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Fourth Edition

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Preface by the Editors

It is with great pride and high esteem, as Co-Editors-in-Chief, to present the fourth edition of the Plassey Law Review.

We are privileged to continue the legacy of our predecessors by unveiling the ambitious fourth Edition of the Review. The articles featured in this edition delve into a captivating array of issues that hold significant importance in today's legal landscape. It explores the History and Evolution of Bankruptcy and Personal Insolvency Law, the issue of how the An Bord Pleanála needs to be reformed, the issue of how harm should be measured in the case of Cyberbullying and even includes a fascinating discussion on the Embryology of Legal Pluralism. It is no doubt that this edition showcases a remarkable breadth of exploration. The passion and commitment of our authors shine through in each piece, skilfully presenting informative articles that address important legal topics. Their dedication to scholarly excellence has not only elevated the discourse within the legal community but has also inspired future generations of legal scholars and practitioners.

We would like to express our deep gratitude to the entire editorial board for their unwavering commitment and diligent efforts in bringing this publication to fruition. The dedication exhibited by the members of this year's board deserves special commendation. Their tireless efforts have ensured the excellence and professionalism that our readers have come to expect from the Plassey Law Review.

This review would not have been possible without the support of our supervisors, Professor Raymond Friel, and Professor Jennifer Schweppe. We would like to express our profound gratitude to them for their invaluable guidance, support and mentorship throughout the editorial process. Their counsel and profound knowledge have been indispensable throughout this undertaking.

Furthermore, we would like to extend our gratitude to the faculty members of the UL School of Law for their assistance and support that has been provided in reviewing articles for publication. Their expertise and guidance have been instrumental in shaping the quality of the

work. This review is truly not possible without the continued support of the UL School of Law faculty.

It is crucial that we also thank our sponsors for this publication. We would like to thank Arthur Cox LLP for returning as a sponsor for the publication and Orbits Law LLP for joining us this year as a sponsor. Their support is instrumental in making our endeavours possible, and we are truly grateful for their generous contributions.

We would also like to thank Judge Thomas E. O'Donnell for taking the time to write a foreword for this publication. We are also honoured as such a young publication to have such an esteemed Judge to be our keynote speaker for the launch night of the publication.

Finally, we would like to thank everybody who contributed to this Edition of the Plassey Law Review. We received a substantial number of submissions for this publication, and we recognise the effort and courage it takes to submit one's work for consideration. We commend each individual who took that leap and submitted their work. We would like to congratulate our successful authors - Karen, Annette, Carol, Cameron, Eve and Stephy. Thank you for your cooperation throughout the editing process. The submissions that we received this year inspire us with optimism about the Review's potential for a thriving and enduring future.

Siofra Gleeson
Sonya San

Co-Editors-in-Chief

FOREWORD

His Honour Judge Thomas E. O'Donnell
Judge of the Circuit Court

Welcome to the current edition of the Plassey Law Review. While it is clear that there is no literal interconnection between the various contributions nevertheless the chosen topics are an education on historical and current issues and future challenges to both the legal profession and the legislature.

Dr. Karen O'Brien's in-depth paper on the Evolution of Bankruptcy and Personal Insolvency law through the ages is an extremely interesting treatise on matters old and new. One cannot but be amused to note that we are still grappling with the laws relating to creditors and debtors down through the centuries to this very day.

Ms. Annette Cleary's paper on the critical evaluation of An Bord Pleanala should be a template for correcting mistakes and omissions made in previous legislation which hopefully will not be repeated in the future. Her views on rebuilding and restoring public confidence in the planning process as a whole are of notable significance.

Dr. Carol Lynch's paper on the legal challenges faced in respect of Online Bullying is a lesson in the struggles that are encountered in trying to legislate for technological developments in a rapidly changing society. The difficulties that the lawmakers will have to try and balance between the positive and negative impact and the issue of emotional harm remains a challenge as it has been in other pieces of criminal legislation in the past.

Mr. Cameron Moss's inciteful paper on the tension between Legal Analytical Theory and Legal Pluralism no doubt will be the source of many a philosophical debate in years to come.

The case notes compiled by Ms. Eve O'Sullivan and Ms. Stephy Varghese are concise, extremely helpful and indeed tell a cautionary tale in respect of both the civil and criminal law.

As I enter the twilight of my judicial career it is more than refreshing to see that legal scholarship and endeavour are alive and thriving in the UL School of Law. I wish to extend my congratulations to each of the contributors and also to the editorial board of the Palssey Law Review.

Long may it continue.

Judge Thomas E. O'Donnell,
The Circuit Court.
Limerick.
6th March 2024.

The History and Evolution of Bankruptcy and Personal Insolvency Law

From debtors' prisons to the concept of 'discharge of debt'

Dr. Karen O'Brien

Abstract

Insolvency law can lay claim to being one of the oldest areas of law with many of today's insolvency principles stemming from historical events and influences that are over two thousand years old. In adopting a historical analysis, this paper examines the origins of the introduction of the discharge of debt and the prevailing attitudes which began to change towards the bankruptcy of natural persons particularly from the sixteenth century onwards. It traces the early historical origins and evolution of bankruptcy and insolvency law. It examines how insolvents were dealt with at common law and considers the bankruptcy laws of continental Europe in the Middle Ages. It discusses the important causal factors that shaped change leading to the need for reform and the introduction of imprisonment for debt, which did not exist in the earliest period of the common law. It examines key junctures of legislative developments from the sixteenth century to the twentieth century when significant changes and reforms of bankruptcy laws occurred throughout Europe and other parts of the world. This paper focuses primarily on the evolution of the laws in Britain during this period. Finally, the writer concludes how the introduction of discharge in 1705 was the ultimate instrument of the transformation and most significant development in the history of bankruptcy law.

Section 1 - Introduction

This paper aims to provide a vignette through which the history and evolution of bankruptcy and personal insolvency law from the Middle Ages up to the twentieth century is evaluated. It will discuss how the law dealing with personal insolvency and bankruptcy has evolved and developed over the centuries. It appraises important transformations in societal attitudes towards the law relating to insolvent natural persons. In adopting a historical analysis, this paper will examine and trace the origins of the introduction of the discharge of debt and the prevailing attitudes which began to change towards the bankruptcy of natural persons particularly from the sixteenth century onwards. Despite the current and historical importance of bankruptcy and personal insolvency law, its pre-modern past has hardly been explored and

considered, the writer believes that in order to move forward and progress it is always essential to look back and learn from lessons of the past.

This paper is divided into sections and purports to examine chronologically the key legislative developments of bankruptcy and personal insolvency law as follows: Section 2 sets the scene by tracing the early historical origins and the conceptual evolution of bankruptcy and insolvency law. It will examine how insolvents were dealt with at common law and then move on to consider the bankruptcy laws of continental Europe in the Middle Ages. It was these laws that shaped and influenced Britain in the lead-up to 1542 when bankruptcy as a procedure first entered the English legal system. It will discuss the important causal factors that shaped change which led to the need for reform and the introduction of imprisonment for debt, which did not exist in the earliest period of the common law.[1] Section 3 will examine the key junctures of the legislative developments from the sixteenth century up to the twentieth century when new forms of capitalism led to huge transformations and reforms of bankruptcy laws throughout Europe and other parts of the world. This paper will primarily concentrate on the evolution of the laws in Britain during this period.[2] Section 4 includes a discussion on further developments and reforms that moved towards a debtor's era which began to emerge in the eighteenth century onwards. Finally, Section 5 concludes and presents how the introduction of discharge in 1705 was the ultimate instrument of the transformation and the most important development in the history of bankruptcy law. It was a momentous development as it provided a statutorily mandated system for the benefit of both debtors and creditors.

Section 2 - The early historical origins and evolution of bankruptcy and insolvency law

Notably insolvency law can lay claim to being one of the oldest areas of law with many of today's insolvency principles stemming from historical events and influences that are over two thousand years old. The earliest forms of bankruptcy can be traced back to the Roman and Greek civilisations. The first seeds of bankruptcy were planted in Roman law with the creation of a code of law in the form of the Twelve Tables in 450 BC. Table III dealt with debtors who

[1] See discussion Jay Cohen, 'The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy' (1982) 3 Journal of Legal History, 153-171.

[2] The Acts of the Union 1800 came into force on 1st January 1801. This was a legislative agreement uniting Great Britain (England and Scotland under the name of the United Kingdom of Great Britain and Ireland). The Union officially ended on January 15, 1922, and on May 29, 1953, by proclamation, Elizabeth II became known as the queen of the United Kingdom of Great Britain and Northern Ireland.

were unable to pay their debts and enabled multiple creditors to divide the debtor's person life or property proportionately between themselves.[3] It is clear from historical records that insolvency in societies was enforced by the sentiment of the community rather than by any rule of law, the concept of bankruptcy did not really exist. In fact, indebtedness was seen as a special privilege and the exception of the traditional and customary method of dealing. It would appear debtors and creditors were unknown in the early stages of social evolution and in very primitive societies there were no laws preventing fraud of debtors or regulating the distribution of a debtor's estate among various creditors. Nonetheless, the concept of the 'cannot pay debtor' and the 'will not pay debtor' is not new, it has been known since antiquity.[4] It is generally agreed that the term 'bankruptcy' derives from the Italian phrase *banco rotto* ('broken bench'). During the Middle Ages, the Venetian merchants would have had benches upon which they conducted business broken when they could not meet their debts. [5] To understand the original rationale for bankruptcy discharge one must explore its historical evolution.

Traditionally, the only remedies in the area of insolvency and bankruptcy law involved enforcement of security, realisation of a debtor's assets and the penalisation of resisting debtors. In addition, the fundamental principles of all insolvency and bankruptcy law, no matter when or where developed and enacted, have had at least two general objectives. First, it aims to secure an equitable division of the insolvent debtor's property among all his creditors. Secondly, it precludes on the part of the insolvent debtor from conduct harmful to the interest of his creditors.[6] Furthermore, it has, however, struggled with the two key dimensions of the balance of power between debtors and creditors and the dilemma of balancing competing interests

[3] Table III provides that: 1. One who has confessed a debt, or against whom judgment has been pronounced, shall have thirty days to pay it in. After that forcible seizure of his person is allowed. The creditor shall bring him before the magistrate. Unless he pays the amount of the judgment or someone in the presence of the magistrate interferes in his behalf as protector the creditor so shall take him home and fasten him in stocks or fetters. He shall fasten him with not less than fifteen pounds of weight or, if he choose, with more. If the prisoner chooses, he may furnish his own food. If he does not, the creditor must give him a pound of meal daily; if he choose, he may give him more. 2. On the third market day let them divide his body among them. If they cut more or less than each one's share it shall be no crime. 3. Against a foreigner the right in property shall be valid forever. This excerpt was taken from 'The Twelve Tables', <https://spot.pcc.edu/~rflynn/HST_101/Online%20Readings/Twelve_Tables.htm>. For an interesting discussion on the origins of the Twelve Tables see Michael Steinberg, 'The Twelve Tables and Their Origins: An Eighteenth-Century Debate' (Jul. – Sept. 1982) 43 (3) Journal of the History of Ideas 379-396 available at <https://www.jstor.org/stable/2709429>. See also Michael Quilter, 'Bankruptcy and Order' (2013) 39 (1) Monash University Law Review, 189 -212.

[4] Louis Levinthal, 'The Early History of Bankruptcy Law' (1918) 66 (5) University of Pennsylvania Law Review, 223, 237.

[5] See discussion at Sandor E Schick, 'Globalization, Bankruptcy and the Myth of the Broken Bench' (2006) 80 (1) American Bankruptcy Law Journal 219, 222.

[6] Louis Levinthal (n 4) 225.

between the creditors' legal right of recovering debt.[7] Bankruptcy strives to 'protect the creditors first from one another and, secondly, from their debtor'.[8] In order to contextualise the origins and sources of bankruptcy and insolvency law we must first understand 'the normal concept of bankruptcy suggests insolvency, conversely the legal meaning of it is far wider'.[9]. Over the centuries, a definitive recognition has evolved that now over indebtedness is a huge problem in all affluent societies including both social market and welfare states. In addition, the origin of modern bankruptcy procedure has only developed significantly from the time that debt recovery was directed towards personal property rather than the person.[10] Furthermore, we will see in this paper that over the centuries this law has become much less punitive.

2.1 Early history of the treatment of bankruptcy and insolvents at common law

For centuries, insolvents were dealt with under the common law, the plaintiff's execution remedies were the writs of *fieri facias*[11] and *levari facias*.[12] There was a comparable ancient procedure for obtaining satisfaction from the debtor's land, the writ of *elegit.*[13] The arrest of the alleged debtor was prohibited because of his obligation to serve his lord, therefore imprisonment for debt did not exist in the earliest period of common law. It has been observed that:

> *'[D]ebtors and creditors have a relationship that runs as far back as any in civilization. While the earliest legal systems did recognize this relationship, none was more too*

[7] See discussion Gino Dal Pont & L Griggs, 'The Journey from Ear Cropping and Capital Punishment to the Bankruptcy Legislation Amendment Bill 1995' (1995) Corporate & Business Law Journal 155, 156.
[8] Louis Levinthal (n 4) 225.
[9] J.A. Mac Lachlan in his '*Handbook on the law of Bankruptcy'* (West Publishing Company 1956) gives the following quotation from *In re: Reiman* [Fed. Cas. No. 11 673 20 Fed. Cas. 490, 494 (1874)] and describes it as a classical definition: 'Bankruptcy is a law for the benefit and the relief of creditors and their debtors, in cases in which the latter are unable or unwilling to pay their debts'.
[10] Stasys Velvsis & Vilija Mikuckiene 'Origin of Bankruptcy Procedure in Roman Law' (2009) 3 (117) Jurisprudencija 285-297.
[11] This was a common law writ of execution after judgement obtained in a legal action for debt or damages which empowered the sheriff to levy on goods of the judgment debtor.
[12] This was a common law writ of execution for a judgment debt from the goods and lands of the judgment debtor.
[13] A writ of execution directed to the sheriff, commanding him to make delivery of a moiety of the party's land, and all his goods, beasts of the plough only excepted. The sheriff, on the receipt of the writ, holds an inquest to ascertain the value of the lands and goods he has seized, and then they are delivered to the plaintiff, who retains them until the whole debt and damages have been paid and satisfied; during that term he is called tenant by elegit. *A Law Dictionary, Adapted to the Constitution and Laws of the United States.* By John Bouvier (1856). Retrieved June 29, 2017, from <http://legal-dictionary.thefreedictionary.com/Elegit>.

equitable in its treatment of the debtor. As time moved forward, debtors did eventually gain rights, but in the oldest traditions, they were treated rather harshly.' [14]

Most of the early bankruptcy laws were designed mainly to stigmatize and punish people who failed to pay their debts.[15] There was no distinction between the fraudulent or honest defaulting debtors, they were all treated very severely. Aside from the many draconian punishments, debtors were also subjected to many forms of degradation and humiliation in public, sometimes being required to sit in a public place with 'baskets over their heads or may have had to bang their buttocks on a rock before a heckling crowd or wear distinguishing clothes in public.'[16]

Furthermore, under the early common law, the ancient practice of taking refuge in a sanctuary enabled a debtor to immunise himself from arrest or imprisonment by remaining within a protected enclave.[17] Also under the common law, a debtor could use the notorious practice of keeping house as it forbade entry into a man's house for the purpose of executing a civil process, ostensibly on account of the maxim that 'a man's house is his castle', *domus sua cuique est tutissiumu refugium.*[18] This practice did not originate from Continental European law, it is described as 'an indigenous product of English soil'.[19] Eventually, at this time in the Kingdom of Great Britain a debtor could depart the kingdom without paying his creditors and the absconding debtor who took flight could be deemed an outlaw. Any possessions of the debtor would vest in the Crown unless the creditor petitioned the King for a share of the assets.[20]

2.2 Early history of bankruptcy and treatment of insolvents in Continental Europe

In classical antiquity and up until the late nineteenth century in Europe, the Roman notion of *fallitus ergo frudator* or 'insolvent thus a swindler' was the term used to define an insolvent

[14] Rhett Frimet, 'The Birth of Bankruptcy in the United States' (1991) 96 Commercial Law Journal 160,161.
[15] A Mechele Dickerson, 'Bankruptcy Reform: Does the End Justify the Means?' (2001) 75 American Banker Law Journal 243, 258. See further discussion Rafael Efrat, 'The Evolution of Bankruptcy Stigma' (2006) 7 (2) Theoretical Inquiries in Law 365-393 accessed at <https://www.csun.edu/sites/default/files/Evolution%20of%20Bankruptcy%20Stigma%20Article.pdf >.
[16] Rafael Efrat, 'The Evolution of Bankruptcy Stigma' (2006) 7 (2) Theoretical Inquiries in Law 365, 366.
[17] For further discussion Israel Treiman, 'Escaping the Creditor in the Middle Ages, (1928) 43 Law Quarterly Review 230, 235.
[18] The castle principle is said to have originated in *Semayne* v *Gresham* (1604) 77 E.R. 194 where Sir Edward Coke at 195 held '[t]hat the house of everyone is to him as his Castle and Fortress as well for defence against injury and violence, as for his repose'.
[19] Israel Treiman (n 17) 233.
[20] ibid 236.

debtor. This worked like a distorting shadow to explain how insolvency had occurred. This old Roman law also had a long-lasting impact on insolvency law across much of Europe.[21] Continental Europe had many different systems in dealing with the problems of bankruptcy and insolvency law.[22] As noted in Section 1.2 above, under early Roman law the old proverb, 'he who cannot pay with his purse pays with his skin', was literally applied and unpaid creditors 'were permitted to cut up his body and divide the pieces or leave him alive and sell him into slavery'.[23] This practice was eventually abolished but debtors could still pledge either themselves or family members as collateral for certain obligations.[24] In ancient Greece and Germany, there was also enslavement for debt by the creditor, such debt slavery could last a lifetime or until their debt was entirely paid off by physical labour, however, their masters by law could not kill them or remove any of their limbs. Levinthal suggests 'once execution was directed against the debtor and that the religious and primitive sanctions prevailed there was little need for the introduction of bankruptcy as a distinct system of jurisprudence.'[25]

The medieval continental laws continued to be extremely punitive in their treatment of all insolvent debtors, again regardless of their honesty. These degrading and punitive laws reflected the negative sentiment of society towards bankrupt debtors and continued to perpetuate the social stigma associated with bankruptcy and non-payment of debt. It also led failing debtors to flee from their creditors. The practice of fleeing originated from the Continent where during this period in Spain, Italy, France, Germany, and the Netherlands, 'flight was the customary act of bankruptcy'.[26] This practice did not become prominent among English merchants until around the sixteenth century because the common law, as we have seen above, had offered the dishonest debtor many other alternatives and more accessible methods of escaping his creditors.[27]

[21] See further discussion Stasys Velyvis & Vilija Mikuckiene (n 10).
[22] See Gino Dal Pont & L Griggs (n 7) 159.
[23] Twelve Tables Table III: For further discussion see Louis Levinthal, 'The Early History of Bankruptcy Law,' (1918) 66 (5) University of Pennsylvania Law Review, 223 at 250; Rhett Frimet 'The Birth of Bankruptcy in the United States' (1991) 96 Commercial Law Journal 160 -188.
[24] Rhett Frimet (n 14) 161.
[25] Examples include 'sitting d'harna' procedure used in India and a similar practice known as 'fasting on' in Ireland, in both, the creditor placed himself before the debtors' doorway, and would remain there until the debt was paid see further discussion at Louis Levinthal, 'The Early History of Bankruptcy Law', (1918) 66 (5) University of Pennsylvania Law Review 223, 231.
[26] Israel Treiman (n 17) 230.
[27] Israel Treiman (n 17) 232.

2.3 From old folk law, special customs, and Law of the Merchant to reform

During the eleventh century, most disputes between traders had been dealt with by old folk law of the market and by special customs of traders which were administered by local courts. These old procedures developed into the Law of the Merchant which was not created through legislative enactments but the growth of these special customs which were based on good faith and mutual confidence between the parties concerned.[28] Notably, 'England was the first European nation to administer the Law of the Merchant through the common law courts'.[29] By the eleventh century, with trade and commerce gradually expanding, conditions improved greatly in Britain which was stimulated mainly by the crusades with the gild merchants, in the aftermath of the Norman Conquest.[30] This led to a significant increase in foreign commerce which also encouraged domestic trade.[31] Furthermore, with commerce developing so rapidly this caused further extension of credit, and with this massive commercial advancement, it became apparent that the old remedies available were inadequate to deal with the growing demand.[32] Kadens suggests during this period 'the merchant or trader who relied on credit lived constantly on the edge'.[33] Therefore, due to the deficiencies in the common law and its cumbersome application, many merchants refused to come to England to trade. This led to the first English mechanisms to be introduced which were designed specifically for individual creditors and solely for the benefit of the creditor employing the process. There was no concern or attention whatsoever paid to the interest of debtors. The only consideration and priority were for the creditor's interests, protecting creditors and protecting commerce due to the belief 'commerce was king'.[34] Parliament had a desire to find a commercially justifiable solution to the problem of financial failure. According to Blackstone, English bankruptcy laws were described as 'laws calculated for the benefit of trade and founded on the principles of humanity as well as justice.'[35]

[28] See discussion Charles Kerr, 'The Origin and Development of the Law Merchant' (1929) 15 (4) Virginia Law Review 350-367.
[29] ibid 356.
[30] ibid. 350-367.
[31] Louis Levinthal 'The Early History of English Bankruptcy Law' (1919) 67 (1) University of Pennsylvania Law Review 1-20.
[32] H.H Shelton, 'Bankruptcy Law, its history and its purpose' (1910) 44 American Law Review, 394, 397.
[33] Emily Kadens, 'The Last Bankrupt Hanged: Balancing incentives in the Development of Bankruptcy Law' (2010) 59 Duke Law Journal 1229.1237.
[34] Charles Tabb, 'The Historical Evolution of Bankruptcy Discharge' (1991) 65 American Bankruptcy Law Journal. 325, 326.
[35] 2 W. Blackstone commentaries 472.

2.4 The introduction of first statutes for imprisonment for debt into English Law

As noted earlier, imprisonment for debt did not exist in the earliest period of common law. However, by the thirteenth century, the introduction of the first statute into English law authorising the detention of a defendant under a civil suit came into effect under the Statute of Marlbridge (1267).[36] Imprisonment was seen as a fundamental tool to protect creditors' interests.[37] The Statute of Acton Burnell (1283) provided not only for the arrest but also the imprisonment of a merchant's debtor allowing the merchant to bring his debtor before an official to have the debt's due date formally acknowledged.[38] This statute proved unworkable from the time it was introduced, as many sheriffs and officials refused to implement the terms of the statute. The Statute of Merchants (1285) expanded further the merchant creditor's power to imprison the debtor after judgment by providing for confinement regardless of whether the debtor possessed sufficient chattels to satisfy his debt.[39] These two Statutes were not directed to bankrupts but to debtors in general. The Statute of Westminster (1275) provided the feudal lord with a comparable power to detain his debtor until the arrangement of payment was agreed upon.[40] The first Act introduced to deal expressly with bankruptcy was in 1350.[41] This Statute was directed solely against the companies of Lombard's Trading, which originated from Italy. These were merchant traders who resided in England temporarily and having obtained large sums of credit, subsequently absconded leaving creditors unpaid.[42] The introduction of this new law declared if a member of one of the companies of Lombard's Trading in England fled from the country without paying off his creditors, the whole company would be liable for the debts.[43]

[36] 2 Henry 3, c23 (1267) the provision dealt with an isolated case, a lord's arrest of his bailiff who failed to make an accounting. The act authorised the bailiff's arrest pending trial, providing that the bailiff owned no land. When such per-trial detention was extended to other types of cases it became known as imprisonment upon mesne process.
[37] Jay Cohen (n 1) 155.
[38] (11 Edw.1) For a detailed discussion of this Act see Pamela Nightingale (2018). The Records of the Statutes of Acton Burnell, and Merchants, 1284–1349. In: *Enterprise, Money, and Credit in England before the Black Death 1285–1349*. Palgrave Studies in the History of Finance. Palgrave Macmillan, Cham., <https://doi.org/10.1007/978-3-319-90251-7_2>.
[39] 11 Edw. 1, Section 3, this remedy of imprisonment was for the use of merchants only.
[40] 3 Edw. 1, stat. 1 also known as the Statute of Westminster II.
[41] 25 Edw. 111 stat. 5, c.23.
[42] Jay Cohen (n 1) 153-171.
[43] Israel Treiman (n 17) 232.

It was the introduction of imprisonment for debt into the common law that increased the creditor's coercive power over a debtor.[44] It has been asserted debtors' prisons historically 'emerged as a hostage-taking institution'.[45] It has also been asserted by Dal Pont and Griggs 'the unbridled enforcement of all such legal rights may generate an outcome inconsistent with the principle of civilised society of loss distribution'.[46] Furthermore, these legislative measures introduced again drew no distinction between solvent and insolvent debtors. Critics of the law of imprisonment for debt argue that it was absurd to imprison a debtor who lacked assets for the main purpose of forcing him to pay his debts.[47] Fear of imprisonment of course led debtors to devise various ways of evading coercive imprisonments.[48] The debtor's ability to avoid imprisonment is one of the main reasons for the introduction of the earliest bankruptcy laws. For example, fraudulent and clever debtors continued to seek other avenues available to them under the common law which had been available during the fourteenth and fifteenth centuries. Examples of these avenues have been discussed above, such as taking refuge in the places deemed 'sanctuaries' whereby, the fraudulent debtor would dispose of all their means of conveyances and fictitious sales. This allowed the debtor to be deemed as possessing no property and was therefore allowed to take refuge in these sanctuaries.[49] During this period many petitions were addressed to Parliament to tackle this notorious practice, however, it was not until the reign of Henry VIII that measures were taken to restrict this practice.[50] Nonetheless, imprisonment for debt continued to occupy a prominent place in English law for more than another six hundred years.[51]

Other factors leading to reform in legislation, during this period, resulted in much pressure from traders who had suffered financially because of wars and had lost total confidence in a bankruptcy regime that did little to encourage debtors to enter a compromise or to disclose their

[44] Jay Cohen (n 1) 155.
[45] Sarah Balakrishnan, 'The Jailhouse divergence: Why debtors' prisons disappeared in the 19th Century Europe and Flourished in West Africa' (2022) 24 (5) Punishment and Society, 807.
[46] See further discussion Gino Dal Pont & L Griggs (n 7) 156.
[47] See further discussion Israel Treiman, 'Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law (1938) 52 Harvard Law Review, 189-215.
[48] Jay Cohen (n 1) 155.
[49] Israel Treiman (n 17) 235.
[50] For example, under the Act of 34 and 35 of Henry VIII these if persons concealing assets of the bankrupt were to forfeit double their value, to be recovered by means as the authorities should think proper, or persons making false claims of debt were to forfeit double the sum demanded. If a debtor left the kingdom, he was to be adjudged out of the king's protection and those who may help him would also suffer a fine and imprisonment as the lords thought fit.
[51] See discussion Jay Cohen (n 1) 153-171.

assets.[52] The common law was continuing to prove much too cumbersome in its application and its old remedies were also proving to be totally inadequate.

Section 3 - Introduction of the first insolvency statute in the English legal system - The '*Creditors Era'*

It is generally accepted that bankruptcy as a procedure first entered the English legal system when the first statute and cornerstone of English law dealing with bankruptcy and insolvency was passed by Parliament in England with the introduction of *An Act against Such Persons as Do Make Bankrupt* (hereinafter 'the 1542 Act').[53] As the title suggests, its main concern was to protect creditors, paying little attention or concern to the interests of debtors who were referred to throughout the Act as 'offenders' who were also characterised as selfish and unscrupulous. The Preamble of the 1542 Act stated:

> *'Whereas, divers and sundry persons, craftily obtaining into their hand's great substance of other men's goods, do suddenly flee to parts unknown or keep their houses, not minding to pay to restore any of their creditors their debt and duties, but at their own will and pleasures consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience'.*

The 1542 Act along with all the earlier bankruptcy laws was quasi-criminal in nature specifically 'designed to deter financial irresponsibility'[54] by providing for the imprisonment of the bankrupt who was referred to as an offender.[55] The 1542 Act targeted the two most common debt avoidance practices of the sixteenth century whereby the debtor who sought to evade imprisonment by taking flight or keeping house, the 1542 Act imposed severe penalties.

For example, if there was evidence of misbehaviour or misconduct by a debtor, this statute laid out mechanisms that would continue in some form through all subsequent statutes. A bankrupt who fled the country or tried to evade his debtors was giving *defacto* proof of misconduct and if found could be arrested and imprisoned without bail. The Act states the debtor shall:

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[52] Michael Quilter 'Daniel Defoe: Bankrupt and Bankruptcy Reformer '(2004) 25 Journal Legal History, 53.
[53] (1542) 34 and 35 Henry V111, c 4: This was repealed by Section 1 of the Act 6 George 4 c 16.
[54] A Mechele Dickerson (n 15) 243, 258.
[55] Charles J Tabb (n 34) 330.

> '[*L*]*ose and forfeit double the value of all such goods, chattels, wares, merchandizes, and debts by them or any of them so concealed, and not wholly and plainly declared and shewed, which forfeitures shall be levied and recovered by the said lords, having authority as is aforesaid, by such ways and means as to them shall seem requisite and convenient. And the same forfeiture to be distributed and employed to and for the satisfaction and payment of the debts of the said creditor or creditors, in such like manner, rate and form, as is above declared concerning the ordering of the goods and chattels of the said offenders, keeping their houses, or flying to places unknown, as is aforesaid.'*[56]

The 1542 Act has also been described as 'a little more than a criminal statute directed against men who indulged in very prodigal expenditures and then made off'.[57] It proved that Parliament believed that bankruptcy law only existed to serve creditors alone and thought all they had to do to obtain debtor cooperation was to threaten punishment.[58] Kadens concludes, 'the law's sole concern was that creditors should be repaid, while the interests of the debtor were ignored'.[59] Quilter contends bankrupts during this period were assumed to be 'evasive at best and fraudulent at worst'.[60] Furthermore, debtors were also required to take part in their complete financial and personal degradation without having any right to demand anything except almost certain incarceration in a debtor's prison in return.[61] As such, the law continued to make no distinction between the criminal, fraudulent bankrupt, and the unfortunate insolvent who had failed due to loss or misfortune.

The legislation, however, provided for the basic elements of a pro-rata bankruptcy system, in doing so this statute imported into English law for the first time the *pari passu* principle of distribution on insolvency.[62] The fundamental principle of the 1542 Act was a summary collection or realisation of the assets, and then an administration or distribution for the benefit of all creditors. It has been claimed that the two great features of all bankruptcy law today

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[56] 34 & 35 Henry 8 c.4: An Act Against Such Persons As Do Make Bankrupt

[57] Louis Levinthal 'The Early History of English Bankruptcy'(n 4) 1. See further discussion Jay Cohen (n 1) 153 – 171.

[58] Emily Kadens (n 33) 1229, 1233.

[59] Emily Kadens (n 33) 1229, 1236.

[60] Michael Quilter, 'Daniel Defoe: Bankrupt and Bankruptcy Reformer' (n 52) 53 - 80.

[61] Emily Kadens (n 33) 1229, 1233.

[62] The principle of equal distribution, which was affirmed in *Smith v Mills* (1584) 2 Co Rep 25a, 26a; 76 ER 441, 473-474 remains a fundamental tenet of insolvency law, and further Acts built on these foundations.

originated in the 1542 Act, whereby it inaugurated a group collection procedure, which can be described as the emergence of collective and rateable distribution. There were, however, many severe limitations to the 1542 Act and the subsequent Act introduced in 1571.[63] This led to the system's infrequent use. In particular, a major restriction in the *Act Touching Orders for Bankrupts 1571* ('hereinafter 'the 1571 Act') was the fact that it was again limited in its application to tradesmen:

> *'[A]ny merchant or other person using or exercising the trade of merchandise by way of bargaining, exchange, recharge, bartry, cheviance, or otherwise, in gross or by retail or seeking his or her trade of living by buying and selling.*'[64]

This was also very common with laws across Europe during this period.[65] Blackstone has suggested that English bankruptcy laws were not concerned with insolvency but with fraud upon trade creditors.[66] If a non-trader was unable to pay his debts this meant that he had over-extended himself through his own fault and was not entitled to protection from his creditors.[67] Instead of offering a more sympathetic approach to the debtor, the fate of the bankrupt debtor continued to prove quite grim well into the seventeenth century.[68]

3.1 Reforms during the seventeenth century

Moving into the seventeenth century, Britain was in a phase of huge commercialisation with trade expanding enormously both at home and abroad. However, this was also an extremely volatile and turbulent period in British history, which found itself not only involved in a civil war but also in wars in Scotland, Ireland and the Continent. During this period there were also huge problems caused by nature, for example, the Great Plague of London (1665-1666) which killed more than two hundred thousand people over a period of seven months. This was almost one quarter of London's population at that time. Regardless of all these difficulties, there continued to be a large increase and growth in commercialisation. This led to a widespread use

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[63] 13 Eliz. C7 which empowered Chancery to appoint a person to deal and dispose of a bankrupt's property, constituted in part of creditors, for valuing debtors' estates, approving creditor's claims and apportioning assets. This Act was directed against the fraudulent debtor who committed an act of bankruptcy examples include the debtor taking refuge in his home, taking sanctuary, or vacating the jurisdiction.

[64] Bankruptcy Act 1571 ss 2-3. For a detailed discussion see Ian P. H. Duffy, 'English Bankrupts, 1571-1861 (Oct.1980) 24 (4) The American Journal of Legal History 283-305, <http://www.jstor.com/stable/844904>.

[65] See discussion Emily Kadens (n 33) 1232.

[66] 2 Blackstone Commentaries 474, 477.

[67] ibid 473, 474.

[68] See discussion Daniel Defoe, '*An Essay Upon Projects'* (London 1697).

of unlimited credit and wealth grew significantly, along with that financial failure became much more prevalent. This new wealth and troubled times were a very unhealthy combination, especially if any individuals failed to meet their financial obligations because this could cause the financial downfall of another individual in the process.[69] In general, with the major rise in industrialisation together with the economic turbulence caused by the rapid development of trade and economic activity 'the equation bankruptcy equals fraud began to have little empirical support'.[70]

Furthermore, during this period, frequent scandals continued to be exposed in Parliament or by popular press with authors and social critics such as Charles Dickens and Daniel Defoe describing the cruel and harsh conditions in the debtor's prisons, which shocked the British public.[71] Much cognisance was given to the fact that there also appeared to be a huge distinction between certain types of debt and certain sorts of debtors', whom have always been treated differently than others. It became obvious that these debtors' prisons were regularly divided into two sections.[72] The most notorious prisons being Fleet and Marshalsea, stories began to evolve describing:

> '*[S]hackled debtors in tiny cells, covered with filth and vermin and how there was no attempt made to distinguish the fraudulent from the unfortunate debtor or the rich rogue able but unwilling to pay his debts, might riot in luxury and debauchery, while his poor unlucky fellow prisoner was left to starve and rot on what the popular press described as the common side.*'[73]

Class distinction was noticeably clear with experts suggesting:

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[69] John McCoid, 'Discharge: The most important Development in the History of Bankruptcy (1996) 70 American Bankruptcy Law Journal, 164 and see also discussion G. Staring, 'Bankruptcy – An historical View (1985) 59 Tulane Law Review 1157 – 1180.

[70] Paolo Di Martino, 'The Historical Evolution of Bankruptcy Law in England, the US and Italy up to 1939: Determinants of Institutional Change and Structural Differences' in Karl Gratzer, Dieter Stiefel (eds), *History of Insolvency and Bankruptcy: from an International Perspective* (2008 Huddinge: Södertörns högskola) 263, 265 see also: Ian Duffy, '*Bankruptcy and Insolvency in London during the Industrial Revolution*, (London: Garland Publishing 1985).

[71] See further discussion - Philip Woodfine, 'Debtors, Prisons, Petitions in Eighteenth Century England (2006) 20 (2) Duke University Press 1 -31.

[72] David Graeber, '*Debt the First 5,000 years'* (Melville House Publishing 2012) 7; See further discussion Charles Dickens, '*Little Dorrit'* (Bradbury and Evans 1857).

[73] David Graeber, '*Debt the First 5,000 years'* (n 72) 447.

'[A]ristocratic inmates who often thought of a brief stay in these prisons as something of a fashion statement, were wined and dined by liveried servants and even allowed to receive regular visits from prostitutes.'[74]

Whereas on the common side of these prisons, impoverished debtors, as one report put it, were left to suffer, and die of hunger and jail fever.[75] Graber comments not much has changed and states 'in a way you can see current world economic arrangements as a much larger version of the same thing.'[76]

Nevertheless, Parliament further passed two new bankruptcy Acts, again with penal consequences reinforcing the perception 'commerce was being served by a law that treated the debtor with a penal slant'.[77] In 1604, *An Act for the better Relief of the Creditors against such as shall become Bankrupt* 1604 (hereinafter 'the 1604 Act') expanded compulsory powers to investigate the 'secret and so subtle' practices of bankrupts.[78] The preamble of the 1604 Act evidenced further the concern regarding the conduct of bankrupts and referred to frauds and deceits daily increasing amongst people engaged in buying and selling. It is argued the main purpose of this legislation was to increase the coercive powers of commissioners in an attempt to prevent fraud and abuse of the legal system.[79] It introduced new provisions which threatened imprisonment to bankrupt those who refused to answer the commissioners' questions. If they deceived or gave false information to the commissioners this led to a criminal indictment and if they were found guilty the bankrupt was sentenced to having to stand in the pillory for two hours and have one of his ears nailed to the pillory and then cut off.[80] The 1604 Act also expanded the description to include any person who 'being arrested for debt, shall after his or her arrest lie in prison for six months or more upon that arrest'[81] The legislature made a further

[74] ibid.
[75] Hallam 1866 V '*The constitutional history of England, from the accession of Henry V11 to the death of George 11'*. London: Widdleton, 269. Since the government did not feel it appropriate to pay for the upkeep of improvident prisoners were expected to furnish the full cost of their own imprisonment. If they, couldn't they simply have starved to death.
[76] David Graeber (n 72) 7.
[77] 1604 Act and 1624 Act.
[78] 1 Jac 1, c15.
[79] Ian Duffy, *Bankruptcy and Insolvency in London During the Industrial Revolution* (London: Garland Publishing, 1985) 9.
[80] This was a common seventeenth century punishment for crimes ranging from 'sedition, writing seditious and libellous works, forgery and coin-clipping to fortune –telling, drunkenness, gambling, adultery and giving short weight.'
[81] 1 Jac 1. c2.

extension by including the simple non-payment of debt by any person.[82] In 1624, *An Act for the Description of a Bankrupt and Relief of Creditors* (hereinafter the 1624 Act) extended the punishment to a debtor who 'failed to show that bankruptcy was due solely to misfortune.'[83] The scope of the expanded 1624 Act further demonstrated that the lawmakers 'expected honest insolvents to also be brought under the bankruptcy acts'.[84] This of course again led debtors to take measures in an effort to protect their interests due to the increasing coerciveness of the law.[85] This statute also introduced for the first time an examination of the bankrupt's conduct in his affairs, by giving the commissioners very wide powers which allowed them:

> *'[t]o break open the bankrupt's house, chambers, shops, warehouses, doors, trunks, or chests and to seize upon and order the body, goods, chattels, ready money and other estate of such bankrupt, as shall be thought by the commissioners necessary.'* [86]

Daniel Defoe, as mentioned above, was a notable protagonist and one of the principal proponents of the introduction of discharge into English law, he was not only a novelist but was also a trader, who himself was an un-discharged bankrupt.[87] He played a significant part in the introduction of statutory bankruptcy having set out a damning indictment of the state of bankruptcy laws towards the end of the seventeenth century. He stated:

> *'[A] statute, as we call it, forever shuts up all doors to the debtor's recovery as if breaking were a crime so capital that he ought to be cast out of human society and exposed to extremities worse than death. And which will further expose the fruitless severity of this law, it is easy to make it appear that all this cruelty to the debtor is so far, generally speaking, from advantaging the creditors, that it destroys the estate, consumes it in extravagant charges, and unless the debtor is consenting, seldom makes any considerable dividends.'*[88]

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[82] 21 Jac 1, c 19, 'who being indebted to any person or persons in the sum of one hundred pounds or more, shall not pay or otherwise compound for the same within six months next after the same shall grow due or within six months after an original writ sued out to recover the said debt'.
[83] 21 James 1 c 19, s 6.
[84] 21 James 1 c 19, extended pillorying and ear-cutting not just to perjury but to concealment of assets, refusal to disclose information about the estate to the commissioners and the making of an intentionally fraudulent conveyance.
[85] See Emily Kadens (n 33) 1248; see also further discussion in Gino Dal Pont & L Griggs, 'The Journey from Ear Cropping (n 7) 164.
[86] 21 Jac. 1, c. 19, s 8.
[87] Michael Quilter (n 52) 53,73.
[88] Daniel Defoe, '*An Essay'* (n 68) 120.

In response to these factors, in 1649 the Parliament passed the first statute providing for the release of imprisoned insolvent debtors titled '*An Act for the relief and release of poor distressed prisoners for debt'*.[89] Again in 1670 a further Act *The Insolvent Debtors Relief Act* was introduced which provided for the liberation of imprisoned debtors, however, one provision provided that a creditor could insist on an imprisoned debtor being detained even if the debt could not be validated if the creditor paid a weekly fee for the debtor's subsistence.[90] Ultimately, the writer believes the main aim of legislation throughout the sixteenth and early seventeenth centuries was to increase the coercive powers of commissioners in an attempt to prevent fraud and abuse of the legal system.[91] By the late seventeenth century bankruptcy continued to remain involuntary. Evidence suggests that due to the increasing coerciveness of the law, collusion between a debtor and a favoured creditor became very common.[92]

Section 4 - Moving towards the *Debtor Era* –The Eighteenth century

The Industrial Revolution was a critical juncture which began in Britain during the eighteenth century. It was a period that saw Britain rise as the leading imperial and industrial nation in the world.[93] This created a changing environment from an agrarian and handicraft economy into a society dominated by industry and machine manufacturing. This in turn again led to a great change in social structure and living conditions with society becoming much more industrialized and urbanised as growing numbers of people moved to urban centres in search of employment. The growth of cities was one of the most important corollaries during this time. This caused a greater need for credit in society as living standards changed significantly during this period of rapid growth. With this changing environment it became very obvious that the old bankruptcy laws dealing with the pre-industrial revolution requirements were inadequate in dealing with the emerging middle class, economic growth, and the increase in consumer spending.[94] The average income and population grew, standards of living increased for the

[89] The Statute required the judge to give a creditor thirty-day notice prior to the oath. If the creditor failed to appear on the appointed day, or if he could not contravene the validity of the debtor's oath, the prisoner obtained his freedom.
[90] 22 & 23 Car. 2, c20 (1670).
[91] Ian Duffy (n 79) 9.
[92] Emily Kadens (n 33) 1229, 1248.
[93] The Acts of the Union 1800 came into force on 1 January 1801 this was a legislative agreement uniting Great Britain (England and Scotland under the name of the United Kingdom of Great Britain and Ireland). The Union officially ended on January 15, 1922, and on May 29, 1953, by proclamation, Elizabeth II became known as the queen of the United Kingdom of Great Britain and Northern Ireland.
[94] See Eric Hobsbawn, *'The Age of revolution: Europe 1789-1848': The Age of Capital 1848-1875; The Age of Empire: 1875-1914.*

general population, great wealth was created but it also created great poverty. With the Industrial Revolution and the further emergence of capitalism, the importance and the idea of money gained much momentum.

During this period there was also a further expansion in Britain's trade in overseas markets continuing from its earlier success during the seventeenth century in carving out its extensive colonial empire with London becoming the first financial centre of the world by the end of the eighteenth century with many overseas traders strategically settling in the British capital.[95] Lack of liquidity became a huge problem for a lot of merchants during this period due to a delay in realising profits from overseas trade, including the increased risk of 'wars, storms and pirates which equally made the outcome of trade very unpredictable.[96] This led merchants to have an increasing dependence on credit due to the slow periods involved to realise profits from overseas trade. The law of bankruptcy was still confined to traders, debtors and those who were not traders could not qualify to become bankrupt. The legal definition of trader included individuals who made a living buying and selling.

4.1 A pivotal point in English Bankruptcy Law - Introduction of the concept of discharge

The eighteenth century led to a pivotal point and a most important juncture in English bankruptcy law, when Parliament introduced the Bankruptcy Act of 1705 entitled '*An Act to Prevent Frauds Frequently Committed by Bankrupts'* (hereinafter called 'the 1705 Act') which introduced the concept of discharge into the law of bankruptcy signalling a new modern approach and an important turning point in the history of bankruptcy law.[97] As noted, earlier statutes had been mainly focused on punishment of fraudulent debtors and creditor collection mechanisms. Therefore, in contrast to the sixteenth and seventeenth century statutes, the 1705 Act widened the focus of the legislation by introducing the principle of discharge with its primary purpose to protect creditors from fraudulent debtors, this Act represents a fundamental

[95] See discussion Margrit Beerbuhl 'The Risk of Bankruptcy among German Merchants in Eighteenth-century England' in 'History of Insolvency and Bankruptcy from an International Perspective,' Karl Grazer and Dieter Stiefel, 64.
[96] ibid.
[97] 4 and 5 Anne c 17; Under the Act, the Lord Chancellor was given the power to discharge bankrupts once disclosure of all assets and various procedures had been fulfilled. Discharge was introduced for those who co-operated with creditors. The discharge took effect once a bankrupt obtained a certificate of the bankruptcy commissioners providing that there has been full disclosure and adherence to their directions. See further discussion Emily Kadens (n 32)1229-1319.

stage in the evolution of bankruptcy law.[98] The 1705 Act was the first indication of any relenting from the severity of previous Acts towards unfortunate insolvents.[99] The discharge, however, was not self-executing. For a bankruptcy to receive a discharge, this Statute also introduced the concept of a certificate of conformity, whereby the commissioners of bankruptcy would provide a statement that the bankrupt had satisfied all the relevant legal requirements. This was conditional that the debtor had co-operated and surrendered all their goods and assets and four fifths of major creditors agreed. The 1705 Act, however, imposed no limits on the exercise of the creditor's discretion in signing or not signing the certificate of conformity. Once signed the certificate of conformity freed the bankrupt debtor from his past debts and allowed him start again. Tabb highlights this prerequisite to the debtor receiving a discharge based on conforming to the Act, again, shows the 'fundamentally creditor orientated basis of the law'.[100] However, many modern historians have seen the 1705 Act as a monumental evolution of the bankruptcy laws, suggesting the introduction of discharge was an overdue acknowledgement that 'not all debtors are scoundrels and that the discharge was designed to help the honest ones'.[101] The liberal and humanitarian purposes of 'modern bankruptcy law had been accomplished' with the concept of discharge and the 'doctrine of fresh start for the poor but honest debtor'.[102] The 1705 Act has also been described 'as the true birth date of a unique, pro-market, English bankruptcy tradition, one that uniquely conjoins principles of humanity and the benefit of trade'.[103] Tabb comments in the commercial context, credit was finally identified as 'a necessary evil.'[104]

One major restriction of the 1705 Act was the fact that it continued to be limited to traders and merchants. McCoid describes it as 'simply a carrot to induce those in trade who became insolvent to co-operate in supplying information about assets and dealings for the benefit of their creditors'.[105] Furthermore, it has been suggested that discharge was the ultimate instrument of the conversion of bankruptcy from a creditors' collection remedy to a system of

[98] Charles J Tabb (n 34) 325, 333.
[99] Louis Levinthal (n 57) 18.
[100] Charles J Tabb (n 34) 337.
[101] John McCoid (n 69) 163.
[102] Staring, 'Bankruptcy – An historical View (1985) 59 Tulane Law Review 1157, 1180.
[103] J Sgard, 'Courts at Work: Bankruptcy Statues, Majority Rule, and Private Contracting in England (17th – 18th century) 9. See further discussion Michael Quilter, 'Bankruptcy and Order' (2013) 39 (1) Monash University Law Review 188, 212.
[104] Charles J Tabb (n 34) 335.
[105] J McCoid (n 69) 163.

statutorily mandated composition 'mutually beneficial to debtors and creditors'.[106] The restriction to traders was to remain until later in the century when it was finally removed.[107] A second limitation to the 1705 Act was that bankruptcy remained a purely involuntary remedy and only creditors could put the debtor into bankruptcy, if the debtor had committed 'an act of bankruptcy'.[108]

Subsequently, any benefits that were hoped for as a result of the introduction of the 1705 Act were diminished again with the introduction of the restrictive conditions imposed in 1706 legislation entitled '*An Act to Explain and Amend an Act of the Last Session of Parliament for Preventing Frauds Frequently Committed by Bankrupts'* (hereinafter the '1706 Act').[109] Under this Act, Parliament introduced creditor consent as a pre-requisite to obtaining a discharge.[110] Thus creditor control over the discharge continued until almost the twentieth century. The crime of fraudulent bankruptcy was statutorily defined as a debtor's failure to cooperate with his creditors by appearing before the bankruptcy commissioners and disclosing all his assets after becoming bankrupt. It was also made a capital offence.[111] Coercing the debtor to be honest failed, in fact, it again caused fraud to become more prevalent and the death penalty for bankrupts was found to be a disproportionate remedy by both creditors and jurors.[112]

Subsequently, the 1716 Act eventually drew a distinction between honest and fraudulent bankruptcy with the introduction of the certificate of discharge, indicating that bankruptcy could be possibly caused without dishonesty.[113] The later 1720 Act dealt with the injustice of the imprisonment system when it again was made very public, aided particularly by a report published in 1929 by the parliamentary committee. [114] The introduction of the 1732 Act introduced assignees, providing for the first-time creditor participation in the administration of the bankrupt's estate. [115] In 1772 the Thatched House Society was founded, this was a philanthropic society which made attempts to secure the liberty of petty sum debtors from

[106] J McCoid (n 69) 192.
[107] Bankruptcy Act 1861, 24 & 25 Vic 1, c134: Bankruptcy Act 1869, 32 & 33 Vic 1, c71.
[108] Charles Tabb (n 34) 335.
[109] (1706) 5 Anne c. 22 which introduced a pre-requisite that discharge was conditional on securing four-fifths of his/her creditor's approval.
[110] 5, Anne, c 22 1706 Act.
[111] 4 & 5 Ann., c 17, 1, 18 (1705).
[112] Emily Kadens, 'The Last Bankrupt Hanged (n 32).
[113] 3 Geo. 1, c 12.
[114]7 Geo. 1, c. 31.
[115] 5 Geo. 2, c. 30.

imprisonment by offering to pay £10 to obtain their release.[116] In the last quarter of the eighteenth century, they were successful in obtaining the liberty of over fifteen thousand debtors.[117]

4.2 Reform during the nineteenth century leading to the eradication of imprisonment for debt

It has been suggested that the social and cultural relations created by credit continued to play a major role in the lives of all classes from the latter part of the eighteenth century well into the twentieth century.[118] For most of human history, money has been widely understood to represent debt.[119] However, the first formal credit theory of money only began to arise in the nineteenth century.[120] There was still, during this period, a critical difference between bankruptcy and insolvency schemes available and in particular the differing statutory treatment of trading and non-trading debtors. In Britain, at this time, there were still continuous stories of the shocking depravity of conditions in debtors' prisons which made insolvency law reform one of the most debated issues on the legislative agenda. This led to nineteenth century:

> *'[M]oral reformers branding the debtors' prison a 'survival' of medieval 'barbarism., an institution totally incongruous with the modern era.'*[121]

Due to the major increase in bankruptcies from the mid-nineteenth century onwards, this led to many countries in establishing the modern bankruptcy laws although despite similarities in the causes leading to the transformation at the end of the process for example in Europe, England, France, Germany and Italy had developed very dissimilar bankruptcy regimes.[122] Notably, civil law and common law traditions parted ways regarding the treatment of non-trading debtors' liability toward creditors during this period.[123] Furthermore, consumer credit

[116] Jay Cohen (n 1) 163.
[117] Jay Cohen (n 1) 153-171.
[118] See further discussion Margot Finn, *The Character of Credit, Personal Debt in English Culture 1740 – 1914* (Cambridge University Press 2003).
[119] See discussion David Graeber (n 71).
[120] Also referred to as debt theory of money, these theories concern the relationship between money and credit. According to Joseph Schumpeter, the first known advocate of a credit theory of money was Plato. See Henry Dunning Macleod '*The Theory of Credit* '(1889).
[121] John Stuart Mill, *Principles of Political Economy'* (London: Routledge, 1891) 585.
[122] See further discussion Paola Di Martino (n70). See also discussion Kevin Costello 'The Irish Shopkeeper and The Law of Bankruptcy 1860-1930 (2016) The Irish Jurist 56 (56) 180-198.
[123] Elgueta Giacomo Rojas, 'The Paradoxical Bankruptcy Discharge: Rereading the Common Law – Civil Law Relationship' (2014) 19 Fordham Journal of Corporate & Financial Law 293, 312.

transactions become much more common during this period. It also became obvious that the success of bankruptcy as a debt-collection mechanism centred on providing a greater balance between the needs and duties of creditors and debtors, the law began to pursue other ways to provide positive inducements for debtor participation.[124] One such process was the introduction of voluntary bankruptcy and self-adjudication implying that bankruptcy was no longer thought of as fraudulent. [125] Tribe observes:

> *'[T]he position of a bankrupt at the end of the nineteenth century and continuing into the early twentieth century, in relation to discharge was that they were compelled to apply for their own discharge, however, the discharge was only obtained at the court's discretion.'*[126]

Fear of open court and lack of familiarity with the relevant provisions of this Act deterred debtors from applying for their discharge.[127] In contrast to the bankruptcy laws over the three preceding centuries, it appeared that there was finally a concerted effort to reform bankruptcy law. According to Mann, European development in the nineteenth century was characterised by 'a re-definition of insolvency from sin to risk, from moral failure to economic failure.'[128] This was a period during which bankruptcies were no longer regarded as a consequence of moral shortcomings but merely as economic failures.[129] Di Martino validly asserts bankruptcy and personal insolvency law has evolved through a major process of rethinking, transformation, significant change with many structural differences.[130] Trentmann further identifies 'the global proliferation of bankruptcy laws is finally a definitive recognition that over-indebtedness is a problem in all affluent societies, including social market and welfare states.[131] Public opinion

[124] Emily Kadens (n 33) 1234.
[125] 5 George. I, c.24.
[126] Dr. John Tribe, 'Discharge in bankruptcy: an examination of personal insolvency's fresh start function in English Law: Part 2' (2012) 25 (8) Insolvency Intelligence, 117 - 120.
[127] ibid.
[128] B.H Mann. '*Republic of Debtors. Bankruptcy in the Age of American Independence'* (Cambridge Mass: Harvard University Press London 2002) 5. Mann's observation was based on the conditions in the US but can be assumed to constitute a reasonably good description of European development. Development in Europe from 1808 occurred in Europe in Austria, Belgium, Denmark, England, France, Hungary, Italy, The Netherlands, Norway, Portugal, Spain, Finland, Sweden, Germany/Prussia, Sweden, Switzerland see further discussion in Jerome Sgard 'Do legal origins matter? The case of bankruptcy Laws in Europe 1808-1914, (2006) 10 European Review of Economic History, 389 – 419.
[129] Karl Gratzer, Dieter Stiefel (eds), *History of Insolvency and Bankruptcy: from an International Perspective* (2008 Huddinge: Södertörns högskola) available at <https://diva-portal.org>
[130] See discussion Paolo Di Martino (n 70).
[131] Frank Trentmann, '*Empire of Things: How We became a World of Consumers from the Fifteenth Century to the Twenty First'* (Allen Lane, 2016) 432.

and mentality began to change towards the idea that a debtor could be imprisoned for non-payment of debt which led to a huge decline and the eventual abolition of imprisonment for debt.[132] Kadens states 'the offence and the men who were executed under this penalty have become something of a curiosity, relegated to offhand dismissal'.[133] The revolutionary instrument of debt discharge introduced in the 1705 Act had begun to gain much momentum.

In 1808 an Act was introduced that enabled an imprisoned debtor who owned less than £20 to obtain his immediate release if he had been confined for one year previously, subject to continued liability upon his debt.[134] Another key change in bankruptcy law occurred in 1813 when Parliament enacted a new act which established a Court for Relief of Insolvent Debtors to hear prisoners' petitions for release.[135] By the same Act, a quasi-criminal jurisdiction was given to the Bankruptcy Court so that offenders could be punished against commercial morality which were not necessarily unlawful, for example, extravagant living or rash speculation causing the unpaid debt. The Court did, however, retain its discretionary power to grant this new order for discharge.[136] The 1808 Act remained the basis of bankruptcy until the enactment of *The Bankrupt Law Consolidation Act 1849* (hereinafter 'the 1849 Act').[137] The 1849 Act introduced the Deeds of Arrangement. In 1861, the introduction of *An Act to amend the Law relating to Bankruptcy and Insolvency in England* (hereinafter 'the 1861 Act')[138] was an additional important juncture in the historical evolution of discharge in English law. It introduced no distinction between traders which has been described as one of 'the most curious aspect of the history of imprisonment for debt.'[139] Parliament finally merged bankruptcy and insolvency law.[140] This extension to non-traders was criticised as it enhanced creditors' power to bring bankruptcy actions against a wider group in society. Parliament was opposed to this in fear that it could be used by 'unscrupulous money lenders against gentlemen and landowners'[141] This Act also abolished the classification of certificates and certificates of conformity and replaced them with an order for discharge.[142] In response to further public

[132] 1 George IV, c.115 (1820) (abolished the death penalty for fraudulent bankruptcy).
[133] Emily Kadens (n32) 1231. See further discussion Gino Dal Pont & L Griggs (n7).
[134] 48 Geo. 3 c 123 (1808).
[135] 53 Geo.3, c 102 (1813).
[136] Bankruptcy Act 1861, ss 157, 159.
[137] 12 & 13 Vict. c 106.
[138] 24 & 25 Vict. c 134.
[139] 24 & 25 Vict s 69. See also discussion Jay Cohen (n1) 153-171.
[140] 24 & 25 Vict. c 134 (1861).
[141] V Markham Lester, *Victorian Insolvency: Bankruptcy Imprisonment for Debt and Company Winding up in the Nineteenth Century England* (New York: The Clarendon Press, Oxford University Press, 1995).
[142] Bankruptcy Act 1861, ss 157, 161.

outcry for additional reform Parliament reacted by passing a further Act entitled '*An Act for the Abolition of Imprisonment for Debt, for the punishment of fraudulent debtors and for other purposes'*[143] (hereinafter the 'Debtors Act of 1869').[144] In general, the Debtors Act 1869 abolished imprisonment for debt, except for fraudulent debtors, in other words, debtors who would not pay their judgment debts although they had the means to do so. However, the pendulum in favour of official administration had swung back to the Courts' discretion which was made conditional.[145] This Act also provided for the appointment by the creditors of trustees for the administration of bankrupts' estates.

In 1883, Joseph Chamberlain's Bankruptcy and Insolvency Act (hereinafter 'the Bankruptcy 1883 Act') established the framework for the twentieth century bankruptcy law in England and Wales.[146] This Act was in response to many criticisms of unequal treatment and the inaccessibility of bankruptcy for the working class insolvents by providing an alternative collection remedy to imprisonment for debt.[147] It introduced the administration order, whereby, a County Court Judge could make an order for the payment by a debtor who owed less than £50 to be made by agreed instalments and be administered by the court with the possibility of an ultimate discharge. The 1883 Act did not abolish imprisonment for debt in all cases, however, it could no longer be said that there was inequality in the law between the rich and poor debtors. The administration order is described as an early endeavour to alter bankruptcy law to cater for wage earners by providing the working class with an alternative collection solution rather than imprisonment for debt.[148] Defects in the procedure were identified in a report in 1887, however, no attempt was made to address these or to raise the low ceiling on debts of £50.[149] It appears that during this period 'few people seemed interested in the administration order'.[150] Ramsey describes the lack of interest in reform as a process of drifting

[143] (1869) 32 & 33 Vict. c71.
[144] (1869) 32 & 33 Vict. c 62 amended by 41 & 42 Vict. c 54 (1878).
[145] (1869) s 48 Debtor must have paid 10 shillings in the pound to creditors or the creditors consenting to the discharge.
[146] 46 & 47 Vict. c 52.
[147] Iain Ramsey, *Personal Insolvency in the 21st Century A comparative analysis of US and Europe'* (Oxford: Hart Publishing 2017) 10.
[148] ibid.
[149] See Bankruptcy (Administration Orders) Committee, 'Report of a Committee Appointed by the Lord Chancellor and the Board of Trade to Inquire in the Working of s 122 of the Bankruptcy Act 1883' (Great Britain) C (2nd series) 1887, 5139, 2.
[150] See further discussion P Polden, '*A History of the County Court 1846-1971'* (Cambridge, Cambridge University Press, 1999) Iain Ramsey, *Personal Insolvency in the 21st Century A comparative analysis of US and Europe'* (Oxford: Hart Publishing 2017) 80.

which reflected political and bureaucratic choices for inaction'.[151] The 1883 Act also introduced a provision that a bankrupt had to apply to the court for their own discharge.[152] Therefore, removing the control that creditors previously had, however, creditors still retained the power to dispute the granting of the discharge. Tribe describes the intention behind this legislation was to 'encumber the state of bankruptcy with a further stigmatising tool.'[153]

Section 5 - Conclusion

This paper has provided a detailed discussion of the historical origins and the conceptual evolution of bankruptcy and insolvency law from the Middle Ages up to the beginning of the twentieth century. It has clearly demonstrated the causal factors that led to the rise of personal insolvency law which shaped change and the resulting legislative intervention. The analysis suggests that this change has been influenced by many factors over the centuries such as the huge change in the role of household debt in the economy, and the influence of neo-liberalism which led to a period of massive credit and capital liberalisation. Furthermore, this historical paper teaches us that financial failure and bankruptcy were seen as immoral, deceitful, quasi-criminal and sinful behaviour. It is clear the issue of stigma associated with bankruptcy has had a long heritage in both common law and civil law legal systems. Social stigma accompanied all bankruptcies down through the centuries and still remains present in many jurisdictions today. Stigma has been defined as 'an attribute' that is deeply discrediting and an undesired differentness' from the expected social norm.[154] Bankruptcy stigma is seen as one such form of discreditable stigma.[155] Furthermore, the stigma of bankruptcy also has an economic aspect affecting a bankrupt as an economic player, whether in seeking employment, the ability to obtain future credit or obtaining positions of responsibility. The main objective of the additional liberalised discharge procedures was to principally reduce the stigma of bankruptcy in particular to honest bankrupts and to improve their access to credit after discharge. The modern 'fresh start' philosophy has therefore been to reduce the impact of financial failure and to encourage a 'second chance' culture. In addition, we have seen how bankruptcy is also widely regarded as a means of rehabilitation for debtors in severe financial hardship. Therefore, achieving economic rehabilitation was also one of the principal purposes of an insolvency

[151] Iain Ramsey *Personal Insolvency in the 21st Century* (n 147) 69.
[152] Section 28 of the 1883 Act.
[153] Dr. John Tribe (n 126) 3.
[154] Martin Ryan, 'The Stigma of Bankruptcy' (1992) Sociolegal Bulletin 6, citing Erving Goffman, Stigma (Penguin, 1968) 13, 15.
[155] ibid.

system. Without effective rehabilitation, a 'fresh start' may not deliver economic success. One core theme that also runs through this paper is that it is evident, that in order to improve this area of law when moving forward one must continue to keep in mind 'the lessons learnt over a period of over four hundred and fifty years historical experience'.[156] Two distinct eras have been identified, the first was the sixteenth and seventeenth centuries which has been described as the creditor era and the second is the eighteenth and nineteenth century a period which was moving towards the debtor era. Ultimately, the writer believes the introduction of discharge in 1705 was the most crucial instrument of transformation and an extremely important development in the history of bankruptcy. Notably also the 1883 Act was a further important juncture as it had established the framework for the twentieth century bankruptcy law in England and Wales.

This paper also raises a further key point questioning how historically bankruptcy had been dealt with in the rubric of criminal law, this leads to the question of whether this should be the case today. The writer firmly contends that credit is the lifeblood of the modern economy and financial failure is unfortunately the price society must pay. How we avoid and deal with problem debt now and in the future is of course the important question. The writer believes it is imperative to uphold the principle that debts should be repaid, and it is also important to ensure that the insolvency processes in place are not seen as a soft option or allow for moral hazard.

[156] Further discussion Charles Tabb (n 34) 371.

What goes up, must come down…. The Rise and Fall of An Bord Pleanála

Annette Cleary

Abstract

This paper critically evaluates the performance of An Bord Pleanála by focusing in particular on its management of Strategic Housing Development applications. The first part of the article will discuss the role of An Bord Pleanála in approving applications for large-scale housing developments. It will reveal that an absence of legal expertise among Board members compounded the difficulty when making decisions that contravened local Development Plans. It will explore the effect that violating local development plans had on the operational plans of local authorities. The findings will demonstrate that the operational plans were being affected without the local authorities' awareness or consultation.

The second part of the research will review the consequences that result from not mandating Board members to hold legal qualifications. It will examine the intent of the original legislatures who, at the time of establishing the Board, required the Chairperson to be a former judge. The article will examine the consequences that ensued when this stipulation was removed in subsequent legislation and explore whether the Board's legal framework requires restructuring. The final part of the article will review the Government's plan to reform planning legislation and analyse elements of the proposed planning Bill. It includes a comparison to the German planning system which is regarded internationally as being exemplary and will assess whether the Board's continued existence in its current state is appropriate or necessary.

The analysis leads to the determination that An Bord Pleanála is not regarded as an exemplary institution internationally and that aligning the planning process with the best practices observed by our European peers would be more beneficial for the common good. This could be achieved through the implementation of minor adjustments to the proposed new planning legislation, thereby obviating the necessity for an appellate body and facilitating the dissolution of An Bord Pleanála.

Background to An Bord Pleanála

An Bord Pleanála is an independent, appellate body that was established in 1977 under the Local Government Act.[1] It was established with the objective of operating an open, independent and impartial planning appeal system.[2] Prior to its establishment, planning appeals were made directly to a government minister and concerns had been raised regarding the impartiality, consistency and integrity of decisions. Other politicians criticised the process and regarded some decisions made by the Minister as being 'very strange'.[3] While some Ministers were seen to uphold most appeals against Local Authority decisions; other Ministers rejected most appeals and upheld Local Authority decisions.[4]

The disparity between ministerial decisions led to comments in the Supreme Court by Henchy J, where he stated that it was no wonder appellate power had transferred to An Bord Pleanála as the Minister might be influenced by political pressure or other unworthy considerations. The strong words were made during *Pine Valley,* a case where the Minister approved a planning application on appeal for industrial development of lands that were zoned for agricultural use.[5] The court held that the Minister had acted ultra vires when he upheld the appeal, he had acted outside his power and violated the development plan in disregard of the conditions required to materially contravene the plan. Ministerial decisions must always be made in accordance with applicable laws. The finding in *Pine Valley* exposed a systemic flaw and reinforced the need to develop an unbiased, well-informed decision-making process. When the *Pine Valley* case reached the Supreme Court, the Bill establishing An Bord Pleanála had already been drafted but the case was symptomatic of ministerial decision-making on planning matters.

Over time the role of An Bord Pleanála has expanded to include responsibility for determining planning appeals, applications for key infrastructure developments, appeals under water pollution, building control legislation and compulsory purchase orders. It is distinctive in an international context in its role as an appellate body for the planning system.[6] The Irish

[1] Local Government (Planning and Development) Act, 1976.
[2] Office of the Planning Regulator, *Introducing the Planning System: Planning Leaflet 1* (January 2021).
[3] Dáil Éireann debate, Local Government (Planning and Development) Bill, 1973, Second Stage (13 March 1974) Vol 271 No. 2.
[4] Seanad Éireann debate, Local Government (Planning and Development) Bill, 1973, Second Stage (1 April 1976) Vol 83 No. 18.
[5] *The State (Pine Valley) v Dublin County Council* [1984] IR 407.
[6] The Department of Housing, Local Government and Heritage, *Action Plan for An Bord Pleanála* (October 2022) p.1.

Government proudly state that An Bord Pleanála stands at the apex of the planning system in Ireland and that it is quite unique in an international context.[7] The Board was established in 1977 and has operated as an independent planning appellate body for almost fifty years. In that time, it has not been replicated internationally at any stage. This demonstrates that it being 'quite unique'[8] is not a positive attribute but rather it indicates that the international community do not consider it successful enough to be worth copying.[9] The argument proffered by this paper is that An Bord Pleanála is not considered an exemplary body internationally.

Significance of Development Plans

To assess operational efficiency at the Board it is essential to examine how it has performed in recent years. To achieve that, this section of the paper will interrogate the role of An Bord Pleanála in approving applications for large-scale housing developments. Ultimately, the initiative failed and the Government were forced to revoke the process. However, it is crucial to look at the reasons why it failed and consider whether An Bord Pleanála contributed to its failure. Before analysis is carried out on An Bord Pleanála's contribution to the Strategic Housing Development approval process, it is important to gain an understanding of the role of Development Plans in the State.

Every Local Authority is statutorily required to develop a plan every six years for their respective areas. The plan outlines the planning objectives and becomes the area's governing spatial document for the rest of its existence. The process includes a public consultation period that contributes to amendments and it must be passed by locally elected Councillors.[10]

Role locally elected representatives play in development plans

While the local level that the Councillors operate at brings a different perspective to the plans and any subsequent amendments, the democratic dimension to the Irish planning system is

[7] ibid.
[8] ibid p.5.
[9] In contrast the Criminal Assets Bureau has been replicated around the world, used as a model agency for the Europol Bureau and provided inspiration for a new EU Directive requiring all EU member states to establish a similar office. See Cormac O'Keeffe, 'European Criminal Assets Bureau based on CAB' *The Irish Examiner* (Dublin, 14 October 2009); DIRECTIVE 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union; Jim Cusack, 'Veronica's legacy to benefit all EU' *The Irish Independent* (Dublin, 30 June 2013).
[10] Dublin City Council, *Dublin City Deelopment Plan, 2016 – 2022*.

often thought to be problematic.[11] The power given to local Councillors to approve or block elements of the Development Plan can limit its reach and hinder it from reaching its potential.[12] Local Councillors have an interest in holding onto votes and this objective does not always align with the bigger picture or what is in the best interest of the country as a whole. Its narrow focus involves appeasing disgruntled voters and this can often be at the expense of what is in the best interest of the country.

This impacted planning applications for large-scale housing developments. In 2016, a growing housing crisis put pressure on the Government, and they were forced to take action; they implemented a programme by introducing a new policy.

Rationale behind the implementation of Strategic Housing Developments

Ireland experienced a real estate boom in the 1990s, which collapsed in the 2000s. It triggered the state's economic collapse and a 90% decline in housing construction. From 2006 to 2013, the number of housing units developed declined from 93,000 to 8,300 per annum because of bankruptcy or loss of access to funding by many developers.[13] This had devastating repercussions, it exacerbated the housing crisis and increased pressure on the government to take immediate action.

The Government established a legal process for large-scale residential planning applications (Strategic Housing Developments) to be expedited through the planning process by applying directly to An Bord Pleanála.[14] The thinking behind it was that Strategic Housing Developments would fall under the direct control of a national strategic decision-making body with the authority to quickly commit to large-scale developments. Making the approval process quicker was intended to help with the growing housing problem. It bypassed Local Authorities and the Government hoped it would fast track large-scale housing initiatives to help ease the housing crisis in the State. An Bord Pleanála had originally been formed as the appellate body for planning applications, but it no longer arbitrated decisions; rather, it now was a key agency involved in determining national policy. Local Planning Officers were not given an opportunity

[11] Mick Lennon, Richard Waldron, '*De-Democratising the Irish Planning System'* European Planning Studies (8) 1607-1625.
[12] ibid.
[13] Tom Healy, Paul Goldrick-Kelly, '*Ireland's Housing Crisis – The Case for a European Cost Rental Model'* Nevin Economic Research Institute, Administration, vol 66, no. 2 (2018) 33-57.
[14] Government of Ireland, *Rebuilding Ireland: Action Plan for Housing and Homelessness*, (July 2016).

to review the applications and the acceleration of Strategic Housing Developments through the planning system led to Development Plans being bypassed.

De-democratisation of the planning system

As an independent body, An Bord Pleanála was not bound by Development Plans and this contributed to diminishing the role of the Plans and in turn weakened democratic input by omitting community aspirations for their areas. A critical element in how An Bord Pleanála functions is its independence from perceived political interference and that they are not answerable to either the public or the government. The new Strategic Housing Development process resulted in local Councillors, the Local Authority, and the public being excluded from the planning system because Strategic Housing Developments could not be appealed. The new system and the Board were heavily criticized by all stakeholders. Politicians were critical of the de-democratisation of the planning system; they claimed it alienated local communities. It was perceived as eroding the democratic decision-making power of local authorities and their elected officials.[15]

The importance of democratic input into policy decisions

Democratic input is crucial for spatial planning and should be an essential element for Governments and public bodies when making policy decisions. Adopting a citizen-centric approach to service delivery is essential for boosting public satisfaction and lowering costs. It is vital that housing policymakers understand the citizens ask as it is important to find out exactly what citizens want when it comes to housing. Proactive community engagement is essential to combat urban and rural disadvantage and the alienation of local communities from the development of their areas. Development plans represent the future of an area according to the democratic wishes of its population. A balance is required between democratic input and the challenges of local parish politics. An Bord Pleanála did not provide this balance, instead, it excluded all the essential stakeholders from the process of spatial planning when it came to large-scale housing development.

Democratic input is vital as it ensures decisions are representative of the population and take on board their aspirations rather than imposing the Government's objectives. This develops

[15] Dáil Éireann debate, Planning and Development (Amendment) (Large-scale Residential Development) Bill 2021 [Seanad]: Second Stage (Resumed) (1 December 2021) Vol 1015 No. 1.

trust between citizens and decision-makers and helps focus the delivery of services in areas. Policymakers and planners should integrate the citizens ask into their policies and not focus solely on what is faster or what developers and lobbyists want to build.

Accountability of An Bord Pleanála

Any attempt to change the planning process should recognise the need for democratic input and reduce the likelihood that lobbying and corruption will have an impact. Strategic Housing Developments essentially had the opposite effect. Because An Bord Pleanála were an independent body, their decisions were not accountable to the public. Not being held accountable to the electorate makes the Board more susceptible to lobbying, corruption and operating within a democratic deficit. It is clear that the lack of accountability opens An Bord Pleanála up to objective bias. The years following the Mahon Tribunal were a time when there was a need for the planning system to be more transparent, not less.[16] It was important for citizens to trust their elected representatives and the systems in place being managed by them. However, An Bord Pleanála was making irreversible decisions about large-scale developments and the public, Councillors and local authorities did not agree with this.

Impact of Strategic Housing Developments on Local Authorities operational plans

Another important element that had the potential to be impacted by fast-tracking Strategic Housing Developments through An Bord Pleanála was local authorities' operational plans. Development Plans create spatial plans for their respective areas and set out high-level policies for planning. The plans overlap and interconnect at different levels with Local Authority Corporate Plans and these provide frameworks for Local Authority operations by translating into annual delivery plans and service plans. They are also linked to the Local Authority budget planning and risk management structure.[17] An Bord Pleanála's ability to grant Strategic Housing Development planning applications (bypassing Development Plans and interconnecting Corporate Plans) meant that decisions of An Bord Pleanála could impact the delivery of services by local authorities.

[16] *Tribunal of Inquiry into Certain Planning Matters and Payments (Mahon Tribunal) Final Report;* March 2012.
[17] Dublin City Council, *Dublin City Council Corporate Plan, 2020 – 2024*.

An Bord Pleanála is not familiar with the operational frameworks of local authorities and how crucial they are to the successful operation of services in their respective areas. An Bord Pleanála decisions could impact Local Authority budgets and risk management strategies without any input or review by the local authorities themselves. The Local Authorities are obligated to focus on the needs and quality of life of the citizens and businesses operating in their areas, An Bord Pleanála did not have the same obligations. This created a conflict between An Bord Pleanála decisions and the delivery of Local Authority services in cities and towns around the country.

An Bord Pleanála decisions that materially contravened development plans

An increasing number of legal challenges against An Bord Pleanála have stemmed from issues with the Strategic Housing Development process breaching Development Plans, Local Area Plans, and other planning policy requirements.[18] Although the Board was permitted to contravene Development Plans, they were required to provide a declaration stating the reason why they were contravening it. The reasons were not always clear and at times the Board failed to even recognise a material contravention of the Plan.[19] In *O'Neill v An Bord Pleanála,* permission for 245 apartments was quashed as the reason for contravening the Plan by the Board was not even applicable to the development in question.[20] The Board was also found to have difficulties interpreting the Plans in some cases, this is evident in *Redmond v An Bord Pleanála.*[21] These cases demonstrate a lack of legal knowledge and skills required to interpret Development Plans at a basic level from decision makers at the Board.

The lack of legal knowledge and the irreversible nature of Strategic Housing Development approvals led to many of the proposals being quashed by Judicial Review. There were concerns about how decisions were being made at An Bord Pleanála.[22] This is evident in *Crekav Trading GP Ltd v An Bord Pleanála* where An Bord Pleanála's decision to refuse an application for Strategic Housing Development was quashed as the Board disagreed with its own inspector's report and departed from its recommendation. [23] Barnville J held that the reasons for departing

[18] Office of the Planning Regulator, *Report on Phase 1 of a Review by the Office of the Planning Regulator of certain systems and procedures used by An Bord Pleanála pursuant to s31AS of the Planning and Development Act 2002, as amended* (October 2022) p.48.
[19] *Ballyboden Tidy Towns Group v An Bord Pleanála* [2022] IEHC 7.
[20] *O'Neill v An Bord Pleanála* [2020] IEHC 356.
[21] *Redmond v An Bord Pleanála* [2020] IEHC 151.
[22] Office of the Planning Regulator, (n 17) p. 12.
[23] *Crekav Trading GP Ltd v An Bord Pleanála* [2020] IEHC 400.

from the inspector's report were inadequate in various respects.[24] In an attempt to reduce influence, the Board members and An Bord Pleanála Inspectors do not communicate with each other. This contributed to the issues with decision-making at the Board, as the inspectors who held planning qualifications, skills and knowledge were prevented from sharing their knowledge with members of their own Board. The requirements for the Board to depart from their own inspector's recommendations were set down by the Supreme Court in *Connolly* and it became clear that An Bord Pleanála was not following them.[25] In *Heather Hill*, the Board failed to even carry out a justification test for breaching the Development Plan. The court held that An Bord Pleanála had erred in law and quashed their decision.[26]

The Board's inability to follow the precedent established by the judiciary stems from the fact that the organisation lacks members with legal knowledge. When the Board was established, the original intention had been that the members would hold planning qualifications. At the time, members of the Seanad voiced concerns about the lack of qualifications required to become a Board member.[27] Members of the Oireachtas were astonished and found it extraordinary that Board members would not be required to hold qualifications. A Minister is at least answerable to the Oireachtas, whereas a "*gentleman currying favour with the present government*" is not answerable to anyone.[28] The absence of required qualifications for members of An Bord Pleanála undeniably contributed to the growing number of legal errors in their decision-making.

Due to the independent nature of the Board, they did not meet local authorities or discuss development plans or planning policies with them; they were operating completely independent from such agencies. Because of this failure to communicate, the Board lost any chance it would have had to seize an opportunity to improve its understanding of the significance of development plans. This was in direct contrast to the aim of the Oireachtas members who, at the time of drafting the 1976 Act, insisted that the new institution must keep abreast of public policy issues that may be pertinent to planning and development.[29] This move away from the

[24] ibid para 279.
[25] *Connolly v An Bord Pleanála* [2018] IESC 31.
[26] *Heather Hill Management Company CLG v An Bord Pleanála & Anor* [2019] IEHC 450.
[27] Seanad Éireann debate, Planning and Development (Amendment) (Large-scale Residential Development) Bill, 1976, Committee and Final Stages (17 June 1976) Vol 84 No, 4.
[28] Dáil Éireann debate, Local Government (Planning and Development) Bill, 1973, second stage (13 March 1974) Vol 271 No. 2.
[29] Seanad Éireann debate, Local Government (Planning and Development) Bill, 1973, second stage (1 April 1976) Vol 83 No. 18.

original intent of the legislature was set to become significant. Stakeholders who had been excluded from the process of evaluating Strategic Housing Development application submissions were a contributing factor to the rise of the number of legal challenges being brought before the courts.

There was no platform for local authorities to voice concerns, so they were forced to seek judicial reviews of decisions by the Board. It is extremely uncommon for a Local Authority to challenge a decision made by An Bord Pleanála through the judicial review process. However, following a decision by the Board to grant permission for a development's height to be increased to 13 stories in a Strategic Development Zone; Dublin City Council contended that the Board lacked jurisdiction to grant such a decision. They had no choice but to seek judicial clarification on the situation.[30] Not only had the Board veered outside its jurisdiction, but it was also another application on which the Board had not followed its own Inspector's recommendation. An Bord Pleanála strongly argued that they had jurisdiction to grant approvals for Strategic Housing Developments in the strategic zones but the Board's decision to grant the height increase within a Strategic Development Zone was quashed. The court held that the Board did not have jurisdiction to approve applications that departed from the Strategic Development Zone plan. Humphreys J held that it would be illogical and inconsistent if An Bord Pleanála were to be allowed to depart from a Strategic Development Zone plan in a way that the Local Authority could not.[31] However, it must be noted that the government had already passed legislation that gave An Bord Pleanála the ability to deviate from development plans even though local authorities are not permitted to do so. When the reasoning from *Dublin City Council v. An Bord Pleanála* is applied to the legislative jurisdiction that An Bord Pleanála has over development plans; there is an inconsistency between what is considered illogical by judiciary on the one hand and what forms the basis of statute on the other hand. The court was also critical of the legislation and stated that its ambiguous wording was open to interpretation.[32] Legislation governing planning should be easily understandable and free from ambiguity. It is essential to provide applicants and developers with clarity to instil confidence in the construction industry. Since the legislation is subject to interpretation, it does not provide the required clarity and further complicates the challenges that An Bord Pleanála faced in determining where their jurisdiction resided. To help with better decision-making and prevent

[30] *Dublin City Council v An Bord Pleanála and Spencer Place Development Company Ltd* [2020] IEHC 557.
[31] ibid para 30.
[32] ibid.

legal errors by planning bodies and An Bord Pleanála, there have been calls for more streamlined, legible and user-friendly planning legislation.[33]

An Bord Pleanála decisions relating to Strategic Housing Developments impacted local authorities' operational plans, demonstrated errors in law, breached Development plans, went against the recommendations of their own Inspectors and at times went beyond the scope of their jurisdiction. An Bord Pleanála's role in the Strategic Housing Development approval process undoubtedly contributed to their failure. Public trust in the planning process was devastated and the only place they could look to for help was the courts.[34] The resulting high level of successful legal challenges to its Strategic Housing Development decisions has driven up legal costs at the Board. In 2019 legal costs at An Bord Pleanála were in and around €3.3m but this rose to just over €8.2m in 2020.[35] The increase in successful legal challenges is significant and evidences the volume of legal errors being made by An Bord Pleanála.

The winding down of Strategic Housing Developments

In 2021, 45% of the Board's budget was allocated to dealing with successful legal challenges to its decisions, largely relating to Strategic Housing Development applications.[36] As the failures of the Strategic Housing Developments approval process became more evident, the Government was again forced to take action. In 2021, the Government enacted legislation to cease the fast-tracking of Strategic Housing Development applications to An Bord Pleanála on a phased basis.[37] The Act provided for large-scale planning applications to be submitted to local authorities in the first instance and An Bord Pleanála were to revert to the role of appellate body. During Dáil debates on the proposed amending legislation, there were calls for greater consultations with communities about large-scale residential developments. Politicians opined that the Strategic Housing Development process had been a complete failure as the process squeezed out locally elected representatives, side-lined local authorities and made a mockery of democratically agreed Development Plans. When discussing the requirement for greater transparency at An Bord Pleanála, one Deputy went so far as to state:

[33] Office of the Planning Regulator, (n 18) p.136.
[34] Robin Mandal, 'Faith of ordinary citizens in the integrity of Ireland's planning process has collapsed' *The Irish Times* (Dublin, 6 September 2022).
[35] An Bord Pleanála, *Annual Report & Accounts 2020.*
[36] Office of the Planning Regulator, (n 18) p.6.
[37] Planning and Development (Large-scale Residential Developments) Act 2022.

'*if it smells, looks and acts like it is rotten then it is rotten. That to me is An Bord Pleanála*'.[38]

The Board was characterised by a lack of accountability, which contributed to a sense of remoteness, and thus contributed to a lack of trust on the part of the population.[39]

Requirement for legal qualifications

Prior to the establishment of An Bord Pleanála, a citizen could appeal a planning decision to the Minister for Local Government.[40] To remove these sensitive decisions from the control of a single politician, this appellate power was assigned to An Bord Pleanála in the 1976 Act.[41] By assigning the power to the independent administrative body, the Government hoped there would be more transparency and less opportunity for lobbying and objective bias.[42] An Bord Pleanála insulated politicians from decisions that affect individuals and enabled them to focus on strategic policy-making decisions.[43] The original provisions of the 1976 Act included that the Chairperson was to be a serving or former Judge of the High Court. This indicates that the Oireachtas recognised the significance of An Bord Pleanála's quasi-judicial decision-making role as they initially looked to the judiciary to lead the organisation tasked with rebuilding public faith in the planning process. There was broad support in both houses of the Oireachtas for a Judge to lead the organisation.[44] In the initial thirty years or so of its existence, An Bord Pleanála had enjoyed a high degree of trust and a favourable reputation for its independence, impartiality, and technical expertise. This reputation caused the courts to set an extremely high bar for legal challenges, of which there were relatively few during the first thirty years.[45]

However, in 1983, a completely new procedure was implemented for appointing the Chairman.[46] The requirement for the Chairman to be a current or former member of the

[38] Seanad Éireann debate, Planning and Development (Amendment) (Large-scale Residential Development) Bill, 2021, second stage (1 December 2021) Vol 1015 No. 1. Comments made by Deputy Michael Healy-Rae.
[39] Robin Mandal, 'Faith of ordinary citizens in the integrity of Ireland's planning process has collapsed' *The Irish Times* (Dublin, 6 September 2022).
[40] Local Government (Planning and Development) Act 1963, s26.
[41] Local Government (Planning and Development) Act, 1976.
[42] Dáil Éireann debate, Local Government (Planning and Development) Bill, 1973, second stage (13 March 1974) Vol 271 No. 2.
[43] Oran Doyle, *The Constitution of Ireland A Contextual Analysis* (1st edn, Hart Publishing, Oxford 2018) 95.
[44] Dáil Éireann debate, Local Government (Planning and Development) Bill, 1973, second stage (13 March 1974) Vol 271 No. 2 and Seanad Éireann debate, Local Government (Planning and Development) Bill, 1973, second stage (1 April 1976) Vol 83 No. 18.
[45] Office of the Planning Regulator, (n 18) p. 11.
[46] Local Government (Planning & Development) Act 1983.

judiciary was removed. Instead, the Chairman is now selected from a shortlist of three people by the Minister. There are nine members of the Board, eight of which are selected by the Minister from the following four groups of organisations:[47]

a) Occupations relating to physical planning, engineering and architecture
b) Organisations associated with land development, construction industry, economic development and provision of infrastructure
c) Organisations representative of local government, farming and trade unions
d) Organisations representative of protecting the environment, voluntary/charitable bodies, rural/local community development, promotion of Irish language/ heritage/ arts and culture/ people with disabilities/young people

The other member is chosen by the Minister from a group of people who, in the Minister's opinion, have enough experience, knowledge, or qualifications when it comes to environmental and sustainability issues. There is no requirement for the Chairperson or any member to have legal qualifications or experience and none of the groups listed above are representative of legal professions. Removing the requirement for judicial experience to be the Chairperson has created a vacuum of legal knowledge at An Bord Pleanála. Where once a high level of legal competence existed at the helm of the Board, a void now exists in this regard. The lack of legal knowledge compounded the difficulty of the Board when interpreting where its jurisdiction lay, the significance of precedent in legal cases, recognising material contraventions of development plans and interpreting the plans when making determinations. The requirement for the Chairperson to have judicial experience was based on the quasi-judicial role performed by the Board. The extent of this role was clearly evident in *Genport*, where the court considered An Bord Pleanála's obligation to take reasonable steps to ensure interested parties be made aware of third-party representations and in doing so re-confirmed that the Board performed a quasi-judicial function and thus had such obligations.[48] Its quasi-judicial role is provided for under the Constitution and requires decisions to be made on matters regarding legal interpretation.[49]

[47] An Bord Pleanála, Appointment Process for the Board <https://www.pleanala.ie/en-ie/appointment-process-for-the-board> accessed 23 February 2023.
[48] *(State) Genport v An Bord Pleanála* [1983] ILRM 12.
[49] The Irish Constitution, art. 37.

An Bord Pleanála serves diverse and multiple purposes, their responsibilities invariably require them to exercise quasi-judicial decision-making power involving legal interpretation of intricate and complex statutory provisions. Re-instating the requirement for the Chairperson to have judicial experience would assist them in performing their quasi-judicial function more efficiently and would help to regain An Bord Pleanála's previously held high degree of trust and its reputation for its independence, impartiality, and technical expertise. In the absence of this, and while Board members and officials may struggle with interpreting legal concepts; legal training could help them to understand the complexities of their quasi-judicial function and assist them in understanding bias and its repercussions.

Is a legal framework necessary to regulate perceptions of bias?

There is currently no procedure in place in An Bord Pleanála that identifies staff or Board members' personal interests or monitors such interests regarding the quasi-judicial decision-making role of the Board.[50] Significantly, the 1976 Act marked the first time in Irish legislative history that the concept of public disclosure of any interests was codified into law. Regretfully this did not continue to be provided for in subsequent legislation and the requirement for officers to publicly disclose their interests was extinguished over time. Holders of public office are custodians of the public good and should have nothing to hide. There is a requirement for a framework to be put in place at An Bord Pleanála to assist members in better understanding requirements relating to self-declarations. Although the Board members are well-intentioned decision makers; in the course of arriving at their decisions power was invested in too few people who lacked legal training. Two members of the Board made numerous decisions and overturned the recommendations of their own inspectors.[51] This resulted in allegations of conflicts of interest.[52] It had detrimental consequences to the long-established good reputation of the Board as it led to public perception of bias at the organisation.[53] Two or three people should never be permitted to make decisions in specialised areas. To reduce the risk of lobbying and bias; decisions that impact individuals must be spread out across more people. The significance of decisions being made by only two Board members was originally raised as a

[50] Office of the Planning Regulator, (n 18) p. 83.
[51] Mike Gilmore, 'Calls to review permissions as public confidence shaken in An Bord Pleanála' *FM104 News* (16 August 2022) <https://www.fm104.ie/news/fm104-news/calls-to-review-permissions-as-public-confidence-shaken-in-an-bord-pleanala/> accessed 5 January 2023.
[52] ibid.
[53] Mick Clifford, 'Report exonerating Kenny ignores the perception of bias' *The Irish Examiner* (Dublin, 23 February 2023).

concern in 1974 by the Oireachtas. They questioned the wisdom of there being potential for two members making decisions as they would merely be approving each other's recommendations.[54] It is disappointing that the Bill was not amended when this flaw was highlighted in such a prescient manner. To effectively mitigate the aforementioned concerns, a restructuring of the legal framework would be required. At the very least, this should encompass improved ethical oversight, legal education for board members, and the reinstatement of the chairperson's judicial experience requirement.

This research paper did not evaluate the suitability of the mechanism used to establish An Bord Pleanála nor whether the expectation for independent bodies to operate in a similar manner as public bodies is even attainable. The operation of Government-owned bodies necessitates a profound comprehension of the prerequisites for holders of public office, which may not always be easily applicable to independently run bodies due to their inherent intricacies and the absence of public officials employed there.

Planned reforms to planning legislation

It has been well documented that most planning stakeholders consider the labyrinth of planning legislation complex and hard to navigate.[55] The 2000 Act was amended so many times that it had become too complex even for lawyers to understand.[56] In *Portland Estates*, O'Higgins CJ described it as follows:

> *"These statutes are drafted for an elite cognoscenti - those who in either central and local government are accustomed to the exercise of the powers prescribed and the language used. For others the ascertainment of what is laid down involves an arduous journey into the obscure…"*[57]

The complexity of planning legislation contributed to cases decided by An Bord Pleanála being quashed by judicial review. The Planning Regulator has called for the legislation to be streamlined to help support improved decision-making by planning bodies and to help avoid

[54] Dáil Éireann debate, Local Government (Planning and Development) Bill, 1973, second stage (13 March 1974) Vol 271 No. 2.
[55] Office of the Planning Regulator, (n 18) p. 136.
[56] Dáil Éireann, *Joint Committee on Housing, Local Government and Heritage* (2 March 2023).
[57] *Portland Estates (Limerick) Ltd v Limerick Corporation* [1980] ILRM 77, p.80.

legal errors in such decision-making.[58] To add to the complexity, An Bord Pleanála is a competent authority under EU environmental law. EU law is extremely complex and does not transpose easily into Irish law, this increases requirements for Irish planning legislation to be clear. However, the Oireachtas are currently debating a planning Bill that runs to 738 pages.[59] There is a tangible possibility that the new Bill will not simplify existing legislation but will instead substitute one intricate and perplexing system of laws with another. Concerns have already been raised about the proposed legislation's compatibility with EU law and the Aarhus Convention; there is already evidence that the draft Bill will be problematic.[60] The Law Society has indicated that their members have had trouble understanding the proposed changes.[61] If members of the Law Society cannot understand it then neither will the public. The significant concerns of the Law Society are disconcerting; public law should always be accessible to the public.

Furthermore, new legislation should be robust enough so citizens do not feel the need to take judicial review cases. Originally, the Bill sought to impede judicial reviews by residents' groups.[62] The resulting backlash to this proposal led to amendments in the interest of protecting access to justice. Fortunately, this element of the Bill was amended however, had it been successful in its original format it would have interfered with people's right to seek judicial review and would have further diminished public trust in the planning system. This would not have complied with Ireland's obligations under Aarhus, which provides a requirement for access to justice to be facilitated.[63] The Bill proposes public legislation that will impact the day-to-day lives of the public and they should have recourse to challenge any decisions made under it. The volume of successful judicial reviews of An Bord Pleanála's decisions evidences that these planning proposals should have never been approved in the first place. It would not have been appropriate to prevent individuals from exercising their legal entitlement to contest decisions in court, especially when many previous decisions were found to be illegitimate. Instead, the Bill now provides for a change to the manner in which residents associations may take a case. This

[58] Office of the Planning Regulator, (n 18) p. 136.
[59] Draft Planning and Development Bill 2022.
[60] Dáil Éireann, (n 56).
[61] ibid.
[62] Jack Horgan-Jones, 'Explainer: Government plans to overhaul the planning system' *The Irish Times* (14 December 2022).
[63] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998) Art 3(5).

amendment to the Bill will help to preserve the avenue of recourse and means of redress for residents associations.

The objective of the new legislation is to bring clarity, consistency and certainty by aligning all of the piers of the planning process, streamlining the planning legislation and by coordinating the process of applying to An Bord Pleanála and Local Authorities. The proposed changes would see planning applications reduced from eight different formats to one and this would deliver much needed consistency. The streamlined application system could facilitate increased housing supply and the delivery of much needed critical infrastructure nationwide.[64] Additionally, the legislation will establish an Environmental Legal Costs Scheme with the aim of preventing the financial burden of judicial review on individuals.[65] The new legal aid scheme is likely to be warmly received by individuals who may be apprehensive about the financial implications of losing their case. It will significantly contribute to the prevention of cost-related obstacles to action.

The Bill proposes to introduce a time limit for the judicial review process, this would require resources to be ramped up to enable decisions to be delivered within the restrictive timeframes. Nevertheless, the timelines are not related to available resources, so this would force judges to expedite their deliberations, which is not practical and could be problematic.

The Bill proposes strengthening provisions for ministerial guidelines to be mandatory and Local Authority planning documents will be compelled to conform to them. This increases the authority of the Minister office and diminishes the role of Local Authorities and houses of the Oireachtas.[66] It appears that the government is disregarding and setting aside the findings of the *Pine Valley* case, in which the Supreme Court criticised the Minister for exceeding his authority and expressed worries about the possibility of ministers being persuaded by unworthy motives.[67] If the legislation passes in its current form, power will be returned to a single politician. One-person control increases the likelihood of lobbying, corruption, and bias. This

[64] Department of Housing, Local Government and Heritage, Press Release, *Planning and Development Bill 2023 is Published*, 21 November 2023 <https://www.gov.ie/en/press-release/833dd-planning-and-development-bill-2023-is-published/> accessed 28 February 2024.
[65] The Law Society Gazette, *Planning Bill makes Changes on Judicial Review Process*, <https://www.lawsociety.ie/gazette/top-stories/2023/october/government-backs-planning-reform-bill> accessed 28 February 2024.
[66] Convention on Access to Information, (n 63).
[67] *The State (Pine Valley) v Dublin County Council* [1984] IR 407.

section of the bill reflects a return to pre-1976 legislation and signifies a regressive step towards the historic systemic flaws identified in *Pine Valley*.[68]

One of the most fundamental changes in the Bill is the proposal to extinguish the right to appeal from the High Court to the Court of Appeal on planning matters. Extinguishing the jurisdiction of an appellate court to an entire category of cases requires strong justification and the Government has yet to provide this. This element of the legislation is likely to give rise to litigation as it may contravene Aarhus, EU Law and its constitutionality could be questioned.

The Minister has proposed changes to the structure of An Bord Pleanála. If the Bill is successful, the Board will be restructured, renamed An Coimisiún Pleanála and the decision-making and governance structures will be separated.[69] This separation of responsibilities is not only essential but also extremely important. It will help establish strong governance structures and mechanisms to supervise the corporate function of the company and maintain ethical monitoring. This will substantially contribute to the resolution of a number of the issues previously raised in this paper. There are also provisions for Planning Commissioners to replace board members, a Chief Commissioner and Deputy Chief Commissioner who will be accountable for decision-making, and a Chief Executive Officer would oversee governance. However, the credentials required to become a commissioner remain unclear; the Minister would retain authority for nominating the 'most suitably qualified person'. This would not address the flaws highlighted in 1974, which continue to impair An Bord Pleanála's decision-making.

It is clear that the Bill attempts to facilitate legislatively connected thought in order to promote progress at the local, regional, and national levels. It establishes a new legislative structure to ensure sustainable and appropriate spatial development. The allowance for the restructuring and improved allocation of resources for An Bord Pleanala is welcomed. Nevertheless, the Bill has faced resistance from a multitude of organisations that have voiced extensive concerns regarding its potential consequences. Time will tell whether these concerns are warranted and whether the bill will effectively untangle the existing labyrinth of existing planning laws.

[68] ibid.
[69] Draft Planning and Development Bill 2022.

Comparison to an exemplar planning system

The Constitutional right to self-govern is an important feature of the German planning system. While housing delivery, spatial planning and land allocation are largely governed by the Federal Building Code, urban land use planning is regulated and managed at the Local Authority level.[70] Regular updates to the Federal Building Code ensure that regional development strategies are uniform across the country. Planning is coordinated vertically across the country rather than hierarchical decision-making.[71] Each state has a Regional Plan, a State Wide Plan and a Land Use Plan that describes how the state will develop over the next fifteen to twenty years.[72] Together, the plans offer a legally mandated foundation for urban development in every area. The Regional Plans define the spatial structure and objectives for each area and local authorities must abide by them. They establish rules around minimum densities, height restrictions, accommodation types and size for development in each area. The legally binding nature of the Regional Plans extends to pre-planning consultations with Local Authorities and this gives developers certainty when applying for permission to develop land. When an application is reviewed, the Local Authority completes checks to ensure the application complies with planning laws and if no concerns have been raised then the Local Authority must grant permission.[73]

The German procedure for planning appeals differs significantly from the Irish system. As Regional Plans are legally binding and conclusive in nature, there is no requirement for an appellate body. Sections 214 and 215 of the Federal Building Code significantly limit the scope of judicial reviews. Legal action may be initiated if a Local Authority rejects a planning proposal, however, the court will only consider whether the refusal was legal. Third party action can only be initiated if they demonstrate that a permission is unlawful and infringes on their constitutional rights.[74] This provides fairness, cohesion and balance to the German planning system. The stability of the system is clearly evident by the fact that it has remained largely unchanged and the overarching legislation and the system itself has remained consistent.

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[70] The Academy for Spatial Research and Planning, *Studies in Spatial Development* (Germany, 2008).
[71] The University of Glasgow and the University of Liverpool, *Germany: A Balanced Planning System* (Glasgow, 2020).
[72] Ministry of Land, Infrastructure, Transport and Tourism, Japan, An Overview of Spatial Policy in Germany, <https://www.mlit.go.jp/kokudokeikaku/international/spw/general/germany/index_e.html> accessed 26 November 2022.
[73] The University of Glasgow and the University of Liverpool, Germany: A Balanced Planning System (Glasgow, 2020).
[74] Offentliches Baureacht (Translation: Public Building Law).

Urban Development Zones

If the draft planning Bill is successful in its passage through the Houses of the Oireachtas, the Government proposes to replace local area plans with specific types of area-based plans to meet particular needs and will include Urban Area Plans, Priority Area Plans and Joint Area Plans.[75] The Draft Bill provides for a new category of area planning where Urban Development Zones will be identified. A planning scheme can be implemented for the region once it has been identified. Importantly, the designation restricts what can be done with land so that the area can be consolidated and developed in line with the planning and delivery framework. Applications that are consistent with the planning scheme must be approved.[76] There is also a provision that states that An Bord Pleanála will not have appellate jurisdiction in the zones.[77] This suggests that legislators believe there will be no need for an appellate body if the system is correctly implemented for each area. The planning process proposed for Urban Development Zones is quite comparable to the process used in the German system of Regional Plans. By establishing rules around minimum densities, height restrictions, accommodation type and size for development in each area, there is no requirement for a specific planning appellate body in Germany. If the new rule is implemented well, it will make it clear to developers, landowners, and citizens what type of structures can be constructed in each zone.

The mandated nature of the Development Zones has the potential to revolutionise the Irish planning system and bring it closer to conformity with model EU planning systems, albeit more democratic input will be required when schemes are being created. If the Zones were to be implemented on a national scale, Irish planning would be brought in line with European best practices.

European Union influence on planning

There is no one planning profile across the European Union.[78] Yet, many EU policy measures, such as the Habitat and Maritime Directives, have a significant impact on spatial planning

[75] Department of Housing, Local Government and Heritage, Outline of the Proposed Planning and Development Bill (December 2022).
[76] Draft Planning and Development Bill 2022 s93(5).
[77] Draft Planning and Development Bill 2022 s97(6).
[78] Andreas Faludi, Bas Waterhaut, *The Making of the European Spatial Development Perspective: No Masterplan* (Routledge, 2002).

across member states in Europe.[79] Evidently, the exchange of knowledge and experience between policymakers from various member states can have a substantial impact on future human settlement planning and management. The European Union has always supported an integrated and sustainable approach to urban development throughout its member states.[80] Although the EU has previously highlighted issues with the Irish planning system, including the length of time it takes to obtain planning permission and the high cost of appeals, these issues continue to be a concern.[81] It is quite clear that the Irish planning system is not considered to be a model system by other member EU states.

The majority of the ten new states that joined the EU in 2004 modified their planning legislation. They enacted new planning rules and procedures in accordance with European best practices for urban and spatial planning.[82] The EU is not currently actively pursuing supranational coordination of planning systems in member states, but it continues to be a persuasive and influential organisation. As the rest of Europe gradually adopts planning systems that are in line with best practices, Ireland is firm in protecting the integrity of its own planning system and unique appellate framework.

Current instability at An Bord Pleanála

At the time of writing this paper, An Bord Pleanála remains in a state of flux. The former Deputy Chairman appeared in court accused of nine counts of failing to comply with planning laws.[83] Ultimately, he was given a suspended sentence and a €6,000 fine for breaching Planning and Development legislation.[84] The Board are overwhelmed with a yearlong backlog of files.[85] They have failed to meet a number of statutory timelines and these delayed decisions have impacted the delivery of thousands of homes.[86] Public perception of bias and confidence in the

[79] European Committee of the Regions, *Commission for Territorial Cohesion Policy & Budget: Spatial Planning and Governance within EU Policies and Legislation and their Influence on the New Urban Agenda*, (European Union, 2018).
[80] European Parliament, *The New Leipzig Charter; The Transformative Power of Cities for the Common Good*, (2020).
[81] European Committee of the Regions, (n 79).
[82] The Academy for Spatial Research and Planning, Studies in Spatial Development (Germany, 2008).
[83] Noel Baker, 'Paul Hyde appears in court on nine counts of failing to comply with planning laws' *The Irish Times* (Dublin, 28 March 2023).
[84] Barry Roche, 'Paul Hyde given suspended sentence and €6,000 fine over failure to declare property interests' *The Irish Times* (Dublin, 15 November 2023).
[85] Arthur Beesly, 'An Bord Pleanála 15 person board down to 6 members' *The Irish Times* (Dublin, 9 February 2023).
[86] Arthur Beesley, 'Senior barrister to investigate 'matters of concern' at An Bord Pleanála' *The Irish Times* (Dublin, 31 January 2023).

body has dwindled irreparably; urgent efforts are required to regain public confidence in the body and the planning system.

Conclusion

The successful implementation of a comprehensive system of planning standards, aligned with the best practices observed in Europe, would require strong political commitment. However, if executed efficiently, this endeavour would obviate the need for an appellate body. Legislatures in 1963 required that 'all planning is to be done in the interests of the common good'.[87] It is contended that aligning planning legislation with European and worldwide best practice would be the most effective approach to serving the interests of the common good. Nevertheless, it is apparent that the government will not take this road, as the Oireachtas persists in deliberating new planning legislation.

In the interim, given the magnitude of the Board's responsibilities; they should be obliged to hold suitable credentials. While independence is a prerequisite for the Board, it has led to a lack of accountability, necessitating efforts to restore public trust. In the first instance, this issue might be resolved by introducing clear, well-defined terms of reference, robust governance structures, and efficient procedures to guide all personnel in their quasi-judicial decision-making process. But restoring public confidence in the Board requires a transformation in the organisation's culture that extends beyond governance. A strong Chairperson is required to exert authority over Board members and hold them accountable for their decisions. Ideally, reinstating the requirement for a current or former High Court judge to hold the position would stabilise the Board, reduce the volume of legal errors and improve the public perception of bias.

While two judges are assigned to handle planning and environmental cases, it remains difficult to keep up with the volume of cases. This paper did not investigate the possibility of a planning-specialised court being constituted; it may be reasonable to establish a court division that deals exclusively with planning cases (similar to the commercial court). This would facilitate better monitoring of planning-related legal decisions and provide support to decision-makers to effectively use precedents established by any such cases.

[87] Local Government (Planning and Development) Act 1963.

It is evident that An Bord Pleanála and Irish planning legislation are not regarded as exemplary systems by the international community. As the Government persists in advancing the draft legislation through the Oireachtas, aligning the planning system with global and European best practices would help to serve the best interests of citizens. This would eliminate the need for an appellate body and effectively address the issue of public distrust in the existing system.

Measuring the Emotional Harm Caused by Online Bullying: When to Criminalise, When Not to Criminalise.

Dr. Carol Lynch

Abstract

Online bullying is a societal issue that requires a dynamic response, as certain incidents of online behaviour require criminalisation for the infliction of serious emotional harm sustained as a result. Difficulties in prosecution relate to the different nature of online bullying, particularly its pervasive nature and the fact that the laws currently in place were developed at a time when the internet had not even been envisaged. This article forms part of a body of research that presents a thorough description of the various correlations between online bullying behaviours and emotional harm, with the more unexplored focus set primarily on the criminal legal response. Though not all forms of online bullying behaviours come within the criminal context, certain online behaviours can cause serious harm to a victim and are worthy of criminalisation - while others are not. This commentary illustrates that only those instances of online bullying causing the most serious of emotional harm should be subject to criminal law. Accordingly, the various levels of harm that can result from online bullying behaviours are examined.

Introduction

Causing emotional harm without restriction should not be a crime, as over-criminalising certain behaviours that cause emotional harm can lead to the criminalising of otherwise ordinary conduct. However, where incidents of online bullying, or 'cyberbullying' as it is also referred to, are serious enough to warrant legal intervention, identification of when and where the law should intervene must not be confused with simple annoyance complaints.[1] If criminal law is to be the most appropriate response, then it must be demonstrated how behaviours that predicate serious emotional harm would warrant criminalisation, and others, not. [2] A review of

[1] To note, the terms "cyberbullying" and "online bullying" are used inter-changeably to describe online abusive behaviour. Within a legal context, "cyberbullying" can be described as involving the use of online and digital devices to repeatedly communicate either directly or indirectly with a person with the intention to cause, or be reasonably expected to cause, serious emotional harm to another, who cannot easily defend themselves.

[2] "Serious emotional harm" can be described as harm which is caused to a person that does not necessarily require medical or other professional treatment or counselling, but which results in serious and prolonged emotional impairment of a mental function.

the degrees of harmfulness caused by such behaviours, how harm might be measured, and how this measurement can be applied will be examined.

For the purposes of this discussion, a frame of reference is useful, much like a BER (Building Energy Rating) on a property.[3] The more energy efficient the property is, the higher the grade afforded it and the more valuable and purchasable it is. The higher the degree of emotional harm caused by online bullying, the greater should be its potential for criminalisation. Such a 'rating system' in the cyberbullying context would set parameters clarifying the types of conduct that ought to be prohibited against the degree of harm caused to a victim's mental well-being. A rating system that could be collectively agreed upon would not only assist the judiciary in cases involving serious emotional harm to victims but would also assist in defining the threshold for state intervention. With this argument in mind, Feinberg's Harm Principle as set out in his publication, *Harm to others - The Moral Limits of the Criminal Law,*[4] will be explored. This presents a means of justification for the criminalisation of harmful and wrongful conduct where the creation of a criminal offence would potentially prevent harm to others. The discussion will look at various measurement approaches to the issues of online bullying behaviours, many of which focus on victimisation. Such behaviours can then be categorised in accordance with the gravity of possible harm and seriousness that a particular form presents.

Feinberg's "Harm Principle

Within Anglo-American criminal law theory, "the Harm Principle is the principal basis for assessing the legitimacy of criminalisation."[5] This Principle was first developed by John Stuart Mill, who proposed that "[t]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others".[6] Feinberg further advanced this principle, but is more concerned with "the power exercised by the state" by way of criminal law.[7] His approach to the harm principle is permissive as well as positive in that he believes that preventing harm is a justification for coercive regulation, "but coercive

[3]A Building Energy Rating (BER) Certificate sets out a property's energy performance. The energy performance is rated from A to G, with A being the most energy efficient – with the lowest energy bills.
[4]Joel Feinberg, *Harm to others - The Moral Limits of the Criminal Law*, vol 1 (Oxford University Press 1984).
[5]A P Simester, Andreas von Hirsch, *Crimes, Harms, and Wrongs-On the Principles of Criminalisation* (Hart Publishing 2014) 108.
[6]John Stuart Mill, *On liberty* 1859 (Batoche Books 2001) 13.
[7]Feinberg (n 4) 3.

regulation can be permissive in the absence of that reason".[8] Feinberg states harm to be first, a setback to someone's welfare interests, and second, harm as a wrong to another person.

Duff points out that harm in the former instance is not required to be harmful, and in the latter, while such harms are also considered as harms in the first instance, where one adversely affects another person, that act is usually wrong and is considered "as an invasion of--and thus a setback to--their interests."[9] The Harm Principle sets out that the harm must be identified and requires illustration that such harm has sufficiently impeded a person's interests. Furthermore, it must be shown "why the defendant's conduct is wrongful,"[10] as not all harms are supplemented by a wrong.

Feinberg devises his formulation of the harm principle stating that,

> *"it is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values".*[11]

While the first part of this reading identifies the rationale for criminalising conduct where the founding of a criminal offence is the prevention of harm to others, the second part does, however, signal caution of creating such an offence where non-criminal alternatives would prove just as sufficient. Therefore, the implication is that the criminal law should be a last resort as it is "a State's most coercive form of power over an individual".[12] Feinberg is concerned with the way that harm justifies the creation of criminal legislation as it pertains to the first part of the principle. Husak however, points out that while various criminal offences are ruled out for failing to prevent harm to others, few are disqualified simply for failing to meet the "last resort" element of the harm principle.[13]

[8]James Edwards, 'Harm Principles' (2014) 20 Legal Theory 253, 257.
[9]R A Duff, 'Harms and Wrongs' (2001) 13 (5) Buffalo Criminal Law Review13.
[10]Simester and von Hirsch (n 5) 38.
[11]Feinberg (n 4) 26.
[12]Douglas Husak, 'The criminal law as last resort' (2004) 24 Oxford Journal of Legal Studies 207, 216.
[13]ibid 214.

The Harm Principle "forces an enquiry into the consequences of the conduct – does it hurt anyone?"[14] Simester and von Hirsch proffer that where an individual is harmed, that person's life possibilities deteriorate. Where a person's interests are impeded "there is a diminution" of one's "wherewithal [...] means and capacities, for pursuing a good life and facing its challenges".[15] Feinberg has defined an individual's interests as "all those things in which one has a stake" and which are "distinguishable components of a person's wellbeing […] What promotes them is to his advantage or in his interest; what thwarts them is to his detriment or against his interest".[16] Individual interests include privacy, freedom from humiliation, physical integrity, as well as material support and amenity, and "comprise of the longer-term means or capabilities that one has."[17] These are deemed to be of the most importance and therefore, "the most grievous harms are those which drastically diminish one's standard of wellbeing".[18]

Langos notes that the experiences may also include short-term stress or anxiety, frustration or embarrassment.[19] Feinberg describes these states as experiences that occur, "are suffered for a time, and then go, leaving us as whole and undamaged as we were before".[20] What is of consequence in the satisfying of the Harm Principle is "not a wrong *per se* but the implications of that wrong for a person's well-being".[21] The Individual Interests in more detail are set out as follows:

"Physical integrity" encompasses health and safety, and the avoidance of physical pain.[22] This, according to von Hirsch and Jareborg, is the most basic human-interest dimension, with the living standard catering to physical integrity and no further.[23] Physical integrity is predominantly threatened by the most serious of harms and this is done through the taking away of subsistence.[24] "Freedom from humiliation" refers to such injuries to one's self-respect which stems from others' behaviours towards them. "Privacy/autonomy" affects wellbeing while promoting self-respect. It is worth noting here that "[i]t is a dimension which is culture-

[14]Simester and von Hirsch (n 5) 35.
[15]ibid 36.
[16]Feinberg (n 4) 34.
[17]Simester and von Hirsch (n 5) 37.
[18]Andrew von Hirsch, Nils Jareborg, 'Gauging, criminal harm: A living standard analysis' (1991) 11(1) Oxford Journal of Legal Studies 1, 7.
[19]Colette Langos, 'Cyberbullying: The Shades of Harm' (2015) 22 (1) Psychiatry, Psychology and Law 106 1, 4.
[20]Feinberg (n 4) 45.
[21]Simester and von Hirsch (n 5) 36.
[22]ibid 20.
[23]ibid 10.
[24]Tom Sorell, 'The Scope of Serious Crime and Preventive Justice' (2016) 3 (3) Criminal Justice Ethics 163.

specific: in our culture it affects well-being considerably, but another culture may give privacy or autonomy less weight." 25

The fourth interest is "material support and amenity". This interest can extend from a basic material interest such as food and water to material amenities required for a life of varying opulence.[26] To note, this final interest dimension is less applicable to the discussion, as most incidents of cyberbullying do not encroach on an individual's tangible material interests. It may, however, be pertinent to cyberbullying within the workplace, or indeed, to where the individual's business is conducted online, with the victim's ability to perform their duties/business being impeded and so impacting earning capability.[27]

What is of concern here is not simply one's feelings being hurt because of being cyberbullied, but the emotional harm that is caused to the victim which can prove damaging and long-lasting to an individual's psyche. For, "[a]n undesirable thing is harmful only when its presence is sufficient to impede an interest".[28] Feinberg differentiates between "harm", "hurt", and "offences". The categories of "hurt" and "offences" are not always deemed harmful experiences, with "physical pain"[29] being the foremost of the hurts, which assists in the identification of "mental pains" that are considered as "hurts". He considers "offended states" to be comparable to certain non-painful physical discomforts. "Harmful" experiences lie to one side of the spectrum, with "Disliked, But Not Harmful" (which includes "Hurts" "Offenses" and "Other") to the other.[30] The latter are not conditions which would severely impede an individual's interests. "Hurts" can also include mental distress, and where this condition may cause only minor interference, the hurt may also be so severe as to cause further mental illness.[31]

Now that the concept of Feinberg's harm principle has been surveyed, some methods as to how online bullying behaviours and the resulting emotional harm it causes might be measured will be discussed.

[25]Von Hirsch and Jareborg (n 17) 20-21.
[26]ibid 20.
[27]Langos (n 19) 18.
[28]Feinberg (n 4) 47.
[29]Feinberg cites physical pain to include aches, pangs, stabs, stiches etc. causes by bruises, cuts, infections, muscle spasms, etc. See Feinberg (n 4) 46.
[30]ibid 46-47.
[31]ibid 48.

Methods for measuring online bullying behaviours and the resulting harm

In the first of the methods to be considered, Jenkins *et al*.[32] compiled a 'compendium' in their measurement of bullying victimisation, bullying perpetration and bystander experiences of children. They dealt with each group separately, that is, 1) Bully, 2) Victim, 3) Bully and Victim and 4) Bystander, Bully and/or Victim. In the first category, 'Bully', the researchers set out an Aggression scale, a Bullying-behaviour scale, a Children's social-behaviour scale self- report, and a Modified aggression scale. Different scoring systems were used for each category, beginning with a summary of information regarding each measure. For example, in the measurement of bullying by the bully, scoring ranged from 0 to 66 points with high scores relating to greater frequency of engagement in "overt and relational aggression".[33]

While in the Peer Victimisation Scale (self-reporting), the scale is divided in two, whereby, two columns of discordant statements are set out, with rating ranging from 1 – "Really true for me"/ "Sort of true for me" on the left side, to 4 – "Really True for Me"/ "Sort of true for me" on the right side.[34] Two discordant statements are presented, and the respondents are required to identify which one is of greater relevance to them.[35] The researchers' intention was for their compendium to provide valuable information to other researchers, law enforcement parties interested in prevention, and educators, so that these experiences might be prevented in the future, or dealt with more effectively.[36] As with every rating scale, there are limiting factors, one of which in this instance is that the compendium does not appear to present an overly comprehensive outline of the measures.

Tynes *et al.* set out the Online Victimization Scale (OVS) which comprises four subscales that include the subjects' involvement with victimisation experienced online.[37] Their intention was

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[32] E Lynn Jenkins, Linda Dahlberg, Mikel Walters, 'Measuring Bullying Victimization, Perpetration, and Bystander Experiences: A Compendium of Assessment Tools', Center for Disease Control and Prevention, National Center for Injury Prevention and Control Division of Violence Prevention (Georgia 2011) <Measuring Bullying Victimization, Perpetration, and Bystander Experiences (cdc.gov)> accessed 27 March 2021.

[33] ibid 9.

To note: Relational aggression relates to covert bullying behaviour towards another. It can take such forms as exclusion, or the spreading of rumours about another.

[34] ibid 24.

[35] ibid 24. Examples of such discordant statements include: 1) "Some children are often teased by other children BUT Other children are not teased by other children." 2) "Some children are often bullied by other children BUT Other children are not bullied by other children." The scale runs from left to right.

[36] ibid 2.

[37] Brendesha M Tynes, Chad A Rose, David R Williams, 'The Development and Validation of the Online Victimization Scale for Adolescents', 4 (2) Cyberpsychology: Journal of Psychosocial Research on Cyberspace, Article 2.

for the information found here to be utilised in clinical, educational, and other research areas. The creation of the scale was drawn from the theoretical framework of the Youth Internet Safety Survey by Finkelhor *et al.* in 2000. In broad terms, the first scale, 'the online victimisation scale' measured: 1) General Online Victimisation, 2) Sexual Online Victimisation, 3) Individual Online Racial Discrimination, and 4) Vicarious Online Racial Discrimination. More pointedly, their second study measured: 1) Psychological Adjustment Measures, 2) Profile of Mood States-Adolescents, 3) The Rosenberg Self-esteem Scale, 4) The Perceived Stress Scale, and 5) Satisfaction with Life Scale.

The first heading in the second study, "Psychological Adjustment Measures", involved a rating system containing a ten-item self-report measure which assessed affective, cognitive, and behavioural indicators of depression. The subjects had to choose one of the following three options to describe how they felt over the previous two-week period: 1) "I am sad all the time", 2) "I am sad every once in a while", or 3) "I am never sad". The subjects were aged between seven and 17 years.

The second heading "Profile of Mood States-Adolescents" contained a 24-item scale, used to assess anger, depression, fatigue, confusion, tension, and vigour. The subjects had to choose a rating, ranging from 1-5. Point 1 being "not at all" to Point 5 being "extremely", all based on these moods experienced over a two-week period. The third heading entitled "The Rosenberg Self-esteem Scale"[38] measured global self-esteem. It contains a 10-item span of opinions, ranging from those that "would only be endorsed by those with low self-esteem to those endorsed solely by those with high self-esteem". The 4-point scale set out choices for subjects to choose from. They then had to indicate along the scale as to whether they strongly agreed or disagreed with the option.

The fourth heading "The Perceived Stress Scale", pertained to "a 14-item measure of the degree to which situations in one's life are appraised as stressful."[39] The subjects were required to

[38]*The Rosenberg Self-esteem Scale* (RSE) was designed by Morris Rosenberg, whereby, the rating and scores, while somewhat difficult to decipher, incorporates "a method of combined ratings". The scale was designed to measure self-esteem. See Morris Rosenberg in Joseph Ciarrochi Linda Bilich, 'Acceptance and Commitment Therapy. Measures Package Process measures of potential relevance to ACT' (School of Psychology University of Wollongong 2006) 61 <https://www.integrativehealthpartners.org/downloads/ACTmeasures.pdf#page=61> accessed 28 March 2021.

[39]Sheldon Cohen, Tom Kamarck, Robin Mermelstein, 'A global measure of perceived stress' (1983) 24 (4) Journal of Health and Social Behavior 385.

specify how often they experience each of the items stated. The "Satisfaction with Life Scale"[40] heading is the final 5-item scale in this category and measures "an individual's judgments about their overall satisfaction with life". As a 1 - 7-point rating scale, it looks at the subjects' level of agreement/disagreement with the statements presented. The scores ranged from 5 to 35and the higher the scale, the greater the subject's life satisfaction. In their Online Victimization Scale, Tynes *et al.* have drawn from several other approaches to measurement in compiling the rating scale for the information that they wished to measure. They noted that no one scale alone is perfect, but rather that a hybrid of approaches together can achieve a much better result.

Another self-reporting-based approach was undertaken by Álvarez-García *et al.*[41] Their Cybervictimisation Questionnaire (CYVIC) involved a total number of 3,159 subjects aged from 12 to 18 years. They created three scales in their search for information regarding internet risk behaviours, self-esteem, and offline school victimisation. The scale was structured to incorporate such forms of cyberbullying as visual-sexual cybervictimisation, impersonation, written-verbal cybervictimisation, and exclusion behaviours online.

Further markers of visual cybervictimisation such as happy slapping and teasing were also included. These elements were incorporated to ensure factor validity, in that the scale would measure what the researchers intended it to. In terms of how well one measure may forecast the outcome for another, the questionnaire results compare positively with offline school victimisation and internet risk behaviours, while scoring negatively with the self-esteem measure.[42] This would prove useful in their prediction of behaviour and resulting victimisation in future situations.

While the approaches outlined have contributed to the examination of online bullying and the impact it has on its victims, their practical use will depend on what the research is focused on finding out, how the questions are presented, and to whom they are addressed. Many researchers have employed several rating scale approaches to their studies in a bid to deal with

[40]Ed Diener, Robert A Emmons, Randy J Larsen, Sharon Griffin, 'The Satisfaction With Life' Scale (1985) 49 (1) *Journal of Personality Assessment* 71.
[41]David Álvarez-García, José Carlos Núñez, Alejandra Barreiro-Collazo, Trinidad García, 'Validation of the Cybervictimization Questionnaire (CYVIC) for adolescents' (2016) Computers in Human Behavior 70 270.
[42]ibid.

issues of both validation and design.[43] Cetin *et al.*[44]believe a multidimensional approach to victimisation and perpetration to be the preferred route. This is borne out in their 2011 study, through their use of two scales, the Scale of the Cyber Victim (SCV) and the Scale of Cyber Bullying (SCB), in the overall development of the Cyber Victim and Bullying Scale (CVBS), which they created to determine cyber victimisation and bullying behaviours among 600 high school students.[45]

In the first scale, (SCV), subjects were required to rate their feelings within a 22-item measure with regards to the amount of their exposure to cyberbullying. The higher the rating indicated the higher the level of exposure to online bullying behaviours. In the second scale, (SCB), the same 22-item measure was used to identify the level of their exhibiting of cyberbullying behaviours. An Aggression Questionnaire was also used to measure aggression, which again was based on a self-reporting approach.[46] It involved a 34-item measure which gauged subjects' opinions and attitudes, with the scale rating ranging from, "Extremely Uncharacteristic of Me", to "Extremely Characteristic of Me".[47] Five sub-dimensions were also set out in this questionnaire; verbal aggression, physical aggression, indirect aggression, hostility and anger. They noted that several studies had acknowledged that cyberbullying can lead to aggression, with the results of the CVBS also indicating this to be the case. Such validity and correlation confirms the researchers' belief, that "the scale has criterion related validity".[48]

[43]Ateş *et al.,* using the relational screening model, they set out to examine how the levels of cyber victimisation as well as bullying behaviours affected subjective well-being. Along with perceived social support from friends, families, and teachers. Their study was again drawn from Eryilmaz's 2009 Scale, Adolescent Subjective Well-Being Scale; from Çetin, Yaman & Peker's 2011 scale, The Cyber Victim and Bullying Scale; Yildirim's Perceived Social Support Scale (1997, 2004). See Bünyamin Ateş, Alican Kaya, Erhan Tunç, 'The Investigation of Predictors of Cyberbullying and Cyber Victimization in Adolescents' (2018) 14 (5) International Journal of Progressive Education 157 109.
To note: The Relational screening model can be described as "a research model which attempts to determine the existence and level of change in and between two or more variable". See Mehmet Kandemir, Tahsin IIhan, Ahmet Ragip Ozpolat, Mehment Palanci,' Analysis of academic self-efficacy, self-esteem and coping with stress skills predictive power on academic procrastination' (2014) 9 (5) Academic Journals, Education Research and Reviews 146.
[44]Bayram Çetin, Erkan Yaman, Adem Peker, 'Cyber victim and bullying scale: A study of validity and reliability' (2011) 57 (4) Computers and Education 2261.
[45]ibid 2264.
[46]The Aggression Questionnaire was developed by Buss and Perry in 1992. "1 = extremely uncharacteristic of me 2 = somewhat uncharacteristic of me 3 = neither uncharacteristic nor characteristic of me 4 = somewhat characteristic of me 5 = extremely characteristic of me" < https://project-oracle.com/uploads/files/BussPerry_agression_questionnaire_scoring.pdf> accessed 1 April 2021.
[47]Çetin *et al* (n 44) 2264.
[48]ibid 2269.

Cetin *et al.* set out to "separately identify 'victim' and 'bullying', two different dimensions of being exposed to or exhibiting cyberbullying behaviours."[49] They did this through the development of the CVBS. In their review of the literature pertaining to this issue, they acknowledged that spreading rumours, teasing, outing, threatening online and humiliating could all be considered verbal online bullying. The posting of private and intimate images and creating fake accounts were to be considered as a message-related attack, or as Cetin *et al.* described it, "cyber forgery". Anonymity online, with the intention to cause harm to another, was also acknowledged to be an important aspect for consideration within cyberbullying.

The above rating scales are mainly based on self-reporting approaches and have been informative in observing the impact which victims themselves believe cyberbullying can have on their lives and well-being. The emotional harm felt by the individual is subjective in experience. It is important for courts to be able to legislate more consistently in respect of serious emotional harm that has been caused by online bullying. Therefore, a more objective approach to this concept is worth considering, so that a universal and applicable measurement might be more readily administered.

Wellford and Wiatrowksi also stress the importance that any judging of the seriousness of criminal conduct needs to be undertaken in "an objective manner which removes the variation generated when court judges consider offences which vary widely in composition and circumstance". This they believe to be a more direct approach to the measurement of crime seriousness.[50] With this in mind, the discussion now turns to the more generalised approach of Von Hirsch and Jareborg's "crime seriousness" framework, which provides an examination of harm against "standard" incidents of "traditional" crimes, and although not directly pertaining to cyberbullying as such, its general approach is still readily applicable to this issue.

The assessment of crime-seriousness has become more relevant over time, whereby "the severity of the punishment" is primarily based on the gravity of the crime committed. The seriousness of a crime has two aspects, namely, harm and culpability.[51] Offences are differentiated via the offender's blameworthiness, and the punishment "should reflect the

[49]ibid.
[50]Charles F Wellford, Michael Wiatrowksi, 'On the Measurement of Delinquency' (1975) 66 (2) Journal of Criminal Law and Criminology 174,175.
[51]Von Hirsch and Jareborg note that in the last 30 years or so, that 'the dominant rationale for sentencing' was based on crime prevention as opposed to punishment. See Von Hirsch and Jareborg (n 18) 2.

degree of blameworthiness of the criminal conduct."[52] The utilisation of what von Hirsch and Jareborg term as a harm scale, endeavours to rate harm along five gradations from very serious/grave to the minor and is presented as; grave, serious, upper-intermediate (significant harm) lower-intermediate (mild harm), and finally, lesser (no intrusion).[53]

In turn, this is correlated with varying degrees of an individual's standard of living, which is "one of a family of related notions, including wellbeing that refers to the extent of human flourishing".[54] In other words, these are capabilities which one regards as important to the quality of one's life. They proffer that a breakdown of harm be applied to standard examples of traditional crimes.[55] Offences, where a victim is harmed, are explored through a framework which evaluates the harm to establish the appropriate punishment.[56] Its adjustment to a cyberbullying context sets out to determine why certain kinds of online bullying warrant criminalisation, while others would not. This is dependent upon the likely harmfulness of the behaviour. The framework ranks the gravity of behaviour based on the extent to which the individual's standard of living has been intruded upon, where an individual's interest dimension has been impeded.

Von Hirsch and Jareborg's Living standard levels and degrees of intrusion.

The following living standards were set out by von Hirsch and Jareborg to measure the degree to which a criminal act would intrude upon an individual's living standard. These are as follows:

Subsistence - (First degree Harm) / Grave harm
Minimum Well-being – (Second degree harm) / Serious harm
Adequate Well-being - (Third degree harm) / Significant harm (Upper intermediate)
Enhanced Well-being - (Fourth degree harm) / Mild harm (Lower intermediate)
Living Standard not affected - (or only Marginal degree of harm) / Lesser harm

[52]ibid 6.
[53]Von Hirsch and Jareborg note that "each gradation might be set forth as a band, so as to make room for-differentiations within the band." ibid 28.
[54]ibid 10.
[55]Von Hirsch and Jareborg cite crimes such as assault, theft and burglary offences by way of examples.
[56]To note, critical of von Hirsch and Jareborg's approach is Ryberg, in that he believes it to fail to provide "a clear concept of probability". See J Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Dordrecht, Kluwer, 2004) 66.

They also note that the level of well-being will vary within the gradation and should be viewed as "a continuum, not neatly demarcated steps."[57] At the first level where an individual's subsistence[58] is impeded, that individual's living standard is greatly diminished. The impact equates to being "gravely harmful"[59] and is termed as a first-degree intrusion whereby the severity of the impact is acute with the level of harm being considered as "grave".[60] The second level of intrusion pertains to where an individual's living standard of "minimal well-being" is intruded upon. Von Hirsch and Jareborg define this as "a minimum level of comfort and dignity" and therefore, an intrusion on this level of living standard would impact greatly and is likely to cause serious harm. This is a second-degree intrusion.[61]

"Adequate wellbeing" is the "maintenance of an adequate level (but no more) of comfort and dignity"[62] and is the third degree of intrusion with a harm gradation of upper-intermediate. The harm is less grave but still significant. Where this is impeded, the individual's quality of life will become deficient because of the intrusion. Von Hirsch and Jareborg consider the degree of this intrusion as significantly harmful. The fourth degree of intrusion relates to where an individual's living standards of "enhanced well-being" is impeded. Von Hirsch and Jareborg describe this state as "significant enhancement in quality of life above the mere adequate level",[63] and where their living standard and quality of life are merely intruded upon. The level of harm experienced by the individual from this level of intrusion is mild, with the severity of impact being considered as lower-intermediate.[64] Below the "enhanced well-being" level lies "marginal harm", or harm that has little or no impact.[65] This level is where "hurt" occurs as opposed to "harm". There will be no lasting intrusion on the individual's interest and will not therefore impact one's quality of life or wellbeing.[66]

When Feinberg's Individual Interest Dimensions are fused with von Hirsch and Jareborg's Living Standard Levels and Degrees of Intrusion, measurement of the cyberbullying

[57]Von Hirsch and Jareborg (n 18) 18-19.
[58]Von Hirsch and Jareborg describe what they term as "subsistence" in general terms as "survival, but with maintenance of no more than elementary human capacities to function". See (n 18) 17.
[59]ibid.
[60]ibid 29.
[61]ibid 17-18.
[62]ibid 18.
[63]ibid 17.
[64]ibid 29.
[65]ibid 19.
[66]ibid 11.

behaviours, which cause the most serious of harm to victims, may be identified. DeVellis highlights that "theory plays a key role in how we conceptualize our measurement problems".[67] With that, von Hirsch and Jareborg consider a mixture of harms, in other words where more than one intrusion on a person's interest dimension occurs. They suggest that in pinpointing the interest dimension which generates the highest harm-rating, this should then be recognised as the "primary harm".[68]

Within cyberbullying, an individual's interest will not always be intruded upon, despite a level of emotional harm being experienced because of being bullied online. The incident may be no more than a trivial infringement. One mean online post that has been directed at the target does not automatically mean intrusion into the victim's ability to be free of humiliation and should be regarded as a "hurt" as opposed to "harm" to the target.[69] Feinberg proffers that while an insult might cause one to feel discomfort at the rebuke, overall one is unharmed. Where, however, "the experience is severe, prolonged, or constantly repeated, the mental suffering it causes may become obsessive and incapacitating."[70] A hurt qualifies as a harm when it is,

> "sufficiently serious to qualify as the harm suggests itself; the hurt is serious enough if and only if it is either a symptom of a prior or concurrent harm of another order (as a pain in an arm may be the result and sign of a broken bone) or else it is in itself the cause of a consequential harm (e.g. mental breakdown) of another order".[71]

Therefore, repeated derogatory posts directed at the target may, through their consistent repetition, mark an intrusion into the target's ability to be free from humiliation and adversely affect one's adequate well-being.

Categorising Online Bullying Behaviours based on the gravity of harm and seriousness of behaviour

There are several harmful types of online bullying behaviours that warrant criminalising and depend on the gravity of harm connected with certain conduct. Von Hirsch and Jareborg believe

[67]Robert F DeVellis, *Scale Development: Theory and Applications* (2nd edn, Sage 2003) 6.
[68]Von Hirsch and Jareborg (n 18) 31.
[69]Colette Langos, 'Cyberbullying: The Shades of Harm' (2015) 22 (1) Psychiatry, Psychology and Law 106 1, 4.
[70]Feinberg (n 4) 46.
[71]ibid 47.

that "their harm-rating should depend not only on the importance of the interest but the degree to which it is risked."[72]

Harassment online is a criminal offence, but to break it down for the purpose of this discussion, it is because the individual's "personal integrity" can be significantly impeded as the result of such behaviour. It also comprises an intrusion on an individual's "freedom from humiliation" interest dimension, borne out through the intention of the perpetrator to cause the victim harm.[73] The harassing behaviour, if lengthy in duration, can cause significant harm, just as it can cause milder harm for the recipient if shorter in duration. Where harassment is significant, this form of behaviour could fluctuate between serious/second degree intrusion, and an upper-intermediate harm gradation/third-degree intrusion on one's living standard, again depending upon the severity of behaviour and harm experienced.

Langos states 'happy slapping'[74] to be a form of online behaviour which might impede several interest dimensions; "physical integrity", "freedom from humiliation" and "privacy/autonomy" interests.[75] This is due to the physical assault and posting of the incident online without the victim's consent, with the assault element itself and the humiliation experienced also contributing to the victim's distress. Such intrusions are likely to cause "significant harm", which is comparable to a third-degree intrusion. Where the conduct is more severe, it equates to "serious harm" and a second-degree intrusion.

In situations which involve masquerading and impersonation,[76] where the intent is to cause harm to the target, the "privacy" interest will be intruded upon, as will one's "freedom from humiliation" interest dimension. This can be due to the masquerading aspect of the behaviours. Depending on what the perpetrator achieved or was intending to achieve, through masquerading and/or impersonation, the harm could be considered as significant and therefore relatable to an upper-intermediate gradation and third-degree intrusion on one's living standard.

[72]Andrew von Hirsch, Nils Jareborg (n 18) 30.
[73]Von Hirsch and Jareborg also note the interest of "freedom from humiliation" to be "affected by a variety of criminal acts, from physical assault to verbal harassment" See (n18) 20.
[74] "Happy slapping" can be described as an extreme form of bullying, where physical assaults have been recorded on mobile phones or digital cameras and distributed online.
[75]Langos (n 19) 9-10.
[76]"Impersonation" or "masquerading" is where the perpetrator professes to be the victim and infiltrates a target's online identity via their email or social media accounts.

Denigration through the posting of intimate images online without consent could impede the privacy/autonomy interest as well as the freedom from humiliation interest. The harm which the victim is likely to suffer would fluctuate between "significant harm" (third-degree intrusion), and "serious harm" (second-degree intrusion), depending on the severity of the behaviour and its effects.[77]

"Denigration" (through words only - for example, criticising or treating someone in a derogatory manner,) does not typically justify criminalisation. However, it would depend on the duration and severity of the communication, with the impact on the victim more generally being marginal. In instances of short duration, the impact will be reduced and will more usually come within the range of what von Hirsch and Jareborg describe as "mild harm", (lower-intermediate/fourth-degree intrusion). In terms of longer-term "denigration", the harm arises from the humiliating aspect of the behaviour, which, for example, could be in the form of mocking or belittling the victim, or could be through the posting of malicious rumours about them online. This form of cyberbullying typically correlates to "significant harm" where the words cause distress and embarrassment and can be damaging to a person's adequate well-being and reputation, equating to an upper-intermediate/third-degree intrusion.

According to Langos, cyberstalking is equivalent to a third-degree intrusion into the "physical integrity" interest dimension, due to fear of imminent harm which is intrinsic to this type of cyberbullying.[78] The "privacy/autonomy" interest can also be impeded, whereby personal details may be posted online, usually with malicious intent, (otherwise known as "doxing").[79] Alternatively, the person's interest could be impeded by the perpetrator's relentless online harassment. The concluding harm connected to this type of online bullying could be considered as adversely affecting one's "minimum well-being" (a minimum level of comfort and dignity),[80] causing "serious harm" and therefore a second-degree intrusion. Langos concluded that the online behaviours of "cyberstalking", "happy slapping" and "denigration by way of a sexual or intimate image" all warrant criminalisation.[81]

[77]This would pertain to whether the image was a non-sexual intimate image, or whether it was a sexual intimate image.
[78]Langos (n 19) 12.
[79]Doxing refers to publishing the victim's personal details online, or posting content which could readily identify the individual, usually with the intent to cause distress.
[80]Von Hirsch and Jareborg (n 18) 17.
[81]Langos (n 19) 12.

‘Trolling’ is where the reason for online communication is to cause the victim distress or anxiety. This can be undertaken by a perpetrator through the starting of arguments or causing upset to people through the posting of nasty or inflammatory communications that are ultimately designed to raise tensions among online users. When directly affected by such comments, an individual’s “freedom from humiliation” and “personal integrity” interest dimensions may be intruded upon.

Depending on the severity of the behaviour and situation, the level of intrusion could be equated to a third-degree intrusion with an upper-intermediate harm gradation, meaning that the harm is less grave but still significant. Where, however, the trolling behaviour extends to causing the victim physical harm (and/or serious emotional harm) brought about, for example, through the sending of an animated strobe image to another, knowing that the victim may be prone to epileptic seizures, and which could potentially cause such seizures, then the “physical integrity” (which pertains to safety, health, and avoidance of physical pain) of the individual will be impeded.[82] The harm gradation will measure as “grave”, with a first degree living standard where subsistence/survival has been seriously compromised.

Behaviours that would not warrant criminalisation can include exclusion, or unfairly criticising someone (denigration). However, as previously stated, it will depend on the duration of the behaviour, the intensity, and circumstances of the incident, and whether it forms part of another more serious form of online bullying. Although less serious than other forms of bullying behaviour, such behaviours can nevertheless cause emotional harm and hurt to the victim.

In consideration of what online behaviours should and should not warrant criminalisation, again it is important to note that one’s level of well-being can move along the harm continuum and is not rigidly confined to a particular living standard category, meaning that it will depend upon the relative circumstances. From this discussion, it can be concluded that only certain forms of cyberbullying behaviours cause serious emotional harm to a victim and, therefore, are worthy of criminalisation.

[82]An example of such an occurrence was where John Rayne Rivello from Maryland, USA sent a seizure inducing GIF via Twitter to Kurt Eichenwald, a journalist who suffers from epilepsy. He was indicted for aggravated assault for allegedly triggering an epileptic seizure and which caused Eichenwald complete loss of both mental faculties and bodily functions, impairing him mentally and bodily for many months.

Other lesser adversarial processes should be utilised before the engagement of criminal law.[83] Feinberg's harm principle puts forward that a State cannot justify the criminalisation of "hurts" based on conduct being merely offensive to others.[84] "Harm" that is considered sufficiently serious, however, can.[85] In addition, Baker opines that legislatures must demonstrate that the creation of any proposed criminal offences must be fair and proportionate in assessing the wrongs in question.[86] Harm varies along a spectrum, with many decisions in the courts being "determined as a matter of degree within a particular category of harm".[87] Baker also points out that "distinguishing wrongs that ought to be criminalised from those that may be criminalised is a matter of drawing a line somewhere between the continuum of culpability and the continuum of the character and seriousness of the harm".[88] This then raises a further question: just how probable should the harm be to warrant criminalisation?

How probable must the harm be to warrant criminalisation?

The Harm Principle sets out to balance the welfare interests in the consideration of the degree and likelihood of the harm concerned, against other consequences of criminalising such conduct. The interests must be protected through the prohibiting of such actions that cause harm. Feinberg states that it is through both the magnitude and probability of harm that together come to comprise "risk", the degree of which "varies directly with both its magnitude and its probability".[89] This, Feinberg states, is essential in the directing of legislatures as he sets out the opposing differentiation between probability of harm, and scale of harm, as follows:

> *"[T]he greater the probability of harm, the less grave the harm need be to justify coercion; the greater the gravity of the envisioned harm, the less probable it need be."*[90]

As interests differ from one to another, individual's vulnerabilities also vary. For the Principle to justify criminalisation, the reasonable man standard ought to be employed, whereby, "[t]he

[83]For example, a Garda caution for juveniles and first-time offenders, whereby, the suspect is administered a caution (as opposed to prosecution) which is made by a Garda Superintendent.
[84]Feinberg (n 4) 245.
[85]To note, the Law Reform Commission also applies the Harm Principle in relation to proportionality requiring that "responses based on policy, education and the civil law should be prioritised and that the criminal law should only be employed to deal with serious harm". See Law Reform Commission, *Report: Harmful Communications and Digital Safety* (LRC 116-2016) 17.
[86]Dennis J Baker, 'Constitutionalizing the harm principle' (2008) 27(2) Criminal Justice Ethics 3, 3.
[87]ibid 17.
[88]ibid 7.
[89]Feinberg (n 4) 191.
[90]ibid 191.

problem is solved by the positing of a "standard person" who can be protected from standard forms of harm to "standard interests".[91] Another consideration for the legislature involves the rationality of allowing the action that creates a degree of risk and how it is to be assessed. Feinberg states that, generally,

> *"[T]he greater the social utility of the act or activity in question, the greater must be the risk of harm (itself compounded of gravity and probability) for its prohibition to be justified."*[92]

Conclusion

How online bullying behaviour is currently being measured by researchers remains somewhat inconsistent. The review of some measurement approaches has acted as a useful starting point, in consideration of whether a rating scale for the measurement of emotional harm is necessary or otherwise. What the discussion has shown is that, where any one scale/rating mechanism should fail to cover a base, another can fill in the gaps in a hybrid approach. Through the consideration of the seriousness of certain forms of online behaviours which predicate serious emotional harm, and behaviours which should and should not warrant criminalisation, the discourse has been informative. In terms of serious emotional harm as a result of online bullying, there is a case that future research ought to look to secure a more standardised method of measurement. The preferred measurement scale must be reliable, observable, measurable, and predictable in its assessment of cyberbullying behaviour and the harm it causes.

It is important to note that there will be challenges in achieving a universally viable scale, one of which is that the type of rating scale to be created will depend on what information the researcher wants to determine. It is important that the scale is suitable for the type of bullying behaviour being measured. Different uses of terminology and definitions will also contribute to differentiations in interpretation and results. This could be overcome through the creation of a scale that sets out the comparable behaviours that cause the most serious emotional harm, is widely recognised as such, and is grouped together along with the intensity and duration of the behaviours under consideration.

[91] ibid 188.
[92] ibid 191.

While there are indeed several degrees of harm which can be linked to online bullying, such degrees require clarification in law. The degree of harm must be such as to have caused indisputable harm to the victim, as the causing of simple irritation will not suffice. Research into measurement mechanisms needs to continue to be revised in accordance with the society for which they are intended. As society changes, so too does the consideration of what constitutes certain forms of criminal behaviour. Therefore, it is imperative to describe the concept as completely as possible, and then measure the concept that is mutual to all forms of criminal conduct. Whatever the form of rating system that researchers and lawmakers eventually settle upon, and however one system rates over another, the utilisation of some system of measurement is certainly better than none.

The Embryology of Legal Systems & Legal Pluralism

Cameron Moss[1]

Abstract

In legal theory, analytical theory has dominated the field over the past few decades, whether rightly or wrongly. However, over the last few years, legal pluralism has been making a steady rise to compete with analytical theory. There have been recent calls for analytical theorists to seriously engage with the criticisms and discoveries of legal pluralism. This essay answers that call by responding to the shortfalls in the arguments of legal pluralists to classic problems of legal theory. It does so by highlighting how analytical theorists, namely legal positivists, have already indirectly engaged with many of the points which legal pluralists think they have made progress with. In showing that on many of these issues, analytical theorists can defend against legal pluralist critiques this article also highlights the relevance of legal pluralism to legal theory and demonstrates why analytical theorists should engage with legal pluralists. This article also seeks to demonstrate why certain aspects of HLA Hart's theory of legal systems are deserving of greater attention for its ability to dispense with the core aspects of the pluralist challenge.

Part I - Introduction

Within legal theory, there are many different fields of study. For present purposes, nothing valuable would be gained by a rigorous line drawing exercise as to what does or does not count as a field within legal theory. However, it does suit present objectives to briefly discuss why legal pluralism is not considered part of mainstream analytical theory, which is by far the dominant and most active area of legal theory. Analytical theory is simply a way to categorise the methods and techniques that legal theorists use which come from analytical philosophy. Analytical philosophy took off in the last century with major contributions from Gottlob Frege, Bertrand Russell, and Ludwig Wittgenstein among others. These developments largely made their way into legal theory because of HLA Hart and Hans Kelsen who openly used these

[1] Legal Researcher at the Law Reform Commission. The views expressed in this essay are not necessarily shared by the Law Reform Commission. I would like to express my thanks to Prof. Klaus Günther at Goethe-Universität Frankfurt am Main for his helpful comments on an earlier version of this essay. I would also like to express my thanks to my colleagues and friends at the European Academy of Legal Theory whose many discussions with me on legal theory helped to inform my views on this topic. I am also grateful to them for putting up with my pesky 'common law perspective'.

techniques to great success, due to their ability to address some of the classic problems in legal theory such as the strange areas of law created or distorted by Austin's command theory. Hart is often credited with bringing the 'linguistic turn' in philosophy to legal theory.

It is not just legal positivists like Hart or Kelsen that use these methods but also natural law theorists like John Finnis and Lon Fuller, and anti-positivist theorists such as Ronald Dworkin and Robert Alexy. All of these theorists are analytical theorists despite supporting different schools of thought, and for the most part, these schools of thought currently operate almost exclusively within analytical theory. Legal pluralism is different in that it does not have an overt commitment to analytical principles or techniques. Legal pluralists often or almost exclusively use techniques from other branches of philosophy, particularly continental philosophy. For these underlying reasons, legal pluralists often label analytical theory their rival, but especially legal positivism. This is essentially because within analytical theory positivism is the dominant school of thought. Pluralists have even gone so far as to label positivism an 'ideology' to which they are completely opposed.

Some brief comments on legal positivism are in order here just to clarify what should be identified and associated with it, anything else is beyond the scope of this essay. In general, positivism supports a number of theses about the nature of law.[2] Firstly, what is often called the 'source thesis' or 'social fact thesis', which holds that the existence of law depends on what a society thinks or believes.[3] Secondly, the most controversial thesis in all of legal theory is the 'separation thesis', which holds that as a descriptive matter, the existence of law and the (moral) merits of such law are conceptually distinct.[4] Thirdly, for the order of a society to be a legal order or system it must be 'definite' and 'officially organised'.[5] Any theory of law which

[2] The formulation here of these theses is overtly Hartian since it makes no sense to discuss them prior to Hart's contribution and to discuss them afterwards would no longer be general enough.

[3] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) Harvard L Rev 593; HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) Chs I, V-VI, IX; Leslie Green and Thomas Adams, 'Legal Positivism' *The Stanford Encyclopedia of Philosophy* (Winter edn 2019) Ch 2 <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/> accessed 3 March 2024.

[4] Often this has been expressed by the phrase 'law as it is versus law as it ought be'. A far too common error is to think the thesis means one should ignore moral quandaries created by specific legal provisions – this error regularly overlooks the qualification that they are *conceptually distinct*, in practical considerations both can be at play according to Hart and many other positivists. See, Hart, 'Positivism and the Separation of Law and Morals' (n 3); Hart, *The Concept of Law* (n 3) Ch VIII, IX; Leslie Green and Thomas Adams, 'Legal Positivism' (n 3) Chs 3, 4.2.

[5] This thesis is not often mentioned as a core positivist thesis but examination of early and later positivist theories always shows some thesis of this kind. Hobbes, Bentham, and Austin make the Sovereign the expression of this

supports these theses is said to be positivist. Note that some positivists particularly John Gardner, have critiqued the formulation of these theses, few however regard any of these critiques as decisive.[6] It should become clear later in this essay why pluralists have taken issue with positivists, especially regarding the third thesis.

Analytical theorists have mostly ignored legal pluralism for various reasons, but this difference is philosophical background is the most important. Analytical theorists gain little from engaging with a field which has no rigorous definitions to support its arguments or explanations to classic problems based on its alternative methods. For example, Austin in constructing his account of law began his inquiry by outlining that law needs to be distinguished from what it is not, otherwise he might have to describe "the law of general or public opinion", "the law or rules of honour" or "the law set by fashion".[7] Analytic theorists, even natural law theorists, accept that some societal relations are not legal whilst others are. Legal pluralism, in most accounts, runs contrary to this and other accepted propositions of analytic theory by arguing for a plurality of simultaneous legal regimes.[8]

The objective of this essay is to engage with legal pluralism from an analytical perspective, both because this has not been done and since it is beneficial for legal theory in general. Contemporary legal pluralism has a number of points which are of analytical interest and which should not be ignored; firstly the extent to which accounts of 'law' can account for state law and non-state law, secondly the extent to which pluralist accounts that deny a common distinct legal feature are credible, and finally whether the pluralist challenge is detrimental to legal centralism (which is taken to characterise mainstream analytic theories).[9]

A promising response from analytic theorists to legal pluralism on these points can come from positivism generally and Hart specifically. For Hart, it is essential that the secondary rules

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thesis, Kelsen's theory relies heavily on norms which have this effect, for Hart it is the union of primary and secondary rules, Raz's vast work centres almost entirely on the application of this thesis. See, Hart, *The Concept of Law* (n 3) 9-12, Chs II-VI; HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford UP 1982) Ch IX; Hans Kelsen, *General Theory of Law & State* (Originally published 1949, Routledge 2017) Pt I Ch X; Joseph Raz, *Practical Reason and Norms* (2nd edn, first published 1975, Oxford UP 1999).

[6] John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford UP 2012) 19-53; Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83(4) New York U L Rev 1035, 1044-1058.

[7] John Austin, *The Province of Jurisprudence Determined* (John Murray (London) 1832) 3.

[8] For an example of the application of legal pluralism see, Mrinalini Shinde, 'Troubled Waters: Reviewing Legal Pluralism at the Interface of Caste and the Access to Water in India' (2023) 1(1) Frankfurt L Rev 1.

[9] See, Jorge L Fabra-Zamora, 'The Conceptual Problems Arising from Legal Pluralism' (2022) 37(1) Canadian J of L and Society 155, 172.

which have to be accepted for a legal system to exist are accepted *both* by the officials and the ordinary citizens. Thus, when considering the 'embryology' of a legal system one can account for the emergence of 'a new legal system emerging from the womb of an old one', which shows that the legal system can be in a factual state of flux or doubt. In this connection, law comes from the legal system and since the existence of this can be in doubt this can explain some of legal pluralism's non-state law. Likewise, Hart's definition of a legal system can be defended. Equally important, legal pluralism focuses on 'state law' however analytic theory typically focuses on the 'legal system', with Hart and Kelsen holding generally that where there is a legal system or order there can be a state, not, as legal pluralism portrays centralism as maintaining, that a state is a necessary condition for law to exist.

Part II – The Background of Legal Pluralism

The purpose of this essay is not to present legal pluralism of its various kinds in detail, rather it is to address the intersection between the relevant positions and analytic theory. As such this work draws inspiration from the points and discussion raised in an article on the subject by Fabra-Zamora and can be considered a response to it.[10] The debate about legal pluralism is in essence a debate about the position of law as a norm or the relation between law and other norms. A brief background of the development of legal pluralism will aid in rendering an understanding of the present discussions.

Legal pluralism originates in sociology of law.[11] Particularly important in this regard is the debate between Kelsen and Eugen Ehrlich.[12] Pluralists take Ehrlich's point: law may exist outside the confines of the state, which allows that there may be many legal norms – law is found where there is social ordering.[13] Kelsen's response criticised this, holding that nothing about this made it legally 'valid', and therefore nothing indicated that it was legal.[14] Kelsen is taken to argue contra Ehrlich that law is state-centric, i.e. without the state there can be no

[10] See, Fabra-Zamora, (n 9).
[11] Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) L and Society Rev 869, 874.
[12] For a summary of the debate see for instance, Marieke J Hopman, 'Wait, what are we fighting about? – Kelsen, Ehrlich and the reconciliation of normative jurisprudence and sociology of law' (2022) 54(2-3) The J of L Pluralism and Unofficial L 155, 156-169.
[13] Baudouin Dupret, 'What is the Plural in Law? A Praxiological Answer' (2005) 1 Égypte/Monde Arabe, para 6 <https://journals.openedition.org/ema/1869> accessed 18 July 2023. Note the points and structure of this essay are largely repeated in another essay, Baudouin Dupret, 'Legal Pluralism, Plurality of Laws, and Legal Practices' (2007) 1(1) European Journal of Social Studies <https://hdl.handle.net/1814/6852> accessed 18 July 2023.
[14] See for instance, Hopman, (n 12) 161-162.

law.[15] Other sociologists including Malinowski and Van Vollenhoven endorse roughly the same point as Ehrlich that law is 'ordering that upholds human associations'.[16] Karl Llewellyn, though not a sociologist, follows this trend in holding that where there is dispute resolution there is law,[17] thus there need not be a state for there to be law. Gurvitch and Pospisil's accounts argue that there are different levels or kinds of law in operation within social groups and social sub-groups at any one time.[18] It should be clear that these sociological accounts were already in conflict with analytic theory long before legal pluralism grew from them, as is observed from the Kelsen-Ehrlich debate - nothing about 'social ordering' by itself entails or explains legal validity. This directly clashes with the third positivist thesis, a thesis which long predates sociology of law when traced back to Hobbes.

Since Kelsen this point of departure between analytic legal theorists and sociologists remained largely segregated. Notably in Hart's *The Concept of Law* the sociological position made no appearance, perhaps as a reader of Kelsen he thought the issue settled. On the other hand, Hart did describe his book as an essay in descriptive sociology. In any case, Hart and others afterwards do consider the point indirectly because as was mentioned in part I, one of the classic problems in legal theory is distinguishing law from that which is not law. The point raised by Kelsen and the sociologists was a recasting of the classic problem understood by Austin and Bentham but specifically from a normative perspective.

"What distinguishes the legal order from all other social orders is the fact that it regulates human behavior by means of a specific technique. If we ignore this specific element of the law, if we do not conceive of the law as a specific social technique… then we lose the possibility of differentiating law from other social phenomena; then we identify law with society, and the sociology of law with general sociology."[19]

Thus after Kelsen positivists did not address the point raised by sociologists *per se*, nor did they feel the need to get involved in the project of defining a state in contrast to the stateless law of sociologists as Kelsen did. Thus the problem of defining a state and considering its

[15] ibid, 162-163.
[16] Dupret, 'What is the Plural in Law? A Praxiological Answer' (n 13) paras 4-7.
[17] This is unsurprising since Llewellyn was a legal realist, see for instance, ibid, para 7; Hart, *The Concept of Law* (n 3) 1-2.
[18] See, Dupret, 'What is the Plural in Law? A Praxiological Answer' (n 133) paras 8-9.
[19] Kelsen, *General Theory of Law & State* (n 5) 26.

relation to law became a secondary and less prevalent issue in legal theory. It was within this state of affairs that legal pluralism in its contemporary form began to take hold.

The birth of contemporary legal pluralism is taken to be from John Griffiths' article 'What is Legal Pluralism?'[20] Here Griffiths attacked legal positivism for promoting a state-centric 'ideology' of law or what he calls 'legal centralism' – citing Hobbes, Austin, Kelsen and Hart.[21] Griffiths holds that 'precisely because it is an ideology' it is 'a mixture of assumptions about how the world necessarily is and how it ought to be' and thus 'conceptions about what law is have reflected how it ought to be'.[22] Griffiths distinguishes the concept of legal pluralism that he wants to defend from legal pluralism in a 'weak sense' as a 'pragmatic governing technique', [23] nowadays known as 'weak legal pluralism'. Weak legal pluralism is where the state or centralised legal order recognises or adopts (local) customs or other norms as law.[24] Griffiths, rightly, holds that this form of legal pluralism really is an expression of legal centralism because it relies on the recognition of the state and therefore implicitly endorses the notion that it is the state which makes or decides what the law of the particular society is.[25] Griffiths defines strong legal pluralism, or legal pluralism proper, as follows:

"Legal pluralism is a concomitant of social pluralism: the legal organization of society is congruent with its social organization. 'Legal pluralism' refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping 'semi-autonomous social fields', which, it may be added, is in practice a dynamic condition. A situation of legal pluralism - the omnipresent, normal situation in human society - is one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another".[26]

The most insightful part of Griffiths contribution actually comes from a note wherein he says that he does not agree with the view that legal and non-legal types of social control (i.e. norms)

[20] John Griffiths, 'What is Legal Pluralism?' (1986) 24 J of L Pluralism and Unofficial L 1. See also, Dupret, 'What is the Plural in Law? A Praxiological Answer' (n 13) paras 12-13.
[21] Griffiths, (n 20) 3.
[22] ibid.
[23] ibid, 5.
[24] ibid, 6-8.
[25] ibid.
[26] Note that the reference to semi-autonomous social fields come from the work of Sally Falk Moore (a sociologist) which was discussed by Griffiths and adopted, ibid, 38-39.

are distinguishable and points out that he has argued elsewhere for law to be considered a non-taxonomic and continuous variable.[27] Rather than a binary status designating a norm's legalness, Griffiths views law as being continuous and so norms are 'more or less legal'.[28] It is unfortunate that this thought was not expressly integrated into the rest of the argument because it is a vital part of it. Since it is a logical conclusion that if law should be considered a continuous variable, or if one is of the belief that it is, then of course legal centralism is a myth, as Griffiths argued. It should be noted that here Griffiths is arguing against the classic problem of distinguishing law from what it is not - a problem which analytical theorists since Austin have insisted is vital to understanding law - according to Griffiths however all norms are legal to some degree. In this sense, it would be nonsense to distinguish certain social conduct as legally valid or as consisting only of social non-legal rules as positivists do. Similarly, it is a grave offence to legal pluralism to argue as positivists do that legal organisation depends on one closed legal system and not multiple overlapping systems.

Part III – Contemporary Problems in Legal Pluralism

After Griffiths, many contributions were made to contemporary legal pluralism. Hereinafter legal pluralism and theories of legal pluralism refer to theories which satisfy Griffiths' definition of strong legal pluralism. These contributions come from various backgrounds including but not limited to; systems theory as devised by Niklas Luhmann but substantially applied to legal pluralism by Gunther Teubner,[29] legal pluralism as a postmodern conception,[30] along with theories such as Massaji Chiba's that further distinguish official and unofficial law within legal pluralism.[31] It would be beyond the scope of this essay to consider all the forms of legal pluralism and derive general issues applicable to them all, moreover, there is a large consensus on the general issues facing legal pluralism so this move should not prove controversial.

[27] See note 3, ibid, 39.
[28] ibid.
[29] See for instance the short overview here, Dupret, 'What is the Plural in Law? A Praxiological Answer' (n 13) paras 25-27.
[30] See for instance, ibid, paras 21-24.
[31] See for instance, ibid, para 28.

The first issue is the definitional problem of legal pluralism, i.e. what is the 'legal' in legal pluralism.[32] As has been alluded to, the problem here stems from Griffiths article which was very influential and often taken as the foundation for other legal pluralists. Griffiths was unable to provide a distinguishing criteria for law as a continuous variable. As Kelsen had warned would happen, legal pluralism lost the ability to distinguish law from other norms and began to use the word 'law' as synonymous with 'norm', or to conflate legal sociology with general sociology. Griffiths eventually abandoned legal pluralism in his investigations of social norms, instead focusing on the sociology of rule following.[33] As Fabra-Zamora points out, other legal pluralists became acutely aware of this problem and have proposed distinctive legal features with which to distinguish law from other norms, including Teubner, Croce and Tamanaha among others.[34] These will be considered in the next part.

Dupret, citing Tamanaha, considers that there is a problem regarding the functionalism present in legal pluralism, stemming from the notion that law is 'social ordering'.[35] The argument goes that if law has the function of social ordering then in order for it to have a function it must be intended to be that way, the notion however that law is created to independently perform social functions as implied by legal pluralism is "historically and empirically dubious".[36] Dupret also considers that legal pluralism suffers from 'essentialist culturalism', wherein concepts like 'native law, indigenous law, primitive law, official law, transplanted law, state law' and so on are promoted,[37] holding that:

"this kind of "nativist" interpretation… offers a very naïve picture of law, which is far from being supported by substantial empirical evidence. The so-called "indigenous" or "native" law has often never existed except in the heads of these scholars, although it is constituted as the yardstick to which the scope of legal "acculturation" is evaluated."[38]

[32] ibid, paras 29-33; William Twining, 'Legal Pluralism 101' in Brian Z Tamanaha, Caroline Mary Sage & Michael J V Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge UP 2012) 114-115; Cormac Mac Amhlaigh, 'Book Review: *Legal Pluralism Explained: History, Theory, Consequences*' (2022) 49 J of L and Society 430, 430-431; Fabra-Zamora (n 9) 162-170.
[33] John Griffiths, 'The Social Working of Legal Rules' (2003) 48 J of L Pluralism and Unofficial L 1; John Griffiths, 'The Idea of Sociology of Law and its Relation to Law and to Sociology' in Michael Freeman (ed), *Law and Sociology* (Oxford UP 2006). See also Twining, (n 32) 115; Mac Amhlaigh, (n 32) 431.
[34] Fabra-Zamora, (n 9) 169-170.
[35] Dupret, 'What is the Plural in Law? A Praxiological Answer' (n 13) paras 34-38.
[36] ibid.
[37] ibid, para 39.
[38] ibid.

Legal acculturation here means the degree to which law is present in the society concerned.[39] This issue of 'essentialist culturalism' is really just another expression of the definitional problem suffered by legal pluralism, it is not a separate issue. This is so for if these notions of native or indigenous law were backed up by a proposed definition rather than simple assertion they would have sufficient clout to be taken seriously – restating the issue as a separate one is unnecessary and misleading.

Now there is one final problem in legal pluralism apart from the definitional problem and functionalism, this being the position of the state. There is essentially disagreement between weak legal pluralists and legal pluralists over the relevance of the state and its conceptual positioning as determining what is 'law'.[40] The context of these disputes has developed over the years with discussions considering organisations like the EU or the current state of international law. Discussions which have rightly occupied analytic theorists as well. There are genuine issues at play, for instance, the EU exhibits state-like functions and characteristics however it is not itself a state but constituted by its Member States. International law on the other hand was canonically considered to be laws or agreements between states but in recent times UN sanctions have been directed at named individuals binding them personally. These issues have generated much discourse concerning the multilateral relationships between the state, law, organisations, and individuals. Having discussed the background and problems facing legal pluralism it is now time to address Fabra-Zamora's charge that analytic theorists have largely ignored legal pluralism and that the agenda of analytic theory should be adjusted to address this failing.[41]

Part IV – The Analytic Response to Legal Pluralism

It should not be a surprise that it is argued that the charge against analytic theory should be dismissed. This can be achieved by demonstrating the ways in which analytic theorists have discussed and considered the issues that legal pluralism faces, whether directly or indirectly. Thus this part will take it in turn to consider analytic responses to the definitional problem, the functional problem, and the debate about the state. Of course, as mentioned this will incorporate

[39] It should be noted that Brian Tamanaha, rightly, considers this sort of approach as circular because it presupposes a certain kind of law in order to do the analysis which then determines the theory of law, this point is summarised in, Mac Amhlaigh, (n 32) 431.
[40] For instance, Fabra-Zamora, (n 9) 170-171.
[41] ibid, 171-172.

a discussion of legal pluralists who have identified specifically 'legal' features of norms and a discussion of Hart's theory.

In the previous part, the relationship between the definitional problem in legal pluralism and the classic problem of distinguishing law from other norms was highlighted, and it should be recognised that it is in reality the case that legal pluralism's quest to find 'law' is the same classic problem faced by jurists and analytic theorists. This has been implicitly recognised by some pluralists but it is has been particularly highlighted by Tamanaha. As Dupret concedes, Tamanaha's critique is sound, this being that legal norms are different to other norms in that legal institutions legalise other norms as legal norms.[42] Kelsen would describe this as the technique specific to law – 'just as everything King Midas touched turned into gold, everything to which the law refers becomes law'.[43] The question that needs to be asked then is whether the conceptions of law advanced by legal pluralists pose a challenge to analytic theory.

Fabra-Zamora identifies the views of Teubner, Melissaris, Croce and Tamanaha as posing such conceptions for the following reasons.[44] Teubner held that law comes from autopoietic discourses that define actions as legal or illegal.[45] Melissaris grounds legal practices on shared normative commitments. Croce advocates identifying law as a specialised kind of knowledge which claims to be self-sufficient and separate from common knowledge. Importantly Tamanaha advocates for a folk conception of law, law is whatever happens to be called law by the community.[46] It would be wise at this point to remove Croce's account from present considerations since it is beyond the scope of this essay to consider for the following reasons. Firstly, law is usually considered as such because legal officials and the community consider it to be that way, not because it is a kind of knowledge. Secondly, it would require significant investigation to ascertain that legal knowledge is its own kind of epistemic entity and that it does not come to be this way because officials or a community consider it to be that way. Thirdly, there are many questions that could be posed about the relationship between common knowledge, specialised knowledge, and a community's obedience to law.

[42] Dupret, 'What is the Plural in Law? A Praxiological Answer' (n 13) para 32.
[43] Kelsen, *General Theory of Law and State* (n 5) 161.
[44] See, Fabra-Zamora, (n 9) 169-170.
[45] For an overview of systems theory and this point about law and autopoiesis see, Clemens Mathias, 'The System Theory of Niklas Luhmann and the Constitutionalization of the World Society' (2012) 4(2) Goettingen Journal of International Law 625, 628-632.
[46] See also, Dupret, 'What is the Plural in Law? A Praxiological Answer' (n 13) para 45; Mac Amhlaigh, (n 32) 431.

The remaining accounts can be reduced into arguing for the proposition that 'law is whatever society or the community believes it is', hereafter referred to as the 'belief conception'. In Teubner's view law is defined through autopoietic discourses of the community, these discourses have the effect that law is believed to be what the community has itself defined – if this were otherwise the position would be self-defeating. Melissaris' position that law is grounded in shared normative commitments also requires or implies the proposition that the community believe that the legal practice places a normative burden on them. As for Tamanaha's position, it is effectively the belief conception – if they are calling it law they must believe it otherwise it would just be an empty declaration. Legal positivists have considered the belief conception as a possibility for showing descriptively what law is, but it was rejected.

The first reason for rejecting this was emphasised by Austin in defining what the subject of his inquiry was. Austin pointed out that law is confused with many things by resemblance and analogy, whilst also suffering from improper or ambiguous use.[47] So important is this problem that Austin's book is titled *The Province of Jurisprudence Determined*. Austin mentions the 'laws regulating the growth or decay of vegetables' and 'laws determining the movements of inanimate bodies' as improper uses.[48] The problem evidenced here is that the word 'law' is being used to describe things with no social or normative relevance whatsoever. This possibility is admitted and encouraged in principle by holding that 'law is whatever society believes it is'. Of course a society may believe that their laws are the same as or come from those which define or express how the world operates, such as it is with natural law, but here there is a union or intersection of social and scientific or religious (metaphysical) expression of 'laws'. That is, the rules express normative commitments and non-normative propositions. What very much needs to excluded in a definition of law is phenomena that have no social or normative relevance whatsoever, i.e. those which just express non-normative propositions.

It could however be alleged that the reduction of law to community beliefs has been too literal and that it was intended that the belief of the community must be a belief about norms.[49] For the sake of argument let this be granted and henceforth the proposition be considered in a normative sense – 'law as a norm is whatever the community believes it to be'. While this

[47] Austin, (n 7) 1.
[48] ibid, 4.
[49] Though this does not seem to be the case as Mac Amhlaigh raises the same concern against Tamanaha, Mac Amhlaigh, (n 32) 433.

reformulation mitigates the first reason against conceiving of law as community beliefs it does not mitigate against the second reason, which is that community beliefs are simply insufficient for defining law because it ignores legal officials. The belief conception considers it to be the case that if the slaves believe law is synonymous with freedom then it is, but such a state of affairs would be nonsense. How could they be slaves if the belief conception were true? Austin illustrated this in his criticism of natural law, where, in one of his examples, a person is sentenced to death but shows this to be contrary to natural law.

"In case I commit an act which is innocuous or positively useful, but to which the sovereign legislature has annexed a capital punishment, the tribunal which tries me enforces the law, in spite of its mischievous tendency. If I object to the indictment, "that the law is adverse to utility;" "that, by necessary consequence, it conflicts with the law of God;" and "that, by equally necessary consequence, it is not binding or valid," the tribunal demonstrates the unsoundness of my objection, by hanging me up in pursuance of the law which I impugn."[50]

What Austin is showing here is not just an argument against natural law or the notion that laws must be moral, but also the importance of legal officials. Effectively the position is that if the legal officials consider something to be the law then it matters not what morality or other norms consider the law to be. Thus while the slaves might believe in this view of law and that this entitles them to be free, it is far from being a norm, never mind law. This early form of positivism was flawed however in that it attributed an over-inclusive view of officials in defining law. According to Austin officials were extensions or authorised agents of the Sovereign, which were therefore always able to exercise the threat of force or sanctions. Hart showed this model of law as coercive orders did not accord with usage.[51] Hart effectively began to argue that the point of view of the citizenry is essential for understanding law. For instance, Austin's model fails to take into account of the person who wants to follow the law – people do not only follow the law out of fear of sanction or because they are all like Holmes' 'bad man'.[52] Precisely because the citizenry has been left out of the picture of understanding law and obedience to it Hart concludes:

[50] Austin, (n 7) 279.
[51] Hart, *The Concept of Law* (n 3) Chs II-IV.
[52] ibid, 40. See also, Frederick Schauer, 'Was Austin Right After All? On the Role of Sanctions in a Theory of Law' (2010) 23(1) Ratio Juris 1, 6-7.

"The assertion that a legal system exists is therefore a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour."[53]

Important here is that the ordinary citizens may be deplorably sheeplike and may end up like lambs to the slaughter but that is no reason to deny the existence of a legal system.[54] What Hart is eager to allow in constructing law this way is that a revolt by the ordinary citizens, or friction between them and the officials, may be sufficient reason to no longer consider a legal system to be in operation. Another important reason Hart has for including the perspective of the citizenry is that Hart is mindful that the concept of law should be compatible with a variety of governmental configurations, particularly democracy and federations which the command theory attempted but failed to permit.[55] Even under Hart's theory however it is not enough for the slaves to simply 'believe' law means freedom. Some positivists however dispute Hart's view on this point, holding that Hart places too much emphasis on ordinary citizens and not enough on sanctions or legal officials who enforce them.[56] Either way, the belief conception advocated by legal pluralists completely disregards the place of legal officials, and autocracy, in the understanding of law and therefore offers a shallow view of law since it cannot account for these paradigmatic instances of it.

Legal pluralism at this point however has no definitional recourse because it must provide some explanation of how the officials come to be 'legal officials', but the only way to do that would be to admit that some centralised institution makes them that way.[57] This could be regarded as a third reason for rejecting the belief conception but it would be more worthwhile at this point to consider the problem of functionalism. Dupret pointed out a seeming conflict in legal pluralism between the notion of law as social ordering and that it supposedly performs this independently. There is actually much more to this problem than is probably realised. Legal pluralism regularly considers law as a somewhat autonomous phenomenon due to Griffiths

[53] Hart, *The Concept of Law* (n 3) 117.
[54] ibid.
[55] See Hart's discussion of the democratic Sovereign, ibid, 77-78.
[56] Schauer, 'Was Austin Right After All? On the Role of Sanctions in a Theory of Law' (n 52); Frederick Schauer, *The Force of Law* (Harvard UP 2015); Kenneth Einar Himma, *Coercion and the Nature of Law* (Oxford UP 2020).
[57] Obviously if one wants to offer an alternative they may. I would not like to be accused of ideological presupposition as Griffiths alleged of legal positivists in his 1986 article but the reason for coming to this conclusion is that it is paradigmatic of law that institutionalisation accompanies it, or perhaps vice versa. If it is supposed that officials need not come from a centralised institution of some sort then what distinguishes the legal official from the vigilante or the gangster?

adoption of the 'semi-autonomous social field'. The consequence of this is that law emanates from society, or social discourses, etc. This is actually a major, if not fatal, problem for legal pluralism.

The problem is that Hart expressly held that law does not come from diffuse social pressure.[58] A society which operates in this way, i.e. the general attitude of the group and the resulting social pressure, is one that only has what Hart terms 'primary rules of obligation'.[59] These primary rules suffer from three defects; uncertainty, staticness, and inefficiency.[60] Important for present purposes is the defect of uncertainty, which arises when there is a dispute about what is required by the primary rules. This dispute brings about uncertainty over what the obligations are or require because there is no prior rule or social understanding about how to resolve the dispute, e.g. by recourse to an authoritative text or sacred tablets.[61] This is expressly encouraged by Griffiths however, who described 'a situation of legal pluralism' as one in which 'multifarious social fields may support, complement, ignore or frustrate one another'.[62]

Therefore a state of legal pluralism may exist where the social fields of a society frustrate each other, having the effect that there is no way to resolve the dispute, hence suffering from the defect of uncertainty. This brings legal pluralism into a direct clash with positivism and Hart's expression of the third positivist thesis. If pluralists were therefore to strike off frustration as a situation of legal pluralism they would then need an account of social rules or understanding which prevent it, however, this would tend towards Hart's remedy of secondary rules, i.e. legal centralism. Essentially legal pluralism maintains that there can be law where there are only primary rules but, as just demonstrated, utterly fails to explain how law can be sustained in a situation where these defects are present or nascent. Defects, which when they arise, correspond paradigmatically, and in usage, to lawlessness. Many better critics have attacked Hart's theory but not one has successfully criticised these specific points, this is a clash in which legal pluralism in its current form cannot win.

This discussion of primary and secondary rules, the union of which provides for the existence of a legal system, points now towards a discussion of the state. Pluralists have often found their

[58] Hart, *The Concept of Law* (n 3) 91-92.
[59] ibid.
[60] ibid, 92-93.
[61] ibid, 92
[62] Griffiths, (n 20) 39.

motivation for the tradition in opposing the idea that law always comes from the state and its institutions. As was mentioned earlier Kelsen is taken to advocate contra Ehrlich that law comes from the state. Kelsen however responded to a similar point and maintained rather that 'the state is a legal order but not every legal order is a state, only a relatively centralised legal order is a state'.[63] Importantly Kelsen insisted that one should not confuse the state and legal order as separate things, to do so was to personify the state and imagine it as a power behind the law, and this personification leads to "sham problems and empty tautologies".[64] One appreciates Kelsen's point about personification, it can obviously obscure inquiry. But it is not universally accepted that Kelsen establishes his contention that the state is imagined behind law. Salmond for instance, considered that the law exists in a state during peacetime so that it can maintain 'peaceable and orderly relations within the community itself', but also considered that a state can exist without law in a time of war, citing Cicero – *inter arma silent leges*, and Hobbes among others.[65]

Hart did not give much discussion about the state and its connection to legal systems, nor has legal theory made much if any effort to renew this inquiry post-Hart. When holding that a legal system exists where there is the union of primary and secondary rules Hart bypasses the issue of the state and its relation to the legal system. Though when discussing international law Hart makes a formulation reminiscent of Kelsen, saying that a state 'is not something outside the law, it is a way of referring to two facts':

"first, that a population inhabiting a territory lives under that form of government provided by a legal system with its characteristic structure of legislature, courts, and primary rules; and, secondly, that the government enjoys a vaguely defined degree of independence."[66]

Therefore Hart, like Kelsen but contrary to Salmond, holds that prior or simultaneously to there being a state there must be a legal system. Considering precisely when a legal system is taken to exist is therefore crucial to the notion of there being 'state' or 'non-state' law. Thus, when considering the 'pathology' of legal systems Hart notes that the official sector may become detached from the private sector, here there is a partial breakdown in the legal system, for

[63] Hans Kelsen, 'Law, State and Justice in the Pure Theory of Law' (1948) 57(3) Yale L J 377, 381-382. See also the construction Kelsen originally made of the state, Kelsen, *General Theory of Law & State* (n 5) 181-183.
[64] Kelsen, 'Law, State and Justice in the Pure Theory of Law' (n 63) 382.
[65] Sir John Salmond, *Jurisprudence* (7th edn, Sweet & Maxwell 1924) 139-144.
[66] Hart, *The Concept of Law* (n 3) 221.

instance by revolution, enemy occupation, or anarchy.[67] Furthering that discussion with the 'embryology' of legal systems Hart mentions that the history of the commonwealth is 'an admirable field of study'.[68] Here Hart discusses where colonies of the United Kingdom develop a 'local root' of legal validity or rule of recognition, wherein the validity of enactments are considered so, not because of the statute of the United Kingdom which originally set up the colonial legal system but due to local enactments to that effect.[69] Here one imagines historical examples like America.[70] Hart also mentions that the parent legal system may not recognise in whole or in part the new legal system which has factually sprouted but which their laws consider not to be the actual state of affairs, here Hart specifically has in mind the history of the Irish Free State.[71] A digression here is in order so that these notions may be supported by example.

There are many examples from Free State history which support Hart's point and one instance is the passport debate.[72] Following the Anglo-Irish Treaty of 1921 Ireland managed to gain independence from the United Kingdom which it had been considered part of since the Act of Union 1800. Ireland had desired complete independence from the British Empire but Britian would not compromise that far so Ireland became a dominion of the Empire, like Canada and Australia – leading to the civil war in Ireland. Thus coming to power the new Free State government sought to issue passports to its citizens, the distribution of which had been disrupted due to the civil war. Since Ireland was a dominion however the government needed the approval of the British government, and also agreement from the Foreign and Commonwealth Offices. Basically, the British were adamant that the words 'British subject' must appear on the passports but for the Irish this was a redline – it would be telling the people they were still British despite having fought for independence. The Irish proposed alternatives such as 'Imperial subjects' or 'Citizens of the Irish Free State and Commonwealth of Nations' however the British absolutely refused. Eventually, the Free State government came under internal pressure and so issued a passport which did not say 'British subject'. The British refused to recognise this passport, creating a bizarre situation where if Irish citizens travelled

[67] ibid, 118.
[68] ibid, 120.
[69] ibid, 120-121.
[70] This was discussed by Salmond and likely a scenario Hart has in mind, see, Salmond, (n 655) 154-155.
[71] Hart, *The Concept of Law* (n 3) 121, 296.
[72] The details of the debate and its historical development are discussed in detail in this article, Joseph P O'Grady, 'The Irish Free State Passport and the Question of Citizenship 1921-4' (1989) 26(104) Irish Historical Studies 396.

elsewhere in the Empire their passports were confiscated and they would be issued British ones, which in turn would be confiscated on return to Ireland.

The point that can now be made is that legal pluralism is deeply misplaced in its objection that legal positivism can be identified with legal centralism which advocates a state-centric view of law. Clearly, legal positivism does not, both Hart and Kelsen hold that a state can only exist where there already is a legal system or legal order – if there is a state, then there is a legal system but not the other way around. This contrasts clearly with Salmond's position. It appears that legal pluralism wants to describe situations like the passport debate as 'legal' but Hart already accounted for this and similar situations under the pathology and embryology of legal systems. Examples of legal pluralism such as Shinde's between the Indian State and the Hindu caste system are already captured in Hart's framework as a detachment between the official and private sectors, i.e. the citizens view diverges from the officials, meaning an effective legal system is not in operation in that territory and that a local root is attempting to assert itself.[73] At what point this is or becomes a state however is not as easy a question to answer, but it is not one that concerns the objections of legal pluralism towards analytic theory and so need not be considered.

One final point of mention is that earlier when discussing Griffiths' situation of legal pluralism there was only a focus of the position in relation to primary rules but not where they and secondary rules are present. The reason for this is simple, the simultaneous presence of primary and secondary rules is Hart's theory. Could it not be supposed however that a situation of legal pluralism could exist where these rules are both present? Well it can and does in fact happen. As John Gardner concludes Hart allows legal pluralism.[74] But really what is meant here is that Hart allows weak legal pluralism, which he indisputably does when he considers commonwealth history and the embryology of legal systems. Hart endorsed many of contemporary legal pluralism pragmatic contentions long before it ever came into being.

Part V – Conclusion

This essay has attempted to answer the challenges posed by Fabra-Zamora towards analytic theorists. In doing so it considers that analytic theorists, namely legal positivists, to have

[73] See, Shinde, (n 8).
[74] Gardner gave this lecture mentioning that he hoped to write more about legal pluralism in the future however it does not appear that he managed to do so before his untimely passing, John Gardner, 'What is Legal Pluralism' (Osgoode Hall Law School, 8 May 2013) <https://www.youtube.com/watch?v=q-aTJgTTOA8> accessed 18 July 2023.

sufficiently engaged with the problems posed by legal pluralism. Granted these have not, until now, been a direct response but the responses were made nonetheless. Relatedly however there are allegations that analytic theorists do not take legal pluralism seriously or as being legal theorists. This essay has shown that many legal pluralism contentions directly bear on theories of law, pluralists are therefore as much legal theorists as analytic theorists.

As for the suggestion that the agenda of legal theory ought to be adjusted to reflect contributions from legal pluralism, it seems that this is not much of a request since many of the contentions of legal pluralism already fall within the purview of analytic theory as items of interest. Perhaps though a return to the issue of law and state would be desirable, it does seem *prima facie* plausible that a state in a position of total war could operate only by primary rules and not secondary rules, given the necessity of such a situation. In which case Salmond's construction of law coming from the state rather than Hart or Kelsen's would be more realistic and accurate. If so it seems that legal pluralists were right to maintain that the issue of state-centric law ought to be on the theoretical agenda. Perhaps then there is more to their other contentions after all since it implies a flaw in Hart and Kelsen's reasoning.

A Short Analysis of Jeffrey v The Minister for Justice, Equality and Defence [2019] IESC 27

Stephy Varghese

Factual Background

The Appellant was convicted of road traffic offences in Sligo District Court on December 9th, 2010. During the court proceedings a member of An Garda Síochána presenting on behalf of the Director of Public Prosecutions, Inspector Connolly, stated that Mr. Jeffery had prior convictions for serious offences however this was not true as was pointed out by the Appellant's solicitor. The statement was disregarded by the Court and the sentencing took place as normal, however, the mistaken information was later published in the local media. Mr. Jeffery took to the High Court to seek damages for negligence, breach of duty and negligent misrepresentation. Barrett J dismissed the claims and found that they were bound to fail. Mr. Jeffery subsequently appealed to the Supreme Court.

Issues

i. Can a statement such as the one made by the presenting garda result in a dispute of negligent misstatement?
ii. Could it be argued that the presenting garda owed a duty of care towards the Appellant?
iii. Does the presenting garda enjoy immunity from suit or absolute privilege as a witness?

Judgment

Clarke CJ allowed the appeal and stated that the Appellant should be allowed to pursue a claim limited to seeking to establish negligent misstatement and economic loss as a result of the misstatement.

Reasoning

When assessing the first issue of whether a statement, such as the one made by the presenting garda in this case, can give rise to a claim of negligent misstatement Clarke CJ approves of the

Respondent's reference to the English case of *Spring v Guardian Assurance Plc*[1]. It appears from this case that a claim for economic loss, rather than one of damage to reputation, resulting from a negligent statement may be successful in this jurisdiction and therefore this claim was not bound to fail.

When evaluating the second issue, Clarke CJ acknowledged the complexity of the question of whether the maker of a statement owes a duty to the person about whom the statement is made. It was therefore acknowledged that it could not be said that the law concerning this possible duty of care was sufficiently clear enough to establish that the claim was bound to be unsuccessful.

On the issue of immunity, Clarke CJ recognised that the trial judge viewed Inspector Connolly's role as that of a witness, conferring on him absolute privilege.[2] However, this could be questioned given that despite providing information normally provided by witnesses, Inspector Connolly was not sworn in at the time the statement was made and he was also not cross-examined. He therefore cannot be said to enjoy witness immunity under the role of a witness. Similarly, it is open to question whether Inspector Connolly may enjoy immunity normally possessed by advocates appearing in court given his position as a representative of the D.P.P. since the precise nature of his role is not sufficiently clear. It was accepted that the position in this jurisdiction concerning immunity from suit differs from that of the United Kingdom where it was significantly limited.[3] Clarke CJ also accepts that it can be said that all legitimate participants of court proceedings may enjoy significant immunity however it is unclear whether there are limitations to that immunity and what those limitations may be.

Commentary

This case elicits many interesting questions, notably that of immunity from suit, an issue which is arguably clearer in other jurisdictions. The principle of immunity derives from public policy as it was believed that immunity was essential for advocates to carry out their duties to both their client and the court[4], leaving lawyers in what has been described as an 'unjustifiably

[1] [1995] 2 AC 296.
[2] *Looney v Governor and Company of the Bank of Ireland and Morey* [1996] 1 IR 157.
[3] *Hall v Simons* [2002] 1 AC 615.
[4] *Batchelor v Pattison and Mackersy* (1876) 3 R 914, 918.

special position.'[5] In the English case of *Rondel v Worsley*[6] the question of immunity of the bar was challenged before the House of Lords. Here, it was held that barristers did in fact enjoy immunity and three public policy justifications for allowing immunity were discerned:

i. The advocates' duties to the court are paramount to their duties to the client.
ii. The re-litigation of issues already dealt with is contrary to public interest.
iii. Imposing liability despite the "cab rank"[7] principle would be unreasonable.

Lord Reid in his judgement finds that, despite the differences between the roles of a barrister and a solicitor, the justification for immunity of counsel is so compelling that is should also apply to solicitors working in litigation.[8] These three justifications reiterate the common law belief that immunity from suit benefits public interest. In the case of *Saif Ali v Sydney Mitchell & Co*[9] it was accepted that this immunity also applied to pre-trial work, as well as court proceedings.

The *Rondel* case was, however, later overturned in the landmark English case of *Hall v Simons*[10] which was heard before the House of Lords. Here, immunity from suit was significantly limited by a unanimous decision. Lord Hoffman referenced the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[11], a landmark English case which developed the principle that a party who has suffered an injury due to professional negligence should be allowed a remedy in damages. Lord Hoffman was of the opinion that to deny such a remedy without justification would be to 'fail to observe the fundamental principle of justice which requires that people should be treated equal, and cases treated alike'.[12] Similarly, the Australian case of *Boland v Yates Property*[13] was cited where it was stated obiter by Kirby J that immunity is 'a derogation from the normal

[5] Stephen O' Halloran, 'Peek-A-Boo I Can Sue You: Barristers' Immunity In The Twenty-First Century — Part II' (2008) 26 ILT 304, 309.
[6] [1961] 1 AC 191.
[7] A rule which does not allow a barrister to turn down any case provided that it is within their competence.
[8] [1961] 1 AC 191, 232.
[9] [1980] 1 AC 198.
[10] [2002] 1 AC 615.
[11] [1964] AC 465.
[12] [2002] 1 AC 615, 688.
[13] [1999] HCA 64.

accountability for wrongdoing to another which is an ordinary feature of the Rule of Law and fundamental rights'.[14]

The House of Lords also examined the three principal justifications for immunity identified in *Rondel*. Firstly, Lord Steyn, in reference to the argument that advocates often have conflicting duties concerning their clients and the court, asserted that doctors also have conflicting duties concerning their patients and an ethical code. Despite this, it is not argued that doctors should enjoy immunity from suit in negligence claims which raises the question of why it should therefore apply to lawyers. Regarding undue re-litigation, Lord Steyn maintained that the principles of res judicata, issue estoppel and abuse of process would adequately confine the risk of such litigation. Finally, concerning the cab rank rule, it was maintained that the rule does not have great significance in daily practice, especially under the context of immunity.

The position in this jurisdiction is not as sufficiently clear in comparison to other jurisdictions. Until the Supreme Court case of *E.O'K v D.K*[15] there had not been many direct mentions as to the existence or limitations of immunity. In this case immunity was explicitly recognised as it was stated that justice is more likely to be obtained where '…parties, witnesses, judges, jurors or lawyers can discharge their function without fear of being held to account…for the manner in which he performs his role.'[16] It is abundantly clear from this case that immunity does in fact apply to court participants in this jurisdiction. In the case of *Behan v McGinley*[17] it was stated that although the decision in *Hall v Simons*[18] has not been explicitly endorsed in this jurisdiction, the Court would assume that blanket immunity would not apply to barristers. Similarly, in *O'Reilly v Lee*[19] it was accepted that re-litigation would be against public policy but also accepted that immunity from suit of the legal profession is no longer 'good law'.[20]

Regarding the immunity enjoyed by witnesses, the English case of *Jones v Kaney*[21] abolished the immunity previously enjoyed by expert witnesses. Lord Phillips noted that, unlike

[14] ibid [129].
[15] [2001] IESC 84, [2001] 3 IR 568.
[16] ibid.
[17] [2008] IEHC 18, [2011] 1 IR 47.
[18] [2002] 1 AC 615.
[19] [2008] IESC 21, [2008] 4 IR 269.
[20] ibid.
[21] [2011] UKSC 13.

nonexpert witnesses, these witnesses had volunteered to give evidence and would receive payment for doing so and thus he saw no justification for maintaining immunity on the assumption that experts would be hesitant to provide their services. In this jurisdiction it seems that witnesses, expert or otherwise, still enjoy immunity where serious abuse of their position is not found.[22]

The issue of immunity from suit is one which has been subject to much debate and which has seen significant development over the decades. While there are strong arguments for upholding immunity from suit, as Hampel and Clough maintain, 'Any infringement of the general principle of equal treatment before the law must be carefully considered and justified on compelling grounds.'[23] It appears that the law in this jurisdiction with respect to the immunity enjoyed by advocates will follow the English stance of significantly limiting this immunity. It could also be argued that the scope of immunity conferred upon witnesses should also be limited to allow for more accountability in the legal system. However, it is questioned whether this is an issue to even be considered by judges as currently 'the assessment is being carried out by judges who were previously barristers.'[24] Hampel and Clough suggest leaving this issue to be addressed by an independent body to avoid the 'perception of self-interest which cannot help but arise when the matter is decided by the courts.' [25]

An alternative approach would be to address these negligence cases at the standard of care stage where possible. As Lord Hobhouse of Woodborough stated,

> The standard of care to be applied in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. It requires a plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made.[26]

[22] *E.O'K v D.K* [2001] IESC 84, [2001] 3 IR 568.
[23] George Hampel & Jonathan Clough, 'Giannarelli v Wraith - Abolishing the Advocate's Immunity from Suit: Reconsidering Giannarelli v Wraith' (2000) 24 MULR 1016, 1026.
[24] ibid, 1027.
[25] Hampel & Clough (n 23) 1026.
[26] [2002] 1 AC 615, 737.

It is argued that the standard of care test eliminates the need for immunity and Lord Hobhouse asserts that lawyers as a profession do not require exceptional protection from liability. This is clearly demonstrated by the analogy often drawn between the advocate and the surgeon. In *Saif Ali v Sidney Mitchell & Co*[27] Lord Diplock acknowledged that despite the 'disastrous consequences'[28] which may result from their negligence, surgeons do not enjoy the immunity which was granted to advocates. However, as Lord Diplock concludes, the lack of immunity for surgeons has not been proven to be detrimental to their performance, implying that abolishing immunity from suit would not be unfavourable to lawyers. In other jurisdictions, such as Canada and the United States of America, lawyers are liable for a standard of care. It has been argued that holding lawyers to a minimum standard of care 'ensures quality in the provision of legal services by presenting a disincentive to negligent conduct' which could lead to the more effective administration of justice.[29]

Holding court participants accountable for their actions in court would allow our legal system to conform better to the fundamental principle of justice which provides that there are remedies for wrongdoings. It would also bring an end to the exclusive exemption from liability long enjoyed by advocates. Though the justification of immunity was founded on public policy, it could be contended that, in modern times, restricting or even abolishing immunity from suit may better serve current public policy.

[27] [1980] 1 AC198.

[28] ibid, 220.

[29] Thalia Anthony, 'Australia's Anachronistic Advocates' Immunity: Lessons from Comparative Tort Law' (2007) 15 Tort L Rev 11, 14.

A Short Analysis of Powers v Greymountain Management Ltd [In Liquidation] & Ors [2022] IEHC 599

Eve O'Sullivan

Introduction

In 2022, the High Court delivered a seminal ruling in *Powers v Greymountain Management Ltd [In Liquidation] & Ors ('Powers')*[1]. The judgment by Twomey J strikes at the very heart of company law and its "*most established and enduring principle*"[2] of separate legal personality ('SLP'). The principle assures that a company exists as a legal entity separate from its owners and shareholders. Only in certain limited circumstances may the SLP of a company be disregarded. This is often known as the "piercing" or "lifting" of the corporate veil. In cases where the corporate veil is pierced, controllers of the company may be personally liable for the debts and obligations of the company.

The decision in *Powers* is the first in which the Irish courts pierced the corporate veil and made directors and shadow directors[3] personally liable for loss suffered as a result of an international fraud. This case considered the role of passive directors who took no active role in the running of the company.[4] It serves as a reminder that a failure by directors to have regard for their duties and act in the interests of the company can result in severe personal consequences. It further highlights the significant impact proper corporate regulation can have on the general public.[5]

The following will consider the legal and factual background to this landmark case, prior to engaging in a detailed analysis of Twomey J's judgment and considering the implications it may have on the current state of the law in this area.

Factual Background

[1] [2022] IEHC 599.
[2] Thomas B Courtney *The Law of Companies* (4th edn, Bloomsbury Professional 2016) 16. 149.
[3] Courtney defines a shadow director as a person who is neither formally appointed, nor necessarily held out as a director, but to whom certain sanctions and regulations, normally reserved for directors, can be applicable.
[4] *Powers v Greymountain Management Ltd [In Liquidation] & Ors* [2022] IEHC 599 at [2].
[5] ibid.

The case relates to an alleged international fraud worth €186 million which operated by misrepresenting to members of the public that they were investing in binary options trading. A key factor in this scheme was an Irish incorporated company, Greymountain Management Ltd ('Greymountain'). Greymountain was operated by two Irish directors, Mr. Grainger and Mr, Coates, and two non-resident shadow directors, Mr. David Cartu and Mr. Johnathon Cartu ('the Cartu Brothers').

Greymountain was the recipient of credit card payments made by individuals who wished to invest in binary options trading. It provided a "*veneer of legitimacy*"[6] as investing members of the public believed that their money was safe in the hands of a company subject to Irish and EU regulations. However, it transpired that the binary options were never purchased and instead the money invested was syphoned off for the shadow directors' use.

Whilst the proceedings concerned 35 plaintiffs, an order made on 25th June, 2020 resulted in the litigation progressing in the name of only one plaintiff, Mr. Powers. In 2016, Mr Powers was contacted by brokers through a website which offered a binary options trading platform. Mr. Powers made a number of investments by way of payments to Greymountain and consequently, lost $124,072. As Greymountain was insolvent, Mr. Powers sought an order making the directors and shadow directors personally liable for this sum.

Legal Background

The seminal case of *Salomon v Salomon & Co Ltd* ('*Salomon'*)[7] established the principle of SLP. In delivering his judgment, Lord MacNaghten encapsulated the essence of this principle, stating:

"*The company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits".*[8]

[6] *Powers v Greymountain Management Ltd [In Liquidation] & Ors* [2022] IEHC 599 at [8].
[7] 1897 AC 22.
[8] ibid at 51.

This ruling by the House of Lords has been endorsed in an abundance of subsequent case law[9] such that it is now regarded as the "*corner stone of company law*".[10] Nevertheless, despite its position as a "*bedrock of company law*",[11] there have been "*substantial inroads"*[12] on the principle of SLP by the legislature and the judiciary. The case of *Salomon* itself acknowledged that circumstances may arise which warrant displacing the principle's strict application as Lord Halsbury noted that in the case there was "*no fraud and no agency*" and the "*company was a real one and not a fiction or a myth*".[13]

The courts in England and Wales have also demonstrated a willingness to disregard SLP where a company is being used as a mechanism to avoid legal obligations,[14] where a relationship of agency may be inferred[15] and where the relationship of one or more group companies justifies treating them as a 'single economic entity'.[16]

The Companies Act 2014 ('the Act') identifies further exceptions to the SLP principle so as to permit the imposition of personal liability on officers of the company. S.610 of the Act which refers to fraudulent and reckless trading represents "*one of the most notable modifications of the Salomon principle*"[17]. However, a failure to state a company's name properly[18] and a failure to keep proper accounting records[19] are also circumstances recognised by the Act as possibly justifying piercing the corporate veil.

Nevertheless, despite the judiciary and legislature's recognition of instances in which the principle of SLP may be disregarded, this is not a common practice in Ireland. The Supreme Court's judgment in *Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels Ltd*[20] evidenced the Irish courts' relatively conservative approach to this issue, highlighting that it would take an "*exceptional state of affairs*"[21] to pierce the veil of incorporation. This

[9] *Lee v Lee's Air Farming* [1961] AC 12.
[10] *Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels Ltd* [1998] 2 IR 519 at 534.
[11] Katharina Neumann, 'Out of Touch with Reality — The Inappropriate Consequences of Separate Legal Personality in the Modern Commercial Context' (2022) ILT 40(11), 157, 157.
[12] Brian Hutchinson *Keane on Company Law* (5th edn, Bloomsbury Professional 2016) 11.16.
[13] *Salomon v Salomon & Co Ltd* 1897 AC 22 at 33.
[14] *Gilford Motor Co Ltd v Horne* [1933] Ch 939; *Jones v Lipman* [1962] 1 WLR 832.
[15] *Smith, Stone & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116.
[16] *DHN Food Distributors Ltd v Tower Hamlet London Borough Council* [1976] 3 All ER 462.
[17] Brian Hutchinson *Keane on Company Law* (5th edn, Bloomsbury Professional 2016) 11.20.
[18] S.47 of the Companies Act 2014.
[19] S.609 of the Companies Act 2014.
[20] [1998] 2 IR 519.
[21] ibid at 537.

demonstrates the respect of SLP from an Irish legal perspective and, consequently, the significant burden to be overcome to have SLP disregarded in a particular case.

Judgment

i. Piercing the Corporate Veil

Although a significant volume of evidence was produced to support the contentions of the alleged fraudulent scheme, the defendants did not challenge it, nor did they adduce any evidence of their own to contradict the claims made. Thus, the Court was satisfied that there was never any binary options trading nor had there been any prospect of a return on the "investments" made by individuals. It had "*little hesitation*"[22] in finding that Greymountain was used as an instrument to defraud unsuspecting members of the public.

Accordingly, the matter of whether the corporate veil should be pierced in the current circumstances fell for consideration. Twomey J began his comprehensive analysis on the law in this area by stressing:

"*it is a well-established principle of company law, since Salomon's case (Salomon v. Salomon [1897] A.C 22), that a company has a separate legal personality to its members and so, save in exceptional cases, the directors and shadow directors are not liable for the actions of a company*".[23]

In acknowledging that to date there was no Irish precedent on piercing the corporate veil, Twomey J highlighted that this practice has been discussed in obiter comments in Irish case law. In this respect, he referred to *Dublin County Council v. Elton Homes Ltd*[24] in which controllers of a company had been found guilty of its mismanagement. Nevertheless, this case demonstrated that mere mismanagement alone was insufficient to result in the piercing of the corporate veil, and justify making the controllers of the company personally liable for its debts and obligations.

[22] ibid at [144].
[23] ibid at [150].
[24] [1984] ILRM 297.

The Court also had regard to *Dublin County Council v. O'Riordan*,[25] *Dun Laoghaire Corporation v. Parkhill Developments*[26] and *Ellis v. Nolan*.[27] Upon consideration of the foregoing authorities, Twomey J set out the following circumstances in which the Irish courts may consider piercing the corporate veil and finding directors of a company personally liable for its acts and omissions:

- where there is fraud or misapplication of monies or misrepresentation, on the part of the directors, or
- where directors have syphoned off large sums of money out of the company so as to leave the company unable to fulfil its obligations, or
- where there is negligence or impropriety on the part of the directors in the conduct of the affairs of the company,

provided that the facts are established in a plenary hearing, and not merely on affidavit, and that the parties charged have had the opportunity to know the full extent of the case against them and a proper opportunity to defend themselves.[28]

The aforementioned criteria were further qualified by reference to *The State (McInerney Company Ltd) v. Dublin County Council*[29] as Twomey J noted that "*the interests of justice must demand or require*"[30] that the corporate veil be lifted before a Court can do so. However, the Court did not provide concrete guidance on the application of this principle on the facts of the case. This is an interesting aspect of the judgement as the term "the interests of justice" has attracted criticism in the past when used in the context of challenges to SLP. The House of Lords in *Woolfson v Strathclyde Regional Council*[31] expressed reservations as to its use; a sentiment echoed by the UK Court of Appeal in *Adams v Cape Industries*.[32] Moreover, given

[25] [1985] IR 159.
[26] [1989] IR 447.
[27] Unreported, High Court, 6th May, 1983.
[28] *Powers v Greymountain Management Ltd [In Liquidation] & Ors* [2022] IEHC 599 at [155].
[29] [1985] IR 1.
[30] *Powers v Greymountain Management Ltd [In Liquidation] & Ors* [2022] IEHC 599 at [157].
[31] (1978) SC (HL) 90.
[32] [1990] Ch. 433.

the "*imprecision of justice*",[33] "the interests of justice" has been identified as an "*elusive concept*"[34] which precipitates uncertainties in its application.[35]

Accordingly, it is unclear whether the inclusion of "the interests of justice" in Twomey's judgment represents its resurrection as a factor in determining whether the corporate veil should be pierced. As such, this aspect of the judgment will inevitably require further scrutiny and elaboration by the Irish courts in future cases.

ii. Liability of Shadow Directors

Upon consideration of the evidence before him, Twomey J was satisfied that the Cartu brothers were "*the controlling minds*"[36] behind the scheme. Whilst the Court acknowledged that the aforementioned authorities concerning the piercing of the corporate veil related to directors and not shadow directors, it saw "*no reason in principle to distinguish*"[37] between the two when applying the principles stemming from such case law. This conclusion was further supported by the Court's reference to s.221 of the Act.[38]

As such, in addition to finding the shadow directors to be "*morally liable*" for the loss suffered by Mr. Powers, the Court held that they could not evade legal liability by using their status as shadow directors to hide behind the veil of incorporation. Twomey J reiterated the fundamental importance of the principle established in *Salomon* and emphasised that the corporate veil should not be lifted lightly. Nevertheless, and seemingly drawing on his prior emphasis on the relevance of justice in displacing SLP, he concluded that a failure to pierce the corporate veil in the present circumstances would be "*an affront to justice*"[39] and thus, found the Cartu brothers personally liable for the loss suffered by Mr. Powers.

This finding by the Court reaffirms that fraud can amount to an exception to the rule set down in *Salomon*. As such, it may be viewed as a contemporary restatement of Lord Halsbury's articulation that SLP applies where there is "*no fraud and no agency*". Moreover, given that

[33] Ámhra Carey "Aligning Theory and Reality - Theories of the Company and Piercing the Corporate Veil in Irish Law" (2023) ILT 41(16).
[34] Fergus A Bolster et al, 'Disregarding the Separate Legal Personality of a Subsidiary Company where the "Justice of the Case" Requires' (1999) ILT 17.
[35] ibid.
[36] *Powers v Greymountain Management Ltd [In Liquidation] & Ors* [2022] IEHC 599 at [158].
[37] Ibid at [160].
[38] Shadow directors shall be treated as a director of the company for the purposes of Part V of the Act – which Part deals, inter alia, with the duties and personal liability of directors.
[39] *Powers v Greymountain Management Ltd [In Liquidation] & Ors* [2022] IEHC 599 at [162].

the shadow directors were conducting a multimillion-euro fraud on an international level, it is also indicative of the exceptional circumstances required to pierce the corporate veil.

iii. Liability of Directors

The Court regarded the situation of the Irish directors of Greymountain as "*significantly different*"[40] to that of the shadow directors. This was mainly attributable to the fact that the Court could not conclude from the evidence that the directors had been aware of the fraud. As such, their acts and omissions were of a "*completely different character to the fraudulent acts*"[41] of the shadow directors.

Both Mr. Coates and Mr. Grainger claimed to be directors only in name. The latter sought to compare his role in the company to be more akin to a company secretary. Nonetheless, the Court pointed to various examples which evidenced Mr. Grainger's role went beyond this. This included Mr. Grainger signing payment processing agreements on behalf of Greymountain and preparing and filing Companies' Office documentation. On the other hand, there was very little evidence demonstrating that Mr. Coates had taken an active role in the company. The Court accepted that he was a college student who had only assumed the role of the director following a suggestion by his mother to do so as a means of covering his college costs.

Nevertheless, the Court concluded that neither Mr. Grainger and Mr. Coates acquired sufficient knowledge of Greymountain's business to enable them to properly discharge their duties as directors. The Court found that the directors had failed to observe even the most basic of directors' duties as:

- "*they failed to inform themselves about the nature of their duties as director (or if they did, they ignored those duties)*
- *they failed to acquaint themselves with the affairs generally of Greymountain and*
- *they failed to exercise appropriate supervision or oversight at a board level in respect of the execution or discharge of whatever tasks or functions have been properly and appropriately delegated to others*."[42]

[40] ibid at [167].
[41] ibid at [169].
[42] ibid at [199].

The Court concluded that the Irish directors had *"handed over the keys of the company"*[43] to the shadow directors, and thus, were "*unwittingly involved in facilitating*" [44] the fraud. Furthermore, Twomey J delineated that it was likely that the fraud would not have occurred if the Irish directors had taken steps to find out what was happening in the company. Thus, although the Court expressed some sympathy for the Irish directors, especially Mr. Coates, it held that the extent of their impropriety and the "*complete dereliction*"[45] of their duties as directors justified finding them personally liable to Mr. Powers for the sum of $124,027.

Twomey J's emphasis on the directors' complete abrogation of their responsibilities serves as another reminder of the exceptional circumstances required to pierce the corporate veil. Given that the directors "*handed over the running of a company without knowing whether it was being used for good or evil and not apparently caring*",[46] their impropriety and breach of their duties was evidently of an extreme degree and clearly distinguishable from mere mismanagement.

Conclusion

The *Powers* case acts as a stark reminder to company directors that they must acquire sufficient knowledge of the company to enable them to discharge their duties. It solidifies that individuals should not undertake the role of director if they are not prepared to adhere to their statutory obligations and act in the company's interests. The decision highlights that even where directors have no moral responsibility for a company's acts or omissions, the veil of incorporation does not necessarily shield them from a finding of personal liability where they have disregarded their duties.

However, this case also emphasises that exceptional circumstances are required to pierce the corporate veil. This case largely turned on its facts as it involved an international fraud on a massive scale and a high degree of impropriety and dereliction of duties on the part of the directors. The Court noted that if these circumstances did not justify piercing the corporate veil, then it was hard to envisage any circumstances that would warrant making directors and shadow directors personally liable for the acts or omissions of the company.

[43] ibid at [225].
[44] ibid at [198].
[45] ibid at [227].
[46] ibid at [222].

Requiring exceptional circumstances to pierce the corporate veil ensures that disregarding SLP only occurs where it is absolutely necessary. Accordingly, this judgment did not seek to displace SLP as the cornerstone of company law, and, in effect, may be viewed as a modern reiteration of Lord Halsbury's comments in *Salomon* that fraud may displace the application of SLP. Whilst the foregoing illustrates that the judgment provides clarification on a number of matters, Twomey J's inclusion of "interests of justice" will certainly require further consideration.

In essence, the *Powers* case sends a strong message that individuals, whether they hold the position of director or shadow director, or whether they reside in Ireland or abroad, cannot use an Irish company to carry out international fraud and then seek to evade personal liability by hiding behind the veil of incorporation.[47] Nevertheless, Twomey J emphasised that the decision did not seek to make it a "*a regular occurrence for directors to be made personally liable for the acts or omissions of a company*".[48] Future decisions from the Irish courts will be required to shed further light on the range and scope of the circumstances in which the courts will be prepared to intervene and set aside the corporate veil.

[47] ibid at [162].
[48] ibid at [164].