THE MAYNOOTH LAW SOCIETY PRESENTS

THE NINTH EDITION OF

OF THE GOLDEN THREAD

"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

Woolmington v DPP **[1935] UKHL 1, as per** ***Viscount Sankey***

Editor's Note

This year, the Golden Thread sought for its potential authors to step outside the box and dive into a contemporary area of law that they may not have come across in their studies. This editor can undoubtedly confirm that the authors presented in this edition did just that.

We hope that this edition of the Golden Thread inspires prospective students and shows them the value of academic writing. Additionally, with more uptake, the Maynooth Law Society hope to push the boundaries and make the Golden Thread bigger and better with every edition following this.

We would like to extend our sincere gratitude to the Maynooth Law Department, who never fail to offer help and inspiration. We would also like to thank everyone who sent in pieces to this year's edition of the Golden Thread. Finally, we extend a huge congratulations to our accepted authors, Daniel O'Dowd, Adam McNally, Rory Penny, Sarah West and Daniel Mooney for their outstanding submissions.

Is mise le meas,

Aislin Worsnop,
Editor-in-chief of the Ninth Edition of the Golden Thread.

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By Daniel O'Dowd

> "…Religion & Govt. will both exist in greater purity, the less they are mixed together."[1]

I. Introduction

The traditional Roman Catholic views of motherhood and the role of women in society[2] are crystallised in Article 41.2 of Bunreacht na hÉireann,[3] and it is the submission of this author that this provision be emended so as to reflect the contemporary structure of the family and

[1] Letter from James Madison to Edward Livingstone (10 July 1822):

> "Notwithstanding the general progress made within the two last Centuries in favor of this branch of liberty, and the full establishment of it, in some parts of our Country, there remains in others, a strong bias towards the old error, that without some sort of alliance or coalition between Government & Religion, neither can be duly supported. Such indeed is the tendency to such a Coalition, and such its corrupting influence on both the parties, that the danger can not be too carefully guarded against. And in a Government of opinion, like ours, the only effectual guard must be found in the soundness & stability of the general opinion on the subject. Every new & successful example therefore of a perfect separation between ecclesiastical & Civil matters is of importance. And I have no doubt that every new example will succeed, as every past one has done, in shewing that Religion & Govt. will both exist in greater purity, the less they are mixed together. It was the belief of all Sects at one time that the establishment of Religion by law was right & necessary; that the true Religion ought to be established in exclusion of all others; and that the only question to be decided was, which was the true Religion. The example of Holland proved that a toleration of Sects dissenting from the established Sect, was safe and even useful. The example of the Colonies now States, which rejected Religious establishments altogether, proved that all Sects might be safely & advantageously put on a footing of equal & entire freedom. And a continuance of their example since the Declaration of Independence has shewn, that its success in Colonies was not to be ascribed to their connection with the parent Country. If a further confirmation of the truth could be wanted, it is to be found in the examples furnished by the States which have abolished their religious Establishments. I can not speak particularly of any of the cases excepting that of Virginia, where it is impossible to deny that Religion prevails with more zeal, and a more exemplary priesthood, than it ever did when established and patronized by Public authority. We are teaching the World the great truth, that Governments do better without Kings & Nobles than with them. The merit will be doubled by the other lesson, that Religion flourishes in greater purity, without than with the aid of Government."

[2] *See*: John Charles McQuaid Papers, Section 5, File 48, Dublin Diocesan Archives (Comments made by Archbishop McQuaid regarding the drafting of the Constitution): "Nothing will change in law and fact of nature that woman's natural sphere is in the home." *See also*: Erika Maza Valenzuela, 'Catholicism, Anticlericalism and the Quest for Women's suffrage in Chile' (1995) Working Paper 214, 3 <https://www3.nd.edu/~kellogg/publications/workingpapers/WPS/214.pdf> accessed 6 February 2016

[3] Article 41.2, Bunreacht na hÉireann (1937):

> "1° In particular, the state recognises that by her life within the home, woman gives to the state a support without which the common good cannot be achieved.
>
> 2° the state shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

the centrality of women within Irish society.[4] Forbye, the provision continually refers to the 'mother' and pays little heed to the acceptance of same-sex marriage and indeed same-sex adoption by the Irish populace.[5] The provision overlooks the role played by fathers in the upkeep of the home[6] and, per the Irish Human Rights Commission, is rooted in a "stereotypical view of the social roles of women as homemakers and mothers."[7] I contend that instead we should adopt the recommended amendment of the Constitution Review Group:

> "The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home."[8]

This amended provision would embody the support of the family as a whole in *lieu* of seeking to categorise support as an exclusive function of the mother. Albeit, women's rights to earn a livelihood[9] and have equality with their male counterparts[10] are protected under the

[4] Seamus Ó'Tuama, 'Revisiting the Irish Constitution and De Valera's Grand Vision' (2011) 2 Irish Journal of Legal Studies 54, 62: "…Roman Catholic social teaching on the role of women began to be incorporated into Irish law and was consolidated in the Irish Constitution of 1937. De Valera contributed to this view of the role of women in Irish society, which attempted to unravel their contribution to the revolution and indeed the centrality of women to the ―'Celtic identity.'"

[5] *See*: 34th Amendment to Bunreacht na hÉireann (Article 41.4): "Marriage may be contracted in accordance with law by two persons without distinction as to their sex."

[6] *See*: *DT v CT* [2002] IESC 68, per Murray J (Posits that Article 41.2 implicitly endorses the contribution of fathers to the family unit):

> "[t]he Constitution…is to be interpreted as a contemporary document. The duties and obligations of spouses are mutual and, without elaborating further since nothing turns on the point in this case, it seems to me that [the Constitution] implicitly recognises similarly the value of a man's contribution in the home as a parent."

See also: *Sinnott v Minister for Education* [2001] 2 IR 545, 664 per Denham J (Argues that Article 41.2 is not discriminatory as the value of the role of the father was implicitly entailed in the Constitution): "The undefined and valuable role of the father was presumed and remained unenumerated by the drafters of the Constitution."

[7] Irish Human Rights Commission, *Submission to the UN Committee on the Elimination of All Forms of Discrimination Against Women in respect of Ireland's Combined Fourth and Fifth Periodic Reports under the UN Convention on the Elimination of All Forms of Discrimination Against Women* (2014) p16: "The IHRC reiterates that Article 41.2 of the Constitution is based on a stereotypical view of the social roles of women as homemakers and mothers, thus retaining a perception in the Constitution which ascribes women to a limited and dependent role."

[8] Report of the Constitution Review Group (Dublin: Government Publications, 1996), at p333-334

[9] Article 45.2(i), Bunreacht na hÉireann (1937): "The State shall, in particular, direct its policy towards securing: (i) That the citizens (all of whom, men and women equally, have the right to an adequate means of

Article 41.2, Bunreacht na hÉireann (1937): The Ill-fated Intersection of Roman-Catholic Dogma & the Law

By Daniel O'Dowd

Constitution; the inclusion of an explicit provision – utilising gender specific terminology – pertaining to females being the quintessential homemakers is representative of the archaic dogmas which once pervaded Irish society but do no longer.[11] In this paper, I shall firstly delineate the restrictive application of Article 41.2 in Irish law. Then secondly, I shall advance the reforms I believe would amend the Article so as to continue to enshrine the salience of the home within Irish society whilst paying homage to the diversification of society since the 1930's.[12]

livelihood) may through their occupations find the means of making reasonable provision for their domestic needs."

[10] Article 45.4, Bunreacht na hÉireann (1937) (Pertaining to the equal protection provision of the Constitution which must be considered in conjunction with Article 41.2):

> "1° The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged. 2° The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength."

[11] Report of the Constitution Review Group (Dublin: Government Publications) p296 (Detailing the influences prevalent in Article 41.2 and the subsequent decline in these influences within Irish society, resulting in a need for change):

> "Article 41 was a novel provision in 1937. The Constitution of 1922 contained no provision relating to family and marriage. It is generally considered that Articles 41and 42 were heavily influenced by Roman Catholic teaching and Papal encyclicals. They were clearly drafted with only one family in mind, namely, the family based on marriage. The family in Irish society has been profoundly affected by social trends since 1937. The mores of Irish society have changed significantly over the past six decades. The traditional Roman Catholic ethos has been weakened by various influences including secularisation, urbanisation, changing attitudes to sexual behaviour, the use of contraceptives, social acceptance of premarital relations, cohabitation and single parenthood, a lower norm for family size, increased readiness to accept separation and divorce, greater economic independence of women."

[12] Alan D P Brady, 'The Constitution, Gender and Reform: Improving the Position of Women in the Irish Constitution (National Women's Council of Ireland – www.nwci.ie, September 2012) <http://www.nwci.ie/download/pdf/nwci_workingpaper_gender_constitution_2012.pdf> accessed 1 March 2017:

> "In recognising women as primary care giver and validating that role, an implicit rejection is made of women as economically independent. Similarly, the definition of woman also implies a corresponding vision of man as breadwinner. This vision of gender is of significance both for the validation of private sphere citizenship and our economic system. These roles, if they ever were reflective of Irish society, are certainly not reflective of it now."

II. Application of Article 41.2

The predominant, successful application of Article 41.2 has arisen regarding the governance of socio-economic rights, and the allowance of positive discrimination in favour of women in relation to spousal entitlements. In *Denehy v Minister for Social Welfare*,[13] Barron J determined that social welfare provisions permitting discrimination between deserted wives and deserted husbands were validated by Article 41.2. It was held that this discrimination was not unconstitutional, on the basis that "women, by her life within the home, [sic] gives to the State support which is essential to the achievement of the common good."[14] This precedent was upheld in the subsequent case of *Lowth v Minister for Social Welfare*,[15] where the plaintiff contended that a failure to provide for a 'deserted husband's payment' was unconstitutional per Articles 40.1,[16] 40.3[17] and 41 of Bunreacht na hÉireann. The Court rejected this argument; rather the Court held that Article 40.1 allowed ample flexibility for citizens to be treated differently contingent on the circumstances, and that the Oireachtas was entitled to provide for the greater of needs of deserted women in *lieu* of deserted husbands in such circumstances.[18] Withal, the Court added that "the provisions of the Constitution dealing with the family recognise a social and domestic order in which married women were unlikely to work outside the family home."[19] I contend that the article be emended so as to afford the state the flexibility to support whichever family member finds themselves in the position of caring for the other members of the family unit; such an amendment would afford constitutional protection to new classes of persons such as deserted husbands and fathers who find themselves to be the primary caregivers of their children.[20]

[13] (Unreported, 26th July 1984)
[14] Eilies Barry, Notes on Equality and Social Welfare - Presentation to the Equality Authority (March, 2007) p2 < http://www.nwci.ie/download/pdf/equality.pdf>
[15] [1998] 4 IR 321
[16] Article 40.1, Bunreacht na hÉireann (1937): "All citizens shall, as human persons, be held equal before the law. this shall not be held to mean that the state shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."
[17] Article 40.3.1 "The state guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."
[18] Note 13, p3
[19] [1998] 4 IR 321, at 341
[20] *See also*: The Paternity and Benefit Act (2016) (Entitles parents other than parent of the child to paternity leave and recognises a new class of primary caregivers within the family unit)

However, Article 41.2 has been rejected as possible justification for the circumscription of women's rights in non-socioeconomic contexts – namely the dispensation of women from jury service and the refusal to allow adoptions by certain classes of women. This argument was first put forward in the case of *de Búrca v AG*,[21] where the case centred on the Juries Act[22] enacted by the Oireachtas to govern the composition and function of a jury – with an exemption for women being expressly included.[23] The State along with O'Higgins CJ contended that such discrimination did not amount to an exclusion of women from serving on a jury but rather was the preferential treatment of women envisaged by the Constitution.[24] Thankfully, the Court repudiated this interpretation and attempted extension of Article 41.2 to protect statutory exemptions of women from serving on a jury. Similarly, the Court in *O'G v AG*[25] ruled that the Adoption Act[26] was unconstitutional and in violation of Article 40.1; provisions of the Act precluded adoption orders being made in favour of childless widowers and could not be justified on the basis of Article 41.2. It would seem that Article 41.2 has been interpreted so as to acknowledge the merit of mother's work within the home, but not so as to legitimise other wider societal discriminations. As exemplified in the case of *O'G v AG*[27] though, to acknowledge only the salience of the mother and her contributions to society, and make provisions to ensure the mother does not forego such contributions due to 'economic necessity' serves to only alienate several classes of caregivers; rather it would be more prudent to endorse the contribution of the family unit to society as recommended by the Constitution Review Group.

Forbye, as well as attempting to expand the scope of Article 41.2 to encompass certain forms of discriminations, several justices have sought to utilise Article 41.2 to expand the rights of

[21] [1976] IR 38
[22] The Juries Act (1927)
[23] *Ibid*, s.5: "The persons specified in the First Schedule to this Act shall be absolutely freed and exempted from serving as jurors and all other exemptions from serving as a juror subsisting immediately before the passing of this Act shall cease immediately upon such passing."
[24] N.19 per O'Higgins CJ: "When one considers the special recognition of women and mothers in Article 41 of our Constitution, it does not appear inappropriate that the State in its laws should give some preference to woman; particularly when the exercise of her right in relation to jury service also involves the acceptance of a burden. As I have stated, this is a discrimination which is not invidious because it does not amount to an exclusion and because some preferential treatment of women citizens seems to be contemplated by the Constitution."
[25] [1985] ILRM 61
[26] The Adoption Act (1974)
[27] [1985] ILRM 61

mothers which has thus far proven unsuccessful. A paragon of this is the case of *L v L*,[28] where Barr J averred that Article 41.2 "places a specific duty on the State to ensure that mothers are not obliged to work outside the home. Therefore, the State's laws should positively support the woman who devotes herself to the home after marriage."[29] This by extension meant that a wife's work within the home conferred a proprietorial interest in the family home unto her, which was accepted by the High Court. The Supreme Court rejected this argument as such a ruling was "not a development of the existing law relating to constructive trusts but was the creation of a new right in favour of the plaintiff."[30] Subsequently in *Sinnott v Minister for Education*,[31] Denham J sought to distinguish *L v L* as a case concerning property rights between spouses, and sought to expand Article 41.2 also; in this case Denham J ruled that the breach of her autistic son's educational rights amounted to a breach of Mrs Sinnott's rights.[32] This novel interpretation did prove unsuccessful however, and the Court again indicated that Article 41.2 was more a recognition of the contributions of mothers to the family and a safeguard against an attack against the family in *lieu* of a cause for derivative action.[33] It is submitted that Denham J's interpretation would have been successful under the Constitution Review Group's recommended amendment.

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III. Reform of Article 41.2

From the preceding paragraphs, it is evident that Article 41.2 is in need of reform; the Courts have precluded the provision from being expanded to either encompass wider incidents of discrimination, or to confer additional rights unto women within the home. Professor Alan Brady posits that the current provision does not represent the lives of women today and that

[28] [1992] 2 IR 77
[29] *Ibid*. at 78
[30] *Ibid*. at 79
[31] [2001] 2 IR 545
[32] *Ibid*. at 549 per Denham J: "The second plaintiff, as a parent of a family, had a duty to the first plaintiff as a child of that family, and the second plaintiff was entitled under Article 41 of the Constitution to defend the institution of the family which suffered as a consequence of the defendants' breach of the first plaintiff's rights. The special constitutional recognition given to the role of women and mothers within the home must be read harmoniously with other articles of the Constitution when a combination of articles fell to be analysed."
[33] *Ibid*. at 726 per Geoghan J: "There is no doubt that in an appropriate case the mother might be able to claim breaches of constitutional duties towards her under Articles 41.2.1 and 41.2.2 as these are constitute does not seem to me that any of the behaviour of the State disapproved of by the learned trial judge constituted an attack on the family."

the provision essentially prescribes that work within the home is exclusively the function of mothers and should be their only real form of work.[34]

Article 41.2 places a premium on a woman's life within the home and offers scant protection to the life of women outside of the home.[35] At the time of the Constitution being drafted and at the time of this essay being drafted, the diagnosis of women as primarily caregivers, and indeed that this diagnosis should take precedence above all else is anathema to all notions of gender equality. As noted by Professor Brady, women do 82% of caring for adults and 86% of caring for children.[36] Albeit Article 41.2 is supposed to recognise the contribution of women in this capacity; the Article has the effect of designating the task of primary caregiver as one to be ultimately fulfilled by women in lieu of stipulating that both men and women are compelled to equally fulfil this role. This was noted by the Constitution Review Group who noted that essentially "Article 41.2 assigns to women a domestic role as wives and mothers."[37] This does not reflect the advancement of women within society and the panoply of roles held by women today including our Chief-Justice, Attorney General and Minister for Justice. The provision also seems to exempt men from their duties and responsibilities as carers.[38] An amendment to the provision to make the provision gender neutral was proposed by the recent Constitutional Convention,[39] and received backing from the Department of Justice.[40] Thus far no amendment has been put to the Irish people, and the provision remains.

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[34] Note 11

[35] Professor Siobhán Mullally, 'Report on Women in the Home' (www.constitution.ie, 11 February 2013) <http://tinyurl.com/gthkhyj> accessed 1 March 2017; *see also*: Doorley, D. 'Gendered Citizenship in the Irish Constitution' in Murphy, T. And Twomey, P. (eds.) *Ireland's Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998), at p. 127:

> "…the Constitution adopts most explicitly a dualism of private and public spheres, with women's citizenship mandated for the realm of domestic management, nurturing, education of the young and a plethora of complex and demanding tasks. Woman's "life" is in her home and a strong implication can be drawn that this is where her primary citizen commitments should be contained."

[36] Note 11, p43

[37] Note 10, p311

[38] Note 33, p.2

[39] Constitutional Convention, 'Ninth Report of the Convention on the Constitution: Conclusions & Final Recommendations' (www.constitution.ie, March 2014) <http://tinyurl.com/owmmldm> accessed 1 March 2017

[40] Irish Legal News, 'Department of Justice officials back update to Article 41.2

Thus, it would seem that the provision that purports to protect the lives of women only protects the lives which comport with the values underpinning the provision.[41]

Furthermore, on a more technical note, the segment in the provision - 'within the home' has the consequence of excluding care for family or friends outside of the home, broader care work within the community, and again does not recognise the fluid nature of unpaid care work. The restrictive wording of Article 41.2 and its subsequent restrictive application exemplify the inability of a narrowly-construed provision to cater to fluid phenomena; the area of unpaid care work being characterised by its informal and fluid nature. Rather, I submit that we emend the recommended proposal of the Constitution Review Group to read as follows:

> "The State recognises that home, family and community life give society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others."[42]

Coupled with a broad definition of "caring,"[43] this provision would afford constitutional recognition to socio-economic rights of caregivers. Such recognition is increasingly salient due to the cap placed on the amount of hours of unpaid work in calculating the Census, and the expectation of primary caregivers to compensate for the persistent lack of social expenditure on caring services in Ireland.[44] The absence of such a provision would likely inhibit the ability of the Courts to "develop a body of concrete constitutional benefits for care workers."[45]

[41] Letter from Gary Maloney to the Fifteenth Annual UCC Law Conference (3 November 2015) <https://www.corkonlinelawreview.com/single-post/2016/10/10/Article-412-Not-Quite-the-Ireland-We-Dreamed-Of> accessed 2 March 2017; Committee on the Elimination of Discrimination Against Women, Thirty Third Session, Concluding Comments: Ireland CEDAW/C/IRL/CO/4-5 at para 24-25

[42] Note 11, p43

[43] Engster, D. 'Rethinking Care Theory: The Practice of Caring and the Obligation to Care' (2005) 20 Hypatia 50, 55: "[C]aring may be said to include everything we do directly to help others to meet their basic needs, develop or sustain their basic capabilities, and alleviate or avoid pain or suffering, in an attentive, responsive and respectful manner."

[44] Kathleen Lynch and Maureen Lyons 'The Gendered Order of Caring' in Ursulla Barry (ed.), *Where are We Now? New Feminist Perspectives on Women in Contemporary Ireland* (New Island Press, 2008)

[45] Note 11, p43

IV. Conclusion

Ultimately, Article 41.2 in its continued existence enshrines misconceptions regarding gender roles and responsibilities, and further regarding the nature of caring for another. Perhaps, it is this flawed reasoning which has resulted in the scarce litigation or utilisation of Article 41.2 in the Irish Courts. Opposition to such reasoning was regarded as "anti-Catholic" and thus the voices of resistance were quelled, and the progress for equality for women under the 1916 proclamation[46] and the 1922 Constitution[47] was rolled back.[48] Article 45.4.2° was far more progressive with the adoption of gender neutral wording and adopted a provision providing that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength."[49] This provision is the antithesis of Article 41.2 and it is submitted that the adoption of a similar provision would rectify many of the aforementioned issues. As detailed in the preceding paragraphs, Article 41.2 has been precluded from being used as a legitimisation of gender-based discrimination and a possible basis for the expansion of womens' entitlement under the Constitution whilst also failing to afford adequate protection to female caregivers and essentially categorising 'care' as the 'moral imperative' of women.[50] It is my submission that we adopt the amendment proposed by the Constitution Review Group with the subsequent revised wording suggested by Professor Brady so as to remove the misconceptions regarding both gender roles and the nature of unpaid care work from the Constitution. Such a provision would also be more in line with the progressive idealism underpinning the 1922 Constitution and is equally prevalent today, rather than enshrining in our Constitution the social teachings of one particular faith.

[46] Caitriona Beaumont 'Women, citizenship and Catholicism in the Irish free state, 1922-1948' [1997] Women's History Review 6:4, 563
[47] *Ibid*., 564-566
[48] Thomas Mohr, 'The Rights of Women under the Constitution of the Irish Free State' [2006] 41 The Irish Jurist 20, 20-23
[49] Article 45.4.2°, Constitution of the Irish Free State (Saorstát Eireann) Act (1922): "The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength."
[50] Note 43

Does Codetermination Unfairly Distribute Income by Exhibiting Democratic Capitalism?

By Adam McNally

Introduction

Codetermination may be considered a worthy tool for increasing stakeholder interest, but does it represent a more socially defined regime by distributing collective justice in the form of income equalities? Can such be assumed as exhibiting a democratic capitalism ideology? I shall analyse certain treaty provisions, directives and case law that have attempted to determine the viability of this elusive corporate governance tactic.

Codetermination as a Concept

In corporate governance, codetermination is the practice of workers in a company who have the right to vote for representatives on the board of directors in a company. Primarily, codetermination can be divided in two ways. Firstly, the representation of employees is called a 'work council.' A work council represents the 'shop-floor' employees working in the firm to ensure that they are represented fully; a concept that appears to be quite democratic in nature. Secondly, codetermination is an 'enterprise level' which is a step-up for employees, as they're seated members on supervisory boards thus establishing that all employee's voices are heard. We may look to Germany as an example, world leaders in the application of codetermination since its creation post-WWII. German companies traditionally tend to incorporate an obligation to elect half their board of directors by a vote of their employees, rather than of their shareholders[1].

In our understanding of the German model of codetermination, Abraham Shuchman stated that "codetermination could mark for the people of the world a new course between capitalism and collectivism that leads to a more rational and more just social order."[2] This is a way of pursuing the idea of democratic capitalism in an unjust manner where employees have the ability to climb up the employment ladder without receiving additional pay. Should vocalizing one's opinion be rewarded by increased income? Research from Wagner's text indicates that codetermination has the potential to increase employment in companies and increase incomes[3].

[1] Gérard Hertig, 'Codetermination as a (Partial) Substitute for Mandatory Disclosure?' (2006) 7 European Business Organization Law Review.
[2] Joachim Wagner, 'One-Third Codetermination at Company Supervisory Boards and Firm Performance In German Manufacturing Industries: First Direct Evidence From A New Type Of Enterprise Data' (2011) 4352 Discussion Paper Series.
[3] Ibid

This sounds appealing to an employee who in essence will receive shorter working times, increased wages and the benefits-in-kinds from working on the board. Inevitably, this requires careful attention as codetermination rights could transform into a "country club" for workers thus undermining its designated purpose.[4]

The Erzberger Case

This provides authority for employees to have their opinions recognized and potentially enforced. It is worth noting that Germany doesn't suffer from the widespread unemployment that plagues European neighbors; adding to its *economic powerhouse of Europe title*[5]. However, can this concept be transferred to other European Union (hereinafter referred to as "EU") Member States ("MS")? Currently, Germany is flying solo in its pursuit of codetermination, as it isn't a common tool in the corporate governance toolbox.

It's difficult to secure European case law on codetermination due to the obscurity of its nature. Despite such, there was a significant judgement on the corporate governance gambit in the case of *Erzberger* [6]. The Court found that the national codetermination law failed to breach EU laws concerning the freedom of movement or equal treatment if it excludes workers in foreign subsidiaries from election rights to their parent company board.

In essence, German codetermination law suffices as being fully compliant with both Articles 18 and 45 of the Treaty of Functioning of the European Union (hereinafter referred to as the "TFEU"), namely equal treatment and workers' freedom of movement. There aren't legal grounds in the treaties, EU law or case law that mitigates for a *cross-border element* connecting the situation of workers in foreign subsidiaries with Articles 18 or 45. Although these workers may indirectly be affected by parent-board decisions, the Attorney General ("AG") declares that this is not enough to connect them to the German labour market and rules. This is a very interesting point to note because it has broadened the meaning of Articles 18 and 45. I believe that this decision exemplified the EU's stance on ensuring that the labour market in the EU is

[4] Larry Fauver and Michael E Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence from German Corporate Boards' (2006) 82 Journal of Financial Economics.
[5] The Stakeholder Strategy' (*Democracy Journal*, 2019) <https://democracyjournal.org/magazine/26/the-stakeholder-strategy/?page=all> accessed 22 March 2019.
[6] C -566/15

retained in a manner that doesn't allow for unique rules in other MS alter the efficiency of a company of another MS.[7] It ensures adherence to a simple form of the likes of joint venture or globalisation etc. so that the economic efficiency doesn't necessarily slow down nor should it derogate aspects of the local laws as this could defy the customary law of that MS. Additionally, Article 45 can discourage German companies from relocating as it would erase their workers' rights and could see a fluctuation in their wages, along with a return to a traditional company structure. This judgement retains the laws of the MS and prevents an exportation of working rights from one MS to another.[8] I understand the methodology behind the judgement crystallises the protection of the rights of a company and prevents the creation of ambiguity of MS *company laws* in other countries.[9]

Interestingly, the AG considers Article 45 not to avert MS's from sprawling their workers previous positions to territories outside of Germany. The AG explained this by establishing an analogy with social security rules, where such an approach has been taken by the CJEU. If the territoriality principle does not *per se* prohibit a country from expanding codetermination rights to its workers abroad, the AG concludes that it does impede a MS from extending some obligations to participants under the jurisdiction of a different MS. Hence, it is the prescribed format of the German system and not the territoriality principle as such, that prevents the German codetermination system from being applied outside Germany. Furthermore, the AG notes that the decision to incorporate foreign corporate governance laws can rests with the choice of the MS themselves, thus granting a myriad scope of arbitration. This is in line with EU laws as there is no breach of free movement or equal treatment.

Simultaneously, the AG disclosed their desire to ensure some inclusive solutions to workers' participation within cross-national groups of companies in the future. It was evaluated that he's "sympathetic to the idea that any worker employed by a group of companies should benefit, within the EU, from the same rights of participation within that group, irrespective of the

[7] Michael Rein, 'German Corporate Codetermination Withstands ECJ Scrutiny | Lexology' (*Lexology.com*, 2017) <https://www.lexology.com/library/detail.aspx?g=6a4a2105-40d7-451f-ae2a-e2d05013d224> accessed 22 March 2019.
[8] Titiaan Keijzer, Olivier Oost and Marnix van Ginneken, 'The ECJ Erzberger Case: An Analysis Of German Co-Determination And EU Law' [2016] Research Gate.
[9] Ibid

location of his place of employment". While he maintains that rules in this regard have not been harmonised and remain under scrutiny by MS, his support for more inclusive solutions at the EU level could be seen as a nudge for the EU legislator to act. This is a very pro-worker idea and could be difficult to reproduce in a corporate world as it is fixated upon social policies in the Treaty of the Functioning of the European Union ("TFEU") rather than exploring how economic efficiency and income controls can be managed at a larger level in the EU. However, perhaps harmonisation of such laws could provide a more cohesive understanding for participating MS's.

Nevertheless, certain clarifications were established by the AG in respect of the "cross-border element" of categories of workers affected, namely under Article 45 and the interpretation of the territorial scope. Correspondingly, there are gaps in the AG's judgement such as, what happens to the German workers in establishments abroad who are employed on a German contract? Is Article 45 applicable to exclusion of their German contractual rights or does the territorial principle take precedence in such?

In general terms, the AG's opinion highlights relevant uncertainties between the current state of EU labour law and cross-border business realities, providing a sign of the need for change. His judgement displayed a more favourable approach to workers but did not give enough attention to other areas that require consideration in order to ensure the fair treatment of workers.[10]

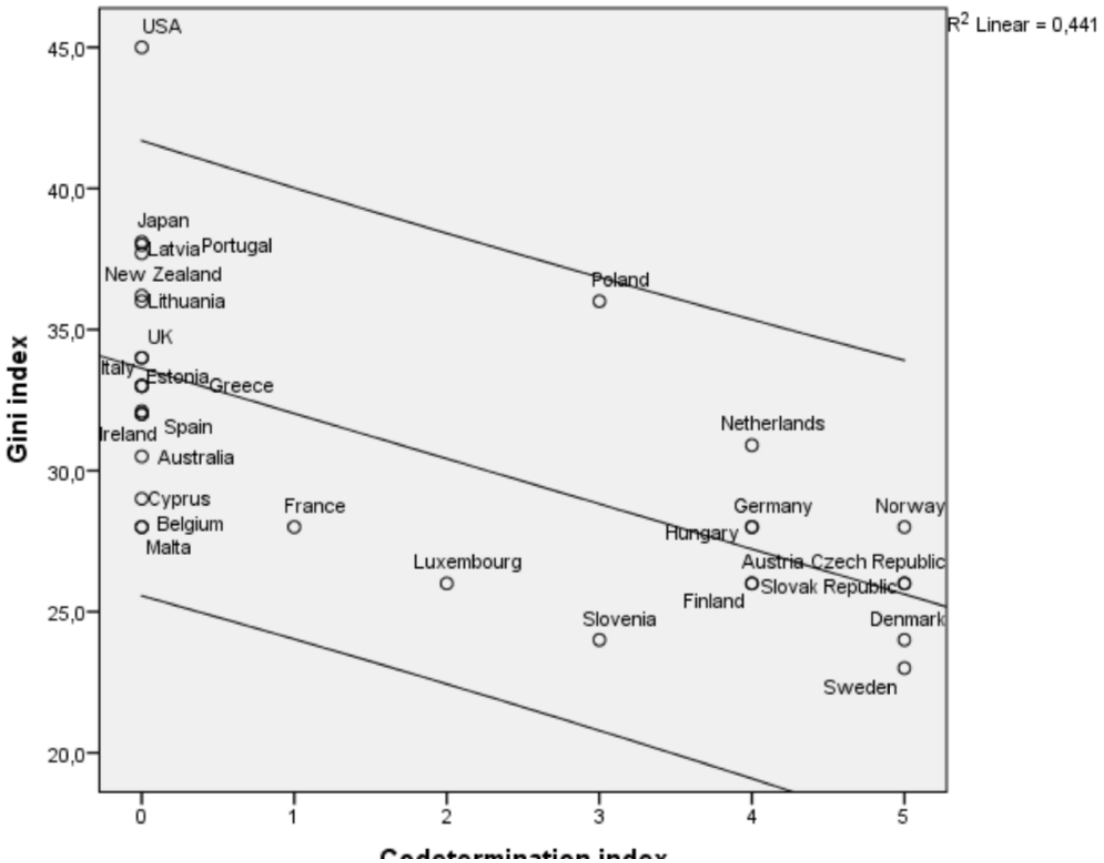
Empirical Evidence

"Theory gives no guidance as to the likely effects of mandated codetermination. The beneficial or detrimental effects of co-determination ought, therefore, to be demonstrated empirically" (Baums & Frick, 1998; 144)[11].

[10] 'German Codetermination Compatible with EU Law, States Advocate General While Calling for More Inclusiveness' / What's New? / About WP / Home - WORKER PARTICIPATION.Eu' (*Worker-participation.eu*, 2019) <http://www.worker-participation.eu/About-WP/What-s-new/German-codetermination-compatible-with-EU-law-states-Advocate-General-while-calling-for-more-inclusiveness> accessed 22 March 2019.

[11] Felix Hörisch, 'The Macro-Economic Effect of Codetermination on Income Equality' [2012] Arbeitspapiere – Working Papers.

Figure A. 1: Codetermination and Income Distribution in Western Welfare States



After regarding the significant judgement in favour of codetermination, it is now necessary to examine whether codetermination truly works as a fully-functioning concept. The figure displayed above portrays the bivariate correlation between the level of codetermination and the income distribution for all 32 EU and OECD member states in 2005.[12]

Figure A. 1: Codetermination and Income Distribution in Western Welfare States

I discovered a relevant study carried out which explored whether codetermination does in fact increase or decrease income levels when it is enacted within a company. As a brief introduction, it is important to understand the following, as extracted from the study itself:

[12] Ibid

Explanatory notes: Regression line with 95% confidence interval (Beta = -0,664; R2 = 0,441). If the outlier United States is dropped from the sample the correlation between the level of code- termination and income distribution increases (Beta = -0,692; R2 = 0,479). If then Poland is excluded additionally the distribution increases even further (Beta = -0,742; R2 = 0,551).[13]

This figure shows us that higher levels of codetermination in Western states provide more equally distributed income level. Additionally, the following cross-sectional analyses controls for further vital, but dormant, influencers of income distribution. Hence, the third model includes three socio-economic control variables: Gross domestic product per capita, the unemployment rate and the openness of the economy. The gross domestic product might have an impact on the income distribution since it sets the leeway for redistribution. Unemployment will be controlled for because a higher unemployment rate could lead to a larger share of people receiving none or very little limited income. In essence, this could result in a higher Gini index value. The last independent variable, openness of economy, operationalises as to how and to what extent a political economy is exposed to international competition. Ultimately, it can be argued that a progressive and open economy may experience such equality, therefore codetermination must be functional in Germany as it ticks these boxes. In a similar vein, America operates under a free market economy thus could mitigate room for the smooth facilitation of codetermination.[14]

Conflictingly, with regards to their GDP growth, Hörisch (2012) looks at the association between codetermination and income inequality (measured using the Gini index) in OECD countries and finds that it is negative – meaning that there's higher income equality in countries with codetermination[15].

[13] Causes and Effects of Coalition Preferences in a Mixed-Member Proportional System / Paul W. Thurner ; Franz Urban Pappi. –Mannheim, 1999 (Arbeitspapiere - Mannheimer Zentrum für Europäische Sozialforschung ; 1) ISSN 1437-8574

[14] Ibid

[15] Bennet Berger and Elena Vaccarino, 'Codetermination in Germany – A Role Model for the UK and the US? | Bruegel' (*Bruegel.org*, 2019) <http://bruegel.org/2016/10/codetermination-in-germany-a-role-model-for-the-uk-and-the-us/> accessed 22 March 2019.

Albeit, Kent Greenfield believes that codetermination would in fact be extremely beneficial in an American orientated-system because it limits state interference with firms[16]. He argues that it can deter companies from going public because public companies have less worker representation on their boards. Secondly, he discusses the governance of corporations as becoming more conscientious of their increased number of stakeholders, so if their voices were amplified within the internal management of the company, it could minimise a political process in the company and inevitably, decrease a "them" vs "us" mentality.[17] I find this argument to be slightly idealistic rather than pragmatic as it shadows the basic aim of a company, to gain profit. Instead, these private companies are allowing their workers to engage with its governance, perhaps, mildly emanating a socialistic approach to corporate governance. It is also important to note in Greenfields case that America has a free-market economy, unlike Europe which operates as a mixed-market economy, thus state interference is already anticipated.

Conclusion

There is a myriad of evidence establishing that the German stakeholder system of codetermination as it has been a positive experience due to its exemplification in Germany, along with increasing income equality. There are also other factors to note with the German economic system that can allow for codetermination to succeed in their economy, for example, interaction between firms and social partnerships. I believe that the theoretical idea of capitalistic democracy sounds reasonable, however in practice, I believe that it can interfere with the efficiency of a company by creating unnecessary time to ensure that certain workers are satisfied with the internal structure of the company. In my view, there needs to be a separation of powers between the departments of the company as codetermination undermines the value of shareholders by placing them at an equal footing with workers and this isn't the primary role of a worker in a private company. It can be difficult to assume that this should provide for income equality, despite data declaring that it occurs, especially from the notable portrayal, as aforementioned, made by Fauver and Fuerst (2006) who believe that

[16] Ibid

[17] Dylan Matthews, 'In Germany, Workers Help Run Their Companies. And It'S Going Great!' *The Washington Post* (2012) <https://www.washingtonpost.com/news/wonk/wp/2012/10/07/in-germany-workers-help-run-their-companies-and-its-going-great/?utm_term=.8c918b88c5ed> accessed 4 March 2019.

codetermination rights could transform into a "country club" for workers thus undermining its designated purpose.[18]

[18] Ibid

Working in the Gig Economy: Does Irish Employment Law Provide Sufficient Protection?

By Rory Penny

Introduction

The gig economy has become increasingly prevalent. It is characterised by short-term contracts or freelance work, as opposed to permanent jobs. Independent work is defined as having 'three defining features: a high degree of autonomy; payment by task, assignment, or sales; and a short-term relationship between worker and client'.[1] Gig economy proponents point to the flexible hours,[2] untethered workplace and the 'creative destruction'[3] of outdated, inefficient businesses. The prevalence of the gig economy has risen in tandem with technology and on-demand services.

Company's such as Deliveroo, Uber and Airbnb have attempted to infiltrate the Irish market to various degrees of success. Uber's unlicensed ride sharing service was deemed not legal and described as 'undesirable' by the National Transport Authority. Airbnb has been criticised for its role in exacerbating the current rental crisis.

Deliveroo's business practices have also been admonished. Although they have over 900 riders in Irish cities, they do not refer to their couriers as 'staff'. They are instead referred to as 'independent suppliers'. This has been widely criticised as the avoidance of certain terms appears to be a way of not acknowledging them as employees. Deliveroo's business model is based on using thousands of self-employed contractors rather than employees, which helps save substantially in regards to holiday pay, sick pay and tax.[4]

Employment Classification and Legislation

Under Irish law the distinction between employees and self-employed contractors is important. The crucial aspect that must be differentiated is whether a person is employed under a contract of service or under a contract for services. A person working under a

[1] McKinsey Global Institute, *Independent Work: Choice, Necessity, and the Gig Economy* (2016) 20.
[2] Gerald Friedman, 'Workers without employers: shadow corporations and the rise of the gig economy', 2014 2(2) *Review of Keynesian Economics*, 184.
[3] Thomas K. McCraw, *Prophet of Innovation: Joseph Schumpeter and Creative Destruction* (Harvard University Press 2009).
[4] Sarah Butler, 'Deliveroo accused of 'creating vocabulary' to avoid calling couriers employees' *The Guardian* (5 April 2017) <https://www.theguardian.com/business/2017/apr/05/deliveroo-couriers-employees-managers> accessed 21 March 2019.

contract of service is an employee and is protected by employment laws. A person operating under a contract for services is a self-employed contractor and is generally not protected.[5]

This 'binary divide' has been criticised due the evolving nature of modern employment.[6] The debate surrounding classification has grown due to the increasing conceptual and practical difficulties of distinguishing between the two.[7]

Unemployment in Ireland has fallen to 5.6%, having peaked at 15% in 2012.[8] Ireland's economic recovery in recent years belies the fact that an increasing swath of the population rely on part-time employment and the gig economy to survive.

The Labour Court and the Labour Relations Commission exist in Ireland today to make rulings in relation to employment issues. Neither body exercises judicial power under Article 34 of the Constitution, rather their primary function is in relation to the settling of disputes between employers and employees.[9] Under the Workplace Relations Act 2015 the Labour Court may refer a question of law arising in an appeal to the High Court. The High Court's determination is final and conclusive.[10]

One of the key statutory differences between the UK and Ireland is the existence of the 'worker' category. Such persons are neither employees nor contractors, which entitles them to limited benefits such as minimum wage and annual leave. Without the category of 'worker' in employment legislation in Ireland, those in app-based platforms at the heart of the gig economy may be less likely to be clarified as employees.

The Competition (Amendment) Act 2017 is potentially important legislation. This Act had the intention of removing perceived obstacles to certain categories of self-employed individuals being represented by a trade union for the purposes of collective bargaining. It

[5] Mary Faulkner, *Essentials of Irish Labour Law* (2nd edn, Gill and Macmillan 2013) 9-10.
[6] Guy Davidov, 'Who is a Worker?', 2005 34(1) *Industrial Law Journal*, 57.
[7] Brenda Daly and Michael Doherty, *Principles of Irish Employment Law* (Clarus Press 2010) 40-41.
[8] Jennifer O'Connell, 'We're young, we're working, but we're not employed', *The Irish Times* (Dublin 28 October 2017).
[9] Raymond Byrne and J Paul McCutcheon, *The Irish Legal System*, (6th edn, Bloomsbury Professional 2014) 395.
[10] Workplace Relations Act 2015, s. 46.

also introduced the concept of the 'false self-employed worker' in Ireland for the first time.[11] In the future, it is possible to imagine workers relying on terms and definitions in this Act to challenge their 'self-employed' status.

It is important to note however, that the extent to which the Constitution affects relations between employers and workers outside the traditional areas of industrial action or trade union disputes is largely unexplored territory.[12]

Employment Status Case Law – United Kingdom

In November 2017 Deliveroo won a landmark case[13] which established that their riders were self-employed which meant they did not have to give minimum wage or holiday pay. The Central Arbitration Committee ruled that Deliveroo's riders are not workers because there was a genuine right of substitution of drivers.[14] This has since been upheld by High Court.

In *Dewhurst v CitySprint UK Ltd.*,[15] the Employment Tribunal held that the plaintiff, a courier, was a worker and not self-employed. Therefore, she was entitled to basic rights including holiday pay and the national living wage. This was despite the fact contractual documents were presented describing her as a self-employed contractor. A similar verdict was given in the high-profile case of *Aslam v Uber B.V.*[16] It held that Uber drivers were workers and not self-employed.

Pimlico Plumbers v Smith[17] is also important to consider. It was held by the Court of Appeal that Mr. Smith was entitled to basic workers' rights although he was technically self-employed. A cautionary note was given in this ruling however which stated that, '….employment lawyers should be careful about trying to draw any very general conclusions from it'.[18] There have been calls for reform of the law so that gig workers are reclassified as

[11] Jeffrey Greene, 'Gig economy turns the spotlight on who is really self-employed', *The Irish Independent* (Dublin 21 June 2018).
[12] Michael Forde, *Employment Law* (2nd edn, Round Hall 2001) 9.
[13] *Independent Workers Union of Great Britain v RooFoods Ltd (t/a Deliveroo)* TUR1/985(2016).
[14] TUR1/985(2016), para 103.
[15] ET/220512/2016 (05 January 2017).
[16] [2017] IRLR 4.
[17] [2017] EWCA Civ 51.
[18] [2017] EWCA Civ 51 [143] (Underhill LJ).

dependent contractors who could then maintain flexibility whilst receiving statutory benefits.[19]

Employment Status Case Law – Ireland

A review of modern employment practices in Ireland may not be witnessed until a high profile case is brought before the Courts. Many cases have considered employment status already. The factors considered most important in these cases are mutuality of obligation, control and the ability to make a profit.

The Supreme Court case of *Henry Denny & Sons v Minister for Social Welfare*[20] considered the definition of a self-employed person. The leading test in this area is now whether 'an individual is in business in his or her own account or is under the control of the other party'. If a case similar to that of *Aslam v Uber B.V.*[21] arose it could be argued that due to the structure and control of the gig company it would be clear that the driver was an employee. It could be argued that Irish Law already possesses a higher standard of protection that the UK.

The case of *Castleisland Cattle Breeding Society Limited v Minister for Social and Family Affairs*[22] concerned the categorisation of an artificial inseminator, as an employee. One of the key determinative factors in this case was that the Society retained a degree of control over who could carry out the work.[23]

There is no single overarching test however. The case of *Minister for Agriculture and Food v Barry*[24] demonstrated the difficulty is assessing employment classification. The High Court made clear that all of the tests that may be used are only potential aids to identifying the

[19] Department for Business, Energy & Industrial Strategy, *Good Work: The Taylor Review of Modern Working Practices* (2017) 76.
[20] [1998] 1 IR 34.
[21] [2017] IRLR 4.
[22] [2004] 4 IR 150.
[23] Maeve Regan 'The Contract and Relationship of Employment' in Ailbhe Murphy (ed) *Employment Law* (2nd edn, Bloomsbury 2017) 30.
[24] [2008] IEHC 216.

nature of the working relationship. No single test is definitive. The Supreme Court late affirmed this reasoning.

European Union Law

EU law also offers protection to gig economy workers. In *King v Sash Windows Workshop Ltd & Richard Dollar*[25] it was held that that the plaintiff, a window salesman, was entitled to payment for the time off as well as any leave that he had not taken over his 13 years of employment. The judges added that the right to paid holiday was a 'particularly important principle of EU social law'.[26]

Another recent high profile case before the ECJ concerned Uber's classification as a transport company.[27] The Spanish taxi drivers' association which brought the case argued that Uber is a taxi company and should be subject to the rules governing such businesses. Attorney General Maciej Szpunar agreed with this assessment stating that Uber 'whilst innovative, falls within the field of transport'.

These rulings will have strong implications on those working in the gig economy and those who have been wrongly classified as self-employed.

Conclusion

The issues associated with the gig-economy in Ireland are still developing, as is the legislation surrounding it. There is a dissonance between these new forms of work and the current classifications of employment status. There is little grey area to be witnessed: an individual is either an employee or a self-employed contractor. Numerous studies[28] have called for greater clarification of the definition of self-employment.[29] Another crucial aspect

[25] Case C-214/16.
[26] Case C-214/16 *King v Sash Windows Workshop Ltd & Richard Dollar* (ECJ 29 November 2017), para 32.
[27] Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL* (ECJ 20 December 2017).
[28] Foundation for European Progressive Studies, *Working in the European Gig Economy* (2017) 50-51.
[29] European Parliament Policy Department A: Economic and Social Policy, *The Social Protection of Workers in the Platform Economy* (2017) 54.

of promoting labour protection in the gig-economy is strong advocacy to have jobs in this sector fully recognised as work.[30]

Most economists expect the independent workforce to continue to grow with improved technology. Legislators, employers and regulators will need to respond effectively to this growth and consider new approaches to the provision of benefits, the classification of workers and wages.

Workers in the gig economy in Ireland can look to European Union law as a source of protection. It may be argued that there is already protection offered in Ireland, relative to that given in the UK. However, there is still clearly scope to expand on current legislation. The legislative will need to approach the issues that arise over the next few years in a thoughtful, nuanced manner. The nature of work and the classification of employment are changing. It is therefore crucial to safeguard employment rights to allow for a more prosperous, secure future.

[30] Valerio De Stefano, *The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig economy"* in International Labour Office - Geneva: Conditions of Work and Employment Series No. 71 (2016) 22.

The Responsibility to Protect: Its Potential and Limitations

By Sarah West

The primary purpose of the UN is the maintenance of international peace and security. It may therefore intervene in conflicts where such harmony is threatened, but in each case must ensure a potential intervention will not infringe on a state's own sovereignty. The principle of non-intervention developed to prevent such cases is outlined in the UN Charter as follows; that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state''[1]

Although this principle has been used politically by states, it is important to distinguish this political rhetoric from its use in legal argument, though this is no easy task.[2]The principle is found throughout international case law and treaties as well as in the resolutions of the UN General Assembly from the mid-1960s to 1980s. The International Court of Justice recognised this principle first in the case of *Corfu Channel*[3]and later enlarged this principle in the case of *Nicaragua*[4], finding that allowing intervention "by reason of the political and moral values... [would]…involve a fundamental modification of the customary law principle of non-intervention" [5].

The line between this principle of non-intervention and the general duty to maintain peace worldwide is a thin one; often blurred, convoluted and subjective. Governments allowing heinous crimes of ethnic cleansing or genocide often hide behind their claims of sovereignty, while international actors use the justifications for intervention in other states affairs to advance their own political agenda. The two principles seem irreconcilable and are subject to much debate within international law, often paralysing the UN in the face of mass atrocities. Further adding to this paralysis are the five permanent members of the UN Security Council who may veto any resolution which does not fit with their own political agenda.

[1] United Nations, *Charter of the United Nations* (24 October 1945) 1 UNTS XVI art2(7)
[2]Maziar Jamnejad and Michael Wood, '*The Principle of Non-Intervention'* (2009) 22 Leiden Journal of International Law 345
[3]Corfu Channel (United Kingdom v. Albania), Merits, Judgment of 9 April 1949, [1949] ICJ
[4]Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986
[5] *ibid*.

Such was the case in responding to the Rwandan and Bosnian genocides. The failures of the UN missions in Somalia contributed to this hesitation to act especially after images of US troops being killed by Somalis reached the media. While the Security Council debated action in Rwanda, the Ambassador to Rwanda, Bizimana, sat on the council in silence as "no one on the council confronted him".[6] This inaction, along with failures in Srebrenica brought about heavy criticism of the UN and its bodies as "inaction in the face of atrocity was becoming a common posture for the council."[7]

Consequentially, this criticism of inaction eventually led to a response by the some of the international community in the case of Kosovo to bypass the UN Security Council. NATO went ahead with the bombing of Serbia until they withdrew their forces from Kosovo, which Russia and China stood to veto otherwise. The other permanent members were haunted by their previous inactions in Rwanda and Bosnia, as the French president claimed "the humanitarian situation constitutes a ground that can justify an exception to a rule, however strong and firm it is".[8] The Security Council had passed resolutions declaring the issue presented a threat to international peace and security and demanded a ceasefire.[9] NATO argued that it was acting to support these resolutions, but this argument was weak, as it was not part of customary international law for a military force outside of the UN to enforce its resolutions.[10] Serbia claimed this was an infringement on their sovereignty and that these were domestic affairs. Such a conflict displays the constant battle of principles, "the doctrine of humanitarian intervention was colliding with the strictures of the UN Charter, producing severe discomfort".[11]

[6] David L. Bosco, *Five to Rule Them All: the UN Security Council and the making of the modern world (*Oxford University Press 2009) 191
[7] David L. Bosco, *Five to Rule Them All: the UN Security Council and the making of the modern world (*Oxford University Press 2009) 193
[8] David L. Bosco, *Five to Rule Them All: the UN Security Council and the making of the modern world (*Oxford University Press 2009) 210
[9] UNSC Res 1199 (September 1998) S/RES/1199
[10] Malcolm D Evans, *International Law* (4th edn, Oxford University Press 2014) 515
[11] *ibid*.

From this continued collision of principles was born a new norm in international law. Conceived in 2001 by the International Commission on Intervention and State Sovereignty[12] and later introduced by The World Summit Outcome in 2005 was the doctrine of Responsibility to Protect (R2P). This states that "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[13] This is the first dimension of R2P with the second outlining the responsibility of every state to assist other states which are unable to protect their own people. The third, as outlined in Section 139, is the responsibility of the international community to engage by taking "collective action (…) should peaceful means be inadequate and national authorities are manifestly failing to protect their populations".[14] This flips the notion of state sovereignty on its head, that "crimes happening behind sovereign state walls were everybody's business, not nobody's."[15] It challenges the idea of state sovereignty, making it a responsibility, not an absolute right, and in theory at least presents "the most significant adjustment to sovereignty in 360 years".[16] However, it has been criticised as failing to overcome the political complexities behind decisions of intervention. The issue of whether or not the international community can intervene in states' domestic affairs remains highly political, and any discussion on this topic, albeit a legal one, is incomplete if it fails to acknowledge the politics surrounding it in practice. The international community has been inconsistent with its application of the doctrine, as it had been in the past before its conception as already discussed in the cases of inaction in Bosnia versus action without the Security Council's consent in Kosovo. The inseparability of politics in international law leaves R2P vulnerable to abuse by States to forward their own agendas, as was seen in the case of Libya.

Civil society, regional organisations and the wider international community were all quick to condemn Gaddafi's abusive regime in Libya and to remind him of his Responsibility to Protect.

[12] International Commission on Intervention and State Sovereignty (2001), *The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty*, Ottawa, International Development Research Centre.
[13] World Summit Outcome Document A/RES/60/1 16 September 2005 Section 138
[14] World Summit Outcome Document A/RES/60/1 16 September 2005
[15] Gareth Evans, '*R2P: The Next Ten Years*' (2016) In (Ed.), The Oxford Handbook of the Responsibility to Protect. : Oxford University Press http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780198753841.001.0001/oxfordhb-9780198753841-e-49 accessed 22 November 2018.
[16] Martin Gilbert, *'The Terrible 20th Century'*, (2017) The Globe and Mail https://www.theglobeandmail.com/opinion/the-terrible-20th-century/article17990016/ accessed 22 November 2018

The Human Rights Council adopted a resolution calling for the establishment of an international commission of inquiry and called on the General Assembly to suspend Libya's membership from the Council,[17] which passed unanimously. After sanctions, imposed through resolutions, were ignored, military intervention was needed. The council passed a resolution for a no-fly zone and permitted the use of "all necessary measures…to protect civilians" and affirmed "the international community's development to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government"[18], of which NATO enforced. The actions of the UN bodies up to this point are to be commended and shine as an example of the successful application of R2P and the potential it has for preventing inaction on the part of the international community. NATO forces went further and supported rebels in the removal of Gaddafi. This was seen by many as a step too far. The states behind the NATO forces, notably the USA, pursued their own agenda and went beyond their mandate from the Council, effecting regime change, something which a state ought to have sovereignty over. The counter argument is that regime change was in fact needed for the protection of the population. However, such a response is a slippery slope towards a belief that the UN could be the decider of what is objectively moral beyond what is illegal in international law. The Nuremburg Trials labelled such horrendous crimes as a standard the world can agree which must uphold; but this should not be mistaken for allowing powerful countries to dictate how other States should rule themselves. Humanitarian intervention and R2P are necessary for the enforcement of justice and prevention of international crimes, but the principle of sovereignty of States must be upheld nevertheless if there is to be continued cooperation among the international community.

The Responsibility to Protect has the potential to loosen the gridlock so often found in the UN. It challenges the excuse of sovereignty so often used by states to object to intervention. It puts pressure on the international community to assume responsibility in the face of such horrors; genocide, ethnic cleansing, war crimes and crimes against humanity. However, it cannot be used as a Trojan horse for other states to pursue their political agendas; imposing their own ideologies

[17] UNHRC Fifteenth special session UN Doc A/HRC/S-15/1
[18] UNSC Res 1973 (March 2011) S/RES/1973

and moral values. To do so would undermine the very spirit of cooperation upon which the United Nations was built.

Socio-Economic Rights in South Africa: A Model for Ireland?

By Daniel Mooney

In Ireland, socio-economic rights and attempts to vindicate them have largely been met with rejection from the Irish judiciary. Indeed, the Irish Courts approach is summed up well by Costello J's suggestion in *O'Reilly v Limerick Corporation* that the plaintiff's claims for a mandatory order to enforce socio-economic rights were better advanced "in Leinster House rather than the Four Courts".[1] In recent times, socio-economic rights have again been discussed with both the Constitutional Convention recommending that they be specifically enumerated and cognisable[2] and in particular recent talk of inserting a right to housing into the Irish constitution[3]. This recent resurgence of discussion surrounding socio-economic rights gives rise to questions of how, and indeed if, they should be recognised and vindicated. While the Irish Courts have rejected attempts thus far to recognise socio-economic rights, this is not the case internationally. Many constitutions across the world explicitly recognise and enforce socio-economic rights, while others that contain mere directive principles have also found innovative ways of allowing these rights be vindicated. This article seeks to examine the international examples of socio-economic rights being constitutional recognised and enforceable before the courts, with a view to considering avenues for reform in Ireland. The article will begin by providing a brief overview of Irish caselaw in the area before moving on to discussing international examples of constitutionally recognised, judicially enforced socio-economic rights.

The Irish Courts first considered socio-economic rights in the aforementioned *O'Reilly*[4] case which involved the plaintiffs, who were members of the Traveller Community living in considerable deprivation and poverty, seeking a mandatory order for provision of basic services that would enable them live on their halting site as well as damages for the breach of their constitutional rights that had occurred from having to live in such deprivation. In the case, the Court held that to adjudicate on the claim, would require the Courts consider and direct the spending of public monies, which it refused to do citing the separation of powers. The argument essentially revolving around the fact that the Court directing how public monies be spent was contrary to the powers entrusted to the government by the constitution. This conservative

[1] *O'Reilly v Limerick Corporation* [1989] ILRM 181.
[2] Convention on the Constitution (May 2013), Eighth Report of the Convention on the Constitution.
[3] Elaine Loughlin, 'Symbolic Blow for Government as Right to Housing Motion Passes in Dáil' *The Irish Examiner* (Cork, 5 October 2018).
[4] Supra 1.

approach was further elaborated upon in the cases of *Sinnott v Minister for Education*[5] and *TD v Minister for Education.*[6] In the former case, the facts concerned the first plaintiff who suffered from an intellectual disability and, *inter alia*, whether the State was obliged to provide free primary education beyond the age of majority. In the case, the Court held that again, it was the role of the legislature to make provision for primary education and accordingly, the Courts could not make an order. A similar finding was made in the case of *TD*, where the Courts again cited separation of powers concerns to deny remedy for a breach of socio-economic rights.

As can be seen, the Irish judiciary have generally taken a conservative approach toward socio-economic rights, consistently citing concerns surrounding the separation of powers as justification for the refusal. This position is not without merit; indeed, the Courts often are focused on the plaintiff and do not have access to the general context surrounding the issues at hand, which naturally would be available to a policy-maker and the executive.[7] However, it is submitted that while the Courts may be focused on the specific plaintiff at hand, this does not mean that the courts should be precluded from ensuring that the State vindicate specific rights. Otherwise, it is submitted, their existence is rendered near pointless.

This position of rejecting socio-economic rights is not universal and there are many examples from various jurisdictions of the courts enforcing socio-economic rights or, in cases where they would run afoul of non-cognoscibility, utilising other means to allow some vindication of rights take place. The primary example of enumerated and enforced socio-economic rights is South Africa. The Bill of Rights in South Africa's constitution contains numerous clauses guaranteeing, amongst other rights, a right to housing, healthcare services, social security, further education etc.,[8] alongside provisions requiring the executive to take "reasonable legislative and other measures". This reasonableness test essentially disallows a right to be cognisable without regard to the State's circumstances but rather restricts provision of socio-economic rights to within reason. Reasonableness has been set out in numerous decisions of the South African courts[9] and require that measures taken be flexible, balanced, must not

[5] *Sinnott v Minister for Education* [2001] IESC 63
[6] *T.D. and Others v Minister for Education* [2001] IESC 101.
[7] David Gwynn Morgan, *A Judgement Too Far? Judicial Activism and The Constitution* (Cork UP 2001) 63.
[8] The South African Constitution, Chapter 2, Bill of Rights S7-S39.
[9] See for instance *Minister for Health v Treatment Action Campaign* [2002] 5 SA 721 (CC) and *Grootboom* (n12).

exclude large sections of society and must also provide relief for those in intolerable situations etc.[10]

The Bill of Rights creates a somewhat abstract and open-ended duty for legislators requiring both positive and negative action from the executive.[11] The South African executive, as a result, must protect and respect existing rights as well as fulfil and work towards the attainment of other aspirations.[12] The Constitutional Court in South Africa has thus generated a fairly significant jurisprudence in the area of socio-economic rights generally. Chief among these is the case of *Grootboom*[13] a case involving the destruction of a make-shift settlement and the eviction of its residents from the private land. The Court upheld the claimant's argument that the State had violated its obligation not to deprive them of shelter.[14] It also provided a broader extrapolation of the positive obligations placed upon the State. Even despite the government providing a detailed national housing strategy, the fact that it didn't have any provisions for emergency shelter meant that it didn't protect the most vulnerable, thus rendering it an unreasonable failure to provide[15]. The reasonableness test set out in the constitution still allows broad discretion to the executive in making decisions in terms of the policy specifics[16]. This was set out by Justice Yacoob when he said "a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent".[17] Further jurisprudence from South Africa highlights a similar approach taken by the Courts to other socio-economic rights like healthcare[18] and education[19].

It is submitted that the South African constitution's recognition of socio-economic rights has struck an excellent balance between balancing the concerns about judicial legislating and the need to vindicate rights guaranteed to citizens. While the Irish Courts have rejected socio-

[10] Sandra Liebenberg 'Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow' (2014) 37 DULJ 137.
[11] Oliver Njuh Fuo 'Constitutional Basis for the Enforcement of "Executive" Policies that give effect to Socio-Economic Rights in South Africa' (2017) 16(4) Potchefstroom Electronic Law Journal 14.
[12] Gerry Whyte 'Judicial capacity to enforce socio-economic rights' (2014) 37 DULJ 208.
[13] *Government of the Republic of South Africa v Grootboom* [2001] 1 SA 46 (CC).
[14] Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (Hart Publishing 2010).
[15] Ibid, at 133.
[16] Ibid.
[17] Supra note 12 at 41.
[18] *Minister for Health v Treatment Action Campaign* [2002] 5 SA 721 (CC)
[19] *Head of Department of Education, Free State Province v Welkom High School* [2013] 9 BCLR 989.

economic rights, the South African constitution has embraced them. The question of course that now is posed, is what the path forward should be. It is submitted that the easiest and most straightforward way to recognise and vindicate socio-economic rights would be to specifically enumerate certain rights in the Irish constitution in an amendment, similar to that done in South Africa. This was the most favoured course of action by the Constitutional Convention.[20] Sandra Liebenberg writing in the Dublin University Law Journal advises that an important lesson to be learned from South African jurisprudence in the area is that even with constitutionally recognised socio-economic rights, it is important that the reasonableness test not be too liberally interpreted so as to allow the legislature too much freedom to disregard its obligations to strive for attainment of these social goals[21]. However, an alternative path, one not requiring an amendment would also be possible. In the Indian constitution similar non-cognoscibility issues arose with their directives on social policy.[22] The response by the Indian courts was to liberalise rules relating to public interest litigation, such as rules on standing etc. which has increased access to people seeking to vindicate their rights in social rights litigation.[23] Other procedural innovations such as flexibility and strong legal aid supports have also made access to the courts much easier.[24] It is submitted that this provides a great example to the Irish judiciary, although as Whyte notes, it is likely that there is little appetite amongst Irish judges to attempt this kind of innovation with respect to public interest litigation.[25]

To conclude, it is submitted that Ireland should look to South Africa or indeed India when considering the potential reform of our traditional approach to socio-economic rights. Both jurisdictions have seen the development of a body of caselaw surrounding these issues and both illustrate clearly the different options available. It is submitted that of course, both the inclusion of socio-economic rights in Bunreacht na hÉireann and a liberalisation of the courts rules that currently restrict public interest litigation are desirable. Both would allow for the greater recognition of rights that are essential to the realisation of a republic where rights are properly vindicated and enjoyed by all.

[20] Supra note 2.
[21] Supra note 10, at 170.
[22] Supra note 12, at 206.
[23] See for example *SP Gupta v Union of India* [1982] 2 SCR 365.
[24] Jamie Cassels 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible' (1989) 37 American Journal of Comparative Law 501.
[25] Supra note 12, at 207.

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