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PLASSEY LAW REVIEW

Second Edition

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PREFACE BY THE EDITOR

It is my honour, as Editor-in-Chief, to present the Second Edition of the Plassey Law Review.

This being only the Second Edition of the Review, we believe that there are unique opportunities to be seized by virtue of the fact that we are such a young publication. It has been a pleasure throughout the year to build on the work of past Editorial Boards in putting together what we hope is a dynamic and ambitious review that is responsive to the legal challenges of today. Suitably, a young collection of writers have been published in this edition and I acknowledge their skill as well as their passion for these pressing legal issues which are on the cutting-edge of legal academia. From fast fashion to roadblocks for tech start-ups and from hate crime to a "United States of Europe," this edition focuses on topics relevant to the next generation of lawyers, a spirit that I can only hope this publication carries into what I am sure will be a long and prosperous future.

With regard to this Edition, I must first express my immense gratitude to the Editorial Board who have been a superb team to work with throughout the year in putting together this publication of which we can all be proud - your time, commitment and enthusiasm has been invaluable throughout. A particular thanks is owed to my Deputy Editor-in-Chief, Molly Kavanagh, as well as to Rachel White, for your unwavering dedication and determination in making this publication a success and for being my right-hand-women through it all.

Furthermore, both personally and on behalf of the entire Editorial Board, I would like to extend my sincere thanks to Professor Raymond Friel, Head of UL School of Law, for his incredible support and encouragement throughout the entire process of producing this publication - it would not have been possible without you.

I would also like to extend my thanks to the UL Law Society for their support and guidance throughout the year.

Moreover, we would like to thank the entire faculty at the UL School of Law who contributed to the Academic Review stage of editing for their added value in reviewing and providing insight on the pieces of writing in the review.

In addition, a particular achievement of the Plassey Law Review this year has been moving forward with making the publication available on HeinOnline and through the Glucksman Library. Pattie Punch, the Arts, Humanities & Social Sciences Librarian at the Glucksman Library, is owed a huge

thanks for facilitating these inclusions.

Another group of supporters without whom the success of this publication would not have been possible is our generous sponsors. To that effect, we would like to thank McCann FitzGerald LLP, William Fry LLP and Maurice Power Solicitors as well as our title sponsors, Arthur Cox LLP, to whom a particular debt of gratitude is owed for their patronage.

Last but not least, we would like to thank all of those who submitted to this edition of the Plassey Law Review. The initiative and ambition in submitting your own pieces of legal writing does not go unnoticed and we are thoroughly grateful to you. Given the high standard of submission, all who submitted are to be commended. In particular, we would like to thank and congratulate our successful contributors - Eoin, Eoin, Alison, Kate, Jessica and Garry. It has been a pleasure to work with you all throughout the editing process and you should all be terrifically proud of your work. We are delighted to create a publication in which you can be published authors and that can host your tremendous work.

Áine Crowley

Editor-in-Chief

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This article was awarded the Law and Technology Award, kindly sponsored by McCann FitzGerald LLP

Upping the (Ex) Ante - Digital Competition Reform in the Era of *Google Shopping*

Eoin Jackson

Abstract

This article argues in favour of an *ex-ante* approach to regulating the digital economy. It analyses new and forthcoming reforms to EU competition policy designed to implement this *ex-ante* approach. Particular attention is levelled at the proposed introduction of the Digital Markets Act (DMA) in 2022 and the 2021 landmark ruling in *Google Shopping v Commission*. It will be argued that these developments demonstrate how an *ex-ante* regime can function in practice.

While the focus of this article is on the EU competition policy, limited analysis of movements within the US is utilised to refute potential criticisms of an *ex-ante* regime. The focus of the article will be on how an *ex-ante* model for regulation is necessary to address the unique challenges posed by the digital economy, with the outlined policy and jurisprudential developments providing ample evidence of the potential benefits of an *ex-ante* approach.

Introduction

Digital platforms have assumed a dominant position in academic discourse surrounding competition policy. The European Commission has struggled to enforce traditional regulatory mechanisms designed to prevent digital platforms from preventing competition in the market. However, recent movements within the political sphere have led to the promulgation of the *Digital Markets Act* (DMA).[1] This legislation will see an *ex-ante* sector-specific approach taken by the Commission to regulation of the digital economy.[2] An *ex-ante* approach involves anticipating anti-competitive behaviour, and seeking to pre-empt its existence through a tackling of the dominance of core service providers via the imposition of heightened obligations.[3] While the DMA has faced a myriad of criticisms, this article will argue that an *ex-ante* approach to the digital economy is not only appropriate, but necessary, particularly in

1 Proposal For A Regulation Of The European Parliament And Of The Council On Contestable And Fair Markets In The Digital Sector (Digital Markets Act) (2020) 2020/0374 (Cod).

2 Luis Cabral, *The EU Digital Markets Act A Report from a Panel of Economic Experts* (2021) European Commission Joint Research Centre.

3 Ania Thiemann and Gaetano Lapenta, *Ex Ante Regulation and Competition in Digital Markets* (2021) OECD

the aftermath of the General Court's decision in *Google Shopping v Commission* (*Google Shopping*).[4] It will be demonstrated that *Google Shopping* is a landmark decision that lays the foundation for DMA enforcement, while assisting with refuting criticisms of an *ex- ante* regime.

This article will be divided into four parts. Part A will analyse, with particular reference to the Cremer Report, the unique problems posed by digital platforms that justify *ex-ante* reform of competition policy. Part B will argue that it is entirely appropriate for the DMA to utilise an *ex-ante* approach and analyse its potential implications for digital platforms. Part C will argue that the decision in *Google Shopping* paves the way for practical enforcement of the DMA. Part D will identify potential criticisms of an *ex-ante* approach and refute these criticisms through an analysis of wider theoretical problems within contemporary competition policy.

Part A: Dominant Problems, Dominant Discourse

It is submitted that an *ex-ante* approach to digital competition policy can be justified due to the unique problems they pose for regulators. The Cremer Report has identified some of these problems,[5] though, as will be discussed below, it is not exhaustive, nor does it provide a comprehensive answer to the remedies needed to address these problems.[6] Importantly it does provide a basis through which justifications for an *ex-ante* approach can be identified.

The Cremer Report and the Identification of Unique Problems:

The Cremer Report has identified the following problems:

- The extreme returns to scale that render the cost of production to be much less than the total number of consumers served. This makes it difficult for start-ups to compete with established companies such as Google, who possess an unprecedented advantage as a result of these extreme returns.[7]
- Network externalities which make it difficult for new entrants to persuade consumers to transfer to an alternative product. This stifles innovation and gives the incumbent company a unique advantage over competitors.[8]
- The role data plays in establishing new competitive parameters. Linked databases and the

[4] Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021].
[5] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzert, *Competition Policy for the Digital Era* (European Commission Report, April 2019).
[6] Jaqueline Yin, 'Cremer Report on Competition for the Digital Era Misses the Mark' (2019) Competition Policy International.
[7] Carmelo Cennamo, 'Competing in Digital Markets: A Platform-Based Perspective' (2021), 35(2) Journal of Academy and Management.
[8] Joost Rietveld, 'Platform Competition: A Systematic and Interdisciplinary Review of Literature' (2021) 47(2) Journal of Management 1528-1563.

> gatekeeping of data from competitors can serve to heighten barriers to entry for firms who do not possess the same level of information about consumers.[9]

While the Report is broadly correct in its analysis, it overlooks some key characteristics of digital platforms conducive to identifying the full extent of the problem posed by digital platforms. It is necessary to outline these additional issues in order to fully analyse the reasoning behind a shift to an *ex-ante* approach.

Algorithms and their Contribution to the Domination of Digital Platforms:

Firstly, there is little discussion of the lack of transparency in regard to the use of algorithms to power the digital economy.[10] The possibility for collusion between companies through algorithms can potentially be achieved without overt human influence, due to the use of artificial intelligence.[11] Additionally, an algorithm can act to narrow consumer choices through adjustments designed to maintain consumers within their existing product preference.[12] When this is coupled with the extensive degree of market control possessed by Google, Amazon, Facebook and Apple (GAFA), it becomes clear that algorithms can 'lock in' current market dominance while disguising the means through which this dominance is maintained.[13] Thus, while not discussed within the Cremer Report, it is submitted that algorithms do present a unique difficulty for competition regulators.

The Illusion of Multi-Homing:

Secondly, while there is some discussion of 'multi-homing' within the report, some critics have argued that the pro-competitive nature of this ability is not fully considered.[14] However, it is submitted that this ignores the fact that many of the alternative platforms are owned by GAFA. Facebook for example already owns Instagram and WhatsApp. This aggressive acquisition strategy is exacerbated by the extreme returns to scale, in that the vast resources possessed by GAFA makes it easier for these companies to acquire potential competitors instead of leaving competition to the market.[15] Thus, multi-homing creates the illusion of competition only within the parameters of a wider parent company.[16]

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9 Gábor Polyák, 'The Value of Personal Data from a Competition Law Perspective' (2020) 167 Elite Law Journal.

10 Ulrich Schwalbe, 'Algorithms, Machine Learning and Collusion' (2019) 14(4) Journal of Competition Law and Economics 568- 607.

11 Kentaro Hirayama, 'Interaction between Information Law and Competition Law: Organising Regulatory Perspectives on Platform Businesses' (2021) 12 (2), Asian Journal of Law and Economics 171-188.

12 Christophe Hutchinson, 'Tacit Collusion on Steroids: The Potential Risks for Competition Resulting from the Use of Algorithm Technology by Companies' (2021) 13 Journal of Sustainability 951.

13 Stefan Scheuerer, 'Artificial Intelligence and Unfair Competition – Unveiling an Underestimated Building Block of the AI Regulation Landscape' (2021) 70(9) Journal of European and International IP Law 834- 845.

14 *supra* [6]

15 D Evans, 'Why Winner-Takes-All Thinking Doesn't Apply to the Platform Economy' (2016) 2 Harvard Business Review 5.

16 Tim Wu and Stuart Thompson, 'The Roots of Big Tech Run Disturbingly Deep' *NY Times* (7 June 2019). <https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html> accessed 27 October 2021

The illusion poses a challenge in that multi-homing, when used appropriately, could potentially align with a more competitive market.

Justifying an Ex-Ante Approach:

The problems discussed above illustrate that digital platforms challenge the foundations of traditional competition policy. By effectively gatekeeping smaller competitors, traditional tools of competition regulation, such as the small but significant and non-transitory increase in price (SSNIP) test are rendered ineffective.[17] The zero-price nature of these platforms for consumers, coupled with the resulting dependency on advertisers, cannot be quantified using the SSNIP test.[18] This disrupts the capacity of the Commission to adequately define the market. Without this definition, the Commission struggles to prove that digital platforms are in violation of Article 101, given it must identify anti-competitive behaviour post the application of the SSNIP test. Thus, by the time the SSNIP test can be rectified or swapped for an alternative method, the digital platform has already accumulated a significant amount of market power. Additionally, the lack of transparency in relation to data and algorithms can obfuscate the potential effects of the test while harming other potential methods of defining the market.[19]At that point, due to the extreme returns to scale, it is almost impossible, under current enforcement guidelines, to produce a remedy that will address this dominance. A fine for anti-competitive behaviour identified post the assumption of dominance will have a much lesser effect on a digital platform and may even be seen as the cost of doing business in a digital world.[20]

Similarly, the high barriers to entry associated with digital platforms make it easy for current players to become entrenched within their market. This allows established platforms to 'lock in' consumers to an ecosystem of products and leverage their existing power to prevent potential switching to other products.[21] While the Commission has attempted to address leveraging in the past, it has been unable to counter dominance as a whole, given that leveraging can only be recognised as an anti-competitive behaviour ex-post the creation of a dominant entity. Individual firms may face disciplinary action, but the structure of the market as a whole remains bound to a handful of digital conglomerates. This is why Google, Facebook and Apple among others continue to possess unrivalled market dominance even as competition authorities increase scrutiny of their behaviour. Essentially, attempting to challenge the 'locking in' of consumers when they are by definition chained to one system results in a sense of 'too

[17] James Mancini *Abuse of Dominance in Digital Markets* (2020) OECD.
[18] David Mandrescu, 'The SSNIP Test and Zero-Pricing Strategies' (2019) 2(4) European Competition and Regulatory Law Review 244- 257.
[19] Jan Kramer, 'Big Data and Digital Markets Contestability: Theory of Harm and Data Access Remedies' (2021) Journal of Competition Law and Economics (forthcoming).
[20] ibid
[21] Alina Sorescu, 'Innovation in the digital economy: a broader view of its scope, antecedents, and consequences' (2021) 49 Journal of the Academy of Marketing Science 627- 631.

little too late' emanating from competition authorities.[22]

If the structure of the market cannot be altered using existing regulatory mechanisms, then the problems outlined by the Cremer Report cannot be resolved in a meaningful manner. Not only does this have an effect on consumer welfare and innovation, but there are wider social costs associated with an ex-post approach. Facebook and Twitter best illustrate these effects, with there being widespread criticism of their failure to counter 'fake news' and anti-democratic movements.[23] Thus, there is a dangerous intertwining of failed regulatory frameworks with failing democratic institutions, that pose an obligation upon legislators to consider a new approach to the digital economy.[24] The primary concern in deviating from an ex-post approach is how an *ex-ante* regime would operate in practice. It is submitted that the DMA represents a progressive example of how an *ex-ante* approach can operate in practice.

Part B: The DMA - Legislating the *Ex-Ante* Approach

The EU has sought to introduce sweeping reforms to digital competition policy through the implementation of the DMA. The DMA is the legislative proposal of the Commission that aims to regulate competition between digital platforms.[25] The DMA has a great deal of political support, with there being an expectation that the Act will pass in July 2022, with its formal implementation beginning in 2023.

The Act as it stands, has several key components. These include:

- A core platform service provider e.g., Facebook will be classified as a gatekeeper.[26]
- Gatekeepers will be subject to positive obligations to maintain access for users outside the platform, allow third parties to inter-operate with their services and allow the transport of data generated by consumers when using the platform.[27]
- Restrictions on algorithms that favour services offered by the gatekeeper and it will be less possible for gatekeepers to restrict the ability of users to switch between different softwares accessible using the gatekeeper's system.[28]

Anticipating Challenges to Innovation:

It is clear that from an EU perspective, the DMA marks an inevitable *ex ante* regulation of GAFA's potential anti-competitive behaviour, that is at dramatic odds with current applications of competition

[22] Patrick Todd, 'Digital Platforms and the Leverage Problem' (2019) 98 Nebraska Law Review 2.
[23] Manuel Goyanes, 'Social media filtering and democracy: Effects of social media news use and uncivil political discussions on social media unfriending' (2021) 120 Computers in Human Behaviour 3.
[24] Diane Coyle, *Practical competition policy implications of digital platforms (*2021) Bennett Institute for Public Policy, <www.bennettinstitute.cam.ac.uk/media/uploads/files/Practical_competition_policy_tools_for_digital_platforms.pdf.> accessed 27 October 2021
[25] *supra* [1]
[26] ibid.
[27] ibid, Article 5.
[28] ibid, Article 6.

law. Unlike, Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which deal with anti-competitive behaviour after their occurrence,[29] The DMA proactively seeks out dominant digital platforms and imposes obligations that pre-date the potential abuse of market power. For example, behaviours that can result in a platform being deemed a gatekeeper, including the combining of data from core and non-core services and the ranking of platform services above competitive products, take direct inspiration from the practises of Google, Amazon, Facebook and Apple.[30] The onus will now lie with the gatekeepers to prevent such activity, rather than on the Commission to investigate whether such activity has an anti-competitive effect.[31] This is contended to be appropriate in light of the unprecedented market power enjoyed by gatekeepers. By forcing the allocation of their resources to self-regulation of potential abuses, the Commission ensures it is possible for smaller firms to compete on even terms. At the same time, the Commission can anticipate potential abuses using the gatekeeper designation as a warning sign, which allows for more effective scrutiny of the most relevant companies. In turn, future digital developments can be monitored to ensure that bigger firms cannot compromise on their competitiveness before they have had a fair opportunity to enter the market. Gatekeepers may dominate the market, but the playing field as a whole is levelled by a pre-emptive assumption that this dominance leads to abuse.[32]

The Shift to Structuralist Competition Theory:

The DMA also highlights the shift from mere amendments of competition policy to an *ex-ante* interventionist approach. This is due to its theoretical emphasis on market structures.[33] The increased restriction on gatekeepers is indicative of a 'big is bad' approach by law firms, that wishes to facilitate smaller digital platforms.[34] This should reduce barriers to entry for digital start-ups by realigning the market in favour of the innovator. While this, on balance should be greeted positively, a note of caution must be struck regarding the potential unfair punishment of large platforms. Digital service providers cannot be blamed for exploiting the existing ex-post approach in order to obtain a dominant market share.[35] Proportionality remains an important element to EU jurisprudence, and it is legitimate

[29] Pieter Van Cleynebrugel, 'Digital Markets Act: beware of procedural fairness and judicial review booby-traps!' (2021) European Law Blog <https://europeanlawblog.eu/2021/06/24/digital-markets-act-beware-of-procedural-fairness-and-judicial-review-ooby-traps/> accessed 27 October 2021.

[30] Doris Karina Oropeza Mendoza, 'Antitrust in the New Economy Case Google Against Economic Competition on the Web' (2016) 8 Mexican Law Review 2.

[31] Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12(7) Journal of European Competition Law and Practice 561- 575.

[32] Chiara Carrozza, Digital markets act in the making: challenges and potential of the new EU regulation on big tech (2021) 49 European University Institute Policy Brief 2467-4540.

[33] Meredith Broadbent, 'Implications of the Digital Markets Act for Transatlantic Cooperation' (2021) Centre for Strategic and International Studies.

[34] William Leslie, 'The European Commission's Digital Markets Act Proposal: Regulating Systemically important Digital Platforms' (2021) <https://www.linklaters.com/en/insights/publications/2020/december/european-commissions-digital-markets-act-proposal-regulating-systemically-important-digital> accessed 27 October 2021.

[35] Cedric, 'The Digital Markets Act, a new chapter in the history of competition law' (2021) 3 Esprit 125- 138.

for a digital firm to seek as large a share in the market as possible.[36]However, it should be noted that the identification of a firm as a gatekeeper does not automatically mean the Commission will pursue further action. *Ex-ante* approaches leave open a greater possibility for accountability, but this can also be aligned with fundamental ideas of fairness and transparency within regulatory frameworks.[37]

Enforcing Ex-Ante Policy - Striking at the Heart of Digital Platforms:

This is also reflected in the heightened enforcement powers granted to the Commission by the DMA. The ability to interfere with the structure of digital platforms, including the dismantling of their corporate structure, would represent an unprecedented degree of intervention.[38] While such an action is undoubtedly an extreme measure, it is submitted to be justified on the basis of the deterrent effect it will have on digital platforms.[39] There are safeguards in place requiring "*dialogue*" between potentially affected parties, thus granting the platform time to accommodate the Commission's concerns.[40] At the same time, it leaves open the power to fundamentally restructure certain markets, which may involve a consideration of wider public interest principles.[41] While this should be approached cautiously, it does leave open the possibility to hold digital platforms accountable on quite a direct level if they continue to have a detrimental social impact.[42]

Thus, it is contended to be wholly appropriate for the DMA to adopt an *ex-ante* basis for challenging the dominance of digital platforms. However, some concerns have been expressed from firms about a lack of guidance as to how to comply with gatekeeper obligations, and the overall practicality of the DMA. While such guidance is largely a matter of policy, the decision in *Google Shopping* provides an important foundation through which the above concerns can be answered.

Part C: The *Google Shopping* Decision - The Path to an *Ex-Ante* Approach

The decision in *Google Shopping* has significant potential for a new *ex-ante* approach. In *Google Shopping*, the Commission fined Google 2.42 Billion Euros for their self-preferential treatment of their Google Shopping service. This hindered the ability of competitors to access the market and was considered by the Commission to be a violation of Article 102 TFEU.[43] In a landmark ruling, the General Court

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36 Hans Gilliams, 'Proportionality of EU Competition Fines: Proposal for a Principled Discussion' (2014) 37 (4) World Competition 435-458.
37 *supra* [3]
38 Penelope BergKamp, 'The Proposed EU Digital Markets Act: A New Era for the Digital Economy in Europe' (2021) 18(5) European Company Law 152-161.
39 Simona Rudohradska & Diana Trescakova, 'Proposals for the Digital Markets Act and Digital Services Act - Broader Considerations in Context of Online Platforms' (2021) 5 ECLIC 487
40 *supra* [1]
41 Niamh Dunne, 'Public Interest and EU Competition Law' (2020) 65(2) The Antitrust Bulletin 256-281.
42 ibid.
43 Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021].

upheld the decision of the Commission and identified self-preferential treatment as being in violation of the above article.[44]

The *Google Shopping* decision is relevant to the *ex-ante* context, due to its identification of Google as having a position of "*super dominance*" within the market.[45] This concept had previously been dismissed by the General Court, making it particularly interesting that its use was revived in a case involving a digital platform. According to the Court, a super dominant position involved a 'stronger obligation not to allow its (Googles) behaviour to impair genuine, undistorted competition on the related market for specialised comparison'.[46] Such a position was imposed upon Google on the basis of the 'very high barriers to entry' in the search engine market.[47] This places an onus on Google to anticipate what a stronger obligation could look like, while signalling to similar platforms that they too could occupy a super dominant position. The links to the DMA's gatekeeper concept seem relatively apparent. As with a 'super dominant' undertaking, a gatekeeper would have additional obligations to facilitate competition on the basis of their capacity to restrict competition in a market that is already difficult to enter.[48] Logically, *Google Shopping* leaves open the possibility for the Court to expand upon its interpretation of super dominance and apply it to gatekeepers. The Commission investigation can therefore circumvent some of the initial complexity with defining the market for digital platforms, given such power has already been defined, and focus directly on the alleged anti-competitive behaviour at hand.[49] The speeding up of the regulatory process should be looked upon favourably in light of its potential to tackle barriers to entry before they become embedded within the market.

In this regard, particular attention should be drawn to the Court's conclusion that the Commission did not have to show that Google's behaviour had actual anti-competitive results. Instead 'at least potential' evidence of anti-competitive effects on the market was all that was required to be demonstrated by the Commission.[50] This eases the burden of proof on the Commission, which in turn makes it easier to hold digital platforms accountable. Importantly, it can be coupled with the DMA's intention of imposing positive obligations upon gatekeepers to prevent behaviour before it has occurred. If anti-competitiveness must only be shown to exist in the realm of the hypothetical, the Commission is better equipped to examine the structure of the market as a whole and consider whether the new behaviour could have a negative impact on consumer welfare.[51] *Google Shopping* indicates that the Court is aware these measures are needed to address the digital economy, and it is unlikely to apply this criteria to

44 ibid.
45 Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021] 182.
46 Case T-612/17 *Google And Alphabet V Commission (Google Shopping)* [2021] 183 and Munyai Phumudzo, 'Competition Law And Corporate Social Responsibility: A Review Of The Special Responsibility Of Dominant Firms In Competition Law' (2020) 53 De Jure Law Journal 2225- 7160.
47 ibid.
48 *supra* [34]
49 *supra* [29]
50 Case T-612/17 *Google And Alphabet V Commission (Google Shopping)* [2021] 441 and 459.
51 Wei Wang, 'Structural Remedies in EU Antitrust and Merger Control' (2011) 34(4) World Competition 571-596.

other markets, given the same status quo would not be present.

The *Google Shopping* case could raise the question of whether the DMA is necessary for future regulation, if a quasi-*ex-ante* approach has been approved at a General Court level. It should be noted that, while positive, the judgment was determined in the context of preferential treatment, which was identified as a form of 'leveraging' by the Court.[52] Thus, it is uncertain as to whether the scope of the ruling could be expanded to cover other forms of platform abuse, particularly circumstances involving killer acquisitions. To do so, without some form of legislative authority, would invite a great deal of uncertainty into digital competition law. Such uncertainty could have a dampening effect on innovation, given that digital firms would be unsure as to whether any competitive behaviour could suddenly be deemed a TFEU violation on the basis of an *ex-ante* identification of its position being super dominant.[53] The DMA, by contrast, sets out clear obligations for gatekeepers as well as laying out detailed criteria that would have to be met for a digital platform to be labelled in this manner.[54] Its anticipation of anti-competitive behaviour has democratic approval, while uncertainty can be mitigated through appropriate reform as opposed to waiting for another judgment to come before the General Court. Thus, while *Google Shopping* is a progressive indication that an *ex-ante* approach should be pursued, it should not delimit the vast potential of regulatory reform that will be introduced by the DMA.

Google Shopping is important in removing roadblocks that could exist for the Commission in using an *ex-ante a*pproach. The greater discretion allowed to the Commission in terms of market definition and enforcement mechanisms opens the door to a sector-specific expectation for digital platforms to defer to a higher standard of accountability. This in turn can alleviate the concerns surrounding algorithmic manipulation, killer acquisitions and extreme returns to scale. The judgment reflects the Court's understanding of these issues, which bodes well for future interpretations of the DMA. While the DMA remains the most appropriate method of introducing a new approach, as will be discussed in further detail in Part D, *Google Shopping* must be commended for recognising the *ex-ante* future that lies ahead.

Part D: Refuting Challenges to an *Ex-Ante* Regime

It is conceded that there are several legitimate concerns posed by critics regarding the adoption of an *ex-ante* approach and in particular the enactment of this approach via the DMA. Potential challenges

[52] Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021] 240 and Jurian Langer, 'Tying and Bundling as a Leveraging Concern under EC Competition Law' (2007) Kluwer Law International.

[53] Geoffrey Manne, 'Google and the Limits of Antitrust: The Case Against The Antitrust Case Against Google' (2011) 34 Harvard Journal of Law and Public Policy 1.

[54] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12(7) Journal of European Competition Law & Practice 529- 541.

to an *ex-ante* regime will be examined in the sections below in order to illustrate why the approach is, on balance, the most appropriate one to remedy digital competitive inertia.

The Microsoft Approach and the Essential Facilities Doctrine – Retooling an Old Model?

In an EU context, the case of *Microsoft Corporation v Commission* may arguably show that a strengthening of current competition law would be sufficient to address the problems caused by digital platforms.[55] The case identified Microsoft as having an "*overwhelmingly dominant position*" which in turn placed a "*special responsibility*" on the company not to abuse its position.[56] It then obliged Microsoft to ensure the interoperability of its systems with alternative models. Thus, it could be argued that an expansion of this approach, rather than an *ex-ante* designation of a company as a gatekeeper, may be a better means of achieving appropriate competition.[57]

However, it is submitted that such an approach would not address wider problems in relation to the vast pool of data possessed by digital platforms. The *Microsoft* decision stipulates that a competitor should be able to point to how the data in question could lead to a new product or a prediction with improved value.[58] It is argued that this is impossible in practice given the obfuscation of data by platforms,[59] which subsequently makes it difficult to point to its potential uses for the development of new products. Additionally, the *Microsoft* decision does little to address the stifling of innovation, given it requires identification of the dominant position post the establishment of this dominance.[60] At this point, interoperability could be seen, as noted in Part A, as merely the cost of doing business, as opposed to an instruction to accommodate competitors.[61]

Alternatively, some commentators have suggested a remodelling of the essential facilities doctrine, which was previously used to challenge the dominance of American railway companies in the early 20th century, could be the key to tackling GAFA.[62] It is argued that this would be difficult under current EU law in light of the shift away from its application, as evidenced by the approach taken in *Google Shopping*.[63] In *Google Shopping*, the Court held that "*not every issue of, or partly of, access, like that in the present case, necessarily means that the conditions set out in the judgment of Bronner relating to the*

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55 *Microsoft Corp. v. Commission* (2007) T-201/04.
56 ibid
57 Christian Ahlborn, 'The Microsoft Judgment and its Implications for Competition Policy Towards Dominant Firms in Europe' (2009) 75(3) Antitrust Law Journal 887-932.
58 Giuseppe Colangelo, 'Big Data as Misleading Facilities' (2017) 13(2-3) European Competition Journal 249-281.
59 Daniel L. Rubinfeld, 'Access Barriers to Big Data' (2017) 59 Arizona Law Review 339.
60 Rob Friedan, 'Ex Ante Versus Ex Post Approaches to Network Neutrality: A Comparative Assessment' (2015) 30(2) Berkeley Technology Law Journal 1561-1612.
61 Wolfgang Kerber, 'Interoperability in the Digital Economy' (2021) Journal of Intellectual Property, Information Technology and E-Commerce Law 12.
62 Inge Graef, *'EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility'* (Kluwer Law International 2016)
63 Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021].

refusal to supply must be applied".[64] The *Bronner* criteria requires the Commission to demonstrate that a product/service is indispensable in order for it to be classified as an essential facility.[65] Instead, the Court circumvented this doctrine by noting that Googles 'active' use of self-preferential treatment of its Google Shopping service constituted unfair competitive behaviour.[66] There is a degree of judicial creativity being utilised in adopting this distinction.[67] What could be construed as 'active' behaviour could also arguably be viewed as a refusal of Google to grant access to prominent positions within search results. This would render the difference between 'active' and 'passive' behaviour irrelevant, given the issue was fundamentally one of access, which is a core component to the essential facilities doctrine.[68] When viewed in this light, the *Bronner* criteria would have needed to be applied.[69] It can therefore be concluded that the Court has somewhat relaxed the essential facilities doctrine in favour of a more interventionist approach in the context of digital platforms.

The problem with this approach is that any relaxation of the doctrine also relaxes the safeguards associated with *Bronner*. In the absence of legislative scrutiny, it could become difficult to assess when *Bronner* should be side-stepped and when its criteria should be strictly applied.[70] This is relevant to a digital economy that, by its very nature, consistently and rapidly evolves new developments and practices. The risk posed by expanding on this element of the *Google Shopping* decision, is that it becomes impossible for firms to predict whether a new initiative will land them in front of a Commission investigation. Thus, the desire for innovation would remain as stifled as it is within the current market structure.

The DMA would mitigate this impact through a clear outline of how a firm will be designated as a gatekeeper and the resulting positive obligations that this will impose on a firm. The best elements of the essential facilities doctrine can therefore be incorporated into legislation without compromising on procedural safeguards. More broadly, it allows the Court to enforce interoperability within a framework designed around the facilitation of smaller entities. Even if the legislation as enacted is not perfect, it can subsequently be amended or reformed to reflect new considerations.[71] *Ex-ante* approaches better align with new market forces given they are designed to anticipate and pre-empt their anti-competitive effects.

A Poisoned Chalice for Innovation?

It is acknowledged there is no guarantee that regulations like the DMA will achieve the desired increase

64 ibid, 230.
65 Albertina Albors-Llorens, 'The "Essential Facilities" Doctrine in EC Competition Law' (1999) 58 Cambridge Law Journal 490- 492.
66 Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2021] 513.
67 Inge Graef, '*Rethinking the Essential Facilities Doctrine for the EU Digital Economy*' (Tilburg University, 2019)
68 Alejandra Palacios, *Rethinking Competition in the Digital Economy* (2018) Federal Economic Competition Commission.
69 *supra* [62]
70 ibid.
71 Luis Cabral, *The EU Digital Markets Act A Report from a Panel of Economic Experts* (2021) European Commission Joint Research Centre.

in competition through the emergence of new digital platforms. The labelling of firms as a gatekeeper once they have reached a certain threshold may discourage smaller competitors from expanding their services, due to the fear of additional restrictions on their operations.[72] There is a balance to be struck between preventing smaller firms from being excluded from the market and avoiding the punishment of innovators who disrupt the market, without compromising on the competitive process.

It is submitted that this concern can be addressed through appropriate dialogue with the concerned parties. The DMA for example provides for a "*tailored application*" of the obligations imposed upon gatekeepers subject to "*dialogue*" between the concerned platform and the Commission.[73] This would mitigate innovation concerns by ensuring potential new gatekeepers have a form of warning before restrictions are imposed upon their abilities. Additionally, the extreme remedy of restructuring would require "*systemic non-compliance*" with the Regulation.[74] This is a high threshold for the Commission to meet, particularly when coupled with the traditional principle of proportionality.[75] Therefore, provided a firm is cautious as they approach a position is no reason why they should seek to maintain a smaller business model. So called 'disruptors' are also less likely to have the same level of obligations imposed on them by the Commission, in light of their capacity to challenge the market structure as a whole. Thus, the Commission can, under the DMA, grant tacit approval of private efforts to alter the market structure using a 'tailored application' approach. Consequently, concerns surrounding innovation fail to take into account the significant scope of discretion made possible under the DMA.

Big Tech Strikes Back - Political Implications of Competition Law Reform:

It should also be noted that an *ex-ante* sector-specific approach may also have to contend with significant backlash from digital platforms, particularly if the convergence in US-EU theory is not reflected in the subsequent legislative response. There has already been opposition from GAFA to the proposed congressional US antitrust package, that would implement similar *ex-ante* measures as the DMA.[76] This has also been reflected in wider jurisdictions, with Facebook clashing with Australia when the latter government introduced new bills mandating payment of news providers.[77] Thus unity will be needed to ensure political machinations do not interfere with potential regulation. Otherwise, an *ex-ante* approach will become compromised by intentional divergences in competition enforcement.

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[72] Aurelien Portuese, *The Digital Markets Act: European Precautionary Antitrust*(Information Technology and Innovation Foundation 2021)

[73] *supra* [1]

[74] *supra* [1]

[75] Maria T. Patakyova, Principle of Proportionality and European Competition Law (2020) collection of Papers From the International Academic Conference of Ph.D. Students and Young Researchers at the University of Bratislava.

[76] Ben Remaly, 'Lobbyists flood Congress over Tech Antitrust Bills' (2021) Competition Policy Review <https://globalcompetitionreview.com/gcr-usa/digital-markets/lobbyists-flood-congress-over-tech-antitrust-bills> accessed 27 October 2021

[77] Rory Cellan Jones, 'Facebook v Australia: Who blinked First?' (*BBC News,* 23 February 2021) <https://www.bbc.com/news/technology-56168843> accessed 27 October 2021

However, there have been positive indications that a theoretical consensus has been achieved, between EU and US. The announcement of a EU-U.S. Joint Technology Competition Policy Dialogue,[78] coupled with the intention to create a US-EU Trade and Technology Council,[79] indicate significant cooperation between key regulators. More broadly, the US has proposed several legislative bills that will adopt similar *ex-ante* approaches as are seen within the DMA.[80] While these Bills may collapse in the face of a partisan Congress,[81] they at least indicate that key competition regulators are aligned in their desire for an *ex-ante* approach. This would arguably lend itself to a quasi-internationalisation of the response to digital platforms. While this cannot avoid a backlash, it mitigates the ability of digital platforms to exploit differences in the theoretical underpinnings of different competition authorities.

Conclusion

In conclusion, the dominant position of digital platforms in competition law discourse can be attributed to the unique challenges they pose for regulators. These include extreme returns to scale, network externalities and the accumulation of data. However, this description does not cover the full extent of these unprecedented challenges, with a lack of transparency linked to complex algorithms also requiring a remedy from regulators. Such challenges require a new *ex-ante* approach in order to ensure there is appropriate accountability for digital platforms. The DMA represents a progressive example of how this approach can work in practice.

The case for the DMA is bolstered by *Google Shopping*, though the judgment itself has its limits. While it does indicate approval of the DMA, its relaxation of current essential facilities standards leaves open the possibility for widespread business uncertainty and a potential hindering of innovation. That does not justify the contention of an ex-post model, but rather highlights the importance of using the DMA, with its emphasis on consultation to implement a new framework. At the same time criticism surrounding an *ex-ante* model for digital competition regulation are largely grounded in outdated perceptions of the capacity of the Commission at present to interfere with the market. The *ex-ante* approach is necessary not only to expand on this capacity but to do so in a manner that can address the structural issues prevalent within the digital economy. Stakeholders should cautiously welcome the DMA and seek to work with the Commission to ensure future business operation both aligns with new legislative responsibilities and thrive in the face of a level playing field.

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[78] Council of the European Union (2021) 'Towards a Renewed Transatlantic Partnership'

[79] Digital Europe, *Ten Priorities For The Eu-Us Trade And Technology Council – A Partnership That Can Deliver* (2021)

[80] American Innovation and Online Choice Act Bill (2021) and the Platform Competition and Opportunity Act (2021)

[81] Lauren Feiner, '2022 will be the 'do or die' moment for Congress to take action against Big Tech' (*CNBC* 31st December 2021) <https://www.cnbc.com/2021/12/31/2022-will-be-the-do-or-die-moment-for-congress-to-take-action-against-big-tech.html> accessed 6 January 2022

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Lessons for a Federalised European Superpower: An Assessment of Shared Law-Making Competencies in the USA and Canada as a Comparative Example

Eoin McGloin

Abstract

The prospect of the European Union one day becoming the "United States of Europe," or at least a united federalist European superpower, is well regarded in geopolitics. Hence, a discussion arises as to how this eventuality might be prepared for, especially in regard to the sharing of law-making competencies between federal and state lawmakers, which this article addresses in specific. To that effect, the USA's system is assessed for its merits and downfalls with a discussion made of the Tenth Amendment, Commerce Clause and Necessary and Proper Clause. Brief analysis is then made of the Canadian federalist system in the capacity of a comparative example. With these systems in mind, recommendations for a potential federalist European superpower are made in regard to the content of an underpinning constitutional document, the existing EU federalist structures and the potential for an emphasis on retaining cultural integrity and minority rights in such a system. Though undoubtedly imperfect, it is argued that the US, as well as Canada, has rather a lot to teach this Europe of the future by way of appropriately sharing law-making competencies between the federate and the Member States.

Introduction

The United States of America is typically regarded as the most recognisable federalised legal system of the world. Indeed, "there are some surprising and distinctive features of the American legal system that set it apart in interesting ways from other Western legal systems"[1] and warrant analysis both individually and comparatively. Notably, one such feature that every "school-child" learns about is the "system of dual sovereignty" whereby the federal and state governments share law-making responsibilities,[2] with the question of how these powers are shared noted by one-time Chief Justice Marshall as "perpetually arising, and will probably continue to arise, as long as our system shall exist."[3]

In contrast, the prospect of the European Union at some point making way for a federalised European

1 William Ewald, "What's So Special About American Law?" (2001) 26(3) Oklahoma City University Law Review 1083
2 *Gregory v Ashcroft* [1991] 501 U.S. 452, 457
3 *McCulloch v. Maryland* [1819] 17 U.S. (4 Wheat.) 316, 372

superpower is, it goes without saying, a deeply contentious topic.[4] Nevertheless, experts in geopolitics and EU technocrats alike advise that we ought to be prepared for this very possibility.[5] Certainly, it has been widely observed that the key challenges for the EU of late, namely the preservation of Ukrainian territory, the COVID-19 pandemic and soaring inflation, have underlined the case that some actors in the European Union make for creating a federalised superpower.[6] Thus, one submits that constitutional lawyers ought to look, however speculatively, towards how Europe may share law-making competencies between Member States and central federal lawmakers in such an eventuality.

Insofar as "although EU Member States currently have more autonomy over some decision-making processes than US state governments, findings indicate that the overall federal structures are largely similar,"[7] one may indeed suggest that an assessment of the US is a good place to start for identifying lessons that could be learned by a federalised European superpower in regard to shared law-making competencies. In making that assessment, the following will address the Tenth Amendment, Commerce Clause, Necessary and Proper Clause and then move to a discussion of the Canadian system before speculating the lessons that may be learned by this potentially federalised Europe of the future.

The Tenth Amendment

Firstly, one looks to the basis for America's federal political structure, a system noted as "often created by a written constitutional document,"[8] as is the case with the Bill of Rights' Tenth Amendment for the USA which states; "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[9] *US v Darby* characterised this amendment as a "truism," clarifying "that all is retained which has not been surrendered,"[10] meaning law-making powers not expressly reserved by the federal system remain in the remit of state lawmakers. Comparatively speaking, it has been remarked that "in any system of government," responsibility for law making is "divided among the government's branches" but that "in a federal system, it is further divided between the federal government and the governments of the states."[11] Thus, in assessing the American federalist system specifically, one notes that the "whole of private law" as well as limited areas

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4 Christoph Hasselbach, "Germany's goal of a European federal state proves elusive" (*Deutsche Welle,* 25 January 2022), <https://www.dw.com/en/germanys-goal-of-a-european-federal-state-proves-elusive/a-60539427
> accessed 28 January 2022

5 Keith Head and Thierry Mayer, "The United States of Europe: A Gravity Model Evaluation of the Four Freedoms" (2021) 35(2) Journal of Economic Perspectives 23; Matas Kudarauskas, "A Federal Europe: One More Try?" (*Harvard International Review*, 13 December 2021), <https://hir.harvard.edu/a-federal-europe-one-more-try/
> accessed 23 December 2021; Asle Toje, "Europe: "Arcana imperii"- A free short talk with Asle Toje" (*EURAC Research Science Blogs*, 23 May 2019) <https://www.eurac.edu/en/blogs/arcana-imperii-short-talk-with-asle-toje
> accessed 23 December 2021

8 David G. Barnum, "Constitutional Organization and the Protection of Human Rights in Britain and the United States" in John R. Schmidhauser (ed.) *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis* at 185 (Butterworths 1987)

9 Tenth Amendment, Rights Reserved to States or People, Bill of Rights (1791)

10 *United States v Darby* [1941] 312 U.S. 100

11 Henry M. Hart. Jr., "The Relations between State and Federal Law" (1954) 54(4) Columbia Law Rev. 489

of commercial law fall within the competence of state governments[12] while law-making powers largely pertaining to taxation, public expenditure, interstate and foreign commerce, wars and national defence, international relations, citizenship and immigration, *inter alia*,[13] are reserved by the federal government as provided for by Article I, Section VIII of the US Constitution.[14] It is remarked that "contemporary accounts of the Tenth Amendment generally focus on the tug-of-war" between the Tenth Amendment and the articles which grant federal law-making powers, namely the Commerce Clause and Necessary and Proper Clause.

The Commerce Clause

The so-called Commerce Clause empowers Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[15] The Commerce Clause has been dubbed "both a source of national power and a limitation of state power."[16] The 20th century "dealt overwhelmingly with the allocation of power between the national government and the states." In doing so, courts interpreted federal powers expansively,[17] adopting a "submissive and broadly defined Commerce Clause jurisprudence."[18] Such expansive interpretations of the Clause often arose from civil rights cases, such as *Heart of Atlanta Motel*, wherein it was ruled that states could not regulate commerce serving predominantly interstate travellers, with bans on African-Americans in hospitality ruled to have "affected commerce."[19] Where the Commerce Clause has been used to affirm federal civil rights legislation in cases such as this, it is noted that courts typically justify this by viewing the federal law as in the interests of commerce and do not engage in value judgments of the activity subject to regulation itself,[20] in this case hospitality.

However, although the Supreme Court had found for the federal government in all Commerce Clause cases from 1937-1994,[21] towards the end of the 20th century decisions began to favour a less broadly-defined Commerce Clause jurisprudence.[22] Indeed, while the earlier broad view of the Commerce

12 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) at 250
13 Eugene Hicock, "On Federalism" (1987) 3 Benchmark 229
14 Article I, Section 8, Constitution of the United States
15 Article I, Section 8, Clause 3, Constitution of the United States
16 Otis H Stephens Jr and John M Scheb II, *American Constitutional Law: Sources of Power and Restraint* (4th edn, Thomson Wadsworth 2006) at 316
17 Heather K Gerken, "Slipping the Bonds of Federalism" (2014) 128(85) Harvard Law Review 86
18 Kelly Allison Belli, "Does *Gonzales v. Raich* Signify a Return to an Expansive Interpretation of Congress's Commerce Clause Powers - Dubious Prospects for State Police Power to Regulate Professional Medical Care" (2007) 11 Holy Cross J.L. & Pub. Pol'y 110
19 *Heart of Atlanta Motel Inc v United States* (1964) 379 U.S. 241
20 Louis J Virelli IY and David S. Leibowitz, "Federalism Whether They Want It or Not: The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation after *United States v Morrison*" (2001) 3(3) Journal of Constitutional Law 926
21 Alex Kozinski, "Introduction to Volume Nineteen" (1996) 19 Harvard Journal of Law & Public Policy 1
22 William Fisch, "Constitutional Law" in David S. Clark and Tugrul Ansay (ed.s) *Introduction to the Law of the United States* (2nd edn, Kluwer Law International 2001) at 63

Clause often facilitated socially liberal federal policy,[23] the later, more narrow view saw such federal policy struck down, such as in *US v Lopez* in 1995,[24] a decision which signalled an "important change in the judicial interpretation of the Commerce Clause."[25] Here, it was the view of the US Supreme Court, in a 5:4 verdict, that the Gun Free Zones Act 1990 "exceeds the authority of Congress to regulate commerce" and that only activity which "substantially affects" interstate commerce ought to be in the competence of federal powers. Though it is noted that contemporary commentators brandished *Lopez* as "either political, or activist, or fundamentally flawed,"[26] proponents of preserving state power on such matters welcomed the decision, with it remarked that the Commerce Clause could no longer be analogous with a "Hey, you-can-do-whatever-you-feel- like Clause."[27] In order to distil this framework, the bench in *Lopez* and later its "sidekick"[28] *Morrison*[29] sought to "impose meaningful limits" on federal powers under the Commerce Clause,[30] outlining three areas for federal regulation:

1. Channels of interstate commerce,
2. Instrumentalities, persons or things involved in interstate commerce, and;
3. Activities substantially affecting interstate commerce.

While submitted as not overly restrictive, the rationale for these criteria is to ensure federal power does not overstep states' law-making powers which are constitutionally enshrined by the Tenth Amendment, which, in light of *Lopez*, "serves an enforceable bulwark for states to protect their sovereignty against federal power under the Commerce Clause."[31]

However, the turn of the 21st century saw a broadening of this framework with *Gonzales v Raich*, which subverted expectations[32] by invalidating a California law legalising cannabis for medical purposes due to a federal law criminalising marijuana possession.[33] The successful government argument in *Raich* stemmed from a 1942 decision, *Wickard v Filburn,*[34] where it was ruled the Commerce Clause empowered the federal government to regulate individual crop cultivation because of its effect on the interstate wheat market, which is submitted as a far broader conception of the Commerce clause than

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[23] Gerald N Rosenburg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, University of Chicago Press 2008)
[24] *United States v Lopez* (1995) 514 U.S. 549
[25] Michael C Carroll and Paul R Dehmel "*United States v Lopez*: Reevaluating Congressional Authority Under the Commerce Clause" (1995) 69(579) St John's Law Review 579
[26] Lawrence Lessig, "Translating Federalism: *United States v Lopez*" (1995) Supreme Court Review 125
[27] Andrew St Lauren, "Reconstituting *United States v Lopez*: Another Look at Federal Criminal Law" (1997) 31(1) Columbia Journal of Law and Social Problems 61
[28] Richard Primus, "How the Gun-Free School Zones Act Saved the Individual Mandate" (2010) 11 Michigan Law Review First Impressions 44
[29] *United States v Morrison* [2000] 529 U.S. 598
[30] Ilya Somin, "*Gonzales v Raich*: Federalism as a Casualty of the War on Drugs" (2006) 15(3) Cornell Journal of Law and Public Policy 507
[31] Thomas D Dillard, "*United States v Lopez*: The Commerce Clause vs. State Sovereignty, Once Again" (1996) 22(1) Journal of Contemporary Law 158
[32] Marcia Tiersky, "Medical Marijuana: Putting the Power Where it Belongs" (1999) 93 Northwestern U. L. Rev. 547
[33] *Gonzales v Raich* [2005] 545 U.S. 1
[34] *Wickard v. Filburn* [1942] 317 U.S. 111

Lopez/Morrison envisaged. The key precedent from *Raich* is submitted as effectively being that a non-economic activity may be regulated under the Commerce Clause if it forms part of a broader federal regulatory scheme with implications for commerce.[35] Interestingly, it has however been analysed that *Raich* did not so much undo the reasonings from *Lopez/Morrison* as broaden them.[36] That said, views differ on whether *Raich* has "heralded a new era of federalism"[37] or if this expanded interpretation of the federal government's enumerated powers may be limited to drug distribution.[38] Ergo, one submits that is "unlikely that *Raich* spells the end of the conversation" regarding the extent of the federal government's law-making powers under the Commerce Clause.[39] Ergo, one could assert that the lessons that may be learned by other federalist systems in this regard may depend on the future jurisprudence of the US Supreme Court.

The Necessary and Proper Clause

In addition, the Necessary and Proper Clause also competes with the Tenth Amendment to retain federal law-making powers. This clause allows Congress to "make all laws which shall be necessary and proper for carrying into execution the [congressional] powers, and all other powers vested by this Constitution in the government of the US,"[40] thereby granting the federal government "very generous room for play in its legislative activities."[41]

McCulloch v Maryland,[42] "the seminal US Supreme Court opinion on the resolution of conflict between state and federal powers,"[43] over which "much ink has been spilled,"[44]offers an interesting starting point for the law around the Necessary and Proper Clause. It is noted that at different points in the Clause's evolution, courts' definitions of "necessary" have ranged from as stringent as "absolutely necessary," to as permissive as "convenient."[45] In this case, it was ruled that per the Necessary and Proper Clause, the federal government was empowered to incorporate a national bank as this would facilitate other federal powers being carried out. Simply, Marshall J in *McCulloch* characterised federal powers as coming in the form of both "means," as in those enumerated in the Constitution and "ends," as in those necessary

35 William Baude, "The Contingent Federal Power to Regulate Marijuana" in Jonathan H Adler (ed.) *Marijuana Federalism: Uncle Sam and Mary Jane* (Brookings Institution Press 2020)
36 Gregory W Watts, "*Gonzales v Raich*: How to Fix a Mess of "Economic" Proportions" (2015) 40(3) Akron Law Review 545
37 Christina E Coleman, "The Future of the Federalism Revolution: *Gonzales v Raich* and the Legacy of the Rehnquist Court" (2006) 37(4) Loyola University Chicago Law Journal 803
38 William Baude, "State Regulation and the Necessary and Proper Clause" (2015) 65(3) Case Western Reserve Law Review 513
39 Ernest A Young, "Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after *Gonzales v Raich*" (2005) Supreme Court Review 1
40 Article I, Section 8, Clause 18, Constitution of the United States
41 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) at 250
42 *McCulloch v. Maryland* [1819] 17 U.S. (4 Wheat.) 316
43 Albert P Melone and Allan Karnes, *The American Legal System: Perspectives, Politics, Processes and Policies* (2nd edn, Rowman & Littlefield 2008) at 91
44 Ilya Somin, "Taking Stock of *Comstock*: The Necessary and Proper Clause and the Limits of Federal Power" (2009-10) Cato Supreme Court Review 239
45 Randy E Barnett, "The Original Meaning of the Necessary Proper Clause" (2005) 10(1) The Independent Review 139

to fulfil those powers.

Although one concedes that "Marshall's construction of federal power (in *McCulloch*) has been embraced so broadly and for so long that it is sometimes difficult to appreciate the radical nature of his argument,"[46] it is submitted that the broad scope granted by the notion of "implied" powers may grant strikingly wide-ranging powers to the federal government. However, some have also highlighted that Marshall J does not employ the terms "broad" or "liberal" in the *McCulloch* judgment and accordingly it may not be appropriate to characterise the framework it provides as such.[47] Furthermore, it has been contended that *McCulloch*'s reasoning does not seek to grant federal powers but merely facilitate the proper exercise of existing federal powers.[48] That said, it is nonetheless thought-provoking when looking at the American federalist system as a model to see the narrative around the sharing of law-making powers turn from only a limited set of federal responsibilities at the Tenth Amendment's outset to a view where federal power may be unlimited, save for notable exceptions, as it has been characterised.[49]

Though *McCulloch*'s formidability as an authority is noted, the Necessary and Proper Clause has not seen the same level of development as the Commerce Clause, primarily due to it being "rare" that "a case that rests as expressly and completely on the necessary and proper clause as *McCulloch* did."[50] That said, with *US v Comstock* in 2010,[51] the Supreme Court "presented a substantial rethinking of the Necessary and Proper Clause, for perhaps the first time since *McCulloch*."[52] Here, in what the Court did dub a "broad approach," a law passed by Congress allowing for "sexually dangerous" federal prisoners' detention beyond the date they would otherwise be released was deemed to have been made within the competence of the federal government as such a law carries into execution the enumerated federal powers of the Constitution. In reaching this finding, which has been castigated for some for its "novelty," "inconsistency" and "creation of confusion,"[53] the Court posited a 5-prong test in respect of federal powers under the Necessary and Proper Clause, the "flexibility" of which has raised concerns in terms of how it "may result in increased federal intrusion into state sovereignty."[54] The test outlines that courts ought to consider the following in assessing federal law-making competence;

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46 Kurt T Lash, "The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and 'Expressly' Delegated Power" (2008) 83 Notre Dame Law Review 101

47 David S Schwartz, "Misreading *McCulloch v Maryland*" (2015) 18 Pennsylvania Journal of Constitutional Law 1

48 Charles F Hobson, *The Great Chief Justice John Marshall and the Rule of Law* (University Press of Kansas 1996), at 122

49 Michael S Greve, *The Upside-Down Constitution* (Harvard University Press 2012) at 128.

50 Jeff Neal, "McCulloch v Maryland: Two centuries later" (Harvard Law Today, 23 September 2019) <https://today.law.harvard.edu/mcculloch-v-maryland-two-centuries-later/ > accessed 1 May 2021.

51 *United States v Comstock* [2010] 560 U.S. 126

52 Philip Levits "A Modern Fiduciary Theory of the Necessary & Proper Clause" (2012) Yale Digital Commons 123 < https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1123&context=student_papers > accessed 1 May 2021.

53 Jefferson H Powell, "The Regrettable Clause: United States v. Comstock and the Powers of Congress" (2011) 48 San Diego Law Review 713

54 Laura Kulpa, "*United States v. Comstock*: The Next Chapter in the Struggle between State and Congressional Power" (2010) 44(3) Loyola of L.A. Law Review 1145

1. the broad nature of the Necessary and Proper Clause,
2. the degree to which the federal government has historically been involved in the arena at issue,
3. the sound reasons for the statute's enactment in light of the public interest,
4. the statute's accommodation of state interests, and
5. the narrowness of the statute's scope.

While *Comstock* has been bemoaned for having "cloaked in uncertainty" the Supreme Court's Necessary and Proper Clause jurisprudence,[55] the Court attempted to simplify its rationale by professing that its finding did not lengthen the chain of implied federal powers but strengthen the "chain-link" of implication as to these powers. Thus, one may evaluate that *Comstock* does not undercut state law-making powers but merely clarifies pre-existing implied federal powers. Though it is submitted that this may have been meant as reassurance to those wary of expanded federal powers, critics have highlighted that to date- "jurisprudence in this field lacks a coherent method by which to ajudge such principles" as set out in *Comstock*.[56] However, despite this, a consensus appears to have emerged that federal powers are unlikely to expand beyond the competence set out in *McCulloch*, as *Comstock* "neither changed the course of Necessary and Proper Clause doctrine nor established a ground-breaking legal framework for future analysis."[57]Accordingly, one could profess that while it is less developed, the legal position of shared law-making powers is more certain with regard to the Necessary and Proper Clause than the Commerce Clause and so lessons may be more readily learned from other systems in respect of this clause.

Yet, in surmising, one heeds that the US legal system generally entails a "confusing hodgepodge of federal law and state law,"[58] the responsibilities for which hinge largely on competing powers under the Tenth Amendment and Commerce and Necessary and Proper Clauses.

Canada: a comparative example

In order to enhance one's understanding of how law-making competence is shared between the federal legislature and the individual states, one may briefly look to the US' neighbouring common law jurisdiction of Canada – which is noted as a distinctly more "unified" federalised legal system.[59]

To begin, one may note that Canadian federal law-making powers tend to outweigh those seen in the US, with it remarked that the limitations on federal powers in the US Constitution would have drawn the "vehement derision" of the drafters of the Quebec Resolutions which founded federalism in

[55] Shane Magnetti, "The Rational Federalist: Synthesizing Necessity and Propriety in the Sweeping Clause" (2019) 93(1) St John's Law Review. 141
[56] Michael Parsons, "The Future of Federalism: A Uniform Theory of Rights and Powers for the Necessary and Proper Clause" 11(1) Georgetown Journal of Law & Public Policy 177
[57] Ilya Shapiro' and Trevor Burrust, "Not Necessarily Proper: *Comstock*'s Errors and Limitations" (2010-11) 61 Syracuse Law Review 413
[58] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) at 253
[59] Gerald L Gall, *The Canadian Legal System* (3rd edn, Carswell 1990) at 164

Canada.[60] However, the American federal government does oversee some areas which the Canadian does not and *vice versa*, with family law falling under federal powers in Canada but not in the US and labour law falling under federal powers in the US but not in Canada being notable examples.[61]

Additionally, in the US, where federalism is said to be rooted in "popular sovereignty" following the civil war,[62] the sharing of law-making powers "is not used as a way to protect the cultural integrity of a minority group, in the way that the Canadian province of Quebec protects the distinctiveness of the primarily Francophone Quebecois."[63] Thus, the US and Canadian systems again contrast in that while America has its 50 states, Canada only devolves power across 4 provinces.[64] That said, the legal provisions which give rise to federal powers in the US and Canadian legal systems may be deemed comparatively similar, with it noted that law-making powers are allocated to the Canadian federal government in "broadly worded constitutional text" which empowers the national parliament to "make Laws for the Peace, Order, and good Government of Canada" and with regard to the "Regulation of Trade and Commerce."[65] In turn, one observed that these echo the Necessary and Proper and Commerce Clauses as discussed. Notably however, the Canadian jurisdiction qualifies these clauses with protections for provincial prerogatives.[66]

Similarly, again, much like how the US Bill of Rights reserves state power at the Tenth Amendment, the Canadian Charter of Rights and Freedoms[67] allows for judicial review to be taken in respect of any law which may be claimed as falling outside the competence of either the federal or a provincial government.[68] Notwithstanding this, the jurisprudence that has developed around federal versus devolved law-making powers in Canada is submitted as differing greatly from the US. Where the US Supreme Court has steadily leaned towards broadening the federal powers in the Constitution, the superior courts of Canada have "moved in the opposite direction," tending to favour broadened provincial powers.[69] This approach which sets the Canadian federalised legal system aside from the American has been distilled in the sentiment that "Canadians prefer to ensure that important economic, social, and cultural policies they prefer are enacted in their own provinces"[70]

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60 HJ Laski, "A Note on Sovereignty and Federalism" (1915) 35 Canadian Law Times 891

61 Harvey Wingo, "US & Canadian Federalism: A Study in Contrast" (1986) 11 Vermont Law Review 473

62 Ronald L Watts, "The American Constitution in Comparative Perspective: A Comparison of Federalism in the United States and Canada" (1987) 74(3) Journal of American History 769

63 John D Richard, "Federalism in Canada" (2005) 44 Duquesne Law Review 5

64 Alan C Cairns, "The Governments and Societies of Canadian Federalism" (1977) 10(4) Canadian Journal of Political Science 695

65 The Constitution Act (Canada), 1867

66 John Eaton, "The Nature of Canadian Federalism" (2003) 3 Legal Information Management 166

67 Pt 1, Canadian Charter of Rights and Freedom

68 Christopher P Manfredi, "The Canadian Supreme Court and American judicial review: United States constitutional jurisprudence and the Canadian Charter of Rights and Freedoms" (1992) 40(1) American Journal of Comparative Law 12

69 Martha A Field, "The Differing Federalism of Canada and the United States" (1992) 55(1) Law and Contemporary Problems 107

70 Stephen F Ross, "Insights from Canada for American Constitutional Federalism" (2014) 16(4) Journal of Constitutional Law 891

Thus, having assessed the Canadian legal system's approach to the sharing of law-making powers in a federalised legal system, one may deduce that while state powers in the US are extensive, US courts are comparatively less restrictive towards the federal government exercising law-making powers. Therefore, in reality one may submit that the American jurisprudence on this point has led to a federalised system where federal powers are in fact quite expansive, with certainly a broader interpretation of the Constitution granted to the federal government than in Canada.

Lessons for a federalised Europe

For the avoidance of any doubt, the discussion of what lessons a federalised Europe may learn from the US and Canada is admittedly entirely speculative insofar as such a system may elect to instate entirely different governmental, democratic and administrative structures. Nonetheless, for the purposes of this discussion, it will be assumed that any future creation of a united and federalist European superpower would build on the EU and the federal systems of its current form. Not to mention, given its "confusing hodgepodge" of law,[71] one may at the outset also be dubious about what lessons the US may have to teach Europe. Regardless, in identifying what lessons may be learned, this section will move in three parts by assessing the following:

1. A potential constitutional provision to underpin shared law-making competencies
2. The federal structures the EU presently has in place compared to the US
3. A potential emphasis on protecting cultural integrity and minority groups

A potential constitutional provision to underpin shared law-making competencies:

As discussed, the American approach to sharing law-making power between the federate and the states flows from the constitutional document of the United States itself in the form of the Bill of Rights. Practically speaking, it may be readily assumed that were Europe to become a fully-fledged federate, it too would likely require some foundational document which one would imagine containing details of the sharing of these powers. That said, the US Bill of Rights would likely be of little use as a potential model for such a document insofar as it has been labelled "antiquated,"[72] a fair claim given that it dates back to 1789. However it is not just the age of the Bill of Rights for which it attracts such criticism, but it has also been argued the rigid imposition of such an anachronistic document in America's "political and legal consciousness" has been counterproductive for ensuring democratic ideals,[73] an oft-cited concern of sceptics of a federal Europe.[74]

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71 *supra* [58]
72 Gene R Nichol,"Towards A People's Constitution" (2003) 91(2) California Law Review 621
73 K Sabeel Rahman, "How our changing view of the Bill of Rights has changed our democracy" (*The Washington Post,* 19 January 2018)
74 Éva Boka, "In Search of European Federalism: A Historical Survey" (2006) 28(3) Society & Economy 309

Furthermore, one could submit that it is far from bold to assert that a textual interpretation of the Necessary and Proper Clause and Commerce Clause would not be undertaken in a modern context and that these provisions, in particular the latter, were very much so of their time when proposed by the 1st United States Congress. In addition, it is not even merely the subject matter of these provisions but also the almost labyrinthine fashion in which they conflict and cooperate with the Tenth Amendment that makes the adoption of similar provisions difficult to envisage. Indeed, this view is elucidated in light of the sustained efforts by the EU to ensure its legal provisions are "simpler and clearer," as is the vision of the Birmingham Declaration.[75] This effort has been redoubled as recently as 2016 with the Interinstitutional Agreement on Better Law-Making[76] and so accordingly, it may be speculated that it is most improbable that the European Union would abandon such a noble quest if pursuing full status as a federalised superpower.

Thus, on the whole, one could submit that while a future federalist European superpower would almost certainly make a constitutional provision for the sharing of law-making competencies between the federate and Member States, it is unlikely that such a provision would closely resemble the equivalent provisions in the US.

The federal structures the EU presently has in place compared to the US:

Insofar as it has been widely postulated that the EU in many respects already acts as a federation, albeit a "deeply contested" one,[77] it may be contended that a future federalised European superpower could take cues from the existing structures and processes of the European Union to decipher how law-making competencies could be shared between the federate and the Member States. In general, one could submit that the current balance between Commission and Member State law-making powers at least bears a spirit similar to that espoused in *US v Darby* of "all is retained which has not been surrendered,"[78] though it is worth highlighting that academic discussion has been ignited around the idea of a "competence creep" by the EU whereby it increasingly seeks to increase its share of law-making competencies as against the Member States.[79]

Looking towards how this "creep" may turn to full-blown federalisation, the law-making competencies that the Commission has may warrant analysis insofar as this institution may most closely resemble the federal government in the US or Canada. To that effect, in a vein similar to the American federal

[75] Conclusions of the Birmingham European Council (16 October 1992), Annex 1

[76] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L 123/1

[77] John Erik Fossum, "European federalism: Pitfalls and possibilities Special Issue: How to Get out of the European Trap: The Manifold Crises" (2017) 23 European Law Journal 361

[78] supra [10]

[79] Sacha Garben and Inge Govaere, "The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future" in Sacha Garben and Inge Govaere (ed.s), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing), at 7

government's role in overseeing constitutional matters, the Commission is regarded as the "Guardian of the Treaties" per Article 17 TFEU which denotes that the Commission "shall ensure the application of the Treaties," making it the "soul of the Union" in maintaining its goals and ensuring EU law implementation and compliance.[80] Indeed, specific provisions of TFEU, namely Article 102 on competition and Article 107 on state aid, reserve law-making competencies in these particular areas for the Commission, much like the Commerce Clause and Necessary and Proper Clause. Hence, if TFEU were to be largely preserved or used as a base for the constitutional document of a European superpower, these Articles may be retained and federal law-making competencies be focused on areas of law such as competition and state aid, though one notes that the hopes of ardent European federalists would be for powers far greater than these.[81]

Regardless of the hopes that European federalists have, it is worth noting that presently, even the idea that federal EU legislation be directly effective on Member States has been branded a "highly political idea"[82] and is generally limited to "self-executing provisions."[83] As would be well known, Regulations are typically directly effective[84] while Directives "shall be binding as to the result to be achieved… but shall leave to the national authorities the choice of form and methods."[85] In contrast, the US federal law-making facility, in the form of the President, Congress and House, have recourse to no facility akin to a Directive whereby the states can implement a law of their own choosing to achieve a designated result. In the US system, Executive Orders and Presidential Memoranda from the President as well as successful Bills from the legislative branch are all directly effective on the states, assuming they are constitutional. Thus, if, in federalising, the EU were to seek to implement a US-style model, the powers of the central federal lawmakers of Europe to enact directly effective federal legislation under TFEU or its later equivalent may require significant expansion. One may contend that this may prove a stumbling block in the federalisation of Europe given the frosty reception with which many of the federalist elements of Lisbon were met.[86]

Be that as it may, the Lisbon Treaty is nonetheless generally credited as instrumental for clarifying, while arguably also expanding, the exact law-making competencies of the EU *de lege lata,*[87] with Article 3 TFEU reserving EU federal power in the areas of marine conservation under the Common Fisheries Policy, monetary policy in respect of the Euro, the customs union, competition policy for the purposes

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80 Neller, *Fairhurst's Law of the EU* (12th edn Pearson 2018), 58
81 *supra* [6]
82 Pierre Pescatore, "The Doctrine of Direct Effect: An Infant Disease of Community Law" (1983) 8 European Law Review 155
83 *Van Gend en Loos v Nederlandse Tariefcommissie* (case 26/62) [1963] ECR 1
84 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, Article 288
85 ibid
86 Vlad Perju, "Identity Federalism in Europe and the United States" (2020) 53(1) Vanderbilt Journal of Transnational Law 207
87 *supra* [79], at 8

of internal market regulation and common commercial policy.[88] Strikingly, many of these same areas are retained in the US through the Commerce Clause and so one could deduce these provisions as being to some extent analogous. That said, Article 3 and Lisbon as a whole are, like their American counterpart, a fraught question for the courts. In that vein, a result of Lisbon has been that national courts assessing the constitutionality of the EU's broadened law-making competencies have "had to struggle to reconcile an increasingly state-like European Union with the requirements of basic law,"[89] such as the *Bundesverfassungsgericht* case from Germany.[90] This case in particular has been invoked as an example of a national court, especially one of a pro-federalism Member State,[91] dealing a "pre-emptive strike against European federalism."[92] Ergo, while it certainly may be acknowledged that the general areas reserved under Article 3 could form a launchpad for the areas for which central federal lawmakers may have responsibility in a European superpower, the reticence of Member States to even forego competency in these limited areas, particularly fisheries policy,[93] suggests that a rethink of such a model could be necessary for a level of federalisation akin to the US.

Altogether, it could be suggested that while the existing federal structures of the EU for the sharing of law-making competencies may be reasonably readily adapted for a federalised European superpower. However, given the contention that surrounds many of these structures' implementation and expansion in their history so far, it could be advanced that European federalists may find a more "clean slate" type of approach more propitious, irrespective of if this approach is in any way modelled on the US or not.

A potential emphasis on protecting cultural integrity and minority groups:

As observed in this article's brief assessment of the Canadian federal system of shared law-making power, there is an emphasis on state governments retaining competence for matters involving cultural integrity and minority groups that is not evident in the US. Given that the population of the EU at present nears half a billion people[94] speaking 24 official EU languages[95] as well as approximately 60

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88 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, Article 3

89 Tobias Lock, "Why the European Union is not a State – Some Critical Remarks Comments on the German Constitutional Court's Decision on the Lisbon Treaty" (2009) 5(3) European Constitutional Law Review 407

90 *Bundesverfassungsgericht* (Second Senate), Cases 2 *B v E* 2/08; 2 *B v E* 5/08; 2 *B v R* 1010/08; 2 *B v R* 1022/08; 2 *B v R* 1259/08; 2 *B v R* 182/09, decision of 30 June 2009

91 *supra* [6]

92 Julian Arato, "A Preemptive Strike against European Federalism: The Decision of the *Bundesverfassungsgericht* Concerning the Treaty of Lisbon" (*Blog of the European Journal of International Law,* 9 October 2010), <https://www.ejiltalk.org/a-preemptive-strike-against-european-federalism-the-decision-of-the-bundesverfassungsgericht-concerning-the-treaty-of-lisbon/ > accessed 1 February 2022

93 Emily Self, "Who Speaks for the Fish? The Tragedy of Europe's Common Fisheries Policy" (2015) 48(2) Vanderbilt Journal of Transnational Law 577

94 Eurostat, "Population on 1 January" (*European Commission*, 5 July 2021), <https://ec.europa.eu/eurostat/databrowser/view/tps00001/default/table?lang=en > accessed 1 February 2022

95 The European Union, "Languages" (*European Union*, undated), <https://european-union.europa.eu/principles-countries-history/languages_en > accessed 1 February 2022

minority and/or regional languages[96] and the fact that Europe is home to around 87 native ethnicities or "peoples of Europe," of which 33 are a minority group-[97] it is submitted that accounting for such diversity presents a mammoth challenge for European federalisation to which lawmakers will have to respond. A way that may be suggested of doing this is to take inspiration from the Canadian jurisdiction and allow a latitude for Member State governments to decide what social and cultural policies they prefer, much like how Canada makes such allowances for its constituent provinces.

In terms of language policy in particular, the EU's current commitment arising from Lisbon to protect linguistic diversity but not the use of autochthonous languages has resulted in hostility from the speakers of such languages towards further federalisation.[98] Thus, one may deem that federalisation encompassing specific derogations to Member States in areas such as language and cultural policy presents an opportunity to improve the status of such languages. Hence, rather than the current provisions of the EU which "short-change both linguistic minorities and minority languages"[99] a federalist system reserving specific powers for Member States by way of how they address these minorities may better facilitate the rights of the relevant communities in this area. Nevertheless, one acknowledges that not only the EU but also the Member States, for example France[100] and Spain,[101] are oftentimes guilty of poor standards in minority language policy and so even expansive derogation may not result in a better legal provision for these communities in a would-be federalist European superpower.

Furthermore, one could say the same for the protection of minority groups, with the EU also accused of failures in this area but unfortunately, Member States also face similar criticisms. For example, regarding the minority Roma community of the EU, "thus far EU Roma policy has failed to address the complex issues facing Roma owing to inadequate policy interventions"[102] though again France and others,[103] including Italy[104] and Czechia,[105] have been admonished for their own failings of the Roma community. Therefore, while a Canadian-style model that grants competency for law-making

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[96] European Parliamentary Research Service, *Briefing: Regional and minority languages in the European Union* (European Parliament, September 2016), <https://www.europarl.europa.eu/EPRS/EPRS-Briefing-589794-Regional-minority-languages-EU-FINAL.pdf > accessed 1 February 2022

[97] Cristoph Pan and Beate Sibylle Pfeil, *National Minorities in Europe: Handbook, Volume 1* (Braumüller, 2003)

[98] Petra Lea Lancos, "From the Principle of Linguistic Diversity to Enforceable Language Rights in the European Union" (2013) Hungarian Yearbook of International Law and European Law 93

[99] Solange Mouthaan, "The EU and Minority Languages: Missed Opportunities and Double Standards" (2007) 5 Web Journal of Current Legal Issues, <https://www.bailii.org/uk/other/journals/WebJCLI/2007/issue5/mouthaan5 > accessed 10 February 2022

[100] Gavin Radford, "French language law: The attempted ruination of France's linguistic diversity" (2015) Trinity College Law Review Online <https://trinitycollegelawreview.org/attempted-ruination-of-frances-linguistic-diversity/ > accessed 10 February 2022

[101] Clare Mar-Molinero, "The Politics of Language: Spain's Minority Languages" (1994) CLE Working Papers 106

[102] Aidan McGarry, "The dilemma of the European Union's Roma policy" (2012) 32(1) Critical Social Policy 126

[103] Caitlin T Gunthert, "France's Repatriation of Roma: Violation of Fundamental Freedoms?" (2012) 45(1) Cornell International Law Journal 205

[104] Aoife Nolan, "Aggravated Violations, Roma Housing Rights and Forced Expulsions in Italy" (2011) 11(2) Human Rights Law Review 343

[105] Jirina Siklova and Marta Miklusakova, "Denying Citizenship to the Czech Roma" (1998) 7(2) East European Constitutional Law 58

regarding minorities may be preferable to a US-style model that does not account for such cultural diversity, the practical effect of such a system may regrettably not be an improved state of affairs for minorities as well as their languages.

In the main, a general lesson to be learned by a federalist Europe from the US versus Canada and how the Canadian approach to sharing law-making competencies treats cultural integrity and minority groups is that it would arguably be beneficial to place similar emphasis on such matters. Notwithstanding this, such derogation is not likely to be a tangible benefit of a European federalist system for the relevant communities without action to ensure meaningful regard is shown for these matters in national societies and law-making.

Conclusion

There are undoubtedly lessons that Europe may learn from the US by way of its federal system which largely hinges around the US Supreme Court granting significant latitude to the federal government while state governments still vaunt important and notable law-making powers. That said, having analysed the provisions that ground this system and having undergone comparative analyses, the imperfect nature of this US system is duly conceded.

Similarly however, the more limited federal systems of the EU in its current incarnation may also be castigated for their flaws and make for equally, if not more so, a bone of contention in their respective jurisdiction. Ergo, for its notoriety, prominence and longstandingness alone, Europe may find it advantageous to pay due regard to the US system, warts and all, if it were to pursue becoming a fully-fledged, federalised superpower.

In addition, affording attention to the US' neighbours in Canada, the comparative example in this discussion, may also illuminate the European strategy for sharing law-making competencies in a federalist system of the future. In particular, one would assert that lessons from Canada may especially inform European federalisation in respect of cultural integrity and minority groups, as discussed. Hence, while neither the Bill of Rights' or the Canadian Charter's treatment of shared law-making competencies should be treated as a paragon for European federalisation, "do's and don'ts" *per se* may emerge from a thoughtful assessment of the systems that those constitutional provisions underpin.

Regardless, as stated, the creation of a European federalist superpower remains a fairly remote possibility. Accordingly, the ultimate view of this article would be that the federalists likely have time on their side to devise a plan for how Member States and central European lawmakers may eventually, if at all, share law-making competencies in such a vastly revised geopolitical and legal landscape for Europe.

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Wastewater, Fast Fashion and the Water Convention 1992

Alison Ní Riordáin

Water and fast fashion have both become hotly contested topics in modern society in an era when international law has been tasked with responding to many water-related environmental crises. Meanwhile, wastewater exists at the intersection of water and fast fashion with the practices of the fast-fashion industry with respect to wastewater having egregious effects on water systems and in turn, the environment.

Thus far, the Water Convention 1992 has been central to international law on water and wastewater so consequently is the touchstone in law for accountability for fast fashion's practices with regard to wastewater. Having addressed the state-of-play for wastewater and fast fashion generally, this article seeks to then appraise the Convention for both its effectiveness in general and in regard to this particular issue. In assessing the Convention, analysis is undergone of both the text of the document as well as its constituent structures and initiatives and how each is equipped to respond to the particular legal challenges that wastewater and fast fashion present.

Altogether, this article seeks to unite these three converging issues of wastewater, fast fashion and the Convention in order to glean a holistic view of the international legal landscape on which they play out. Accordingly, the culmination of the observations therein is a set of recommendations, based around the existing law, of how international law may be best equipped going forward in relation to these topics.

Wastewater and fast fashion

Introduction and definitions:

Water, the earth's most precious resource, is in peril. This is largely due to human interference affecting water quality and is compounded by the discharge of domestic or industrial wastewater without treatment. Wastewater can be defined as "*any water which has been adversely affected in quality by anthropogenic influence*".[1] Many industries are responsible for the production of wastewater, but the

[1] Cristina Tuser, 'What is wastewater?' (09 January 2020) <https://www.wwdmag.com/wastewater-treatment/what-wastewater
> accessed 9 November 2020.

focus is largely concentrated on the agricultural sector. However, this provides a limited understanding of wastewater production at a global level and hampers an opportunity to recognise other sources and solutions which are necessary to reduce wastewater. One of those sources is the *fast fashion* industry, an industry responsible for 20% of the earth's wastewater annually.[2] Furthermore, there is no cap on water consumption in the industry despite the fact that it takes 2,700 litres to produce one t-shirt which is enough water to sustain a human being for three years.[3]

Wastewater is produced even at the earliest stages of production in the textile industry during cotton cultivation, which requires both the use of water and carcinogenic pesticides. Once cultivated, the cotton is often shipped to factories in developing countries that bleach and dye the fabrics with dangerous, cancer-causing chemicals such as lead, cadmium, chromium and mercury.[4] The textile industry is estimated to use over 15,000 chemicals in its manufacturing processes.[5] This toxic wastewater is often released into rivers and oceans without treatment and causes widespread contamination.

A particularly worrying feature of the vertical disintegration of the supply chain of the fast fashion industry is the global dispersion of production and processes across the globe. The industry relocates strategically to developing countries because of their lenient labour and environmental laws.[6] While many developing countries have national laws explicitly providing for the protection and management of water in industry, high levels of corruption coupled with weak institutions allow textile companies to exploit water resources, without implementing the correct wastewater treatment systems.[7] One illustrative example of this is Cambodia where the fast fashion industry is said to be responsible for 60% of the country's water pollution.[8] Meanwhile, developed countries place elaborate obligations on the textile industry which are set out in national laws. At a European level, industry is even required to pre-treat wastewater before being sent to a wastewater treatment plant to protect the health of those working at the plant.[9] Moreover, the industry even aims for a zero discharge of hazardous chemicals in developed countries.[10]

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2 UNEP, 'Wastewater, sewage and sanitation' <https://www.unenvironment.org/cep/wastewater-sewage-and-sanitation > accessed 10 October 2020.

3 Julie Malone, 'It Takes 2,700 Liters of Water to Make a T-shirt' (06 February 2016) <https://www.triplepundit.com/story/2013/it-takes-2700-liters-water-make-t-shirt/54321 > accessed 9 November 2020.

4 Angel Chang, 'The life cycle of a t-shirt' (5 September 2017) <https://www.youtube.com/watch?v=BiSYoeqb_VY&t=173s > accessed 9 November 2020.

5 Kirsi Niinimäki, Greg Peters, Helena Dahlbo, Patsy Perry, Timo Rissanen, Alison Gwilt, 'The Environmental Price of Fast Fashion' (2020).

6 Bin Shen, 'Sustainable Fashion Supply Chain: Lessons from H&M' (11 September 2014).

7 Maiko Sakamot, Tofayel Ahmed, Salma Begum, Hamidul Huq 'Water Pollution and the Textile Industry in Bangladesh: Flawed Corporate Practices or Restrictive Opportunities?' (2 February 2019).

8 Nikolay Anguelov 'The Dirty Side of the Garment Industry: Fast Fashion and its Negative Impact on Environment and Society' (2015) CRC, Taylor & Francis.

9 Urban Wastewater Treatment Directive 91/271/EEC (European Commission – Environment, 1991).

10 Zero Discharges of Hazardous Chemicals Programme, 'Textile Industry Wastewater Discharge Quality Standards Literature Review Rev1' (2015) <https://uploads-ssl.webflow.com/5c4065f2d6b53e08a1b03de7/5db6f553d5d32793e8e9a653_WastewaterQualityGuidelineLitReview.pdf > accessed 10 November 2020.

Facts and figures:

Water is the most vital resource on the planet.[11] It is the source of drinking water, sanitation and hygiene, while enabling agriculture, industry and recreation. Water contributes to the eradication of poverty through sanitation and hygiene, productivity of land and labour and the provision of affordable food.[12] while the absence of correct wastewater management systems in industry often resulting in waterborne diseases. These diseases include diarrhoeal diseases, schistosomiasis, filariasis, trachoma and intestinal worm infections to skin diseases such as dermatitis.[13] Water pollution also threatens security and stability of ecosystems as the composition of wastewater changes the chemical and biological balance of water, thus threatening fish and other aquatic species.[14] The rise in demand for water in industry has seen the increase of untreated wastewater, which results in the degradation of water quality around the world, such practices negatively impact water availability and sustainable development.[15]

Global governance structures addressing wastewater:

The United Nations Sustainable Development Goal 6 (SDG 6) calls out for "access to water and sanitation for all" with the specific goal of improving water quality by "halving the proportion of untreated wastewater" by 2030.[16] Some noteworthy global governance structures which are tackling the global water crisis are as follows;

1) *UN-Water*:

This interagency group strives to provide clear and coherent data on water related issues and also publishes the *World Water Development Report* every year on World Water Day.[17]

2) *World Bank*:

The world's largest multilateral source of investment, investing in projects relating to water issues.[18] Bangladesh is a hub for garment manufacturing, particularly in Dhaka. The World Bank has committed $170 million to the People's Republic of Bangladesh to finance the Dhaka Sanitation Improvement Project.[19]

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11 Anonymous, 'Water: How can we account for our most vital resource?' (European Environment Agency, 10 May 2012) https://www.eea.europa.eu/highlights/water-how-can-we-account accessed 10 November 2020

12 UN Water, *supra* no.1, 80.

13 World Health Organization, 'WHO Guidelines for the safe use of wastewater, excreta and Greywater' (2006) 4.

14 Sujata Mani , Ram Naresh Bharagava 'Textile Industry Wastewater: Environmental and Health Hazards and Treatment Approaches' (November 2018). <https://www.researchgate.net/publication/328701616_Textile_Industry_Wastewater_Environmental_and_Health_Hazards_and_Treatment_Approaches > accessed 9 November 2020.

15 UN Water, The United Nations World Water Development Report 2017 - Wastewater The Untapped Resource' (2017) <https://reliefweb.int/sites/reliefweb.int/files/resources/247153e.pdf > accessed 10 November 2020.

16 UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) A/RES/70/1.

17 UN Water, 'What we do' <https://www.unwater.org/what-we-do/ > accessed 10 November 2020.

18 The World Bank, 'Water' <https://www.worldbank.org/en/topic/water > accessed 10 November 2020.

19 The World Bank, 'Dhaka Sanitation Improvement Project' <https://projects.worldbank.org/en/projects-operations/project-detail/P161432 > accessed 10 November 2020.

3) *World Water Council*:

This international think tank co-organises the World Water Forum every three years, the world's largest water event which brings together key decision-makers and "global community of water" to establish long term goals on global water challenges.[20]

4) *World Health Organisation (WHO)*:

WHO has delivered a number of important resolutions on drinking water, sanitation and health.[21]

Objective and outline

After a brief discussion of the relevant global normative framework, this paper will assess the suitability of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992 (hereinafter the Water Convention) in tackling wastewater. This will be followed by an examination of how the normative framework is implemented by different global governance structures with a focus on how the Water Convention[22] is implemented. Strengths and weaknesses of both the normative framework and implementation mechanisms will be presented, before concluding the paper with recommendations which aim to reduce the wastewater produced by the textile industry.

Applicable normative framework

Overview of the normative framework which addresses wastewater:

Before turning to the Water Convention in detail, the purpose of this section is to give the reader a brief overview of the applicable normative framework which addresses wastewater globally. General principles of international environmental law have afforded the environment protection for almost a century and include the Polluter Pays Principle (PPP)[23], the precautionary principle[24] and the

[20] World Water Council, 'About us' <https://www.worldwatercouncil.org/en/about-us > accessed 10 November 2020.

[21] The World Health Organization, 'Water, Sanitation and Hygiene WASH' <https://www.who.int/health-topics/water-sanitation-and-hygiene-wash > accessed 10 November 2020.

[22] 1992 UN Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourse and International Lakes concluded in Helsinki which came into force in 1996.

[23] The polluter pays principle is succinctly defined by Judge Weeramantry in the ICJ's Advisory Opinion as "placing on the author of environmental damage the burden of making adequate reparation to those affected". See: Dr. Jorge E. Vinuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) Fordham International Law Journal 247.

[24] The precautionary principle is particularly relevant in regards to wastewater which has evolved from principle 15 of the Rio Declaration and also forms part of the Stockholm Convention on Persistent Organic Pollutants and the Helsinki Convention on the Protection of the Marine Environment. This principle provides that the lack of scientific certainty shall not be used as a reason for not implementing cost effective measures which prevent potential environmental damage.

preventative principle.[25] These principles are supported by a substantial body of case law,[26] the OECD[27] and receive strong support from the European Union.[28] Human rights law linked to water[29] have also protected the environment by incorporation into national constitutions[30] and through soft law instruments.[31] Many leading brands also have internal human rights policies. When these policies are coupled with the monitoring of compliance by NGOs impressive results can be achieved.[32] Furthermore, many multilateral environmental conventions have been concluded at an international level which seek to restrict, reduce or even ban the production, use and trade of certain chemicals with the aim of protecting human health and the environment.[33] Recent wastewater samples with large amounts of perfluorooctane sulfonic acid were found in the Yangtze River Delta and the Pearl River Delta discharged by leading brands such as Adidas and Nike,[34] a chemical which is deemed to be a persistent organic pollutant by the Stockholm Convention.[35] This provides an important tool to insist on the reduction of this pollutant in China, a party to the Convention.

Another important instrument available at international level are guidelines. The WHO has been very active in producing non-binding, albeit influential, wastewater guidelines with a focus on wastewater

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25 The preventative principle ensures early action to be taken to prevent pollution before it happens. First emanating in 1941 in the historical "trial smelter case" of the International (Arbitral) Court. See: European Commission, "Workshop on EU legislation" 2012 available at: <https://ec.europa.eu/environment/legal/law/pdf/principles/9%20Preventive%20and%20Precautionary%20Principles_revised.pdf .>

26 *Supra* no. 1, 246.

27 OECD, 'The Polluter Pays Principle: OECD Analyses and Recommendations' (1992, Paris) <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(92)81&docLanguage=En#:~:text=Under%20the%201972%20and%201974,is%20in%20an%20acceptable%20state%22 > accessed 10 November 2020.

28 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

29 The right to water and sanitation, the right to food, which infers we must use water sustainably, the right to a healthy environment, the rights of indigenous people who maintain a close relationship with natural ecosystems. See: United Nations General Assembly Resolution 64/292 recognises the human right to water and sanitation. The Committee on Economic, Social and Cultural Rights recognises the human right to water under General Comment No. 15. Report of the Secretary General, 'Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (19 July 2018) A/73/188. United Nations Environment Programme, 'Good Practices for Regulating Wastewater Treatment: Legislations, Policies and Standards' (2015) 15.

30 United Nations Environment Programme, 'What are your rights?' <https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what-0 > accessed 10 November.

31 United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights' (2011) HR/PUB/11/04.

32 A recent example of this is Greenpeace's report which exposed the leading brands who were responsible for the pollution of the Citarum River. These brands have since committed to upholding these rights more responsibly. See: Iman Prihandono, Fajri Hayu Religi, 'Business and Human Rights Concerns in the Indonesian Textile Industry' (Yuridika, Vol. 34, September 2019) https://www.researchgate.net/publication/335625747_Business_and_Human_Rights_Concerns_in_the_Indonesian_Textile_Industry accessed 10 November 2020.

33 Stockholm Convention on Persistent Organic Pollutants (POPs); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; Montreal Protocol on Substances that Deplete the Ozone Layer; Minamata Convention on Mercury; Chemical Weapons Convention (CWC); The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; ILO's Chemicals Convention concerning Safety in the use of Chemicals at Work; Strategic Approach to International Chemicals Management (SAICM).

34 Greenpeace, 'Dirty Laundry' (2011) <https://storage.googleapis.com/planet4-international-stateless/2011/07/3da806cc-dirty-laundry-report.pdf > accessed 11 November 2020.

35 Stockholm Convention on Persistent Organic Pollutants (POPs)

produced within the agricultural sector.[36] It would be this author's view that the WHO has failed to highlight the textile industry's devastating effects on human health as a result of wastewater production.

Finally, more than 3,600 international agreements dealing with water-related issues are known.[37] One of those, the Water Convention, will be discussed in detail below.

The Water Convention:

Having briefly addressed the applicable normative framework, the focus now turns to the Water Convention which is serviced by the United Nations Economic Commission for Europe (UNECE). The Water Convention seeks to strengthen international cooperation for ecologically sound management and protection of transboundary surface waters and groundwaters, facilitating the achievement of SDG 6. The Water Convention began as a regional instrument but is open to accession to all United Nations Member States since 2016. The accession of developing countries to the Water Convention, namely; Chad (2018), Senegal (2018) and Ghana (2020) is promising for the strengthening of the rule of law in transboundary water cooperation worldwide.[38] By acceding to the Water Convention, developing countries can benefit from the instrument by developing a predictable relationship with riparian states but also from the experience to date of the Water Convention, including its guidance documents, activities and projects on the ground. One of these projects is the National Policy Dialogues which have taken place since 2006 under the European Union Water Initiative which is co-led by the UNECE. This initiative has driven water sector reforms which modernise legal and institutional frameworks to improve water quality in ten countries including in Eastern Europe, the Caucasus and Central Asia.[39] Developing countries can also raise finance of water management through the Water Convention's national and international donors. In fact, the Convention aims to increase collaboration with financial institutions, such as the World Bank, under its Programme of Work for 2019-2021.[40] Furthermore, the accession to the Water Convention acts as a signal of a state's willingness to cooperate on the basis of standards and norms under the Convention, which strengthens the developing country's reputation and credibility at a global level.[41]

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[36] These guidelines include 'Guidelines for drinking water quality', 'Guidelines for sanitation and health', 'Guidelines for safe use of wastewater, excreta and greywater' and 'Guidelines for safe recreational water environments' which influence the development of policy, procedure and regulatory frameworks at a national level. The third edition of 'Guidelines for safe use of wastewater, excreta and greywater' published in 2006 featured a volume aimed at wastewater produced within the agricultural sector and as a result has been receiving a lot more attention from decision-makers.

[37] Sergei Vinogrador, Patricia Wonters, Particia Jones, "Transforming Potential Conflict into Cooperation Potential: The role of international water law" PCCP Publications 2001-2003.

[38] UNECE, 'Frequently asked questions on the 1992 Water Convention with the Road map to facilitate accession processes' (2020) Geneva, preface.

[39] Economic Commission for Europe, 'Report of the Meeting of the Parties on its ninth session' UN Economic and Social Council (8 March 2022) <https://unece.org/sites/default/files/2022-03/ECE_MP.WAT_63_Add.1_advance%20copy%20web.pdf >

[40] ibid

[41] *supra* no.39, 3.

Moreover, it should be noted that the Water Convention is supplemented by two Protocols; the 1999 Protocol on Water and Health and the 2003 Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters. Critically, accession to the Convention does not imply accession to the Protocols. The 1999 Protocol is not open for accession to regions outside of UNECE regions.[42] Despite not having reached the minimum number of ratifications, the 2003 Protocol would allow for recourse to adequate and prompt compensation for individuals affected by industrial accidents.[43] The Protocol also incorporates liability for damage to property,[44] liability for response[45] and reinstatement[46] measures of impaired transboundary waters as result of an industrial accident. 'Industrial accident' is defined in the Protocol as "*an event resulting from an uncontrolled development in the course of a hazardous activity*."[47] It may be suggested that long-standing poor standards in the textile industry is not within the remit of such a precise and narrow definition. However, the willingness of certain states to be bound by such a Protocol provides food-for-thought when drafting future Protocols, which may entail liability for companies who fail to abide by these international standards.

Furthermore, by way of structure, a preamble opens the Water Convention recognising the need for sustainable water management and highlighting the importance of reducing the use of hazardous chemicals and their release into aquatic environments.[48] The Convention is then divided into three parts (Part I; Articles 2-8, Part II; Articles 9-16 and Part III; Articles 17-28) concluded by annex I-IV.

The Convention follows a three-pillar normative structure;

a) the "no harm rule" i.e., the due diligence obligation to prevent, control and reduce significant transboundary impact;
b) the equitable and reasonable utilization principle and;
c) the principle of cooperation.[49]

The principle of cooperation acts as a "catalyst for the realisation of the prior two."[50] These objectives are to be achieved through a two-tiered approach.[51] The first category of objectives are laid out in Part I of the Convention, which are more general and apply to all parties to the treaty, whereas Part II of the Convention contains more specific obligations and are thus implemented by the conclusion of

42 *supra* no.37, 20.
43 The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, Article 4 <https://treaties.un.org/doc/Treaties/2003/05/20030521%2002-09%20PM/Ch_XXVII_16p.pdf >
44 ibid Article 2 (2)(d)(ii).
45 ibid Article 2(2)(v).
46 ibid Article 2(2)(iv).
47 ibid Article 2(e).
48 *supra* no.22, preamble.
49 UNECE, "The Global Opening of the 1992 Water Convention" (2013) 13.
50 ibid
51 ibid

further agreements of riparian states who share the same transboundary water.[52] It must also be noted that the Convention addresses both water quality and quantity issues; the equitable and reasonable utilization principle is a cornerstone pillar on how both of these issues should be addressed. In fact, water allocation is being examined under the Convention between 2019-2021 by an expert group, with the aim of creating a soft law instrument that will govern the equitable and sustainable allocation of water resources.[53]

Article 2 of the Convention encompasses the due diligence nature of the obligation to prevent, control and reduce significant transboundary impact. Parties to the Convention are required to take "all appropriate measures" to implement this obligation.[54] In taking these measures, the states are to be guided by the precautionary principle, the PPP and the fact that water resources are to be managed in such a way that facilitates sustainable development.[55] Water management essentially should be organised to ensure that future generations are not compromised and that their needs will be met, while meeting current needs. Article 2 (2)(c) stipulates that transboundary waters are to be used in a reasonable and equitable way with particular regard to activities which may prove to have harmful effects on such waters.[56] The principle of cooperation, laid out in Article 2 (6), provides that such cooperation shall be based on equality particularly those who have suffered the environmental impacts of the textile industry, ought to be called into question.

On its face, Article 2 does not seem to consider the position of developing countries who often lack good governance and strong institutions, who have defective patterns of industrialisation and processes therein, who experience corruption, social disparity, poverty and inequality. Developing countries often lack either the capacity or the political will to successfully implement multilateral environmental agreements and this has indeed led to the failure of implementation of many treaties.[57] Bangladesh, for example, has signed many conventions relating to the environment.[58] Yet, the annual water footprint remains at around 1.8 billion m^3.[59] The Convention is of a "due diligence" nature, meaning that the level of implementation expected of the country in question is proportionate to its capacity.[60] The Convention should therefore be read in light of the due diligence nature which are attached to the

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52 ibid 13.
53 *supra* no.39, 32.
54 Water Convention 1992 Article 2(2)
55 *supra* no. 22, Article 5(a), 5(b) and 5(c).
56 *supra* no. 22, Article 2(2)(c).
57 Shamim Hosen, 'Implementation of United Nations Conventions on Environment and Development in Bangladesh' (2014).
58 M. Z. Ashraful, Application of the Principles of International Environmental Law in the domestic legal System of Bangladesh: A Critical Study on the legal framework and the position of judiciary' (May 2014) Journal Of Humanities And Social Science, 20.
59 Laila Hossain and Mohidus Samad Khan, 'Water Footprint Management for Sustainable Growth in the Bangladesh Apparel Sector' (4 October 2020).
60 UNECE, 'The Water Convention: Responding to global water challenges' (2018) 5 <https://www.unece.org/fileadmin/DAM/env/water/publications/brochure/Brochures_Leaflets/A4_trifold_en_web_2018.pdf > accessed 11 November 2020.

obligations. The flexibility afforded to countries affected by the textile industry is promising as the Convention adapts itself to local circumstances. Furthermore, the rules and tools can be used as means to secure water-related investments.

Article 3 elaborates on the "no harm principle," obliging parties to develop, adopt, implement and render compatible relevant legal, administrative, economic, financial and technical measures that prevent, control and reduce transboundary.[61] Of particular relevance to the textile industry, the Article stipulates the requirement for the protection of waters against pollution, from point sources through the prior licensing of waste-water discharges by the competent national authorities, and that the authorized discharges are monitored and controlled.[62] In addition it has been further stipulated that appropriate measures and best environmental practices are developed and implemented for the reduction of hazardous substances from diffuse sources.[63]

Annex II of the Convention sets out further guidelines for establishing best environmental practices which include; making information available to the consumer as to the environmental consequences of products,[64] developing good codes of practice for all aspects of the products life[65] and the use of labels to inform consumers as to environmental risks of products.[66] Furthermore, in determining what constitutes "best practice" states should be mindful of the product, its production, use and disposal.[67]

Article 3(2) sets out a further obligation of interest in the context of the textile industry; parties are required to set emission limits for discharges from point sources into surface waters based on the best available technology, which are specifically applicable to individual industrial sectors or industries from which hazardous substances derive.[68] Further codification of international customary law, namely the preventative principle is included, emphasising that all measures must be taken to prevent potential harm to another watercourse state. This means taking measures before damage is done which is often difficult and expensive to remedy, as exemplified by the estimated 349 million m^3 of wastewater that is predicted to be produced by textile factories in Bangladesh in 2021.[69] This is indeed why suitable regulatory frameworks exist at national level that address wastewater production, disposal and management of textile industries. It is this author's view that the preventative principle is key when addressing environmental issues as it allows for a more flexible and incremental approach, taking the industry's specific needs into account.

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61 Water Convention 1992 Art 3(1)
62 *supra* no.22, Article 3(b).
63 ibid, Article 3(g).
64 *supra no.22,* Annex II 1 (a).
65 ibid, Annex II 1 (b).
66 ibid, Annex II 1 (c).
67 ibid, Annex II 2 (a) (i-iv).
68 ibid, Article 3(2).
69 Maiko Sakamoto, Tofayel Ahmed, Salma Begum and Hamidul Huq, 'Water Pollution and the Textile Industry in Bangladesh: Flawed Corporate Practices or Restrictive Opportunities?' (April 2019).

Thereafter, Article 4 provides for monitoring, Article 5 for research and development and Article 6 for the exchange of information. These articles contribute to the "umbrella nature" of the Convention, manifested in its institutional framework, allowing individual countries with specific situations and needs to benefit through participation of these consultative obligations.[70] While the Convention is based on and aligned with customary international law however it exceeds this standard by specifying and developing key obligations deriving from the principle of cooperation.[71] It may be submitted that these aspects of the Convention may prove to be particularly beneficial tools for states in the context of the fast fashion industry, whereby the supply chain spreads across the globe. By identifying the different stages of this complex supply chain, countries could share their expertise on the matter and ensure that all sources of pollution, including fast fashion, are addressed.

As previously noted, Part II of the Convention is much more specific and is addressed to riparian states i.e., parties to the Convention which share the same transboundary waters. Article 9 sets out the provisions that deal with bilateral and multilateral cooperation and obliges riparian states to enter into further agreements or arrangements. Other parties to the Convention, i.e., non-riparian states do not share this same obligation. Negotiations of such agreements are facilitated under the Convention in a neutral manner, mindful that the legal and institutional cooperation on transboundary watercourses evolves gradually.[72] Part II of the Convention also sets out the obligations of riparian states with other riparian states. These states must hold consultations,[73] establish joint monitoring and assessment programmes,[74] participate in common research and development,[75] exchange information,[76] create warning and alarm systems to communicate and cooperate during critical transboundary water situations,[77] provide mutual assistance to one another[78] and make information available to the public.[79] As riparian states are obliged to enter into further bilateral and multilateral agreements or arrangements, these states must establish joint bodies as an institutional roof for over these agreements.[80] Finally, Part III sets out the institutional and final provisions of the Convention. To that effect, the institutional framework of the Convention shall be discussed in more detail below.

Implementation and enforcement mechanisms

Overview of global governance structures tackling wastewater:

As provided for with the normative framework, an overview of some important implementation

70 *supra* at no. 38, 20.
71 *supra* at no. 37, 20.
72 ibid, 36.
73 *supra* at no.22, Article 10.
74 ibid, Article 11.
75 ibid, Article 12.
76 ibid, Article 13.
77 ibid, Article 14.
78 ibid, Article 15.
79 ibid, Article 16.
80 ibid, Article 9 (2).

activities conducted by the United Nations Environmental Programme (UNEP) and the Alliance for Sustainable Fashion will be explored, before focusing on the implementation and enforcement of the Water Convention.

A key achievement of the UNEP has been the facilitation of the Global Wastewater Initiative (hereinafter GW²I) which seeks to bring key voluntary stakeholders into partnerships including governments, intergovernmental agencies, academia, the private sector and civil society with their common goals of synchronised action, encouraging investments, developing coordination and cooperation and identifying and fostering opportunities which can be applied or improved by different countries in the field of wastewater.[81] The Partnership seeks to address a "pervasive lack of data"[82] in developing countries and provide them with technical support. Imperatively, the Partnership has developed tools such as the SDG Policy Support System (SDG-PSS) which translates data into "fit-for-policy" evidence,[83] which one may submit as readily applicable to the fast fashion industry.

The recent development of the UN Alliance for Sustainable Fashion, which was launched in 2019 should also be noted. This Alliance consists of ten United Nations organisations who seek to address the environmental harm caused by the fashion industry by engaging with key stakeholders in the industry by conducting activities, sharing information, harmonising synergies between existing initiatives and promoting advocacy.[84] The fruits of the Alliance's labour are yet to be seen, however, the proliferation of new political actors such as NGOs, MNCs and other international institutions has brought about a great deal of overlapping of responsibilities in response to the fast fashion industry's environmental impact. It is argued that a strong centralised approach, vesting all the powers within one institution, runs against the flexibility and diversity needed when addressing environmental issues, which are largely contextual in their nature.[85] The Alliance's institutional model of decentralised, multi-level governance may prove to be a more suitable model to accommodate the complexities that arise within the fast fashion industry.

The various activities discussed are submitted as prime examples of the advocacy, awareness building and "all hands on deck" approach that is key when dealing with a complex, multi-jurisdictional issue. Indeed, this translates into collaborative action on a global level; textile companies taking matters into

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81 United Nations Environment Programme, 'Global Wastewater Initiative GW²I - what we do' <https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/addressing-land-based-pollution/global-wastewater-initiative > accessed 27 October 2020.

82 ibid no. 10, 7.

83 Eunhae Joeng and Guillaume Baggion, *SDG 6 Policy Support System*, Regional Workshop, 3-4 July 2019, Tunis, Tunisia <https://unosd.un.org/events/2019-workshop-using-sdg-6-policy-support-system-sdg-pss-facilitate-countries-africa-and > accessed 12 November 2020.

84 UN Alliance for Fashion, 'What is the UN Alliance for Sustainable Fashion?' https://unfashionalliance.org/ accessed 10 November 2020.

85 Peter M. Haas, 'Addressing the Global Governance Deficit' (2003) <https://kb.osu.edu/bitstream/handle/1811/31977/Global%20Governance%20Deficit.pdf > accessed 10 November 2020.

their own hands and initiating "pacts" such as the Fashion Pact, a global coalition of companies in the fashion industry all committed to various environmental goals. The most recent Fashion Pact report has even found that Adidas aims to reduce its water usage and waste by 20% by the end of 2020.[86] Towards how progress may be made on this issue, the willingness of brands to partake in such initiatives is certainly a positive sign for the future of the United Nations Alliance for Sustainable Fashion which could unite key stakeholders and governments in cleaning up the industry.

Implementation and enforcement of the Water Convention

An important feature of the Convention's institutional structure is the Meeting of the Parties which was established to support the Convention's implementation and is the highest decision- making body of the Convention.[87] The Meeting of the Parties is an intergovernmental platform which comprises all parties to the Convention however, other States as well as intergovernmental and non-governmental organisations may participate as observers. The mandate of the Meeting of the Parties is to ensure implementation of the Convention and sets out a three year working plan by consensus.[88] The Meeting of the Parties therefore allows for constant review of the parties' implementation of the Convention and have scope to promulgate parties who fail to issue timely reports.[89] The exertion of political pressure is an important tool for ensuring continuous compliance by the parties but also allows for further political cooperation by the parties. The Meeting of the Parties also establishes working and subsidiary bodies who receive a clear mandate and implement the activities which are set out in the Working Plan of the parties. Such bodies include the Working Group on Integrated Water Resources Management, the Implementation Committee, the Legal Board and the Task Force on Water and Climate.[90] The set-up of these bodies change depending on the programme of work of the Convention, which allows for both flexibility and responsiveness to changing needs.

The implementation of the Water Convention is largely facilitated by the Implementation Committee which consists of nine members nominated and elected by the Meeting of the Parties, who act in a personal capacity and not as a representative of their country.[91] These members are qualified lawyers and water experts who meet twice a year in an open and transparent manner. The role of the Committee is twofold; providing practical case-oriented assistance and facilitating dispute prevention.[92] When

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86 The Fashion Pact, 'First steps to transform our industry' <https://thefashionpact.org/wp-content/uploads/2020/10/038906e111abca13dce4c77d419e4f21.pdf > accessed 11 November 2020.

87 *supra* no. 53, 6.

88 UNECE, 'Meeting of the Parties' <https://www.unece.org/env/eia/mop.html > accessed 4 December 2020.

89 Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context serving as the Meeting of the Parties to the Protocol on Strategic Environmental Assessment, Minsk 13-16 June 2017, ECE/MP.EIA/23/Add.2–ECE/MP.EIA/SEA/7/Add.2 see; Decision VII/1 paragraph 3(h) and 5.

90 *supra* no.37, 47.

91 Economic Commission for Europe, 'Report of the Implementation Committee to the Meeting of the Parties and draft decision on general issues of implementation' (2021) <https://unece.org/sites/default/files/2021-07/ECE_MP.WAT_2021_5_ENG.pdf .> accessed 9 January 2022

92 *supra* no. 37, 47.

acceding to the Water Convention, states are encouraged to establish an implementation plan in order to demonstrate their commitment to the Convention,[93] with the support of the committee if needed. Furthermore, the Committee assists states in negotiating bilateral and multilateral agreements into which riparian states are obliged to enter. An advisory procedure is available to states under the Convention based on the initiative of a Party or Parties. This procedure is available to those who have difficulty in implementing the Convention or are faced with difficult water management issues and can seek the advice and the assistance of the Committee. The Committee is available to answer all implementation questions and this is done through a supportive and non-adversarial procedure, rather than "punishing" states and ensures assistance at an early stage.[94] The Committee can also receive Party-to-Party submissions, or take a 'Committee initiative' when it becomes aware of possible difficulties of implementation and compliance and seek advice and specialised support.[95] When necessary, the Meeting of the Parties may decide to issue a statement of concern, a declaration of non-compliance or a caution of suspension of the special rights and privileges afforded to Parties upon recommendation of the Committee. However, this has not yet occurred under the Convention.[96]

A regular reporting mechanism was also established in 2015 through decision VII/2 at the 7th session of the Meeting of the Parties to further contribute to the implementation of the Convention. The UNECE and UNESCO reporting exercises coupled together, allow for synergy and efficiency by providing an in-depth analysis of transboundary cooperation.[97] The aim of the reporting mechanism is to enhance cooperation, to inform the public about measures which have been taken to implement the Water Convention, to identify the needs of parties to support mobilisation of resources (capacity-building and technical assistance), to identify emerging environmental issues and to facilitate the exchange of lessons learned to enhance the implementation of the Water Convention. The reporting mechanism requests states to submit reports every three years based on the adopted reporting template.[98] The UNECE's guide to reporting encourages states to substantiate their responses but this is not a requirement. The guide also encourages states to report in a consultative manner, engaging with stakeholders in the reporting process but this is not currently mandatory.[99] Therefore, one could suggest that clear efforts are underway to establish frameworks for accountability under the Water Convention in this regard.

The Convention provides that if a dispute arises about the interpretation of the Convention or its

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93 ibid, 45
94 *supra* no. 38, 59
95 ibid, 47.
96 ibid, 46.
97 UNECE, 'Reporting under the Water Convention and SDG indicator 6.5.2' <https://www.unece.org/water/transboundary_water_cooperation_reporting.html > accessed 11 November 2020.
98 Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 'Reporting under the Convention' Decision VIII/1.
99 UNECE, 'Guide to reporting under the Water Convention and as a contribution to SDG indicator 6.5.2' (2020) <https://www.unece.org/fileadmin/DAM/env/water/publications/WAT_60/GuideToReporting_WatConv-SDG652_ENG_web.pdf > accessed 11 November 2020.

application that those parties shall seek a solution through negotiation or any other means of dispute settlement.[100] When disputes cannot be resolved by negotiation, an 'opt in' is available to parties for compulsory arbitration or adjudication by the International Court of Justice.[101] Therefore, there is no obligation to settle disputes through the ICJ or arbitration. Without prejudice to Article 22 of the Convention, the Implementation Committee has established a mechanism which supports the settlement of disputes outside of the ICJ or arbitration. This mechanism is more conciliatory than adversarial and does not affect the right of the parties to proceed with traditional methods of dispute settlement, such as under the ICJ or arbitration.[102]

Is the Water Convention fit-for-purpose?

Having analysed the frameworks surrounding wastewater and having undergone assessments of the Water Convention and its associated structures, it may be suggested that the system which governs wastewater at a global level remains fragmented. The effectiveness of the discussed provisions is dependent on the circumstances of each state. Insofar as many nations are constantly fighting a losing battle to economic interests, the PPP remains ineffective as weak enforcement allows factory owners the choice of paying a menial fine, rather than installing the correct wastewater treatment systems.[103] Bangladesh, an adoptee of the PPP system, may be cited as an example of its inadequacy.[104]

Furthermore, the "naming and shaming" of leading brands has led to increased transparency in supply-chains[105,] but this is often after the environmental damage has already been done. Unfortunately, organisations including the WHO, the UNEP and the UN Alliance for Sustainable Fashion all remain rather limited in their effectiveness. That said, the UNEP has proven that its strengths lie in the ability to monitor and assess wastewater and to raise awareness and provide early warning. While the importance of the activities cannot be underscored, the UNEP is more broadly obstructed by its lack of financial resources[106] and as a result has not delivered tangible solutions. Nevertheless, to its credit, a possible strength of the newly formed UN Alliance for Sustainable Fashion could very well lie in its institutional structure of multilevel and decentralised governance which some theorists argue are the best designed institutions to deal with complex, multijurisdictional environmental issues however these benefits are yet to be see.[107].

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[100] *supra* at no. 22, Article 22.
[101] ibid.
[102] UNECE, The role of the UNECE Water Convention, Implementation Committee (2015)
[103] Sakamot *supra* no.7, 3
[104] The Bangladesh Environmental Conservation Act 1995, Article 7.
[105] Iman Prihandono, Fajri Hayu Religi, 'Business and Human Rights Concerns in the Indonesian Textile Industry' (Yuridika, Vol. 34, September 2019) 504https://www.researchgate.net/publication/335625747_Business_and_Human_Rights_Concerns_in_the_Indonesian_Textile_Industry accessed 10 November 2020.
[106] David L. Downie and Marc A. Levy 'The United Nations Environment Programme at a Turning Point' pp. 355-377 in Pamela Chasek, ed. *The Global Environment in the 21st Century: Prospects for International Cooperation.* (Tokyo, 2000, UNU Press).
[107] Haas, *supra* no. 74, 7.

The elevation of the Water Convention from regional to global scope thus allowing accession for all United Nations Members is to be applauded.[108] This inclusive expansion, coupled with the "due diligence" nature of the Convention, renders the Convention an attractive instrument in respect of wastewater, especially for developing countries. Furthermore, the Water Convention is a powerful tool in providing clear parameters of international water law for parties.[109] It is also strengthened by its Protocols, one of which provide a basis for civil liability in the context of industrial accidents. Admittedly, it is unlikely that the Protocol of 2003 could pave the way for liability in the context of malpractice by the textile industry. It may be contended that it would be advisable for future revisions of the Convention to specifically address the textile industry in order to refine this area of the law. Nonetheless, the inception of the Convention indicates willingness by states to be bound to further Protocols and their commitment to cooperation on water-related issues. In the meantime, one can only speculate as to what protocols on wastewater and specific rules for the textile industry may lay ahead.

In contrast to the Convention on the Law of the Non-navigational Uses of International Watercourses 1997, the Water Convention obliges riparian States to enter into further agreements and arrangements and provides an institutional roof for such agreements under joint bodies[110]. This allows for a decentralised approach, which considers specific needs at a regional level. At a European level eleven joint bodies have been created under the Convention,[111] some of which have been tasked with detecting pollution sources[112]. Such work may be observed by the International Commission for the Protection of the Danube River, in the creation of an 'Emission Inventory' in 2002 which considers point and diffuse sources of pollution in the Danube.[113] This allows for the constant growth and development of the Convention and to address specific needs of different basins.

Moreover, additional strengths of the Convention include the institutional Implementation Committee structure which provides tailor-made implementation plans for parties upon accession. The competence and capacity of the Committee is to be commended, consisting of both legal and scientific experts. The Committee can hear individual concerns and Party-to-Party complaints but also can take its own initiative if it becomes aware of difficulty in implementing the Convention. While this process is largely non-adversarial, the Committee is empowered to make a recommendation to the Meeting of the Parties to suspend certain rights and privileges of parties who do not comply with the Convention. However, this power may prove to be quite weak in reality insofar as the ultimate decision lies with the Meeting of the Parties who may be influenced politically. The dispute resolution mechanism under

[108] UNECE, 'About the UNECE Water Convention' <https://www.unece.org/env/water/text/text.html > 5 December 2020.
[109] *supra* no.22, Annex II.
[110] *supra* no. 37, 23.
[111] UNECE, 'Cooperation through joint bodies' <http://www.unece.org/env/water/partnership/part63.html > accessed 5 December 2020.
[112] *supra* no.22, Article 9 2(b).
[113] ICPDR, 'Water Pollution' <https://www.icpdr.org/main/issues/water-pollution > accessed 5 December 2020.

the Implementation Committee is another weakness of the Convention given that it is conciliatory in nature and cannot bind parties to a decision. While parties may also settle disputes in a more traditional manner through arbitration or in the ICJ, this is an opt-in provision and is not compulsory.

The newly established regular reporting mechanism may be characterised as a further weakness of the Water Convention. A comparative analysis with several human rights treaties which use reporting as a compliance mechanism is illustrative of the point[114]. Wider consultations with the public are not obligatory, allowing for a possible narrow representation of a state's compliance with the Convention to be formulated. Furthermore, the self-reporting nature of the Convention may prove to be problematic, given the obvious absence of impartiality. These criticisms are heightened by the non-obligatory nature of the reporting, combined lack of a definite follow up procedure with the state. Conversely, these reports are made available on the UNECE's website which may be deemed as a strength of this implementation mechanism.[115] The publicity of the reports may induce state compliance in an effort to save face on the international stage.

The crowning jewel of the Convention is the Meeting of the Parties which ensures continuous implementation of the Convention. The effectiveness of the group is bolstered by a certain level of political pressure that exists between the parties and their ability to suspend rights and privileges of those who are non-compliant. Furthermore, the Meeting of the Parties is empowered to create subsidiary bodies which respond to the specific needs of the Working Plan. This allows for a great deal of flexibility to respond to emerging water-related problems and allow for tailored plans. The Working Group on Development was established in 2004 which reviews developments of legal instruments in other international forums. This subsidiary body drafted a revised Annex I in 2012 to bring the Convention in line with the UN's Globally Harmonised System of Classification and Labelling of Chemicals and to maintain consistency with corresponding EU legislation[116]. It may be evaluated that such a development is a positive step towards effective global water management.

In short, while the Water Convention may be lauded for some commendable work, it may be difficult to conclude that it is entirely "fit-for-purpose" until certain barriers to its effectiveness in terms of finance, bureaucracy and political will are removed.

Recommendations

The fragmented system that governs wastewater urgently needs to be revised as the resource is becoming increasingly scarce, due in part to a poorly regulated textile industry. The complex and sophisticated

[114] Rhona K. M. Smith, *International Human Rights Law*, (Oxford, 2020, 9th edition) 144, 145.
[115] *supra* no. 58, para 14.
[116] UNECE, 'Working Group on Development' <>https://www.unece.org/env/teia/wgdevelopment.html accessed 5 December 2020.

organisation of supply chains across the globe has rendered many legal instruments unsuitable in finding the textile industry liable for the great deal of environmental destruction. Nevertheless, the Water Convention is an important contribution to the rule of law on transboundary water resources and therefore considerations should be given to strengthening the normative framework and institutional structures. On the basis of the above findings the following recommendations may be considered;

A strong executive body is necessary to monitor implementation of the Convention. The Implementation Committee currently has a mere advisory role, maintaining ultimate state autonomy, with little scope for mandatory disclosures to the Committee. Therefore, it is submitted that this mechanism should be strengthened by follow-up procedures such as a punishment mechanism (fines). The Implementation Committee can currently issue a recommendation to the Meeting of the Parties to withdraw special rights and privileges of non-compliant states. However, as previously considered, the Meeting of the Parties may be influenced politically by its decision not to punish a non-compliant state. Thus, it is recommended to change the voting procedure from voting by consensus to simple majority.

In addition, one may also argue that the reporting should also be obligatory under the Convention. While admittedly, the first reporting pilot exercise in 2015 saw 38 out of 40 states respond to the request,[117] there is always a risk that shifts in attitudes could potentially result in weaker participation at some point in the future, should reporting only be "requested" of them. Additionally, more stringent reporting procedures should be laid out under the Convention such as substantiating reports with data or the requirement to consult with a variety of stakeholders. This would act as a counterbalance to the lack of transparency and impartiality that is inherent to self-reporting. Furthermore, considerations should be given to the follow up mechanism to reports in order to give it the necessary bite to ensure compliance. For instance, a potential viable option could be the imposition of sanctions upon non-compliant states. As discussed, a large number of actors are tackling wastewater and accordingly, the Meeting of the Parties could establish a subsidiary body mandated to oversee coordination of the activities which are undertaken by other international organisations to ensure that activities and efforts do not unduly overlap.

While the Meeting of the Parties has been forthcoming with establishing Protocols which supplement the Convention, notable omissions remain. Namely, there are no specific rules that pertain to liability for industries who continue to ignore recognised international wastewater treatment standards by strategically moving their subsidiary companies into developing countries. Therefore, it is recommended that consideration should be given to develop a protocol which addresses this legal lacuna. Developing a Protocol which includes the "real seat" theory[118] could pave the way for liability for many leading

[117] UNECE, 'Reporting under the Water Convention and SDG indicator 6.5.2' <http://www.unece.org/water/transboundary_water_cooperation_reporting.html > accessed 10 November 2020.
[118] Werner F Ebke, "The Real Seat Doctrine in the Conflict of Corporate Laws" (2002) 36(3) International Lawyer 1015

brands under domestic laws which escape liability by having their "real seat" of production line on a foreign territory. Considerations could also be given to developing protocols which are industry specific and put a cap on the allocation of resources in order to reduce water consumption.

Finally, the Implementation Committee occupies both an executive and judicial role. The dispute settlement resolution mechanism which has been established under the Convention is an advisory procedure rather than adversarial. Though settling matters through consultation is certainly preferred, a strong judicial remedy should be available to Convention signatories. One may suggest the removal of the 'opt-in' clause to settle matters in the ICJ or by way of arbitration and decide on compulsory jurisdiction for all Parties to the Convention. Alternatively, an independent judicial body may be set up under the Convention that hears both party-to-party disputes as well as individual complaints against industry. This would provide additional pressures particularly from the fast-fashion industry. The judicial body could work similarly to the appellate body of the World Trade Organisation which has successfully adjudicated on 597 cases since its establishment in 1995.[119] The judicial body could adopt reports by panels adjudicating on disputes which could be appealed which are adopted by negative consensus. Appeals could be referred to the Appellate body which would ensure legal certainty and recourse.[120]

To conclude, the possible recommendations that can be made in respect of the Water Convention and it addresses wastewater as well as the fast fashion industry are broad and far-reaching. Essentially however, a more obligations-based and industry-tailored approach may, as outlined, result in vast improvements in the Convention's effectiveness in this area and in turn significantly reduce fast fashion's environmental footprint.

[119] WTO, 'Appellate Body' <https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm ?> accessed 4 December 2020.
[120] ibid

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Hate Crime: A critical analysis into whether an evidence-based approach is best in determining what groups are afforded protection in hate crime legislation

Kate O'Donovan

Abstract:

The debate over what forms of different groups are afforded protection within hate crime legislation has become increasingly contentious. This article evaluates the recent law reform developments within the jurisdictions of Scotland, England and Wales and Northern Ireland endeavouring to create an objective, evidence-based test in the determination of protected characteristics. It argues that such a test is challenging to apply universally, especially within Ireland, which lacks adequate police records and victimisation studies. This article maintains that while an evidence-based approach is favoured, to ensure that policy is effective, such legislation needs to be coherent and precise with clear guidelines setting out what constitutes sufficient evidence. In the absence of legislation, it is imperative that training is provided, and data is collected on hate-related crimes to ensure effective, evidence-driven policy.

Introduction

There are two central approaches in the determination of what groups are afforded protection in hate crime legislation: a theoretical approach and an evidence-based approach. The primary focus of this article is on the recent attempts of the legislature to move towards a more objective, evidence-based approach, However, the various theoretical approaches that endeavour to justify the inclusion and exclusion of different groups will also be examined along with the issues that arise with a number of these approaches.

The reviews conducted in Scotland, England and Wales and Northern Ireland will be evaluated as they illustrate a recent drive towards attempts to create an objective test in determining the inclusion of characteristics. The argument will be presented that there is a lack of clarity in all three reviews in determining what constitutes sufficient evidence and furthermore, a critique will be made of how certain characteristics are chosen for inclusion and justified retrospectively.

The approach taken to gender will be assessed, and an attempt will be made to understand this

characteristic in the context of the tests set out. The way in which each review defines gender and the application of their objective test to this characteristic will be outlined. Furthermore, the inclusion of protected characteristics in an Irish framework will be explored and the issues arising in relation to the application of an evidence-based test, considering the dearth of victimisation studies and recording of hate crimes.

Finally, the most appropriate approach that should be taken will be outlined. The argument will be presented that an evidence-based approach should be adopted. It is challenging to be truly objective when it comes to hate crime legislation and thus it is vital that whatever test is developed should be precise and coherent with clear guidelines on what constitutes sufficient evidence. It will be argued that there exists a lack of understanding of the hate element and the characteristics affected amongst the Gardaí and thus, in the absence of legislation, it is essential that adequate training is provided to create a collective understanding. This will aid in identifying the prevalence and severity of such crimes nationally and will create more effective, empirically driven policy.

Part A: Theoretical Approaches to Determining Protected Characteristics:

In the absence of a universal definition of hate crime, the work of Barbara Perry in defining the concept has gained the most support.[1] Perry contends that hate crime:

> *"involves acts of violence and intimidation, usually directed towards already stigmatised and marginalised groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order".*[2]

Mohamad Al Hakim[3] has noted that victims of hate crimes are distinct from those of 'ordinary crimes' because the selection of victims is based on *what* they are and not *who* they are. Academics have provided various rationales in endeavouring to justify the inclusion of certain characteristics and these debates over what forms of difference are deserving of protection have become increasingly contentious and complicated in recent years.[4]

Schweppe notes that historically, hate crime statutes have not been created out of an evidence-based objective approach, but as a result of political lobbying by interest groups.[5] Characteristics considered

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1 Neil Chakraborti and Jon Garland, 'Reconceptualizing hate crime victimization through the lens of vulnerability and 'difference' (2012) 16(4) Theoretical Criminology 499.

2 Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Psychology Press 2001), 10.

3 Mohamad Al-Hakim, 'Making a home for the homeless in hate crime legislation' (2014) 30(10) Journal of Interpersonal Violence, 1759 (emphasis added).

4 Gail Mason, 'Victim attributes in hate crime law: Difference and the politics of justice' (2014) 54(2) British Journal of Criminology 161.

5 Jennifer Schweppe, 'Defining Characteristics and Politicising Victims: A Legal Perspective' (2012) 10(1) Journal of Hate Studies 173.

worthy of legislative protection have been minority groups that have suffered oppression, with the existence of political backing and a persuasive social movement.[6] It is important therefore, to pose the question as to whether there are other groups without access to these resources that allow them to be afforded such protection.[7] Determining which victim groups should be protected by legislation is a highly problematic process and, while it is clear that there are a plethora of theories as to how the legislature should determine what groups are to be protected, in practice, this process is not as objective as it should be.[8]

Mutability:

A focus on characteristics which are so fundamental as to be 'immutable'[9] raises issues with regards to religion. Schweppe notes that it would be imprudent for a legislature to suggest that religion is mutable.[10] An approach that could avoid this problem is to include characteristics that are considered fundamental to personal identity, thereby including the protection of religious belief. However, this has also been criticised as being over-inclusive as a person may assert that their wealth is core to their identity.[11]

Vulnerability:

Chakraborti and Garland[12] have further expressed concerns regarding the determination of victims by shared characteristics, contending that such a narrow focus on group identity ignores individuals who are vulnerable to crimes as a result of their perceived difference. Wachholz[13] has observed that even though the homeless, goths,[14] and sex workers[15] could all be classified as 'stigmatised and marginalised groups' as per Perry's definition, they have been excluded from the social construction of hate crime as they lack the privilege of political clout.[16] Chakraborti and Garland argue that the solution to this lies in a focus on the victim's vulnerability.

Disadvantage:

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6 *supra* [4]
7 *supra* [5]
8 ibid
9 ibid
10 ibid, 180.
11 Law Commission (2020) *Hate Crime Laws: A Consultation Paper* (Law Com CP No.250 2020) 183.
12 *supra* [1]
13 Sandra Wachholz, 'Pathways through hate: exploring the victimisation of the homeless' (2009) In: Perry B (ed.) *Hate Crimes Volume Three: The Victims of Hate Crime* (Praeger 1999).
14 Jon Garland, 'It's a mosher just been banged for no reason: Assessing the victimisation of goths and the boundaries of hate crime' (2010) 17(2) International Review of Victimology 159.
15 Helen Carter '"Crossbow cannibal' victims" drug habits made them vulnerable to violence' (*Guardian*, 21 December 2010).
16 *supra* [1]

The vulnerability approach has been criticised, however, as labelling people with disabilities as 'vulnerable', which is arguably inherently ableist. Al Hakim[17] in particular notes the contentiousness of this approach as it carries troubling connotations of helplessness. He argues instead for a 'disadvantage' approach to be adopted, contending that it "provides the strongest, most consistent, and coherent account for explaining the choice of the groups selected for protection under hate crime laws".[18] This allows for the inclusion of the homeless, while avoiding the inclusion of other socioeconomic groups that are not disadvantaged, which, he argues, offers a more neutral and politically constrained approach.[19]

Consistency with Equality Law:

While Schweppe suggests that equality legislation could be a good starting point in identifying victims of hate crime[20], Chara Bakalis goes further and argues explicitly for a consistent approach between equality law and hate crime. Bakalis concludes that victims should form an exclusive group based on the characteristics currently protected under equality legislation, as the focal concern of hate crime law is the furthering of equality and elimination of discrimination. [21]

Part B: Evidence-based Approach

The legislature across the UK have attempted to move away from the theoretical approaches above, with Scotland, England and Wales, and Northern Ireland currently undertaking law reform processes, endeavouring to create an objective test in determining what characteristics should be protected[22]. In this section, the reviews conducted in each of these jurisdictions will be evaluated. The test set out by Lord Bracadale in his independent review on Scottish hate crime will firstly be examined. Following this, consideration will be given to the test advanced by the Law Commission in England and Wales, which similarly proposes an evidence-based examination. Finally, the approach considered by Judge Marrinan in Northern Ireland will be explored. The argument will be presented that there is a lack of clarity in all three reviews in determining what constitutes sufficient evidence and the difficulty that arises in attempting to apply these tests universally. Furthermore, criticisms will be made on the way certain characteristics are chosen for inclusion and justified retrospectively.

Scotland:

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17 *supra* [3]
18 Mohamad Al-Hakim, 'Making a home for the homeless in hate crime legislation' (2014) 30(10) Journal of Interpersonal Violence 1758.
19 *supra* [3]
20 *supra* [5]
21 Chara Bakalis, 'The victims of hate crime and the principles of the criminal law' (2017) 37(4) Legal Studies 718.
22 Law Commission (2020) *Hate Crime Law: A Consultation Paper* (Law Com CP No. 250 2020); Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018); Hate Crime Legislation in Northern Ireland, *Hate Crime Legislation in Northern Ireland- Independent Review* (Hate Crime Legislation in Northern Ireland 2020).

Background:

Following the publication of a report in 2016 by the Independent Advisory Group on Hate Crime, Prejudice and Community Cohesion, recommendations were made to the Scottish Government on the consideration of adding to the current list of protected characteristics. Lord Bracadale was appointed to follow up with an independent review of hate crime legislation.[23] In May 2018, a review was published that attempted to 'ensure that the right legislative protection is in place to tackle hate crime'.[24]

The Objective Test Set Out:

Scottish criminal law allows any existing offence to be aggravated by prejudice in respect of race, religion[25], disability, sexual orientation, and transgender identity.[26] Prejudice is proven if, at the time of committing the offence, the offender evinces malice or ill-will towards the victim because of their protected characteristic.[27] In attempting to address the question as to whether additional characteristics should be protected, Lord Bracadale creates an objective test. He contends that there are three bases that justify hate crime legislation: (1) recognition of the additional harm which hate crime offending causes to the victim, others who share the protected characteristic and wider society; (2) the important symbolic message which the law can send, and (3) the practical benefits which arise from having a clear set of rules and procedures within the criminal justice system to deal with hate crime.[28] He tests the potential group against these criteria to determine whether offences committed against this group should be considered to be a hate crime.

Evidence:

In broader terms, Lord Bracadale examines whether there is evidence that hostility is manifested through the offending behaviour, where the characteristic and form of hostility are such that a specific provision be made, and what the practical consequence of such a provision would be. It is not clear, however, what exactly constitutes evidence in this context.[29] In relation to gender, Lord Bracadale draws on consultation responses from various organisations who refer to the issue of online abuse against women, in addition to an Amnesty International report on '#ToxicTwitter' which outlines qualitative and quantitative research on women's experiences on social media and deems these to fulfil the evidence criteria.[30] In contrast, he argues that alternative subcultures, specifically goths, are not

[23] Lord Bracadale, *Independent review of hate crime legislation in Scotland: final report* (May 2018) 2.
[24] ibid
[25] Criminal Justice (Scotland) Act 2003, s.74.
[26] Offences (Aggravation by Prejudice) (Scotland) Act 2009, ss (1) and (2).
[27] ibid.
[28] *supra* [23]
[29] ibid, 32.
[30] ibid, 36.

appropriate to be included as a protected characteristic[31]. This is interesting considering the research conducted by Jon Garland[32] and Paul Hodkinson[33] on alternative subcultures, the work undertaken by the Sophie Lancaster Foundation in helping individuals who experience harassment and abuse[34] and the fact that the Greater Manchester Police record crimes committed against subcultures[35], which are not deemed to be sufficient in demonstrating evidence.

While Lord Bracadale's evidence-based, objective approach may seem appealing in theory, in practice it has the danger of excluding many vulnerable and disadvantaged groups who do not have adequate resources available to them to meet the criteria, fundamentally creating 'hierarchies of hate'[36]. In necessitating evidence and data on crimes committed against these groups, it further presumes that such data is collected objectively, which is not always the case. The question arises as to who can determine what data should be collected and on what groups. Moreover, even in cases where there exists evidence of hostility, Lord Bracadale posits that such groups should not be afforded protection. This lack of consistency in relation to what evidence is deemed to be sufficient seems to create self-fulfilling prophecies for certain groups. Furthermore, it appears that he chose the groups he wished to include and attempted to justify his choice and the application of his test retrospectively.

England & Wales:

Background to the Consultation Paper:

Following Lord Bracadale's review in 2018, and the Hate Crime Bill introduced by the Scottish government in May 2020, the Law Commission for England and Wales sought to set options available for the reform of the existing protected characteristics in the jurisdiction.[37] There are three sets of provisions within criminal law in England and Wales that currently deal with hatred. The Crime and Disorder Act 1998 covers aggravated offences involving racial or religious hostility[38], the Public Order Act 1986 applies to offences which involve the stirring up of hatred based on race, religion, and sexual orientation[39]; and enhanced sentencing provisions are dealt with under the Criminal Justice Act 2003 which applies to race, religion, sexual orientation, disability, and transgender identity.[40]

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31 ibid, 53.
32 *supra* [14]
33 Paul Hodkinson, 'Goth: Identity, Style and Subculture' (Bloomsbury Professional 2002)
34 *supra* [14]
35 The Irish Times, 'Goths, emos and punk designated victims of hate crimes' (Dublin, 4 April 2013) < https://www.irishtimes.com/news/world/uk/goths-emos-and-punks-designated-victims-of-hate-crimes-1.1348699> accessed 13 April 2021.
36 Jennifer Schweppe 'Defining Characteristics and Politicising Victims: A Legal Perspective' (2012) *Journal of Hate Studies* 173, 191 argues that "by creating hierarchies of victims in hate crime statues, the criminal justice system discriminates arbitrarily between social groups".
37 *supra* [11] at 21.
38 Crime and Disorder Act 1998.
39 Public Order Act 1986.
40 Criminal Justice Act 2003.

The Objective Test Set Out:

The report considers the theoretical arguments for recognising hate crime characteristics, as previously outlined, while also drawing on the methods undertaken in other common law jurisdictions. However, they conclude that no singular method is likely to achieve a wholly suitable approach[41] and contend that an evidence-based approach should consist of an evaluation of three elements: (1) demonstrable need, requiring evidence that crime based on hostility or prejudice towards the group is prevalent; (2) additional harm, involving evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely and (3) suitability, which ensures that protection of the characteristic would fit logically within the broader offences and sentencing framework. These criteria are indeed similar to the objective test set out by Lord Bracadale.[42]

Demonstrable Need:

The demonstrable need criterion requires evidence of a high occurrence of hostility or prejudice in criminal targeting against the characteristic group.[43] It is challenging to determine what constitutes adequate evidence, and it is not clear whether this requires evidence from victimisation studies, or whether testimonies made by victims are sufficient. The Commission notes that prevalence in this context is not measured exclusively in numerical terms but also by the severity of the crime. It is therefore deemed that three elements must be analysed in the assessment of prevalence: (1) absolute prevalence, (2) relative prevalence, and (3) severity.[44] Absolute prevalence is defined as "the total amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic". Relative prevalence on the other hand, is based on crimes towards a characteristic, relative to the magnitude of the group who share this characteristic. Severity is described as "the nature of the criminal behaviour that is targeted based on hostility or prejudice".[45] However barriers remain for groups lacking a persuasive social movement and the resources that would allow them to gather such data, making it challenging to satisfy this prong of the test.[46]

Additional Harm:

The additional harm condition requires evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, evidence of harm to members of the

41 *supra* [11] at 194.
42 ibid, 196.
43 ibid, 194.
44 ibid, 197.
45 ibid, 197.
46 *supra* [14] at 168.

targeted group who share the characteristic, and evidence of a wider harm to society.[47] In relation to harm to the primary victim, Iganski and Lagou's 2014 study illustrates that victims of hate crimes are more likely to have been affected "very much" in comparison to victims of 'ordinary' crimes.[48] However, determining what constitutes evidence of additional harm is demanding. The Commission holds that due to a lack of comparative research in respect of a number of smaller groups that have been suggested for inclusion, it is harder for these groups to objectively demonstrate evidence of increased harm.[49] Therefore, in the absence of empirical research, victims may contend that they experience additional harm from these crimes as it targets "a characteristic that is an important part of their identity or a characteristic on the basis of which they experience disadvantage". [50] In explaining what is meant by core identity, the Commission contends that a victim may draw on the mutability of a characteristic, the fact that this characteristic affects their lived experience of the world or the emphasis that society places upon this attribute. In relation to disadvantage, emphasis is placed on systemic disadvantage and groups that are socially excluded or marginalised and against which violence is normalised.[51] However, it is unclear what is deemed sufficient to demonstrate this.

The second aspect of the additional harm criterion is assessing evidence of harm to members of the targeted group. The consultation paper posits that groups may display high levels of anxiety and changes in group behaviour in demonstrating evidence of additional harm.[52] This would suggest that victim testimonies, and arguments made by members of a group who share the victim's characteristic would constitute sufficient evidence. However, it remains unclear.

The final element to this criterion is evidence of wider harm to society, and the Commission offers the example of increased social division resulting from hate crime as possible evidence of this.[53] It is difficult to demonstrate evidence of isolation or withdrawal of certain groups from society and thus it is again unclear as to what would fulfil this requirement.

Suitability:

The third prong of the test proposed by the Law Commission is suitability, which requires that the protection of the new characteristic fits logically within the broader offences and sentencing framework.[54] Potential issues arise in relation to difficulties in proving the aggravation. The Commission points to challenges in evidencing disability hate crime as well as proof of hostility in relation to age, which

47 *supra* [11] at 198.
48 Paul Iganski and Spiridoula Lagou, 'The personal injuries of "hate crime"' in Nathan Hall, Abbee Corb, Paul Giannasi, John Grieve and Neville Lawrence (eds), *The Routledge International Handbook on Hate Crime* (Routledge 2014) 41.
49 ibid, 202.
50 ibid.
51 ibid.
52 ibid, 203.
53 ibid.
54 ibid, 204.

could prove to be more symbolically harmful than helpful.[55] They also point to the appropriateness of including a characteristic when the proportion of relevant offending against it is low. This seems contradictory to the first element of the test in which the Commission states that prevalence is not measured exclusively in numerical terms but also by the severity of the crime[56], as well as the second criterion which lays out that in circumstances where there is a lack of empirical evidence; victims may contend that they experience additional harm based on their identity or disadvantage.[57]

Correspondingly to Lord Bracadale's review, the Law Commission's consultation paper demonstrates an attempt on the part of the legislature to move away from a theoretical approach and a shift towards adopting an objective, evidence-based approach. While objectivity may seem the fairest method to employ, it is challenging in the context of hate crime to be truly objective considering its fundamentally political nature. These reviews are contradictory at times and unclear as to what evidence is sufficient to justify inclusion. Numerous groups lack the resources and political clout to gather data, and even in cases where evidence of hostility exists, it is often held to be insufficient, despite a lack of clarity on what type of evidence is necessary in this context. It is also important to consider whether such a test would be universally useful. Walters et al. note that England and Wales hold "an impressive body of documentation for hate crime".[58] England and Wales are thus an outlier in that they include comprehensive policies and records of hate crime, the existence of the Crime Survey of England and Wales (CSEW) is instrumental in this. The question needs to be considered whether such an objective-based test could apply in other jurisdictions, arguably it could not be so easily applied in Ireland considering the dearth of policy, lack of consistency in police records and collection of data and absence of victimisation surveys.[59]

Northern Ireland:

Background:

Subsequent to the publication of both Lord Bracadale and the Law Commission's respective reviews, Judge Desmond Marrinan conducted an independent review on hate crime legislation in Northern Ireland following a commitment made in 2017 by the then Minister for Justice.[60] Judge Marrinan draws on the two reviews, both opposing and matching the opinions of the Lord Bracadale and the Law Commission on varied points throughout. While currently there does not exist any specific offence

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55 ibid, 206.
56 ibid, 197.
57 ibid.
58 Mark A Walters, Susann Wiedlitzka and Abenaa Owusu-Bempah, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex 2017).
59 Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).
60 Hate Crime Legislation in Northern Ireland, *Hate Crime Legislation in Northern Ireland- Independent Review* (Hate Crime Legislation in Northern Ireland 2020).

of hate crime in Northern Ireland, the Criminal Justice (No.2) Order 2004 enables perpetrators of offences aggravated by hostility against one of the protected characteristics which include race, religion, sexual orientation, and disability, to receive a higher sentence.[61]

While Judge Marrinan does not set out his own evidence-based test, he seems to follow the approaches set out by Lord Bracadale and the Law Commission. In addressing the question of whether there is a need for additional categories of protected characteristics to be added, he acknowledges Chakraborti's comments that:

"*whether because of greater resources, a more powerful voice, public support for their cause or a more established history of stigma and discrimination, campaigners working to support certain strands of hate crime victim will invariably be able to lobby policymakers harder than other potential claim makers*". [62]

However, he nonetheless notes that sufficient justification of the inclusion of a characteristic is required. This raises questions relating to unclear guidelines on what constitutes evidence and a lack of adequate data for many groups. Haynes and Schweppe note that complaints data has little value in determining prevalence due to low rates of reporting.[63] Judge Marrinan thereby concludes that an explanation based on equality, as proposed by Bakalis, 'provides the best justification on the selection of protected groups.'[64] However, contrary to this, when determining the addition of protected characteristics, he seems to adopt the approach taken by Scotland and England and Wales. He justifies the inclusion of gender, for example, based on evidence that women are targeted due to hostility and prejudice towards their gender, although it is unclear as to what evidence he is referring to and for what reason it is deemed to be sufficient.[65]

Part C: Understanding Gender in the Context of this Test

Scotland:

In applying the test to gender, Lord Bracadale contends that 'gender' is the most appropriate term to use in this context as 'sex' is too restrictive.[66] However, when examining the applicability of 'gender' as a potential characteristic for inclusion, it is interesting to note that he seems to focus solely on 'gender' in binary concepts of male and female. He suggests that a gender-neutral term be used despite acknowledging that the majority of crimes covered will be those committed against women[67] and

61 Criminal Justice (No 2) Order 2004 (Northern Ireland)
62 Neil Chakraborti, 'Framing the Boundaries of Hate Crime' in Nathan Hall, Abbee Corb, Paul Giannasi and John Grieve (eds), *The Routledge International Handbook on Hate Crime*, (Routledge 2015) 17.
63 *supra* [60] at 182.
64 ibid.
65 ibid, 203.
66 *supra* [23] at 34.
67 ibid.

recommends new statutory aggravation based on gender hostility, following the pattern used in the existing statutory aggravations.[68]

When applying his evidence-based test to gender, Lord Bracadale acknowledges that women are regularly subjected to verbal and physical harassment as a result of their gender, and draws on an Amnesty International Report, a review conducted by the Fawcett Society and testimonies from respondents to indicate this.[69] Respondents argued that such gender-hostility crimes impact women collectively,[70] which seems to fulfil the first prong of the test requiring evidence of additional harm.[71] Secondly, he argues that the inclusion of gender as a protected characteristic would be of symbolic value and would 'send a message' to women of intolerance to such crimes.[72] Furthermore, he contends that by categorising such behaviour as hate crime it would allow for the collection of data and would provide victims with more assurance in being taken seriously, which may aid in combatting the ongoing issue of underreporting by women.[73]

Following Lord Bracadale's Report, the Scottish Government in May 2020 introduced a Hate Crime Bill. Although it did not extend the law to cover hostility based on sex or gender, under clause 15 Ministers have the power to add the characteristic of 'sex' at a later stage.[74] The use of the term 'sex' however, is overly restrictive and applies solely to sex characteristics assigned to a person at birth, therefore restricting access for transgender and non-binary persons under this characteristic.

England and Wales:

The Law Commission draw on definitions of 'sex' and 'gender' from those used by the UK Government.[75] They note that sex is assigned at birth and refers to "the biological aspects of an individual as determined by their anatomy, which is produced by their chromosomes, hormones and their interactions", while "a person's gender may not match the sex they were assigned at birth"[76] and instead refers to "a social construction relating to behaviours and attributes based on labels of masculinity and femininity". [77] They use both terms gender and sex in their analysis, and they seem to understand gender in binary terms of 'male' and 'female', contending that hostility towards non-binary identity would be more applicable under the category of hatred based on transgender identity.[78]

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68 ibid, 43.
69 ibid, 35.
70 ibid.
71 ibid, 43.
72 ibid, 39.
73 *supra* [23]
74 Hate Crime and Public Order (Scotland) Bill, Part 3(15).
75 *supra* [37] at 232.
76 Office for National Statistics: *What is the difference between sex and gender?* (21 February 2019).
77 ibid.
78 *supra* [37] at 233.

The Commission notes arguments made in the pre-consultation period that violence against women is linked to female biology and that inclusion of the term 'sex' is most appropriate to allow for consistency with terminology used in the Equality Act 2010. This view exemplifies a dangerous rise in 'gender critical' rhetoric in the UK in recent years and the prominence of trans-exclusionary radical feminists, often referred by the acronym TERFS.[79] The inclusion of these 'gender critical' opinions by the Commission illustrates a double-standard and lack of consistency when it comes to hearing opinions on different characteristics as they would arguably not consider views from white supremacists with regard to race.[80] In addition, this further contributes to politicising the determination of protected characteristics.

In assessing the inclusion of gender under the objective criteria set out, the Commission accepts that women are disproportionately the victims of certain crimes and acknowledges that this violence is deeply connected to prejudicial concepts and overt hostility towards women.[81]

In meeting the demonstrable need criterion, it is recognised that there is a vast amount of evidence that women are targeted for certain crimes, which is linked to prejudice or hostility towards their gender and they draw on Women's Aid Reports, the Equality and Human Rights Commission and the CSEW to illustrate this.[82] Furthermore, in determining whether there is evidence of additional harm to the primary victim, members of the group and society as a whole, the report deduces that gender based prejudice and hostility causes additional harm and draws on research by academics such as Mason-Bish and Duggan,[83] Walters and Tumath,[84]and Hodge who notes that "the consequences of gendered violence are damaging, not only to the millions of women experiencing such violence, but also to the millions of women who fear victimisation."[85]

Northern Ireland:

In understanding gender, Judge Marrinan, like the Law Commission, draws on the definition used by the UK government interpreting 'gender' as a social construct.[86] In his recommendations, he holds that 'sex/gender' should be included as a protected characteristic, and the term should be neutral so as to cover a wider spectrum.[87] He further notes that any inclusion of gender would provide protection to

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79 Ruth Pearce, Sonja Erikainan and Ben Vincent, 'TERF wars: An Introduction' (2020) 68(4) *The Sociological Review* 677.
80 Katelyn Burns, 'The rise of anti-trans "radical" feminists, explained' (*Vox* 2019) (<https://www.vox.com/identities/2019/9/5/20840101/terfs-radical-feminists-gender-critical.>
81 *supra* [37] at 237.
82 ibid 237-242.
83 Hannah Mason-Bish and Marian Duggan, 'Some men deeply hate women, and express that hatred freely: Examining victims' experiences and perceptions of gendered hate crime.' (2020) International Review of Victimology 112.
84 Mark Walters and Jessica Tumath, 'Gender 'hostility', rape, and the hate crime paradigm' (2014) The Modern Law Review 563.
85 Jessica Hodge, *Gendered Hate: Exploring gender in hate crime law* (1st edn., 2011) 10.
86 *supra* [76]
87 *supra* [60] at 205.

all genders, which suggests that transgender, cisgender and non-binary identities would be included.[88]

Ireland:

Current Legislative Framework:

Currently, Ireland does not have any specific legislation dealing with hate crime. The Prohibition of Incitement to Hatred Act 1989[89] is the only legislative provision that covers hate-based inchoate offences, however, there has been a scarcity of prosecutions since its genesis.[90]

It is important to consider whether gender might too be determined to be included as a protected characteristic in any new hate crime legislation in Ireland. To ensure consistency within the law, any new legislation would presumably follow the precedent of the Gender Recognition Act 2015 (GRA) in understanding gender, which requires a person to identify as either male or female, interpreting gender in binary terms.[91] However, the newly published Criminal Justice (Hate Crime) Bill 2021[92] may provide a broader definition of gender. The bill seeks to create aggravated forms of existing criminal offences where those crimes were motivated by prejudice against a protected characteristic.[93] The protected characteristics included in this bill are race; colour; nationality; religion, ethnic or national origin; sexual orientation; gender; or disability.[94] They seem to have drawn on both the 1989 Act[95] and the Equal Status Act 2000[96] in deciding what characteristics are included. This bill seems to understand gender to include gender expression or identity, which acknowledges non-binary identities. It is important to also mention a private members' bill on hate crime that was recently presented by Senator Fiona O'Loughlin.[97] In Seanad debates on this bill, Senators David Norris and Sean Kyne made note of submissions they received criticising the bill and the GRA for "allowing the concept of gender to replace that of biological sex and thereby allowing someone who identifies as female to be recognised as a biological female".[98] This emergence of 'gender critical' rhetoric, which has already come to prominence in the UK, is dangerous and may become an issue in the future in determining protected characteristics, perhaps not legally, but arguably will amount to a further politicising of gender identity and transgender rights.

Problems in relation to evidence and recording:

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88 ibid, 210.
89 Prohibition on Incitement to Hatred Act 1989.
90 Department of Justice, *Legislating for Hate Crime in Ireland- Report on the Public Consultation* (2020) 17.
91 Gender Recognition Act 2015, s.18.
92 Criminal Justice (Hate Crime) Bill 2021.
93 ibid, Part 2, Head 4(1).
94 ibid Head 2.
95 Prohibition on Incitement to Hatred Act 1989, s.1(1).
96 Equal Status Act 2000, s.3(2).
97 Criminal Justice (Hate Crime) Seanad Bill (2020).
98 Seanad Deb 17 November 2020, vol 272, no.7.

Unlike England, Wales and Scotland, who conduct large-scale victimisation surveys, namely the CSEW and the Scottish Crime and Justice Survey (SCJS) respectively, Ireland has a lack of adequate police records and victim studies, and therefore could never meet the evidence thresholds as set out in the tests by Lord Bracadale and the Law Commission.

Ireland does not gather national data with respect to the prosecution and sentencing of hate crimes. The most common means of recording hate crime is through police recording, and in the absence of legislation, An Garda Síochána record 'discriminatory motives' related to ordinary offences under the categories of: ageism, anti-disability, anti-Muslim, anti-Roma, antisemitism, anti-Traveller, gender related, homophobia, racism, sectarianism, and transphobia. This data is collected by the Central Statistics Office, who have noted quality issues in recording. In 2015 for example, 17 percent of crime reported was not logged. Furthermore, the adequacy of police recorded hate crime data may be undermined by underreporting where victims do not communicate their experiences to the police and thus does not represent the real prevalence of hate crime in Ireland.

Part D: Recommended Approach

It is challenging to be objective with regard to hate crime, however, it is contended that an evidence-based approach should be utilised in determining protected characteristics. If policy is not empirically driven, it is less likely to be effective.[99] It is evident that the recording of crimes with a hate element needs to be reformed in Ireland. This is imperative in the absence of legislation in order to understand the prevalence and severity of such crimes nationally. As noted by Schweppe and Haynes, adequate procedure and training needs to be provided to members of An Garda Síochána as, at present, there seems to be a lack of understanding of the recording categories.[100] The current dilemma facing hate crime in Ireland is that the hate element, in the absence of legislation, is not taken seriously or considered by Gardaí, however it is challenging to create effective legislation in the absence of sufficient evidence.[101] Nonetheless, further training and the creation of a collective understanding of the significance of the hate element to crimes should aid in developing coherency and consistency in reporting.[102] The significance of collecting data on hate crime has been highlighted by the European Union's Fundamental Rights Agency, who endorse the creation of a dedicated national crime victimisation survey.[103]

If such a test were to be created in Ireland, it is imperative that adequate statistics and records are collected of hate-related crimes. Furthermore, it is essential that new legislation provides clear guidelines on what

[99] ibid 21.
[100] In research conducted by Jennifer Schweppe, James Carr, Niamh Carmody and Shannen Enright, '*Out of the shadows: Legislating for Hate Crime in Ireland- Preliminary Findings*' (ICCL 2015) one of the ELO/LGBT officers interviewed had no concept of what a transphobic crime was.
[101] *supra* [59] at 130.
[102] ibid 204.
[103] European Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims' Rights* (2012), 62.

is deemed to be sufficient evidence. The lack of consistency and clarity in the reviews above suggest that characteristics such as gender and age were chosen for inclusion and justified retrospectively, and it is unclear as to why evidence regarding other characteristics was deemed to be inadequate. It is important to work closely with victims and NGOs and in addition to police recording of hate crime, victim testimonies and research conducted by academics should be considered sufficient to fulfil the evidence criteria.

Conclusion

Hate crime legislation is complex to construct and controversial to introduce.[104] As a result, the debate over the determination of what victim groups are deserving of protection has become increasingly contentious. While objectivity may seem the fairest method to employ, it is challenging in the context of hate crime to be truly objective, considering its fundamentally political nature. An evidence-based approach may seem appealing in theory, however, in practice it has the danger of excluding many vulnerable and disadvantaged groups who do not have adequate resources available to them to meet the criteria. The reviews discussed are contradictory at times and unclear as to what evidence is sufficient to justify inclusion. The lack of consistency seems to create self-fulfilling prophecies for certain groups and suggests that groups are chosen, and the tests are applied retrospectively. Moreover, in the context of applying this test to gender, the emergence of 'gender critical' rhetoric in England, and Ireland, should be noted as such contentions have the potential to cause issues and further politicise protected characteristics and transgender rights.

In considering the application of an evidence-based test in an Irish context, it is maintained that it would be near impossible to meet the thresholds required given the current dearth of adequate policy, lack of consistency in the collection of data and the absence of victimisation surveys. It is evident that there exists a lack of understanding amongst the Gardaí in relation to both the hate element of crimes and the characteristics affected. Thus, it is essential that suitable training is provided to create a collective understanding of these crimes. If an objective test were developed in future legislation in Ireland, it is crucial that there is clarity on what constitutes sufficient evidence. Furthermore, with regard to the scope of suitable evidence, it is important to not only examine data in numerical terms but also to consider NGOs and victim testimonies in deciding what groups should be afforded protection given the high level of underreporting of hate crime. Conclusively, it is held that any legislation that is enacted should be precise and certain given the politically sensitive nature of hate crime and, in the absence of such legislation, it is vital that there is clarity and coherency in police records and the collection of data, so as to ensure effective policy that is empirically driven.

[104] Jennifer Schweppe, 'Hate Crime and the Principle of Certainty' (2021) 7(1) Cogent Social Sciences.

CASE NOTE

Zalewski: Formalising the WRC while Deformalising the *Bord na gCon* Test

Jessica O'Neill

Case Name:

Zalewski v Adjudication Officer & Ors [2021] IESC 24

Court:

Supreme Court of Ireland (Clarke C.J, O'Donnell J, McKechnie J, MacMenamin J, Dunne J, Charleton J and O'Malley J)

INTRODUCTION

The Workplace Relations Commission (the "*WRC*") was established under the Workplace Relations Act 2015 (the "*2015 Act*").[1] Since its inception, the WRC has been an accessible forum for resolving employment disputes quickly and informally. Earlier this year, the WRC procedures came under scrutiny, and the status of the WRC as a quasi-judicial decision-making body was called into question when the Supreme Court delivered their judgment in *Zalewski v. Adjudication Officer & Ors.*[2]

For the most part, the power to administer justice is reserved for the courts. In its exploration of WRC functions, the Supreme Court considered the scope of Article 34 of the Constitution[3] and the appropriate means of defining an administration of justice. The judiciary examined the powers exercised by Adjudication Officers ("*Officers*") in the WRC and the enforceability of their determinations in assessing the potential for the WRC powers to be limited, and consequently safeguarded, under Article 37 of the Constitution.[4]

In this note, I analyse the effect of *Zalewski* on quasi-judicial decision-making bodies ("*bodies*") in

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1 Workplace Relations Act 2015.

2 *Zalewski v. Adjudication Officer & Ors,* [2021] IESC 24.

3 Article 34.1, "*Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.*"

4 Article 37.1, "*Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge, or a court appointed or established as such under this Constitution.*"

Ireland. In doing so, the court-like procedures that the WRC was ordered to implement and thereby "formalising" the WRC are acknowledged. Furthermore, the impact that this development will have on both Officers and bodies hereafter is assessed and it is ultimately concluded that while the boundaries of permissible delegated power have become blurred, bodies may stand to benefit from this "casualised" and more flexible approach.

FACTUAL BACKGROUND

Mr Tomasz Zalewski was employed as an assistant manager at a Costcutter shop in Dublin 3. In May 2016, Zalewski made a complaint to the WRC against his employer, Buywise Discount Stores Ltd.[5] He made a claim for unfair dismissal pursuant to the Unfair Dismissals Act 1977[6] and an additional claim for non-payment of wages in lieu of notice pursuant to the Payment of Wages Act 1991.[7] The hearing took place on 26 October 2016 but at the hearing, the Officer granted an application for adjournment so that an absent witness could provide evidence.[8] This hearing lasted approximately ten minutes in duration.

When Zalewski arrived at the adjourned hearing on 13 December 2016, he was informed that this hearing had been organised in error.[9] Zalewski was notified that the complaint was considered to have been heard on 26 October 2016 and decided in favour of the Respondent, on the basis of preliminary written submissions only. Zalewski's claim was therefore dismissed without a full hearing.[10]

Zalewski subsequently lodged an appeal to the Labour Court. In February 2017, he was granted leave for judicial review in the High Court as the WRC admitted that the decision should be quashed as a result of the flawed procedure.[11] The High Court however, held that Zalewski lacked legal standing to pursue this challenge.[12] This finding was ultimately reversed by the Supreme Court in 2018.[13] The case was then remitted back to the High Court where Mr Justice Simons found that the powers exercised by the WRC did not equate to an administration of justice.[14]

Following this conclusion, Zalewski appealed this finding to the Supreme Court, challenging the constitutionality of Part V of the 2015 Act.[15]

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5 *supra* [2], 3
6 Unfair Dismissals Act 1977.
7 Payment of Wages Act 1991.
8 *supra* [2], 2
9 ibid, 5
10 ibid.
11 ibid, 10
12 ibid.
13 *Zalewski v Adjudication Officer and The Workplace Relations Commission* [2019] IESC 17, [2019] 2 I.L.R.M. 153.
14 *Zalewski v Workplace Relations Commission* [2020] IEHC 178.
15 *supra* [2], 2

ARGUMENTS

In the High Court, Zalewski contended that the process leading to the WRC's decision was unconstitutional. Firstly, Zalewski argued that the WRC was administering justice when it determined workplace disputes. He submitted that this was a power assigned to the judiciary under Article 34.[16] Secondly, Zalewski argued that deficiencies in WRC statutory procedures failed to vindicate his personal constitutional rights, for example:

1. Officers were not required to have legal qualifications, experience or training;
2. Evidence was not taken on oath;
3. There was no express provision for the cross examination of witnesses; and
4. WRC proceedings were held otherwise than in public.[17]

The High Court rejected both of these arguments, so Zalewski appealed this decision to the Supreme Court.

JUDGMENT

The Supreme Court judgment was delivered by O'Donnell J. In determining whether a body is administering justice, he emphasised the need to apply the five-part test from *McDonald v Bord na gCon* with flexibility.[18] The indicia of judicial power were defined in this test as:

1. a dispute or controversy as to the existence of legal rights or a violation of the law;
2. the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
3. the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
4. the enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment; and
5. the making of an order by the Court which, as a matter of history, is an order characteristic of Courts in this country. [19]

In the High Court, Simons J highlighted the WRC's inability to enforce its own decisions. A party must apply to the District Court to have a WRC order enforced[20] so as a result, Simons J concluded that the WRC was not engaged in the administration of justice.[21]

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16 ibid, 16
17 ibid, 26
18 *McDonald v Bord na gCon* [1965] IR 217.
19 ibid.
20 Workplace Relations Act 2015, s43.
21 *Zalewski* (n 2) [21].

Conversely, O'Donnell J stated that the five-part test is not a "*statutory checklist*" as the characteristics are closely linked and overlap significantly.[22] The Supreme Court therefore found that the WRC was administering justice but concluded that such was permissible under Article 37 as bodies may exercise "limited functions and powers of a judicial nature, in matters other than criminal matters."[23]

In its analysis of the WRC powers, the Court noted that:

1. the subject matter was limited to areas of employment law detailed in the 2015 Act;[24]
2. awards of compensation were capped at 104 weeks' remuneration;[25]
3. enforcement was limited and the District Court could only substitute compensation for redress through reinstatement or reengagement;[26]
4. WRC decisions are subject to appeal;[27] and
5. the WRC is subject to judicial review.[28]

With regard to the constitutionality of the WRC procedures, the Court declared the blanket prohibition on public hearings repugnant to the Constitution.[29] Additionally, the absence of any provision for the administration of an oath was deemed inconsistent with the Constitution, which raises the prospect of criminal prosecution should a witness provide false evidence.[30]

COMMENTARY

Although the judgment is welcome progress from a fair procedures perspective, it formalises the WRC process. In July 2021, the Workplace Relations (Miscellaneous Provisions) Act 2021 (the "***2021 Act***") came into force.[31] This Act amends the 2015 Act to allow for public hearings (unless the Officer decides "special circumstances" dictate otherwise)[32] and the publication of party names in WRC decisions.[33] Publicity is a daunting prospect for all individuals involved in future WRC complaints. For employees bringing proceedings against their employers, there is an element of courage now needed to pursue the action. Meanwhile for employers, who may fear reputational damage, there is an element of dread associated with this potential exposure. Whilst confidentiality ensures that workplace relationships are safeguarded, employment disputes are of clear public interest. Employees may of course be discouraged from proceeding with public disputes which could result in more parties settling complaints privately

22 ibid, 92.
23 Article 37.1.
24 *Zalewski* (n 2) [116].
25 ibid.
26 ibid.
27 ibid.
28 ibid, 117
29 ibid, 142
30 ibid, 144
31 Workplace Relations (Miscellaneous Provisions) Act 2021.
32 ibid s4(b).
33 ibid s4(c).

or using mediation to resolve complaints instead. Nevertheless there is an obvious societal benefit with open justice and the endorsement of transparency is to be applauded.

The 2021 Act also makes provision for evidence to be taken on oath or affirmation[34] and for the enforcement of penalties where a lawfully sworn witness gives false information.[35] At a glance, these formalities mark such a drastic departure from the intended functioning of the WRC that its purpose almost seems to have been forgotten but the power to prosecute for perjury reinforces the importance of justice. The WRC may have been founded as a casual forum for resolving disputes, but the reality is that the WRC today deals with substantial issues. With this in mind, the focus on fair procedures seems obligatory as the quality of the examination of the complaint should not be overlooked and the significance of the WRC as a pillar in Irish labour law should not be ignored.

In the course of his judgment, O'Donnell J emphasises the need for bodies to demonstrate independence, impartiality, openness and fairness.[36] These are all concepts which are familiar to the courts. That being the case, it seems at odds for the judiciary to emphasise judicial values and make provision for court procedures but not require Officers to have any legal qualifications to carry out this administration of justice. By refraining from introducing such a requirement however, O'Donnell J conserves the informality of the WRC. If the objective of the judiciary had been to completely overhaul the functioning of the WRC, this may not have been the outcome. With this action, or more accurately, with this inaction, it is clear that the judiciary only altered the WRC procedures which it felt needed to be improved on in order to comply with fairness. O'Donnell J notes that the WRC is "staffed by persons with expertise in the areas of employment law and with practical experience in industrial relations."[37] Through his words, O'Donnell J expresses faith in the ability of the Officers to deliver the desired service and by amending the procedures, he ensures that they can do this justly.

Pre-*Zalewski*, the independence of Officers was guaranteed under s 40(8) of the 2015 Act.[38] O'Donnell J noted that this promise was undermined however, when considered in conjunction with s 40(7) of the 2015 Act[39] which granted the Minister for Jobs, Enterprise and Innovation (the "*Minister*") unqualified powers to revoke the appointment of Officers.[40] Although this part of the 2015 Act was not deemed to be unconstitutional in *Zalewski,* O'Donnell J declared this aspect of the 2015 Act to be "*troubling*"[41] and it was subsequently altered with the 2021 Act. The 2021 Act restricts the power of the Minister to

34 ibid s4(a).
35 ibid.
36 *supra* [2], 138
37 ibid [137].
38 Workplace Relations Act 2015, s40(8).
39 ibid, s 40(7).
40 *supra* [2], 147
41 ibid.

revoke the appointment of Officers to particular situations.[42] It is now only in distinct circumstances, such as where the Officers have failed to execute their duties as Officers or where they have engaged in certain misconduct, that the Government can have the Officers removed from their positions.[43] By explicitly laying out specific grounds where the Minister can exercise this power, the 2021 Act reigns in the Minister's powers and strengthens the independence of the Officers. This in turn reaffirms trust and confidence in the operation of the WRC and the capability of the Officers. While the Officers will still essentially be supervised by the Minister, their fate will not be at his mercy nor his whim. The significance of the *Zalewski* judgment is evidenced with this development in law as following the decision, legislative changes have been implemented even in response to the opinions and comments of the judiciary; not just in response to the ruling itself.

Perhaps the greatest consequence of the *Zalewski* case is the broadening of the scope of an administration of justice under Article 34. In reaching his conclusion, O'Donnell J explains that there is no "*litmus test*" for determining which bodies come within the ambit of Article 34.[44] Although O'Donnell J is complimentary of the test, he recognises that

> *"…the treatment of the criteria in McDonald as a checklist which must be minutely and precisely complied with risks missing the wood for the trees. It also encourages an approach to drafting that could remove proceedings from the field of the administration of justice because of some small, and in truth insignificant, deviation from the checklist. That would be a triumph of form over substance."*[45]

The traditional test laid down in *McDonald* is interpreted widely as O'Donnell J emphasises a need to detach from its strict application and instead treat the characteristics as simply "*indicating features of importance*."[46] While the aim here is clear, the instructions for achieving this aim are less obvious. It may have been more preferable to replace the test or to amend its features as opposed to suggesting a relaxed application of the rigid test already in place. Potentially, as cases fall to be considered, the modified approach to this test will become more apparent and common elements in these bodies will be identified. Alternatively, there may be a greater need for legislation governing the area. From the outset however, it appears that going forward the courts will consider the administration of justice on the whole as opposed to examining each component of the historical test independently.

In light of this interpretation, more bodies may now be viewed as administering justice and subject to the implementation of similar court-like procedures in the future. It will undoubtedly be important

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42 Workplace Relations (Miscellaneous Provisions) Act 2021, s 3(d).
43 ibid.
44 ibid [127].
45 ibid [91].
46 ibid, 93

for bodies to be able to prove that their functions are "*limited*" under Article 37 in this regard.[47] In *Zalewski*, the fact that a WRC decision could be subject to an appeal was pertinent to determining that the WRC functions were limited.[48] Whether this continues to be a dominant factor will be intriguing but in a similar fashion to the test for Article 34, it would be favourable for common attributes amongst such bodies to be detected early.

Once the judiciary determined that the WRC was administering justice, the availability of an appeal of a WRC decision lay at the heart of the discussion on whether or not this activity could be permitted under Article 37. The 2015 Act makes provision for a WRC decision to be appealed to the Labour Court.[49] Despite the fact that the majority and minority agreed that the availability of an appeal should be accounted for, the absence of a merits-based appeal was highlighted by the minority.[50] The provision for an appeal serves as a protective measure against any decision of the WRC being the final determination of a complaint. As long as this is the case, the administration of justice is clearly limited. O'Donnell J steered clear of assessing the adequacy of the appeals system which was acceptable in the case at hand but may be regrettable in terms of providing clarity for future controversies before the court. Perhaps if the availability of an appeal had been the only limiting factor for discussion in *Zalewski* it may have been necessary to examine the matter in considerably more detail. Given that it was only one of a number of factors which appeared to restrict the power of the WRC, the possibility of a review was enough to add weight to the list of factors limiting the WRC powers without requiring it to be a review based on the merits.

On the whole, *Zalewski* was decided well on the facts but whether the decision sets a good precedent for this area of law remains to be seen. This case presented a distinct set of circumstances and the factors which were deemed to limit the WRC were unique to that body specifically. What will happen if the Residential Tenancies Board or An Bord Pleanála are accused of administering justice? Presumably these bodies will now be examined under a similar process despite the fact that the WRC has a very different role to either of them. That is perhaps however the purpose of this judgment. The aim in not setting out a strict test can be seen as a move towards encouraging a flexible approach on the part of the judiciary; an approach that adapts to the facts of each individual complaint before the court. O'Donnell J is to be commended for placing the emphasis on testing guidelines as opposed to re-establishing or reinforcing a rigid test. This method proposed by O'Donnell J places a greater burden on the judiciary when it comes to considering whether bodies are limited under Article 37 but in turn, stands to heighten the standard of adjudication observed.

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47 Article 37.1.
48 *supra* [2], 116
49 Workplace Relations Act 2015, s44.
50 *supra* [2], 118

In summary, the boundaries for permissible delegated power are undeniably blurred as a result of this relaxed process. Hopefully this means that each case that comes before the court will be explored cautiously and examined in depth. Each decision will need careful examination and considered analysis of the scope of the administration of power under review which is a promising prospect for all future cases.

CONCLUSION

Overall, the implications of this judgment are largely positive in terms of the WRC's future. Though WRC hearings will remain a generally casual affair, the Court has formalised the WRC's processes to ensure that this tone is not at the cost of fairness. Going forward, it will be interesting to observe whether these formalities deter individuals from pursuing action in the WRC and encourage the use of alternative means of dispute resolution instead.

As a consequence of *Zalewski,* a strict test for determining the existence of an administration of justice has been abandoned, but the position is now slightly ambiguous. Though now treated more casually, the *McDonald* test still looms in the background while the modified approach proposed in *Zalewski* presents the courts with the opportunity to consider bodies in each case on their own merits.

It is hoped that common elements across a range of bodies are identified quickly to ensure consistency and predictability because based on this reading of the Constitution, many other bodies may be classified as administering justice under Article 37 in a way similar to the WRC.

CASE NOTE

DPP v Brown: A Lesser of Two Evils?

Garry Corcoran

Case Name:

Director of Public Prosecutions v Gerard Brown [2018] IESC 67

Court:

Supreme Court of Ireland

Majority: Dunne J, O'Malley J, McMenamin J (concurring)

Minority: McKechnie J, Finlay-Geoghegan J (concurring).

FACTS OF THE CASE

On the 6th of November 2015, the appellant, Mr. Gerard Brown was convicted of assaulting a fellow inmate, Mr. Stephen Cooper, in Midlands Prison Portlaoise contrary to s3 of the Non-Fatal Offences Against the Person Act 1997. Mr. Brown was found guilty by unanimous verdict for striking the victim in the head on a number of occasions and was sentenced to three years imprisonment consecutive to his current sentence. In evidence, Mr. Brown alleged that Mr. Cooper had consented to the attack in order to facilitate a transfer to another prison. In return, he promised Mr. Brown €1,000 and sensitive documentation which he had acquired due to his former position as a member of An Garda Síochána. This was denied by the victim.

Counsel for the appellant submitted that the defence of consent should be allowed to go forward to the jury as 'without the consent of the other'[1] is integral to the construct of assault under section 2 which is pursuant to section 3 of the Act. Conversely, counsel for the Director of Public Prosecution (DPP) submitted that section 2 and section 3 of the Act were standalone offences, a precedent which originated in the High Court[2] and Supreme Court[3] rulings of the *Minister for Justice Equality and Law Reform v Dolny*. Crucially, the trial judge refused to allow the defence of consent to proceed and ruled

1 Non-Fatal Offences Against the Person Act 1997, s3
2 *Minister for Justice Equality and Law Reform v Dolny* [2008] IEHC 326.
3 *Minister for Justice Equality and Law Reform v Dolny* [2008] IESC 48.

that section 2 and section 3 of the Act were standalone offences. Mr. Brown appealed his conviction to the Court of Appeal. This was rejected, with the court ruling that 'proof of an absence of consent is therefore not a necessary ingredient to a section 3 assault.'[4] The appellant was granted leave to appeal his case in the Supreme Court on the basis of 'a number of issues of general public importance.'[5]

JUDGMENT

The five-judge court unanimously rejected the understanding of assault as previously stipulated in section 2 and 3 in the *Dolny* case, and hence, found that the meaning of the term 'assault' is the same in both sections. Consequently, the absence of consent is a necessary ingredient in a s 3 assault. Despite the departure from the *Dolny* precedent, the court ruled that the conviction against Mr. Brown should stand. Consent as a form of defence in the case was precluded as 'consent to an assault causing harm for an unlawful purpose is no consent.'[6] It is primarily on this point, one of public policy, that the minority and majority judgments diverge, due largely to their interpretation of the intention of the legislature in the creation of the graduated nature of the offences of assault in the Act. Dunne J, with McMenamin J concurring, delivered the primary majority judgment with O'Malley J also handing down a brief judgment. McKechnie J delivered the minority judgment with Finlay-Geoghegan J concurring.

REASONING

The reasoning of the majority appears to be one grounded in an overly paternalistic outlook and one which interprets the statute to the point that, it could be argued, impinges on the right to privacy and the autonomy of the individual citizen, where their right to consent to harm is concerned. Dunne's J judgment offers the opinion that if the Oireachtas had wished for such a 'radical change in the law'[7] to the point that all assaults could be defended on the basis of consent, then it would have specifically and intentionally legislated for such circumstances. The majority concurred that the public policy issue intended was wherein consent to assault could only be permissible if there was a lawful benefit to society at large and an aggregate positive contribution to social utility.

This dicta is supported by the presence of s 22 in the Act which outlines the exceptions, such as organised sport and medical procedures, where consent to harm is lawful.[8] In addition, the exceptions presented are generally subject to their own regulations. Such regulations are present largely for the protection of those consenting to the recognised 'harm', as is the case in the sport of boxing where a referee adjudicates respective bouts and in medical treatment where there are established procedures

4 [2016] IECA [38].
5 [2018] IESC 67 [9].
6 [2018] IESC 67 [56].
7 [2018] IESC 67 [59].
8 Non-Fatal Offences Against the Person Act 1997, s22

that safeguard patients. The majority judgment has attracted criticism, not only from the dissenting judgment, but elsewhere too for the arguably unintended consequence of failing to reformulate assault offences and overly criminalising such instances given that it raises the threshold for the level of harm that can be consented to.[9] It does, however, uphold the long established exceptions which provide certainty and continuity in addition to conceding that there should be a case by case approach to instances where consent is cited as a defence to assault causing harm.[10]

The minority judgment interprets the Act in a far more liberal and progressive manner, while elucidating strong legal arguments for the defence of consent. It is one which may be more in keeping with the cultural and societal shift towards personal autonomy, civil liberty and right to privacy that has become prevalent in the twenty years since the Act's inception. McKechnie J believes that the legislature did in fact intend a radical departure from previous law where assault is concerned stating that 'section 3 has altered the threshold of consent and has departed from the common law and the cases which established the position adopted by it.'[11]

He accounts for this by examining the meaning of 'lawful excuse.' In his opinion, the reason that the term is included in the Act is to uphold the common law understanding that there are instances where use of force is justified, not to vitiate consent as was cited in the majority judgment.[12] In McKechnie's J analysis, these are to be found in section 18 and 19 of the Act. In addition, he cites the established and long accepted common law general defences outlined in s 22 as instances where consent will be accepted as an exculpating factor in the charge of assault. Ultimately, the minority judgment believes that the 1997 Act's purpose was to permit instances of harm that had been voluntarily consented to, and hence, did not come under the more serious definition of s 4 assault.[13]

Brown is somewhat of an outlier in the Irish legal annals. The criminal justice system in Ireland is wholly based on the presumption of innocence and there is a ubiquitously recognised principle that the burden of proof lies on the prosecution in criminal liability cases, bar specific instances such as insanity. This burden of proof is proof beyond reasonable doubt. As the consent at the heart of the *Brown* case was judged to be unlawful, it was deemed not to be part of the offence at trial. Although accepted by the five judge Supreme Court that this was an error, there remains an anomalous element to *Brown* in the sense that a conviction stood in the 'absence of proof of an offence element and in the presence of defence evidence to the effect that the opposite to an offence element pertained.'[14]

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9 Andrea Schieber, "Consent to Assault Causing Harm" (University of Kent, 04 February 2019) <https://blogs.kent.ac.uk/criminaljusticenotes/2019/02/04/consent-to-assault-causing-harm/#> accessed on 19 January 2022.

10 [2018] IESC 67 [54]

11 [2018] IESC 67 [90]

12 [2018] IESC 67 [162]

13 *supra* [9]

14 David Prendergast, *Limiting Consent in Criminal Law: DPP v Brown* [2018] IESC 67, School of Law, Trinity College Dublin, Irish Supreme Court Review Conference, 12 October 2019.

CONCLUSION

In conclusion, the paternalistic approach adopted by the majority in *Brown* is arguably the lesser of two evils. Although there is an argument to be made for greater autonomy to consent to harm in private scenarios, given the seemingly solipsistic tendencies that have emerged in modern society, the unintended consequences of such uncertainty could pave the way for a defence of consent that would not contribute to greater social utility.