l'éthique. L'Irlande est en train d'exécuter des réformes de la GPA, et d'autres pays comme le Royaume Uni et les États-Unis permettent la GPA depuis des décennies. En considération de cette actualité, il vaut mieux peut-être discuter des réformes possibles qui gardent à l'esprit les objections éthiques suscitées que de refuser d'envisager la réforme. Un tel effort n'est pas du tout facile. Comment mettre en balance les intérêts de la mère porteuse, les enfants et les parents d'intention, sans être trop restrictif et sans encourager les gens à contourner la loi à l'étranger? Comment envisager tous les cas possibles et mettre en exécution une approche qui valent pour tous ces cas? Il n'y pas de réponse parfaite; il n'y a que quelques suggestions. Tout effort de réforme sera critiquable d'une manière ou une autre.

Cet auteur a suggéré avec hésitation les réformes susmentionnées, qui n'écartent pas du tout toutes les questions éthiques relatives à la GPA mais qui visent seulement à répondre aux objections les plus évidentes contre la GPA. Parmi les suggestions était l'existence d'une autorité régulatrice de la GPA qui aurait des pouvoirs significatifs de valider et d'annuler les accords de GPA en vue d'assurer le bien-être de toutes les parties, une reconnaissance préalable d'essai et l'abolition de l'exigence de la GPA gestationnelle.

Cet article présente d'une manière incomplète la législation actuelle gouvernant la GPA, des efforts actuels de réforme, les questions éthiques relatives à la GPA, les suggestions de réforme et enfin l'impossibilité d'arriver à une réponse parfaite pour régir cette question épineuse. Une réforme raisonnable de la GPA respecterait autant que possible les objectifs de la tolérance et de la vie familiale privée, tout en gardant à l'esprit les questions éthiques graves que peut susciter la GPA et les intérêts auxquels la GPA porte atteinte.

FROM EXECUTION VIDEOS TO CATS OF MUJAHDEEN: HOW DO SOCIAL MEDIA COMPANIES REGULATE TERRORIST CONTENT?

*MacKenzie F Common**

Dear Editor,

Until 2014, most discussions about social media focussed on its positive effects for democracy and human rights. This was exemplified by the Arab Spring, where Peter Beaumont, a journalist for *The Guardian*, opined that '[t]he barricades today do not bristle with bayonets and rifles, but with phones.'[1] Then, in August 2014, the popular narrative changed when the upstart terrorist group ISIS posted a video of journalist James Foley being beheaded on social media.[2] The group continued to use social media for publicity, recruitment, and intimidation, prompting a global reappraisal of the merits of social media and its lack of regulation.

Now, politicians and users alike demand that social media platforms identify and remove terrorist content as quickly as possible. Theresa May, for example, stated in a speech at the United Nations General Assembly that tech companies must go 'further and faster' in removing terrorist content.[3] In our collective rush to respond to this new threat, however, we have failed to ask important questions about how terrorist content is regulated on social media. This ignorance has resulted in a reliance on private-sector censorship without any of the safeguards that are available in a public institution.

* MacKenzie F Common is a fourth year PhD student in Law at the London School of Economics (LSE). Common has an LLM in International Law from the University of Cambridge, where she completed a thesis on the challenges of regulating hate speech on social media. She also holds an LLB (Graduate Entry) from City University of London and an Honours BA in Political Science from the University of Guelph (Canada). Her research focuses on the content moderation processes at social media companies and argues that many of their practices are problematic from a human rights law and rule of law standpoint. Her work on social media recently won the Google Prize at the Bileta (the British and Irish Law Education and Technology Association) conference.

[1] Peter Beaumont, 'The Truth about Twitter, Facebook, and the Uprisings in the Arab World' *The Guardian* (London, 25 February 2011) <http://www.theguardian.com/world/2011/feb/25/twitter-facebook-uprisings-arab-libya> accessed 21 February 2020.

[2] CNN Editorial Research, 'ISIS Fast Facts by CNN Library' *CNN* (21 January 2019). <https://edition.cnn.com/2014/08/08/world/isis-fast-facts/index.html. Accessed 21 February 2020> accessed 26 March 2020.

[3] Heather Stewart and Jessica Elgot, 'May Calls on Social Media Giants to do More to Tackle Terrorism' *The Guardian* (24 January 2018) <https://www.theguardian.com/business/2018/jan/24/theresa-may-calls-on-social-media-giants-to-do-more-to- tackle-terrorism> accessed 21 February 2020.

One major issue is that social media companies do not provide the public with enough information about how they define a terrorist group. There is no universally accepted definition of terrorism and even experts on the area acknowledge the semantic difficulty of creating one.[4] I suspect that social media companies have often employed US Supreme Court Justice Stewart's approach to defining hard-core pornography in *Jacobellis v Ohio*: 'I know it when I see it.'[5]

Creating a definition, however, is only half the battle (and arguably the easier half). The challenge comes when moderators have to evaluate the activities of real groups against this broad set of parameters. These platforms do not state who they consider to be a terrorist although it's clear they have a master list as they make their moderators memorise their faces.[6] We should all be concerned about how these platforms define terrorist groups because inclusion or exclusion from social media affect the legitimacy, publicity, and political power of any group. These decisions must be made in a reasoned, accountable way and there must be an opportunity for individuals or groups to appeal this categorisation just as there are mechanisms in EU law to apply to be removed from the EU terrorist list.[7]

Another interesting question is whether it is appropriate to ban all content from members of a terrorist group or only content that violates other terms and conditions on the platform (such as the prohibition of violent content or hate speech). Social media companies were catalysed by ISIS's use of social media to post execution videos so most of the prohibitions of terrorist material can be found in the rules banning graphic content.[8] These prohibitions, however, are often enforced against all content emanating from a terrorist group, whether it's the famous 'Cats of Mujahadeen'[9] or dating profiles by violent white supremacists.[10] Monica Bickert,

[4] Conor Gearty, *Terror* (Faber and Faber 1992), 10.
[5] *Jacobellis v Ohio*, 378 US, 197 (Stewart J concurring).
[6] Nick Hopkins, 'Facebook Struggles with "Mission Impossible" to Stop Online Extremism' *The Guardian* (24 May 2017) <https://www.theguardian.com/news/2017/may/24/facebook-struggles-with-mission-impossible-to-stop-online-extremism > accessed 21 February 2020; Olivia Solon, 'To Censor or Sanction Extreme Content? Either Way, Facebook Can't Win' *The Guardian* (23 May 2017) <https://www.theguardian.com/news/2017/may/22/facebook-moderator-guidelines-extreme-content-analysis> accessed 21 February 2020.
[7] European Council 'EU Terrorist List' https://www.consilium.europa.eu/en/policies/fight-against-terrorism/terrorist-list/ accessed 27 January 2020.
[8] See for example, YouTube's Violent or Graphic Content Policy <https://support.google.com/youtube/answer/2802008?hl=en-GB> accessed 21 February 2020.
[9] James Vincent, '"I Can Haz Islamic State Plz": ISIS Propaganda on Twitter turns to Kittens and LOLSpeak' *The Independent* (21 August 2014) <https://www.independent.co.uk/life-style/gadgets-and-tech/isis-propaganda- on-twitter-turns-to-kittens-and-lolspeak-i-can-haz-islamic-state-plz-9683736.html> accessed 21 February 2020.
[10] Paris Martineau, 'Bumble Did What Twitter Didn't: Why are Dating Apps Better at Banning White Supremacists than Twitter?' *The Outline* (25 January 2018) <https://theoutline.com/post/3116/why-are-dating-apps-better-at- banning-white-supremacists-than-twitter?zd=1&zi=bjjrsfmm > accessed 21 February 2020.

Facebook's head of global policy management, has said that terrorists are not allowed on Facebook even if they don't post about terrorism: '[i]f it's the leader of Boko Haram and he wants to post pictures of his two-year-old and some kittens, that would not be allowed.'[11] While it is perfectly permissible for social media companies to ban any individual or group, there is a lot of confusion over whether these are life-time bans and whether banning individuals could ever be considered a violation of their right to expression and to receive information. After all, the US Supreme Court in *Packingham v North Carolina* held that a law prohibiting convicted sex offenders from using social media is a violation of the First Amendment.[12] These platforms must provide more detailed rules that provide clarity and certainty to users.

Finally, the effects of outsourcing censorship to a private company must be addressed. Traditionally, private companies have been legally permitted to take actions that would be considered human rights violations if they were a public institution. There are now growing concerns that Western governments who espouse a strong commitment to human rights are trying to back-door censorship by requiring companies to remove content that would be the subject of judicial hearings if the government took action. A good example of this is the Network Enforcement Act in Germany, where if illegal content is not removed within 24 hours, platforms can face a fine of up to 50 million Euros.[13] Russia, Singapore and the Philippines have announced they will be drafting similar laws.[14] This is problematic because the focus of Germany has narrowed to a single time-frame without considering the implications of demanding companies make difficult decisions about free expression with no legal oversight. This is exactly the wrong way we should be moving, deprioritising social obligations and human rights law.

In conclusion, governments and NGO's must ask more of social media companies than simply to demand terrorist content be reported and removed. Platforms must be clear about who they consider to be a terrorist, what content is deemed terroristic, and there must be transparency with users and concerned parties alike about who they've designated a terrorist organisation. There should also be the option to appeal this designation, just as there is at a governmental

[11] Kate Klonick, 'The New Governors: The People, Rules, and Processes Governing Online' [2018] *Harvard Law Review* 131, 1652.
[12] *Packingham v North Carolina* 137S.Ct.1730 (2017).
[13] Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act). An English translation can be found at: <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationF ile&v=2> accessed 21 February 2020.
[14] Human Rights Watch, 'Germany: Flawed Social Media Law' (14 February 2018) <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law> accessed 21 February 2020.

level, as it would have a huge impact on a group's ability to participate in our social-media centric world.

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MacKenzie F Common