Editorial

Welcome to this special edition of the Irish Judicial Studies Journal.

This edition comprises papers originally delivered at two important events last year; the first was a conference entitled 'Human Rights in a Time of Change: Perspectives from Ireland and Strasbourg', hosted by the Chief Justice last October in DCU, to mark the visit of the President and members of the European Court of Human rights to Dublin during Ireland's Presidency of the Council of Europe Committee of Ministers. The event was a historic one, coming shortly after the election of Judge Síofra O'Leary as the next president of the European Court of Human Rights. Judge O'Leary is both the first woman and the first Irish person to be elected president of an institution which has jurisdiction in respect of 46 member states with a population of 675 million. Out-going President Robert Spano emphasised how important such events are in creating dialogue and in strengthening the on-going conversation on human rights protection. The second event was the conference of the Colloque Franco-Brittanique-Irlandais, which is a liaison body for the French, British and Irish judiciary. The purpose is to exchange ideas as to how justice is to be administered as between very different systems of law: the French civil system, with its separate administrative courts and tendency to have the judge as the primary enquirer into the case, and the common law based on precedent and individual statutes, where the judge is less the manager of the case and leaves the presentation to the parties as the tradition in the adversarial courts. In addition to having a bi-annual meeting, from which these papers are drawn, the Colloque also facilities judicial exchanges whereby judges can travel for a week of observation and study in England, France, Scotland, Northern Ireland or Ireland.

This combination of papers gives us a fascinating special edition where significant insights are provided on matters such as Ireland's relationship with the ECHR, the role of the European Court in conflict resolution, why the Convention and the judgments of the Strasbourg Court are still important 70 years later, the legitimacy of the Convention in rights-protection, and challenges in protecting fundamental freedoms. Further papers examine aspects of the common law that are often misunderstood, the issue of judgment-writing, including methods of drafting, judge-craft, and the writing of administrative judgments, and we also have a number of papers on different aspects of judicial education and training which also look at perspectives from Northern Ireland, Scotland, Ireland, and France. Some of the papers are presented as delivered on the day and others have been reformulated into an academic style, as per the preference of the authors.

Thank you, as always, to our editorial team at the University of Limerick and to our judicial board; particular thanks to Deputy-Editor Dr Laura Donnellan for all her work, to our copy-editor Bláithín O'Shea, who did trojan work on this edition, and to Saoirse Enright who provided copy-editorial assistance. Final thanks to all of the authors who contributed to this edition.

Go mbainfidh sibh taitneamh as.

Dr Laura Cahillane
Editor in Chief

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OUR COLLECTIVE COMMITMENT: IRELAND AND ITS RELATIONSHIP WITH THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS[1]

Author: The Hon. Mr Justice Donal O'Donnell, Chief Justice of Ireland

President Keogh, Minister O'Gorman, President Spano and Vice-president and President-elect O'Leary, colleagues and friends.

It is a great moment for me to be able to welcome, in public, the President and President-elect and all section presidents of the Council of the European Court of Human Rights ('the ECtHR') to Ireland. This is a historic visit of the senior members of the ECtHR to Ireland and is its own illustration of the long and respectful relationship between the Irish State (in particular, the Irish courts) and the Court of Human Rights. Yesterday, members of the Supreme Court and the Court of Appeal had a day-long bilateral exchange with our guests on a number of topics of common interest, such as the intersection between criminal law, evidence, and Convention rights, privacy and data protection, and the procedure introduced for the provision of advisory opinions by the ECtHR.

I am particularly pleased that we have been able to include this public conference in the schedule for this visit, and furthermore, that it is being held on the campus of Dublin City University and involves contributions from the Irish judiciary, senior members of the ECtHR, a distinguished academic lawyer and a Government minister. Not only is this indicative of the importance of the topic, and of the value of the Court and the European Convention of Human Rights ('ECHR') at this time but it also illustrates the fact that the task of the protection of the rights, to which the contracting states dedicated themselves more than 70 years ago, is a task for all of us: judges, practising lawyers, academic lawyers, members of the government, members of parliament, and, indeed, members of the public.
In opening today's conference, I want to touch on three themes.

First, it is useful on an occasion like this to have the opportunity of looking back on the development of the jurisprudence of the ECtHR and the manner in which that has interacted with the law of Ireland. My colleague, Ms. Justice O'Malley, will address this subject in more detail, but in my view, it is a relationship which has been productive and something upon which both sides can reflect on with an element of pride.

It would be, I think, incorrect to view the relationship between Ireland, and the Irish courts on one side, and the ECHR and the ECtHR on the other, through the prism of the occasional high-profile case when there have been decisions giving rise to some controversy, or disagreements. There are times in any functioning relationship when voices can sometimes

[1] This article is based on a speech delivered at the 'Human Rights in a Time of Change: Perspectives from Ireland and from Strasbourg' conference in Dublin City University, 21 October, 2022.

be raised. However, what is more important, in my view, are the long periods of contented silence, and moreover, the ability to communicate, to discuss, and to keep the relationship going. That is, perhaps, a particularly appropriate image in this context, because at one time, the most contentious issues which arose under the ECHR related to private life and the law regulating personal relationships. However, despite what could be perceived as tension in the relationship, there has never been a time when, to extend the metaphor, there was a discussion about divorce, or obtaining a barring order. That is not a small achievement; we need only look at events in the recent past, and beyond, to understand that this in itself is something to celebrate. But the fact is that we have done more than simply muddle along. It is possible of course, to pick out points where the ECtHR did not perform as vigorously as some might have liked, or in other cases, perhaps performed too vigorously. Equally, there have been points where the Irish State was slow to respond to decisions of the Court or where the Irish courts made decisions which can be criticised. But that friction is to some extent unavoidable. It is worth standing back and remembering that adherence to the ECHR meant agreeing to external supervision of matters that previously would have been regarded within the exclusive jurisdiction of a sovereign state. It is not surprising – indeed, it is perhaps inevitable – that the operation of that process will have points of friction. But I think it is fair to say today, that we have not just muddled through to a more contented and mature relationship. I think we can say that the relationship between the State and the Council of Europe, and the Irish courts and the Court of Human Rights, is one which is characterised by a high degree of mutual respect and understanding, which is only deepened by exchange and communication that has evolved in events such as this.

To turn to the second theme, looking back on the events leading to the establishment of the Council of Europe and the ratification of the ECHR, it carries a different resonance today than it did 10 or 20 years ago. It is impossible to look at the establishment of the ECHR and the agreement of the contracting parties to the supervision of a supra national court without understanding that it was driven by a reaction to the slide into totalitarianism of a number of countries in the 1930s. It was in the United Nations Declaration of Human Rights, and in the ECHR and in other important instruments, there was an attempt to identify those fundamental rights which no government, however temporarily popular, and no state, however powerful, could breach.

For much of my lifetime, these ideas seemed a little old fashioned. They were like some ancient fortifications that you come across and wonder what exactly was the threat that led people to construct such an elaborate defensive edifice. Inevitably, during that period, there was a feeling that protection of rights such as liberty, free speech, association and freedom from torture , and an independent judiciary were taken as given or, if you like, battles that had been won, and that the only interesting issue was how those rights could be expanded upon and developed into new areas.

But over the last decade with every passing year, we have come to realise, that just like those times when our parents told us to wear sensible shoes and wellington boots going out in the bad weather that our forebears were right, and we are facing in ways some of us thought unimaginable, threats and challenges that have more an echo of the mid-20th century, than the bright modern future we imagined.

It is commonplace to hear people to say that Convention rights were being tested in ways which the drafters might not have imagined. But what is perhaps telling about today's world, is that in many ways the rights sought to be protected in 1953 and 1958 are being challenged,

and are being tested, just as the drafters foresaw, although perhaps not necessarily from the parties or the direction they might have predicted. That realisation may bring with it a renewed appreciation of the work of the drafters and the wisdom of those who encouraged the adoption of the Convention, but it is a sobering thought that we are confronting challenges, not just to the Convention, but also to the idea of fundamental, basic rights that each state must respect.

That is of course, a challenge, and it is a challenge for all of us, but it is also at some level exciting, because the idea that underpins the ECHR is the idea that basic rights must be defended, that it is a court's job to do so, and that the tools are those tools which should be nurtured in educational institutions like this; the capacity to use our minds, the capacity to reason, to discuss, to think, to communicate and ultimately to decide and justify our decisions by nothing more than the robustness and rigour of their reasoning.

That is something we should celebrate, and we should take this opportunity to renew our collective commitment to the ideal of protection of fundamental rights by courts.

Finally, I would like to say it is a particular pleasure for me to be here in the Seamus Heaney Auditorium. He was a personal hero of mine from the time I first encountered him as a primary schoolboy and Ireland is a poorer place without his gentle, thoughtful and humane presence. He was a man who, at one level, never left rural Tyrone, but on another level was a citizen of the world, and his last words were appropriately in a universal language: *noli timere* – be not afraid. Seamus Heaney was from Northern Ireland. As one commentator put it, Northern Ireland has been a severe testing ground for the Convention. But it was after all, the location which gave rise to the first interstate case, *Ireland v. The United Kingdom* [1978] ECHR 1, relating to the treatment of persons who had been interned and has given rise to a number of important cases, most notably on the obligation to investigate deaths particularly those which occur at the hands of the forces of law within a state. Northern Ireland has always had a close connection to the ECHR. I think not just of the jurisprudence, but of the people, such as Michael O'Boyle, the long-time Registrar of the Court, and the co-author of the first and leading textbook on the ECHR.

I also think of Kevin Boyle from Newry who was heavily involved in the civil rights movement, later established the department and, indeed, law faculty in University College Galway, and who was one of the early proponents of the ECHR. Kevin Boyle understood that the Convention was not a weapon to be used in a political battle and associated with one side, in polarised political debates . It had to be applied in an even-handed way, and as a result was willing to take any and every case. It is perhaps forgotten that he was the lawyer who initiated the complaint and succeeded before the Commission in *Dudgeon v. United Kingdom* [1981] ECHR 5, which was the start of a ball rolling that eventually led to the repeal of the provisions of the 1861 Offences Against the Person Act, and the 1885 Criminal Law Amendment Act, in this jurisdiction, which had criminalised male homosexual conduct.

Furthermore, the ECHR formed a part of the discussions and the negotiations that resulted in the Good Friday Agreement and in particular led to the obligation under paragraph 9 on this state, to offer equivalent protection in the field of human rights to that which was available in Northern Ireland, which in turn led to the incorporation of the ECHR in domestic law under the European Convention on Human Rights Act, 2003. It has been noted that this provision is a curious one way valve in the agreement: the obligation is on the

Republic of Ireland to keep pace with developments in Northern Ireland and while it might seem fanciful at this remove, if Northern Ireland were gripped by an evangelical fervour for the advancement of human rights, then those developments would, it seems, have to be mirrored here.

The first Irish judge appointed to the Court of Human Rights was Richard or Dick McGonigal, SC, one of the most distinguished barristers of his time. His biography describes him as born in Dublin but in fact he has a strong cross-border connection. His father John McGonigal was a county court judge for Tyrone not far from Seamus Heaney's home place. The family lived in Belfast after 1922 and Dick McGonigal's brother Ambrose McGonigal went to the Northern Ireland Bar, and ultimately became a Lord Justice of Appeal in Northern Ireland. And I am really pleased to welcome today one of Ambrose McGonigal's successors, Lord Justice Seamus Treacy of the Northern Ireland Court of Appeal and to acknowledge, when our courts have to consider the interpretation of the Convention, the invaluable assistance that is provided by the judgments of the Northern Ireland courts, which constitute a rich resource, and where provisions from a legal system very similar to our own, are subjected to very close scrutiny by reference to the Convention.

So, for me, this conference and this visit has resonances on many levels. And it is worth remembering that the communication channel is not merely a connection between the Republic of Ireland and Strasbourg with occasional sidelong glances to London, it also provides an important channel for communication, between families and friends, and sometimes just suspicious acquaintances, on this island.

CONFLICT PREVENTION OR CONFLICT RESOLUTION: WHAT ROLE FOR THE EUROPEAN COURT OF HUMAN RIGHTS?

Author: Robert Spano, President of the European Court of Human Rights

Introduction

On 7 October we learnt that the 2022 Nobel Peace Prize was awarded to human rights advocate Ales Bialiatski from Belarus, the Russian human rights organisation Memorial and the Ukrainian human rights organisation Centre for Civil Liberties. Why this choice? Because the three laureates represented civil society in their home countries. They had for many years promoted the right to criticise power and protect the fundamental rights of citizens. They had made an outstanding effort to document war crimes, human rights abuses and the abuse of power. Together they demonstrated the significance of civil society for peace and democracy. One could not hope for a clearer example of the link between human rights, the rule of law and democracy on the one hand and peace on the other. At a time when Europe is once again witnessing armed conflict and devastation on its soil it is only right that we ask ourselves: what role does the European Convention on Human Rights play in a conflict prevention and resolution?

The preamble to the European Convention on Human Rights stresses that human rights and fundamental freedoms 'are the foundation of justice and peace in the world'. As has been accepted by the UN Security Council, gross, massive or systemic violations of human rights constitute a threat to international peace and security. Therefore, ensuring the observance of human rights by way of a strong mechanism of judicial control is a factor in ensuring stability, security and peace. I would like to echo here the words of a former President of the European Court of Human Rights, Judge Alexandre-Linos Sicilianos, when he asserted on its 70th anniversary, that the European Convention on Human Rights was one of the greatest peace projects in history.[1]

For the purposes of this article, a rather black and white dichotomy between conflict prevention on the one hand and conflict resolution on the other is illustrated. In real life, the distinction is not so clear cut, just like our case-law. Nevertheless, each will be addressed separately. In the first place, the article examines conflict prevention in terms of the work the European Court does 'upstream' in maintaining political pluralism and a healthy civil society. Second, in respect of conflict resolution, the article concentrates on the work that the Court does 'downstream' in relation to inter-State applications. How effective are they and what difference can they make? Of course, one may think of other ways in which the Court assists in conflict resolution, in particular by looking at the implementation of the Court's judgments and the ensuing impact of the Convention in Member States of the Council of Europe.

[1] Linos-Alexandre Sicilianos, 'The European Convention on Human Rights at 70: the dynamic of a unique international instrument' (European Court of Human Rights, 5 May 2020) <https://echr.coe.int/Documents/Speech_20200505_Sicilianos_70th_anniversary_Convention_ENG.pdf> Accessed 26 June 2023.

Conflict prevention – the Court's work in respect of maintaining political pluralism and civil society

According to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by 'an effective political democracy'. Democracy is essential if people are to live in freedom, dignity and security. Democracy is also required as a backstop for maintaining human rights and the rule of law. As the Secretary General to the Council of Europe noted in her annual report in 2021, the three pillars of the work of the Council of Europe are inseparable. If one pillar weakens, so too do the others.[2] A healthy democratic environment is achieved through the protection of a number of key rights provided for in the European Convention, such as, freedom of expression (Article 10); freedom of assembly/association (Article 11) and electoral rights (Article 1 of Protocol No. 1) as well as an efficient, impartial and independent justice system whose decisions are enforced (Article 6). The latter is key to the rule of law and a precondition for the enjoyment of all fundamental rights and freedoms. I will look at each very briefly.

Freedom of expression (Article 10)

In its interpretation of Article 10 of the Convention, the Court has held that 'freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man'.[3] The importance the Court attaches to freedom of expression, and in particular its role in a democracy, is reflected in the heighted protection it affords to those tasked with upholding democratic values such as journalists, academics and opposition politicians. Indeed, the positive obligations under the Convention imply, among other things, that States are required to establish an effective mechanism for the protection of authors and journalists in order to create a favourable environment for participation in public debate of all those concerned, enabling them to express their opinions and ideas without fear, even if they run counter to those defended by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking to the latter. In this connection, the Court has consistently held there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debates on questions of public interest.

Freedom of association and assembly (Article 11)

Political parties play an essential role in ensuring pluralism and therefore come within the scope of Article 11. Any measure taken against them affects both freedom of association and, consequently, democracy in the State concerned. The exceptions set out in Article 11 should, therefore, be construed strictly. Associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy.

In the recent and very important case of *Ecodefence and Others v. Russia*, the applicants were 73 Russian non-Governmental organisations who were involved in areas of civil-society issues, human rights, protection of the environment and cultural heritage, education, social security, and migration.[4] They included some of the oldest and most established Russian organisations

[2] Secretary General of the Council of Europe, *State of Democracy, Human Rights and the Rule of Law: A democratic renewal for Europe* (2021) <https://rm.coe.int/annual-report-sg-2021/1680a264a2> Accessed 26 June 2023.
[3] *Handyside v The United Kingdom,* App No 5493/72 (ECHR, 7 December 1976) para 49.
[4] App Nos 9988/13 and 60 others (ECHR, 14 June 2022).

such as the Memorial Human Rights Centre. The case concerned the measures imposed by virtue of the Foreign Agents Act 2021 on these organisations. These measures included registration of the organisations as 'foreign agents', which entailed extraordinary auditing, reporting and labelling requirements, and heavy fines. Many of the organisation had been either forced to dissolve or had been wound up as a result. The Court found a violation of Article 11 interpreted in the light of Article 10. The link between the two is obvious.

Moreover, the Court looks closely at the chilling effect of certain State actions in relation to the freedom of assembly such as banning gay pride marches or the excessive use of police force. For example, in *Navalnyy and Gunko v. Russia*, the Court noted that the first applicant's brutal arrest, as well as his subsequent administrative conviction, had a chilling effect, discouraging him and others from attending protest rallies or indeed from engaging actively in opposition politics.[5]

The right to free elections under Article 3 of Protocol No. 1

The Court has consistently emphasised the importance of Article 3 of Protocol No. 1 in an effective democracy and, as a consequence, its prime importance in the Convention system. It has reiterated that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Indeed, free elections and freedom of expression, and particularly freedom of political debate, form the foundation of any democracy.[6] These principles have been recently confirmed in a judgment against Russia in October 2022, *Kara-Murza v Russia*.[7] The applicant is a well-known opposition politician and journalist. He complained before the Court of the annulment of his registration as a candidate for election to the Yaroslavl Regional Duma. The reason he was given was on the grounds of his having two nationalities. The Court found a breach of that Article, referring to the lack of proportionality.

Conflict resolution and the role of the inter-State application

At the heart of the Court's role in respect of both conflict prevention or conflict resolution lies in the inter-State application. The inter-State application is provided for in Article 33 of the Convention. But what is its object and purpose? Is it a mechanism intended to settle international disputes between States or rather to ensure the collective enforcement of human rights, or both? Beyond these questions, there seems to be an interest within the Council of Europe in recalibrating how it functions, at least to ensure that it works as efficiently as possible.

There are currently 16 inter-State applications pending before the Court, with the majority relating to conflict situations. In addition, there are around 11,000 pending individual applications which the Court considers as connected to inter-State applications or to an inter-State dispute. These amount to around 15% of the total number of pending individual applications which today stand at around 75,000. There have been over 20 inter-State cases since the Convention entered into force in 1953 and compared to the number of individual applications one can say that it is rather rarely used. The first one was *Greece v United Kingdom* lodged in 1957 concerning alleged violations in Cyprus.

[5] App No 75186/12 (ECHR, 10 November 2020) para 88.
[6] *Tănase v. Moldova* App No 7/08 (ECHR, 27 April 2010).
[7] App No 2513/14 (ECHR, 4 October 2022).

Why do States bring these applications against each other? Most inter-State applications concern situations of crisis or conflict, such as the UK authorities' interrogation techniques from 1971 – 1975 in Northern Ireland, Turkey's military operations in Northern Cyprus in 1974, the armed conflict between Georgia and Russia in 2008 and the events in Crimea and Eastern Ukraine in 2014. However, the last decade has seen a marked increase in the number of inter-State applications being brought to the Court. As mentioned, there are currently sixteen pending applications. On one hand, this may unfortunately be a result of increased recent conflict in the European legal space. However on the other, it also shows a certain confidence in the role that can be played by the Court in resolving disputes that arise at the inter-State level within the Council of Europe. Since 2020, the Court has seen eleven new inter-State applications being lodged. I will not go through each one but give you some examples.

Three relate to the conflict in Nagorno-Karabakh.[8] One, *Ukraine and the Netherlands v Russia,*[9] concerns the shooting down of Malaysia Airlines Flight MH17 over Eastern Ukraine in 2014. Another, *Liechtenstein v the Czech Republic,*[10] relates to alleged breaches of property rights of Liechtenstein citizens following the Second World War. *Ukraine v the Russian Federation (IX)* concerns allegations of a State-authorised targeted assassination operations against perceived opponents outside a situation of armed conflict.[11] *Ukraine v Russia (X)* concerns the Ukrainian government's allegations of mass and gross human rights violations committed by the Russian Federation in its military operations on the territory of Ukraine since 24 February 2022. Twenty-three Council of Europe governments and one NGO have requested leave to intervene as third parties in the proceedings.

Some of these cases arise from political conflict or dispute; some are the result of steps taken by States to represent the interests of individual nationals; others demonstrate the possibility for States to operate a more general 'policing' role.[12] All inter-State applications are factually complex and invariably raise difficult legal questions. These judgments have important political ramifications and may affect a large number of individuals, given the number of individual applications associated with inter-State cases or more generally with conflict situations. Currently there are 9,600 associated individual applications. Essentially, they relate to conflicts in the following three regions: Abkhazia and South Ossetia (with applications pending against Georgia and before Russia); Nagorno-Karabakh (with individual applications pending against Armenia and Azerbaijan); and Eastern Ukraine and Crimea (with individual applications pending against Ukraine and Russia).

There have been some recent developments in inter-State cases. These are the admissibility decisions in *Ukraine v Russia (re Crimea),*[13] and *Slovenia v Croatia,*[14] and a judgment in respect of *Georgia v Russia (II)*[15] adopted on 21 January 2021. The admissibility decision in *Ukraine v*

[8] *Armenia v Azerbaijan* App No 42521/20; *Armenia v Turkey* App No 4351/20; *Azerbaijan v Armenia* App No 47319/20.
[9] App Nos 8019/16, 43800/14 and 28525/20 (ECHR, 30 November 2022).
[10] App No 35738/20 (ECHR, 29 November 2018).
[11] App No 10691/21 (ECHR, 19 February 2021).
[12] Philip Leech, 'On Inter-State Litigation and Armed Conflict Cases in Strasbourg' (2021) 2(1) European Convention on Human Rights Law Review 1-48.
[13] App No 20958/14 (ECHR, 14 January 2021).
[14] App No 54155/16 (ECHR, 18 November 2020).
[15] App No 38263/08 (ECHR, 13 December 2011).

Russia (re Crimea)[16] contains some interesting developments *inter alia* as regards the assessment of evidence and the burden of proof (non-exhaustion/administrative practice). In *Slovenia v Croatia,* the Court found that the Convention did not allow Governments to use the inter-State application mechanism to defend the rights of a legal entity that was not a 'non-governmental organisation'.[17] Accordingly, the Court lacked jurisdiction to hear the complaint. In *Georgia v Russia (II),* the Court decided on important questions of jurisdiction; further defined the criteria of the concept of an administrative practice; and examined the interrelation between the provisions of the Convention and the rules of international humanitarian law.

What are the consequences of rulings of the Court in inter-State cases? In 2000, there was a friendly settlement in the case of *Denmark v Turkey* concerning the alleged ill-treatment of a Danish national detained in Turkey. The settlement provided for *ex gratia* payment and expression of regret by the Turkish government for the ill-treatment inflicted, provision of assistance in police training by the applicant Government and establishment of a continuous dialogue. *Cyprus v Turkey* concerned the situation in Northern Cyprus since Turkey carried out military operations there in July and August 1974, and the division of the territory of Cyprus since that time. Turkey was ordered to pay Cyprus €30,000,000 in respect of the non-pecuniary damage suffered by relatives of 1,456 missing persons and €60,000,000 in respect of the non-pecuniary damage suffered by the enclaved Greek-Cypriot residents of the Karpas peninsula.

Conclusion

Can human rights prevent serious conflicts including armed conflicts? Has the European Convention on Human Rights stopped wars? Just like Professor Angelika Nussberger, former Vice-President of the Court, when she asked this question at the 70th anniversary celebrations of the Convention, I would like to reply 'yes', but the reality is more complicated.[18] One could ask if Russia's invasion of Ukraine on 24 February and the continuing war in Europe is proof that the Convention is somehow powerless in the face of determined military action. However, I hope that this article has demonstrated two points. The first is that the European Convention, through its protection of key civil and political rights, plays an important role in ensuring that the elements for a peaceful society – democracy, tolerance and pluralism – are in place and not dismantled by an authoritarian government. The European Convention does create a climate in which the escalation of conflict becomes less likely. Second, States and individuals, victims of conflicts can turn to the Court for reparation and a public statement of a violation of the Convention.

[16] App No 20958/14 (ECHR, 14 January 2021).
[17] App No 54155/16 (ECHR, 18 November 2020).
[18] Angelika Nußberger, 'Promoting Peace and Integration among States' (70th anniversary of the European Convention on Human Rights Conference, Strasbourg, 18 September 2020) <https://echr.coe.int/Documents/Speech_20200918_Nussberger_Conference_70_years_Convention_ENG.pdf> Accessed 26 June 2023.

IRELAND AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract: This paper explores the concept of the European Convention on Human Rights ('ECHR') as a dynamic conversation between various stakeholders, including the European Court of Human Rights and the member states of the Council of Europe. The paper examines Ireland's participation in this conversation, taking inspiration from the intergenerational nature of constitutional interpretation. This includes Ireland's participation in the Council of Europe, contributions to the creation of the ECHR, alignment of Irish jurisprudence with the rulings of the European Court, and the opportunity for growth and development by incorporating Strasbourg case law into Irish legislation. The argument that the ECHR functions as a discourse across different generations and entities is introduced in the paper's opening section, which emphasizes the metaphorical understanding of a constitution as an ongoing discussion across generations. The paper then explores Ireland's involvement in the creation of the ECHR. The paper looks at an important issue involving Ireland's first interaction with the ECtHR: Gerard Lawless' 1957 petition contesting his incarceration under the Offences Against the State (Amendment) Act 1940. In conclusion, the paper demonstrates the multigenerational and multidimensional nature of the conversation facilitated by the ECtHR. It highlights Ireland's active involvement in forming the Convention and bringing its jurisprudence in line with the rulings of the European Court. The paper also makes the case that adopting Strasbourg case law into Irish law can advance and strengthen human rights values. This paper illuminates the broader dynamics of the ECtHR as an ongoing dialogue across many institutions and generations, promoting the protection and promotion of human rights in Europe, by evaluating the Irish experience.

Author: The Hon. Ms. Justice Iseult O'Malley, Judge of the Supreme Court of Ireland

Introduction

In 1937, the People of Ireland adopted a Constitution that declared, in the present tense, that 'We, the people of Éire… do hereby adopt, enact and give to ourselves this Constitution…'[1] In 2015, the present Chief Justice observed (in *Jordan v. Minister for Children and Youth Affairs*) that the youngest living person who could be said to have adopted the Constitution in 1937 was, as of the date of his judgment, nearly 100 years old.[2] The concept of 'adopting and giving' the Constitution to 'ourselves' must, therefore comprehend also the acceptance of the Constitution by successive generations, and the accretions to it by the process of constitutional interpretation in the courts. In that context, he described a constitution as 'to some extent an ongoing conversation across the generations'.[3] The somewhat diffuse theme in this article involves stealing that metaphor and suggesting that the European Convention on Human Rights might be described as a conversation, not only across the generations, but also between the ECtHR and the other Strasbourg organs, on the one hand, and the peoples, courts and judges of the contracting States on the other. I want to look at some aspects of the Irish part in that conversation – how Ireland became involved in the Council of Europe, how it assisted in drafting the Convention and bringing it into force, how the Irish jurisprudence enabling growth and development of constitutional principles finds some common ground with the jurisprudence of the European Court of Human Rights, and, finally, how that growth and development may be assisted through the provisions of the legislation enabling the courts to give a more influential role to the Strasbourg case law.

[1] Bunreacht na hÉireann, Preamble.
[2] *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33 [64].
[3] ibid.

Early Human Rights Protections in Ireland

Before examining the European Convention on Human Rights, it is worth extending the reach of the intergenerational nature of the conversation by briefly mentioning an event of legal significance that took place thirteen hundred and twenty-five years ago. In the year 697 AD, St Adomnán convened a Synod, or assembly, in Birr, Co Offaly in the middle of Ireland. Adomnán was a successor (and biographer) of St Columba, the founder of the very influential monastery of Iona. The assembly was well supported by the Irish clergy and kings including Loingsech mac Óengusso, the most powerful king in Ireland and a distant relative of Adomnán. It was also supported by the kings of the Picts and the Dal Riada (who between them controlled much of modern Scotland and part of what is now Northern Ireland). The assembly was called in order to adopt the Cáin Adomnáin, also known as the Lex Innocentium or the Law of the Innocents.[4] It was intended to be applied throughout Ireland and in the areas controlled by the Picts and the Dál Riada. The text records the names of forty senior clerics and fifty-one kings or their representatives, as guarantors, or enforcers, of the new law. The law, the first of its kind in Western Europe, has been described as an early forerunner of the Fourth Geneva Convention, in that it protects non-combatants – the 'innocents' of the title – but I think it has human rights implications beyond the laws of war. It can also probably be described as the first international human rights treaty subscribed to by the rulers of Ireland.

The purpose of the law was stated clearly in the text – to give 'perpetual protection' to clerics, to females and to boys who were not old enough to kill a man. These, obviously, were the categories of people who did not carry arms, could not defend themselves and were insufficiently protected by existing laws. In a significant break with existing legal principle, the penalties for breach of the new law did not, in Adomnán's text, depend on the honour-price of the victims – that is to say, they did not distinguish by social rank or between free and unfree. Normally, in Irish law, the honour-price of a woman was one half that of the man on whom she was dependent. Now, the life of any woman was to be seen as equal in value to the life of even a high-ranking man.

It is impossible to know the effectiveness of the law – there are no records of cases or judgments. However, we do know that the Cáin Adomnáin came to be associated exclusively with the protection of women. We have a legal text written in the early years of the 8th century which, in dealing with the duties of kingship, refers to the Cáin Adomnáin as the type of law which it is proper for a king to make.[5] We have a text from the early 9th century, in which Adomnán is credited with having brought about the 'lasting freedom of the women of the Gaels'.[6] We have a further text from the 10th century describing the law as one of the four chief laws of Ireland.[7] Some additional material inserted around that time into the text of the law described it as 'the first law in heaven and on earth which was arranged for women'. The additional material includes a rather dubious story attributing Adomnán's motivation for introducing the Lex Innocentium to his mother Rónnat, who was appalled by the sight of women's mutilated corpses at battlefield sites. Her efforts to persuade him to do something for the women of Ireland are said to have included burying him in a stone chest for several years. Some men take a lot of persuading, but the power of an Irish mother should not be underestimated.

[4] James W. Houlihan, *Adomnán's Lex Innocentium and the Laws of War* (Four Courts Press 2020).
[5] Daniel Anthony Binchy (ed), *Críth Gablach* (Dublin Stationary Office 1941, repr. 1970).
[6] Whitley Stokes (ed and tr), *Félire Óengusso Céli Dé* (London 1905).
[7] Whitley Stokes and John Strachan (eds), *Thesaurus Paleohibernicus* (Cambridge 1901 – 1903)).

Ireland and the European Convention on Human Rights

Certain historical events over succeeding centuries irrevocably changed the nature and sources of the laws of Ireland. Skipping over those centuries, I want now to look at the next Irish involvement with an international human rights instrument – the European Convention on Human Rights. Ireland was among the founder members of the Council of Europe in 1949. On the 4th November 1950, Ireland was among the 11 States that signed the Convention. Ireland was the first State to accept the compulsory jurisdiction of the Court and the second to accept the right of individual petition.[8]

To put Irish participation in context, it should be noted that Ireland at that time was relatively new to independent statehood, was anxious to assert itself on the international stage and did not have many outlets for international engagement. At a bilateral level, we had diplomatic representation in about a dozen other States but there were at least some politicians who questioned whether even that was too extravagant for a small country. Eamon De Valera had been a strong supporter of the League of Nations and had served as President of its Council, but the League was wound up in 1946. The Soviet Union vetoed Irish membership of the United Nations in 1946, in part because of Irish neutrality in the War, and it continued to do so until 1955.[9] When the creation of the North Atlantic Treaty Organisation was being proposed, the possibility of Ireland joining had been broached. However, the government's position was that it could not enter into a military alliance with Britain while Ireland remained partitioned.[10] In attempting to interest other founder members of NATO in this issue, the government may have underestimated the relationship between Britain and the US, and may also have overestimated Ireland's geographic strategic value to the new organisation, but in any event Ireland did not join. The State did subscribe to some European financial agreements, but these were mainly of a technical nature and were secondary to the economic objective of keeping the link with sterling. After the enactment of the Republic of Ireland Act in 1948, the State left the Commonwealth in April 1949 (although it continued to be part of the preferential trade arrangements and of the sterling financial area). Ireland had taken an active part in the Commonwealth and in the Imperial Conferences concerned with the relationships between Britain and the other States, but that was now over.

The Council of Europe was an opportunity for Ireland to take a role in building a new post-war Europe. It must, of course, be borne in mind that there were many factors in play at the time, pushing in different directions. Ireland wanted to be part of the new initiative, but was wary of some of the proposals being campaigned for, at the time, by those who saw an integrated Europe as the best guarantor of future peace. The Irish did not wish to agree to anything that might jeopardise recently-established Irish sovereignty, and feared that economic integration would imperil the policy of protecting infant Irish industries. In one of the debates about the role of the Council of Europe, De Valera made it clear that his preference was for functional cooperation between sovereign States to address economic and other issues. He said that the Irish had struggled for centuries to prevent their national identity from being 'destroyed, submerged or absorbed' by a larger political entity, and it would be extremely difficult to induce the people to suddenly reverse the current of their

[8] Suzanne Egan, Liam Thornton and Judy Walsh, *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional 2014).
[9] Elizabeth Keane, *An Irish Statesman and Revolutionary: The Nationalist and Internationalist Politics of Sean MacBride* (1st edn, Bloomsbury Publishing).
[10] Michael Kennedy and Eunin O'Halpin, *Ireland and the Council of Europe* (Council of Europe Publishing, 2000).

thought.[11] The Irish delegates perhaps lacked experience in international dialogue, and it does appear that their tendency to raise the issue of partition at the Parliamentary Assembly of the Council of Europe went down badly.[12] Other delegates took the view that they were there to discuss new ways for European nations to cooperate, and not to debate the many contentious borders on the continent of Europe. Furthermore, as the Irish Times pointed out at one stage, many of the European delegates had had direct experience of living under dictatorship in the recent dark past, and some had seen or even experienced the concentration camps.[13] They were not inclined to see the situation in Northern Ireland as comparable.

However, the contributions of the Irish in the closer committee and drafting work on the Convention was appreciated. The Foreign Minister at the time was Sean MacBride, a keen internationalist and a believer in the international protection of human rights, who took a direct interest in bringing about agreement that the Assembly should discuss the definition of human rights and fundamental freedoms. He was also influential in the drafting of the Convention. In particular, he argued strongly for the inclusion of a right of individual petition rather than simply leaving the protection of individuals to the initiative of other contracting States. Irish support for the inclusion of specific protection for the right of parents in the education of their children, property rights and free elections helped to secure that protection in the form of the First Protocol to the Convention.[14] The development of a legal regime that could be invoked by individuals against their own States was hugely significant. The recent trials in Nuremberg were of course an innovation in terms of holding people criminally responsible for actions against their own peoples, within their own territories, but the provision of a forum for the binding resolution of human rights complaints brought by individuals was a further, vital step. Naturally, like many of the signatory States, the Irish did not really expect to be a defendant in the European Court of Human Rights and it must have come as an unwelcome surprise when the first petition by an individual to be considered by the Court was that of Gerard Lawless.[15] Lawless, who used the Irish version of his name (Ó Laighléis) when litigating in Ireland, had been a member of a faction that split from the IRA in the 1950s. (He ultimately became a Labour Party councillor in London in the 1980s.) In July 1957 he was arrested and interned under the provisions of the Offences Against the State (Amendment) Act 1940, on foot of a warrant reciting the opinion of the Minister for Justice that he was engaged in activities prejudicial to the security of the State. The provisions conferring a power to intern without trial had been brought into force that month in response to a resurgence in IRA activity, and the government notified the Secretary-General of the European Council by letter 12 days later. Subsequently the Government announced that any detained person who undertook not to engage in unlawful activities contrary to the Act would be released.

In *habeas corpus* proceedings, Lawless argued amongst other grounds that his detention amounted to a violation of Articles 5 and 6 of the European Convention on Human Rights.[16] The case is fascinating for many reasons. To begin with, the legal personnel included figures of significant importance in the development of Irish constitutional rights and also of the

[11] National Archives: 'Statements made by Ireish representatives in the Consultative Assembly in regard to the Federation of Europe'.
[12] Kennedy and O'Halpin op cit.
[13] Irish Times, 13th August 1949.
[14] Kennedy and O'Halpin op cit.
[15] *Lawless v Ireland* (No.1) App No 332/57 (ECHR, 14 November 1960), *Lawless v. Ireland* (No.2) App No 332/57 (ECHR, 7 April 1961), *Lawless v. Ireland* (No.3) App No 332/57 1 July 1961.
[16] *Re Ó Laighléis (Lawless*) [1960] IR 93.

Convention and its jurisprudence. Lawless's senior counsel was Sean MacBride himself, while the State's team was led by Brian Walsh SC, who went on to become a hugely influential judge of the Supreme Court and, later, of the European Court of Human Rights. The members of the Supreme Court that heard the appeal included Cecil Lavery, who had taken part in some of the drafting work on the Convention, as well as Cearbhall Ó Dálaigh, later Chief Justice and judge of the European Court of Justice. MacBride expressly disavowed any argument that the Convention was, in itself, directly effective in Irish law. This was clearly correct, having regard to Articles 15 and 29 of the Constitution. (These provide that the sole and exclusive power to make law for the State is vested in the Irish legislature, and that no international agreement can form part of the domestic law of the State unless it is made so by the Oireachtas.) The case made on behalf of Lawless was that the Convention was an effective agreement and statement of international law; and that any Court construing an enactment should do so in such a way as to avoid any conflict with the principles of international law including the provisions of the Convention. If the enactment could not be so construed then, since the State had become a party to the Convention, the Government, or any person acting under its authority, should not be permitted to rely upon the enactment. The Supreme Court, which delivered judgment on the 6th November 1957, gave the submission short shrift. No argument could prevail against the express terms of the Constitution, and the primacy of domestic law could not be displaced by the State becoming party to the Convention. Nor could an Act passed in 1940 be construed in the light of, for the purpose of finding conformity with, a Convention entered into ten years later. Lawless lodged his application with the European Commission of Human Rights two days later. Meanwhile, he gave the necessary verbal undertaking to the Irish authorities not to engage in any illegal activities, and was released from detention.

As the first individual case *Lawless* was, presumably, seen as a landmark in Strasbourg and elsewhere in Europe, as well as in Ireland, and not surprisingly it gave rise to a number of procedural and jurisdictional disputes and rulings. The first and second judgments are concerned with procedural rules that are no longer in force.[17] However, they are of some interest in that they demonstrate the willingness of the Court from the start to give a broad interpretation to rules that were, on their face, highly restrictive of the rights of the individual complainant. This was seen as being in the interests of both that individual and the proper administration of justice. The substantive judgment was delivered on the 1st July 1961.[18] Among other features, it is interesting to note that the Irish government based some of its case on the *travaux préparatoires* and drafting history, in both English and French, of the Convention – a form of legal argument unknown in the domestic Irish courts, and obviously picked up from European colleagues. The Court, however, found the text to be clear to the point that resort to the preparatory work was not permitted. The detention was unanimously held to be contrary to the terms of Article 5. However, the Court unanimously agreed with the Commission that the government was justified in declaring a public emergency threatening the life of the nation and in derogating from the Convention. It accepted on the evidence that the application of the ordinary law had been unable to check the growing danger, and that even the special courts could not have sufficed to restore peace and order. A secret army was engaged in unconstitutional activities and using violence to attain its objectives, and in its operations outside the territory of the Republic was seriously jeopardising the State's relationship with its neighbour. Alternative measures suggested in

[17] *Re Ó Laighléis (Lawless)* [1960] IR 93.
[18] *Lawless v. Ireland* (No. 3) App No 332/57 (ECHR (Chamber), 1 July 1961).

argument, such as sealing the Border, would have had extremely serious repercussions for the population.

The Act itself was examined and safeguards to prevent abuses were found. On the evidence, there had been grounds justifying Lawless's arrest. The government's public announcement that it would release any person who undertook to observe the law and refrain from activities contrary to the Act constituted a legal obligation in a democratic country such as Ireland, and Lawless had been released on foot of it. It is possible to discern, in this first substantive judgment on an individual complaint, certain themes that became hallmarks of the Strasbourg jurisprudence. The Court accepts that the duties of national governments include the protection of their people and of the interests of the State in its foreign relations. However, claims made by defendant States, and the evidence for those claims, are subjected to scrutiny (although it might perhaps be said that the level of scrutiny did over time become higher, and less deferential, than it was in *Lawless*). Where powers are conferred by national law, safeguards against abuse are looked for. The importance of the availability of remedies in the ordinary courts is emphasised.

Ireland's international outlook changed rapidly in the 1960s, with the abandonment of protectionist economic policies, the move to attract foreign investment and the (initially unsuccessful) attempts to join the European Economic Community. In the meantime, Irish jurisprudence had commenced one of its most exciting periods, with judges developing a deep interest in those provisions of the Constitution that declare and protect fundamental rights. A theme began to emerge in constitutional interpretation that would soon be mirrored in Strasbourg – the concept of a rights instrument as a living document, to be construed in the light of current circumstances rather than being frozen in the time of its drafting. The first explicit reference to this concept in Irish law appears to be in the judgment of Walsh J. in *McGee v. The Attorney General* (1973) where he said:

> According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts. [19]

Similarly, O'Higgins C.J. said in *State (Healy) v Donoghue* (1976):

> In my view, this preamble makes it clear that rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity which may gradually change or develop as society changes and develops, and which fall to be interpreted from time to time in accordance with prevailing ideas. The preamble envisages a Constitution which can absorb or be adapted to such changes. In other words, the Constitution did

[19] *McGee v. The Attorney General* [1973] IR 284 [318].

> not seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment. [20]

In *Tyrer v United Kingdom* (1978), the ECtHR held that corporal punishment of juvenile offenders, as practiced at that time in the Isle of Man, constituted degrading punishment contrary to Article 3 of the Convention. [21] Part of the case made by the Attorney-General of the Isle of Man was that such punishment could not constitute a violation, since it did not outrage public opinion on the island but was viewed by local people as an effective deterrent. In its response, the Court said:

> The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.[22]

Walsh J. was appointed to the European Court of Human Rights in 1980, and it is clear that he brought with him, and communicated to his new colleagues, his firm endorsement of that view. Writing in *Essays in Honour of Brian Walsh* published in 1992, the then President of the European Court of Human Rights Rolv Vyssdal said of Walsh that he had 'more than actively contributed' to the firm establishment in the Irish Constitution and in the Human Rights Convention of this interpretative principle:

> He has consistently hammered home the message that the Convention, like the Irish Constitution, is written in the present tense and is intended at all times to be read as contemporary law, and not frozen to the particular mischiefs which the drafters may have had in mind. Bearing witness to the universality both of human rights and of their accompanying principles of interpretation, he has quoted in Dublin and in Strasbourg the dictum of Justice Brennan of the Supreme Court of the United States of America '…the ultimate question must be, what do the words of the text mean in our time?'[23]

Meanwhile, true to the ruling in *Re Ó Laighléis*, the courts here held firm against occasional attempts by practitioners to rely directly on the Convention and Strasbourg jurisprudence. However, that did not prevent judges from having some regard to Convention jurisprudence when developing, interpreting or applying constitutional principles. A good example is the landmark judgment of Costello J. in 1994 in *Heaney v Ireland*,[24] pioneering the use of a proportionality test in determining whether legislation infringes constitutional rights. While the formulation of the test was borrowed directly from a judgment of the Supreme Court of Canada,[25] Costello J. noted that a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society was frequently adopted by the European Court of Human Rights. He cited *Times*

[20] *State (Healy) v Donoghue* [1976] IR 325 [347].
[21] *Tyrer v United Kingdom* App No 5856/72 (ECHR, 25 April 1978).
[22] ibid para 31.
[23] James O'Reilly, *Human Rights and Constitutional Law – Essays in Honour of Brian Walsh* (O'Reilly edn, Round Hall Press 1992) page 10.
[24] *Heaney v Ireland* [1994] 3 IR 593.
[25] *R v Chaulk* [1990] 3 SCR 1303.

Newspapers Ltd v United Kingdom (1979) in this regard.[26] The voice of Strasbourg was being heard, even when domestic law did not oblige Irish judges to listen.

For its part, the ECtHR enables a continuing conversation by the application of the principles of consensus and the 'margin of appreciation', which have assisted in avoiding head-on clashes between the Convention and the Irish Constitution on particularly sensitive issues. The operation of these principles obliges the Court to listen to not just the lawyers in the case, but the voices of the people of the defendant State and of the peoples of other States. The margin of appreciation has been defined as 'the space for manoeuvre that the Strasbourg organs are willing to grant national authorities'.[27] The presence or absence of a consensus among member States on a particular issue is relevant to, but not determinative of, the breadth of that margin. One example of how the principles work (although it may not be typical) is provided in the judgment in *A, B, and C v. Ireland*,[28] a 2010 case involving complaints about the failure of the Irish State to legislate for abortion in line with the judgment of the Supreme Court in the 1992 *X* case.[29] (Obviously, the case predates the repeal of the 8th Amendment and the introduction of the current statutory regime.) Each of the three plaintiffs had travelled abroad for an abortion, and their complaint was that their rights under Article 8 ECHR had been violated because there was no legal provision for the procedure in Ireland. The ECtHR agreed that there was a European consensus in favour of broader abortion rights than those available under Irish law, to the extent that each of the women could have obtained an abortion in most of the other Member States. However, it accepted that the majority of the Irish people had taken a stance against abortion during the 1983 referendum. There could be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation was, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest and the conflicting rights to respect for private lives under Article 8 of the Convention. Accordingly, the State was entitled not to provide abortions sought for reasons of health and well-being. Two of the complainants were found to be within this category and their claims accordingly failed. The third, however, succeeded, because she had a medical condition that could have brought her within the *X* case criteria relating to a risk to her life, but there was no adequate process by which she could establish her legal right to an abortion in Ireland.

The commitment that States give is to protect the substance of Convention rights, but the remedies and protection mechanisms are not prescribed. The ECtHR has never required direct incorporation of the Convention into domestic law, or attempted to lay down rules to be applied uniformly in the contracting States. However, it does frequently have to determine whether domestic law provides an adequate remedy for a breach of rights, and whether a litigant has exhausted those remedies. In the *A, B and C* case,[30] it ruled that a declaration of incompatibility under s. 5 of the European Convention on Human Rights Act 2003 (in respect of the 1861 legislation outlawing abortion) would not have been an adequate remedy. It noted that the rights guaranteed by the 2003 Act would not prevail over provisions of the Constitution. Further, a declaration of incompatibility would place no legal obligation on the State to amend domestic law and, since it would not be binding on the parties to the relevant

[26] *Times Newspapers Ltd (Nos 1 and 2) v The United Kingdom* App No 6538/74 (ECHR, April 26, 1979).
[27] The Council of Europe/Lisbon Network of national judicial training institutions
[28] *A, B and C v Ireland* App No 25579/05 (ECHR, 16 December 2010).
[29] *Attorney General v X* [1992] 1 IR 1.
[30] *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010).

proceedings, it could not form the basis of an obligatory award of monetary compensation. I would tentatively suggest that, while it is certainly correct to say that the legislature cannot confer power on a court to override the Constitution, the declaration of incompatibility has perhaps been underrated. It certainly does not have the same legal effect as invalidation of a statute by reason of inconsistency with the Constitution. However, ours is a system that quite frequently utilises the declaratory remedy in litigation against the State. The basis for this is that the separation of powers requires each organ of State to respect the role of the other organs, and that involves respecting the outcomes of their processes. The courts have the role of interpreting and upholding the Constitution and the laws. It is generally to be assumed, for example, that if the court declares that a person's rights have been violated by the executive, the executive will take remedial action accordingly. In that context, a declaration by an Irish court that Ireland is in breach of its international treaty obligations must be seen as having some significant weight. However, s. 5 declarations should, ideally, be rare. Apart from any other consideration, they are to be granted only where no other legal remedy is adequate and available. It is, after all, to be hoped that constitutional and common law principles will in general provide a remedy for an identified breach of rights. The ECtHR confirmed, in a judgment delivered in *P.C. v. Ireland*, that the domestic authorities have a margin of appreciation in conforming with their obligations under Article 13. [31] Where a domestic court is competent to determine constitutional issues alongside Convention issues, the margin is taken as encompassing the discretion of that court to uphold a challenge to legislation on some but not all of the grounds raised by litigants before it. Taking such an approach in a case is not inconsistent with the duty of the respondent State to ensure the availability of a remedy for alleged violations of Convention rights. The Supreme Court had been entitled, therefore, to grant a remedy under the terms of the Constitution without having to go on to determine the Convention claim.

In short, the Constitution and the Convention remain separate legal orders. Provided rights are in fact protected and vindicated by the law, there should be no need to attempt to import the Convention into the place of the Constitution. The most useful provisions of the 2003 Act, so far as most litigation is concerned, may perhaps lie in the interpretative obligation in s. 2, the performance obligation in s. 3 and the judicial notice obligation on the courts set out in s. 4. The enactment of the 2003 Act has, of course, meant a great expansion of the significance of Convention jurisprudence in disputes in the Irish domestic courts and there are now few cases concerning human rights where Strasbourg case law is not cited. However, it should perhaps be emphasised that the tendency on the part of some practitioners to plead and argue cases as if the Convention applied directly, rather than as mediated through the Act, is not only to ignore the most important feature of the Irish legal landscape but is to under-appreciate the reach of the Act itself. For example, the matters listed in s. 4 go beyond the provisions of the Convention itself, and the judgments of the ECtHR – they extend to declarations, decisions and advisory opinions of the Court, decisions and opinions of the Commission, and decisions of the Committee of Ministers. The conversation is not always just between lawyers.

Conclusion

When President Ryssdal was writing his essay in 1991, he was anticipating a progressively greater workload for the ECtHR, with greater responsibility, due to the accession of the newly independent and democratic countries of central and eastern Europe. Those were optimistic days, after the fall of the Berlin Wall, and it is obvious now that the judges of the

[31] *P.C. v. Ireland* App no 26922/22 (ECtHR, 1 September 2022).

Court face different and perhaps greater challenges in the coming years. A member State of the Council of Europe is defending itself against a war of aggression. In some parts of Europe and the wider world there is a movement towards a form of strongman authoritarianism that would deny the legitimacy of democratically established institutions, respect for rights and the rule of law. In others, there may be a tendency towards isolationism. It is good to know that the work of the Court will continue to be sustained by a judge of the integrity, intelligence and clear-mindedness of Síofra O'Leary. We hope that the conversation will go on, and that, like the best conversations, it will convey not just information and enlightenment but also solidarity and friendship.

WHY THE EUROPEAN CONVENTION ON HUMAN RIGHTS STILL MATTERS

Abstract: The article, which reproduces a speech delivered at Dublin City University in October 2022, on the occasion of a visit of the European Court of Human Rights, sets out why, more than 70 years on, the European Convention still matters, not just to Ireland, but to all States within the Council of Europe legal space, contributing to peace and stability in Europe and to the development of more tolerant, pluralist democracies governed by the rule of law. Three broad illustrations are given relating to access to justice; safeguarding the rule of law and characterisations of the Convention as a living instrument of European public order. As regards access to justice, the article demonstrates how effective rights do not exist without effective remedies and obtaining an effective remedy requires firstly access to court. Hundreds of thousands of litigants, or their relatives, have turned to the Strasbourg Court when their complaints failed or were rejected at national level. Turning to the second illustration, the article addresses recent rule of law backsliding within Europe, giving concrete examples of how the Strasbourg court has responded to rule of law suspension, break down or dysfunction and how it has developed case-law in defence of judicial independence. Finally, the article explains how the judgments of the Strasbourg Court in relation to highly delicate and contested ethical, moral and social questions have shone a light on issues in relation to which applicants may previously have had difficulty gaining traction at their own national level. The evolutive interpretation of the European Convention by the Strasbourg Court has its limits nevertheless, with the margin of appreciation doctrine allowing a balance to be struck between common minimum standards on the one hand and the needs and specificities of different societies and legal systems on the other.

Author: Judge Síofra O'Leary, President of the European Court of Human Rights.

Introduction

In her 2021 annual report, the Secretary General of the Council of Europe noted that Europe's democratic environment and democratic institutions were in mutually reinforcing decline.[1] Last year, in a speech delivered at UCD, the Chief Justice referred to legislative proposals previously tabled across the Irish Sea in relation to the Human Rights Act, to difficulties at EU level in relation to protection of the rule of law and to what he described as the current 'stresses' facing the European Court in Strasbourg, emphasising that: 'the post-war model of judicial protection of human rights is under more challenge today in more significant ways and in more locations than at any time since 1945'.[2]

Strasbourg judges know only too well the 'stresses' to which both refer. It is not every day that an organisation like the Council of Europe, in existence since 1949, and designed to promote democracy, the protection of human rights and the rule of law, expels a member.[3]

[1] Council of Europe, *State of Democracy, Human Rights and the Rule of Law: A democratic renewal for Europe* (Report by the Secretary General of the Council of Europe 2021) <https://www.coe.int/en/web/secretary-general/report-2021#page-15> Accessed 6 June 2023.

[2] Chief Justice Donal O'Donnell, 'A Court and the World' (The Making (and Re-Making) of Public Law, UCD, 6-8 July 2022).

[3] See Council of Europe, Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (16 March 2022); European Court of Human Rights, Resolution on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention (22 March 2022); European Court of Human Rights Resolution taking note that the office of the judge in the Court with respect to the Russian Federation would cease to exist on 16 September (5 September 2022).

Yet the post-war model of judicial protection of human rights has never gone unchallenged. Indeed, in some quarters, it has never been fully accepted. The nature of the stresses has simply changed over the decades, whether in relation to certain States, certain regions or certain legal questions. The quality of the 'hope' which inspires so much of what we do in Strasbourg has ebbed and flowed ever since the ink dried on the signature of Séan MacBride, who ratified the Convention almost 70 years ago on behalf of the Irish State.

This article provides three broad illustrations of why, over seven decades later, the European Convention really does still matter. Some illustrations have a particular Irish flavour, others do not.

Access to Justice

I will start with something obvious but essential – effective rights don't exist without effective remedies. To get an effective remedy one must first get to court. In its landmark judgment in *Golder v. the United Kingdom*, decided in 1975, the Strasbourg court held that Article 6 of the Convention guarantees a right of access to court.[4] Although that provision did not *expressly* provide for such a right, the Court held that the rights to fair, public and expeditious proceedings which it does guarantee would have no value if there was no access to courts and therefore no such proceedings to begin with. An Irish audience will know that this landmark judgment led to another, both for the interpretation of the Convention and for Ireland. In *Airey v. Ireland,* the Court held in 1979 that Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for *effective* access to court, either because legal representation is rendered compulsory, as is done by the domestic law of certain States for various types of litigation, or because of the complexity of the procedure or the case.[5] It was not, the Court stressed, Strasbourg's function to indicate, let alone dictate, which measures should be taken to comply with the State's positive obligations. The institution of a legal aid scheme was mentioned as one possibility; but simplification and overhaul of procedure was also mentioned as another. *Airey* is an old case of course; so why mention it? This old case has never lost its relevance. It has been relied on in multiple cases involving different Council of Europe States to find violations of Article 6.[6] And the difficulties which it highlighted in the 1970s continue to resonate in this and other European jurisdictions – covering the whole Council of Europe legal space - to date.

In a judgment delivered in 2018 the former Chief Justice expressed his concern that: 'there are cases where persons or entities have suffered from wrongdoing but where [they] are unable effectively to vindicate their rights because of the cost of going to court.'[7] Across the water, Lord Reed expressed similar concerns in the unanimous judgment delivered by the

[4] (1976) 1 EHRR 524.
[5] App No 6289/73 (ECHR, 9 October 1979).
[6] *Roche v. the United Kingdom* App No 32555/96 (ECHR, 19 December 2005-X) para 116; *Z and Others v. the United Kingdom* App No. 29392/95, (ECHR, 1 May 2001-V) para 91; *Cudak v. Lithuania* App No 15869/02 (ECHR, 23 March 2010) para 54; and *Lupeni Greek Catholic Parish and Others v. Romania* App No 76943/11, (ECHR 29 November 2016) para 84, (extracts)). For more recent examples see *Zubac v. Croatia* App No 40160/12 (ECHR, 5 April 2018) para 76, and *Grzęda v. Poland* App No 43572/18, (ECHR 15 March 2022), paras 342-343.
[7] [2018] IESC 44, [2.5]. See also his comments (albeit in the context of third-party funding) in *Persona Digital Telephony Ltd v. Minister for Public Enterprise* [2017] IESC 27.

UKSC in 2017 in *R (UNISON) v. Lord Chancellor*.[8] An extract from that judgment is worth citing for its simple and timeless message:

> Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.
>
> Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance […].
>
> Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established.[9]

Several years on, those simple words have gained, not lost, in strength. In Ireland a complete review of the administration of civil justice was completed in 2020, seeking amongst other things to tackle questions of simplification of procedure and outdated and excessively complex procedural rules. This had been identified by the Strasbourg Court as potentially problematic 41 years previously.[10] The Chief Justice established an access to justice working group in 2021.[11] Problems in relation to access to court thus continue to be of concern, as witnessed by ongoing measures to comply with Article 6 requirements in this jurisdiction or indeed the strike action undertaken recently by criminal barristers in England and Wales.

What the *Airey* case stressed was the positive obligation on High Contracting Parties to provide *effective* access to justice at national level for litigants. Effective access to justice for litigants is also what the Convention seeks to provide to those who consider that national remedies or authorities have failed. Since the amendments introduced by Protocol No. 11, the right to individual application is confirmed as being at the heart of the Convention system. The unconditional character of this right distinguishes the European Convention

[8] [2017] UKSC 51.

[9] *R (on the application of UNISON) (Appellant) v. Lord Chancellor (Respondent)* [2017] UKSC 51 [66] – [69]. The case concerned the payment of fees by claimants in employment tribunals or employment appeals tribunals. The aims of the Fees Order adopted in 2013 was to transfer part of the cost burden of the tribunals from taxpayers to users of their services, to deter unmeritorious claims, and to encourage earlier settlement.

[10] Department of Justice, *Review of the Administration of Civil Justice: Review Group Report* (7 December 2020) <https://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf> Accessed 6 June 2023.

[11] Courts Service, 'Launch of Chief Justice's Access to Justice Working Group Conference Report' (22 March 2022) <https://www.courts.ie/ga/node/4733> Accessed June 2023. For an overview of issues relating to access to justice see further Síofra O'Leary, 'The legacy of *Airey v. Ireland* and the potential of European Law in relation to legal aid' (2022) *DULJ*.

from other universal or regional instruments.[12] The individual is the real subject of the system and has access, provided certain conditions are fulfilled, directly to the European Court of Human Rights. Hundreds of thousands of litigants, or their relatives, have turned to the Strasbourg Court when they failed at national level and their names are now associated with the Convention rights and principles of great importance which they sought to defend. To name but a few:

- *McCann* on the duty of States to effectively investigate (Article 2);[13]
- *Selmouni* on torture (Article 3);[14]
- *Siliadin* on the duty to criminalise domestic servitude (Article 4);[15]
- *Ilgar Mammadov* on detention for political motives (Article 5);[16]
- *Salduz* on the right of access to legal assistance or *Kavala* on the right to a fair trial (Article 6);[17]
- *Del Rio Prada* on retroactive application of case-law (Article 7);[18]
- *Christine Goodwin* on the rights of post-operative transsexuals or *Norris* on the open expression of one's sexuality (Article 8);[19]
- *Ebrahimian* on the right to manifest one's religion and the limits thereto (Article 9) or;[20]
- *Navalnyy* on the right to freedom of expression and association (Articles 10 and 11).[21]
- *MacFarlane* on the lack of an effective remedy for delays in criminal proceedings *(Articles 13);*[22]
- *Beeler* on discriminatory treatment of widower, taking care full-time of children *(Articles 8 and 14).*

Safeguarding the Rule of Law

The second illustration of why the Convention still matters centres on the rule of law. The Strasbourg court has consistently held that the rule of law forms part of and inspires the fabric of the whole Convention and is inherent in all its articles.[23] Reference to the rule of law undoubtedly provokes thoughts of some of our EU partners and what is termed rule of law backsliding, the subject of EU infringement actions, numerous preliminary rulings on judicial independence and effective judicial protection and an increasing number of judgments of the Strasbourg court in recent years.[24]

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[12] See further Linos-Alexandre Sicilianos, 'The European Convention on Human Rights at 70: the dynamic of a unique international instrument' (Kristiansand, 5 May 2020).
[13] *McCann and Others v. the United Kingdom* App No 18984/91 (ECHR, 27 September 1995).
[14] *Selmouni v. France* App No 25803/94 (ECHR, 28 July 1999).
[15] *Siliadin v. France* App No 73316/01 (ECHR, 26 July 2005).
[16] *Ilgar Mammadov v. Azerbaijan (no. 2)* App No 919/15 (16 November 2017).
[17] *Salduz v. Turkey* App No 36391/02 (ECHR, 8 August 2008); *Kavala v. Turkey* App No 28749/18 (ECHR, 10 December 2019.
[18] *Del Río Prada v. Spain* App No 42750/09 (ECHR, 21 October 2013).
[19] *Christine Goodwin v. the United Kingdom* App No 28957/95 (ECHR, 11 July 2002); *Norris v. Ireland* App No 10581/83 (ECHR, 26 October 1988).
[20] *Ebrahimian v. France* App No 64846/11 (ECHR, 26 November 2015).
[21] *Navalnyy v. Russia* App Nos 29580/12 and 4 others (15 November 2018).
[22] *McFarlane v. Ireland* App No 31333/06 (10 September 2010).
[23] *Engel and Others v. the Netherlands* App No 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (8 June 1976) para 55; *Amuur v. France* App No 19776/92 (ECHR, 25 June 1996) para 50.
[24] *Reczkowicz v. Poland* App No 43447/19 (ECHR, 22 July 2021); *Grzęda v. Poland* App No 43572/18 (15 March 2022); *Żurek v. Poland* App No 39650/19 (16 June 2022); *Dolińska-Ficek and Ozimek v. Poland* App Nos 49868/19

However, it is worth citing an Icelandic judgment, *Ástráðsson,* decided by the Grand Chamber in December 2020.[25] Even though the then President Spano and I did not agree entirely on all aspects of the case, the judgment is another landmark. It is a reminder that the establishment of independent and impartial tribunals in accordance with law is something which we must seek to protect in all European States, even in those, similar to our own, where the rule of law does not otherwise appear fragile. The Court found that Iceland had violated Article 6 of the Convention due to manifest and grave breaches of national law in the judicial appointment procedure relating to the newly established Court of Appeal. The Minister for Justice had replaced four candidates from a list of fifteen proposed by an Evaluation Committee without carrying out an independent evaluation or providing adequate reasons for her decision. In addition, despite the clear terms of the applicable legislation, the Icelandic Parliament when exercising what was intended as a check and balance had not held a separate vote on each individual candidate but had instead voted for the Minister's replacement list *en bloc*.

Thus, two key facets of the recently established procedure for the appointment of judges in a State where the latter had been the subject of considerable discussion and review had been ignored. The Court made clear that:

> Having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, … the process of appointing judges necessarily constitutes an inherent element of the concept of 'establishment' of a court or tribunal 'by law'.[26]

The *Ástráðsson* case illustrates that rule of law problems can still arise in established democracies which have, by and large, successfully embedded the Convention into their domestic legal orders. The judgment demonstrates the common thread running through the three institutional requirements of Article 6 § 1 – namely that a tribunal be established by law, independent and impartial – are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers.[27] *Ástráðsson* also demonstrates, in our interconnected Europe, how national judges, Strasbourg judges and EU judges in Luxembourg, all interact in defence of the common European values which underpin the Constitution, the Convention and the EU Charter. It is essential, now more than ever, that those values are not weakened by any one of those three voices speaking in dissonant tones.[28] In its preliminary reference in *W.O. and J.L. v. Minister for Justice and Equality* on the execution of several EAWs issued by Poland, our Supreme Court relied on *Ástráðsson* in order to ask the CJEU whether the systemic deficiencies in the Polish judiciary amount on their own to a sufficient breach of the essence of the right to a fair trial, requiring an executing authority to refuse the surrender. [29] Ireland's European journey from isolation to integration means

and 57511/19 (8 November 2021); *Broda and Bojara v. Poland* App Nos 26691/18 and 27367/18 (29 June 2021). In July 2022, the ECtHR gave notice to Poland of 37 further applications of this nature.

[25] *Guðmundur Andri Ástráðsson v. Iceland* App No 26374/18 (1 December 2020).

[26] ibid § 227.

[27] Robert Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary' (2021) 27 Eur Law J. 211, 215.

[28] See, for recent examples of ongoing CJEU and ECtHR synergy, Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y v. Openbaar Ministerie* (22 February 2022) §§ 79-80 or *Tuleya v. Poland*, App Nos 21181/19 and 51751/20 (6 July 2023).

[29] *W.O., J.L. v Minister for Justice and Equality* (ECHR 12 July 2022).

that we now form part of two wider European communities – the EU and the Council of Europe – and we depend, as such, not only on the robustness of our own judiciary, but also on that of other States and partners.

From the perspective of the Convention and the Strasbourg Court, the importance of the rule of law cannot be reduced to questions relating to the independence of the judiciary. There are other strands to the rule of law under the Convention which are less familiar to the general public but which are nevertheless of fundamental importance to the type of societies in which we aspire to live.[30] Secret rendition cases, for example, provide a window into how the Strasbourg Court uses the rule of law as an interpretative tool for the development of substantive guarantees under rights set forth in other articles of the Convention, such as Articles 2, 3 and 5. I turn to a case called *El-Masri* which demonstrates what happens when an individual is subject to 'extraordinary rendition' and detention 'outside the normal legal system' and which the Strasbourg Court considered, 'by its deliberate circumvention of due process, [was] anathema to the rule of law and the values protected by the Convention?'[31] The following is a detailed summary of the facts to provide a full measure of the case:

- The applicant, a German national, who was travelling in December 2003 on a bus destined for Skopje was questioned at the North Macedonian border about the validity of his passport as well as possible ties with several Islamic organisations.
- Later he was taken to a hotel room where he was held for twenty-three days.
- During his detention, he was watched at all times and interrogated repeatedly. His requests to contact the German embassy were refused and any attempt to leave were met with a gun to the head. At one stage he resorted to a hunger strike.
- On 23 January 2004, handcuffed and blindfolded, he was put in a car, taken to the airport, placed in a room where he was beaten severely, stripped, sodomised with an object, placed in a nappy and dressed in a tracksuit.
- Then, shackled and hooded, and subjected to total sensory deprivation, he was forcibly marched to a CIA aircraft.
- When on the plane, the applicant was chained to the floor, forcibly tranquillised and flown in that position to Kabul where he was held captive for five months.
- In May 2004 the applicant was returned to Germany via Albania.

The Court held that the treatment to which he had been subjected violated Article 3 of the Convention. The latter enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, making no provision for exceptions or derogations. In *El Masri* the Court found it: '[…] wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework […]'.[32]

[30] For a more extensive explanation of the role played by the rule of law in Strasbourg case-law, contrasting it with the recent case-law of the CJEU see Síofra O'Leary, 'Europe and the Rule of Law', (ECB Legal Conference, 6–7 September 2018).
[31] *El-Masri v. the former Yugoslav Republic of Macedonia* App No 39630/09 (ECHR, 13 December 2012).
[32] ibid para 236.

There may be an inadvertent tendency on our part to comfort ourselves that while this case concerned an EU citizen, the events took place outside this jurisdiction, faraway, on the territory of a non-EU, albeit European, State. However, violations of Articles 3, 5 and 6 of the Convention have been found in relation to our partner EU Member States in similar rendition cases. Take, for example, *Al Nashiri v. Poland* involving extraordinary rendition, a secret detention site, 'unauthorised' interrogation methods, including mock executions, prolonged stress positions and threats to detain and abuse family members. [33] The Court found violations of Articles 2, 3, 5 and 6 of the Convention. As regards the latter, it held:

> No legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence irreparably damages that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded in order to protect the integrity of the trial process and, ultimately, the rule of law itself.[34]

Similar stories of abuse can be found in *Al Nashiri v. Romania,*[35] *Abu Zubaydah v. Lithuania,*[36] or *Nasr and Ghali v. Italy*.[37]

These are different but very stark examples of what rule of law suspension, break down or dysfunction looks like in practice. They are a reminder of the daily fare of the Strasbourg Court whose job it is to respond to individual complaints even in the most extreme of circumstances. In 1949, as the post-war framework for the protection of democracy, human rights and the rule of law from which we now all benefit was being constructed, Hersch Lauterpacht, International legal scholar and judge, wrote:

> [E]ven in countries in which the rule of law is an integral part of the national heritage and in which the Courts have been the faithful guardians of the rights of the individual, there is room for a procedure which will put the imprimatur of international law upon the principle that the State is not the final judge of human rights.[38]

Then and now, when defending the rule of law, in all its different dimensions, the European Convention clearly matters.

The Essential and Enduring Value of the Living Instrument

My third illustration of why the Convention still matters is to be found in what is both an explanation and a defence of the enduring value of the Convention, characterised as being both 'a constitutional instrument of European public order',[39] and as 'a living instrument

[33] *Al Nashiri v. Poland* App No 28761/11 (24 July 2014).
[34] ibid 564.
[35] *Al Nashiri v. Romania* App No 33234/12 (31 May 2018).
[36] *Abu Zubaydah v. Lithuania* App No 46454/11 (31 May 2018).
[37] *Nasr and Ghali v. Italy* App No 44883/09 (23 February 2016).
[38] Hersch Lauterpacht and others, 'The Proposed European Court of Human Rights' (1949) (35) Transactions of the Grotius Society, 34.
[39] *Loizidou v. Turkey (preliminary objections)* App No 15318/89 (ECHR, 23 March 1995) para 75; *Al-Skeini and Others v. the United Kingdom* App No 55721/07 (ECHR, 7 July 2011) para 141.

which must be interpreted in the light of present-day conditions'.[40] As judgments like *Airey* emphasised, the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.[41]

The characterisations of the Convention as a living instrument of European public order have of course left it open to criticism. For example, the case made against the Strasbourg Court by a former UK Supreme Court judge, Lord Sumption, in his Reith lectures was that the Court had 'invented rights' and was guilty of 'mission creep'. He argued that we interfered with national political processes in a manner which undermined democracy.[42] However, it is difficult to see the trajectory of the Court's case-law in Sumption's terms when viewed as a whole and given the emphasis in our case-law on the Court's subsidiary role, the margin of appreciation, European consensus and the emphasis placed on the process and reasoning of the domestic courts, who bear the primary responsibility for ensuring compliance with Convention guarantees.[43]

Those who complain about Strasbourg interference with democratic processes also seem to forget judgments like *Animal Defenders* and subsequent judicial iterations, where we have emphasised the importance of the legislative choices underlying measures whose proportionality is being assessed, stating, firstly, that 'the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance' and secondly, that 'there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision'.[44] Looking at the Court's case-law on Article 10 on freedom of expression and Article 3 of Protocol 1, it is difficult to think of a court – national or international - which has done more to protect democracy and its lifeblood, the free flow of accurate and reliable information, and done so more effectively over decades.[45]

The evolutive interpretation which the Court employs has its limits of course. Such interpretation cannot go against the letter of the Convention and must remain in conformity with its object and purpose. The margin of appreciation doctrine, enshrined in the case-law and now in the Convention's Preamble, contributes to striking a balance between common minimum standards on the one hand and the needs and specificities of different societies and legal systems on the other. In Ireland, it also seems important to remember the positive developments to which the Convention has directly or indirectly, slowly or with more urgency, contributed. I agree with the Chief Justice that it is essential when looking at the Strasbourg Court's interaction with Ireland over the decades not to fixate on one or two cases. However, the applicants who made their way to the Strasbourg court in *Norris* (in relation to the decriminalisation of homosexual activity between consenting adults),[46] *Johnston and Others* (in relation to the absence of divorce and the protection of family life and particularly children outside of marriage),[47] *Open Door Counselling* (on access to information on abortion and reproductive services outside the State),[48] or *A, B and C* (on the absence of

[40] *Tyrer v. the United Kingdom* App No 5856/72 (ECHR, 25 April 1978) para 31.
[41] *Loizidou v. Turkey* App No 15318/89 (ECHR, 18 December 1996) para 72.
[42] Jonathan Sumption, *Trials of the State—Law and the Decline of Politics* (London: Profile Books 2019).
[43] See further the defence by Robert Spano, 'The democratic virtues of human rights law - a response to Lord Sumption's Reith Lectures', (2020) E.H.R.L.R. 132-139.
[44] *Animal Defenders International v the United Kingdom* App No 48876/08 (ECHR 22 April 2013), §§ 108 and 111.
[45] See further Síofra O'Leary, "Democracy, Expression and the Law in our Digital Age" (2022) 73 *NILQ* 1-22.
[46] *Norris v Ireland* App No 10581/83 (ECHR 26 October 1988).
[47] *Johnston and Others v. Ireland* App No 9697/82 (ECHR, 18 December 1986).
[48] *Open Door and Dublin Well Woman v. Ireland* App No 14235/88 and 14234/88 (ECHR, 29 October 1992).

legal regulation of instances when the termination of pregnancy would be lawful) ,[49] represent quite vividly the point made by Lauterpacht which I mentioned above. A similar point was made recently by Judge MacMenamin in a Supreme Court case called *O'Callaghan*, a follow-up to recent Strasbourg judgments on unreasonable delay under Article 6: 'There are occasions when an external critique can be useful in creating an insight into the way in which our own legal system can sometimes be perceived'.[50]

The people within the jurisdiction of this State now feel at home with, and expect, the hallmarks of a democratic society, namely pluralism, tolerance and broadmindedness. In cases now pending before our Court, we seek to ensure that those hallmarks of democratic societies are also enjoyed by other applicants from minority groups in other States who continue to seek fair and proper treatment in accordance with their human dignity. On many occasions the Court has emphasised that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved that ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[51]

The judgments of the Strasbourg Court in relation to often highly delicate and contested ethical, moral and social questions have, at times, shone a light on issues in relation to which applicants previously had difficulty gaining traction at their own national level. But when interpretating and applying the living instrument the Court has sought to proceed in a balanced manner. When finding violations in judgments like *Christine Goodwin*, on the lack of legal recognition of her post-operative sex and about the legal status of transsexuals in the United Kingdom, we see the Court responding to a continuing international legal trend.[52] In contrast, when finding no violations in other judgments – think of *Parrillo v. Italy* on the domestic ban of donating cryopreserved embryos to medical research,[53] *Vavřička and Others v. the Czech Republic* on compulsory childhood vaccinations, [54] or *Dubská and Krejzová v. the Czech Republic* on regulating home births,[55] we see the Court stressing the respondent States' wide margin of appreciation in the relevant fields, the absence of a European consensus and the careful balancing of interests performed at parliamentary and judicial level by the competent national authorities. But in many cases where violations have been found, the Court has simply sought to remedy blind spots within national systems; blind spots which it may have been very difficult for national judges to identify or remedy themselves given that their roots are to be found in national, cultural, social or religious heritage. Think of the institutional tolerance of domestic violence on display in cases like *Opuz v. Turkey,*[56] *Talpis v. Italy,*[57] or *Tagayeva v. Russia,*[58] or secondary victimisation of complainants in sexual violence cases such as *J.L. v. Italy.*[59]

[49] *A, B and C v. Ireland* App No 25579/05 (ECHR, 16 December 2010).
[50] *O'Callaghan v. Ireland* [2021] IESC 68 [119].
[51] *Chassagnou and Others v. France* App Nos 25088/94 and 2 others (ECHR, 29 April 1999) para 112; *S.A.S. v. France* App No 43835/11 (ECHR, 1 July 2014) (extracts) para 128.
[52] *Christine Goodwin v. the United Kingdom* App No 28957/95 (11 July 2002).
[53] *Parrillo v. Italy* App No 46470/11 (ECHR, 27 August 2015).
[54] *Vavřička and Others v. the Czech Republic* App Nos 47621/13 and 5 others (ECHR, 8 April 2021).
[55] *Dubská and Krejzová v. the Czech Republic* App Nos 28859/11 and 28473/12 (ECHR, 15 November 2016).
[56] *Opuz v. Turkey* App No 33401/02 (ECHR, 8 June 2009).
[57] *Talpis v. Italy* App No 41237/14 (ECHR, 2 March 2017).
[58] *Tagayeva and Others v. Russia* App Nos 26562/07 and 6 others (ECHR, 13 April 2017).
[59] *J.L. v. Italy* App No 5671/16 (ECHR, 27 May 2021).

Conclusion

The breadth and range of legal questions which gravitate towards the Strasbourg Court is difficult to capture in a few concluding lines. In recent years, the Grand Chamber has examined a wide range of legal questions of considerable societal importance:

- the privacy implications of mass surveillance and reworking the safeguards States are required to guarantee in that regard;
- the compulsory vaccination of children;
- the independence and impartiality of national courts;
- preventative positive obligations to ensure the safety of women and children in situations of domestic violence;
- the situation of mentally disabled persons in the criminal justice system;
- the lack of procedural safeguards related to electoral irregularities;
- the return of migrants after the breaching of fences at the EU's external borders or the repatriation of women and children from Syrian refugee camps;
- the role of a child's religious background in adoption decisions or;
- the provision of survivor's pensions, on an equal basis, to widowers with children;
- the protection which may be afforded by the Convention in climate change litigation.[60]

In all these cases, in the words of two of my colleagues, whether the Court finds violations or no violations of the relevant Convention articles, it seeks 'to define Convention standards with a durable shelf life that can assist national authorities in the future resolution of similar controversies'.[61]

Most of us would agree that the Convention system has, over the last 70 years, made an important contribution to peace and stability in Europe and to the development of more tolerant, pluralist democracies governed by the rule of law. However, as President Higgins reminded us in his *Daniel O'Connell Memorial Lecture* delivered to the Bar some years ago: 'We must guard against any … assumption that the narrative of human rights in Ireland or globally is linear, or that it is a project that is near completion'.[62] That is why it is a good thing that the demands of universal rights and human dignity continue to be tested every day in national courts and in ours.[63]

Given that we see the post-war model of judicial protection of human rights under greater stress than ever before, what, in conclusion, can and should we do to protect it? Firstly, the system is one of shared responsibilities. The Strasbourg Court is a court of last resort and it

[60] *Big Brother Watch and Others v. the United Kingdom* App Nos 58170/13, 62322/14 and 24960/15 2(ECHR, 5 May 2021); *Centrum för rättvisa v. Sweden* App No 35252/0 (ECHR, 25 May 2021); *Vavřička and Others v. the Czech Republic* (n 51); *Guðmundur Andri Ástráðsson v. Iceland* (n 24); *Kurt v. Austria* App No 62903/15 (ECHR, 15 June 2021); *Rooman v. Belgium* App No 18052/11 (ECHR, 31 January 2019); *Mugemangango v. Belgium* App No 310/15 (ECHR, 10 July 2020); *N.D. and N.T. v. Spain* App Nos 8675/15 and 8697/15 (ECHR, 13 February 2020); *H.F. and Others v. France* App Nos 24384/19 and 44234/20 (ECHR, 14 September 2022); *Abdi Ibrahim v. Norway* App No 15379/16 (ECHR, 10 December 2021); *Beeler v. Switzerland* App No 78630/12 (ECHR, 11 October 2022) and *Verein KlimaSeniorinnen v Switzerland* App No 53600/20 and *Carême v. France* App No 7189/21.

[61] See Darian Pavli and Rachael Kondak, 'Beyond the Age of Subsidiarity: Do Established Democracies Still Need the European Court of Human Rights?' *Liber amicorum Robert Spano; Anthemis: Eleven International Publishing, 2022. - p. 559-570*

[62] President Higgins, 'The Challenge of Human Rights for Contemporary Law, Politics, and Economics' (Daniel O'Connell Memorial Lecture, Bar of Ireland, 19 November 2015).

[63] ibid.

falls first and foremost to national judges and national authorities to secure the rights and freedoms enshrined in the Convention. Many of the protections in the Convention are already in place under the Irish Constitution.[64] That does not mean that reference to or engagement with the Convention is misplaced or unnecessary. There are at least two good reasons for so engaging. On the one hand, as pointed out by the former Chief Justice in a case called *Fox v. Minister for Justice and Equality*, and endorsed extra-judicially by the present Chief Justice:

> […] there may be some merit in the future in Irish judgments using similar language and structure to that adopted by the ECtHR in analysing rights guaranteed by both the Constitution and the ECHR.
>
> The appropriate dialogue between a national court and the ECtHR can only be enhanced if judgments are expressed in terms which minimise the risk of misinterpretation by supranational courts where there may be a real possibility that such courts will be required to consider the national judgments in question.[65]

On the other, Ireland is a common law jurisdiction with proud constitutional foundations. It is rightly regarded in the EU and the Council of Europe as a State fortunate to have independent and impartial courts which engage fully and loyally with European law. The Convention, to borrow the words of Judge O'Malley in *AC v. Cork University Hospital*, was not intended as a 'surrogate constitution' or 'to weaken the rights established in national law'.[66] Irish courts are free to provide protection above and beyond it. As party to the Convention for 70 years and as an EU Member State for 50, the Irish courts' constructive, when necessary critical, but above all comfortable engagement with Strasbourg case-law and the Convention is an important signal for other States less inclined to uphold Europe's common values and common constitutional principles.

Secondly, we cannot expect judges, whether in Strasbourg or Ireland, to alone protect the post-war model from which we have benefitted so much. Although now considered passé in some circles to refer to the poetry of Seamus Heaney, my speech at Dublin City University was delivered in a lecture hall named in his honour and discussing a subject he captured magnificently in his poetry and in a lecture entitled, 'Writer and Righter', delivered at the Irish Human Rights Commission in 2009. In the foreword to that lecture, referring to the poem 'The Republic of Conscience', Maurice Manning pointed out that it:

> […] brought home … the sense of responsibility that stirs all of us to act to uphold human rights.
>
> […] once you become aware of your rights, and the rights of others, you cannot but be a representative for them. You cannot [either] sit idly by and let the rights of others be eroded or abused.

[64] *D.F. v. Garda Commissioner (No. 3)* [2014] IEHC 213 (Hogan J).
[65] *Fox v. Minister for Justice and Equality* [2021] IESC 61 [12.15]; Chief Justice Donal O'Donnell, 'The ECHR Act 2003: Ireland and the Post War Human Rights Project' (2022) 6(2) Irish Judicial Studies Journal 1.
[66] [2020] 2 IR 38.

Judges, parliamentarians, public authorities, the press, NGOs, academics, teachers, you and I as private persons - we are all responsible for protecting the good health of our societies and for what Heaney termed 'the immunity of the body politic'.

'WHAT HAS THE ECHR EVER DONE FOR US?': THE PARTICULAR AND SPECIFIC IMPORTANCE OF THE CONVENTION IN PROTECTING RIGHTS ACROSS A DEMOCRATIC EUROPE

Abstract: The European Convention on Human Rights (ECHR) was recently described by Hogan J. as having 'long been a favourite of the law and our constitutional order'. The importance and value of the Convention is generally acknowledged in Ireland, even as it comes under increasing criticism elsewhere. However, recent case-law has raised issues about the exact nature of the relationship between the Convention and Irish law. In addressing these issues, it is necessary to consider wider questions about the legitimacy of the Convention system of rights protection, and to identify the very real 'added value' it provides to well-established national mechanisms for upholding rights, democracy and rule of law.

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Introduction

In what follows, this paper explores the relationship between the European Convention on Human Rights ('ECHR') and Irish law, with specific reference to the status of the jurisprudence of the European Court of Human Rights ('ECrtHR'). It then proceeds to examine the legitimacy challenges that the ECHR system of rights protection is increasingly facing across Europe, and analyses how the authority of the ECrtHR can be justified.

The ECHR and Ireland: 'A Favourite of our Law and the Constitutional Order'

Speaking on the 11th October 2022 to the Parliamentary Assembly of the Council of Europe, an tUacharán Micheál D. Higgins commented as follows:

> [W]e live in a world where the legitimacy of the ECHR and ECtHR continues to be undermined. Let me take this occasion to state Ireland's view very clearly: the European Convention on Human Rights must remain the cornerstone of human rights' protection across Europe'. He went on to describe the Convention as a 'bedrock', that 'must be re-invoked, extended, bolstered and re-asserted.[1]

These comments represent a striking affirmation of the worth of the Convention. They also reflect the embedded view of successive Irish governments, starting with Seán MacBride's active and enthusiastic involvement in the Convention's birth process as Minister for External Affairs in the late 1940s,[2] and repeatedly reiterated by various ministers ever since

[1] President Michael D. O'Higgins, 'Reasserting the Moral Weight of the Council of Europe' (Fourth part of the 2022 Ordinary Session of the Council of Europe Parliamentary Assembly, Strasbourg, 10–14 October 2022) < https://rm.coe.int/higgins-pdt-ireland-pa-october-2022-2753-1532-5702-1/1680a87426> Accessed 18 July 2023.

[2] William Schabas, 'Ireland, The European Convention on Human Rights, and the Personal Contribution of Seán MacBride', in John Morison eand others (eds), *Judges, Transition, and Human Rights* (OUP 2007), 251–274.

in various domestic and international fora.[3] Ireland has been a positively engaged participant in the ECHR system of rights protection since the first case to reach the newly established ECrtHR in 1960, namely *Lawless v Ireland*.[4] It loses relatively few cases before the Court,[5] but has a reasonably good record of compliance with judgments that have found it to be in violation of the Convention – some of which, such as *Airey,*[6] and *Norris*,[7] have had a significant impact on the development of Irish law and society.

The value of the Convention as viewed through Irish eyes is also reflected in the provisions of the constitutionally endorsed Belfast Agreement,[8] which (i) affirm that respect for ECHR rights is an essential 'safeguard' for the functioning of devolved institutions in Northern Ireland and the integrity of the Irish peace process more generally;[9] and (ii) commit Ireland to consider incorporating Convention rights into domestic law,[10] a step achieved by the European Convention on Human Rights Act 2003 ('the 2003 Act'). This is an exceptional legislative measure: no other set of international human rights commitments has been transplanted into national law and made directly enforceable in domestic law. In the absence of any express constitutional recognition of the status of the Convention, the 2003 Act clarifies when and how national courts can take account of Convention rights in interpreting legislation and reviewing the actions of public authorities. It thus domesticates such rights, and in the words of O'Donnell CJ, puts the application of the Convention in Irish law 'on very clear and firm foundations'.[11]

More generally, there is general acceptance within Irish law and politics of both (i) the binding nature of ECrtHR judgments at the level of international law and (ii) the highly persuasive character of the Court's jurisprudence as a reference point in determining the scope and substance of rights protection within domestic law.[12] Unlike other international human rights treaties, the ECHR is not viewed from the internal perspective of Irish law as a purely 'external' international legal norm, exercising at best a diffuse and indirect influence over the development of national law. Instead, the Convention is treated as part of the domestic legal household, so to speak. The political branches of the state generally endeavour to maintain conformity with Strasbourg case-law in utilising their legislative and executive powers. Furthermore, national courts take this jurisprudence into account both when applying Convention rights in line with the 2003 Act and also, more indirectly, when interpreting the constitutional rights provisions of Bunreacht na hÉireann.[13]

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[3] See the comments made by the Minister for Foreign Affairs, Simon Coveney T.D., on 19 September 2022 welcoming the election of Judge Síofra O'Leary as President of the ECrtHR. <https://www.gov.ie/en/press-release/8912e-ms-justice-siofra-oleary-elected-as-president-of-the-european-court-of-human-rights/> Accessed 22 August 2023.

[4] (1961) 1 EHRR 15.

[5] 28 individual complaints came before the Court from Ireland in 2022: 27 were deemed to be inadmissible or otherwise struck out, while one complaint resulted in a finding of non-violation <https://www.echr.coe.int/statistical-reports> accessed 25 June 2023.

[6] *Airey v Ireland* (1980) 2 EHRR 305.

[7] *Norris v Ireland* (1989) 13 EHRR 186.

[8] Article 29.7 of Bunreacht na hEireann, inserted by the Nineteenth Amendment to the Constitution as approved by referendum on 22 May 1998 and signed into law on 3 June 1998.

[9] Belfast Agreement, *Strand One: Safeguards*, para 5(b).

[10] ibid, *Strand Three: Rights, Safeguards and Equality of Opportunity – Human Rights*, para 9.

[11] Donal O'Donnell, 'The ECHR Act 2003: Ireland and the Post War Human Rights Project' (2022) 6(2) IJSJ 1-13, 12.

[12] For discussion of this distinction between the status of the ECrtHR's judgments in international and national law, see *Costello v Government of Ireland* [2022] IESC 44 – in particular [179] – [186] (Hogan J).

[13] *Fox v Minister for Justice* [2021] IESC 61 (Clarke CJ).

The status thus accorded to Strasbourg jurisprudence rarely if ever generates political controversy, or provokes much in the way of legal angst – bar the odd bout of vague judicial grumbling about elements of the Strasbourg interpretative approach.[14] Recent Supreme Court jurisprudence has emphasised that Irish courts should not focus on Convention jurisprudence at the expense of domestic constitutional rights standards,[15] or assume that the former should 'almost automatically, or even presumptively' form part of the latter – to use O'Donnell CJ's phrasing.[16] Convention rights and constitutional law remain distinct and separate legal strands within the tapestry of Irish law. However, this recent case-law has simultaneously affirmed that Irish courts should take ECrtHR case-law into account when interpreting constitutional rights provisions, and should follow the lead of Strasbourg in applying the provisions of the 2003 Act.[17] More generally, Ireland's adherence to the ECHR continues to be viewed as an unqualified good – not least because of how it reflects a wider national commitment to human rights and rule of law values.[18] As Hogan J puts it with his customary neat turn of phrase in *Costello v Ireland*, the ECHR 'has long been a favourite of the law and our constitutional order.'[19]

The Increasingly Contested Status of the ECHR

In this respect, Ireland's stance vis-à-vis the ECHR is broadly analogous to that of many other European states. Some care needs to be taken in making generalisations in this regard.[20] However, the binding status in international law of ECtHR judgments has been acknowledged by all state parties to the Convention. Similarly, national courts can now review the conformity of the actions of public authorities with Convention rights in every member state – with such rights, as in Ireland under the 2003 Act, generally having sub-constitutional status.[21] Furthermore, national courts are usually willing to interpret and apply constitutional rights provisions in ways that align with Strasbourg case-law, or at least which do not undercut it – while, like the Irish Supreme Court, being at pains to assert their final authority to determine the requirements of national law.[22]

This is not to say that all political or legal actors across Europe are as warmly inclined to Strasbourg as their Irish counterparts tend to be. There is a tendency in some states for the Convention to be regarded as an alien, intrusive, and destabilising influence – and thus

[14] Adrian Hardiman, 'The Jurisdiction of the European Court of Human Rights and the case of *O'Keeffe v. Hickey*', in Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester, 2017), 94–107; Conor O'Mahony, 'Subsidiarity of ECHR and *O'Keeffe v. Ireland*: A response to Mr Justice Hardiman' in Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester, 2017), 108-120.

[15] *Gorry v Minister for Justice* [2020] IESC 55; *Fox v Minister for Justice* [2021] IESC 61 (14 September 2021).

[16] O'Donnell (n 11) 11.

[17] Hogan J was at pains in *Clare County Council v McDonagh* [2022] IESC 2 (31 January 2022) to emphasise that Irish courts should not focus on Convention jurisprudence to the neglect of domestic constitutional law in adjudicating rights claims. However, in giving the judgment of the Court, Hogan J also gave close consideration to the relevant Strasbourg case-law in interpreting Article 40.5 of *Bunreacht na hÉireann*, in particular the ECrtHR's decision in *Winterstein v France* App No 27013/07 (ECHR, 17 October 2013).

[18] O'Donnell (n 11).

[19] [2022] IESC 44, [179].

[20] See in general Colm O'Cinneide, 'Constitutional Interpretation in European Countries and the Influence of the European Convention on Human Rights and the European Union', in Kate O'Regan, Sujit Choudhry and Carlos Bernal (eds) *Elgar Research Handbook* on *Constitutional Interpretation* (OUP 2023) (forthcoming).

[21] ibid. See also Giuseppe Martinico, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23(2) European Journal of International Law 401.

[22] See in general Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015).

ECrtHR jurisprudence is sometimes held at arms' length by national judges.[23] However, the Irish experience generally aligns with similar experience elsewhere, especially when it comes to the readiness of national political and legal actors to ensure domestic law evolves in line with Strasbourg requirements – even if the Irish embrace of the ECHR is sometimes more enthusiastic and less qualified than that of some other states.[24]

Having said that all that, if we return to the starting point of this paper, President Higgins's comments also contain a frank acknowledgment that the ECHR system of rights protection has come under increasing attack in recent years - as reflected in his acknowledgement that the Court 'continues to be undermined', and that the legitimacy of the Convention needs to be 'bolstered and re-asserted'. Over the last decade or so, the Court in particular has attracted growing criticism, that goes beyond minor grumbling about the specifics of particular judgments. It has been accused of over-reaching, of indulging in 'human rights imperialism' by over-extending the scope and substance of Convention rights, and of arrogating legal-decision authority to itself which should be exercised by national authorities. Prominent among these critics have been certain UK government ministers: the political sore opened eighteen years ago by the Court's controversial 'prisoner voting rights' judgment of *Hirst v UK (No 2)* has never really been closed.[25] In late 2021, the UK government published a consultation paper on reform of UK human rights law, which contained some strikingly aggressive criticism of the Court and in particular its interpretation of the scope of certain Convention rights and their associated positive obligations.[26] More recently, the recent grant of a Rule 39 interim order by the Court, which stopped the transfer of asylum-seekers to Rwanda, has triggered another bout of political attacks – including calls for the UK to leave the Convention system.[27] Such criticism has not only come from politicians within the UK. A number of legal academics and prominent ex-judges, including two former members of the UK Supreme Court, have been highly critical of what they see as the 'activist' and 'overreaching' nature of some of the Strasbourg jurisprudence.[28] Furthermore, similar grumblings can increasingly be detected from outside the UK. Some other national governments have supported calls for reform of the Strasbourg system, and criticism of the ECHR is increasingly becoming common in political and legal debate across Europe.[29]

Answering the Critics: The Turn to 'Subsidiarity'

It is worthwhile emphasising that these recent attacks on the Court often feature plenty of sound and fury, but little in the way of tangible proposals for reform at either the level of international or domestic law.[30] Critics of the Court can be frustratingly vague when

[23] O'Cinneide (n 20).
[24] Compare e.g. the Italian experience, as outlined in Giorgio Repetto (ed), *The Constitutional Relevance of the ECHR in Domestic and European Law: An Italian Perspective* (Intersentia 2013).
[25] (2006) 42 EHRR 41.
[26] *Human Rights Reform: A New Bill of Rights* (HMG 2021).
[27] Alexander Butler, 'European Judges Vow to FIGHT UK Plan to Ignore Rwanda Migrant Flights' *Daily Mail* (21 April 2023). (Capitalisation in the original.)
[28] See e.g. Lord Hoffmann, 'The Universality of Human Rights' (2009) 125 LQR 416-432; Jonathan Sumption, *Trials of the State: Law in a Time of Crisis* (Profile, 2019); Richard Ekins, 'Human Rights and the Morality of Law', (*Judicial Power Project*, 7 June 2019) <https://judicialpowerproject.org.uk/human-rights-and-the-morality-of-law-richard-ekins/> Accessed 18 July 2023.
[29] Jacques Hartmann, 'A Danish Crusade for the Reform of the European Court of Human Rights', (*EJIL: Talk!*, 14 November 2017), <https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/> accessed 18 July 2023.
[30] The recent shelving of plans for a new 'UK Bill of Rights', which was designed to dilute the influence of Strasbourg jurisprudence on British law, is perhaps an example of this tendency.

sketching out their constructive proposals as to how the Strasbourg system should function, and often show little appreciation or understanding of why and how the Court's case-law has developed as it has. They also throw around vague, ill-defined concepts like 'judicial activism' and 'mission creep' – while often insisting that the ECrtHR adhere to interpretative techniques, such as a close focus on deciphering the original intent of the post-war framers of the Convention, that are manifestly unsuitable for application in an international law context.[31]

In addition, the Strasbourg Court has been responsive to some of the criticism directed towards its jurisprudence. Robert Spano, the former President of the Court, has emphasised in recent extra-judicial writing that the Court has entered an 'age of subsidiarity' and has 'to a considerable extent recalibrated the methodological parameters of its jurisprudence towards a more democratically incentive review mechanism' – whereby the Court will require 'strong reasons' in the form of clear defects in national democratic processes as they relate to rights protection before it will 'substitute its judgment for the one adopted by the national authorities'.[32] This turn is clearly reflected in the Court's jurisprudence over the last decade, which has shown some signs of being more deferential towards the decisions of national authorities.[33] It also is reflected in the Strasbourg Court's willingness to engage in judicial dialogue with national courts, and to accord greater leeway to national decision-making that has clearly engaged in a constructive manner with Convention norms and gives appropriate weight to human rights values more generally.[34]

Some commentators have expressed concern about the potential for this turn to dilute rights protection under the Convention.[35] However, the Court's qualified embrace of subsidiarity could be viewed as reflecting a healthy sense of the *Zeitgeist* – and a recognition that the embedding of Convention rights within domestic law may make it less necessary that the Court adopt a 'spearhead' role in advancing the legal protection of fundamental rights. It certainly makes the Court less vulnerable to accusations of 'judicial imperialism', even if such accusations invariably have a subjective dimension to them that may be imperious to fine finessing of existing case-law. Furthermore, the Convention still attracts high levels of support and even admiration across Europe – including even in the UK, where much of the legal profession and academia remain strongly supportive of the Convention system. Many state parties, including Ireland, have been reluctant to endorse proposals for radical reform

[31] See Rick Lawson, 'A Living Instrument: The Evolutive Doctrine – Some Introductory Remarks', (Opening of the ECHR Judicial Year Seminar, Leiden, 31 January 2020) < https://www.echr.coe.int/documents/d/echr/Speech_20200131_Lawson_JY_ENG> accessed 18 July 2023.

[32] Robert Spano, 'The Democratic Virtues of Human Rights Law - A response to Lord Sumption's Reith Lectures' (2020) 2 E.H.R.L.R. 132-139; Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14(3) Human Rights Law Review 487-502; Robert Spano, 'The Future of the European Court of Human Rights — Subsidarity, Process-Based Review and the Rule of Law' (2018) 18(3) Human Rights Law Review 473-494.

[33] Laurence R. Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(3) European Journal of International Law 797–827; Alec Stone Sweet, Wayne Sandholtz and Mads Andenas, 'Dissenting Opinions and Rights Protection in the European Court: A Reply to Laurence Helfer and Erik Voeten' (2021) 32(3) European Journal of International Law 897–906.

[34] Jeff King, 'Deference, Dialogue and Animal Defenders International' (*UK Constitutional Law Association,* 25 April 2013) <https://ukconstitutionallaw.org/2013/04/25/jeff-king-deference-dialogue-and-animal-defenders-international/> accessed 18 July 2023.

[35] Helfer and Voeten (n 33).

of the Strasbourg system put forward by states such as Denmark.[36] As a consequence, the Court has thus far remained afloat even in the current populist era, reflecting the legitimacy surplus it has accumulated over time.

What is the 'Added Value' of the ECHR? Lingering Legitimacy Concerns

Having said all that, the recent controversy that surrounds the Court reflects the existence of a genuine legitimacy issue. Under the provisions of the ECHR, the Court is charged with being the final interpreter of Convention rights. Given the potential scope of such rights, this means that the Court has wide-ranging authority to determine many disputed human rights issues. However, such issues are often also the subject of political and legal contestation at the domestic level, before national legislatures, courts and other state organs. In other words, Strasbourg rights adjudication often 'doubles up' with domestic decision-making about rights. And this inevitably generates some difficult questions, which go right to the question of the legitimacy of the ECHR system of rights protection as currently constituted.

Given this 'doubling up' of roles, what added value does the ECHR bring to rights protection in domestic law, given that national decision-makers – judicial or political – would seem to be *prima facie* better placed to determine contested rights issues than a distant and often overburdened court in Strasbourg?[37] Furthermore, how can the authoritative status of Court judgments, and the key role played by Strasbourg in determining fundamental rights disputes across Europe, be reconciled with the orthodox assumption that such authority should be exercised through institutions to whom power has been allocated by an exercise of the popular democratic will – ie national legislatures, executives and courts, depending on the specific separation of powers allocation in place under a given constitutional order?[38] What exactly does the Court contribute to the defence of human rights in Europe, especially in states such as Ireland with well-developed domestic systems of rights protection? And why should national authorities defer to the Court, when they have their own mechanisms for vindicating rights through the work of national courts, legislatures and other bodies?

These are all important and valid questions to ask, not least because they go right to the heart of concerns about the Court's legitimacy. They are relevant even in states like Ireland, where the status of the Convention is not the subject of sustained political and legal contestation – as illustrated by the recent debate within the Supreme Court in *Costello v Ireland* as to how the authority exercised by the Strasbourg Court could be reconciled with the national sovereignty provisions of Article 6 of the Bunreacht.[39] In essence, these questions raise the issue of how

[36] Hartmann (n 29).
[37] This point was strongly made by Lord Hoffmann in his 2009 Judicial Studies Institute Lecture in London: see Hoffmann, 'The Universality of Human Rights' (n 28).
[38] In this regard, it should be noted that it is relatively rare for state ratification of the ECHR to be mandated or endorsed by express constitutional provisions: O'Cinneide (n 20).
[39] [2022] IESC 44. In the absence of any (referendum-inserted) express constitutional provision providing for ECHR accession, Hogan J suggested that ratification of the Convention and acceptance of the ECrtHR's jurisdiction represented an exceptional stretching of the power of the executive to enter into binding treaty arrangements under Article 29.4.2°, which was best viewed as justified only on account of the special status of the Convention and the non-binding status of ECrtHR judgments at the level of national law: [179]-[186]. In contrast, O'Donnell CJ took the view that accession fell squarely within the scope of the executive's treaty-making powers under Article 29.4.2°. The rest of the Court were happy to cite the non-binding status of ECrtHR judgments as a justification of the constitutionality of ECHR accession.

the ECrtHR's authority can be normatively justified, given the *de facto* constraints the Court's jurisprudence exerts on the freedom of national authorities to decide contested human rights issues. And they have become more pressing in an era characterised by sharp political conflict about the scope of such rights, as well as growing national sovereignist pushback against supranational modes of regulation and control.[40]

Justifying the Authority of Strasbourg

In responding to these questions, it is important to look beyond the formal legal structure of the relationship between the ECHR and its state parties. At times, the authority of the Strasbourg Court is justified simply on the basis that states have voluntarily acceded to the Convention and agreed to be bound by judgments of the Court in line with the requirements of Article 46(1) ECHR. However, this can only be at best a partial answer to the legitimacy questions surrounding the Court: state consent to being bound by decisions of the Court cannot serve by itself as a blank cheque to legitimate the Court's authority as it has developed and evolved over time. Instead, it is necessary to focus on the interaction between the ECHR and national law – and to look at the concrete dynamics of how Strasbourg case-law impacts upon the legal systems of state parties to the Convention. A close examination of the substance of this relationship shows how the legitimacy concerns surrounding the Court can be answered, and helps to clarify what 'added value' Strasbourg brings to the protection of rights at national level.

To start with, the very existence of the ECHR system of rights protection has intrinsic value. It is symbolically important that even stable, rule of law respecting democracies like Ireland are willing to accept international scrutiny of their human rights record and accept the conclusions of a supranational court. However, the Strasbourg framework also has tangible, practical and instrumental value. As specified in the Preamble to the Convention, it serves as a 'collective enforcement' mechanism to ensure state parties adhere to their commitment to respect basic rights and the 'common heritage of political traditions, ideals, freedom and the rule of law' that public governance across Europe is supposed to embody and respect.[41] And it does this by (i) distilling highly abstract 'European' values into evolving, 'living' legal norms; (ii) opening up potentially insular national legal systems to new and more dynamic understandings of rights, equality, rule of law and associated concepts; and (iii) providing an external review and checking mechanism which can prod even well-performing states to do better, and to confront their blind spots.

The Strasbourg Court plays a key role in this process. In essence, the Court's 'living instrument' interpretative approach puts flesh on the abstract bones of the rights guarantees set out in the text of the Convention. It gives a purposive reading to these provisions, emphasising the need for such rights to be effectively protected at national level, and develops its case-law by reference to its pre-existing jurisprudence, the existing practice of state parties (the famously cloudy concept of 'European consensus'), and the underlying values which provide the foundation of the Convention system.[42] This interpretative approach keeps the Convention relevant to contemporary conditions, and ensures the ECrtHR's case-law is open to new and evolving concepts of rights – meaning that, for example, Strasbourg jurisprudence has served as a vector for the spread of legal protection

[40] With the Supreme Court's judgment in *Costello*, ibid, being an interesting example of such pushback.
[41] *Austria v. Italy* App No 788/60, admissibility decision of 11 January 1961, 18.
[42] See in general Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015).

against discrimination on the basis of sexual orientation,[43] disability,[44] and other 'suspect' grounds, while also playing an agenda-setting role in relation to new legal, social and technological developments which have the potential to impact negatively on fundamental rights.[45]

However, the Court does not manufacture its jurisprudence in regal isolation. Its case-law has evolved through the incremental unfolding of the individual complaints procedure over time, with the Court adjusting track in response to dialogic signals from national courts and the governments of state parties – as well as responding to the inevitable aporia, internal tensions and demands for clarification and/or extension generated by such a quasi-common law, accumulative, piecemeal process of legal norm generation. It has inevitably been a reflexive and iterative process, with the Court responding to the particular legal issues brought before it from the different member states and generating specific feedback loops with national courts and other key legal actors.[46] Furthermore, it is a process that is heavily influenced by the reactions and responses of state parties, mediated through the highly political character of the Council of Europe mechanisms which assess whether states are complying with Strasbourg jurisprudence – not to mention the various reform processes launched over the last decade, which have provided a vehicle for states to push back against elements of the Strasbourg jurisprudence which they dislike.[47] All this means that Strasbourg jurisprudence gradually crystallises the abstract norms set out in the Convention text into tangible, relevant and relatively concrete legal norms – capable of being applied not just by the Court, but also by national courts aligning domestic law with the requirements of the Convention.[48] This jurisprudence emerges from an iterative process, in which state parties play a significant role. And, crucially, it is national legislatures, executives and courts who ultimately determine how Strasbourg jurisprudence is infused into the bloodstream of domestic law, in line with the requirements of their own democratic constitutional legal orders.[49]

All this means that the ECHR has come to perform a specific and distinct function in European legal systems. It has become an authoritative, established and credible legal mechanism for giving substance to otherwise vague and abstract human rights guarantees, and for prodding domestic legal and political actors to align national law with the cautiously evolutive understanding of rights developed by the Court. As such, it opens up potential national 'blind spots' to challenge and contestation. As Kjaer argues, 'nation-state law…in essence remains oriented toward the upholding of already established normative expectations', but 'transnational law' (such as the Strasbourg jurisprudence) functions as a 'learning process', helping national law adopt and adjust to the existence of other normative

[43] *Dudgeon v UK* (1983) 5 EHRR 573; *Karner v Austria* (2003) 38 EHRR 528.
[44] *Price v UK* App No 33394/96 (10 July 2001); *Guberina v Croatia* App No 23682/13 (22 March 2016).
[45] *Glukhin v Russia* App No 11519/20 (4 July 2023) (facial recognition technology).
[46] Magnus Esmark and others, 'Adjudicating National Contexts – Domestic Particularity in the Practices of the European Court of Human Rights?' (2022) 23(4) German L.J. 465 – 492.
[47] Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) 25(4) European Journal of International Law 1019–1042.
[48] Janneke Gerards, 'The European Court of Human Rights and the National Courts: Giving Sense to the Notion of "Shared Responsibility"', in Janneke Gerards and Joseph Fleuren (eds) *Implementation of the European Convention on Human Rights and of the Judgments of the ECTHR in National Case-Law: A Comparative Analysis* (Intersentia 2014), 13-93.
[49] Bellamy (n 47).

expectations that lie outside its traditional purview.[50] This captures well what 'added value' Strasbourg brings to existing domestic frameworks of rights protection, and why it is generally acknowledged to be an invaluable part of European frameworks for protecting rights, democracy and the rule of law.

In this regard, it is striking how many decisions of the Strasbourg Court over time have been implemented by national authorities without much fuss – and also how many of these judgments are now recognised in retrospect to have brought about desirable and necessary changes in domestic law. This dynamic is reflected in the Irish experience, in cases such as *Airey* and *Norris*. But the same is also arguably true of the UK.[51] In general, as the President of the Court, Síofra O'Leary, recently commented, Strasbourg jurisprudence has often provided fresh 'oxygen' to wilting national rights standards.[52] And it is this added value of the ECHR, taken together with the 'final say' exercised by national authorities over the extent of its influence on domestic law, that underpins the legitimacy of the ECHR process.

Conclusion

As such, President Higgins is right to acclaim the ECHR as a 'cornerstone of human rights' protection across Europe'. Similarly, the Irish courts are right to give considerable weight to Strasbourg jurisprudence both in applying the 2003 Act and interpreting domestic constitutional rights, while insisting on their own final authority to determine the content of Irish law. The balance thus struck between (i) absorbing the fresh 'oxygen' provided by Strasbourg jurisprudence while (ii) affirming the ultimate authority of the constitutionally established organs of the Irish state reinforces the legitimacy of the relationship between the ECHR and Irish law – and helps to shore up the Convention's particular and distinct status as a 'favourite of national law and the constitutional order', even as beyond Ireland it increasingly faces substantial political and legal challenges.

[50] Poul F. Kjaer, 'The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law, and the Political in the Transnational Space' (2010) 2 Wisconsin L. Rev. 489-532.
[51] See in general Colm O'Cinneide, 'Human Rights and the UK Constitution', in Jeffrey Jowell and Colm O'Cinneide, *The Changing Constitution* (9th edn, OUP 2019), 58-93.
[52] Síofra O'Leary, 'Legal Tales of European Integration: the ECHR and Modern Ireland' (Iveagh House EU 50 Lecture, 1 February 2023) <https://www.echr.coe.int/documents/d/echr/Speech_20230201_OLeary_Iveagh_House_EU50_Lecture_ENG> accessed 18 July 2023.

HUMAN RIGHTS IN A CHANGING WORLD[1]

Author: Roderic O'Gorman, Minister for Children, Equality, Disability, Integration and Youth

President Spano, Vice-President O'Leary, Justice O'Donnell, Justice O'Malley, a chairde, friends, I joined the faculty here in DCU ten years ago as a lecturer in European law, and so it's a special joy for me to be back on campus today to speak alongside some of Europe's finest legal minds, and to reflect on a subject that matters hugely to me, to all of us – the state of human rights across our continent. As a lecturer, I could stand at this plinth and talk for hours at a stretch but as every academic knows, the only sure way to stay awake through a closing conference speech is to deliver it. So I promise I'll not keep you long from lunch, or from the joys of a Dublin weekend. In closing this conference, however, I do want to say a little about the values to which our state aspires, what we've sought to achieve these past months through our Presidency of the Council of Europe's Committee of Ministers, and what we hope the legacy of our half-year Presidency term might be.

Ireland assumed the Presidency of the Committee of Ministers in May 2022, at a point of profound crisis for our continent and challenge for the Council of Europe. We have long held the organisation to be the 'Conscience of Europe' and in March, it acted as such, becoming the first international organisation to expel Russia in the wake of its unprovoked invasion of Ukraine and egregious violations of the European Convention on Human Rights. Assuming the Presidency in May, some weeks later, Ireland's overarching goal was to renew Europe's conscience, refocusing, in the wake of Russia's expulsion, on the institution's core values and ensuring the Council's expertise was directed as effectively as possible in support of Ukraine and her people. In that context, we backed agreement of the Council's new adjusted Ukraine Action Plan. In July, we helped to fast-track Ukraine's accession to the Council of Europe's Development Bank, establishing a new Donor Fund there to aid those displaced by the war. And in September 2022, for the first time in our state's history, we sought leave to intervene as a third party before the European Court of Human Rights in the case of *Ukraine v Russian Federation*.

While, ahead of High Level Week at the United Nations, our Presidency led the Committee of Ministers in reaffirming the urgent need for an unequivocal international legal response to Russia's crimes of aggression against Ukraine. Last week, President Higgins and President Zelensky both addressed the Council's Parliamentary Assembly in Strasbourg. And underlined the need to hold the Kremlin to account for their actions. Let there be no doubt: the authorities in Moscow and in Minsk cannot, and will not, escape accountability. But we must not sunder ties with their citizens. As of 16 September, 140 million Russians no longer enjoy the vital protections the Convention affords, just as ten million Belarusians never have. That is their tragedy.

At the Council of Europe, I believe, we have a duty to limit its worst effects and to support those pressing to restore rights across our continent. That's why, at our Presidency's invitation, Sviatlana Tsikhanouskaya, a friend of Ireland from her teenage years, addressed the Committee of Ministers in July. There, she called for 'more Council of Europe in Belarus, and more Belarus in the Council of Europe.' Last month, the Committee of Ministers agreed to deliver just that, committing to holding regular exchanges with Ms Tsikhanouskaya and

[1] This is the text of the speech delivered by the Minister to close the Conference.

establishing a 'Contact group' to engage with representatives of Belarusian democratic forces and civil society – a first in the Council's 73-year history. We hope that, before long, similar steps can be taken to engage Russian democratic activists and human rights defenders, because it's through their bravery that, in the words of Vaclav Havel, we give 'power to the powerless'.

The tasks of the Committee of Ministers are many. Through our Presidency, to date, Ireland has already convened more than fifty conferences, seminars and events such as this. To give you some sense of the range of the Presidency's work, let me mention a few current initiatives which, as Minister for Children and Equality, I consider especially important. On 29–30 September 2022, in Dublin, our Justice Minister Helen McEntee led counterparts from 38 European states in agreeing a Declaration recommitting to the Istanbul Convention, bolstering our collective efforts to strengthen legal standards in the area of gender equality and violence against women. As that conference's title stressed, there can be 'no safe haven' for those perpetrating violence against women, nor can there be any credence given to those states maintaining that, in denying individual rights, they are somehow defending traditional values: that in promoting fear, they are somehow protecting families. Three days after that Dublin Declaration, I hosted a conference myself devoted to safeguarding the rights and best interests of children and young people in parental separation and care proceedings. Next week, I will open a European roundtable where policy makers, academic experts, and civil society from across the continent will gather to shape new approaches to countering anti-LGBTI hate crime.

The challenges facing the Council and the continent today are profound, but grave moments, we believe, must be matched by great ambition, and our aspirations have reflected that. So it was that in June 2022, our Presidency led in convening a High Level Reflection Group, chaired by our former President, Mary Robinson, to consider the future of the Council of Europe. Distilling submissions from the Court, the Parliamentary Assembly, and many other stakeholders, that group published its final report on 5 October 2022. It presents a blueprint for institutional renewal. At its core, and at the heart of our Presidency, is a recommitment to what, as a founding member of the Council, we consider the institution's 'Founding Freedoms'. Above all else, that means the reinforcement of rights and protection of civilians through the work of the European Court of Human Rights. On 11 October 2022, President Higgins called on the Court to meet President Spano and Judge Síofra O'Leary, just as our Taoiseach, Micheál Martin did in May. As President Higgins remarked, Judge O'Leary's election to succeed President Spano reflects her exceptional abilities and the standing in which she is held by her peers in Strasbourg. But even as we recognise the Court's independence, for all of us in Ireland, it's also a source of great pride because, better than most, I think, we understand the importance of the Court having seen our society shaped by it.

In September 2022, the brave organisers of Europride in Belgrade affirmed to the world that LGBTI rights are Human Rights. On 4 October 2022, Slovenia made history as the first eastern European state to establish marriage equality. In 2015, the Irish people voted overwhelmingly for the same right. My DCU colleague, Ann Louise Gilligan, was amongst the leading campaigners, and, alongside her wife and my predecessor as Minister, Katherine Zappone, I was privileged to join her in Dublin Castle to celebrate that incredible May day. But the path to that remarkable referendum result was laid twenty seven years earlier in the courtrooms of Strasbourg when Senator David Norris, a champion of civil rights, won a case against the Irish state that decriminalised homosexual acts. It was a testament to David's bravery, and to the brilliance of the barrister who represented him – Mary Robinson – but

also to the vital importance of the Court in protecting individual rights, and the wisdom – for any who doubt it – of States implementing the Court's judgments, however challenging they might seem. Because a Court ruling ignored is not only a human right infringed: it is societal progress delayed.

In protecting fundamental freedoms, the European Convention on Human Rights is our North Star, and the Court our compass. The implementation of its judgments is not simply a legal requirement: it is a moral imperative. That is why the Irish Presidency has treated so seriously Türkiye's continuing failure, as a Party to the Convention, to implement the judgment of the Court and release Mr Osman Kavala. My colleagues, Minister for Foreign Affairs, Simon Coveney, and Minister for European Affairs, Thomas Byrne, have raised Mr Kavala's case several times over recent months with their Turkish counterparts, and following these exchanges, are now seeking to appoint a contact group, comprising Ambassadors in Strasbourg, to visit Ankara to impress upon Turkish authorities how vital it is to comply with the Court's ruling. To the same end, as part of a package of almost two million euro in new voluntary contributions to the Council, Ireland has committed additional resources to fund the implementation of Court rulings and urged others to do the same.

When Judge O'Leary succeeded Judge Spano as President of the Court in November 2022, she joined Secretary General Marija Buric and Commissioner for Human Rights Dunja Mijatović in leading this Council. How much stronger Strasbourg is for having such brilliant female leaders across three of its offices. But let me end today by honouring another remarkable woman who left her mark at the Council. We gather today in a theatre dedicated to Seamus Heaney, but in this week, a year ago, Ireland lost another of its greatest poets and states people. Máire Mhac an tSaoi was amongst the first Irish female diplomats and the first Irish woman to serve as Permanent Representative to Strasbourg. Born in the same year as the Irish State, she passed on 16 October 2021, aged 99 years. In 1959, as Ambassador to Strasbourg, she prepared a report on the Council of Europe's first decade for the Government in Dublin. The world has changed a great deal since, but her reflections are as true now as then. She described the Council as 'a stage in international progress unimaginable before the last war', and of the European Convention of Human Rights, she observed that it was 'designed as an additional safeguard, over and above those provided by our courts and constitution, for the freedom of the individual and was accepted by us as such', adding 'That it has shown its effectiveness in a manner somewhat disconcerting to us should not prejudice us against it.' Her words capture the fundamental purpose of the Convention system to which our states collectively subscribe, and remind us that those arguing for dilution or departure from the Convention because certain rulings are 'somewhat disconcerting' are missing the point. Because, it is in those very rulings that the Court affirms its effectiveness, and safeguards the freedom of the individual.

Máire Mhac An tSaoi represented Ireland in a number of languages, but she's known – and revered – as a poet of the Irish language. Mar sin, is cúis bhróid agus áthais dom an chéad leagan Gaeilge riamh de Choinbhinsiún um Chearta an Duine a chur os bhúr gcomhair inniu. It is therefore a privilege and joy for me today to rectify a long-standing anomaly by presenting a first Irish language translation of the European Convention on Human Rights and Fundamental Freedoms to the Court. Rinneadh aistriúcháin ar an gCoinbhinsiún i mbreis agus daichead teanga, agus dá bharr sin ba chóir go mbeadh leagan Gaeilge ar fáil faoin am seo. The Convention has been translated into more than forty languages. So it's long past time that an Irish version of the text should be available. On behalf of our Presidency, and with thanks to Donncha Ó Conmhuí, it's an honour for me to present it today in honour of Máire Mhac An tSaoi: in n-ómós do Mháire Mhac an tSaoi. And in the

knowledge that, changed and challenged as our continent might be, the rights this Convention affirms - and our Court protects – are constant.

Go raibh maith agaibh go léir.
Thank you all.

THE MYSTERIES OF THE COMMON LAW

Abstract: Oliver Wendell Holmes stated that 'the life of the law has not been logic: it has been experience'. These words provide a cornerstone for understanding the common law. This article discusses aspects of the common law that are perhaps misunderstood, from its origins to the ways in which it develops according to the world that it exists in, the role of the judge in common law courts and certain principles that are unique to it. In contrast to a civil system, the common law is flexible and ever-changing and this article focuses on the intricacies that make it a unique system of law.

Author: Peter Charleton, Supreme Court of Ireland, adjunct professor University of Galway, and Liam Lochrin, Judicial Assistant.

The Romans had a legal code, as did the Greeks, as did the Kingdom of Jerusalem before its final collapse in 1291 and, today, every country in Europe has one with only Cyprus and Malta surviving with vestiges of English judge-made law, thus leaving Ireland, conquered by the Normans from 1169 on, the last common law legal system within the European Union. The point of a code is to remove from the deciding judicial mind any personal point of view as to where justice lies: the judge applies the law and that is it. But, since the common law is flexible, is the system flawed so that emotion may intrude, distorting the decision that otherwise would have been made?

There are many misconceptions about the common law: that it was made up by judges; that judges can follow their emotions and change or bend legal rules to give a fair result; that it is personal to judges; that there are no rules; that if there are rules, they are impossible to find; that the whole mess is not about rules but about picking out some case from a smorgasbord of varying precedents and saying 'this is it, here is the rule that applies to you!' Thus, step into a common law court and the outcome becomes like what Forest Gump said, 'Life is like a box of chocolates – you never know what you're going to get.' Except, in common law, it is supposed, the judge chooses! Actually, codification followed on from writing down the customary rules followed by judges. In Ireland we had the Brehon Laws, literally the laws made by judges. As a matter of history, law came from morality, with God giving the ten commandments to Moses[1]; but were there not already basic rules without which a society could not survive? If you murder your neighbour, would it not set off revenge, blood feuds, generations of strife? Similarly if you stole, how could it be expected to be left unchallenged; or rape; or arson; or adultery?[2] Some people claim that deep down in human consciousness is to be found that natural law whereby we are all guided to live lives; that we are, in other words, guided by conscience and that its dictats speak from person to person with the same voice. If before codes of law, we had conscience and then customary law or judge-declared law and then codes of law, it must be clear: this is progress, and codification represents the summit. If that is so, then the common law is a mish-mash, arcane, chaotic and useless.

How much common law survives?

Speaking now about Ireland, and about England and Wales, but not the different system in Scotland, huge swathes of common law survive[3]. Contract law, tort, agency and restitution

[1] *King James Bible*, (Oxford University Press 2008) (Original work published 1769), Book of Exodus 19-24.
[2] Peter Charleton, *Lies in a Mirror,* (BlackHall Publishing 2006), 100.
[3] Theodore Plucknett, *A concise history of the common law* (The Lawbook Exchange Ltd 2001).

are some areas that are governed entirely by common law. In European Law, there is not a trace. In Irish company law the entire edifice was a conceit, that a company is a different person to its owners, was erected by legislation and confirmed by judicial decision; in revenue law the rule is no taxation without representation and so parliament made every single rule enabling taxation; and there is no equity. So, Ireland and England are also familiar with codes. That goes back centuries, with codes of taxation by Parliament coming after Magna Carta and the Joint Stock Companies Act of 1844 establishing regulation for artificial enterprises.[4] But when it comes to contracts, it is all common law, except for a few areas like sale of goods[5] and even there it is just a codification of existing judge-made law and product liability, which is EU law; and tort law, about liability for negligence, nuisance, defamation, and all that, that's all common law; and that's really the core of what most cases in court are about and the foundation of business relations. So, it's a huge swathe. And a very important one. But how can you find the rules; where did it come from; and isn't it impossible to predict and to work out because a judge's emotions, his or her feeling about the case, dictate the result?

Origins

When England was conquered by the Norman-French, and subsequently Ireland by the Anglo-Normans a century and a half after King Brían Ború had defeated the Vikings in 1014 in Clontarf,[6] King Henry II had sent his judges out from London to large towns to sit in judgment over wrongs claimed to have occurred in the area.[7] Grand juries would say what the wrongs were that they suspected. The judges consulted with each other as to what law they had applied, how a problem was solved and came together to standardise rules; resulting in the first treatise on English law: *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvill vocatur,*[8] on the causes of actions in royal courts, dating to around 1189. In some courthouses, you can see the physical evidence of this consultation among judges as to what the rules actually were. This was so that individual emotion would not prevail but that laws could be standardised. In the Four Courts in Dublin, for instance, dating from 1792, there was a cloister to the front where, under a colonnade, judges would meet and talk over lunch about their cases; in the Inns of Court, located in the King's Inns in Dublin, judges were expected to dine together and no barrister could be called into the profession without attending lectures and eating in the same room as them; judges did not just sit and hear a case but went out and spoke about the true nature of the legal point to more expert colleagues: hence, you get a recurring phrase in the law reports up to the 19th century such as, 'I have consulted by brother Cave, and he is of opinion, as am I, that …' This was not about emotion: it was about consistency. And then there is the doctrine of precedent: that as far as possible, if a legal point was decided already, that all judges of the same level should follow that view, and that if a superior court had ruled on a point, that all inferior courts were bound to decide according to the precedent.[9] Furthermore, even the Supreme Court has to follow its own precedents:

> The path to reversing a decision must be paved with compelling reasons leading to a point demonstrating error in a prior judgment. Since justice is the fundamental principle upon which the constitutional order is built, and

[4] M.S Rix, 'Company Law: 1844 and To-Day' (1945) 55(218–219) The Economic Journal 242-260.
[5] Sale of Goods Act 1893.
[6] Seán Duffy, *Brian Boru and the battle of Clontarf* (Gill & Macmillan Ltd 2013).
[7] Paul Brand, *Henry II and the Creation of the English Common Law* (Cambridge University Press 2012).
[8] Gaines Post, *Tractatus de legibus et consuetudinibus regni Anglie qui Glanville vocatur* (Nelson 1967) 162-165, (Originally published 12th century).
[9] *Attorney General v Ryan's Car Hire Ltd* [1965] IR 642, 653.

> since certainty of law is an aspect of true social order that enables litigants to predict the basis of the application of any decision to their cause, it may only be in the most exceptional of cases where departure from a fully considered precedent may be considered possible.[10]

Common law judges stick to precedents in order to establish uniformity, to set down the foundations of the law with certainty and to avoid personal judgments. But, it may be asked, with so many decided cases, so many principles, how do you find the law and can't you just choose one precedent so as to reach the result the judge's emotional reaction leads to?

Only one judge!

In France, courts sit in banks of three. Most civil law countries have that as well, with the Netherlands holding criminal trials before three judges, a full rehearing before three other judges on appeal and then a legal appeal after that. What really matters is what works for each country; but more importantly, what are the other rules so that the system as a whole functions. You cannot take a rule from another country and say 'that looks nice' without considering how that rule interacts with the entire procedure within which it functions. In Ireland, to take an example, many victims groups think that someone who complains of rape ought to be represented in court. But to do that might upset the existing balance as between the person accused and the prosecution so that the accused now has two legal teams against him.[11]

History, again, shows where the single judge trial comes from at common law. When Henry II sent out his judges to try cases according to a common system, several judges would travel England but only one would try cases. A case would come before a judge because the grand jury had indicted an individual on the basis of a believable complaint. A judge would not sit on a capital or serious criminal case without a petit jury, the jury we know today of twelve citizens. So, in criminal cases, there was no single judge trial. The exception is for small cases and there the origin of the law was similar, with vestiges in England today with the magistrates system. Historically, the local worthies would have reported to them those who needed sorting out. They would require suspected miscreants and their accusers and witnesses to come before the bench, summoning them. There the cases would be tried before three untrained gentlemen who would sit with a legally-trained registrar. That system continues today but England no longer has grand juries and magistrates no longer initiate cases themselves; but the summons system survives as a vestige.

The French would be shocked to learn that once a judge is appointed in Ireland, that judge may declare that an Act of Parliament is unconstitutional. But like a rule plucked out of context, that is how it works but that is not the full picture. In Ireland, a judge of the High Court has, under Article 34.3.1°, 'full original jurisdiction in and power to determine all questions whether of law or fact, civil or criminal.' That is a single person! We trust judges to act responsibly, but we also surround them with rules. A judge is independent; but like the judges of old in hearing a case, he or she may consult with colleagues. In every court with this power to declare an Act of Parliament unconstitutional , the judges meet for lunch every week and also meet for dinner in the King's Inns, but infrequently. Every judge has at their

[10] *Braney v Ireland* [2020] IESC 76.

[11] Peter Charleton and Orlaith Cross, *Towards a Presumption of Victimhood: Possibilities for Re-balancing the Criminal Process* (2021) 5(2) IJSJ.

disposal the telephone, which puts them in contact with perhaps others who have a greater knowledge or off whom ideas may be bounced. In my career, I have fielded such phone calls. The purpose is not to tell your colleague what to do, rather to hear them out as to what they have to say, find out how certain they are and to perhaps gently suggest another point of view. That is as far as it goes. Also, all Acts of Parliament must be construed so as to have a constitutional outcome, the principle of constitutional interpretation, provided that a judge does not add words or subtract words from the text.[12] Every judge is subject to appeal. But that appeal is limited in the sense that an error of law is corrected on appeal but facts are left within the province of the trial judge. Hence, unless there was no evidence for a fact found at trial, or the finding of fact was unreasonable given the weight of the evidence, the Supreme Court or the Court of Appeal is bound by what the trial judge decides in fact.[13] These principles can be more concisely stated as follows:

1. Findings of fact supported by credible evidence are not to be disturbed.
2. Inferences of fact derived from oral evidence can be reconsidered, but an appellate should be slow to do so.
3. Inferences drawn from circumstantial evidence can be more readily put aside by an appellate court since that court is in as good a position to draw its own inferences as the court of trial.[14]
4. Even on affidavit evidence: the trial judge is only to be overturned if he or she took a wrong legal decision, or if their assessment of fact was unreasonable.

So, yes, we place enormous reliance on trial judges. Why? Well, think: when you are an advocate, your back is turned to the court; you see the judge and the witness but that is all. In contrast, it is a weird feeling of overview when you sit on the judge's bench: a witness speaks but you see the reaction of everyone else in the room; a witness talks about someone else – you see that person as well as the witness. You spot how lies are going down with those about whom they are told, or how the truth impacts on the parties to a case.

Dissenting opinions

When cases are appealed, then three judges sit. We have collegiality. But not anonymity. Judges are known: but none of us are celebrities. We are expected not to go into pubs, except when accompanied by one's family while on holiday and then only for food and refreshments. We cannot appear on the television or the radio or have private blogs. Any speech of mine, including the speech from which this article is based, I send to the Chief Justice for approval in advance. We are absolutely forbidden from discussing any case we made a decision in; an exception being an academic and private conference in a university and even then it is guarded. When we write a legal paper, we shy away from expressing definite opinions on law reform; rather we might say 'it could be suggested … perhaps a reform might consider … some may think, perhaps reasonably' or some such phrase which makes our meaning both clear and ambiguous at the same time.

Dissenting judgments are a plant that grows well only out of a common law soil. There the plant is nourished by the individuality of opinion, by the resort to reason and not to the inflexible words of a legal code and, more than anything, by the strands of prior reasoning

[12] *McDonald v Bord na gCon* [1965] IR 217.
[13] *Hay v O'Grady* [1992] 1 IR 210.
[14] *Ryanair v Billigfluege* [2015] IESC 15, [4].

whereby there may be identified a sufficient flexibility to deal justly with the variety of human experience and human fault. This is a transparent process: one whereby because of a dissent, the majority are challenged to respond by strengthening their opinion to make their reasoning more convincing. Thereby the apodictic of what the law is becomes set on even firmer foundations. But, this can be exaggerated so that the dissenting judge assumes a heroic mantle, even when it is plainly evident that he or she is wrong. Furthermore, it is the majority opinion which blazes the legal trail while the dissenter is, in reality, cast by the roadside. The utility of dissent is in challenge, in advancing reasoning, in demonstrating the strength of the majority, in openness and, above all, in enabling those subscribing to a judgment to actually be seen as fully agreeing with it; instead of blundering into a confirmation of what may be the lowest common denominator of reasoning. But, let's not exaggerate: well, why not? Here goes: 'A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been brought.'[15]

Reasoning and deduction are the basis of common law judgments, effectively making the correct rule emerge out of the context of precedent. Otherwise, it has been said, the civil law judgment reflects the more limited role of the judge in merely applying the code of law. But, into the code of law went many opinions, and perhaps the discourse has already taken place? It should not be forgotten that the hundreds of cases that are dealt with during the daily workload of the Irish or English courts require no more reasoning than this: the court accepts the evidence of the defendant because it conforms with the background and undisputed facts; or, the court applies the relevant case, which states the law very clearly. That is the everyday situation. Then there are the difficult cases which call for all the stops to be pulled out. Such a one was *UCC v ESB*, where a university flooded by a hydroelectric dam sued the national electricity company.[16] Why was it not easy? The electricity company had a duty to produce electricity, not apparently to protect people downstream from its dams from flooding; American cases had said the law on this was that there was no liability unless the dam company added to the flooding; do not worsen nature. But in that case, the ESB was found liable, returning the case for hearing to find out if water had been released earlier, how much lower, if at all, would the water have been. There, a clear result was to be found. But not in all cases. Many of our judgments are too discursive: going on too long, being hard to make out. There are noteworthy examples. In *Dellway Investments v National Assets Management Agency,* the issue was the taking over of bad debt of builders in order to save Ireland's economy.[17] The plaintiff company won on procedural grounds, having lost in the High Court. But, the point here is that the judgments of that case take up an entire volume of the official reports. Can the essence of those judgments be stated? Well, every report begins with a very clever reporter's summary; and many rely on that. When you write a text book you try to put decisions into pithy phrases. These are, as we see in the next section, precedents.

The European Court of Human Rights has dissenting judgments, the Bundesverfassungsgericht enables a dissent, rarely taken,[18] and some civil law systems have dissents. We rarely have dissents on appeal in criminal convictions; but when there is a further appeal to the Supreme Court, there may be a dissent, but that has only happened once.[19] Criminal cases differ from civil ones: in criminal cases the accused is only convicted

[15] Charles Evans Hughes, *The Supreme Court of the United States* (New York 1928) 68.
[16] [2021] IESC 21.
[17] [2011] 4 IR 1.
[18] Federal Constitutional Court Act of 21 December 1970, section 30(2).
[19] *The People (DPP) v FN* [2022] IESC 22 is so far the only example on substantive criminal law.

if reasonable people would consider there is no doubt; similarly, on appeal, there should not be a doubt. Dissent in some types of case may weaken the public trust in the system of justice; but should it? Let us admit that the public do not read legal judgments and that all will be reported is bare numbers: by a 3 to 2 majority, the Supreme Court decided whatever. Nor do journalists. But academics and students do. The confidence of the common law system is in the reasoning and the adherence to and foundation in precedent. That is pretty obvious when the trouble is taken to actually study the outcome of the discourse. Then, matters become transparent. Dissent is human. In what family is there not dissent? And is a dissent actually a dissent? In the common law system, what a dissent acts as is a strand in the reasoning in the final decision as we, in Ireland, and in England too, just state our point of view and we attack no one.

There can be great, prescient and prophetic dissents but for that there have to be real divisions in society and real injustices that are being ignored. Perhaps in the future, scholars will look back and find injustices that we have ignored as, being immersed in our own certainty, what seems to us to be right may be entirely wrong. Examples include the dissent of Brandeis J in *Olmstead v US*,[20] Holmes J in *Abrams v US* and, my own favourite, that of Harlan J in *Plessy v Ferguson*.[21] Were I alive during the New Deal, I would have dissented from the economic self-correction doctrine that the Supreme Court then promulgated. But, look at the issues! *Plessy* was about racial segregation on busses, in the use of all public facilities: that was okay said the majority because it was 'separate but equal.' Now, where have we heard this before? *Olmstead* decided that listening to phone traffic could not be equated with physically searching a suspect's home – where police need a warrant. And *Abrams* decided that leafleting in protest against US involvement in the Russian civil war of 1919 was a crime.[22] The offence was wilfully to speak or publish 'disloyal' language about the American political system or to incite or advocate 'any curtailment of production . . . necessary or essential to the prosecution of the war . . . with intent . . . to curtail or hinder the United States in the prosecution of the war.'[23] So, free speech did not come into it!

But there are dangers and as to how pressing these are depends on the system within which dissents may be allowed. Questions need to be asked: will dissents undermine the civil code; will dissents add to the reasoning and not undermine the majority; will dissenting judges grandstand and hope to become heroes to sectional groups that seek to destroy national cohesion? Are there celebrity judges? Why ask the question? Well, the feeling is that when a person goes into court, he or she is not there being judged by a person but by a system: hence the French having a banc of three judges. That is right. But the system is the law and the individual judge represents the law. Certainly, there is Judge Judy, or Judge Rinder, but you know, a dissenting opinion does not make you a celebrity and nor, in our system, does it blow down the house of cards that is the majority judgment. Why? Because, the apodictics of the judgment blow away all contrary views: that's the theory anyway. If you ask my view, not to criticise anyone, I hate joining in an opinion I don't share and I also think that when five or more come together and hammer out a consensus that it really is not that: it is, so to speak, a horse made out of the parts of a camel and a goat – unconvincing, illogical, without integrity and having the feel of the Yellow River Concerto; the mishmash piano concerto written by a committee of composers under Chairman Mao. Well, maybe that's too strong: but it's only my opinion, after all,

[20] 277 US 438 (1928).
[21] 163 US 537 (1896).
[22] 250 US 616 (1919).
[23] 250 US 617 (1919).

Precedent

If you learn law in university and you try to learn all the cases, all the facts, all the decisions, you will fail. The common law is not like that. What a student looks for, what a judge applies, is a principle as distilled from a case and the judge applies it when a similar case comes along. While civil law system lawyers travel with a code under their arm, or a computer with access to the code, common law system lawyers rely very heavily on text books. Scholars read all the decisions and distil decisions into principles. However the common law is certain enough that it is easily possible to codify it. Australia, which has a federal system, inherited the common law as a country once part of the British Empire. In several states the criminal law has been written down in the form of a code. But all this does is preserve rules that over centuries proved to be certain. In tort law, there are codes in some American states; but it is not necessary. It is easy to achieve as much certainty as in a code.

Let me give an example from a complicated area of law that all legal systems would struggle with. Suppose a person claims that someone had committed a serious criminal offence. The accused is arrested and questioned. After a long trial, a year in preparation, the accused person is acquitted. That person feels aggrieved: they think they have been prosecuted for no reason, that there was no real evidence and that their lives had been ruined by suspicion; they sue the complainer and claim a tort. A judge does not say: is that fair? No judge allows emotion to say what the law is: rather the question is – what is the law? If you were to legislate on this difficult area, considerations of policy would have to be looked at and issues of proof. Should a legislature make it easy to get damages from a person who in good faith, bona fide, had tried to uphold the law by making a complaint of a criminal offence, then people would be terrified of going to the police. Should a legislature not, on the other hand, where a person has had their life ruined by a malicious complaint, provide for damages? A standard has to be set to make the law both workable and of benefit to society. The common law did that by inventing the tort of malicious prosecution.[24] And it can be defined by case decisions and it is. This is how *Salmond on Tort* defines the wrong:

> It is the wrong known as malicious prosecution to institute criminal proceedings against anyone if the prosecution is inspired by malice and is destitute of any reasonable cause.[25]
>
> A similar liability attaches to him who maliciously and without reasonable cause petitions to have another person adjudicated a bankrupt or to have a company wound up as insolvent.[26]
>
> Similarly, it is an actionable injury to procure the arrest and imprisonment of the plaintiff by means of the judicial process, whether civil or criminal, which is instituted maliciously and without reasonable cause.[27]

These definitions are clear and they are certain. To succeed, a plaintiff must demonstrate arrest, bankruptcy or seizure of assets without the defendant who did this having reasonable

[24] Herbert Stephen, *The Law Relating to Actions for Malicious Prosecution* (London 1888) 37; *Saville v Roberts* (1698) 5 Mod 394.
[25] John Willliam Salmond, *Salmond on the Law of Torts* (17th edn, London: RFV Heuston 1977).
[26] ibid 413.
[27] ibid.

cause and probable evidence. Could a code be any clearer? Furthermore, these are questions of law based on proven fact – not on the emotion of the circumstances. It must be conceded, however, that in some respects the common law may become over-complex notwithstanding the simplicity of its principles. Defamation is an example. A good one because it shows how the common law may develop, not just at the whim of a judge but because through deductive reasoning existing principles may allow a legal tenet to apply in a new situation.

Defamation and flexibility

The destruction of a person's character was a wrong in Roman law and is codified by Justinian.[28] Of course, you are not liable if what you say, write or broadcast is the truth: that the plaintiff really did murder his business-partner, that the plaintiff stole money. But, at common law, the defendant who publishes a newspaper article revealing the appalling character of the plaintiff must prove as a probability that what was written was true: that is not easy. But what is defamation? The wrong of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification, that person being still alive.[29] As usual in the common law, it is all about the definition. You defame someone by lowering their character in the minds of ordinary, right-thinking members of society. You can do so if that is true; hence 'lawful justification'. Expressing an opinion on an issue of public interest, such as politics, is not defamation; and neither is vulgar abuse: calling someone 'a monkey-faced tart'. And you are lawfully justified provided you believe what you say to be true or provided you have an obligation to say it and the person to whom you say it has an interest in knowing it. This last defence is called qualified privilege.

Let's give an example from the time when ladies had servants. Lady Muck suspects that her housemaid is light-fingered; that she pinches stuff. In fact, Olive Plant is honest and God-fearing. Lady Muck invites five people to her house to hear a private Chopin recital by a young pianist. On each entering her salon, Lady Muck advises her guests not to leave their handbags out of their sight as 'Olive is a kleptomaniac.' Olive hears this and she sues Lady Muck. In the case of *Plant v Muck*, the defendant will win: Lady Muck had a duty to her houseguests; they had an interest in not being stolen from; Lady Muck was not acting maliciously, though she would have been had she not believed honestly that Olive was stealing from her and likely to steal from others. Now, let's see how the emotion of striving after justice has changed the application of the defence.

While politicians are unlikely to get sympathy if they sue for defamation, sometimes what is broadcast about them becomes too much. No one had thought up to 1994 that the public could take the place of Lady Muck's guests and that a journalist could claim a privilege for revealing to the world that a politician was corrupt, even though it could not be proven or he was not. But in 1994, Albert Reynolds had to resign as Taoiseach (prime minister of Ireland) amid uproar in Dáil Éireann, our parliament. Had he misled the nation or not? The Times of London published a factual analysis, thus fair comment was not available as a defence (this was fact, not comment) and neither was showing the truth of a complex political situation possible for the newspaper. The lawyers had a clever idea, however: there was no law that private situations of qualified privilege (Lady Muck and her guests) could not apply in public. Thus in *Reynolds v Times Newspapers,*[30] the common law moved on. The House of Lords ruled that:

[28] John Baron Moyle (ed), *The Institutes of Justinian* (IndyPublish 1906).
[29] Salmond (n 25) 139.
[30] [1999] UKHL 45, [1999] 4 All ER 609, [2001] 2 AC 127.

> The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.
>
> Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.
>
> 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
> 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
> 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
> 4. The steps taken to verify the information.
> 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
> 6. The urgency of the matter. News is often a perishable commodity.
> 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
> 8. Whether the article contained the gist of the plaintiff's side of the story.
> 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
> 10. The circumstances of the publication, including the timing.
>
> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.[31]

That is a development but, also, it is the application of what was there to a new situation. In law, as in life, new situations come up all the time and the common law is there to respond; not for judges to say, 'oh no! we've never seen this before so even if the outcome is unjust, we judges are doing nothing.' That would be to respond emotionally: to wash your hands of the problem. But, developments at common law are small, incremental, logical and based on experience. Developments are not based on emotion. If the law is sufficiently clear, if the

[31] Later cases said this 10 point list was only indicative*; Jameel v Wall Street Journal Europe* [2007] 1 AC 359, [2006] 4 All ER 1279, [2006] UKHL 44, [2006] HRLR 41; *Leech v Sunday Newspapers* [2007] IEHC 223.

situation has been tested before and precedent established, the common law is a code and it will not move.

Emotion does not matter

Law matters – not emotion. Ireland was a religious country. Seamen coming into Dublin Harbour from foreign climes in the 20th century were catered for by either a Protestant or a Catholic mission, where they could go and receive refreshments and get a bed. There were two and the Catholic mission had a different name to the Protestant mission. In *Re Julian,* a Protestant lady in her will bequeathed a substantial sum of money in her will 'to the Seamen's Institute, Sir John Rogerson's Quay, Dublin'. [32] Two institutions in Dublin claimed that bequest; naturally it must be assumed the Protestant lady left her money to the Protestant institution, and to cap it all, the judge, who I knew as a child because he lived opposite me, Theodore Kingsmill Moore, was a Protestant. Despite unassailable evidence that the deceased lady knew and visited an institution called the Dublin Seamen's Institute at Eden Quay in Dublin, which shared her religious persuasion, and had no interest in another institute on Sir John Rogerson's Quay, the words she used meant that her bequest went to the institute, as she clearly expressed it, on Sir John Rogerson's Quay in Dublin. Kingsmill Moore J added a personal note to his judgment, as to how the law prevailed and how his emotions were not swayed:

> I regret having to give this decision, for the evidence which I have excluded, if I were allowed to take it into account, would convince me to a moral certainty that the testatrix intended to benefit the Dublin Seamen's Institute… This is by no means the first – and, equally, certainly, will not be the last – case in which a judge has been forced by the rules of law to give a decision on the construction of a will which he believed to be contrary to the intentions of the testator.[33]

The common law rule is: that in construing a written contract or settlement, the intention of the parties should be ascertained from the words that they have used within the ascertained context. There was no flexibility. The rules are the rules: just as if they were in a written code.

Principles underlying the common law

Oliver Wendell Holmes, while a practicing lawyer, was invited to give the Lowell Lecture in Harvard in 1880, and in those twelve lectures he explored the inner workings of the common law[34]. Holmes was something of a cynic and his conclusions might not be shared by all: but his scholarship cannot be ignored since he turned over every leaf to try and find the origins of the common law. Actually, you might say that he discovered that emotion was behind the legal rules. For instance, if there is a collision between two ships, Ship A wrongfully damaging Ship B which was in the right shipping lane, the owner of Ship A may arrest Ship B. That way the owners of Ship A gets their damages since they can sell Ship B if the money is not paid.[35] But the real emotion behind the law is a primitive feeling that someone hurt by the wrong of an object, a tree, a dog, a cow, should have it delivered to them so that they might destroy it. This may seem like the law of the jungle. But think about it: as Holmes discovered,

[32] [1950] IR 57.

[33] ibid [65] and [66].

[34] Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, and Company 1881).

[35] ibid 27.

the law channels revenge.[36] Someone's child is assaulted, the mother and father may go after the miscreant. The law, by being rational, objective and fair, will substitute the place of the parents and take revenge. In early English law, that might be through torture or execution but now it is by imprisonment. Juries trying criminal cases are warned not to rely on emotion: only judge the case on the facts as presented in court. I know, because I used to be a criminal barrister, that accused men bring in their pregnant girlfriends/wives so juries can see them, that they call their mother to give evidence on a pretext. None of this matters. While it is hard for juries to be objective, it is also hard for judges. All of this is about cold clinical judgment and jurors are excused if they know the accused or the victim or if they have such strong views that they cannot hear the case. Actually, the real danger is that the Internet will be accessed and prejudice from outside the case will enter.

Holmes told us a few home truths:

- Yes, the common law changes but it does so in a way that hides what it is doing. The judges making the decision claim that they are just applying rules but in fact the judges are inventing new explanations for existing rules and applying them as the needs of the case required.[37]
- When you make law, you make policy. What tort law is about, for instance, is finding rules that allow business to function by requiring only reasonable care in avoiding injury to workers. The consequences of an accident lie with a plaintiff unless that plaintiff can show a want of ordinary care, in which case the plaintiff recovers damages. But, what is ordinary care? In reality, the judges set the standards and then apply these to other situations.[38]
- While, for so long, people felt that the law was based on morality, since it was first administered in church courts, in reality there was no point in trying to delve into a person's mind. Instead, the law concerned itself with setting external standards. The judges set these and defined them and everyone was expected to come up to that standard. A common standard is that of 'the reasonable man'. Who defines him? Judges do.[39]

Development of the law of negligence as exemplar

Negligence as a concept has come up like a tide and almost swamped every other tort. The Supreme Court in Ireland has warned against this. Torts which are well defined and fit the facts of the case are not to be displaced by a plea of negligence.[40] The Supreme Court in *Cromane Seafoods*, held:

> Negligence is not all encompassing. It has not swamped every other tort. If ill is broadcast of a person, the remedy is defamation. If a person is illegally arrested, the remedy is false imprisonment. If in public office, something is done which affects rights, the remedy may be judicial review in terms of

[36] ibid 41.

[37] ibid 35–39.

[38] ibid 109.

[39] ibid 37–38.

[40] *Cromane Seafoods Ltd v Minister for Agriculture* [2016] IESC 6.

> overturning a decision in excess of jurisdiction or, if damages are sought, tort law requires that a claimant should prove misfeasance in public office.[41]

This was affirmed recently in the case of *UCC v* ESB.[42] The law of torts started with situations of trespass or nuisance which were only provable when the plaintiff demonstrated the defendant was negligent. In the famous case of *Donoghue v Stephenson* that evolved into a free-standing wrong: where people were so proximate that the actor had to take into account what consequences his or her actions might have in injuring other people, there was a duty to take reasonable care, and if damages resulted from negligence, a defendant was liable. [43] But, what about this principle that judges invent policy? The development of the law of negligence exemplifies this. Suppose the police prosecute you in good faith but leave out some evidence; suppose public officials carry out their duty but wrongfully and a property owner suffers damages; suppose planning permission to build a factory is refused wrongly: can the wronged-person sue? No, because public policy comes into the mix. First you have to find a duty of care. A solicitor drawing up a will has a duty to a beneficiary to see that he or she gets what the testator wants; a person advising in a special relationship must give careful advice; a doctor operating on a patient has to exercise professional skill and judgment; a motorist on the road must take care. Then you define the standard; that of a reasonable professional/reasonable person but no more. This is not insurance. The damage must result from the wrong and not be remote.

Since negligence has the capacity to apply to every situation; to courts, to politicians legislating, to investigating magistrates; it must be limited. And here, it is the judges who have come up with the limitations as a matter of policy. A feeling, or emotion, of what is right is what limits the danger of a modern state being frozen from functioning because of fear of being sued. In modern form, this is how it is expressed:

> There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff.[44]

And it must be admitted that the current state of the law has been developed through trial and error and informed by the feeling that not every wrong entitles a plaintiff to recover damages when to do so would inhibit the functioning of our democracy.

In the correction of the law, where the common law is flexible, emotion can play a part. I give here an example from criminal law.

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[41] [2016] IESC 6 [29] (Charleton J).

[42] [2020] IESC 38.

[43] [1934] AC 562.

[44] *Glencar Explorations Limited v Mayo County Council (No 2)* [2002] 1 IR 84.

Self-correction as a paradigm

The common law can self-correct. It can go wrong and through an analysis of the consequences, judges can come to the conclusion that the principles were wrongly applied. But is it merely that? Holmes would say that this is an example of judges making law or, going further, making policy. As Holmes said:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[45]

In *The People (DPP) v McNamara,*[46] the Supreme Court was faced with a crime of passion. Some might say a gang-warfare crime. The accused belonged to a motorcycle club and it had a dispute with another club. The accused had been confronted in a bar by a member of the rival club and had his club insignia ripped off and his wife insulted. That night some members of the rival club came and threatened him outside his home. The next day, he got a gun and tracked down the car of the person who had insulted him and followed that car. The accused went to the rival club premises. He parked his car and went over to the gates. There he shot a man who had no connection to events beyond being a member of the rival club who bled to death. The accused claimed he had acted under provocation. The trial judge said there was no sufficient evidence to support that claim and disallowed the defence, whereupon the jury convicted.

Provocation as a defence has a long history and its development can be seen as reflecting the emotions of society and judges' responses to those prevailing moods. The defence reduces murder to manslaughter; hence the accused need not automatically be punished with life imprisonment, it may be lesser. It started to stop gentlemen who duelled with each other being convicted of murder. It developed in a quite misogynistic way, excusing the rage of men when girls in a sexual encounter mocked their performance.[47] It came to be very heavily influenced by Holmes' notion of 'the reasonable man'; thus it was objective: the accused was expected to react only as a reasonable man would. You may ask would a reasonable man ever react so much as to lose his temper to the point of killing someone? Then, in an English case where a boy had been sexually assaulted multiple times, a final insult caused him to hit his torturer with a pan and kill him. At trial, the history of abuse was said to be irrelevant, nothing to do with the reasonable man. On appeal, the fixed characteristics, pregnancy, race if the insult was racial, and abused state were allowed to be added to the reasonable man. [48] In Ireland we went further and said that provocation was entirely subjective.[49] So, you judged the reaction to an insult from no objective criteria at all. That proved to be unsatisfactory. In the *McNamara* case, the Supreme Court overturned 40 years of precedent and said that in reality the true law was that people were expected to keep their temper and that male rage

[45] Holmes (n 34) ch 1.
[46] [2020] IESC 34.
[47] The history is set out in *DPP v McNamara* [2020] IESC 34.
[48] *R v Camplin* [1978] AC 705.
[49] *The People (DPP) v MacEoin* [1978] IR 27.

against women, which accounted for many cases, was not an excuse. This was welcomed by leading commentators:

> The development of the case law on provocation in Ireland shows that there was a need for clarification, and also for a balance to be struck in terms of what the test was to be for the use of the defence. The changes to the law of provocation in Ireland set out in McNamara have the potential to ensure that the standard of the test is suitably achievable, in that there is protection for human frailty and an actual loss of self-control, but at the same time the bar is not set too low to allow the partial defence to be put to the jury in too broad a set of circumstances.[50]

Drink and drugs often fuel violence.[51] To murder, you have to intend to kill or cause serious injury. Two views might be taken: the accused is judged as utterly drunk and if he did not intend death or serious injury he is to be acquitted; the accused is to be judged as sober and even if he did not kill, too bad – he's guilty. Analytically, you could find fault, essential for criminal liability, in getting drunk: but everyone gets drunk! In an English case, a man strangled his girlfriend when high on LSD thinking he was wrestling with snakes in the underworld.[52] Despite him knowing nothing, he was convicted of manslaughter. If he had been sleepwalking, this would have been an acquittal. When the modern law on intoxication was analysed in our Supreme Court, we decided that if the accused was so drunk or drugged as not to realise what he did, that was not murder but there was sufficient fault for manslaughter.[53] Why? Essentially, there would still be fault and people can't escape liability through their own fault. That is the pragmatism of the common law. Led by emotion? I would say led by experience and by pragmatism.

Flexibility and exclusion

There is a rule at common law that a judge cannot act as a judge in his own cause: *nemo judex in causa sua*. The European Convention on Human Rights at Article 6 says that for 'the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' And this is no more than can be expected. The Constitution of Ireland, 1937, makes it clear that judges are not to try cases which involve them and that the judiciary is a completely separate part of the State with which there can be no interference. Thus:

> Article 34 – Justice shall be administered in courts established by law by judges appointed in the manner provided for by this Constitution and … shall be administered in public.
>
> Article 34.6.1° – Every person appointed a judge under this Constitution shall make and subscribe the following declaration: … I will duly and faithfully and to the best of my knowledge and power execute the office of

[50] Caoimhe Hunter-Blair and Ceara Tonna-Barthet, 'The Ground Shifts: An Analysis of the Law of Provocation in Ireland' (2021) 31(2) ICLJ.
[51] Kajol Sontate and others, 'Alcohol, Aggression, and Violence: From Public Health to Neuroscience' (2021) 12 Front Psychol; Shaoling Zhong, Rongqin Yu, and Seena Fazel, 'Drug Use Disorders and Violence: Associations With Individual Drug Categories' (2020) 42(1) Epidemiol Rev 103-116.
[52] *R v Lippman* [1970] 1 QB 152.
[53] *The People (DPP) v Eadon* [2019] IESC 98.

> judge without fear or favour, affection or illwill towards any person, and I will uphold the Constitution and the laws …
>
> Article 35.2 – All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.
>
> Article 35.4 – No judge shall be eligible to be a member [of Parliament or the Senate] or to hold any other position of emolument.
>
> Article 35.4.1° – A judge … shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed [by Parliament and the Senate] …

All of that, however, is what the common law already provided for: that judges would be independent and would not adjudicate on any case which personally involved them. It is utterly fundamental that the court system function as an independent system to which the people resort to resolve legal disputes. If confidence in impartiality is undermined, the courts system is ruined. Lord Denning observed: 'Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking "The judge was biased!"'[54] A judge or decision maker should not have an interest in the outcome of a case. If that is so, then there may float around a suspicion based on rational grounds that the decision may have tilted in one direction because of a factor pulling the decision maker or judge to that specific outcome. This undermines confidence in public administration and it draws systems of justice towards, or even into, the acid bath of public mistrust. An example as old as that of the trial of Saint Jeanne d'Arc may illustrate this. She was condemned to be burnt alive by English forces occupying northern France following a supposed enquiry into heresy, the result of which would favour the invading army. She suffered a horrible death on 30 May 1431 at Rouen.[55] A later enquiry overturned the result on the grounds of bias and rehabilitated her. By then she had suffered horrible indignities leading to a torturous death.

Almost nobody ever claims that a judge went into a case thinking: ah yes, I'm going to make sure that immigrants don't win contract cases, or as in the case of Saint Jeanne, she must die so that our side will win the war. No, the law is more subtle. It focuses on not what the judge was thinking but on what the reasonable person sitting in the back of the court and knowing everything about the judge's background would think. If that person would say that there is a chance that the judge was influenced by matters external to the case, the decision falls. It matters not that the judge was not at all influenced and the judge in the common law system is never asked for testimony; rather, the matter is judged entirely objectively from what the reasonable person would think in the known circumstances.

It is not necessary to prove bias was present or to show the probability of bias, but only a real danger of bias. Thus the test is whether a 'fair-minded and informed observer, having considered, the facts, would conclude that there was a real possibility of bias'.[56] The test is: reasonable apprehension of bias or reasonable suspicion of bias by a reasonable observer.[57] This observer is not a litigant and is not paranoid or subject to conspiracy fantasies but rather has objectivity and has diligently self-educated themselves as to the facts of the case and

[54] *Metropolitan Properties v Lannon* [1968] 1 QB 577.
[55] Helen Castor, *Joan of Arc: A history* (London: Faber and Faber 2015); Seosamh Charleton, *Jeanne d'Arc* (Baile Átha Cliath: Cosceim 1990).
[56] *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.
[57] *Reid v Industrial Development Authority* [2015] IESC 82 [52].

background.[58] This paragon of civic values is an ideal being and capable of fine judgment; in a context where such diverse situations may arise such as a daughter appearing to plead a case in front of her father who is the judge or the judge who subscribes to a magazine of questionable views, this impartial observer will come to the correct decision as to whether there is a risk of bias. Clearly, the gravamen of objective bias is not that the decision maker or investigator formed a prejudgment, and then tendentiously acted upon it by twisting facts to suit what was already decided, but rather that a person of commonsense and reason and in full possession of the relevant background and the facts of the case would reasonably suspect bias may have influenced the process. Importantly, that is to be judged not at the moment when the source of bias is supposed to have crept in, but at the completion of the process. That reasonable person of commonsense would know that, whereas opinion may be powerful, facts speak louder and that while a point of view or a representation may offer a reason to investigate, what an investigation uncovers can fairly be judged in the cold light of reality. The appearance of bias may be left in the wake of serious and determined efforts to deploy investigative resources towards uncovering truth. A reasonable person would dismiss some apparent cases on enquiry and that is because of the nature of such a person.[59]

There is a wealth of cases, since litigants are often anxious to overturn decisions of tribunals or lower courts. The result of a judicial review is that everything starts again. Material interest of the decision maker is important.[60] Or holding positions on a deciding authority and being one of the experts advising on a planning issue.[61] Personal animosity may show bias, as in judging someone whom the judge has recently had a physical showdown with.[62] Or having anti-alcohol views of an extreme kind when adjudicating on licences.[63] Or expressing supposedly funny but troublingly unsettling views about the ethnicity of a party to litigation.[64] Many of these cases of bias turn on a continuing situation: the judge has shares, or the decision maker is the offspring of the person wronged, or the person making the complaint is also acting as judge. On the Supreme Court, where people may have sons or daughters who are lawyers, no one sits if their family are pleading any case. Some other judge substitutes. You know, it's a small country; so conflicts of this kind will pop up from time to time. What I have said forms part of the Bangalore principles, [65] but personal experience is also important. Let me share my view: I will not sit on any case where a litigant has been a friend or a schoolmate. As to casual friendships, the view I take is that if I have been inside anyone's home for refreshments or if anyone has been in mine, I do not sit. I do not own any shares, so that makes other matters easy. But, just knowing someone because they are the parent of a child in your offspring's school, that is not enough. Let me share an experience.

In the High Court in 2012, we were coping with the aftermath of the financial crash of 2008, and since 2010, the International Monetary Fund were in Ireland dictating government policy (they are now gone, I assure you we're back on our feet). A well-known lawyer was before the bankruptcy court and I was substituting for the usual judge, who was away. This lawyer raised the issue that he was not habitually resident in Ireland; as since the crash he had moved

[58] The Right Hon. Lord Woolf and others, *de Smith's Judicial Review* (8th edn, London: Sweet and Maxwell 2018) 10-018.
[59] *Helow v Secretary of State for the Home Department* [2008] UKHL 62 [1-3].
[60] *The People (AG) v Singer* (1963) [1975] IR 408.
[61] *Goode Concrete v CRH plc* [2015] 2 ILRM 289.
[62] R *v Handley* (1921) 61 DLR 656.
[63] Ex parte Robinson (1912) 76 JP 233.
[64] *El-Farargy v El-Farargy* [2007] EWCA Civ 1149.
[65] Bangalore Principles of Judicial Conduct (2002).

to England. The consequences of bankruptcy were that all his assets were seized by the Official Assignee to pay off his debts and he only, then, recovered financial autonomy after 12 years. His case was unconvincing. The plaintiff was the Bank of Ireland, to whom the lawyer owed many millions of euro. In a written judgment I held for the bank and adjudicated the lawyer a bankrupt. When I had read out the judgment, his barrister stood up and said: 'My client has asked me to make an application, but I am not prepared to make it. Would you hear from his brother-in-law?' I agreed. The brother-in-law announced that he had researched my mortgage of my home, my only property, and that I held the mortgage from the Bank of Ireland and that therefore I was biased. I was stunned. Recovering my composure that someone had gone into my private banking affairs, I refused the application to vacate the judgment: there are only four banks in Ireland, I said, and what was involved was ordinary family banking; whether a debt was recovered would make no difference to my relationship with the bank. I have to say, though, that I was furious that it could be suggested that any decision of mine on a legal issue might depend on my liking for a bank. To be clear: I have little affection for banks, especially after 2008.

Constitutions, human rights and real flexibility

It depends on the constitution, it depends on the country, it depends on the human rights treaty, but real flexibility in judicial decision-making derives from the kind of vague promises that fundamental laws are based on. Ireland is different to the United States, though both share a common law heritage, and in turn Ireland is different to Canada and the United Kingdom. This is a job for another day, perhaps, but Canada discovered judicial activism with the passing of the Canadian Charter of Fundamental Rights and Freedoms and England, on the other hand, reigned in temptations to use the European Convention on Human Rights as an instrument for judicial freedom: the inflexibility of precedent within the common law was too ingrained. But Canada is closer to the USA!

How do we operate our Constitution in Ireland? Very carefully; is the answer. There is no interference in economic policy. Conversely, in the United States of America, the reaction to Roosevelt's New Deal was horror at the emergence of socialism, according to the political right, and according to the Supreme Court at an interference in the sacred rights of contract. Of this, there was a long history, since from 1886 that court began striking down scores of laws which the justices deemed to be unreasonable. Thus, the conservative majority held that state laws setting rates for railways, or requiring that slaughtered meat be inspected for disease, enabling the redemption of mortgages after foreclosure, and regulating insurance were all attacks on the liberty of citizens to contract or were undermining a very wide definition of what was regarded as the sacred right to property. Hence, in one New York case, where rates which grain elevators could charge was regulated, the courts struck it down, elevating their language to heights of rhetoric; this was 'vicious in its nature, communistic in its tendency' and thus violated 'the most sacred right of property and the individual liberty of contract.'[66] If there were unbalances or even abuses in the economy, that was nothing to do with the government since these were economically self-correcting 'by the general laws of trade, supply and demand' and not by interference by any 'paternal government'.[67] This will to read laissez faire economics into the US Constitution was based on the due process clause, with which many might think it had nothing to do. And the tendency continued with many of the economic recovery measures post-1933 being struck down.[68]

[66] *People v Budd* (1899) 117 NY 1 (1889) 47.
[67] *People v Budd,* 45, 69; Bernard Schwartz, *History of the Supreme Court* (OUP 1995).
[68] For example, *Schechter Poultry Corp v United States*, 295 US (1935) 495.

Why is Ireland different? Here we do not declare same sex marriage part of the equality clause in Article 40.4 of the Constitution, we do not legalise abortion.[69] The US Supreme Court does that. Ireland has a strong policy of separation of powers. Issues of policy are for the Government, not for the Courts. Furthermore, while it is not easy, it is not close to impossible, as in the US, to amend the Constitution. Since 1937 we have had 39 amendments or votes to change the Constitution. They happen every few years. The proposal must be passed by the Parliament and it is then voted on directly by the citizens. And that is it. Another difference with the US, is that appointments to the Bench are much less political. In my own case, I was nominated by one government and promoted by another. That is common. And no one asks: are you religious, what are your views and are they liberal or conservative? No, we are here to do a job.

You might think, finally, that because of the influence of the common law, that in deciding constitutional cases, we follow emotion, how we feel about the case. Well, as human beings that in reality is hard to rule out but more powerful than that is the doctrine of precedent. What is there in the text, how other judges have interpreted the Constitution, that's what not just guides us but binds us.

[69] *United States v Windsor* 570 US 744 (2013); *Roe v Wade* 410 US 113 (1973).

LES MYSTÈRES DE LA COMMON LAW ET LES EMOTIONS DES JUGES

Résumé : Oliver Wendell Holmes a déclaré : la vie du droit n'est pas la logique, mais l'expérience. Ces mots sont clés pour comprendre la common law. Cet article abords les aspects de la common law qui sont peut-être mal compris, de ses origines, à la manière dont elle se développe en fonction du monde dans lequel elle existe, en passant par le rôle du juge dans les tribunaux de la common law et certains principes qui sont unique à ce système de droit. Contrairement a un système civil, ou il y a un code juridique, la common law est flexible et en constante évolution. Cet article se concentre sur les subtilités qui en font un système de droit unique.

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Les Romains avaient un code juridique, tout comme les Grecs, ou le Royaume de Jérusalem avant son effondrement en 1291. Aujourd'hui, tous les pays d'Europe ont un code, à l'exception de Chypre et de Malte, qui ont retenu les vestiges du droit jurisprudentiel anglais. Alors, l'Irlande, qui a été conquise par les Anglo-Normands en 1169, a le dernier système de common law dans l'Union européenne. Le but d'un code, c'est de supprimer tous les points de vue personnels de l'esprit judiciaire quand un juge détermine la justice d'une affaire. Le juge doit appliquer la loi et c'est tout. Mais, parce que la common law est souple, est-ce que ce système permet à l'émotion de s'immiscer, déformant ainsi la décision qui ne serait pas faite autrement ?

Il y a beaucoup d'idées fausses sur la common law : qu'elle a été inventé par les juges ; que les juges peuvent suivre leurs émotions et changer ou plier les lois pour créer un résultat équitable ; que la common law est personnelle aux juges ; qu'il n'y a pas des règles ; et, s'il y a des règles, qu'elles sont impossibles à trouver ; que tout le système n'est pas centré sur les règles, mais qu'on doit choisir un cas d'un assortiment de précédents variés et dire « cette règle ici, cela s'applique à vous ! » Ainsi, si on entre dans un tribunal de la common law, le résultat devient comme ce que Forrest Gump a dit, « la vie, c'est comme une boite de chocolats, on ne sait jamais sur quoi on va tomber. » Mais dans la common law, on pense souvent que le juge choisit le résultat !

En fait, la codification vient de l'écriture des règles coutumières qui ont été suivies par les juges. En Irlande, nous avions les Lois Brehons, qui étaient littéralement les lois créées par les juges. Historiquement, la loi provenait de la morale ; on pourrait dire que ça a commencé quand Dieu a donné les dix Commandements à Moïse,[70] mais est-ce qu'il n'y avait pas déjà des règles fondamentales sans lesquelles la société ne pouvait pas survivre? Si quelqu'un tue son voisin, ne serait-il pas attendu que cette action génère des cycles de revanches, des querelles, et des conflits ? De la même manière, si quelqu'un a volé, comment est-ce qu'on pourrait s'attendre à ce qu'il n'y ait pas de conséquences ? Pareil en cas de viol, d'incendie criminel, ou d'adultère[71] ? Certaines personnes prétendent que, profondément dans la conscience humaine, il y a une loi naturelle qui nous guide, et que nous sommes guidés par une conscience qui parle à chacun de la même manière. Si, avant les codes de loi, nous avions une conscience et, après ça, du loi coutumière or des lois déclarées par les juges et finalement

[70] *King James Bible*, (Oxford University Press 2008), Exodus 19-24 (Publié en 1769).

[71] Peter Charleton, *Lies in a Mirror,* (BlackHall Publishing 2006), 100.

les codes de loi, c'est clair : chaque étape représente du progrès et la codification, c'est le sommet. Si c'est vrai, alors, la common law c'est un mélange qui est ésotérique, chaotique, et inutile.

Combien de la common law survit?

En parlant de l'Irlande, et de l'Angleterre et du Pays de Galles, mais pas de l'autre système en Ecosse, une grande partie de la common law survit.[72] Le droit des contrats, la responsabilité civile, et la restitution sont des domaines entièrement gouvernés par la common law. Dans le droit européen, il n'y en a pas. Dans le système irlandais, dans la loi d'entreprise, tout l'édifice, par exemple le principe qu'une entreprise est quelque chose de séparé de ses propriétaires, a été érigé par la législation et confirmé par des décisions judiciaires ; et dans la loi d'impôt, on dit qu'il ne peut y avoir de fiscalité sans représentation, et donc le parlement a introduit chaque loi et il n'y a pas d'équité dans ce domaine. Alors, l'Irlande et l'Angleterre sont aussi familiers avec des codes. Ces systèmes existent depuis des siècles – les codes d'impôt ont été introduit par la Magna Carta, et le Joint Stock Companies Act de 1844, qui a établi la régulation pour des entreprises artificielles.[73] Mais quand nous parlons de contrats, nous parlons totalement de la common law, à l'exception de quelques sujets comme la vente de biens, et même dans ce sujet, la législation, c'est seulement une codification de loi établie par les juges.[74] C'est la même situation dans la responsabilité des produits – ce sujet est régi par la loi européenne. Le droit des délits, ou de la responsabilité civile, qui englobe la négligence, la nuisance, la diffamation, est régi par la common law. Ces sujets sont vraiment au cœur de la plupart des affaires judiciaires, et sont la fondation de la majorité des affaires commerciales. Alors, la common law est fondamentale pour beaucoup de cas devant nos tribunaux. Mais comment est-ce qu'on peut trouver les règles ; d'où vient-elles ; et n'est-il pas impossible de prédire la solution parce que les émotions d'un juge, ses sentiments sur l'affaire, dictent le résultat ?

Les origines

Quand l'Angleterre a été conquis par les Normands-Français, et ensuite l'Irlande a été conquise par les Anglo-Normands un siècle et demi après la défaite des Vikings par Roi Brían Ború en 1014 à Clontarf[75], le Roi Henri II avait envoyé ses juges de Londres dans les grandes villes pour tenir des audiences (sur les torts qui sont potentiellement produits dans la région).[76] Les grands jurys détermineraient les torts dont ils soupçonnaient l'accusé. Les juges se consultraient de quelle loi ils devaient postuler, et comment ils devraient résoudre ce problème. Ils ont standardisé les règles, donnant le première traité sur la loi Anglaise : *Tractatus de legibus et consuetundinibus regni Anglie qui Glanvill vocatur,* sur les affaires judiciaires dans les tribunaux royaux, datant d'environ 1189. [77] Dans quelques tribunaux, on peut voir des preuves matérielles de consultations parmi les juges sur le sujet de ces règles. Ils ont établi ces règles pour assurer que l'émotion individuelle ne pourrait pas prévaloir, et pour standardiser les lois. Dans les Four Courts à Dublin, par exemple, établi en 1792, il y avait un cloître à l'avant où, sous la colonnade, les juges se rencontraient et discutaient leurs affaires judiciaires pendant leur déjeuner. Dans les Inns of Court, les juges dînaient avec d'autres

[72] Theodore Plucknett, *A concise history of the common law*, (The Lawbook Exchange Ltd 2001).

[73] MS Rix, 'Company Law: 1844 and To-Day.' (1945) 55(218-219) The Economic Journal 242-260.

[74] Sale of Goods Act 1893, qui représente une codification des règles établi par les juges.

[75] Seán Duffy, *Brian Boru and the battle of Clontarf* (Gill & Macmillan Ltd 2013).

[76] Paul Brand, *Henry II and the Creation of the English Common Law* (Cambridge University Press 2012).

[77] Gaines Post, *Tractatus de legibus et consuetudinibus regni Anglie qui Glanville vocatur* (1967): 162-165, (Originally published 12th century).

juges, et aucun avocat pouvait devenir un juge sans assister à des conférences et sans dîner dans le réfectoire avec les juges. Beaucoup de rapports de droit jusqu'au 19ème siècle montrent que les juges ne se contentaient pas de s'asseoir et d'entendre une affaire ; non, ils trouvaient des experts et discutaient de leurs cas avec leurs collègues. Alors, on peut voir une phrase récurrente dans les rapports de droit : « j'ai consulté avec mon frère Cave, et il est d'avis, et moi aussi, que… » Ce n'était pas fixé sur l'émotion : c'était concentré sur la cohérence de la common law. Et il y avait aussi la doctrine du précèdent, qui dit que, quand il y a un point de loi déjà décidé par des tribunaux, tous les juges du même niveau devraient suivre ce point de vue, et si une court supérieure avait déterminé un point de loi, tous les juges de niveau inférieur devrait décider leurs affaires judiciares conformément à ce précédent.[78] En outre, même la Cour suprême doit suivre ses propres précédents :

> Le chemin pour reverser une décision doit être pavé par des raisons impérieuses, conduisant à un point démontrant une erreur dans un jugement préalable. Parce que la justice est le principe fondamentale sur lequel l'ordre constitutionnel est construit, et parce que la certitude du droit est un aspect d'une véritable ordre social qui permet aux justiciables de prévoir la base de l'application de tous les décisions à leurs causes, seules des circonstances exceptionneles peuvent expliquer qu'on s'écarte du précédent.[79]

Les juges de la common law suivent le précèdent pour établir l'uniformité, pour établir les fondations de la loi avec certitude et pour éviter des jugements personnels. Mais, on pourrait dire, quand il y a tant de cas décidés, avec tant de principaux, comment est-ce qu'on trouve la loi, et ne pourrait-on pas choisir un précédent pour arriver au résultat préféré par le juge ?

Seulement un juge!

En France, les tribunaux travaillent en groupes de trois. Beaucoup de pays avec un système de droit civil utilisent un système similaire – aux Pays-Bas, un cas criminel se déroule devant trois juges, avec une audience d'appel devant trois autres juges, et un appel juridique après ça. L'important est ce qui fonctionne pour chaque pays ; mais ce qui est plus important c'est les autres règles qui assurent que le système fonctionne dans son ensemble. On ne peut pas prendre une règle d'un pays et dire qu'elle pourrait être bénéfique pour un autre sans considérer comment cette règle interagirait avec l'ensemble de la procédure dans laquelle elle fonctionne. En Irlande, par exemple, beaucoup de groupes pour les droits de victimes pensent qu'un plaignant dans une poursuite pour viol doit être représenté devant la cour. Mais ce faisant, l'équilibre existant entre l'accusé et l'accusation peut être bouleversé, mettant l'accusé face à deux équipes juridiques.[80]

L'histoire nous montre d'où le procès d'un juge-singulier vient dans la common law. Quand Henry II a envoyé ses juges pour décider des affaires dans un système common law, plusieurs juges se déplaceraient, mais seulement un juge menait un procès. Un cas est présenté devant un juge parce que le grand jury a inculpé une personne sur la base d'une plainte crédible. Un juge ne participe pas dans une affaire pénale capitale ou sérieuse sans un petit jury, le jury que nous connaissons aujourd'hui de douze citoyens. Alors, dans les affaires pénales, il n'y

[78] *Attorney General v Ryan's Car Hire Ltd* [1965] IR 642, 653.

[79] *Braney v Ireland* [2020] IESC 76.

[80] Peter Charleton and Orlaith Cross, 'Towards a Presumption of Victimhood: Possibilities for Re-balancing the Criminal Process' (2021) 5(2) IJSJ 1.

avait pas de procès avec un seul juge. Une exception existait pour des affaires mineures et dans ce cas, l'origine de loi était semblable, avec des vestiges en Angleterre à l'époque moderne dans le système des magistrats. Historiquement, les notables de la région aurait signalé les individuelles qu'ils aimeraient régler devant les magistrats. Ils leurs demandaient de témoigner devant le tribunal avec leurs accusateurs et témoins ; ils seraient convoqués. Et ces affaires seraient jugés par trois hommes sans formation, qui jugeraient avec un greffier qui avait une formation juridique. Ce système continue maintenant, mais le système n'a pas des grand jurys et les magistrats ne peuvent pas engager eux-mêmes des procès ; mais le système d'assignation persiste comme vestige.

En France, vous seriez choqué d'apprendre que, quand un juge est nommé en Irlande, il ou elle a le pouvoir de déclarer qu'une loi du Parlement est inconstitutionnelle. Mais, presenté comme ça, la règle est sorti de son contexte. Il faut prendre un peu de recul. En Irlande, un juge de la Haute Cour a, en raison de l'Article 34.3.1, « la pleine juridiction originale et le pouvoir de déterminer toutes les questions de loi ou de fait, civil ou criminel. » Et c'est une seule personne ! Nous avons confiance que les juges vont se conduire de façon responsable, mais aussi nous les entourons de règles. Les juges sont indépendants, mais comme les juges d'autrefois, en entendant une affaire, ils peuvent la discuter avec leurs collègues. Dans chaque cour avec ce pouvoir, les juges déjeunent ensemble chaque semaine, et ils se rencontrent à Kings Inns, mais plus rarement. Chaque juge peut téléphoner ses collègues, et ils peuvent être mis en contact avec des autres qui ont une expérience différente, ou qu'ils peuvent leur lancer des idées. Au cours de ma carrière, j'ai répondu a des appels de ce genre. Le but n'est pas de dire à votre collègue ce qu'il ou elle devrait faire, mais de les écouter, de découvrir sur quels points ils sont sûrs, et potentiellement de suggérer un autre point de vue. C'est aussi loin que ça va. En outre, toutes les lois de Parlement doivent être interprétée de telle manière qu'elles auront un résultat constitutionnel ; c'est le principe d'interprétation constitutionnelle, tant que le juge n'ajoute pas des mots ou ne soustrait pas des mots.[81] Chaque juge peut être soumi à un appel. Mais cet appel est limité au sens que seulement une erreur de loi peut être corrigée en appel, mais les faits sont dans la province du juge de première instance. Alors, à moins qu'il n'y ait aucune preuve pour un fait trouvé en procès, ou que la conclusion des faits était déraisonnable compte tenu du poids de la preuve, la Cour suprême se sent liée par ce que le juge de première instance a déterminé en fait. [82] Ces principes pourraient être déclarés de façon plus concise:

1. Des conclusions de fait soutenue par des preuves crédibles ne peuvent pas être modifiées.
2. Les inférences de fait dérivées de preuves orales pourraient être considérées, mais une cour d'appel devrait être prudente à le faire.
3. Les conclusions tirées de preuves circonstancielles peuvent être plus facilement mises de côté par une cour d'appel parce que la cour d'appel est en aussi bien placée pour tirer ses propres conclusions que la cour de première instance.[83]
4. Même dans le cas d'une preuve par affidavit : le juge de première instance peut être annulé seulement s'il ou elle a pris une mauvaise décision juridique, ou si leur évaluation de fait était déraisonnable.

[81] *McDonald v Bord na gCon* [1965] IR 217.
[82] *Hay v O'Grady* [1992] 1 IR 210.
[83] *Ryanair v Billigfluege* [2015] IESC 15 [4].

Alors, oui, nous plaçons une dépendance énorme sur les juges de première instance. Pourquoi ? Quand on est un avocat, on tourne son dos à la chambre ; on voit le juge et les témoins mais c'est tout. Par contre, c'est un sentiment bizarre de vue d'ensemble quand on est sur le banc du juge : un témoin parle mais on voit les réactions de tous les autres dans la chambre ; ou un témoin parle de quelqu'un autre, et on peut voir cette personne et le témoin aussi. On voit comment les mensonges tombent avec ceux dont on parle, ou comment est-ce que la vérité impacte les parties à l'affaire.

Les opinions dissidentes

Quand un procès fait est l'objet d'un appel, trois juges sont impliqués. Nous avons la collégialité, mais pas l'anonymité. Les juges sont connus : mais nous ne sommes pas des célébrités. Nous ne sommes pas censés d'aller au pub , à moins que nous soyons accompagnés par nos familles en vacances. Nous ne pouvons pas passer à la télévision ou à la radio, et nous ne pouvons avoir des blogs. J'envoie toutes mes conférences et mes papiers, y compris celui-ci, au Juge en Chef pour approbation préalable. Ils nous est absolument interdit de discuter toutes les affaires judiciaires dans lesquelles nous avons pris une décision ; une exception à cette règle, c'est quand nous parlons à une conférence académique et privée dans une université, et même alors nous parlons prudemment. Quand nous écrivons un article de loi, nous hésitons à exprimer des opinions précises de réforme du droit ; plutôt nous pouvons dire que « on pourrait suggérer… peut-être pourrait-on envisager une réforme… certains pourraient penser, peut-être raisonnablement… » ou des phrases similaires qui rendent notre sens clair et ambigu en même temps.

Les jugements dissidents sont une plante qui pousse bien seulement dans le sol de la common law. Ici, la plante est nourrie par l'individualité d'opinion, par le recours à la raison et pas aux mots inflexibles d'un code juridique et surtout par les éléments de raisonnement antérieur où il peut être identifié une flexibilité suffisante de traiter avec justice avec la variété des expériences humaines et avec les fautes humaines. C'est un procès transparent : un procès où, à cause de la dissidence, la majorité est contesté à répondre en renforçant son argument pour rendre son raisonnement plus convaincant. Alors l'apodictique du droit est fondé sur des bases plus solides. Mais, on peut exagérer cela afin que le juge dissident assume un manteau héroïque, même s'il est clair qu'il ou elle n'est pas correct. En outre, c'est l'opinion de la majorité qui ouvre la voie juridique alors que le juge dissident est, en réalité, jeté par la route. L'utilité de la dissidence est dans le conteste, dans l'avance du raisonnement, dans la démonstration de la force de la majorité, dans la transparence et, surtout, dans l'habilitation de ceux qui souscrivent à un jugement d'être perçu comme étant entièrement d'accord ; au lieu de se faufiler dans une confirmation de ce qui peut être le plus petit dénominateur commun de raisonnement. Mais, il ne faut pas exagérer : alors, pourquoi pas ? Voilà. Un jugement dissident dans une Cour de dernière instance est un appel à l'esprit contemplatif de la loi, à l'intelligence d'un jour futur, quand une décision ultérieure pourrait corriger l'erreur que le juge estime que le tribunal a commit.[84]

Le raisonnement et la déduction sont les fondements du jugement de la common law , faisant émerger efficacement la règle hors du contexte du précédent. Il a été dit que le jugement du droit civil reflète le rôle plus limité d'un juge en appliquant simplement le code du droit. Mais, beaucoup d'opinions sont déjà entrées dans le code de droit, et peut-être le discours a déjà eu lieu ? Ce qui ne peut pas être oublié, cependant, est que centaines d'affaires qui sont traitées par le travail quotidien des tribunaux Irlandais ou Anglais n'exigent pas plus de

[84] Charles Evans Hughes, *The Supreme Court of the United States* (New York 1928) 68.

raisonnement que : la cour accepte la preuve du défendeur parce qu'elle est conforme avec le contexte et les faits incontestés ; ou, la cour applique le cas de 'Murphy v O'Neill' (par exemple), qui indique la règle très clairement. Ça c'est la situation quotidienne. Et puis il y a des affaires plus difficiles qui demandent tous les efforts de la cour. Un cas comme ça était *UCC v ESB*[85] quand l'université inondé par un barrage hydroélectrique a poursuivi la compagnie nationale d'électricité. Pourquoi est-ce que c'était si difficile ? La compagnie avait un devoir de produire l'électricité, mais apparemment pas de protéger les gens en aval de son barrage ; les cas américains ont dit que la loi à ce sujet était qu'il n'y avait aucune responsabilité à moins que la compagnie avait aggraver l'inondation. Mais dans cette affaire, ESB a été jugée responsable, renvoyant l'affaire pour audience pour savoir si l'eau a été rejetée plus tôt, combien plus bas aurait été l'eau, ou pas du tout. Là, un résultat clair a été trouvé. Mais pas dans toutes les affaires. Beaucoup de nos jugements sont trop discursifs : ils sont trop longs, difficile à distinguer. Il y a beaucoup d'exemples notables. En *Dellway Investments v National Assets Management Agency*,[86] la Cour suprême a considéré la reprise des créances mauvaises des constructeurs pour sauver l'économie irlandaise. La compagnie plaignante a gagné pour des raisons de procédure, après qu'elle ait perdu dans le tribunal de première instance. Mais, le point ici est que les jugements ont pris un volume de les rapports officiels. Est-ce que on peut affirmer l'essence de ces jugements ? Beaucoup de rapports commencent avec un sommaire d'un reporteur très intelligent. Et beaucoup comptent là-dessus. Quand on écrit un manuel, on essaie de condenser les jugements en phrases clées. Et ça, comme on va voir dans la section prochaine, c'est le précèdent.

La Cour européenne des droits de l'homme a des opinions dissidentes, le Bundesverfassungsgericht permet la dissidence, bien que cela soit rarement fait,[87] et certains systèmes de droit civil ont la dissidence. Nous n'avons pas des opinions dissidentes en Irlande en appel dans les condamnations pénales, mais, s'il y a un appel à la Cour suprême, il pourrait y avoir une opinion dissidente, mais cela est très rare.[88] Les cas criminels sont différents des cas civils : dans les affaires pénales, l'accusé sera seulement condamné si des personnes raisonnables considérerait qu'il n'y a aucun doute ; de même, en appel, il ne devrait y avoir aucun doute. La dissidence dans certains types de cas peut affaiblir la confiance du public dans le système de justice, mais devrait-elle ? Reconnaissons que le public ne lit pas les jugements et que tout qui est repporté sera simplement : « par une majorité trois-deux, la Cour suprême a décidé n'importe quoi. » Les journalistes peut-être aussi ne les lisent pas. Mais les universitaires et les étudiants les lisent. La confiance de la système de la common law se trouve dans le raisonnement et l'adhésion à, et sa fondation dans, le précédent. C'est assez évident quand on prend la peine d'étudier le résultat du discours. Ensuite, les choses deviennent transparentes. La dissidence est humaine. Quelle famille n'a pas de la dissidence ? Et est-ce que la dissidence est en fait une dissidence ? Dans la système de la common law, ce qu'une dissidence fait est un brin dans le raisonnement de la décision finale parce que nous, en Irlande, et aussi en Angleterre, disons simplement notre point de vue et nous n'attaquons pas la décision de la majorité.

Il peut y avoir des grandes dissensions prémonitoires et prophétiques, mais pour ça il doit y avoir des véritables divisions dans la société et des véritables injustices qui sont ignorées. Peut-être qu'à l'avenir, les universitaires regarderont en arrière et ils trouveront des injustices qui nous avons ignorées parce que, plongés dans notre propre certitude, ce que nous semble

[85] [2021] IESC 21.
[86] [2011] 4 IR 1.
[87] Federal Constitutional Court Act of 21 December 1970, Section 30(2).
[88] *The People (DPP) v FN* [2022] IESC 22 est un example.

juste pourrait être complètement faux. Par exemple, la dissidence de Juge Brandeis dans *Olmstead v US*,[89] Juge Holmes dans *Abrams v US*[90] et, mon préféré, la dissidence de Juge Harlan en *Plessy v Ferguson*.[91] Si j'avais été vivant pendant le New Deal, j'aurais été en désaccord avec la doctrine d'autocorrection économique qui a été promulguée par la Cour suprême de l'époque. Mais considérez les questions ! *Plessy* était un cas de ségrégation raciale dans les autobus, dans l'utilisation de toutes les installations publiques : la majorité a dit que c'était acceptable parce que c'était « séparés mais égaux ». Où avons-nous entendu cela avant ? *Olmstead* a déterminé que l'écoute du trafic téléphonique n'était pas égale à une fouille du domicile d'un suspect, pour lequel la police a besoin d'un mandat. Et *Abrams* a décidé que la distribution des tracts en signe de protestation contre la participation des États-Unis dans la guerre civile russe de 1919 était un crime. L'infraction a été un discours délibéré ou en publiant un langage « déloyal » au système politique américain ou pour inciter ou promouvoir « toute réduction de la production … nécessaire ou essentielle pour la poursuite de la guerre … avec l'intention … de réduire ou entraver les États-Unis dans la poursuite de la guerre. » Et bien, la liberté d'expression n'y est pas entrée !

Mais il y a des dangers et l'urgence de ces problèmes dépend du système dans lequel les dissensions peuvent être admises. Il faut poser des questions : est-ce que la dissidence minera le code civil ; est-ce que la dissidence ajoutera au raisonnement et minera pas la majorité ; est-ce que les juges dissidents font de la démagogie et espèrent devenir des héros pour des groupes sectaires qui cherchent à détruire la cohésion nationale ?

A-t-il des juges-célèbres ? Pourquoi est-ce qu'on demande cette question ? Le sentiment c'est que quand une personne se retrouve devant les tribunaux, il ou elle n'est pas jugé(e) par un juge individuel, mais par un système : alors, en France vous avez un banc de trois juges. C'est correct. Mais le système c'est la loi et le juge individuel représente la loi. Certainement, il y a Judge Judy ou Judge Rinder, mais un jugement dissident ne fait pas de quelqu'un une célébrité. Et, dans notre système, il ne renverse pas le château de cartes qui est le jugement de la majorité. Pourquoi pas ? Parce que les apodictiques du jugement de la majorité renversent toutes les vues contraires : ça c'est la théorie. Si vous me demandez mon avis, je ne critique personne, mais je déteste me joindre à une opinion que je ne partage pas, et je pense aussi que quand cinq juges ou plus se réunissent et ils parviennent à un consensus, ce n'est pas un vrai consensus : c'est, pour ainsi dire, un cheval fait à partir des parties d'un chameau et d'une chèvre ; peu convaincant, illogique, sans intégrité et ayant la sensation du Concert de la Rivière Jaune, le concerto pour piano écrit par un comité de compositeurs sous le président Mao. Peut-être c'est un peu trop fort ; mais c'est mon opinion seulement, après tout.

Le précédent

Si vous étudiez le droit à l'université et que vous essayez d'apprendre tous les cas, tous les faits et toutes les décisions, vous échouerez. La common law ne marche pas comme ça. Ce qu'un étudiant recherche, et ce qu'un juge applique, c'est un principe distillé d'un cas, et le juge l'applique quand un cas similaire arrive. Les avocats de droit civil voyagent avec un code sous le bras, ou un ordinateur avec l'accès à ce code, les avocats de la common law comptent beaucoup sur des manuels. Les universitaires lisent tous les décisions et ils distillent les décisions en principes. Mais on doit remarquer que la common law est assez certaine qu'on

[89] 277 US 438 (1928).
[90] 250 US 616 (1919).
[91] 163 U.S. 537 (1896).

pourrait facilement la codifier. L'Australie, qui a un système fédéral, a hérité la common law parce qu'elle faisait une partie de l'Empire britannique. Dans plusieurs pays le droit pénal a été écrit dans un code. Mais c'est seulement pour préserver les règles qui se sont révélées certaines depuis plusieurs siècles. Dans le droit de la responsabilité délictuelle, il y a des codes dans certains états américains ; mais ce n'est pas nécessaire. Il est facile d'atteindre le même niveau de certitude avec la common law qu'avec un code.

Permettez-moi de vous donner un exemple d'un domaine juridique complexe, avec lequel tous les systèmes juridiques auraient du mal. Supposons qu'un homme prétend que quelqu'un a commis une infraction pénale grave. L'accusé est arrêté et interrogé. Après un long procès, une année en préparation, l'accusé est acquitté. L'individu se sent lésé : il croit qu'il a été poursuivi sans raison, qu'il n'y avait pas de preuve suffisante, et que sa vie a été détruite par la suspicion; et alors il poursuit le plaignant et il intente une action en responsabilité délictuelle. Un juge ne dit pas : est-ce que c'est juste ? Un juge ne laisse pas les émotions déterminer ce qu'est la loi : la question c'est : quelle est la loi ? Si on devait légiférer dans ce domaine difficile, on devrait considérer des questions de politique et des questions de preuve. Est-ce que la législature devrait rendre facile à recouvrer des dommages-intérêts d'une personne qui, de bonne foi, *bona fide*, avait essayé de faire respecter la loi en déposant une plainte au sujet d'une infraction criminelle. Ne devrait-elle pas, au contraire, quand une personne avait vu sa vie gâchée par une plainte malveillante, prévoir les dommages ? Une norme doit être établie qui rend la loi à la fois applicable et d'intérêt pour la société. La common law a fait cela en inventant le délit civil de poursuites abusives. [92] Et cela peut être défini par les jugements. *Salmond on Tort* le défini comme :

> C'est le déli civil de poursuites abusives pour engager des poursuites pénales contre quelqu'un si la poursuite est inspirée par malice et manque de tout motif raisonnable.[93]
>
> Une responsabilité similaire s'attache à quelqu'un qui malicieusement et sans motif raisonnable demande à voir une autre personne déclarée en faillite ou de liquider une entreprise comme insolvable.[94]

De même, il s'agit d'une blessure donnant lieu à une action d'obtenir l'arrestation et l'emprisonnement du plaignant par voie judiciaire, civile ou criminelle, qui est commencée malicieusement et sans motif raisonnable.[95]

Ces définitions sont claires et elles sont certaines. Pour réussir, un plaignant doit démontrer l'arrestation, la faillite, ou la saisie des avoirs, et que le défendeur n'avait pas une cause raisonnable ou de preuve probable. Est-ce qu'un code serait plus clair ? En outre, ce sont des questions de droit basées sur des faits – pas sur l'émotion des circonstances. Il faut toutefois reconnaître que, à certains égards, la common law peut devenir trop complexe malgré la simplicité de ses principes. La diffamation est un exemple ; c'est un bon exemple parce qu'il montre comment la common law peut évoluer, non seulement sur les caprices d'un juge, mais parce que, grâce au raisonnement déductif, les principes existants peuvent permettre l'application d'un principe juridique à une nouvelle situation.

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[92] Herbert Stephen, *The Law Relating to Actions for Malicious Prosecution* (London 1888) 37; *Saville v Roberts* (1698) 5 Mod 394.
[93] John Willliam Salmond, *Salmond on the Law of Torts* (17th edn, London: RFV Heuston 1977).
[94] ibid 413.
[95] ibid.

La diffamation et la flexibilité

La destruction de la réputation de quelqu'un était un tort en droit romain et ce tort a été codifié par Justinian.[96] Bien sûr, vous n'êtes pas responsable si ce que vous avez dit, écrit ou diffusé est la vérité : que le plaignant a vraiment tué son associé, ou que le plaignant a volé de l'argent. Mais, à la common law, le défendeur qui diffuse un article de journal révélant le caractère épouvantable du plaignant doit prouver comme une probabilité que ce que était écrit était la verité : ce n'est past facile. Mais qu'est-ce que c'est, la diffamation ? La diffamation est la publication d'une déclaration fausse et diffamatoire concernant une autre personne sans raison valable, à condition que cette personne soit encore en vie.[97]

Comme toujours dans la common law, tout est dans la définition. On diffame quelqu'un en abaissant leur caractère dans l'esprit des gens ordinaires et sensés de la société. On peut le faire légalement si c'est vrai : alors, nous avons la « justification légale ». Exprimer un opinion sur une question d'intérêt public, comme la politique, n'est pas de la diffamation, et de même, l'abus vulgaire n'est pas diffamatoire. Et vous êtes justifié légalement, si vous croyez que ce que vous avez dit est vrai, ou finalement si vous avez une obligation de le dire et l'individu auquel vous l'avez dit a un intérêt à le savoir. Cette dernière défense s'appelle le privilège qualifié.

On peut considérer un exemple de cette défense de l'époque quand les dames avaient des domestiques. Lady Muck soupçonne que sa femme de chambre est une voleuse. En réalité, Olive Plant est honnête et pieuse. Lady Muck invite cinq personnes chez elle pour écouter un récital privé de Chopin par une jeune pianiste. En entrant dans son salon, Lady Muck conseille à ses invités de ne laisser pas leurs sacs à main hors de leur vue parce que « Olive est kleptomane ». Olive écoute cela et elle poursuit Lady Muck. Dans le cas de *Plant v Muck*, la défenderesse gagnera : Lady Muck a eu le devoir envers ses invités ; elle ne voulait pas qu'ils soient volé ; Lady Muck n'a pas agi malicieusement, mais elle l'aurait été si elle ne croyait pas vraiment qu'Olive lui volait et qu'elle était susceptible de voler aux autres. Maintenant, nous allons voir comme l'émotion en recherche de justice avait changé l'application de la défense.

Alors que les politiciens sont peu susceptibles d'obtenir notre sympathie, s'ils poursuivent pour diffamation, de temps en temps, ce qui est publié est trop. Personne n'avait pensé jusqu'en 1994 que le public pourrait prendre la place des invités de Lady Muck et qu'un journaliste pourrait revendiquer le privilège de révéler à tout le monde qu'un politicien était corrompu, même si cela n'a pu être prouvé. Mais en 1994, Albert Reynolds a dû démissionner comme Taoiseach (le premier ministre d'Irlande) dans le tumulte au Dáil Éireann, notre parlement. Est-ce qu'il avait trompé la nation ou non ? The Times de Londres a publié une analyse factuelle, alors la défense de « commentaire loyal » n'était pas disponible (parce que ce n'était pas le commentaire) et montrer la vérité d'une situation politique complexe n'était pas possible non plus. Mais les avocats ont eu une idée intelligente : il n'y avait pas de loi que les situations privés de privilège qualifié (comme Lady Muck et ses invités) ne pourrait pas s'appliquer au public. Alors dans *Reynolds v Times Newspapers*[98] la common law a développé : la House of Lords a décidé que :

[96] John Baron Moyle (ed), *The Institutes of Justinian* (IndyPublish 1906).
[97] Salmond (n 93) 139.
[98] [1999] UKHL 45, [1999] 4 All ER 609, [2001] 2 AC 127.

> L'élasticité du principe de la common law permet l'interférence avec la liberté d'expression d'être confinée à ce qui est nécessaire dans les circonstances du cas. Cette élasticité permet au tribunal d'accorder un poids approprié à l'importance de la liberté d'expression par les médias sur toutes les affaires d'intérêt public.
>
> Selon les circonstances, les questions à examiner sont les suivantes. Les observations sont seulement illustratives.
>
> 1. La gravité de l'allégation. Plus l'accusation est grave, plus le public est mal informé et la personne est lésée, si l'allégation n'est pas vraie.
> 2. La nature de l'information et la mesure dans laquelle le sujet est d'intérêt public.
> 3. La source de l'information. Certains informateurs n'ont aucune connaissance directe des événements. Certains ont leurs propres motivations personelles, ou sont payés pour leurs histoires.
> 4. Les mesures prises pour vérifier l'information.
> 5. L'état de l'information. L'allégation a peut-être déjà fait l'objet d'une enquête qui exige du respect.
> 6. L'urgence de la situation. Les nouvelles sont souvent un produit périssable.
> 7. Si on a cherché le commentaire du plaignant. Il peut avoir de l'information que les autres n'ont pas ou qu'il n'a pas encore divulguée. Il ne sera toujours nécessaire de communiquer avec le demandeur.
> 8. Si l'article contient l'essentiel de la version des faits du plaignant.
> 9. Le ton de l'article. Un journal peut soulever des questions ou demander une enquête. Il ne doit pas adopter des allégations comme des déclarations de fait.
> 10. Les circonstances de la publication y compris son calendrier.
>
> Cette liste n'est pas exhaustive. Le poids à accorder à ces et d'autres facteurs pertinents variera d'un cas à l'autre. Toutes les disputes de faits primaires seront une affaire de jury, s'il y en a un. La décision, compte-tenu des faits admis ou prouvé, d'est-ce que la publication était soumis à la défense du privilège qualifié est pour le juge. C'est une pratique établie et ça semble bien. Une opération d'équilibre est mieux réalisée par un juge que par un jury. Avec le temps, un corpus précieux de jurisprudence sera construit.[99]

C'est un développement mais, c'est aussi une application de ce qui existait déjà à une situation nouvelle. Dans le droit, comme dans la vie, des nouvelles situations se présentent tout le temps et la common law est là pour répondre ; pas seulement pour les juges de dire : « ah, non ! Nous n'avons jamais vu cela avant et même si le résultat n'est pas juste, nous ne faisons rien. » Ce serait répondre émotionnellement, se laver les mains du problème. Mais, les développements de la common law sont petits, logiques et basés sur l'expérience. Les développements ne sont pas fondés sur l'émotion. Si, au contraire, la loi est suffisamment claire, si la situation a déjà été testée et un précédent établi, la common law est un code et elle ne bougera pas.

[99] Les cas ultérieurs ont déclaré que cette liste de 10 points n'était qu'indicative; *Jameel v Wall Street Journal Europe* [2007] 1 AC 359, [2006] 4 All ER 1279, [2006] UKHL 44, [2006] HRLR 41; *Leech v Sunday Newspapers* [2007] IEHC 223 [1950] IR 57.

L'émotion ne change rien

La loi est important – pas l'émotion. L'Irlande était un pays religieux. Les marins entrant au port de Dublin de l'étranger au XXe siècle étaient pris en charge par une mission Protestante ou Catholique, où ils pouvaient recevoir des rafraîchissements et trouver un lit. Il y en avait deux et la mission Catholique avait un nom différent de la mission Protestante. En *Re Julian*,[100]une dame Protestante a légué beaucoup d'argent dans son testament à « l'institut de marins, quai de Sir John Rogerson, Dublin ». Deux institutions à Dublin ont réclamé ce legs. Naturellement, il faut supposer que la dame Protestante a légué s'argent à l'institution Protestante et, pour couronner le tout, le juge, que je connaissais enfant parce qu'il habitait près de chez moi, Theodore Kingsmill More, était Protestant aussi. Malgré les preuves irréfutables que la femme décédée a connu et qu'elle a visité l'institution qui s'appelait l'Institut de Marins de Dublin à Eden Quay à Dublin, qui partageait ses convictions religieuses, et qu'elle n'avait pas un intérêt dans l'autre instit à quai de Sir John Rogerson, les mots qu'elle avait utilisé voulaient dire que son legs est allé à l'institut à quai de Sir John Rogerson, comme elle a clairement exprimé. Juge Kingsmill Moore, à page 65 et 66, a ajouté une note personnelle qui a discuté comment la loi avait prévalu et comment ses émotions n'ont pas été influencées :

> Je regrette de devoir rendre cette décision, pour la preuve que j'aurais pu exclure, si je le pouvais en tenir compte, me convaincrait d'une certitude morale que la testatrice avait l'intention de bénéficier l'Institute de Marins à Dublin… Ce n'est en aucun cas le premièr – et, tout aussi, ce ne sera pas le cas dernièr – dans lequel un juge a été forcé par les règles de loi de rendre une décision sur la construction d'un testament qu'il croyait contraire à les intentions du testateur.[101]

La règle de la common law, c'est que quand on interprète un contrat écrit ou un règlement, l'intention des partis devrait déterminer les mots qu'ils ont utilisé dans le contexte vérifié. Il n'y avait pas de la flexibilité. Les règles sont les règles : comme s'ils étaient dans un code écrit.

Les principes qui sous-tendent la common law

Oliver Wendell Holmes, quand il était un avocat, avait été invité à donner la Lowell Lecture á Harvard en 1880 et dans ces 12 conférences il a exploré le fonctionnement interne de la common law.[102] Holmes était un peu cynique et ses conclusions peuvent ne pas être partagées par tout le monde : mais ses contributions ne pourraient pas être ignoré parce qu'il a tourné chaque feuille pour trouver les origines de la common law. En fait, on peut dire qu'il a découvert que l'émotion soulignait les règles juridiques.

Par exemple, s'il y a une collision de deux bateaux, et bateau A a injustement endommagé bateau B, le propriétaire de bateau A peut arrêter le navire B. Ainsi les propriétaires du navire A peuvent recouvrer leurs dommages-intérêts parce qu'ils peuvent vendre navire B si l'argent n'est pas payé.[103] Mais l'émotion réelle qui sous-tend la common law, c'est un sentiment

[100] [1950] IR 57.

[101] ibid [65]–[66].

[102] Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, and Company, 1881).

[103] Holmes, 27.

primitif que quand quelqu'un est blessé par un objet, un arbre, un chien, une vache, ils devraient le recevoir pour le détruire. On peut considérer cela comme la loi de la jungle. Mais considérez ceci : comme Holmes a découvert, la loi canalise la vengeance. Si l'enfant de quelqu'un est agressé, la mère ou le père peut attaquer le mécréant. La loi, parce qu'elle est rationnelle, objective et juste, va remplacer le rôle des parents pour se venger.[104] Dans le système de loi en ancienne Angleterre, on aurait pu le faire par la torture ou les exécutions, mais maintenant nous utilisons l'emprisonnement. Les jurés, en examinant les affaires pénales, sont avertis qu'ils ne peuvent pas compter sur l'émotion : ils devraient seulement juger l'affaire sur les faits, comme ils sont présenté au tribunal. Je sais, parce que j'étais un avocat criminaliste, que les hommes accusés apportent souvent leur femme enceinte pour que les jurés puissent les voir, et qu'ils appellent leur mère pour témoigner. Mais cela n'a d'importance. Alors que c'est difficile pour les jurés de rester objectifs, c'est aussi difficile pour les juges. C'est une question de jugement clinique et les jurés sont excusés s'ils connaissent l'accusé ou la victime, ou s'ils ont des opinions bien arrêtées qu'ils ne peuvent pas entendre l'affaire. En fait, le vrai danger, la substitution de revanche, c'est que l'internet soit accessible et que le préjudice de l'extérieur de l'affaire entrera.

Holmes nous a dit quelques vérités :

- Oui, la common law change, mais elle le fait d'une manière qui cache ce qu'elle fait. Les juges, en rendant la décision, prétendent qu'ils appliquent seulement les règles, mais les juges inventent des nouvelles explications pour les règles existantes et ils les appliquent selon les besoins de l'affaire. [105]
- Quand on fait la loi, on fait aussi la politique. Par exemple, le droit de la responsabilité délictuelle consiste à trouver des règles qui permettent aux entreprises de fonctionner en exigeant seulement un soin raisonnable pour éviter les blessures aux travailleurs. Les conséquences d'un accident se trouvent avec un demandeur sauf si le demandeur peut démontrer qu'il y avait un manque de soins ordinaires, auquel cas le demandeur récupère les dommages. Mais, qu'est-ce que c'est le soin ordinaire ? En réalité, les juges fixent les normes et les appliquent à des autres situations. [106]
- Alors que, pendant si longtemps, les gens ont estimé que la loi était fondée sur la moralité, parce qu'elle était administrée dans les tribunaux d'églises, en réalité il ne servait à rien d'essayer de fouiller dans l'esprit d'une personne. Au contraire, la loi s'occupe de fixer des normes externes. Les juges fixent et définissent la loi et tout le monde devait respecter cette norme. Une norme commune est la norme d'un « homme raisonnable ». Mais qui la définit ? Les juges. [107]

Le développement de la loi de négligence par exemple

La négligence, en tant que concept a surgi comme une marée et elle a englobé presque tous les autres torts. Notre Cour suprême a toutefois mis en garde contre cette pratique : Les délits qui correspondent à des circonstances particulières ont leur définition et ne doivent pas être supplantés par l'invocation de la négligence.[108] Écrivant dans l'affaire *Cromane*, la Cour suprême a déclaré :

[104] ibid 41.

[105] ibid 35-39.

[106] ibid 109.

[107] ibid 37-38.

[108] *Cromane Seafoods Ltd v Minister for Agriculture* [2016] IESC 6.

> La négligence n'est pas un concept global. Elle n'a pas envahi tous les autres recours dans le droit du délit ou de la résponsabilité civile. Si l'on parle mal d'une personne, le recours est la diffamation. Si une personne est arretée illégalement, le recours est le délit de fausse détention. Si, dans l'exercice d'une fonction publique, quelque chose est fait qui affecte les droits, le recours peut être la revue judiciare en termes d'annuler la décision prise en excès des pouvoirs ou, si des dommages-intérets sont demandés, le droit de la responsabilités civile exige qu'un plaignant prouve qu'il a commis une faute dans l'exercice d'une fonction publique. [109]

Cela a été confirmé récemment aussi dans le cas de *UCC v* ESB.[110] La loi a commencé avec des situations d'intrusion ou de nuisance, qui n'étaient prouvables que lorsque le demandeur a démontré que le défendeur a été négligent. Le cas célèbre de *Donoghue v Stephenson*[111] a évolué en un mal autonome : quand des gens serait si proche que l'acteur devait tenir compte de l'effet que ses actions pourraient avoir sur le fait de blesser d'autres personnes, il y aurait un devoir de diligence raisonnable, et si des dommages surgissent, un défendeur serait responsable.

Mais, qu'en est-il du principe que les juges inventent la politique ? Le développement de la loi de la négligence illustre ça. Supposons que la police vous poursuit de bonne foi mais laisse de côté certaines preuves ; ou supposons que les officiels publics accomplissent leur devoir, mais ils le font à tort et un propriétaire subit des dommages ; ou supposons que le permis de construire d'une usine est refusé à tort : est-ce que la personne lésée peut-elle intenter des poursuites ? Non, parce que les principes de la politique publique entrent dans le mélange. Tout d'abord, vous devez trouver un devoir de diligence. Un avocat qui rédige un testament a un devoir à une bénéficiaire pour assurer qu'il ou elle reçoit ce que le testateur voulait ; une personne conseil dans une relation spéciale doit donner du conseil soigneux ; un médecin qui opère un patient doit exercer une compétence et jugement professionnel ; un automobiliste qui conduit dans la rue doit faire attention. Et après ça, on définit le standard ; le standard d'une personne raisonnable, mais pas un standard plus haut que ça. Ce n'est pas l'assurance. Les dommages doivent résulter du tort, et il ne peut pas être distant.

La négligence a la capacité de s'appliquer dans toutes les situations ; aux tribunaux, aux législateurs, aux magistrats d'instruction ; donc elle doit être limitée. Et ici, c'est où les juges ont créé les limitations par principe. Un sentiment, une émotion de ce qui est correct est ce qui limite le danger d'un pays moderne dont le fonctionnement est bloqué à cause de la peur d'être poursuivi.

> Il n'y a pas, à mon avis, une raison pourquoi les cours qui détermine s'il y a un devoir de diligence devait se considérer obligé de déterminer qu'il se pose en tout cas où une blessure ou des dommages matériels étaient raisonnablement prévisible et que le test notoirement difficile et insaisissable de « proximité » ou de «d'être voisin» a été rempli, à moins des considérations des principes de la politique publique très puissantes ne dictent le contraire. Il me semble qu'aucune injustice ne sera faite s'ils sont tenus de prendre l'étape supplémentaire d'examiner si, dans toutes les circonstances, il est juste

[109] [2016] IESC 6, [29] (Charleton J).
[110] [2020] IESC 38.
[111] [1932] AC 562.

> et raisonnable que la loi devrait imposer un devoir d'une portée donnée sur le défendeur au bénéfice de demandeur.[112]

Et il faut bien admettre que l'état actuel du droit a développé par essais et erreurs, et il était informé par le sentiment que pas tous les torts permettent au demandeur de recouvrer des dommages-intérêts sinon on inhiberait le fonctionnement de notre démocratie.

Dans la correction du droit, où la common law est flexible, l'émotion peut jouer un rôle. Je vous donne maintenant un exemple du droit pénal.

L'autocorrection comme paradigme

La common law peut s'auto-corriger. Ça peut mal tourner et par une analyse des conséquences, les juges peuvent conclure que les principes étaient appliqué incorrectement. Mais est-ce que c'est tout ? Holmes disait que c'est un exemple de juges faisant la loi ou, en outre, faisant la politique. Comme Holmes a dit :

> La vie de la loi n'est pas la logique : elle est l'expérience. Les nécessités ressenties de notre époque, les théories morales et politiques courantes, les intuitions politiques publiques, avouées ou inconscientes, même les préjudices que les juges partagent avec leurs semblables, ont eu beaucoup plus à voir avec le syllogisme pour déterminer les règles par lesquelles les hommes doivent être gouvernés. La loi incarne l'histoire du développement d'une nation pendant des nombreux siècles, et elle ne peut pas être traitée comme si elle contenait seulement les axiomes et les corollaires d'un livre de mathématiques.[113]

Dans *The People (DPP) v McNamara*[114] la Cour suprême a été face à un crime de passion. On peut l'appeler un crime de guerre des gangs. L'accusé était un membre d'un club de moto, et le club avait eu un différend avec un autre club. L'accusé avait été confronté dans un bar par un membre du club de moto rival et il s'est fait arracher l'insigne de son club et sa femme a été insultée. Cette nuit-là, des membres du club de moto rival l'ont menacé devant chez lui. Le jour suivant, il a obtenu une arme et il a retrouvé la voiture de la personne qui l'a insulté et il l'a suivi. Le conducteur est entré dans les locaux de club rival à travers les portes. Il a garé sa voiture et il s'est approché les portes. Là, il a tiré sur un homme qui n'avait pas de connections avec les événements de la veille en plus d'être membre du club rival. L'homme est mort. L'accusé prétendait qu'il a agi sous provocation. Le juge du procès a déterminé qu'il n'y avait pas de preuve suffisante et il a rejeté la défense. Apres ça, le jury l'a condamné.

Utiliser la provocation comme une défense dans les procès criminels a une longue histoire et on pourrait voir son développement comme une réflexion des émotions de la société et des avis judiciaires à ses humeurs dominantes. Cette défense réduit le meurtre à l'homicide involontaire ; et par conséquent l'accusé ne doit pas être condamné à la réclusion à perpétuité – la peine de prison pourrait être moindre. La provocation a commencé comme une méthode pour arrêter les hommes en duel dans le 18ème siecle d'être reconnus coupables de meurtre. Et elle s'est développée de manière assez misogyne, en excusant la rage des hommes quand

[112] *Glencar Explorations Limited v Mayo County Council* (No 2) [2002] 1 IR 84.
[113] Oliver Wendell Holmes (n 102) chapitre 1.
[114] [2020] IESC 34.

des femmes se moquent de leur performance dans une rencontre sexuelle.[115] Cette défense en est venue à être très fortement influencé par la notion de la « personne raisonnable » de Holmes ; alors, elle était objectif : on attendait de l'accusé qu'il réagisse comme une personne raisonnable. On peut se demander comment une personne raisonnable peut-elle tuer quelqu'un ? Donc, il y avait un cas anglais quand un garçon avait été agressé sexuellement plusieurs fois, et une dernière insulte lui fit frapper son tortionnaire avec une casserole et le tuer. Au procès, il a été déterminé que les antécédents d'abus n'étaient pas pertinents pour le concept de l'homme raisonnable. En appel,[11682] les caractéristiques fixes comme la grossesse, la race si l'insulte était raciale, l'abus, étaient autorisés à être ajoutés à l'homme raisonnable. En Irlande, nous sommes allés plus loin que la loi en Angleterre, et nous avons dit que la provocation était entièrement subjective.[117] Alors, on doit juger la réaction à une insulte sans tenir compte du tout de critères objectifs. Cela s'est avéré insatisfaisant. Dans le cas de *McNamara*, la Cour suprême a renversé 40 ans de précèdent et la Cour a dit que, en réalité, la vraie loi était qu'on attendait des gens qu'ils gardent leur sang-froid et que la rage des hommes contre des femmes, qui avait représenté la majorité des cas de ce type, n'était pas une excuse. Cela a été bien accueilli par les principaux commentateurs :

> Le développement du précèdent en Irlande sur la provocation a démontré qu'il y avait eu un besoin de clarification, et qu'on doit aussi trouver un équilibre concernant quel test devait être pour l'utilisation de la défense. Les modifications de la loi de provocation en Irlande établi dans *McNamara* ont le potentiel d'assurer que la norme du test est appropriée réalisable, ce qui signifie qu'il y a une protection pour la fragilité humaine et la perte réelle de maitrise de soi, mais, en même temps, que la barre n'est pas trop basse pour permettre cette défense partielle à présenter au jury dans un trop grand nombre de circonstances.[118]

L'alcool et les drogues alimentent souvent la violence. [119] Pour commettre un meurtre, il faut avoir l'intention de tuer ou de causer une blessure grave.[120] On peut avoir deux points de vue sur ce sujet : qu'il faut que l'accusé soit jugé comme s'il était sobre et même s'il n'a pas eu l'intention de tuer la victime, alors c'est dommage – il est coupable. Analytiquement, on peut trouver la faute, un élément essentiel pour établir la responsabilité pénale, en se saoulant : mais on peut dire aussi que tout le monde se saoule de temps en temps. Dans un cas anglais, un homme a étranglé sa copine tout en étant sur un psychotrope puissant parce qu'il croyait qu'il luttait avec des serpents dans le monde souterrain.[121] Bien qu'il ne sache rien, il a été condamné d'homicide involontaire. S'il était somnambule, il y aurait eu un acquittement. Quand la loi moderne d'ivresse était analysé par la Cour suprême, nous avons décidé que si l'accusé était si ivre ou drogué qu'il ne réalisait pas ce qu'il avait fait, que ce n'est pas un meurtre mais qu'il y avait une faute suffisante pour l'homicide involontaire.[122] Pourquoi ?

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115 L'histoire est expliquée dans *DPP v McNamara* [2020] IESC 34.

116 *R v Camplin* [1978] AC 705.

117 *The People (DPP) v MacEoin* [1978] IR 27.

118 Caoimhe Hunter-Blair and Ceara Tonna-Barthet, 'The Ground Shifts: An Analysis of the Law of Provocation in Ireland' (2021) 31(2) ICLJ.

119 Kajol Sontate and others, 'Alcohol, Aggression, and Violence: From Public Health to Neuroscience' (2021) 12 Front Psychol; Shaoling Zhong, Rongqin Yu, and Seena Fazel, 'Drug Use Disorders and Violence: Associations With Individual Drug Categories' (2020) 42(1) Epidemiol Rev 103-116.

120 Criminal Justice Act 1964, s 4.

121 *R v Lippman* [1970] 1 QB 152.

122 *The People (DPP) v Eadon* [2019] IESC 98.

Essentiellement, il y avait une faute et les gens ne peuvent pas échapper à leur responsabilité par leur propre faute. Ça, c'était le pragmatisme de la common law.

Alors, la common law, est-elle guidée par l'émotion ? Je dirais qu'elle est conduite par l'expérience et par le pragmatisme.

La flexibilité et l'exclusion

Il existe une règle dans la common law qu'un juge ne peut pas agir comme un juge dans son propre cas : *nemo judex in causa sua*. L'article 6 de la Convention européenne des droits de l'homme dit que pour la « détermination de ses droits et obligations civiles, ou d'une accusation criminelle portée contre lui, toute personne a un droit à avoir une audience équitable et publique et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi. » Ce n'est pas plus qu'on peut s'attendre. La Constitution d'Irlande, 1937, exige que les juges ne peuvent pas juger dans des cas qui les impliquent, et que la justice existe totalement séparément que l'État, avec lequel les juges ne peuvent pas interférer. Alors :

> Article 34 – La justice sera administré dans les tribunaux établis par la loi par des juges nommés de la manière prévue dans la Constitution et … la justice sera administrée en public.
>
> Article 34.6.1° - Toute personne nommée comme un juge conforme à la Constitution doit faire et souscrire à la déclaration suivante : … J'exécuterai l'office de juge dûment et fidèlement et au mieux de mes connaissances et de mon pouvoir sans peur ou faveur, affection ou mauvaise volonté envers toute personne, et je soutiendrai la Constitution et les lois…
>
> Article 35.2 – Tous les juges seront indépendants en exerçant leur fonctions judicielles et ils ne seront soumis qu'à la Constitution et la loi.
>
> Article 35.4 – Aucun juge ne sera éligible pour être un membre [du Parlement ou du Sénat] ou pour occuper tout autre poste rémunéré.
>
> Article 35.4.1° - Un juge… ne sera pas démis de ses fonctions sauf en cas d'inconduite ou d'incapacité déclarée, et seulement sur les résolutions adoptées par [le Parlement et le Sénat]…

Tout ça, toutefois, c'est quelque chose déjà prévu par la common law : que les juges seraient indépendants, et qu'ils ne jugeraient pas dans les cas qui les concernent directement. C'est tout à fait fondamental que le système judiciaire fonctionne comme un système indépendant auquel les gens peuvent recourir pour résoudre des litiges juridiques. Si la confiance du public de l'impartialité judiciaire est miné, le système judiciaire est ruiné. Lord Denning a observé : « La justice doit être enracinée en confiance, et la confiance est minée quand les gens raisonables s'en vont en pensant que ce juge était biaisé.[123] » Un juge ou un décideur ne peuvent pas avoir un intérêt dans un cas. Si cela se produit, on pourrait raisonnablement penser que la décision était inclinée dans une direction particulière à cause d'un facteur qui a lié le juge à ce résultat spécifique. Cela sape la confiance dans l'administration publique et attire les systèmes de justice vers, ou bien dans, le bain d'acide de la méfiance publique. Un exemple du temp du procès de Sainte Jeanne d'Arc pourrait illustrer ça. Elle a été condamnée à être brûlé vive sur le bûcher par les forces anglaises occupant le nord de la France après

[123] *Metropolitan Properties v Lannon* [1968] 1 QB 577.

une prétendue enquête sur l'hérésie, dont le résultat favoriserait l'armée d'invasion.[124] Elle est morte le 30 mai, 1431 à Rouen.[125] Un cas suivant a renversé le résultat pour cause de biais mais, à ce moment, elle avait déjà connu une mort atroce.

Presque personne dit qu'un juge commence une affaire en pensant : « ah oui, je vais m'assurer que les immigrants ne pourraient pas gagner des cas de contrat » ou, comme dans le cas de Saint Jeanne, qu'elle devrait mourir pour notre succès dans cette guerre aggressive. Non, le droit est plus subtil. Il ne se focalise pas sur ce que le juge pense, mais sur ce qu'une personne raisonnable, assis au fond de la cour et connaissant tout sur les antécédents du juge, penserait. Si cette personne disait qu'il y a une possibilité que le juge pourrait être influencé par des questions extérieures au cas, la décision doit échouer. Si le juge n'était jamais influencé et le fait qu'un juge n'est jamais obligé de témoigner dans un système de la common law, ce n'est pas important. L'affaire est jugée seulement objectivement à partir de ce que la personne raisonnable penserait dans les circonstances connues.

Il n'est pas nécessaire de prouver que le biais était présent, ou de montrer la possibilité de biais, mais seulement le danger réel du biais. Alors l'épreuve est si un observateur impartial et informé, en considérant les faits, conclurait qu'il y avait une possibilité réel de biais.[126] L'épreuve est : appréhension raisonnable de biais ou soupçon raisonnable de partialité par un observateur raisonnable.[127] Cet observateur n'est pas un plaideur et il n'est pas paranoïaque ou sujet à des fantasmes complotistes – il est impartial et il est capable d'un bon jugement et il s'est informé des faits de l'affaire et de son contexte.[128] Ce paragon de civique est un être idéal et il est capable d'un bon jugement; dans un contexte où il y a des décisions aussi diverses, où une fille pourrait plaider un cas à son père, qui est un juge, ou un juge qui a des opinions douteuses, ils formeront toujours un bon jugement. Clairement, la gravité du biais objectif n'est pas que le décideur ou l'enquêteur ont formé un préjugement et, après ça, qu'ils ont tendancieusement agi en conséquence en déformant les faits pour les adapter à ce qui avait déjà été décidé ; elle est qu'une personne de bon sens et en pleine possession du contexte pourrait raisonnablement suspecter la partialité d'avoir influencé le processus. Surtout, il ne faut pas juger dans l'instant quand la source du biais est censé s'être glissé, mais au point final de l'achèvement du processus. Cette personne raisonnable saurait que, tandis que l'opinion pourrait être puissante, les faits parlent plus forts et que pendant un point de vue ou une représentation pourrait offrir une raison d'enquêter, et ce qu'une enquête révéle pourrait être jugé équitablement a la froide lumière de la réalité. L'apparition de biais pourrait être laissé à la suite d'efforts sérieux et déterminés de déployer des ressources d'enquête pour découvrir la vérité. Une personne raisonnable renverrait des cas apparents après une enquête et ça c'est à cause de la nature d'une telle personne.[129]

Il y a beaucoup de cas, parce que les justiciables sont souvent soucieux de renverser des décisions des tribunaux ou des cours inférieures. Le résultat d'une revue judiciaire, c'est que tout le processus recommence. L'intérêt matériel du décideur est important.[130] Ou occuper des postes au sein d'une autorité de décision et être l'un des experts conseillant sur un

[124] Colette Beaune, *Jeanne d'Arc*, (Tempus Perrin 2013); Seosamh Charleton, *Jeanne d'Arc*, (Cosceim, Baile Átha Cliath 1990).
[125] Helen Castor, *Joan of Arc: A history* (London: Faber and Faber 2015).
[126] *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.
[127] *Reid v Industrial Development Authority* [2015] IESC 82 [52].
[128] The Right Hon. Lord Woolf and others, *de Smith's Judicial Review* (8th edn, London: Sweet and Maxwell 2018) 10-018.
[129] *Helow v Secretary of State for the Home Department* [2008] UKHL 62 [1-3].
[130] *The People (AG) v Singer* (1963) [1975] IR 408; *Goode Concrete v CRH plc* [2015] 2 ILRM 289.

problème de planification.[131] L'animosité personnelle peut apparaître, quand un juge doit juger quelqu'un avec qui il avait eu une confrontation physique, par exemple. [132] Ou quand on a des vues anti-alcool extrême quand on décide sur des licences. [133] Ou quand on exprime des vues troublantes de l'ethnicité d'une partie de litige.[134]

Beaucoup de cas de biais sont déterminé par une situation persistante : le juge a des intérêts, ou le décideur est lié à la personne lésée, ou le plaignant agit également en tant que juge. Dans la Cour suprême, où des juges pourraient avoir des fils ou des filles qui sont avocats, aucun juge ne s'implique si sa famille est impliquée. Un autre juge se substitue. L'Irlande est un petit pays ; des conflits de ce genre apparaîssent de temps en temps. Ce que j'ai dit forme une part des principes Bangalore,[135] mais l'expérience personnelle est aussi importante. Permettez-moi de partager mon point de vue personnel : je ne vais pas m'impliquer dans un cas où un plaideur a été un ami ou un camarade de classe. Par rapport à l'amitié occasionnelle, je crois que, si j'avais été dans leur maison pour les rafraîchissements ou si quelqu'un a été chez moi, je ne m'implique pas. Mais, si on connait simplement quelqu'un parce que il est le parent d'un enfant à l'école de ses enfants, c'est n'est pas suffisant. Permettez-moi de partager une expérience.

Quand j'étais dans la High court en 2012, nous faisions face aux conséquences du krach financier de 2008 et depuis 2010 le FMI était en Irlande, et dictaient la politique du gouvernement (ils sont partis il y a longtemps, je vous assure que nous sommes de nouveau sur nos pieds). Un avocat bien connu était devant le tribunal des faillites et je remplaçais pour le juge habituel, qui était absent ce jour. Cet avocat a soulevé le problème qu'il n'habitait pas en Irlande, parce que le krach l'avait fait déménagé en Angleterre. Les conséquences de la faillite on fait que tous ses biens avait été saisis par l'Assignée Officiel pour rembourser ses dettes et seulement après 12 ans il a recupéré son autonomie financière. Son cas n'était pas très convaincant. Le demandeur était Bank of Ireland, à qui cet avocat devait plusieurs millions d'euros. Dans un jugement écrit j'ai déclaré l'avocat en faillite. Quand j'ai lu le jugement, le conseil pour l'avocat s'est levé et il a dit : « Mon client m'a demandé de faire une demande, mais je ne suis pas prêt à le faire. Pourriez-vous l'écouter de son beau-frère ? » J'ai accepté cette offre. Le beau-frère a annoncé qu'il avait recherché l'hypothèque de ma maison, et qu'il avait découvert que mon hypothèque était avec Bank of Ireland, et alors il a dit que j'étais biaisé. J'étais étourdi. Retrouvant mon calme sur le fait que quelqu'un avait fait des recherches sur mes affaires de banque privée, j'ai refusé la demande d'annulation du jugement : il y a seulement quatre banques en Irlande, je l'ai dit, et c'était seulement une affaire bancaire familiale ordinaire : ma relation avec la banque ne serait pas affecté par une dette recouvrée. Je dois dire que j'étais bouleversé qu'on puisse suggérer qu'un de mes jugements sur un problème légal pourrait dépendre de mon goût présumé pour une banque en particulier. Pour être claire : je n'ai pas d'affection pour des banques, surtout après 2008.

Mon avis est que parfois on peut en faire trop de ce principe. On doit faire confiance aux juges. En outre, l'observateur raisonnable n'est pas seulement un observateur ; il ou elle sait autant que le juge, et on s'attend à ce qu'il soit raisonnable. Et ça, c'est la pierre de touche.

[131] *Reid v IDA* [2015] 4 IR 494.
[132] *R v Handley* (1921) 61 DLR 656.
[133] Ex parte Robinson (1912) 76 JP 233.
[134] *El-Farargy v El-Farargy* [2007] EWCA Civ 1149.
[135] Bangalore Principles of Judicial Conduct (2002).

Les constitutions, les droits de l'homme, et la flexibilité véritable

La flexibilité est déterminée en partie par la constitution, le pays, et par le traité des droits de l'homme, mais la prise de décision judicaire flexible est dérivée de vagues promesses sur lesquelles repose la common law. L'Irlande n'est pas comme les États-Unis, bien qu'ils partagent un patrimoine de common law, et l'Irlande n'est pas comme le Canada et le Royaume-Uni non plus. Ça c'est peut-être un sujet pour un autre jour, mais la justice au Canada a découvert l'activisme judiciaire depuis l'introduction du Charte Canadien des Droits et Libertés Fondamentaux. En Angleterre, la justice a résisté à la tentation d'utiliser la Convention européenne des droits de l'homme pour autoriser la liberté judiciaire : alors, l'inflexibilité de précédent dans la common law était trop enraciné pour ça. Mais le Canada est plus proche des États-Unis !

Alors, comment appliquons-nous la Constitution en Irlande ? Avec beaucoup de soin. La justice ne peut pas s'immiscer dans la politique économique. Inversement, aux États-Unis, les conservateurs et la Cour suprême ont été horrifié par le plan « New Deal » de Roosevelt et la montée perçue du socialisme aux États-Unis. La justice a réagi avec une déclaration indiquant que le plan « New Deal » était une ingérence dans le droit sacré de contracter. Il y avait une histoire très longue de ce type de justice active aux États-Unis – la Cour suprême a commencé à abattre des lois que la Cour jugeait déraisonnables. Et bien la majorité conservative a déclaré que les lois des états qui ont fixé les tarifs pour les chemins de fer, ou qui ont exigé que la viande devait être inspectée pour la maladie. Par exemple, dans un cas de New York, la Court a abrogé une loi qui a régulait les prix des silos à céréales. Élevant leur langage aux sommets de la rhétorique, les juges ont dit que cette loi était « de nature vicieuse et communiste dans sa tendance », et donc elle a violé « le droit plus sacré de la propriété et la liberté individuelle de contrat ». [136] S'il y avait des déséquilibres ou des abus dans l'économie, alors ça n'avait rien à voir avec le gouvernement parce que ces déséquilibres s'autocorrigeaient avec l'aide des « règles générales du commerce, de l'offre et de la demande, » et non par l'ingérence d'un « gouvernement paternel » [137] Cette détermination de fonder l'économie laissez-faire dans la Constitution des États-Unis était fondée sur la clause de procédure régulière. C'était une interprétation avec lequelle beaucoup n'étaient pas d'accord. Et cette tendance continuait après le krach économique – la Cour suprême a déclaré inconstitutionnelles des lois pour la reprise économique.[138]

Donc, pourquoi est-ce que le système en Irlande est-il si différent des autres ? En Irlande, nous n'interprétons pas le mariage entre personnes de même sexe comme une partie de la clause d'égalité de l'Article 40.4 de la Constitution. Et nous ne légalisons pas l'avortement via les tribunaux.[139] La Cour suprême des États-Unis peut faire ça. En Irlande, les questions politiques sont pour le gouvernement, pas pour les cours. Alors que ce n'est pas facile d'amender notre Constitution, ce procès est beaucoup plus facile ici qu'aux États-Unis. Depuis 1937, nous avons eu 39 amendements et il suffit d'un vote populaire pour changer la Constitution. Ces référendums arrivent souvent. Quand nous avons un référendum en Irlande, la proposition pour amender la Constitution doit être adoptée par le Parlement, après quoi c'est voté directement par les citoyens. Et c'est tout. Une autre différence entre notre système et le système des États-Unis, c'est que les nominations judicaires sont beaucoup

[136] 117 N. Y. I (1889) 47.
[137] *People v Budd* (1899) 117 NY 1, 45, 69 , voir Bernard Schwartz, *History of the Supreme Court* (OUP 1995).
[138] Par exemple *Schechter Poultry Corp v United States* 295 US (1935) 495.
[139] *United States v Windsor* 570 US 744 (2013); *Roe v Wade* 410 US 113 (1973).

moins politiques en Irlande. J'ai été nominé au poste de juge par un gouvernement et j'ai été promu par un autre gouvernement. Et cela arrive souvent en Irlande. Quand les juges irlandais sont nominés, on ne nous demande pas si nous somme religieux, ou si nous avons des opinions libérales ou conservatrices. Parce que nous sommes sélectionnés pour effectuer un travail.

Vous pourriez penser que, en raison de l'influence de la common law, les juges irlandais comptent sur l'émotion quand nous décidons des cas constitutionnels. En tant qu'êtres humains, c'est assez difficile pour l'exclure. Mais la doctrine du précédent est plus importante. Ce qui est dans le texte et comment d'autres juges ont interprété la Constitution – ce sont les facteurs qui non seulement nous guident, mais qui nous lient.

REFLECTIONS ON CONTINUING JUDICIAL LEARNING

Author: The Rt Hon Lord Justice Bernard McCloskey, Chairman, Judicial Studies Board for Northern Ireland

Overview

This paper offers a Northern Irish perspective on the subject of continuing judicial learning and education, together with some broader reflections of more global application. Except where otherwise indicated any views expressed are those of the author.

The Inalienable Judicial Duty

The starting point in Northern Ireland ('NI') is that continuing judicial learning is a contractual duty. It is contained in an express provision of the terms and conditions of appointment of every judicial office holder. This requires judges '… to attend conferences and courses organised by or on behalf of the Judicial Studies Board on subjects relevant to the work they do'.[1]

Bearing in mind the tenets and full implications of the doctrine of the separation of powers, the duty of continuing judicial learning is also readily identifiable in the judicial oath of office. The person who swears, or affirms, the oath to '… do right to all manner of people after the laws and usages of the Realm …' will scarcely be equipped to discharge this solemn promise if he or she is not in command of the relevant laws, the skills of judgecraft and other important insights as these evolve from time to time. Having regard to the constitutional setting of the judicial oath of office, it is tenable to suggest that the judicial duty of continuing learning is of constitutional stature. Moreover, given that the judicial oath of office is enshrined in statute, the judicial duty of continuing learning may also be viewed as a statutory one.[2] Furthermore, it is clear from the *Statement of Ethics for the Judiciary in Northern Ireland,* which enshrines the *Bangalore Principles of Judicial Conduct* that one of the six key values, 'competence and diligence', sounds directly on this question. In paragraph 7 of the *Statement,* it is noted that the pursuit of this value requires, *inter alia*, that every judge '… take reasonable steps to maintain and enhance the knowledge and skills necessary for the proper performance of judicial duties'. It is a further aspect of the rule of law that the quality of the courts should not be variable or inconsistent and that every member of the judicial cohort be properly equipped to deal with matters coming before them with equal levels of diligence, knowledge and competence.

Given the foregoing, the judicial duty of continuing learning is readily identifiable as an important aspect of the rule of law. It is also, of course, closely linked to individual personal conscience. It must be seen as a delible aspect of the privilege of judicial office. It is also a duty owed to one's judicial colleagues and, hence, a critical facet of the duty of judicial collegiality. One of the most obvious ways of performing this duty is by attendance at relevant seminars and lectures, particularly those arranged by any agency with judicial education responsibilities. However, it is generally held throughout the common law world

[1] Standard terms & conditions of appointment.
[2] section 19 of and Schedule 6 to the Justice (Northern Ireland) Act 2002.

that the duty is not confined to simply attending organised seminars and lectures. Rather it embraces appropriate self-learning. Furthermore, it seems unexceptionable to suggest that the quality, to be contrasted with the volume, of activities of the foregoing kind is a critical characteristic.

Judges should be aware that issues of training are regularly the focus of our political representatives and questions are raised from time to time in the Assembly about judicial training. Thus in recent months, there has been a Written Assembly Question about the training of Lay Magistrates in handling search warrant applications; and a question from a Justice Committee member on what information The Judicial Studies Board for Northern Ireland ('JSB') is providing to the judiciary in relation to the new domestic abuse offence.

A More Global Perspective

At the Commonwealth Law Conference 2021('CLC'), senior judges from around the world considered the duty of continuing judicial education to be of such obvious and fundamental importance that none of them was able to identify the *precise* source thereof in their respective jurisdictions. It was simply a given, something which no one can plausibly contest. Discussions focused on *inter alia* the direct nexus between the duty of continuing judicial learning and the constitutional doctrines of the rule of law and the independence of the judiciary. This discrete subject has the following ingredients. By these doctrines, judges are required to constantly maintain the highest standards of accountability. This has both individual and institutional dimensions. Given the nature and scope of the powers that are conferred on every newly appointed judge, public trust and confidence are essential. The maintenance of this public confidence and trust is fundamental to the efficacy and proper functioning of the administration of justice. In this way, the rule of law is protected and promoted. This analysis highlights, with some emphasis, that inadequate discharge of the individual and institutional duty of continuing judicial learning, in common with unacceptably delayed judgments, positively undermines the rule of law by eroding public trust and confidence in the judiciary. It also damages judicial collegiality. Furthermore, it inflicts reputational damage on the judicial organisation as a wh
ole.

One striking theme emerging was that of the duty of continuing judicial learning and the duty to provide expeditious judgments being (a) of equal importance and (b) at the apex of all judicial duties. No one could plausibly dispute, of course, that every judgment must fundamentally satisfy the kite mark of *quality*. But is *excellence* an immutable requirement? In the real world, there is frequently a balance to be struck between quality and expedition. Attainment of the most elegant prose must sometimes be sacrificed. Furthermore, how can one find time for continuing learning under the pressures of unremitting hearings and judgment writing?

Another of the discrete subjects on the agenda at the recent CLC was that of judicial disciplinary measures. None of the senior judges who contributed to the presentations and deliberations demurred from the view that a failure to discharge the duty of continuing learning or that of producing expeditious judgments can in principle give rise to disciplinary (or comparable) action against the defaulting judicial office holder. This tool is especially sharp in certain countries of the civil law tradition. While in practice the Chief Justice or appointed presiding judge of the relevant tier should be able to oversee this by informal mechanisms, this topic is a challenging one and there is no single, universal model or solution. It would benefit from further research and debate.

As the foregoing demonstrates, the conduct of every member of any judicial organisation in these matters, and others, has repercussions for all other members of the organisation and the institution of the judiciary itself.

At the CLC there was also some NI support for the practice in certain jurisdictions of the legal profession having *some* say (eg by simply expressing views) in the training and continuing learning of judicial office holders – or, indeed, active joint judicial/profession events (as in the NI Chancery Court event in February 2021). Should there be informal consultation with appropriate representatives of the Law Society and the Bar Council as well as greater engagement?

The British Islands: A Snapshot

The JSB has gathered information on the arrangements for continuing judicial education in the three neighbouring jurisdictions of Ireland, Scotland and England/Wales. While the mechanics in all four jurisdictions differ, the common denominator is the underlying judicial duty. This information makes clear that, as in NI, the duty of provision and oversight ultimately rests with the presiding judge of the judicial organisation or, as the case may be, the presiding judge of individual chambers/tiers. In some of the jurisdictions, there are minimum training requirements. In none of the jurisdictions is there any suggestion that compliance with these requirements constitutes full discharge of the judicial duty in question. Notably, completion of post-training evaluation questionnaires is viewed as a discrete facet of the judicial duty in play. It is clear that all four British Isles jurisdictions view continuing judicial learning as a matter of greater importance than ever before. This is linked to *inter alia* the ever-increasing complexities of the law and the requirement to manage courts in ways that reflect and preserve important societal values in regard to eg diversity, equality and the treatment of vulnerable complainants/witnesses, among other things. It is also based on the expectations of the public and the legal profession.

Enter Lord Bingham

I gladly borrow the *ipsissima verba* of Lord Bingham of Cornhill:[3] In the context of his discourse on judicial independence, he said the following:

> Although it is not very long since the need for judicial education and training in this country came to be recognised, I doubt whether anyone now questions the potential benefits to be gained. Such programmes no longer need to be disguised as 'judicial studies' to make them acceptable. Indeed, one of the most potent concerns provoked by Lord Wolff's proposals is whether adequate funds will be forthcoming to provide the training for which the new procedures will call. It is, however, as I would suggest, essential, if judicial education is to promote the end of judicial independence, that control of the content and form of such education should rest squarely in the hands of the judges themselves and such agencies as they may employ, as it now does. It is obvious that if control of the education and training of judges did not rest in the hands of the judges themselves, but in those of the executive, it would become possible for judicial independence to be subverted and not

[3] Lord Bingham, *The Business of Judging: Selected Essays and Speeches: 1985-1999* (OUP 2011) 17.

> promoted. It would, in short, become possible for the state to instruct judges how they should decide cases …
>
> The Judicial Studies Board discharges an ever more important function; but it has no function more important than the protection of judicial autonomy in this field …[4]

Notably, Lord Bingham made these observations in the context of his discourse on judicial independence, while the second, and related theme is judicial control over their continuing education.

The Judicial Studies Board for Northern Ireland (NI)

It is clear from the relevant provision in the terms and conditions of judicial appointment that the Chief Justice of NI has a leading role to play in the matter of continuing judicial learning. This is readily linked to section 12(1A) of the Justice Act, whereby the Chief Justice holds the office of 'President of the Courts of Northern Ireland and (is) Head of the Judiciary of Northern Ireland'. The duty is more specifically expressed in section 12(1B)(c): 'As President of the Courts of Northern Ireland (the LCJ) is responsible … for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of Northern Ireland within the resources made available by the Lord Chancellor …' There is nothing to suggest that the aforementioned duty cannot be discharged, as a minimum in substantial part, via the mechanism of the JSB and the arrangements pertaining thereto and by other mechanisms. In this respect, the JSB is pivotal in the Northern Ireland arrangements.

The Board of the JSB is responsible for overseeing training for all judicial tiers. The services which the JSB provides to the NI judiciary are:

- Programmes of induction training for newly appointed judges;
- An annual programme of judicial training to include a mixture of workshops and seminars;
- To approve funding for attendance at non-JSB events;
- To evaluate all training provided and make alterations and improvements as required;
- To maintain and develop effective working relationships with the training bodies of other jurisdictions; and
- To approve the provision and maintenance of Bench Books and other guidance materials for the judiciary.

Attendance at and participation in JSB organised events

The Chief Justice has the responsibility for ensuring attendance at and participation in JSB organised events at every judicial tier (see above). This is a responsibility which in principle is delegable eg to a Lord Justice of Appeal as regards the senior judicial tier (the Court of Judicature), and the presiding judges of other judicial tiers.

Some NI judges may be unaware that the JSB maintains individual judicial training records. These are based on, firstly, the registration signature of judges at events. The individual

[4] ibid.

judicial record will also include information about attendance at external events – seminars and conferences etc. In some instances, the JSB may have no information about such attendances. Thus judges must be proactive in this respect. It is unclear whether, as a matter of law, judicial training records would be subject to FOIA disclosure. Even if there were some legal basis upon which such disclosure could be resisted, the question of whether it would be politic to do so would require careful reflection. Recently, the JSB has proactively attempted to secure the views and proposals of judicial office holders on topics for training and learning. While this is not especially novel, finding an effective mechanism for doing this has proved elusive. Other mechanisms are being actively explored. The JSB is nothing if not flexible in the matter of how it discharges its responsibilities. Closer interaction between the Board and the judicial office holders that it serves would be welcome. Sectoral leadership judges have a responsibility in this respect. One of the elephants in the room is that of compulsory continuous judicial learning. Finally, in the NI JSB system, the importance of completing the feedback forms circulated following every training event cannot be over-emphasised. This is of fundamental importance to the efficient and efficacious operation of the JSB and, hence, vital to the discharge of the Chief Justice's statutory duty and the performance of the individual duties of every judge.

There are few saints occupying judicial office. This is the indelible mark of Cain. However, the typical judicial office holder is a person of high integrity and strong commitment to the values and standards discussed in this paper. Complacency is one of the arch enemies of the rule of law. So please disagree with any or all of the foregoing text. But kindly do not opt to do nothing – in your courts, judicial associations, social/community/religious/sporting/student/ recreational activities and groupings et al. The sustained value and vigour of the rule of law depend on all of us in every aspect of our lives.

THE CHALLENGES OF JUDICIAL EDUCATION AND TRAINING: A COMPARATIVE PERSPECTIVE

Abstract: Based on the first-hand experience of a French Liaison Judge for the United Kingdom and Ireland and the literature on Judicial Education and Training ('JET'), it is indubitable that there are challenges involved in establishing and maintaining robust models of JET. This article, adopting a comparative analysis will consider some of the challenges that have surfaced in the French civil law system and the Irish common law jurisdiction regarding JET as well as any lessons that can be learned from the approach to JET currently being adopted by France and Ireland respectively. This article will also examine whether the approach to JET ought to vary depending on the legal system. In conclusion, it will be contended that there is a need for JET that has the potential to foster the development of a holistic approach to judging across both common and civil law jurisdictions, thereby enabling the development of skills beyond legal research, writing and advocacy.

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Introduction

Livingston Armytage has noted that Judicial Education and Training (JET) has become increasingly recognised as central to the proper functioning of the judiciary in both civil and common law jurisdictions.[2] From an Irish perspective, in recent times this is certainly true.[3] Judges have become more commonly viewed as human, not merely as 'oracles'[4] of the law residing in ivory towers but as experts in law subject to an ever-changing world, fallibility, and 'other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."[5] This, in turn, has generated greater engagement around the world with the dialogue on JET models particularly regarding how models might best be renewed and strengthened. Hence Ireland's recent development of a modern training programme that was brought about as a result of the Judicial Council Act 2019, and the establishment of the Judicial Council. In particular, the establishment of the Judicial Studies Committee in 2020; a committee of the Judicial Council, has proved imperative to the establishment and implementation of JET in Ireland to date. It is useful to compare and contrast the current state of the French civil law system of JET which is long-standing with Ireland's common law-based model of JET since JET in Ireland is still in its early stages of life, yet it has also

[1] Many thanks to the anonymous reviewers for their constructive feedback on earlier drafts of this paper. Naturally the responsibility for the views expressed and any omissions or errors made are the co-authors. Saoirse would like to thank Dr Laura Cahillane for her invaluable mentorship and also to acknowledge the support of the Irish Research Council.

[2] Livingston Armytage, *Educating Judges: Towards Improving Justice: A Survey of Global Practice,* (Brill Nijhoff 2015) xv.

[3] In Ireland, following Supreme Court judge Seamus Woulfe's failure to obey COVID-19 travel restrictions to attend a dinner party in 2020 otherwise known as 'Golfgate', political, legal and media attention turned to the need for JET and JCE procedures.

[4] William Blackstone and Robert Malcolm Kerr, *The commentaries on the laws of England of Sir William Blackstone / adapted to the present state of the law by Robert Malcolm Kerr,* vol 1 (4th edn, J Murray 1876) 47.

[5] Benjamin N Cardozo, *The Nature of the Judicial Process* (Dover Publications 2005) 163.

implemented some pioneering training initiatives some of which have been recommended by cutting-edge researchers in Ireland and international JET programmes.[6]

This paper will accordingly proceed by considering the aims of JET in international law and standards as well as in Ireland and France, what skills the Irish and French JET models strive to enhance and what measures are in place to realise these ends. Recent JET developments in Ireland and France that bear the potential to benefit the JET model of the other and the world at large will also be considered at this juncture. This will give rise to the finding that despite the differences in jurisdiction between Ireland and France, that is, common law versus civil law, when it comes to JET 'it doesn't matter whether you are in a civil law or common law jurisdiction - the role of the judge is mostly the same and the skills needed are the same'.[7] This determination ought to encourage Ireland and France as well as other jurisdictions to continue to grow and learn from one another when it comes to JET.

There are gaps in both the Irish and French systems of JET. This is not surprising, particularly in the case of Ireland as its system of JET is still in its infancy. Moreover, society is continuously evolving. As a result, the judiciary is expected to adapt to new innovations such as technological advancement to ensure that justice is administered as effectively as possible. Therefore, this paper will also identify some such gaps that have emerged and make concomitant recommendations where appropriate in support of closing these gaps and enabling the flourishing of JET models in Ireland, France, and beyond.

Setting the Standard for Judging: Frameworks and Procedures

What is JET? An International Insight

JET has been expounded accordingly: 'Judicial education is a primarily applied field, not a philosophical one, and it is appropriate for those involved to focus on concrete questions. Yet, without a grasp of the underlying purpose and core principles of judicial education, there is no framework to answer these questions."[8] In a recent report ('the Report') addressing the integration of judicial training and conduct in Ireland with international best practice, the invaluable nature of JET and more specifically the prominence of the international standard of promoting judicial independence and impartiality through JET was foregrounded.[9] The Report accordingly emphasised that judicial independence and impartiality ought to be promoted during JET because these principles are intrinsic to the realisation of the right to a fair trial.[10] The Report pointed out that impartiality has been described by the European Courts for Human Rights as 'an absence of prejudice or bias'[11] which intersects with judicial independence, a concept indicating that judges are expected to be independent not only of

[6] For example, in response to the Victims Directive and the Criminal Law (Victims of Crime) Act 2017 which implements the Directive as well as the O'Malley Review of Protections for Vulnerable Witnesses in the Investigation and Protection of Sexual Offences which recommended that judges receive training in sexual offence cases the JSC established a course, 'Avoiding Re-traumatisation' for the judiciary that sets out to provide the judiciary with a better understanding of the victims' experience in court during sexual offence cases.

[7] Mr Justice Gerard Tangenberg in Laura Cahillane and others, *Towards Best Practice: A report on the new Judicial Council in Ireland* (Irish Council for Civil Liberties 2022) 51.

[8] Diane E Cowdrey, 'Educating into the Future: Creating an Effective System of Judicial Education' (2010) 51 South Texas Law Review 885, 889.

[9] *Towards Best Practice* (n 7) 8.

[10] Article 40.1, 40.3 Constitution of Ireland, Article 6 European Convention on Human Rights, Article 14 International Covenant on Civil and Political Rights.

[11] *Piersack v Belgium* (1983) 5 EHRR 169 para 30.

the other branches of government and their colleagues but also from their own predispositions.[12]

The significance of JET and the need to stave off judicial bias has also been recognised by international instruments addressing JET. The Bangalore Principles of Judicial Conduct ('the Bangalore Principles'), endorsed JET in 2002, stipulating that:

> A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.[13]

These principles also necessitate that the judiciary 'keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.'[14] These two principles, amongst others,[15] imply that judges are expected to engage in JET which should encompass topics beyond doctrinal legal issues thereby denoting the significant and wide-ranging role JET has in maintaining a properly functioning judiciary. Support for judicial neutrality was expressed in the Measures for Implementation of Bangalore Principles ('the Measures for Implementation') wherein it is enshrined that: 'The training of judicial officers should be pluralist in outlook in order to guarantee and strengthen the open-mindedness of the judge and the impartiality of the judiciary.'[16] The Measures for Implementation outline the seriousness attributed to a situation which sees a judge fail to demonstrate independence and impartiality as it is stated that for such behaviour he or she 'may be removed from office'.[17] Similarly, the Commonwealth (Latimer House) Principles also recognised the need for JET that promotes judicial neutrality and other skills beyond legal research, writing and advocacy: 'Judicial training should include the teaching of the law, judicial skills and the social context, including ethnic and gender issues.'[18] The importance of promoting judicial impartiality in JET was again recognised in the European Charter on the Statute for Judges wherein it was noted that JET should promote: 'open-mindedness, competence and impartiality'.[19] The European Commission's publication on Ensuring justice in the EU — a European judicial

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[12] See Shimon Shetreet, 'Creating a Culture of Judicial Independence: The Practical Challenge and the Conceptual and Constitutional Infrastructure' in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff 2012).

[13] Value 6.3.

[14] Value 6.4.

[15] For example, value 5.1 states: 'A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").' Value 5.2, also on the topic of equality, calls for judges to engage in JET that counters judicial bias: 'A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.'

[16] *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), 10 <https://www.icj.org/wp-content/uploads/2015/08/JIG-Measures-effective-implementation-Bangalore-Principles-2010.pdf> accessed 21 February 2023.

[17] ibid, section 16.1.

[18] The Commonwealth Secretariat, the Commonwealth Parliamentary Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Lawyers' Association: *Commonwealth (Latimer House) Principles on the Three Branches of Government* (February 2009) 18.

[19] Council of Europe, *The Explanatory Memorandum to the European Charter on the Statute for Judges* (1998), 2.3 <https://rm.coe.int/16807473ef> accessed 21 February 2023.

training strategy for 2021-2024 ('the European strategy') succinctly captured the comprehensive level of craft required to effectively exercise the role of the judge: 'The law and legal principles do not function in a vacuum, so justice practitioners need to acquire multidisciplinary competences' in the form of JET that addresses 'judicial conduct, resilience, unconscious bias, case and courtroom management, and leadership.'[20] The foregoing point was further implicated by the European strategy as it also recognised the need for judicial 'training on the protection of individuals' rights in the digital space … and the rights of specific groups (e.g. children, persons with disabilities, victims of gender-based violence, racism and discrimination)'.[21]

The European Judicial Training Network ('EJTN'), established in the year 2000 to promote the JET of the European judiciary, 'prosecutors, judicial trainers and court staff across Europe',[22] set out nine principles that 'serve as common foundation and framework for Europe's judicial training institutions.'[23] The principles are as follows:

> 1. Judicial training is a multidisciplinary and practical type of training, essentially intended for the transmission of professional techniques and values complementary to legal education;
> 2. All judges and prosecutors should receive initial training before or on their appointment;
> 3. All judges and prosecutors should have the right to regular continuous training after appointment and throughout their careers and it is their responsibility to undertake it. Every Member State should put in place systems that ensure judges and prosecutors are able to exercise this right and responsibility;
> 4. Training is part of the normal working life of a judge and a prosecutor. All judges and prosecutors should have time to undertake training as part of the normal working time, unless it exceptionally jeopardises the service of justice;
> 5. In accordance with the principles of judicial independence the design, content and delivery of judicial training are exclusively for national institutions responsible for judicial training to determine;
> 6. Training should primarily be delivered by judges and prosecutors who have been previously trained for this purpose;
> 7. Active and modern educational techniques should be given primacy in judicial training;
> 8. Member States should provide national institutions responsible for judicial training with sufficient funding and other resources to achieve their aims and objectives;
> 9. The highest judicial authorities should support judicial training.

These values, analogous to the JET principles, were adopted a year later by the International Organisation for Judicial Training ('IOJT'), which was established in 2002 'to promote the rule of law by supporting the work of judicial education institutions around the world'.[24]

[20] European Commission, *Ensuring justice in the EU — a European judicial training strategy for 2021-2024* (2020) Part 3.
[21] ibid Part 2.
[22] EJTN, 'About us' < https://ejtn.eu/about-us/> accessed 8 February 2023.
[23] EJTN <https://ejtn.eu/> accessed 8 February 2023.
[24] IOJT, 'About us' <https://www.iojt.org/about-us> accessed 8 February 2023.

They have informed the JET workshops organised by the EJTN for members of the judiciary across Europe. On 10-11 November 2022, the EJTN offered a Judicial Training Methods workshop on Communication and Vulnerability in Bulgaria that addressed 'the key judicial skill of communication and the importance of recognising vulnerability in others and ourselves in the court context.'[25] On 1-2 December 2022, the EJTN organised training for 'judicial professionals (judges, prosecutors and court staff) on Victims' Rights in the EU in practice' which took place in Stockholm. This training workshop 'focused on those vulnerable victims such as victims of domestic violence, child sexual abuse and gender-based violence who require a targeted and integrated support and special protection.'[26] Also, in December 2022, the EJTN addressed the live humanitarian crisis taking place in Ukraine as a result of the Russia-Ukraine war by organising a training scheme that offers support and insight to the Ukrainian judiciary on how best to address war-based legal issues.[27] For this year, 2023, the EJTN has scheduled JET which is acclimatised to the administration of justice in the age of digitisation and technology that we now occupy. Some examples of EJTN-coordinated workshops that strive to enhance digital skills within legal systems across Europe include Freedom of Speech in the Digital Era; Cybercrime and Digital Evidence; Law and Digital Technologies: Challenges and Prospects.[28] The EJTN has also signalled its practical-led innovative ability to cater for the times by launching a new Digital Learning Hub which provides its participants with information on their learning.[29] It is accordingly necessary to consider whether the approaches and methods of JET adopted in Ireland and France adhere to the aforementioned standards prescribed at an international level.

JET in Ireland

It was not until 1995, a mere twenty-eight years ago, that Irish law required members of the judiciary appointed by the Judicial Appointments Advisory Board (JAAB) to partake in JET:

> A person who wishes to be considered for appointment to Judicial office shall undertake in writing … his or her agreement… to take such course or courses of training or education, or both, as may be required by the Chief Justice or President of the Court.[30]

[25] EJTN, 'It's time for magistrates to improve their communication and become more resilient!' (9 December 2022) <https://ejtn.eu/news/its-time-for-magistrates-to-improve-their-communication-and-become-more-resilient/> accessed 7 February 2023.
[26] EJTN, 'EJTN committed with Victim's Rights in Criminal Proceedings with special focus on violence against women and children' (20 December 2022) <https://ejtn.eu/news/ejtn-committed-with-victims-rights-in-criminal-proceedings-with-special-focus-on-violence-against-women-and-children/> accessed 8 February 2023.
[27] EJTN, 'EJTN is addressing the challenges of the war in Ukraine through training for Ukrainian judiciary' (6 December 2022) <https://ejtn.eu/news/ejtn-is-addressing-the-challenges-of-the-war-in-ukraine-through-training-for-ukrainian-judiciary/> accessed 21 February 2023.
[28] EJTN, '2021 Calendar of Training Activities' <https://www.ejn-crimjust.europa.eu/ejnupload/Partners/EJTN%202021%20Calendar%20%20of%20training%20activities.pdf> accessed 5 July 2023.
[29] EJTN, 'EJTN's new website is online! Completely bilingual in English and French – and with a new Digital Learning Hub' (14 December 2022) <https://ejtn.eu/news/ejtns-new-website-is-online-completely-bilingual-in-english-and-french-and-with-a-new-digital-learning-hub/> accessed 8 February 2023.
[30] The Courts and Court Officers Act 1995, section 19.

This is somewhat striking given the fact that the Irish Courts system was initially birthed by the Courts of Justice Act 1924,[31] and JET was initiated across common law jurisdictions in a big way during the 1970s following the formation of numerous national JET institutes.[32] The narrative that 'during their legal careers, practitioners acquired the necessary wisdom and mastery of the law to emerge as fully-fledged judges at the other end'[33] was symptomatic of common law jurisdictions until around the time of the Second World War.[34] The IOJT captured the transition towards a recognised need for JET in the following passage:

> It was a common conception that Judges already knew everything, and didn't need any training. This changed as the Judge's profession began to be seen as a skill that needs to be learned…and updated. As such, the profession is similar to the practice of medicine or education, where the practitioners must be both idealistic and constantly updated in order to serve in the best possible fashion.[35]

However, Ireland seemingly fell behind the move towards providing JET as Frances Fitzgerald's line of thought 'that judges did not need training' continued to circulate in Ireland during the close of the twentieth century. [36] It should be noted that recognition of the need for formal JET does not discount the reality that judges learn a vast amount of their craft on-the-job. Instead, it has been suggested that formal JET in Ireland will complement the informal methods of learning that are commonly availed of by the judiciary habitually.[37] This point was captured by Howlin and others:

> while supportive judicial networks exist, access to such networks is subject to geographical and, presumably, other limitations. One's level of acquaintance with established judges and one's willingness to approach peers for advice may constrain the extent to which informal work conversations are available as a resource. With the move to structured training of the Irish judiciary, judges will almost certainly continue to learn from their peers, and there may be opportunities for more formalised peer learning.[38]

It is also suggested that JET may counter judicial misconduct, as JET will provide the judiciary with a better understanding of the role of the judge and the necessary skills to effectively exercise this role. Thus, it is assumed that the judiciary can only benefit from a formal system of JET, especially as the majority of judges have been elevated to the bench

[31] Article 34 of the Constitution of Ireland, 1937 acquired the court system established under the 1924 Act. This was not given effect to until the Courts (Establishment and Constitution) Act 1961 was passed.
[32] For example, The US National Judicial College, the New Zealand Institute for Judicial Studies, the England and Wales Judicial College, and the Judicial Institute for Scotland.
[33] Bernard Teague and Tom Gerald Daly, 'Judicial mentoring: an introduction – part I' (2011) 29 Irish Law Times 178.
[34] Niamh Howlin and others, "'Robinson Crusoe on a desert island"? Judicial Education in Ireland, 1995-2019' (2022) 42 Legal Studies 525, 526.
[35] International Organisation for Judicial Training, *Background Document* <https://www.iojt.org/__data/assets/pdf_file/0014/6143/iojt-background.pdf> accessed 8 February 2023; Robinson Crusoe (n 34) 526.
[36] Dáil Debate 29 November 1995, vol 459, col 1; Robinson Crusoe (n 35) 530.
[37] Robinson Crusoe (n 34) 536.
[38] ibid 537.

following a successful career as a legal practitioner and 'the qualities inherently required of an advocate are substantially different from those required for a judge'.[39]

However, despite the apparent benefits of a formalised model of JET and the stipulation set out in the Courts and Court Officers Act 1995 necessitating judicial participation in JET, it was not until the Judicial Council Act 2019 was passed that real action was taken regarding the formal wholesale delivery of JET. Before this, there was no statutory obligation requiring the provision of JET. The Judicial Studies Institute ('JSI'), established on a non-statutory basis in 1996, provided limited JET for the judiciary. However, the JSI, which later became the Committee for Judicial Studies, did not advance JET in Ireland. It was suggested that the JSI and the Committee for Judicial Studies were 'unable to provide the type of continuing training and education that is common in other jurisdictions because of financial constraints.[40] Thus formal JET had not been engendered as a result of these bodies. Instead, a limited form of JET took place by way of 'annual, one-day conferences',[41] 'regular seminars and by courses provided externally.'[42] However, support for a Judicial Council sparked by judicial conduct controversies which would not only address judicial conduct and ethics ('JCE') but also the issue of JET amongst other areas came to the fore towards the close of the 20th century. In 1999, the Fourth Progress Report of the All-Party Oireachtas Committee on the Constitution recommended that a Council be set up to regulate judicial behaviour and a code of ethics be drafted to include the standard that: 'Judges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office'.[43] Similarly, the 'Denham Report' published in 1999 recommended that 'an independent and permanent body should be established as an agency of the State to manage a unified courts system',[44] which would be responsible for drafting a code of ethics, establishing a complaints procedure and judicial education.[45] A year later, similar recommendations were made in the 'Keane Report' which advocated for the establishment of a 'Judicial Council' comprising a board and three committees, namely:

1. the Judicial Conduct and Ethics Committee;
2. the Judicial Studies and Publications Committee; and
3. the General Committee.[46]

Although the Irish judiciary is recognised for its independence, [47] criticism of Ireland's failure to provide comprehensive JET continued until the Judicial Council was eventually established in December 2019 pursuant to the Judicial Council Act 2019. Just the year prior,

[39] Michael Kirby, 'Modes of appointment and training of judges – a common law perspective' (2000) 26(1) Commonwealth Law Bulletin 540 in Robinson Crusoe (n 34) 536.
[40] Robinson Crusoe (n 34) 530.
[41] ibid.
[42] The Judicial Council, *Annual Report 2021* (2021) 16. <https://judicialcouncil.ie/assets/uploads/documents/Annual%20Report%202021.pdf> accessed 21 February 2023.
[43] All-Party Oireachtas Committee on the Constitution, *Fourth Progress Report: The Courts and the Judiciary* (Stationery Office 1999) 38.
[44] *Working Group on a Courts Commission Sixth Report Conclusion 1998* (Government of Ireland 1999) 11 <https://www.courts.ie/ga/acc/alfresco/d871dde4-c70f-419d-80b3-2a27289e8fad/6th%20Report%20WGCC%20summary.pdf/pdf> accessed 9 February 2023.
[45] ibid 57-58.
[46] Committee on Judicial Conduct and Ethics, *Committee on Judicial Conduct and Ethics Report* (Stationery Office 2000) 52.
[47] The Judicial Council Annual Report 2021 (n 42) 16.

it was highlighted at a European level that Ireland was one of three out of a total of forty-five states that did not provide ongoing systematic JET.[48] Ireland's shortcomings in this regard were highly criticised in the Council of Europe's 2014 GRECO Report on *Corruption prevention in respect of members of parliament, judges and prosecutors*.[49]

The Judicial Council has strived to overcome this criticism and buttress its main pillars of 'excellence in the performance of judicial functions, high standards of conduct among judges, an independent Judiciary, and public confidence in the judiciary and in the administration of justice' by to put in place rigorous structures and procedures with the Council at the apex of the body and the Board as the de-facto decision-maker.[50] The Council has established various committees to exercise specific functions. These include a Judicial Studies Committee, a Personal Injuries Guidelines Committee, a Sentencing Guidelines and Information Committee, Judicial Support Committees, and a Judicial Conduct Committee. The 2019 Act specifies that the Council is obliged to 'promote and maintain continuing education of judges.'[51] Hence the Judicial Studies Committee ('JSC') has been set up 'to facilitate the continuing education and training of judges with regard to their functions.'[52] The 2019 Act also provides that the JSC may 'prepare and distribute relevant materials to judges'.[53] Howlin and others have noted that the function attributed to the JSC 'is broader than that of its non-statutory predecessor.'[54] This is evident as the legislation lists some of the areas in which the JSC can provide JET but does not limit JET to these areas:

> The Council shall — provide, or assist in the provision of, education and training on matters relevant to the exercise by judges of their functions, including but not limited to —
> (i) dealing with persons in respect of whom it is alleged an offence has been committed;
> (ii) the conduct of trials by jury in criminal proceedings;
> (iii) European Union law and international law;
> (iv) human rights and equality law;
> (v) information technology; and
> (vi) the assessment of damages in respect of personal injuries.[55]

[48] European Commission for the Efficiency of Justice, *European Judicial Systems: Efficiency and Quality of Justice* (CEPEJ Studies No 26, 2018) 99 <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c> accessed 9 February 2023.
[49] Council of Europe, *Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors* (10 October 2014) <http://ipo.gov.ie/en/JELR/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf/Files/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf> accessed 26 June 2023; Council of Europe, *Fourth Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors* (13 July 2022) <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a73867> accessed 10 February 2023.
[50] The Judicial Council, 'About the Judicial Council' <https://judicialcouncil.ie/about-the-judicial-council/> accessed 9 February 2023.
[51] Judicial Council Act 2019, section 7(1)(d).
[52] ibid, section 17(2).
[53] ibid, section 17 (3)(a).
[54] Robinson Crusoe (n 35) 532.
[55] Judicial Council Act 2019, section 17 (c).

The Terms of Reference for the JSC, adopted at the Judicial Council's first meeting in February 2020 build on the foregoing functions referenced in the legislation:

> a. identify and continue to update the needs of the judiciary for education and training;
> b. develop courses to meet the needs of the judiciary for induction, continuing professional education and development;
> c. provide, or assist in the provision of, induction, education and training on matters relevant to the exercise by judges of their functions, including but not limited to:
> (i) dealing with persons in respect of whom it is alleged an offence has been committed,
> (ii) the conduct of trials by jury in criminal proceedings,
> (iii) the conduct of trials by judges in civil and criminal proceedings,
> (iv) European Union law and international law,
> (v) human rights and equality law,
> (vi) information technology, and
> (vii) the assessment of damages in respect of personal injuries,
> d. prepare and distribute relevant materials to judges;
> e. publish material relevant to its functions;
> f. promote, explain and protect the core value of judicial independence in judicial training and education; and
> g. establish, maintain and improve communication with –
> (i) bodies representing judges appointed to courts of places other than the State; and
> (ii) international bodies representing judges.[56]

Rónán Kennedy expressed the view that the 2019 Act 'offers a crucial and unrepeatable opportunity to develop modern innovative, and fit-for-purpose mechanisms for key functions such as judicial conduct and ethics, and judicial education and training.'[57] A similar chord was struck by Minister for Justice, Charles Flanagan when he introduced the Judicial Council Bill 2017, as he also identified the potential that lay within the 2017 Bill which later became the 2019 Act:

> All of us in our professional lives, no matter what we do, need to keep abreast of new developments in advancing technologies, changing practices and anything else that can enhance and further develop our capacity to work in a way that can be described as more efficient. Judges are no different in this regard.[58]

It is thus clear that the Irish legal system has recently committed to promoting and advancing JET in Ireland and has endorsed the importance of the value of judicial independence which as previously highlighted is extensively promoted by international law and standards. It is

[56] The Judicial Council Annual Report 2021 (n 42) 16-17.
[57] Law Society Gazette, 'Formal training is needed to ensure judicial excellence' (15 April 2021) <https://www.lawsociety.ie/gazette/top-stories2/formal-training-is-needed-to-ensure-judicial-excellence> accessed 21 February 2023.
[58] Seanad Debate 22 November 2017, vol 645, col 1.

also apparent that the JSC has a vested interest in developing both legal and non-legal judicial skills. This paper will consider how far JET has come since the JSC began its work and thus how the JSC's commitment to establishing a robust model of JET has translated in practice after the next section of the paper which will set out the approach to JET in France and the skills it seeks to promote.

JET in France

It is widely recognised that the provision of JET in civil law jurisdictions is disparate from that seen in common law countries. In the main, this can be attributed to the differences that persist between the legal professions in both jurisdictions. In Ireland, judges are generally appointed to the bench after pursuing a long-term career as a practising solicitor or barrister. However, in France, this is not the case as judges are typically appointed to the bench not long after graduating from university with a law degree.[59] Traditionally, aspiring judges (as well as prosecutors) in France are required to complete competitive entrance exams and subsequently attend the national training school for the judiciary known as the Ecole Nationale de la Magistrature (ENM) which is based in Bordeaux and was founded in 1958.[60] France was thus more motivated to provide JET than its common law counterparts given the early establishment of the ENM in comparison to the founding of judicial training institutes in common law countries which took place several years later.

Having entered the ENM the trainee judge ('auditeurs de justice')[61] has to complete 31 months of 'initial training' to become a qualified judge.[62] During this period the trainee judge is continually assessed.[63] The purpose of the initial training course is to provide aspiring judges with 'professional techniques, and also to give them a broader knowledge of the institutional, human and social environment' in which they will be working. 'It alternates classroom teaching in Bordeaux with internships in courts to give the trainees a broad overall view of their profession.'[64] The internship element of this JET emphasises the level of importance the ENM attributes to the development of practical skills.[65] This method of JET is delivered by way of 'lectures and conferences, themed workshops, role plays and moot courts, debates and round tables, written work and e-learning modules.'[66] However, the main method of delivering the initial training is the organisation of tutorial groups which 'consists of work sequences in small groups on actual cases. These groups consist of about twenty trainees and are formed for the duration of their studies in Bordeaux.'[67] It has been noted that providing JET through these tutorial groups allows 'the trainers to manage the group effectively, allowing for personalised individual follow-up of the trainees and constituting a highly interactive method of learning.'[68] The initial training is conducted by judges or prosecutors to ensure that JET 'remains close to the realities of professional practice in the

[59] Cheryl Thomas, *Review of Judicial Training and Education in Other Jurisdictions Report* (May 2006) <Microsoft Word - Judicial Training & Education Report.doc (ucl.ac.uk)> 104.
[60] ENM, *National School for the Judiciary leaflet* (2017) 1 <READ French ENM leaflet.pdf > accessed 12 February 2023.
[61] ENM Initial Training <https://www-enm-justice-fr.translate.goog/formations/magistrats-francais/formation-initiale?_x_tr_sl=fr&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc&_x_tr_hist=true> accessed 5 July 2023.
[62] ENM leaflet (n 60) 4.
[63] ENM Initial Training (n 61).
[64] ibid.
[65] ibid.
[66] ibid.
[67] ibid.
[68] ibid.

courts'[69] and to safeguard the principle of judicial independence. It has been suggested that this 'front-loaded' approach to training strives to 'compensate for new judges' relative inexperience.'[70] This approach has been contrasted with that taken in 'common law jurisdictions, where judges are recruited from the ranks of experienced legal professionals.'[71] However, the ENM and the JSC in Ireland are similar in the sense that they both aim to produce a judiciary that possesses the skills to be an astute decision-maker which, according to the ENM, requires 'mastery of legal techniques, but also the essential ability to understand human issues.'[72] The next section of this paper will indicate that it is apparent from the JET put into practice since the inception of the JSC that the Irish legal system has endorsed the foregoing values. To mould astute judicial decision-makers the ENM sets out to equip all trainee judges with the following skills:

- Identifying, grasping and applying ethical rules;
- Analysing and summarising a situation or case;
- Identifying, respecting and enforcing a procedural framework;
- Adapting;
- Adopting a position of authority or humility to fit the circumstances;
- Knowing how to manage relations, listening and debating;
- Preparing and conducting hearings or questioning in accordance with adversarial procedures;
- Eliciting agreement and conciliating;
- Making a sensible, enforceable decision that is adapted to its context, based on the law and the facts;
- Justifying, formalising and explaining a decision;
- Taking account of the national and international institutional environment;
- Working in a team;
- Organising, managing and innovating.[73]

The ENM also offers the French judiciary 'life-long' education and training programmes otherwise known as 'in-service training' which was established in 1971,[74] and is also run by judges and prosecutors.[75] There are more than five hundred courses offered as part of this JET and since 2008, judges are mandated to engage in five days of this training per annum.[76] The purpose of the in-service JET is to provide judges (and prosecutors) with the opportunity to 'enhance their technical skills and specialise throughout their career.'[77] More specifically, the following seven objectives have been set out to enable the in-service JET to 'meet the needs of a modern European democracy and the expectations of users of the judicial system':[78]

[69] ibid.
[70] Robinson Crusoe (n 34) 528.
[71] ibid.
[72] ENM leaflet (n 60) 1.
[73] ibid.
[74] ibid.
[75] ENM Initial Training (n 61).
[76] ENM leaflet (n 60) 4, 5.
[77] ENM Initial Training (n 62).
[78] ibid.

- Keep up with legislative and regulatory reforms and developments in case law;
- Assist judges and prosecutors with changes in their work practices and functions;
- Prepare them for management positions and promote a culture of good management;
- Promote sharing of knowledge, methods and good professional practice;
- Contribute to keeping the profession aware of its economic, social and cultural environment;
- Enhance knowledge of European and international law among judges and prosecutors; and
- Provide a multi-disciplinary approach to the subjects that are addressed.[79]

Both the initial training and in-service training initiatives have been established on a cross-disciplinary basis since 2009[80] which indicates the depth of the role of the judge. The judiciary is not required to solely concern itself with the law and legal issues but to possess skills that enable it to take into account the mores of society and thus seek a formulation of the truth that is socially acceptable to the community as opposed to 'verité absolue' or the 'absolute truth'.[81] The ENM also has a far-reaching international presence. The ENM has membership with the EJTN, the Euro-Arab Judicial Training Network ('EAJTN'), the European Programme for Human Rights Education for Legal Professionals and the IOJT. As a result, French judges are in a position to avail of JET offered by these international networks.[82]

Rising to the Challenge: Adopting a Holistic Approach to JET Developments in Ireland

To draw conclusions on how the Irish and French approaches to JET compare in practice and whether either model gives rise to any valuable lessons for JET more broadly, the progress made by the JSC since its establishment on 10 February 2020 must be considered.[83] The Judicial Council Annual Report 2021 ('the Annual Report') provides an insightful indicator of how far the JSC has come. The recently published Report on integrating judicial training and conduct in Ireland with international best practice published before the release of the Annual Report recommended that JET in Ireland should reflect international best practice and more specifically that the JET provided by the JSC should explore the following topics:

- interpersonal and communications skills, including the use of clear and plain language;
- the broader social context;
- unconscious bias and diversity for judges;
- specific human rights topics;
- EU, Council of Europe and UN human rights instruments; and

[79] ibid.
[80] ENM leaflet (n 60) 1.
[81] Boris Bernabé, 'The judgement of Solomon, truth and peace' (2020) 4(4) Les Cahiers De La Justice 595, 604.
[82] ENM Initial Training (n 61).
[83] Judicial Studies Committee, <https://judicialcouncil.ie/judicial-studies-committee/#:~:text=This%20Committee%20was%20established%20on,as%20is%20possible)%20train%20judges> accessed 21 February 2023.

- the issues raised by vulnerable witnesses, which has already been identified as a priority.[84]

To ensure relevant JET that meets the needs of the judiciary is continually provided, the Report also suggested that the JSC facilitate 'widening the needs based assessments for JET to groups outside of the judiciary, as recommended by the international experience; and engaging external reviewers on a regular basis, such as every five years.'[85] A holistic approach to JET that aims to develop skills including and beyond a knowledge of the law, legal research, writing and advocacy skills is thus requisite.

Given the international weight attached to judges training judges otherwise referred to as judge-led training, High Court judge Ms Justice Mary Gearty was appointed to the position of Director of Judicial Studies ('JS') in July 2020. It has widely been recognised that '[j]udges themselves are best suited to conduct continuing professional development for their colleagues',[86] and that this means of JET safeguards judicial independence. Hence, the implementation of a workplan for the future of JET that addresses judge-led training amongst other issues:

1. A focus on newly appointed judges has been provided with dedicated induction training, emphasising conduct and ethics;
2. Commencement of 'judge-led' mentoring training, including training judges from every first instance jurisdiction in this process;
3. Implementing the recommendations of Mr Tom O'Malley in his 'Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences';
4. Addressing the challenges of transforming court practices to enable virtual hearings.[87]

The JSC is hard-working and ambitious because not only has it satisfied its four aims, but it has also afforded time and resources to additional JET initiatives. Staying with the topic of judge-led training, judges received formal training on how to train their colleagues in September and November 2021. International judges shared their 'experience, techniques and skills' with the Irish judiciary thereby enabling Irish judges to 'design, offer and deliver their own training programmes.'[88] The training was designed and delivered by the JSC Director and experienced judicial trainers from England and Wales and the training and study centre for the Judiciary in the Netherlands.[89] Induction training was launched in September 2020 for the benefit of incoming judges. This course resembles a small-scale version of the mandatory initial training provided by the ENM. The induction training offers newly appointed judges practical experience that prepares them for sitting in court as a judge for the first time. This form of training invites experienced judges to engage with their new colleagues by participating in role plays during which newly appointed judges consider a minimum of two applications in numerous areas. Actors are appointed to play the role of litigants and lawyers thereby providing the judges with an opportunity to discuss 'how best to address issues, deal with participants in the court process and manage court time fairly,

[84] *Towards Best Practice* (n 7) 60.
[85] ibid.
[86] Paul McCutcheon, Ray Friel, and Dermot Coughlan, 'Review of the Judicial Studies Institute' (University of Limerick School of Law and Department of Lifelong Learning and Outreach 2004) 119.
[87] The Judicial Council Annual Report 2021 (n 42) 17.
[88] ibid 20.
[89] ibid.

courteously and efficiently.'[90] Newly appointed judges are also provided with a 'more experienced judicial mentor' who is trained to offer 'a formal, but individualised response to the needs of the new judges'.[91]

2021 also saw the JSC deliver interactive workshops on judicial conduct and ethics. The Bangalore principles were fundamental to the development of these workshops. Hence the workshops centre on a structured consideration of: 'Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence.' This is achieved by requiring judges to discuss 'relevant cases' and share their experience and offer 'hypothetical examples relevant to each of the principles.'[92] The material used to inform these workshops was modelled on the sources used by the Judicial Council of England and Wales and informed by relevant case law and input from judges at home and abroad.[93] JET has also addressed how judges should deal with victims sensitively and appropriately during sexual offence cases. The Criminal Law (Victims of Crime) Act of 2017 and Mr Tom O'Malley's recent recommendations that vulnerable witnesses should receive better levels of protection in court and the provision of JET covering sexual offence cases made this JET course known as Avoiding Re-traumatisation a priority. The course was developed with the support of the study centre for the Judiciary in the Netherlands and can be availed of by all judges working in criminal courts. The course aims to reduce trauma for victims of sexual crime.[94] The JSC's effectuation of JET which will allow judges to better deal with bias and vulnerable witnesses was very progressive. It mirrors the growth of mental health awareness and intellectual disability awareness in society as well as a willingness to provide everyone with dignity and the opportunity to heal and develop resilience:

> The aim of the training is not only to inform judges but to enable witnesses to give their best evidence by helping judges to identify potential areas of bias, to question and contradict stereotypes and to offer the judges a deeper understanding of people whose experiences are different from their own.[95]

The course includes an online presentation and discussion on what unconscious bias is and its potential impact on judicial decision-making. The course also incorporates practical court work during which judges preside over hypothetical cases designed with input from the King's Inns which aim to enhance the judge's ability to identify and reduce biases in court.

The JSC has already taken into account four out of the six topics of JET recommended in the Report with interpersonal and communications skills, including the use of clear and plain language and specific human rights topics yet to be addressed. However, it was stated in the Annual Report that depending on the availability of resources during the year 2022, the JSC would address these topics amongst others by introducing courses on 'human trafficking, insolvency and practical information technology for serving judges.'[96] The JSC also identified establishing 'a leadership course for judges and to focus on resilience and judgment writing'

[90] ibid.
[91] ibid.
[92] ibid 18.
[93] ibid.
[94] ibid 19.
[95] ibid.
[96] The Annual Report noted that the JSC would expand its induction training and update its courses on unconscious bias and avoiding re-traumatisation. It also noted that the provision of JET on the area of Assisted Decision-Making was one of its main areas of focus.

as 'medium term' priority.[97] The progress of the JSC thus far and its plans for the future indicate that the JSC is striving towards a holistic and multi-disciplinary approach to JET that heeds international standards and best practice on JET as well as national and international legal research on JET and seeks to pave the way for a judiciary with a well-developed skill set that will enable it to perform its judicial function with excellence. This in turn will maintain confidence in the judiciary and the administration of justice.

Developments in France

A desire to foster a model of JET that caters for a judiciary with a broadly developed skill set has also been evidenced by the ENM in France. The new Deputy Director of the ENM, Haffide Boulakras, has a background in digital technology. Upon his appointment, Haffide recognised the need for JET for other members of the court team. He suggested that the provision of JET in this area will provide the judiciary with better support thereby allowing judges to reap the benefit of saving time on tasks that their court team will be able to assist on. The need for reform within this area is indicative of heavy workloads exacerbated by a lack of resources. On this topic, he also noted that reform is already underway to enhance the skill set of the wider court team. Since September 2022 the ENM has commenced training for legal assistants (juristes assistants). To enable the continued development of this initiative Haffide announced that the Specialist Professional Training Department will be expanding.[98] He also emphasised the importance of continuing to adhere to international standards in particular the rule of law which will be achieved through 'cooperation and the strengthening of judicial schools abroad.'[99] The importance of judges adhering to the rule of law as well as international and human rights law is made clear from the ENM's organisation of JET courses on 'Combatting Terrorism and Corruption' and participation in judicial cooperation projects including the Law Enforcement in Central Asia project funded by the European Union and implemented by Civipol and the International Security and Emergency Management Institute. Similarly, the ENM also signed a cooperation agreement with the National School of Judges of Ukraine to provide long-term support to Ukraine's judicial training institutes on how to deal with the issues they are currently facing. The ENM is also actively involved in the JET facilitated by the EJTN on the war in Ukraine.[100] The need to foster respect for victims' rights while exercising the role of the judge was also addressed in the JET provided by the ENM. Accordingly, the ENM recently organised a seminar as part of its European project 'Victims, Information, Compensation in Trials, Investigation' (VICTI). The main aim of this project was explained as follows:

> Its main objective is to establish some minimum standards for guaranteeing the rights of victims in the Member States of the European Union and to share the good practices established in the countries that have been confronted with these "exceptional" trials, to ensure victims are kept informed of what is happening throughout the procedure, to accompany and

[97] The Judicial Council *Annual Report 2021* (n 42) 21.
[98] ENM, 'Haffide Boulakras: Impact of the États Généraux de la Justice Consultation on Justice and Digital Technology at the ENM' (13 February 2023) <https://www.enm.justice.fr/en/actu-13022023-haffide-boulakras-impact-etats-generaux-de-la-justice-consultation-justice-and-digital> accessed 14 February 2023.
[99] ibid.
[100] ENM, 'The ENM signs a cooperation agreement with Ukraine' (2 December 2022) <https://www.enm.justice.fr/en/actu-02122022-enm-signs-cooperation-agreement-ukraine> accessed 21 February 2023.

> support them through the formalities involving them and ensure they receive fair redress for the harm suffered as quickly as possible.[101]

The first seminar took the following format:

> This first seminar brought together all the actors of the judicial world who have been confronted with these issues (judges, prosecutors, lawyers, court clerks, specialised assistants, forensic scientists, representatives of victim support associations, civil servants from European justice ministries and advisors from the French Inter-ministerial Delegation for Victim Support), taking a multidisciplinary approach, to enable them to share their experiences, suggest solutions or talk about remedies that have been applied in the face of the difficulties encountered during this type of investigation.[102]

This event highlights the significance the ENM places on working with other jurisdictions and disciplines beyond the law to share insights in an endeavour to enhance how justice is administered. More broadly speaking, recent developments in the JET offered by the ENM indicate expansion and a desire to keep up with issues on the ground.

A look to the future

When looking to the future and considering how the objective of JET ought to adapt to keep abreast of a changing society it is worth noting that the Report on judicial education and conduct in Ireland also made recommendations for Government which are central to the success of the rolling out and maintenance of JET in Ireland:

> The Government, in its role in resource allocation, should ensure there is sufficient time available for judges to attend training courses, by appointing an adequate number to the bench; and adequate financial resourcing for the Judicial Council to staff its training function and to engage external experts as necessary.[103]

This recommendation was very recently endorsed in the Report of the Judicial Planning Working Group ('the Working Group').[104] It is thus clear that the provision of resources is central to the success of JET. In fact, the Working Group noted 'that a structured approach to ensuring judges' training needs do not constantly compete with Court sittings can best be addressed by jurisdictions being better resourced.'[105] The issue of resourcing is relevant to JET programmes the world over and should be a key priority for JET bodies. After all, it is established that JET is pertinent to the success of the role of the judge. Therefore, JET needs to be fully resourced so that judges receive education and training that allows them to acquire the skills and knowledge necessary to keep a pace with an ever-evolving society. As previously outlined, the issue of adequately resourcing JET also came to the fore of the ENM's recent consideration of how best to renew and develop its JET. Hence its expression

[101] ENM, 'Ensuring Respect for Victims' Rights in Europe' (6 October 2022) <https://www.enm.justice.fr/en/actu-06102022-ensuring-respect-victims-rights-europe> accessed 15th February 2023.
[102] ibid.
[103] *Towards Best Practice* (n 7) 61.
[104] *Report of the Judicial Planning Working Group* (Department of Justice 2022) 121.
[105] ibid.

of the need for more staff to enable the success of the provision of training not only for judges (and prosecutors) but the wider court team including court assistants. Providing in-depth training and education to other members of the courtroom workplace on how to assist with tasks generally completed by the judiciary but not fundamental to the role of the judge may be an initiative to be welcomed with open arms across many jurisdictions. The provision of education and training in this area would assist judges in reducing backlog, thereby endeavouring to uphold the rule of law, and allowing justice to be administered effectively. The ENM also identified the need for resourcing in the form of supporting staff for the Specialist Professional Training Department as essential to the success of this form of training and education. The need for the appointment of staff to assist with the expansion of JET was also identified by the JSC in Ireland:

> The further expansion of the judicial training function in 2022 is very much dependent upon two key factors, being the appointment of the necessary staff to support this area and extending the number of judges being available to attend courses organised by the committee.[106]

The Working Group also made a similar point: 'providing case management training for judges, officers carrying out quasi-judicial functions such as County Registrars and support staff is one of the key elements of training'.[107] Therefore, both Ireland and France face the common challenge of needing more staff to ensure JET is properly provided. The JSC has also called for the appointment of more judges because in its opinion, '[t]he availability of judges to attend training courses in the light of significant court-sitting commitments is of some concern.'[108] Perhaps the ENM's proposal to expand JET to the wider court team could also benefit JET in Ireland in this regard as such an initiative would provide the judiciary with more time to attend JET events. Interestingly, the Working Group has emphasised giving the Court Service greater responsibility.[109] This is particularly appealing to jurisdictions such as Ireland that deliver judge-led training and have a shortage of judges because in such instances not only are judges obliged to attend JET events to upskill but to impart knowledge to their peers. Therefore, time is of the essence. The Working Group also identified this issue and recommended 'judges should be provided with adequate time during the working year to attend training and skills development programmes.'[110] It has also been suggested that judges should be provided with support in the form of: 'public sector norms, the development of a full suite of human resource supports including welfare supports and the collection and management of relevant HRM data (sick leave, holiday/vacation days, retirement schedules, diversity characteristics).'[111]

A link can also be made between the issue of resourcing JET bodies and the JET they offer. The JET provided hinges on the resources possessed by its training body. Therefore, to allow for the development of JET programmes and the piloting of new courses and events JET requires continuous investment It is suggested that the JET programmes that are already implemented and need to be further developed in both Ireland and France as well as those that need to get off the ground because they are viewed as essential to the future of JET should be resourced appropriately by its training body. Accordingly, the Deputy Director of

[106] The Judicial Council Annual Report 2021 (n 42) 21.
[107] *Report of the Judicial Planning Working Group* (n 104) 122.
[108] The Judicial Council Annual Report 2021 (n 42) 21.
[109] *Report of the Judicial Planning Working Group* (n 104) 8.
[110] ibid 121.
[111] ibid 6.

the ENM noted that there is a need to 'make better use of digital technology in the justice system generally.'[112] He suggested that this ought to be achieved through 'digital acculturation across the board: everyone needs to be aware of the constraints inherent in information system security, data protection issues and the GDPR, etc.'[113] Haffide noted that initial training and in-service training would have to provide training that would enhance one's skills when relying on professional applications. Similarly, the Terms of Reference for the JSC in Ireland identified the importance of 'information technology' and the need to expand its delivery of JET on 'practical information technology for serving judges.'[114] Given the prevalence of information technology ('IT') in the world today and its advantages in the workplace including time-saving and environmental sustainability coupled with the safety risks it can pose continuous interactive JET within this area is welcomed.

Within an Irish context, it has been 'assumed that the COVID-19 pandemic caused rapid upskilling in this area',[115] again indicating the importance of IT during times of global crisis and the need for it to feature in the future of the administration of justice in a worldwide basis. It is clear from the international standards on JET and recent developments in JET in Ireland and France that judges require practical and multidisciplinary-based JET on how to address emerging issues on the ground to promote the rule of law and adhere to international standards. A common thread in both models of JET is the provision of JET on respecting victims and their rights. While both jurisdictions have identified the need for sensitivity on this issue it can be noted that the JSC in Ireland has excelled in this area. Not only has it coordinated informative sessions on issues concerning victims, vulnerable witnesses, unconscious bias and avoiding retraumatisation in court but it has provided judges with a safe environment in which they can gain hands-on experience in applying the knowledge they have garnered on how to cater for these experiences as a judge. This approach to JET allows judges to administer justice with compassion and respect while also adhering to the principles of judicial impartiality and independence. After all, it has been reported that:

> Trauma begets trauma so that people rendered vulnerable by trauma in childhood are very frequently victims of violence and abuse in later life. Survivors of trauma use drugs and alcohol to cope with the aftermath, then find themselves involved with crime which leads to imprisonment and homelessness and further cycles of alienation and despair.[116]

Moreover, as 'most trauma is alterable through human intervention',[117] JET has the potential to provide judges with the ability to 'enhance the experience of those appearing in our courts in any capacity.'[118] Practical-based JET sessions have the potential 'to offer the judges a deeper understanding of people whose experiences are different from their own',[119] and in turn to enhance the interpersonal and communication skills of the judiciary. This approach to JET is viewed positively and should be endorsed to promote impartiality and

[112] Impact of the États Géneraux (n 98).
[113] ibid.
[114] The Judicial Council Annual Report 2021 (n 42) 21.
[115] ibid.
[116] Jonathan Tomlinson, 'We need to talk about trauma' (15 October 2017) <https://abetternhs.net/2017/10/15/we-need-to-talk-about-trauma/> accessed 20 February 2023.
[117] Saoirse Enright, 'Mixed views in judiciary on jury guidance 'bench book'' (Law Society Gazzette, 22 September 2021) <https://www.lawsociety.ie/gazette/top-stories/2021/09-september/mixed-views-in-judiciary-on-bench-book-for-jury-guidance> accessed 20 February 2023.
[118] The Judicial Council Annual Report 2021 (n 42) foreword 4.
[119] ibid 19.

independence in judicial decision-making. Moreover, because of the value of providing JET on issues beyond the law 'judicial training should not just include programmes that are about legal factors and processes but also cover non-legal matters such as the avoidance of cognitive biases.'[120] It is also clear from the recent advancements made in Ireland and France regarding JET that cooperation between jurisdictions plays a crucial role in the provision of JET. In particular, this is apparent from the JET projects the ENM has recently signed up for. It may be suggested that its collaboration with the National School of Judges of Ukraine is both collaborative and with the times. The importance of civil and common law jurisdictions relying on one another for support when developing JET was denoted by the recent initiation of JET in Ireland. In particular, it is noted that the JSC gained vital insight from the study centre for the Judiciary in the Netherlands. Therefore, continued cooperation between legal systems is deemed positive for the advancement of JET. It is thus promising that both Ireland and France have committed to continuing their collaboration with international training bodies such as the EJTN and other jurisdictions.

Conclusion

It is plain that Ireland's newly established model of formal JET requires ongoing enhancement to ensure the effective exercise of the role of the judge which, according to international standards and recent academic analysis on JET, necessitates a well-rounded skill set that exceeds the skills intrinsic to a successful legal researcher, writer, and advocate. Judges are not only required to interpret and apply the law, but they are also obliged 'to listen courteously, to answer wisely, to consider soberly and to decide impartially.'[121] Hence, JET is demanding. Nonetheless, after considering the JET frameworks in place in Ireland and France it is clear that both jurisdictions attempt to provide judges with the skills necessary to effectively administer justice. It is also clear that it is invaluable to look to other jurisdictions when developing and enhancing JET. This was acknowledged in the ENM's new international strategy for 2023 to 2027 as one of its three main objectives is 'to rely on the School's international activities and what our experts observe abroad to enrich the training of French judges and prosecutors as well.' Similarly, as outlined in the Judicial Council's 2021 Annual Report the JSC has recognised the benefit of heeding the evolution of JET at an international level: 'The Director and the Committee renewed and strengthened their engagement with international judicial training bodies and will continue to foster these networks and develop new allies across the world to facilitate cooperation at a global level in the coming years.'[122] It has accordingly been suggested that the provision of JET in Ireland and France will continue to flourish with the aid of continued collaboration with international training bodies. This paper has also emphasised the need for JET to be sufficiently resourced to enable current programmes to be enhanced and new programmes to be developed. With regards to the development of new JET programmes, it is clear that the EJTN provides cutting-edge programmes and therefore inspiration should arise from collaboration with the EJTN and recent developments in society such as technological advancements and humanitarian crises such as the Russia-Ukraine war. Also, it has been suggested that the role of the judge is nuanced and multi-faceted thereby requiring skills beyond legal research, writing, and advocacy. Therefore, judge-led practical skills-based JET that goes beyond legal considerations and is thus informed by various disciplines such as

[120] *Report of the Judicial Planning Working Group* (n 104) 122.
[121] Socrates, as cited in The Right Hon Lady Rose of Colmworth DBE, 'What makes a good judge?' (The Barnard's Inn Reading, Barnard's Inn Hall, 16 June 2022) 1.
[122] The Judicial Council Annual Report 2021 (n 42) 17.

sociology, politics, communications, and neurobiology is essential to the success of the exercise of the judicial function.

NOTES FROM SCOTLAND

Abstract: Some observations on Scots law and Scottish lawyers

Author: Stephen Woolman

Introduction

The Western world broadly divides into two legal camps. The civilian system is based on Roman law. The common law system has its roots in England. Scots law is one of the few mixed systems. Its jurisprudence drinks from both wells. This article is not a scholarly disquisition. Instead, it includes examples of legal Scots lore. It does not discuss the distinctive features of our criminal law, where juries (a) consist of 15 individuals, (b) have three verdicts available to them - guilty, not guilty, and not proven, and (c) can convict by a simple majority.

Origins

Early societies adopted rules that embodied customary and religious values. As trading increased, legal systems became more sophisticated. In particular, the jurists of ancient Rome fashioned a clear scheme. They divided the law into persons, property, things and actions. They also devised elegant solutions to many tricky problems. Students today find that their approach repays study. It stands in marked contrast to the complexity of modern systems.

We can trace modern Scots law to 1681, when Viscount Stair published the *Institutions of the Law of Scotland*. It has been described as:

> 'an original amalgam of Roman law, feudal law and Scottish customary law, systematised by resort to the law of nature and the Bible, and illuminated by many flashes of ideal metaphysics'

At about the same time, Sir George Mackenzie founded the Advocates Library. Under copyright laws, it was entitled to receive a free copy of any book (legal and non-legal) published in Great Britain. That created a wonderful repository for research for the legal profession in Scotland. Eventually, however, the burden of managing the vast holdings became too great. In 1926 the Faculty of Advocates donated the non-legal books to the nation, forming the National Library of Scotland.

Some Enlightenment figures

In the 18th century, Scotland produced two intellectual titans: David Hume and Adam Smith. They acquired their renown in the fields of history, philosophy and economics. But they also had an impact on the law. Hume was the Keeper of the Advocates Library. Smith lectured in jurisprudence at Glasgow University. Both men were members of the Select Society, which met below the Court of Session. Today, there are statues of both men in Edinburgh's Royal Mile. The sculptor (Sandy Stoddart) has partly cloaked Smith's right hand to represent the 'invisible hand' of the market made famous by the *Wealth of Nations*.

Other figures who came to prominence included the eccentric judge, Lord Monboddo. He spent much of his time off the bench in two pursuits. First, tracing the missing link between man and ape. Second, feuding with another judge, Lord Kames, who wrote at length on agriculture. Legal scholars, notably Bell and Erskine, published important works. Together with Stair, they are known as the institutional writers. Bell's *Commentaries* has an interesting arrangement centring on bankruptcy. He considered that to be the one time in an individual's life that called for a precise balance sheet of assets and liabilities. The only other time for such an audit is death.

Although we claim Lord Mansfield as a Scotsman, he was in fact one of the most distinguished English judges of the 18th century. He famously declared slavery to be unlawful in *Somersett's Case*. He had great confidence in his judgment. At the end of one appeal, he invited counsel for the losing party 'to tell us your real opinion and whether you don't think we're right'. Counsel replied that 'he always thought it his duty to do what the court desired and … he did not think that there were four men in the world who could have given such an ill-sounded judgment as you four, my Lords judges, have pronounced.'

The 19th Century

Three colourful figures

In the early 19th century three lawyers were more famous for their literary endeavours. Sir Walter Scott published many novels with legal characters or legal twists. He believed, however, that: 'A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.' Before becoming a distinguished judge, Francis Jeffrey edited the *Edinburgh Review* at its influential peak. His most devastating review was of Wordsworth's poem *Excursion*, which began: 'This will never do'. Given the asperity of Jeffrey's pen, it's not surprising that he fought a duel with pistols against another author following another withering review.

Henry Brougham is arguably the most colourful character of the three. He began his career at the Scots bar before leaving to seek his fortune in England where he reached the high office of Lord Chancellor. His route to the Woolsack was studded with achievement. Here is a list of the highlights. At the age of 16, he read a scientific paper on the properties of light to the Royal Society. He stung Lord Byron into writing a poem *English Bards and Scotch Reviewers* after writing a hostile critique in the *Edinburgh Review*. He designed the Brougham carriage mentioned in the Sherlock Holmes stories. He helped found the University of London. He gave the longest speech in British parliamentary history about law reform. His rhetoric is too rich for modern tastes. He began his closing speech on behalf of Queen Caroline, whom he defended on charges of infidelity before the House of Lords, with a sentence of 242 words:

> 'The time is now come when I feel that I shall truly stand in need of all your indulgence. It is not merely the august presence of this assembly which embarrasses me; for I have oftentimes had experience of its condescension — nor the novelty of this proceeding that perplexes me; for the mind gradually gets reconciled to the strangest things — nor is it the magnitude of this cause that oppresses me; for I am borne up and cheered by that conviction of its justice, which I share with all mankind; but, my lords, it is the very force of that conviction, the knowledge that it operates universally, the feeling that it operates rightly, which now dismays me with the apprehension, that my

> unworthy mode of handling it, may, for the first time, injure it; and, while others have trembled for a guilty client, or been anxious in a doubtful case, or crippled with a consciousness of some hidden weakness, or chilled by the influence, or dismayed by the hostility, of public opinion, I, knowing that here there is no guiltiness to conceal, nor any thing, save the resources of perjury to dread, am haunted with the apprehension, that my feeble discharge of this duty may for the first time cast that cause into doubt, and may turn against me for condemnation those millions of your lordships' countrymen, whose jealous eyes are now watching us, and who will not fail to impute it to me, if your lordships should reverse the judgment which the Case for the Charge has extorted from them.'

Brougham conceived himself to be a great figure. No doubt he expected a slew of biographies after his death. That did not happen. He is largely a forgotten figure, a footnote in history. But he has two unusual consolations. First, a fine statue in Cannes, which he turned into a fashionable resort by building a villa in what was then a fishing village. Second, in the 1950s the car manufacturer Cadillac named one of its models after him.

A colourful case

The case of *Steuart v Robertson*[1] 80 involves gallantry, dissipation, a disputed marriage, entailed estates, and a lengthy lawsuit. It arose out of the death of Major Steuart, the oldest son of an ancient family. He served with distinction in the 93rd Highlanders, being awarded the Victoria Cross. But after leaving the army he fell into a life of dissolution. Alcoholism resulted in attacks of delirium tremens before he died aged 37. A young woman came forward and made a claim on the estate. Mary maintained that she was the major's widow, having wed him two years earlier when she was 16.

The circumstances were these. Major Steuart had boarded with Mary's family in a flat above her father's fishing tackle shop in Edinburgh. One evening after supper he told the major that he could no longer stay under their roof, because his presence was tarnishing Mary's reputation. Major Steuart sat quietly for a minute or two. Tears came into his eyes. He then said 'I am poor now and cannot marry, but I will marry her in the Scotch fashion. He went down on his knee, put a ring on the third finger of Mary's left hand and said you are my wife before Heaven, so help me, oh God'. The couple then embraced, kissed and went to bed together. She gave birth to their child about 14 months later. During the remainder of the major's life, the couple's conduct followed an uneven pattern. Sometimes he acknowledged that he was married to Mary. Sometimes he did not. She likewise claimed to be his wife, but also held herself out as single.

A narrow majority of a full bench of the Court of Session held that the couple were man and wife. Lord Justice Clerk Moncreiffe was 'unable to resist the large and consistent mass of evidence on which the pursuer's case depends'. The House of Lords, however, unanimously reversed that decision. The speeches contain great rolling passages of morality. Here, for example, is Lord O'Hagan: 'It does seem somewhat startling to give such an effect to such doubtful words, spoken, if at all, at a nocturnal carouse by a habitual drunkard, even then emerging from a state of intoxication, weak in mind and body, and weeping maudlin tears.'

[1] (1875) 2R (HL).

Steuart isn't an influential decision. It's rarely cited today. But it reminds us that litigation is about human problems. It could and should have provided the engine for a great Victorian novel. Incidentally, the case illustrates the saying that the House of Lords was the most expensive jury in the world.

Some closing thoughts

I finish with five disparate remarks. First, Scotland continues to generate many important cases. In the 20th century, *Donoghue v Stevenson*[2] established manufacturers' liability. This century, the court had to decide the validity of the United Kingdom government's decision to prorogue parliament: *Cherry v Advocate General for Scotland.*[3]

Second, Scots law prefers 'the sense to the subtilty *(sic)* of law and do seldom trip by niceties or formalities'[4].

Third, Scottish judges aim to follow by issuing judgments that are accurate, brief and clear (the 'abc' approach).

Fourth, oral tradition is integral to the practice of advocacy. The more implausible the story, the more likely it is to be repeated. Here is a well-known Scottish anecdote. Defence counsel opened an appeal by stating that she intended to advance three submissions. One was a sure-fire winner. The second had 50:50 prospects of success. The third was a 'no-hoper'. The bench invited her to start with the best point. The advocate paused and then said 'you don't think I'm going to tell you which one is which?'

Finally, there is the motto of Robert Louis Stevenson, an advocate, but first and foremost a great writer. He said: 'Our business in life is not to succeed, but to continue to fail in good spirits'.

[2] 1932 SC (HL) 31.
[3] [2019] CSIH 49, 2020 SC 37.
[4] Viscount Stair.

'ADJUDICATING IN THE 21ST CENTURY': RECENT REFORM IN THE METHODS OF DRAFTING AND REASONING OF JUDGMENTS FROM THE COUR DE CASSATION IN LIGHT OF PUBLICATIONS BY THE 'COUR DE CASSATION 2030' COMMISSION

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Introduction

Questioning the act of adjudicating in the 21st century invariably leads to a consideration of the evolution of our society: increased demand for justice, increased media coverage of public life, the introduction of digital workplace tools, and the internationalisation of law and justice. The transformations of a judge's environment are numerous and pose new challenges to which the position must adapt. This article aims to explore the reforms undertaken and the discussions conducted by the Cour de cassation in recent years in an attempt to modernise its methods of work in order to respond to the stakes of the 21st century. Conscious of the responsibility imposed on it by its status as the supreme judicial court, the Cour de cassation has committed, over the last decade, to considerable reviews of its methods and functions. As the most important aspect of adjudication, the judgment from the Cour de cassation has seen substantial changes, including its form, and a rethinking of how it is communicated to the public.

A renewed judgment

The adoption of a new way of drafting judgments

In 2014, the Cour de cassation began to reconsider, on the initiative of the first president of the Cour, Betrand Louvel, the format of its judgments, which at the time contributed, in its own words, to accentuating the difficulty of communication that exists between the court and society. As a result of this long process, supported by successive commissions, and convening all the representatives of the Cour de cassation, new judgment-writing rules were produced and have been in effect since 1 October 2019.

Abandoning the single sentence, introduced by 'attendus', the decisions of the Cour de cassation are now written in a direct style. In addition, the paragraphs are now numbered, and the composite parts of the judgment clearly identified: 1) Facts and procedure; 2) Examination of the pleas in law; 3) Operative part.[1] These structural and drafting changes are intended to facilitate the understanding and dissemination of the rulings of the Cour de cassation, and thus increase its influence, without leading to changes in its methods of reasoning or in the requirements of the 'cassation' technique.

[1] For a comparison of the drafting rules for Cour de cassation judgments before and after the reform, see Cour de cassation, *Le mode de rédaction des arrêts de la Cour de cassation change* (5 April 2019) <https://www.courdecassation.fr/files/files/D%C3%A9cisions/Dossier%20de%20presse%20%27Le%20mode%20de%20r%C3%A9daction%20des%20arr%C3%AAts%20de%20la%20Cour%20de%20cassation%20change%27.pdf> Accessed 2 June 2023.

The development of enhanced reasoning

The adoption of a new form of drafting judgments is accompanied by the development of an enhanced statement of reasons for the most important decisions, ie decisions reversing case law, deciding a question of principle or a new question, when the solution is of interest for the unity of the case law, or in the case of a request for an opinion of the Court. The 'enhanced reasoning' or 'developed reasoning' can be summarised by one principle: the judgment must be self-sufficient. In other words, the reading of the judgment alone must be enough for its complete comprehension, without a need to refer to the report of the 'conseiller-rapporteur', the opinion of the Attorney General, or their explanatory notice. The enhanced reasoning will highlight the method of interpretation used by the Cour de cassation, alternative solutions that were not implemented by the Court – when these were seriously considered, and precedents in order to make the development of the case law clearer, all while taking into account impact studies carried out where they played a decisive role in the choice of the solution adopted. In other words, the Cour de cassation no longer believes that the authority of a judgment is linked to a pithy statement of reasons setting out authoritative arguments. On the contrary, we believe in the power of demonstration and persuasion. The enhanced statement of reasons thus pursues an educational effect by promoting the understanding of decisions, while reinforcing legal certainty. It is a response to the phenomenon of the internalisation of law and justice by satisfying the European standards in this area that were developed, particularly by the European Court of Human Rights.

In 2020, as a continuation of the reforms undertaken, the current first president of the Cour de cassation, Chantal Arens, and the public prosecutor of the Court, François Molins, set up a commission named 'Cour de cassation 2030' in order to carry out a prospective review on the future of the Cour de cassation over the next decade, by identifying, in part, the challenges faced in the judicial environment, whether they be institutional or international in nature and by formulating proposals to address these. The result of a year's work, the report issued by the Commission in September 2021 contains 37 recommendations aiming, on one hand, to reinforce adherence to the authority of the Cour de cassation – which involves restoring confidence in the decision-making process, promoting dialogue between judges and opening up to outside views – and on the other hand, to continue to reform the working methods of the Cour de cassation in order to better meet the expectations of the trial courts, litigants and society as a whole.[2] In order to increase confidence in the decision-making process, the report proposes the introduction of an 'open interactive procedure' for 'landmark cases', as the commission calls them, with a public hearing, allowing for the involvement of third parties, external authorities, experts and *amicus curiae*. This hearing and its audience would be recorded and streamed online.[3]

Another example, with regards to improving deliberation and reasoning, is the Commission's proposal to introduce separate opinions in judgments. This process, well known to Anglo-Saxon judges as the practice of dissenting judgments, would be adapted to the specifics of the French judicial culture. This is to say that where the deliberations reveal the existence of a minority opinion alongside the majority opinion, the majority could accept the inclusion of

[2] Cour de cassation, *Le Rapport de la Commission de réflexion sur la "Cour de cassation 2030"* (July 2021) <https://www.courdecassation.fr/la-cour-de-cassation/demain/cour-de-cassation-2030> Accessed 2 June 2023.
[3] ibid annex 1.6.

paragraphs in the judgment setting out the minority opinion or even an anonymised text setting out this opinion at the end of the judgment.[4] Giving more space to the reasons for a decision means that more time must be devoted to deliberation and drafting the judgment, which is likely to have an impact on the time taken to deliver a decision. In this respect, the question arises of the resources available to the judge(s) and the team surrounding him or her. The 'Cour de cassation 2030' commission thus proposes the creation of a support service for judges, inspired by the 'Justices' Clerks' model or the teams available to judges in the ECHR[5]. The development of enhanced reasoning goes hand in hand with a modification of the traditional structure of judgments and their drafting, while preserving the rigour of legal reasoning and its precision. Aware of the practices of our foreign counterparts and anxious to preserve the legal authority of our decisions, the Cour de cassation is endeavouring to invent what could be described as 'a model of improved concision'.[6]

A reimagined communication

The evolution of society in the 21st century, and its digitisation in particular, is changing the role of the judge. There is no justice today without communication about justice. The increasing media coverage of public life requires judges to accompany their decisions with adequate methods of communicating them. 'Judging well' is necessary, but no longer sufficient.

In 2018, the European Commission for the Efficiency of Justice ('CEPEJ') developed a guide on courts' communication to the public and the media, in order to highlight the need to implement a genuine judicial communication strategy.[7] Noting that 'justice is often poorly known and understood and that the public's trust in justice depends on its understanding of judicial activity', the CEPEJ invites courts to develop a general communication strategy in order to define the messages that the judiciary want to convey to the public, to disseminate information about judicial activity in its entirety, and to consider the use of all available means of communication.[8]

Various communication measures have been adopted in recent years by the Cour de cassation to improve the general understanding of its workings and decisions. Press releases are published on the website of the Cour de cassation for certain cases or when required by current judicial events.[9] The creation of a Twitter account for the Cour de cassation shows a choice to diversify and modernise its means of communication.[10] Since 2019, 'letters' from the chambers periodically offer a selection of commented decisions, in a language accessible not only to lawyers, but to all citizens.[11] These letters enable the chambers to explain the

[4] ibid annex 1.5.
[5] ibid annex 1.12.
[6] Didier Guérin and François Cordier, 'La réforme de la Cour de cassation et la matière pénale' (*Gazette du Palais*, 4 October 2016) 79.
[7] European Commission for the Efficacy of Justice, 'Guide on Communication with the Media and the Public for Courts and Prosectuion Authorities' (Council of Europe, 3–4 December 2018) < https://rm.coe.int/cepej-2018-15-en-communication-manual-with-media/16809025fe> Accessed 2 June 2023.
[8] Ibid.
[9] Press releases available on Cour de cassation website: <https://www.courdecassation.fr/toutes-les-actualites?date_du=&date_au=&thematique%5B0%5D=1363&items_per_page=10&sort_bef_combine=created_DESC> Accessed 2 June 2023.
[10] <https://twitter.com/courdecassation> Accessed 2 June 2023.
[11] Cour de cassation, 'Les lettres des chambres' <https://www.courdecassation.fr/kiosque/les-lettres-des-chambres> Accessed 2 June 2023.

meaning and scope of the decisions they issue. Therefore, the summaries of the judgments are accompanied by short comments that help to place them in their context, particularly in terms of case law. More understandable case law contributes to both legal certainty and the quality of appeals before the courts. In the same vein, since the end of 2021, the social chamber of the Cour de cassation has been producing a regular podcast in order to help the public keep track of its decisions and decipher important judgments.[12]

In order to aid this communication, a new website was set up in September 2021.[13] It includes an English version,[14] and a number of decisions are translated every term in order to ensure the dissemination of the case law of the Cour de cassation to a non-French-speaking public.[15] Echoing the conclusions of the CEPEJ, one of the main thrusts of the recommendations made by the 'Cour de cassation 2030' commission is the implementation of a communication strategy enabling the Cour de cassation to make itself better known, but also to be better understood. In its report, the commission stresses that 'it is a given that, in modern democracies, the judicial communication space cannot be limited to the parties and the legal community. It should necessarily and legitimately extend to the public space'.[16] Without claiming to be an exhaustive presentation of the report, some recommendations can be mentioned:

- Filming and broadcasting public preparatory sessions and hearings in certain cases. Since the adoption of Act No. 2021-1729 of 22 December 2021 on confidence in the judiciary, court hearings may be recorded and broadcast to the general public for reasons of public interest of an educational, informative, cultural or scientific nature.[17] The Cour de cassation benefits from an autonomous regime authorising the broadcasting of hearings on the day of the recording - as it already does for the colloquia and conferences it organises. The request for recording is addressed to the first president of the Cour de cassation, who ensures that it meets the public interest objective and that the project is compatible with the proper administration of justice and the serenity of the proceedings.
- In order to increase confidence in the decision-making process, it is proposed that an 'open interactive procedure' be introduced for 'landmark cases', as the Commission calls them, with a public preparatory session prior to the hearing, allowing for the intervention of third parties, external authorities, experts and *amicus curiae*. This preparatory session and the hearing would be recorded and broadcast on the internet.
- The creation of a Cour de cassation Web TV in order to allow the immediate broadcasting of content and to develop an autonomous and proactive communication for all citizens.
- The creation of a forum for dialogue with the legislature in order to improve their understanding of our decisions and to improve the law-making process.[18]

[12] Cour de cassation, 'La Sociale Le Mag' <https://www.courdecassation.fr/kiosque/podcast > Accessed 6 June 2023.
[13] Cour de cassation, <https://www.courdecassation.fr/> Accessed 6 June 2023.
[14] Cour de cassation (English version), <https://www.courdecassation.fr/en> Accessed 6 June 2023.
[15] The translated judgments of the Cour de cassation are available at Cour de cassation, 'All the News' <https://www.courdecassation.fr/en/all-the-news?thematique%5B0%5D=1676> Accessed 6 June 2023.
[16] (n 2) 79.
[17] République Française, 'LOI n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire' <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044545992> Accessed 6 June 2023.
[18] Article R. 212-64 du Code de l'organisation judiciaire, which was modified by decree, 30 August 2019: République Française, 'Article R. 212-64 du Code de l'organisation judiciaire'

- Providing the Cour de cassation with a spokesperson. Initial steps have already been taken in this direction, in particular by attaching the communication department of the Cour de cassation to the first presidency, rather than to the research and documentation department. The proposal also echoes the recommendation made by the 'Conseil supérieur de la magistrature' in its 2021 annual report to create a spokesperson function within the national courts.[19]

Conclusion

The media and social networks are becoming increasingly important in the public arena. Whether one approves or regrets it, the courts must take this phenomenon into account in order to adapt to it and respond to the growing demands of communication.

<https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071164/LEGISCTA000032461957/2020-07-25>

[19] Conseil Supérieur De La Magistrature, *Rapport D'activité 2020* <http://www.conseil-superieur-magistrature.fr/sites/default/files/rapports_activite/csm_-_rapport_dactivite_2020.pdf> Accessed 6 June 2023.

JUDGMENT WRITING AND JUDGECRAFT: A VIEW FROM THE SUPREME COURT

Author: Lord Stephens of Creevyloughgare

Introduction

We are back together after Covid. What a relief and what a great pleasure to be with all of you today. I am also delighted to have an excuse to be back here in Belfast, and back in this building where I have spent most of my working life. I hope you will enjoy your time here. I understand that there is to be a trip to the Giant's Causeway and Old Bushmill's distillery tomorrow. I am sure that you will be able to enjoy what we call a 'wee' glass of whiskey in the distillery. That is whiskey spelt with an 'e' which means that it is Irish as opposed to whisky spelt without an 'e' which means that it is from Scotland which is to be contrasted with American Scotch which means that it is awful!

On the topic of sites to visit in Northern Ireland can I also act as the Northern Ireland tourist Board to entice you to come back. The National Trust property at Castleward on the shores of beautiful Strangford lough is an eccentric- built- example of the need for dispute resolution. The house was constructed in the 1760's for the First Viscount Bangor, Bernard Ward and his wife Ann. They couldn't agree on architectural styles so the entrance side of the building, under his direction, is done in a classical Palladian style, with columns and a triangular pediment. The opposite side, under her direction, is Georgian Gothic with pointed windows. Their architectural quarrel did not stop at the exterior. The whole of the interior is equally divided with a battle line right down the middle. On one side his simple classical decoration. Her side more over the top with detailed and ornate panelling and ceilings. John Betjeman referred to the ceiling in her boudoir as 'like sitting under a cows udder.' You must see it to understand. For me, it appears as a physical representation of the complex, multifaceted, and sometimes downright ugly disputes that fall to be decided by the courts about which we must give judgments.

I confess that when initially presented with the proposed topic of 'judgment writing and judgecraft', I was deeply embarrassed. First, what could I possibly say about judgment writing or judgecraft to all my distinguished colleagues? Second, I have spent the last 15 years as a judge - certainly writing many judgments, and perhaps practising what might be termed 'judgecraft' – but I have not had occasion to spend too much time pondering it from a wider perspective. I suppose that a good start for judgecraft is the Bible. In the book of Exodus Jethro advises Moses to establish a judiciary system to share the load of deciding the legal disputes which were taking up too much of his time. Jethro advises Moses to seek out 'able men, such as fear God, men of truth, hating covetousness'. Another starting place is Socrates. He said 'Four things belong to a judge: to listen courteously, to answer wisely, to consider soberly and to decide impartially'.

Of course judgecraft in the common law and civil jurisdictions is informed by the different routes to becoming a judge. In the common law jurisdictions, judges are appointed towards the latter end of a practitioner's career, and the appointment traditionally was not followed by structured or vocational training. Under this tradition, common law judges were thought to have developed the key skills necessary for judging through the practice of advising and representing clients in their practice as barristers or solicitors. Traditionally in the common

law world, a barrister could be practising as an Admiralty QC one day and then the next on appointment as a judge to be sent out to conduct a murder trial. It was thought that a successful barrister would not need any training in making the move to the Bench. Lord Judge, former Chief Justice, has remarked in a lecture given to the Judicial Studies Board that when he was appointed to be a Recorder of the Crown Court in 1976, he sat for two years before he received any training at all. That was not, he says with characteristic modesty, because of his remarkable talents but that there was not thought to be any need for training. Indeed, he notes that at the time the Judicial Studies Board was set up, there was significant judicial antipathy towards it with many thinking that training was an interference with judicial independence. The fact that it was called the Judicial Studies Board was a deliberate attempt to reconcile those who thought that they were demeaned by the implication that they might need training in the performance of their responsibilities. By 2013 when Lord Judge was giving his lecture, he said that judges now welcome training and know that it has no bearing whatever on their independence. 'Being a judge in the modern world does not merely require such education and training, it requires a frame of mind in which these positive advantages are welcomed.' So we are now following in the footsteps of civil law judges so that there is now training and induction for all judges.

Another feature of the common law system was that the idea of a career judiciary used to be almost unheard of in United Kingdom courts. People tended to choose the level at which they wanted to join the judicial system and expected to stay there for their whole judicial career. In more recent years there has been more movement, for example, judges appointed in the County Court moving to the High Court Bench and judges in the tribunal service moving to be district judges or county court judges. This has benefits for diversity too as those branches of the judiciary tend to have a better gender and ethnic balance. This of course stands in contrast to the training and appointment of judges in civil law systems. In France, a lawyer can qualify as a judge straight out of university and judges are not ordinarily recruited from the ranks of lawyers. They are specifically trained for the role via a standalone process and it is common for a person to become a judge before they turn 30. With certain exceptions, most aspiring judges in France are required to train at the Ecole nationale de la magistrature ('ENM') in Bordeaux. This is the only judicial training school in the country. Admission to the ENM is determined by competitive examination. The coursework lasts 31 months followed by a cycle of traineeships in the court system and supporting agencies (for example juvenile facilities). At the end of this period, a prospective judge takes another exam and is presented with a list of available judicial posts prepared by the Ministry of Justice. Initial appointments are made on the basis of exam scores – those who receive the highest scores get the pick of positions. Most ENM graduates are appointed to a judgeship in the provinces at the lowest level, working as investigating judges or members of benches adjudicating minor criminal cases. They then work their way up the judicial ladder throughout a long career entirely within the judiciary.

Judgecraft and Intellectual Ability

Every judge has to be sufficiently astute, hard-working or clever enough to be able, within the space of a few hours not only to read and understand the material but to get themselves into a position to decide which of the two competing sets of submissions is right – to be able to challenge those submissions of counsel – who may well have been working on the case for years – to discuss the case intelligently with colleagues, and then write a judgment or comment on a draft written by someone else. From start to finish the judge's involvement with the case may last a few weeks or months at the end of which the judge has to produce an authoritative and reasoned decision.

Another aspect of judgecraft I would like to focus on is the changing attitude to rudeness and bullying by judges. Socrates as I have mentioned listed the ability to listen courteously as one of the characteristics of a good judge but this quality has not invariably been manifest in our courts. This topic has been the subject of a great deal of attention recently. In February 2019, the Bar Council published guidance to barristers about judicial bullying. It defines bullying as offensive, intimidating, malicious, or insulting behaviour involving the misuse of power such as can make a person feel vulnerable, upset, humiliated, undermined, or threatened. The Bar Council recognises that when bullying by judges occurs, it presents additional challenges because those who are a target may feel unable, or particularly reluctant, to do anything about it, even though the impact may be particularly acute. I agree with the article written by a senior barrister in New South Wales and included in the Handbook for Judicial Officers in that Australian jurisdiction. It contains this observation:

> The idea that judicial bullying is a necessary "rite of passage" for junior counsel is outdated, dangerous and wholly unacceptable. Older practitioners relating "war stories" of how they were mistreated by former judges should not be a source of admiration but rather, a sad indictment that this issue has not been addressed earlier. Just because one has suffered the humiliation of judicial bullying and "lived to tell the tale" does not mean that it should be an experience visited upon the newer members of the Bar. Rather, it should be the trigger for right-thinking members of the Bench and Bar to ensure that such behaviour is treated with opprobrium.

Why has unpleasant behaviour in court fallen so far out of fashion? It is partly, I think, because younger lawyers have been educated in a school and university system that takes bullying seriously and they are, quite rightly, no longer prepared to put up with it. To my mind, this whole issue is much more significant than just being a way of protecting barristers from having a bad day at the office – important though that is. If lay clients sitting in court see the judge being rude and impatient with their counsel or with the witnesses on their side, they will feel strongly that they have not had a fair hearing. Their dissatisfaction will not be only with the judge, but also, however unfairly, with their counsel and with the overall process of adjudication. This becomes a vicious circle because an advocate will rarely give his or her best for the client, the cause, or for the court when subjected to undue pressure.

The final aspect of character and judgecraft I would wish to highlight is compassion. Judging is not an abstract or mechanical process – it is an intensely human process. The judge is engaged in unravelling and resolving disputes that often have had a profound effect on the lives of the litigants. A judge who is able to see all sides of a problem has a better chance of making a decision that is both fair and just and seen to be fair and just. A judge must be guided by an ever-present awareness and concern for the plight of others and the human condition – compassion is part and parcel of the nature and content of that which we call 'law'.

Judgment Writing

The purpose of a legal judgment is quite clearly first and foremost to resolve particular cases in accordance with the law and the facts, to determine the rights and duties of litigants, to do justice to them, and to provide principled, coherent, and clear guidance for future litigants

in similar situations. The means by which this is done, however, is subject to very few rigid constraints, whether with respect to form, tone, or substance.

Judgments in this jurisdiction range from say some 5 pages to some 100 pages. We produced a five page judgment in a recent Privy Council case by 3 pm having finished the hearing just before lunch. The length depends on varying levels of legal, procedural, and factual detail involved in the case. A judgment can be longer than 100 pages though that must be very rare as otherwise the judge loses the will to live or what is produced could choke a donkey. Much has been written about the constitutional implications for the rule of law, including principles of open justice, in ensuring that law is capable of being read and understood not only by those who study and practise law, but by the world at large, or the community in general. Indeed, much has also been written about what makes a well-written judgment, including in the context of the now significant body of academic work in the field of law and literature. Lord Denning, widely regarded as among the greatest of Britain's judicial stylists, observed:

> [Y]ou must cultivate a style [that] commands attention. No matter how sound your reasoning, if it is presented in a dull and turgid setting, your hearers- or your readers- will turn aside. They will not stop and listen. They will flick over the pages. But if it is presented in a lively and attractive setting, they will sit up and take notice. They will listen as if spellbound. They will read you with engrossment.[1]

Lord Denning himself is of course well known for his unique and engaging style – and most particularly, for some of the best opening lines. For example, few English lawyers would forget his scene-setting start in the case of *Miller v Jackson*, which involved a complaint that cricket balls being hit from a cricket ground were causing actual damage to a neighbouring house and apprehension of personal injury which interfered with their enjoyment of their house and garden whenever cricket was being played; Lord Denning started by stating:

> In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last seventy years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good clubhouse for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work, they practice while the light lasts. Yet now after these 70 years a Judge of the High Court has ordered that they must not play there anymore, He has issued an injunction to stop them. […][2]

Denning dissented. The use of the ground for cricket was a most reasonable use; and it does not suddenly become a nuisance because a neighbour chooses to come to a house in a position where it might occasionally be hit by a cricket ball.

[1] *Lord Denning, The Family Story* 216 (1982)
[2] *Miller v Jackson* [1977] EWCA Civ 6 [1].

Lord Denning is not the only one – another UK Law Lord whose judicial writing has garnered much admiration is that of Lord Rodger. Lord Rodger spoke widely of his view of judicial writing – that a judgment was personal to a judge and should therefore reflect his or her personality and interests. An example is *Re Guardian News and Media Ltd*, where his judgment begins with the provocative words, 'Your first term docket reads like alphabet soup.'[3] As such, judicial opinions of some of the greatest judges across the common law world can be regarded as having significant literary merit and they repay a close literary analysis. And of course, all legal cases come with their own cast of characters, and indeed their own narratives. There are many examples of great judgments incorporating tools and techniques from literature and poetry in order to elucidate or strengthen a particular conclusion. I like the passage from the second coming by Yates, 'The best lack all conviction, while the worst Are full of passionate intensity.' To my mind it sums up the doubts of honest witnesses and the contrasting bluster of manipulative liars.

In April 1995, the United States Supreme Court decided the case of *Plaut v Spendthrift Farm Inc.*[4] Though in its inception this case concerned the story of Mr and Ms Plaut, who along with other investors, alleged that Spendthrift Farm committed fraud and deceit when selling stock, by the time it came to the Supreme Court, the key issue to determine had become a constitutional question regarding the separation of powers – in this case, between the judiciary and Congress.[5] Justice Antonin Scalia, writing for the majority, employed the metaphor of constructing a wall to represent his view of the necessity of drawing clear distinctions between executive, legislative and judicial power. Justice Scalia took the perhaps unusual step of seeking support in the well-known poem of Robert Frost 'Mending Wall', citing the line 'Good fences make good neighbours' in this regard. Another member of the court, Justice Stephen Breyer gave a concurring opinion, but provided a different, more qualified analysis of the separation of powers question. In this critique, Justice Breyer also takes issue with Justice Scalia's interpretation of Frost's poem, noting that on his reading, the speaker in the poem expresses some clear discomfort in the very notion of sharp boundaries, demonstrated in the lines – 'before I build a wall I'd ask to know / What I was walling in or walling out.'

Another example closer to home is Lord Millet in the House of Lords decision in *Uratemp Ventures Limited v Collins*, where in order to divine the meaning of the word 'dwelling-house', examined that word's ordinary usage.[6] Lord Millet held that the meaning contended for by the landlord, that is, that a dwelling place is the place where a person habitually sleeps, eats *and* cooks his meals, had no support in English literature.[7] Citing texts from the Book of Common Prayer, to Milton's Paradise Lost, to Gilbert and Sullivan's the Mikado, Lord Millet sought to demonstrate that 'dwelling' contains no implication that it is the place where cooking occurs. He said:

> According to the Book of Common Prayer, "the fir trees are a dwelling for the storks" (Psalm 104); while W. S. Gilbert condemned the billiard sharp "to

[3] *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, [1]; Lord Reed, 'The Form and Language of Lord Rodger's Judgments', in Andrew Burrows, David Jognston QC, and Reinhard Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (OUP 2013).
[4] *Plaut v Spendthrift Farm Inc et al* 514 US 211 (1995).
[5] Kieran Dolin, 'Introduction to law and literature: walking the boundary with Robert Frost and the Supreme Court' in *A Critical Introduction to Law and Literature* (CUP 2012).
[6] [2001] UKHL 43.
[7] ibid [30].

> dwell in a dungeon cell" (where it will be remembered he plays with a twisted cue on a cloth untrue with elliptical billiard balls): The Mikado Act II. It is hardly necessary to observe that Victorian prison cells did not possess cooking facilities. Of course, the word "dwell" may owe its presence to the exigencies of the rhyme, but it does not strike the listener as incongruous. If faintly humorous, it is because the occupation of a prison cell is involuntary, not because of the absence of cooking facilities. As I shall show hereafter, Gilbert, who had qualified at the Bar, had got his law right. An earlier and greater poet wrote of Lucifer being hurled "to bottomless perdition, there to dwell in adamantine chaos and penal fire": (Paradise Lost Book I l.47).[8]

There is little doubt in my mind that in the pen of a skilled writer, legal pronouncements can be made significantly clearer (and certainly more engaging) with added literary flair or elegance of expression. While one must avoid style over substance, it strikes me that it must be right in legal writing that the two often merge. As noted by American Jurist Benjamin Cardozo in his 1925 essay on Law and Literature, 'Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity."[9] Of course, in reality, the real-life judge is constrained in many ways by the demands of statute and precedent, let alone the demands of time and resource, which no doubt contribute to establishing the parameters for what ends up in a judgment. While poetry, metaphor and narrative structure do assist, the central effort for any judge in writing judgments has to be towards clarity of communication. Though it might sound somewhat less lofty, it is the task of the judge to bear in mind the multiple audiences that must be reflected in the text of the judgment, and who will have recourse to it in relation to their specific dispute, or indeed in the context of future disputes.

Clarity and accessibility are at the forefront of my mind particularly when dealing with difficult family law cases. As a judge in the Family Division in Northern Ireland between 2008 and 2014, I learned the importance and value in writing clear and accessible judgments, easily understood by the litigants (to whom these judgments were of course of exceptional personal importance) as well as for social workers, local authorities, family liaison services and others, not to mention other judges and practitioners. I particularly welcome the recent developments in this jurisdiction and others towards writing judgments in plain English and in a child-friendly or indeed family-centric mode, which I hope we might hear more about from Lord Justice Peter Jackson, who is at the forefront of this development. I hope he won't mind if I draw on one or two of his judgments by way of example: for instance, in 2016 Mr Justice Peter Jackson (as he then was) handed down a 43-paragraph judgment in a difficult case concerning care proceedings in respect of four children, in which there was a concern that the father of the youngest two children might take them to Syria. The judgment starts with the opening line: 'This judgment is as short as possible so that the mother and the older children can follow it'. Following a short explanation of the family history, notes with (for me at least) some breath-taking simplicity: 'People can tell lies about some things and still tell the truth about other things.' [10] I can't think of how many family cases which I have had to decide that could be encapsulated in this observation. A handful of other judgments written in plain English, or otherwise made 'child-friendly' have emerged in this jurisdiction

[8] *Uratemp Ventures Limited v Collins* [2001] UKHL 43.
[9] Benjamin Cardozo, 'Law and Literature' (1925) Yale Review 699.
[10] *Lancashire County Council v M & Ors (Rev 1)* [2016] EWFC 9 (04 February 2016).

in the last few years.[11] An equally notable example is another one of Peter Jackson LJ's decisions in Re A: Letter to a Young Person.[12] This case concerned a bitter custody battle between a 14-year-old child's parents, one of whom wished to relocate to another country with the child. The judgment is only 2,750 words long, and again explains with admirable clarity the host of matters that the judge took into account in making the order he made, in the form of a letter to the child in question.

I confess that I do not think it terribly likely that the Supreme Court will adopt a similar approach in the near future in respect of the family cases that come before us, although as I hope I have made clear, I think this is an extremely positive development in the Family Courts, and one which contains significant lessons for all judges when thinking about how to communicate legal decisions. From the perspective of the Supreme Court, while of course ensuring clarity and accessibility for litigants is paramount, we are also called upon to decide difficult questions of general public importance, and often, to give guidance to the lower courts as to how a particular rule is to be applied. This necessitates a lengthier exposition of the relevant line or lines of authorities, and perhaps a more detailed analysis of the intricacies of the legal position. This point cuts both ways. Cases that come before the Supreme Court attract significant scrutiny among members of the public as well as judges and practitioners. Often, they also attract substantial media attention. There is much that we can do and should be doing to improve the accessibility and clarity of our judgments.

When reflecting on the past two years at the Supreme Court, a couple of themes have emerged. First, it has been instructive to see how the preparation of the press summaries can serve as a helpful check as to whether the key points in any particular judgment are as clearly and cleanly expressed as one would hope. A Press Summary is a short (ideally less than 2 pages of A4) précis of a Supreme Court decision, which is published on the Supreme Court website and the BAILI website alongside the handed-down judgment. The Justices work with their judicial assistants and the Supreme Court communications team to craft something that provides a clear and legally accurate overview of the key findings in a particular case. Of course, these summaries have no legal value whatsoever, but it has struck me that in terms of public understanding of the law, and indeed the public's conception of the role of the Supreme Court as an institution, these press summaries have an important role to play. It is not beyond the extent of my imagination to consider that in many high-profile cases, journalists covering case developments in the national press may be likely to have more regard to the contents of the two-page press summary than to wade through 100 pages of legal text on a print deadline. As a result, it is imperative that this document effectively communicates the salient points of the judgment, so that these make their way into the public consciousness. Anecdotally, I understand that busy practitioners will often also have regard to press summaries to garner a quick understanding of a case, not to mention law students and any combination or variety of interested lay people or groups.

Second, the greater scrutiny and attention focussed on Supreme Court judgments can mean we are nudged towards change by those who are closer to the coalface of a particular practice area on a day-to-day basis. For instance, in November last year, I handed down judgment in the case of *A Local Authority (Respondent) v JB (by his Litigation Friend, the Official Solicitor*). This case was the first time the Supreme Court had considered the concept of mental capacity

[11] Stalford and Hollingsworth, '"This case is about you and your future": Towards Judgments for Children', (2020) 83(5) Modern Law Review 1030.
[12] [2017] EWFC 48.

under the Mental Capacity Act 2005 and specifically had to answer what 'relevant information' a person should be able to understand, retain and use when assessing whether that person has capacity to consent to sexual relations. JB had a number of conditions, namely Aspergers, epilepsy, registered blind, significant brain damage, physical limitations and depression. When the case was listed, the Supreme Court communications team was approached by an interested party, who requested that an Easy Read version of the case summary that is normally published on the Supreme Court website also be provided, such that people with learning disabilities would be supported in following the case and understanding the issues at play. An 'Easy Read' document is one where the text is presented in an accessible, easy-to-understand format, with some or all of the following characteristics: Text should be in short sentences, language should be simplified, and any necessary complicated or technical words clearly explained, and the font and alignment of the text should be optimised for clarity. The Supreme Court communications team produced an Easy Read version of the case summary, [13] and of the press summary following the hand-down of the judgment.[14] I understand that this was well-received, and perhaps is something that we could consider doing more frequently.

Finally, I would also touch on the impact that co-authoring of the majority judgment has on the final product that is handed down. At the Supreme Court, we typically hear cases in panels of five (although occasionally in a smaller or larger configuration, depending on the requirements of the particular appeal), but it is now unusual to see cases where all the justices involved write a separate opinion. The merits or otherwise of this development have been discussed elsewhere, and I don't propose to address them here, save for adding to the mix the contribution in terms of clarity of writing that I think is made where two or more justices together write the opinion of the Court. I have co-authored a number of unanimous judgments since coming to the Supreme Court, and on each occasion, I have observed that through the process of melding together two parts or points, my own line of reasoning is much clarified.

Case Management at the Supreme Court

From judgment writing to 'judgecraft', as promised at the beginning of this paper. The main thing to note is that clearly case management as an appellate judge, and particularly in the UK Supreme Court, is vastly different from case management as a trial judge. The nature of the final appeals that come to us is such that there is much less to 'case manage', in terms of listing, documentation, filings and applications. We don't get many applications prior to the hearing, and when we do, they are usually straightforward. However, I thought it might be interesting to share some brief comments on what we at the UK Supreme Court are currently thinking about in terms of our practice and processes, as well as how we interact with our users, particularly post-pandemic.

There is in our court, as there is across the court systems as a whole, a strong movement towards digitising and modernising filing systems, with a view to increasing efficiency, as well as access to justice. Naturally, the Covid-19 pandemic accelerated the use of electronic filing

[13] UK Supreme Court, *A Local Authority (Respondent) v JB (by his Litigation Friend, the Official Solicitor) (Appellant): Easy Read case summary* < https://www.supremecourt.uk/docs/easy-read-case-summary-for-local-authority-v-jb-uksc-2020-0133.pdf> Accessed 26 June 2023.

[14] UK Supreme Court, *Easy Read Press Summary of A Local Authority (Respondent) v JB (By his Litigation Friend, the Official Solicitor) (Appellant)* <https://www.supremecourt.uk/docs/la-v-jb-easy-read-press-summary-2020-0133.pdf> Accessed 26 June 2023.

and online hearings virtually overnight. This was dealt with at the Supreme Court and JCPC by an introduction of a Covid Practice Note, which mandated electronic filing only, and provided for online hearings. The requirements for filing hard copies were suspended and payment of fees was allowed only by bank transfer. The Covid Practice Note has now been rescinded, but the provision confirming that filing may be in electronic form only remains, as well as the direction that hard copy documents will only be required for the full appeal hearing (and even then only the core documents).

The UK Supreme Court is committed to a program of further change over the next three years, focussing on modernising the court's processes. It seems likely that there will be further changes to the Practice Direction, and perhaps even to the Rules of the Supreme Court, in order to effect these changes. The Justices are all comfortable and confident with using electronic PDFs during hearings, and I don't think there is any likelihood of a return to voluminous bundles (some of which are inevitably never opened) arriving for each case. It has become a regular joke from counsel appearing before us that the Court has outpaced the Bar in going paperless. From a records management perspective, the use of electronic bundles brings significant benefits in terms of efficiency – as above, having vast and voluminous paper bundles is unwieldy and causes extra work in terms of processing and archiving following the conclusion of a case, not to mention the negative environmental impact. From my own perspective, the benefit of doing it electronically is of course that I have more flexibility in terms of working in the office or at home. One possible development arising from mandatory digital filing that I think has significant merit is that it may pave the way for establishing a version of the skeleton arguments or parties' cases to be made publicly available on the Supreme Court website prior to the hearing. This would have substantial benefits in terms of access to justice and open justice, for professional users, journalists, legal academics, and the interested public. How much easier it is to understand what is really being argued before the Court when one has access to the agreed facts and the parties' written cases. I understand this is done in some other courts, including Australia, and is under contemplation in others. This general direction of travel is I think to be welcomed, and we have much to learn from colleagues in other jurisdictions as to how to grapple with the challenges posed by the new normal.

TRANSLATION OF PELLISSIER: LA REFORME DE LA REDACTION DES DECISIONS DE JUSTICE ADMINISTRATIVE: 7 ANS DE REFLEXIONS

REFORMING HOW ADMINISTRATIVE JUDGMENTS ARE WRITTEN: 7 YEARS OF REFLECTIONS

Abstract: In France, the 'juridicitions administratives' hear cases between private individuals and administrative bodies (the State, local authorities, private bodies with public service missions etc). The way judgments are drafted and published has been the subject of sweeping reforms. This paper is a reflection on the 7 years following their implementation. The reform of the drafting of administrative court decisions has highlighted the fact that the form of the court decision, which is not generally questioned, is essential to a number of important questions about the judge's role and what he/she owes to the parties to the proceedings, questions which go beyond the particular administrative law system of France. It is rare for a court system as a whole to undertake a large-scale collective reflection on the essential questions of drafting and reasoning. This reform was therefore interesting both in its content and in its method.

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Introduction

Ten years ago, for the first time in their history, the administrative courts in France undertook a vast review of the methods of drafting their judicial decisions. The aim was to make them more accessible for litigants. This review would never be formulaic: a court decision is an expression of the act of adjudicating; its drafting is entirely dependent on the conditions in which it is drawn up and the judge's perspective of their duty. It has also led to an assessment of the evolution of the administrative judge's place in society. This review led to a reform that has been gradually implemented. It began in 2011 with a working group that submitted its report[1] a year later and the reforms were implemented after several phases of trials which lasted almost seven years. In addition to its content, the methodology of this reform is therefore also of interest.

State of affairs before the reform

Before outlining the review of how administrative decisions are drafted and their results, it is appropriate to specify in a few words its purpose, namely what is meant by the drafting of decisions of the administrative courts. In France, administrative courts are distinct from the overall system of justice. They have the jurisdiction to hear, broadly speaking, disputes in relation to the exercise of public power. The administrative law system includes a supreme court, the Council of State (Conseil d'État), which handles both the management of the administrative law system, from the courts of first instances to the appeal courts and tries to

[1] Groupe de travail sur la redaction des decisions de la juridiction administrative – Rapport, avril 2012. Available on line : Groupe de travail sur la rédaction des décisions de la juridiction administrative : rapport final (conseil-etat.fr)

ensure conformity throughout the jurisprudence of the administrative law system. The claims that come before the administrative courts are varied and so are the judicial decisions in response to them. Without going into detail, it is possible to distinguish several major categories of judgments that are issued by these courts: decisions where the courts reject the application because it is inadmissible because the action has lost its object, or is outside the jurisdiction of the court; decisions where emergency measures are ordered by a judge; decisions where the court issues a judgment following adversarial proceedings and a hearing. The drafting of French administrative law decisions has two principal characteristics: uniformity and a longstanding history. These two features are all the more remarkable given that the method of drafting has developed through judicial experience and practice and there are very few legislative or regulatory provisions concerning it.

The first feature of these decisions is that they follow a model that is common to the entire system of administrative law. Every decision had – and still has – a heading indicating the court issuing it, the date, and the phrase 'In the name of the French people'. This is followed by three distinct sections. The first section, which is known as the 'visas' because each paragraph begins with the word 'vu', ('seen', meaning 'given that' in context), contains a certain amount of information about the parties to the dispute, the pleadings, and the chronological order of their filing. The claims that were made and the arguments developed in support of them are analysed in a very focused manner. It then contains information on the main investigative steps taken by the court; as the court must show the correct investigative procedure was followed. This section ends by mentioning the various authorities that will be of importance in the dispute and these are listed in hierarchical order (Constitution, international standards, law, regulations). The second section is focused on the reasoning behind the decision, which itself is contained in the third section. Whereas the decision part of the judgment is based on an assessment of the essential issue, which is reasoned out by the court, here the view of the court is expressed on the submissions put before it and on which it must rule. Each paragraph in this section begins with 'Considérant que', meaning 'Considering that'. It is customary when the decision rules on several submissions and/or when there are numerous pleas, to insert headings and subheadings to facilitate reading. The third section is the operative part of the judgment. It is broken up into clauses, each clause addressing each issue that was put before the court.

These different sections used to be contained in a single sentence, the subject of which was the issue on which it depended, and which began that part of the ruling. The main verb was the word 'decides' which was used to separate the submissions from the court's ruling. The 'visas' and the reasons were therefore subordinate and were inserted between the subject and the verb, separated from each other by punctuation. This particular manner of laying out French court decisions was the fruit of tradition, as it was not prescribed by any legal template. It was intended to reflect, or even impose, the rigour of judicial reasoning, which applies a general and impersonal rule to a particular situation. This legal reasoning is usually referred to as syllogistic, with the rule of law as the major consideration and the facts as the object of the law. The syntax of the single sentence was intended to make the conclusion seem as though it inevitably flowed from the statement of the applicable law. The three French supreme courts - the Constitutional Council, the Court of Cassation, and the Council of State – have all adopted this drafting method. While all the administrative courts have followed this model, the approach of the first instance courts and courts of appeal has been more variable, with a number of them abandoning the single sentence model in favour of this modern template.

The second characteristic trait of this method of drafting has been its continued use since the origins of administrative law. The French system of administrative law demonstrates the tension of having its origins in the heart of the administration while gradually emancipating itself through judicial decisions. Until the law of 24 May 1872, which gave the Council of State jurisdiction to hear administrative disputes on a sovereign basis, controversies in the administrative system had been settled by the administration itself, the decision being taken by the Head of State at national level, by his/her representatives at local level, and by the prefectural councils at the most basic level. This growth of administrative law from its origins explains certain characteristic features of the way in which decisions are expressed, both in terms of form (judicial decisions are drafted like other administrative acts of the executive, since they were originally decisions of the Head of State) and in terms of content: the administrative judicial decision was for a long time the expression of the hierarchical superior correcting the errors of his subordinates. Decisions were addressed not so much to the litigants as to the decision-makers. It did not therefore have to justify itself, but rather to express the content and scope of the particular law. Long after it had become a court, the decisions of the Council of State retained the mould of the *imperatoria brevitas*; that which characterised the ministerial decision it had prepared. While concision may still mark the form of administrative decisions, the reasoning of these judgments is in a state of constant expansion and enrichment. This giving of reasons is not only a legal obligation, found in Article L. 9 of the Code of Administrative Justice, but also a democratic requirement, whereby we must bear in mind that court decisions are issued 'in the name of the French people'.

The concision of court decisions is not only the product of its history. It is also both a condition and an effect of the manner of drafting. It must be said here that the problems of judgment drafting appear to be inseparable from those of this particular decision-making process. The decision in administrative law is, in principle, a collegial decision – in principle, because today, on average, more than half of the applications submitted to the administrative courts are dealt with by a single magistrate. Nonetheless, this collegiality remains a central characteristic, which requires that the panel (at least of three judges) deliberate on not only the solution to the dispute (the operative part), but also on the reasons which, insofar as they are the necessary support for that part, carry the same authority. In simple terms, before the judicial discussion following the hearing, the bench has a draft judgment drawn up by the rapporteur (who is a member of the bench) and the deliberation takes the form of discussing this draft, amending or reformulating it until it is approved by the majority of the members of the bench. Contrary to what happens in many jurisdictions, the panel does not deliberate solely on the solution, leaving it to the rapporteur to give reasons, it debates the reasoning as well. This is done under the supervision of the presiding judge. For an administrative court to be able to genuinely deliberate on the reasons upon which a case is decided, and considering the fact that the court may have to deal with an average of around twenty cases per hearing, but often many more in the first instance, of necessity, the reasons given must not be too long. The requirement to give reasons must be reconciled with the obligation to deliver judgments within a reasonable time, which currently is between one and two years depending on the difficulty of the cases put before a panel.

While these drafting methods have remained virtually unchanged since the establishment of the Council of State and the prefecture councils, the system of administrative justice has witnessed profound changes over the past half century:

- Firstly, its litigants and their expectations have both multiplied and diversified. The number of applications, and consequently the number of decisions that the courts have to take, is constantly increasing: in 2019, the 42 administrative courts (796 magistrates) handed down 223,219 decisions, the 8 administrative courts of appeal (269 magistrates) 34,260 and the Council of State 10,320, ie at each level a little more than the number of applications registered. This represents an increase of around 15% in ten years.
- Secondly, the cross-section of people applying to the administrative courts has changed profoundly. On the one hand, there is easy access to administrative justice and it is one of the most open systems of its kind in Europe, but the recent increase in quantitatively important disputes, such as driving licence issues, disputes by non-nationals or disputes concerning social benefits, bring before the administrative court a large number of people who expect the judge to give a clear decision as to their rights. These litigants are sometimes unable to completely understand the reasons for a decision in their case, especially as these appeals are often exempt from the need for a lawyer. On the other hand, the development of complex regulations, in the economic, environmental, tax or contractual fields, for example, generates highly specialised and technical litigation, both in terms of the legal situations and the standards applicable to such disputes. The parties to these disputes expect the decision not only to provide precise and just answers to their contentions, but also that the decisions are of a kind which uphold legal certainty and clarity. Between these two extremes, the nuances become infinite, and disputes that only a few decades ago could be resolved by a single, easily identifiable rule of law may today require a combination of several standards proposing different values.
- Recently, new pathways have emerged enabling the delivery of an appropriate response in law: the last half-century has seen the emergence, alongside the substantive administrative judge whose field of competence was constantly expanding, of administrative judges of civil and criminal wrongs, of enforcement, of emergencies or of contracts.
- The law has become much more complex: the hierarchy of norms has developed vertically, with the direct applicability of international norms and the integration of the European Union, whose law has acquired a special place; with the increasing application in litigation of the Constitution, due to the implementation of a procedure for the *a posteriori* review of the constitutionality of laws (the supreme norm of constitutionality), which involves all the courts.
- These developments have changed the perception that the administrative judge has of the judicial role: if he/she is still the judge over the administration's exercise of its powers, he/she, increasingly, is also the judge of the rights and interests involved in any administrative step.

It is these important developments that led the administrative courts, in 2011, to undertake an analysis of the way these decisions are drafted in order to meet the expectations of litigants.

The Reform

This analysis was launched by the Vice-President of the Council of State and overseen by a working group chaired by Mr Philippe Martin, then deputy president of the Administrative

Jurisdiction Division, and composed of members of the Council of State and judges from administrative courts and administrative courts of appeal, representing the various functions exercised within the court (rapporteurs, public rapporteurs, presidents). I took the role of rapporteur.

The Development of the Reform

The analysis carried out by this group was intense: firstly because of its duration, with work lasting more than a year; secondly, because of its scope and the diversity of what needed consideration. A functional analysis of all the elements of the legal decision was carried out in the light of the results of the trials of different drafting methods conducted by the group. This comprised historical and comparative law studies, as well as dialogue involving the various interested parties (administrative judges and judges from other jurisdictions, including foreign jurisdictions; lawyers; administrators; French and foreign professors). A progress report was then published, giving rise to a wide-ranging debate both within and outside those involved with administrative law. This work culminated in the submission to the Vice-President of the Council of State, in April 2012, of a report containing 18 proposals. This submission was then published.[2] This first phase was followed by a long experimental phase (seven years), initially within a few select courts that volunteered for this initiative. It was gradually expanded and supervised by another working group which was responsible for collating the relevant data. At the end of this experiment, in 2019, a number of changes to the drafting of court decisions were adopted and their implementation was accompanied by a short guide for judges. These are now fully integrated into the day-to-day work of the entire administrative court system.

The Substance of the Reform

The working group assessed possible changes in the drafting of court decisions with simple objectives in mind – to make the decision easier to read and understand, since readability is not just a question of form – and with precise requirements in mind: the changes must not lead to a diminution in the thoroughness and precision of the judge's reasoning, they must be compatible with real collegiality, and they must not add to the burden of those who draft the decision. To sum up: improving the drafting should not under any circumstances lead to a deterioration of the content of the decision nor increase difficulties in the way it is drawn up. It is unnecessary to discuss the various elements that have been examined in this context, both numerous and often very technical, but only those that seem likely to contribute to a more general analysis of the preparation of a legal decision.

Strengthening the reasoning for the decision

As mentioned, it soon became clear that improving the drafting of court decisions was inseparable from the refinement and strengthening of the methodology of reasoning. There were many discussions about the information that should be given to the parties in the text of the decision. The challenge was to provide the information necessary for understanding the solution without depriving the reader of the essence of the decision, ie the legal basis for the solution, and to do so in a way that was compatible with real judicial collegiality. It was therefore necessary to start by considering what information must be included: should the arguments of the parties be set out in detail? Did all the facts of the case need to be included? What points of law, judicial precedents and authorities should be set out? Some of these questions did not pose any difficulties:

[2](n 1).

- There is no need to repeat the arguments of the parties: the pleas are analysed in the citations; the reasoning must be confined to the statement of the decisions of fact and law which justify the solution of the dispute.
- Theoretical considerations or considerations relating to alternative solutions that have not been accepted should not appear in the decision. They are the responsibility of the public rapporteur. This public rapporteur, who is specific to the administrative jurisdiction, is in charge of independently presenting at the hearing, the analysis of the case file and the argued solution that is proposed to the panel of judges, of which he is not a member, and the judicial panel is perfectly free not to agree with him. Some elements that shed light on the solution, but which are not the necessary support for it, are expressed by the public rapporteur, which thus dispenses with the need to mention them in the judicial decision. However, as the opinion of the public rapporteur is binding only on him/her, it cannot have the same value as the reasoning for the decision that is agreed upon by the panel of judges.
- Only the laws and facts that support the solution should therefore be included in the decision. These should be as precise and explicit as possible.

Other aspects were also debated, such as the inclusion of case law precedents. References to decisions from other jurisdictions (European; Constitutional Council; Court of Conflicts; Court of Appeal) already make an appearance where it is necessary, either because this case law is binding on the administrative judge or, more rarely, because he or she feels inspired to voluntarily take it into account. However, this is not necessarily the case for the administrative court's decisions. In our system, founded on Roman law, the judge is not bound by previous decisions, even when they come from the Supreme Court. Any interpretation of a particular law that was given in a different case to the instant dispute implies an appropriation of this interpretation and requires its reiteration. However, the principle of guaranteeing to litigants a degree of legal certainty impels the need to ensure the unity and continuity of case law, of which the judge of cassation is the guarantor. Consequently, it is well known that any contentious application of a law to a particular case is part of the jurisprudential interpretation of this law, either initiating it, continuing it, or modifying it to a greater or lesser extent.

While these do not have the force of law, precedents are part of the elements that guide the judge without binding him or her. Opinions within the working group and within the administrative courts in general were particularly divided on the advisability of precedent citation: which precedents should be included? Was there a risk of a dispute over the choice or scope of these precedents? Would this not give, in the eyes of the majority of readers, an importance to case law that it does not bear? The report reflects these discussions and finally proposes to cite only the reference to decisions of principle, listed as such, which have settled a point of law and which, therefore, provide useful information to litigants[3]. As to other references, it is up to the public rapporteur to cite them in his or her conclusions, since they explain the legal context of the dispute, but do not constitute the direct basis for the solution to the case. After trials, it was decided not to adopt this proposal of the report. References to case law precedents do not therefore appear in the decisions of the administrative court. They do, however, find their place in the abstract which accompanies the publication of the decision on the Council of State's website: this means of publicising court decisions on the

[3] See Rapport, pp. 30-32.

internet renders it possible to improve the information provided to the reader without overloading the reasoning within the actual decision.

Drafting improvements

The most significant change, and the one which gave rise to the most heated debate within the administrative law system was the abandonment of the single-sentence syntax described above, whereby each paragraph began with 'considering that', in favour of an appropriate but ordinary expression. Although all agreed that this template made decisions more difficult to read, opinions were divided on the consequences of abandoning a form which, for some, would force the drafter to apply the rigour of syllogistic reasoning while at the same time unfolding to the reader the reasoning of the solution to which it leads. The report decided, however, that rigour and conciseness as qualities of current drafting modality are not so much due to syntax as they are to a judicial culture that will adapt to a more accessible form, and that other recommended requirements, such as the use of short sentences and paragraphs, may guarantee both the rigour of legal reasoning and clarity of expression. In addition to these reasons, many people within the court system regretted abandoning the traditional style of drafting that was a strong mark of the identity of the administrative court. The trials proved that these fears were unfounded. More than ten years later, the modified syntax has been successfully implemented into practice, without any diminution of rigour in the expression of the court's reasoning. The new drafting model retains a small trace of the old one by stating, at the beginning of the grounds: 'in consideration of the following'. The other French courts have, in turn, also abandoned that particular syntax.

LA REFORME DE LA REDACTION DES DECISIONS DE JUSTICE ADMINISTRATIVE: 7 ANS DE REFLEXIONS

Résumé: Pour la première fois dans son histoire, la juridiction administrative a entrepris il y a un peu plus de 10 ans une vaste réflexion collective sur la rédaction de ses décisions de justice, en vue de les rendre plus compréhensibles pour les justiciables et de répondre de manière plus complète à leurs attentes. Cette réflexion ne pouvait rester formelle : la décision de justice est l'expression de l'acte de juger ; sa rédaction est étroitement dépendante des conditions dans lesquelles elle est élaborée et de la conception que se fait le juge de son office. Elle a conduit à prendre la mesure de l'évolution de la place du juge administratif dans la société.

Cette réflexion a débouché sur une réforme dont la mise en place a été très progressive. Entreprise en 2011 dans le cadre d'un groupe de travail qui a remis son rapport un an plus tard, elle s'est généralisée après plusieurs phases d'expérimentations pendant presque sept ans. Outre son contenu, cette réforme est donc aussi intéressante par sa méthode.

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Avant la réforme: état des lieux

Avant de décrire cette réflexion et ses résultats, il convient de préciser en quelques mots son objet, à savoir ce qu'on entend par rédaction des décisions de la juridiction administrative.

La juridiction administrative constitue en France un ordre juridictionnel distinct de l'ordre judiciaire, compétent pour connaître, en gros, des litiges relatifs au fonctionnement de l'administration et à l'exercice de la puissance publique. Cet ordre juridictionnel administratif est composé d'une cour suprême, le Conseil d'Etat, qui assure à la fois la gestion des juridictions administratives, notamment les juridictions ordinaires que sont les tribunaux administratifs en première instance et les cours administratives d'appel en appel et l'unité de leur jurisprudence, en tant que juge de cassation.

Les décisions de la juridiction administrative dont je vais vous parler sont toutes celles par lesquelles ces juridictions résolvent les litiges qui sont portés devant elles ou, pour le dire autrement, par lesquelles elles répondent aux demandes contentieuses qui leur sont faites. Ces demandes sont variées et les réponses juridictionnelles qu'elles suscitent aussi. Sans entrer dans les détails, il est possible de distinguer plusieurs grandes catégories de décisions de nature juridictionnelle, les seules concernées par la réforme: celles par lesquelles la juridiction rejette la demande sans l'instruire car elle est irrecevable, car le recours a perdu son objet ou ne ressortit pas de la compétence de la juridiction administrative; celles par lesquelles un juge unique va ordonner des mesures d'urgence; celles par lesquelles la juridiction va trancher le litige après, sauf exception, une instruction contradictoire et une audience.

La rédaction des décisions de la juridiction administrative française présente deux traits caractéristiques forts: l'uniformité et l'ancienneté. Ces deux traits sont d'autant plus remarquables que le mode de rédaction résulte essentiellement de la pratique, les dispositions

législatives ou réglementaires le concernant étant peu nombreuses et ne portant que sur quelques mentions obligatoires.[4]

Premier trait caractéristique : la rédaction des décisions de justice suit un modèle commun à l'ensemble de la juridiction administrative.Ce modèle était le suivant : Toute décision de justice comportait – et comporte toujours - un en-tête indiquant la juridiction qui la rend, sa date, et la formule 'Au nom du peuple français'. Suivent trois blocs bien distincts : le premier, que l'on a pris l'habitude d'appeler 'les visas' car chaque paragraphe commence par le mot 'vu', contient d'abord un certain nombre d'informations relatives aux parties au litige (identification) et aux mémoires qu'elles ont produit, dans l'ordre chronologique de leur enregistrement. Les demandes qu'elles formulent et les arguments développés à leur appui sont analysés de manière très synthétique. Il contient ensuite des informations relatives aux principales mesures prises par la juridiction pour l'instruction de l'affaire (tels que les notifications aux parties de moyens que la juridiction s'apprête à relever d'office) ainsi qu'aux phases de l'instruction (audience ; prises de parole à l'audience), la décision de justice devant faire la preuve de sa régularité. Ces visas se terminent par la mention des différents textes dont il sera fait application au litige, dans l'ordre de la hiérarchie des normes (Constitution, normes internationales, loi, règlement), jusqu'au code de justice administrative, qui est toujours mentionné car toujours appliqué.

Le second bloc est consacré aux motifs qui justifient la solution du litige, laquelle figure dans le troisième bloc, le dispositif. Sauf lorsque la solution du litige est fondée sur un moyen soulevé d'office par la juridiction, ce qu'elle ne peut faire que dans quelques cas, ces motifs expriment la position prise par la juridiction sur les moyens développés devant elle à l'appui des demandes sur lesquelles elle doit statuer et qui sont analysés dans les visas. Chaque paragraphe commençait par le terme 'Considérant que'. Il est d'usage, lorsque la décision statue sur plusieurs conclusions et/ou lorsqu'il y a de nombreux moyens, d'insérer des titres et inter-titres pour faciliter la lecture.

Le troisième bloc est le dispositif, présenté par articles, chaque article répondant à une demande faite à la juridiction. Ces différents éléments prenaient place au sein d'une phrase unique dont le sujet était la juridiction mentionnée au début, le verbe principal le mot 'décide' qui sépare les motifs du dispositif, et le complément d'objet les articles du dispositif. Les 'visas' et les motifs étaient autant de subordonnées insérées entre le sujet et le verbe et séparées les unes des autres de points-virgules.

Cette syntaxe particulière des décisions de justice françaises était le fruit de la tradition, car elle n'était prescrite par aucun texte. Elle était censée traduire au mieux, voire imposer, la rigueur du raisonnement juridictionnel, qui fait application d'une règle générale et impersonnelle à une situation particulière. On a coutume de désigner ce raisonnement juridique de syllogistique, la règle de droit étant la majeure et les faits la mineure. La syntaxe de la phrase unique paraît faire découler de manière quasi inéluctable la conclusion (réponse au moyen ; solution du litige) de l'énoncé de la norme.

Les trois cours suprêmes françaises – Conseil constitutionnel, Cour de cassation et Conseil d'Etat – adoptaient ce mode de rédaction. Si l'ensemble des juridictions de l'ordre administratif le suivait, les pratiques des juridictions judiciaires de première instance et

[4] Articles R 741-2 à 5 du Code de justice administrative.

d'appel étaient plus variables, un certain nombre d'entre elles ayant abandonné le modèle de la phrase unique au profit d'un style courant.

Le second trait caractéristique de ce mode de rédaction des décisions de la juridiction administrative est sa permanence depuis les origines de la juridiction administrative. La juridiction administrative française présente cette particularité d'être née au cœur de l'administration dont elle s'est progressivement émancipée. Jusqu'à la loi du 24 mai 1872, qui donne au Conseil d'Etat compétence pour juger souverainement les litiges administratifs, ceux-ci étaient réglés par l'administration elle-même, la décision étant prise par le chef de l'Etat au niveau national, par ses représentants au niveau local, après une instruction interne par le Conseil d'Etat au niveau national, par les conseils de préfectures au niveau local.

Cette origine de la juridiction administrative explique certains traits caractéristiques de la manière dont elle s'exprime, tant sur la forme (les décisions de justice sont rédigées comme les autres actes administratifs de l'exécutif, car, à l'origine, elles étaient des décisions du chef de l'Etat) que sur le fond: la décision de justice administrative fut pendant longtemps l'expression du supérieur hiérarchique corrigeant les erreurs de ses subordonnés. Elle s'adressait moins aux justiciables qu'à l'administration. Elle n'avait donc pas à se justifier, mais à exprimer le contenu et la portée de la règle de droit. Les décisions du Conseil d'Etat ont, bien après qu'il fut devenu une juridiction, conservé le souvenir de cette *imperatoria brevitas* qui caractérisait la décision du ministre qu'il avait préparée. Si la concision apparaît toujours comme la marque de fabrique de la juridiction administrative, la motivation des décisions de justice n'a cessé de s'enrichir. Cette motivation est en effet non seulement une obligation légale, rappelée par l'article L. 9 du code de justice administrative, mais aussi une exigence démocratique, que rappelle la mention selon laquelle les décisions de justice sont rendues 'au nom du peuple français'.

La concision de la rédaction de la décision de justice n'est pas seulement le produit de son histoire. Elle est aussi tout à la fois une condition et un effet de son mode d'élaboration. Il faut en dire un mot, tant les problématiques rédactionnelles apparaissent indissociables des processus de décision. La décision de justice administrative est, en principe, une décision collégiale - je dis bien en principe, car aujourd'hui, en moyenne,[5] plus de la moitié des requêtes présentées à la juridiction administrative sont traités par un magistrat décidant ou statuant seul. Et cette collégialité est une vraie collégialité, qui implique que la formation de jugement (au minimum de trois juges) délibère non seulement sur la solution à donner au litige (le dispositif), mais aussi sur les motifs qui, dans la mesure où ils sont le soutien nécessaire du dispositif, ont la même autorité que lui.

Concrètement, la formation de jugement dispose, avant le délibéré qui suit l'audience, d'un projet de jugement rédigé par le rapporteur (qui fait partie de la formation de jugement) et le délibéré va consister à discuter de ce projet, à l'amender ou le reformuler, jusqu'à aboutir à un texte approuvé par la majorité au moins des membres de la formation de jugement. Contrairement à ce qui se passe dans de nombreuses juridictions dans le monde, la formation de jugement ne délibère pas uniquement sur la solution, laissant au rapporteur le soin de la

[5] Les proportions varient en effet selon les niveaux de juridiction : (2018) en première instance, 35 % des affaires sont jugées en formation collégiale (33 % par un juge unique / référé ; 26 % par ordonnances) ; en appel, 60 % sont jugées en formation collégiale (37 % ord) ; le Conseil d'Etat règle presque 48 % des affaires par ordonnances, hors référés, le reste étant jugé par formations collégiales (37 % sous-section jugeant seule ; 13 % sous-sections réunies; 0,3 % section et assemblée).

motiver, sous le contrôle plus ou moins attentif du président. Pour qu'il soit possible à une formation de jugement de délibérer réellement sur les motifs et le dispositif d'une vingtaine – en moyenne, mais souvent beaucoup plus en première instance – d'affaires par audience, il est nécessaire que les motifs ne soient pas trop longs. L'exigence de motivation doit être conciliée avec l'obligation de juger dans un délai raisonnable, qui est aujourd'hui entre un et deux ans selon la difficulté des affaires jugées en formation collégiale.[6]

Si ces modes de rédaction n'avaient pratiquement pas changé depuis l'institution du Conseil d'Etat et des conseils de préfecture, la juridiction administrative a, elle, profondément évolué au cours du dernier demi-siècle: Ses justiciables et leurs attentes se sont multipliés et diversifiés: tout d'abord, le nombre de requêtes, et par conséquent de décisions que les juridictions doivent prendre, ne cesse d'augmenter: en 2019, les 42 tribunaux administratifs (796 magistrats) ont rendu 223 219 décisions, les 8 cours administratives d'appel (269 magistrats) 34 260 et le Conseil d'Etat 10 320, soit à chaque niveau un petit peu plus que le nombre de requêtes enregistrées. C'est environ 15 % d'augmentation en dix ans.

Ensuite, les profils des justiciables de la juridiction administrative ont profondément évolué. D'un côté, l'accès très facile à la justice administrative, qui en fait l'une des plus ouvertes d'Europe, l'augmentation récente de certains contentieux quantitativement très importants (ce qui ne signifie pas qu'ils soient toujours simples), tels que les contentieux du permis de conduire, des décisions concernant les étrangers ou les contentieux des prestations sociales, conduisent devant la juridiction administrative un grand nombre de personnes qui attendent du juge une décision claire sur leurs droits, sans être toujours en mesure d'en comprendre seuls les motifs, d'autant plus que ces recours sont souvent dispensés de ministère d'avocat. D'un autre côté, le développement de réglementations complexes, telles que les réglementations économiques, environnementales, fiscales ou encore contractuelles, génèrent des contentieux hautement spécialisés, d'une grande technicité, tant au niveau des situations juridiques que des normes qui leur sont applicables. Les parties à ces litiges attendent de la décision non seulement qu'elle apporte des réponses précises et justes à leurs argumentations, mais aussi qu'elle conforte la sécurité juridique dont leurs activités ont besoin. Entre ces deux extrêmes, les nuances sont infinies et des contentieux qu'une seule règle de droit aisément identifiable permettait il n'y a encore que quelques décennies de résoudre peuvent aujourd'hui rendre nécessaires la combinaison de plusieurs normes de valeurs différentes.

De nouvelles voies de droit permettant de leur apporter une réponse appropriée sont apparues: Le dernier demi-siècle a vu s'affirmer, à côté du juge administratif du fond dont le champ de compétence ne cessait de s'étendre, des juges administratifs de la cassation, de l'exécution, des urgences ou encore du contrat. Le droit applicable est devenu beaucoup plus complexe: la hiérarchie des normes s'est développée vers le haut, avec l'applicabilité directe des normes internationales et l'intégration européenne, dont le droit a acquis une place particulière; avec l'effectivité croissante de la Constitution, grâce à l'institution d'une procédure de contrôle a posteriori de constitutionnalité des lois (la question prioritaire de constitutionnalité), qui fait intervenir l'ensemble des juridictions; Ces évolutions ont enfin modifié la conception que le juge administratif se fait de son office: s'il est toujours le juge de l'exercice par l'administration de ses pouvoirs, il est aussi et de plus en plus le juge des

[6] Actuellement, le délai moyen de jugement toutes affaires confondues est inférieur à un an à tous les niveaux de juridiction, mais supérieur pour les affaires ordinaires jugées en formation collégiale (environ 2 ans en première instance, un peu plus d'un an en appel et 1 an ½ environ devant le Conseil d'Etat.

droits et intérêts en présence dans l'action administrative. Ce sont ces importantes évolutions qui ont conduit la juridiction administrative, en 2011, à entreprendre une réflexion sur l'adaptation de la rédaction de ces décisions aux attentes des justiciables.

La réforme

Cette réflexion a été lancée par le Vice-président du Conseil d'Etat et pilotée par un groupe de travail présidé M. Philippe Martin, alors président adjoint de la Section du contentieux et composé de membres du Conseil d'Etat et de magistrats des tribunaux administratifs et des cours administratives d'appel, représentatifs des différentes fonctions exercées au sein de la juridiction (rapporteurs, rapporteurs publics, présidents). J'en été le rapporteur.

L'élaboration de la réforme

La réflexion menée au sein de ce groupe et à l'extérieur a été intense : par sa durée, d'une part, les travaux s'étalant sur plus d'une année; par son ampleur, d'autre part et par la diversité des approches.

Il a procédé à une analyse fonctionnelle de tous les éléments de la décision de justice, à la lumière des résultats d'expérimentations d'évolutions des modes de rédaction conduites au sein du groupe, d'études historique et de droit comparé ainsi que de nombreuses auditions des différents publics intéressés (magistrats administratifs et d'autres juridictions, y compris étrangères; avocats; administrations; professeurs français et étrangers). Enfin, la diffusion d'un rapport d'étape a suscité un très large débat tant au sein de la juridiction administrative qu'à l'extérieur. Ces travaux se sont conclus par la remise au Vice-président du Conseil d'Etat, au mois d'avril 2012, d'un rapport comportant 18 propositions, qui a ensuite été publié[7].

Cette première phase a été suivie d'une longue phase d'expérimentation (sept ans), d'abord au sein de quelques chambres dans certaines juridictions, volontaires pour cet exercice, expérimentation progressivement étendue et supervisée par un autre groupe de travail chargé d'en recueillir les résultats. Au terme de cette expérimentation, un certain nombre d'évolutions de la rédaction des décisions de justice ont été adoptées et leur mise en œuvre accompagnée d'un petit guide à l'usage des juges (2019). Elles sont aujourd'hui totalement intégrées à la pratique de l'ensemble de la juridiction administrative.

Le contenu de la réforme

Le groupe de travail a évalué les évolutions possibles de la rédaction des décisions de justice avec un objectif - faciliter la lecture de la décision et enrichir son contenu informatif, la lisibilité n'étant pas seulement une question de forme - et des exigences: les évolutions ne doivent pas conduire à diminuer la rigueur et la précision du raisonnement du juge, doivent être compatibles avec la collégialité réelle telle que je l'ai décrite et ne doivent pas accroître la charge de travail de ceux qui élaborent la décision. Pour le dire en deux mots: l'amélioration de la rédaction ne devait en aucun cas entraîner une dégradation du contenu de la décision ou de ses modalités d'élaboration.

[7] Ce rapport est disponible sur le site du Conseil d'Etat : https://www.conseil-etat.fr/actualites/groupe-de-travail-sur-la-redaction-des-decisions-de-la-juridiction-administrative-rapport-final

Je ne traiterai pas de tous les éléments qui ont été étudiés dans ce cadre, nombreux et souvent très techniques, mais seulement de ceux qui me semblent susceptibles de nourrir une réflexion plus générale sur l'élaboration de la décision de justice.

L'enrichissement des motifs de la décision

Comme je l'ai indiqué, il est rapidement apparu que l'amélioration de la rédaction des décisions de justice était indissociable de l'enrichissement de son contenu. De nombreuses discussions ont eu lieu à propos des informations qu'il convenait de donner aux parties dans le texte de la décision. L'enjeu était d'enrichir l'information nécessaire à la compréhension de la solution sans faire perdre au lecteur l'essentiel de la décision, à savoir le fondement juridique de la solution et dans une mesure restant compatible avec une collégialité réelle, qui s'exerce sur la rédaction de la décision. Il convenait donc de commencer par réfléchir à ce qui était le contenu informatif nécessaire : fallait-il exposer en détail les arguments des parties ? quels éléments de fait indiquer ? quels points de droit : les textes applicables? les précédents jurisprudentiels?

Certaines réponses à ces questions n'ont pas posé de difficultés:

- Inutile de reprendre en détail les arguments des parties : les moyens sont analysés dans les visas; les motifs doivent être consacrés à l'exposé des raisons de fait et de droit qui justifient la solution du litige.
- Les considérations théoriques ou relatives à des solutions alternatives non retenues ne doivent pas figurer dans la décision. Elles relèvent des conclusions du rapporteur public.

(Cette institution originale, propre à la juridiction administrative, est un membre de la juridiction chargé d'exposer publiquement, à l'audience, et en toute indépendance, l'analyse qu'il fait du dossier et la solution argumentée qu'il propose à la formation de jugement (dont il ne fait pas partie et qui est parfaitement libre de ne pas le suivre) de donner au litige. Une partie des éléments qui éclairent la solution mais qui n'en sont pas le soutien nécessaire est ainsi exprimée par le rapporteur public, ce qui dispense la décision d'en faire état. Mais, l'opinion du rapporteur public n'engageant que lui-même, elle ne saurait avoir la même valeur que les motifs de la décision.)

- Seuls les règles de droit et les faits qui justifient la solution doivent donc figurer dans la décision, mais ils doivent aussi précis et explicites que possible.

D'autres ont été plus discutées, comme l'indication des précédents jurisprudentiels. Les références à des décisions d'autres juridictions (européennes; Conseil constitutionnel ; Tribunal des conflits; Cour de cassation) apparaissent déjà actuellement en tant que de besoin, soit parce que cette jurisprudence lie le juge administratif, soit plus rarement parce qu'il s'en inspire ou en tient volontairement compte.

En revanche, ce n'est pas le cas pour les propres décisions de la juridiction administrative. Dans le système de droit romain qui est le nôtre, le juge ne saurait être lié par les précédentes décisions qu'il a rendues, y compris lorsqu'elles émanent de la cour suprême. Toute application au litige qu'il tranche d'une interprétation de la règle de droit donnée à l'occasion d'un autre litige implique ainsi une appropriation de cette interprétation, qui passe par sa réitération. Toutefois, le souci de garantir aux justiciables une certaine sécurité juridique conduit à assurer une unité et une continuité de la jurisprudence, dont le juge de cassation

est le garant. Nul n'ignore, par conséquent, que toute application contentieuse d'une norme à un cas particulier s'inscrit dans le mouvement jurisprudentiel de l'application de cette norme, soit qu'elle l'initie, soit qu'elle le poursuive, soit qu'elle l'infléchisse de manière plus ou moins forte.

Sans avoir la force d'une règle de droit, ces précédents font partie des éléments qui inspirent le juge sans le lier. Les opinions au sein du groupe de travail et de la juridiction en général étaient très divisées sur l'opportunité de les mentionner : quels précédents? risquait-il d'y avoir une contestation sur le choix ou la portée de ces précédents ? ne serait-ce pas donner, aux yeux de la majorité des lecteurs, à la jurisprudence une importance qu'elle n'a pas? Le rapport fait état de ces discussions et propose finalement de ne mentionner que la référence aux décisions de principe, répertoriées comme telles, ayant tranché un point de droit apporte un élément d'information utile aux justiciables. Pour les autres références, il revient au rapporteur public d'en faire état dans ses conclusions, car elles expliquent le contexte juridique du litige, mais ne constituent pas les fondements directs de la réponse apportée aux moyens.

Après expérimentation, il a été décidé de ne pas retenir cette proposition du rapport. Les références aux précédents jurisprudentiels ne figurent donc pas dans les décisions de la juridiction administrative. Ils apparaissent en revanche dans l'abstract qui accompagne la publication de la décision sur le site internet du Conseil d'Etat : les nouveaux supports de publicité des décisions de justice permettent aujourd'hui d'enrichir l'information du lecteur sans surcharger la motivation de la décision.

Améliorations rédactionnelles

La plus importante et celle qui donna lieu aux débats les plus vifs au sein de l'ensemble de la juridiction est l'abandon de la syntaxe de la phrase unique que je vous ai décrite, où chaque paragraphe commençait par "considérant que", au profit d'une syntaxe ordinaire. Si personne ne contestait que cette syntaxe compliquait la lecture de la décision, les avis sont apparus très divisés sur les risques de l'abandon d'une forme qui, pour certains, contraindrait le rédacteur à la rigueur du raisonnement syllogistique en même temps qu'il imposerait au lecteur l'évidence de la solution sur laquelle il débouche. Le rapport estime cependant que la rigueur et la concision, qui font les qualités de la rédaction actuelle, ne sont pas tant dues à la syntaxe particulière qui est la leur qu'à une culture juridictionnelle qui s'adaptera sans difficultés à une forme plus accessible et que d'autres exigences formelles, telles que l'usage de phrases et de paragraphes courts, seront à même de garantir la rigueur tant du raisonnement juridique que de son expression.

A ces raisons s'ajoutait probablement chez beaucoup le regret d'abandonner un style de rédaction traditionnel qui était une marque forte d'identité de la juridiction administrative. L'expérimentation a prouvé que ces craintes n'étaient pas fondées. Plus de dix ans après, la syntaxe ordinaire est parfaitement entrée dans la pratique, sans aucune perte de rigueur dans l'expression du raisonnement. Le nouveau modèle de rédaction conserve une petite trace de l'ancien en indiquant, en ouverture des motifs: 'considérant ce qui suit'. Les autres juridictions françaises ont également successivement abandonné cette syntaxe particulièr.