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Edition 25

2026

The Cork Online Law Review

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https://www.corkonlinelawreview.com/

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This edition may be cited as (2026) 25 COLR

SUBMISSIONS

The Editorial Board of the Cork Online Law Review at University College Cork, Ireland, would like to invite submissions for the 26th Edition. All submissions should be on a legal topic and be between 3,000 and 9,000 words in length. Articles are welcome in English, Irish or French. All interested parties should submit their articles and enquiries to:

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Submissions are also invited for the Roundtable blogs section. Submissions should be on a topic of current legal relevance, whether domestic or international, and be between 800 and 2,500 words in length. All interested parties should submit their blogs and enquiries to:

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ACKNOWLEDGEMENTS

On behalf of the Cork Online Law Review, I would like to express our sincere appreciation to the Faculty of the School of Law, UCC. Their expertise, advice and guidance throughout the review process have been invaluable to the success of this year's publication. We would also like to extend our gratitude to the Dean of the Law School, Professor Conor O'Mahony and the Deputy Dean of the Law School, Professor Fidelma White, for their unwavering support of this year's Edition.

On behalf of the Editorial Board, I would like to thank the Hon. Ms Justice Eileen Costello for doing us the honour of launching the 25th Edition. It is a privilege to have such an esteemed member of the judiciary join us for this celebration of legal academia.

I am very fortunate to have had the encouragement of the Executive Committee of the UCC Law Society, whose companionship has been indispensable to my role as Editor-in-Chief. It has been delightful to work alongside the Auditor, Ronan O'Keeffe. The success of UCC Law Society is a testament to his reliable assistance throughout the year.

On a personal note, I am most grateful to the Editorial Board of the 25th Edition for their hard work and diligence. Each and every board member's commitment has been instrumental in the success of the publication. I am immensely thankful that I have been able to collaborate with such a talented group of individuals. In particular, I would like to wholeheartedly thank our Deputy Editor-in-Chief, Dearbhla O'Donovan. This publication would not be possible without her exceptional dedication, judgement and intellect.

We deeply admire the generosity of our sponsors A&L Goodbody. With their support, we have been able to sustain a platform which allows legal scholars to share their insights, and we are very thankful to A&L Goodbody for helping us achieve this.

Finally, we would like to congratulate all the authors who contributed to the 25th Edition. Their outstanding articles, each exemplary of remarkable scholarship, represent the diverse issues facing the legal landscape. We also greatly appreciate the contributions to our Case Notes Competition and Roundtable Blogs.

Alike our predecessors, we have been committed to upholding the excellence of the Cork Online Law Review. We hope this Edition inspires both our readers and our successors and we look forward to seeing what the Cork Online Law Review produces in years to come.

Le gach dea-guí,
Elena Falvey
Editor-in-Chief of the 25th Edition.

FOREWORD

I am greatly honoured as an alumna of University College Cork to be invited to write the foreword to the 25th edition of the Cork Online Law Review. It is important that online legal publications of this calibre thrive to ensure ongoing timely academic discussion of emerging legal themes and to ensure maximum dissemination.

The contributors to this volume all have links with one or other of the Irish Universities with many having links to universities in other jurisdictions, each one sharing their valuable perspective on their subject of choice. This volume brings together a very broad range of subjects: jury trials, market fairness within the European Union in open banking, post-conflict public interest litigation, human rights protections, the exclusionary rule in criminal law, digital evidence, and the enforcement of conservation law. Although diverse in subject matter, these contributions share a common concern regarding the maintenance of legal legitimacy within a rapidly changing Irish and European context marked by institutional, constitutional, and technological change.

The jury trial occupies a distinctive position in Irish constitutional architecture. It remains a visible expression of civic participation in the administration of justice and a reminder that criminal adjudication is not merely a technocratic exercise. While debate continues regarding scope and efficiency, its endurance reflects a deep-seated societal commitment to public involvement in the criminal process. Its legitimacy depends not only on constitutional guarantees but also on sustained public confidence in the administration of justice itself.

Continuing in the criminal sphere, this volume engages with the evolution of evidentiary safeguards. The exclusionary rule was developed robustly in Irish jurisprudence as a protection of constitutional rights. It has long signalled that the integrity of the process is central to the pursuit of justice. Its refinement illustrates the tension between principled rights protection and practical law enforcement needs. This paper examines the application of the exclusionary rule to defence evidence and proposes a differentiated approach.

Recent judicial developments concerning the power of the State to compel access credentials for digital devices further underscore this tension. As personal and commercial life becomes

increasingly digitalised, the balance between privacy, the privilege against self-incrimination, and the investigation of serious crime has entered new terrain demanding careful and proportionate constitutional calibration. The courts must now navigate these questions within the framework of the Constitution and applicable statutory powers, reflecting the challenge of adapting established principles to technological realities without diminishing foundational protections.

Questions of legitimacy also arise beyond the criminal courtroom. Ireland's deep integration within the European Union shapes domestic law in fields ranging from financial regulation to environmental protection and competition policy, often requiring careful reconciliation between national autonomy and supranational obligation. The evolution of banking and payments infrastructure tests regulatory capacity. As financial services become increasingly digital and instantaneous, new questions arise concerning systemic risk and consumer redress alongside supervisory accountability and market fairness. Public trust in financial institutions, shaped in Ireland by relatively recent experience, depends upon credible supervision and effective accountability at domestic and European levels, particularly within integrated financial markets.

The volume also considers gaps in human rights protection to include AI and age-related discrimination. While Ireland operates within constitutional and European frameworks, questions persist regarding the accessibility of remedies and the practical enforcement of socio-economic rights. Rights that exist in principle but prove difficult to vindicate in practice present challenges for both litigants and the coherence of the legal order and its claim to equal justice.

Post-conflict public interest litigation has particular relevance in the Irish context, both in the Republic and Northern Ireland. Courts are frequently asked to adjudicate on legacy issues, historical wrongs, and the boundaries of executive power. Such litigation tests the limits of judicial intervention while recognising the role of law in accountability and reconciliation within a shared constitutional space shaped by complex political history.

Across these themes runs a consistent thread: the need to sustain public confidence in legal institutions. Whether the issue concerns digital privacy, evidentiary standards, environmental stewardship or market regulation, the legitimacy of law depends upon transparency

proportionality, and reasoned decision-making grounded in constitutional principle. Legal academic writers, Judges and practitioners each play an important role in sustaining public confidence in legal institutions. Online legal publications such as this also play an important role in highlighting emerging challenges and fostering reflection and debate. This collection does not advocate a singular reform agenda. Rather, it reflects the reality that Irish law is engaged in a continuous process of calibration in response to constitutional development, European integration, and technological transformation in an era of rapid global change. The enduring task is to adapt without abandoning principle and to ensure that the legal system retains the trust upon which it ultimately depends in a democratic society governed by the rule of law. This task is now more important than ever. The Editor, Editorial Board and contributors are to be congratulated on the important contribution this most recent volume makes to this task.

Eileen Creedon,
The High Court,
The Four Courts,
Dublin 7.

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ADVANCING COMPETITION AND MARKET FAIRNESS IN OPEN BANKING: A REGULATORY EVOLUTION IN THE EU

Chinh Thi Mai Vu*

A INTRODUCTION

The European Union (EU) has been actively updating its payment and financial data regulations to address shortcomings in the existing framework and to promote a sound, competitive market. Since the adoption of Payment Services Directive 2 (PSD2),[1] several issues have emerged, including uneven competition between banks and non-bank payment service providers, limitations in open banking, and risks associated with the largest technology companies (Big Tech) entering the financial services space. To address these challenges, the EU has proposed three key initiatives: Payment Services Directive 3 (PSD3),[2] the Payment Services Regulation (PSR),[3] and the Financial Data Access (FiDA) proposals.[4]

This paper begins with an overview of the weaknesses of PSD2 from a competition perspective. It then introduces PSD3 and PSR proposals**,** which aim to modernise the EU payment system by standardising open banking access, enhancing customer authentication, and simplifying operational rules. These reforms aim to ensure equal access to payment account data for Third-Party Providers while slightly easing compliance burdens for banks. The discussion also considers the limited treatment of Big Tech market power under these proposals.

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* The author is currently undertaking an LL.M. in Business Law at University College Cork. She worked as a legal assistant at EY Law Vietnam prior to her LL.M. study. The author expresses her sincere thanks to the editors of the Cork Online Law Review for their anonymous review. The opinion expressed in this article is the author's own.

[1] European Parliament and Council Directive 2015/2366 of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35 (PSD2).

[2] European Parliament and Council Proposal for a Directive of 28 June 2023 on payment services and electronic money services in the Internal Market amending Directive 98/26/EC and repealing Directives 2015/2366/EU and 2009/110/EC [2023] COM(2023) 366 final (PSD3).

[3] European Parliament and Council Proposal for a Regulation of 28 June 2023 on payment services in the internal market and amending Regulation (EU) No 1093/2010 [2023] COM(2023) 367 final (PSR).

[4] European Parliament and Council Proposal for a Regulation of 28 June 2023 on a framework for Financial Data Access and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010 and (EU) 2022/2554 [2023] COM(2023) 360 final (FiDA).

Next, the focus shifts to FiDA**,** which represents a broader move towards 'open finance'. It introduces licensed Financial Information Service Providers that can access financial data with customer consent. While this framework promotes innovation and data-driven services, it raises concerns about data concentration and the dominance of Big Tech. EU institutions and Member States have proposed measures to limit Big Tech's access to address this issue.

The final section outlines future policy considerations for EU payments regulation. These recommendations emphasise the need for a sustainable and balanced competitive framework that considers banks' operational capacities, addresses liability asymmetries, supports smaller credit institutions, and ensures reciprocal data-sharing practices. The ultimate goal is to harmonise competition, innovation, financial stability, and consumer protection across the EU payments ecosystem.

B DEFINITION AND KEY CONCEPTS OF OPEN BANKING

Open banking refers to a mechanism that allows authorised Account Information Service Providers and Payment Initiation Service Providers, collectively referred to as Third-Party Providers, to access a customer's bank account data or initiate payments on the customer's behalf, only upon the customer's consent.[5] Before the introduction of this mechanism under PSD2, the payment services field was dominated by traditional Payment Service Providers, including banks, electronic money institutions, and payment institutions.[6] By enabling access to information held by credit institutions (CIs)[7] and other payment account providers, open banking allows new entrants to enter the market and increases competition through the provision of more convenient and advanced financial services.

[5] European Commission, 'Payment Services: Revised Rules to Improve Consumer Protection and Competition in Electronic Payments' (*European Commission,* 28 June 2023) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3544> accessed 8 December 2025.

[6] Piero Cipollone, 'Towards PSD3 – The Dynamics of Digitalized Payment Systems' (International Conference Roma Tre University, 14 April 2023) 2 <https://www.bis.org/review/r230418b.pdf> accessed 30 January 2026.

[7] Credit institution within the meaning of Article 4 of Regulation (EU) No 575/2013 of the European Parliament and of the Council on prudential requirements for Banks and investment firms: means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account.

The basic technology of open banking is an open Application Programming Interface (open API),[8] which allows third parties to securely incorporate banking features, customer data, and financial products into their own platforms, such as enabling payment initiation, personal budgeting tools, or access to credit card details.[9] In this context, Technical Service Providers supply the underlying technological infrastructure that enables these functionalities but do not themselves provide regulated payment services or handle customer funds.[10]

C PAYMENT SERVICES DIRECTIVE 2: REGULATORY EFFECTIVENESS AND COMPETITION CHALLENGES

Europe was the first region to introduce a government-led regulatory framework that enabled open banking,[11] through the adoption of the PSD2 in 2015, which took effect in 2018. Although PSD2 does not explicitly refer to the term 'open banking', it established the legal infrastructure for the operation of open banking. PSD2 significantly reshaped the EU payments market by recognising new entrants, namely Payment Initiation Service Providers[12] and Account Information Service Providers.[13] Crucially, PSD2 requires Account Servicing Payment Service Providers[14] to grant Payment Initiation Service Providers and Account Information Service Providers access to payment account services on an objective, non-discriminatory, and proportionate basis with the consent of the customer.[15] This access must be sufficiently extensive to allow Third-Party Providers to offer payment services in an efficient and unhindered manner.[16] By opening access to account data and payment infrastructure, the Directive aimed to create a more level playing field

[8] Markus Bramberger, *Open Banking - Repositioning of European Financial Institutions* (Springer 2022) 30.
[9] EBA Working Group on Electronic Alternative Payments, 'Understanding the Business Relevance of Open APIs and Open Banking for Banks' (2016) Information Paper 16 <https://www.abe-eba.eu//wp-content/uploads/2025/07/understanding-the-business-relevance-of-open-apis-and-open-banking-for-banks.pdf> accessed 8 December 2025.
[10] Open Banking, 'Technical Service Provider' <https://www.openbanking.org.uk/glossary/technical-service-provider/> accessed 8 December 2025.
[11] Giuseppe Colangelo, 'Open Banking Goes to Washington: Lessons from the EU on Regulatory-Driven Data Sharing Regimes' (2024) 54 Computer Law & Security Review 1.
[12] PSD2 (n 1) article 4(15).
[13] ibid. article 4(16).
[14] Account Servicing Payment Service Provider means a payment service provider providing and maintaining a payment account for a payer, see PSD2 (n 1) article 4(17).
[15] PSD2 (n 1) articles 66 and 67.
[16] ibid. article 36 and recital 51.

between traditional CIs and emerging competitors, particularly FinTech firms.[17] This raises a question for analysis: to what extent has PSD2 been effective in achieving genuine market fairness and fostering a sound competitive payment ecosystem within the EU?

I Competition Objectives under PSD2 and Their Impact on Credit Institutions

One of PSD2's core objectives is to enhance competition within the EU payments market,[18] and in this respect, the Directive is regarded as relatively successful.[19] Before the emergence of open banking, CIs held a dominant position in the EU payments market.[20] As first movers in the payments sector, CIs were able to establish strong market power and maintain exclusive control over customers' financial account data.[21] This market monopoly began to change with the introduction of a regulatory framework designed to open the market to new entrants.[22] By establishing a sector-specific data portability rule through the access-to-account mechanism, the PSD2 marked a crucial step toward fostering competition by granting Third-Party Providers the legal right to access account information, without any prior contractual arrangements with CIs,[23] thereby breaking their traditional data.

[17] Erdinc Akyildirim and others, 'Global Perspectives on Open Banking: Regulatory Impacts and Market Response' (2025) 101 Journal of International Financial Markets, Institutions and Money 3; European Commission, 'Payment Services Directive (PSD2): Regulatory Technical Standards (RTS) Enabling Consumers to Benefit from Safer and more Innovative Electronic Payments' (Memo/17/4961, 27 November 2017) <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/memo_17_4961/MEMO_17_4961_EN.pdf> accessed 9 December 2025.

[18] European Commission (n 5).

[19] European Banking Authority Opinion EBA/Op/2022/06 of 23 June 2022 on its technical advice on the review of Directive (EU) 2015/2366 on payment services in the internal market (PSD2) [2022] 3 <https://www.europa.eu/sites/default/files/document_library/Publications/Opinions/2022/Opinion%20od%20PSD2%20review%20%28EBA-Op-2022-06%29/1036016/EBA%27s%20response%20to%20the%20Call%20for%20advice%20on%20the%20review%20of%20PSD2.pdf> accessed 10 December 2025.

[20] Bramberger **(**n 8) 21; Jan A Jans, *Electronic Payments in the European Market: Create a Level Playing Field between Banks and Non-Banks* (Palgrave Macmillan 2024) 306.

[21] Jans (n 20).

[22] The Payments Association, 'A Brief Guide to Open Banking' (7 December 2022) <https://www.thepaymentsassociation.eu/news/brief-guide-open-banking> accessed 9 December 2025; Bramberger, (n 8) 21.

[23] Giuseppe Colangelo and Oscar Borgogno, 'Data, Innovation and Transatlantic Competition in Finance: The Case of the Access to Account Rule*'* (2018) Transatlantic Technology Law Forum European Union Law Working Paper No 35 3 <https://law.stanford.edu/wp-content/uploads/2018/09/colangelo_borgogno_eulawwp35.pdf> accessed 30 January 2026.

The competitive impact of new regulation is evident in the rapid growth of FinTech firms following PSD2's implementation. By 2018, Europe saw the operation of approximately 2,800 FinTech companies, accounting for around 23% of the global total.[24] Investment in European FinTech also increased significantly, reaching approximately USD 26 billion in the first half of 2018.[25] Following the transposition of PSD2 into national law, the number of PayTech[26] start-ups rose consistently higher than in the pre-PSD2 period.[27] These developments indicate that PSD2 has contributed meaningfully to increased competition.

However, when viewed from the perspective of CIs, particularly smaller banks, the open banking framework in PSD2 has generated significant challenges. Regulatory announcements related to open banking have created uncertainty regarding compliance costs and disrupted traditional banking business models.[28] Smaller banks, which often operate with limited financial and technological resources, tend to experience more pronounced negative impacts in the short term.[29] A major source of difficulty arises from PSD2's Access to Account rule, which requires Account Servicing Payment Service Providers to grant Third-Party Providers real-time access to customer account data and to execute payment orders.[30] They must also implement complex authentication procedures,[31] provide testing environments[32] and develop either dedicated interfaces for Third Party Providers or allow access via customer-facing interfaces.[33] For many CIs, particularly smaller institutions with limited prior experience in API development, these requirements may

[24] Johnathan McCarthy, 'FinTech, Digital Finance and the EU's Regulatory Choices' (2020) 35(11) Journal of International Banking Law and Regulation 465.
[25] KPMG, 'The Pulse of Fintech 2018' (31 July 2018) 31 <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2018/07/h1-2018-pulse-of-fintech.pdf> accessed 10 December 2025.
[26] PayTechs are a sub-group of FinTechs that focus on the payments value chain; see EY, 'The Rise of PayTech — Seven Forces Shaping the Future of Payments' (2022) 4 <https://www.europeanpaymentscouncil.eu/sites/default/files/inline-files/ey-the-rise-of-paytech-seven-forces-shaping-the-future-of-payments-20221202%20%281%29.pdf> accessed 10 December 2025.
[27] Colangelo (n 11) 5.
[28] Akyildirim (n 17) 18.
[29] ibid. 16.
[30] PSD2 (n 1) articles 66 and 67.
[31] ibid article 97(5).
[32] Commission Delegated Regulation (EU) 389/2018 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication [2018], OJ L 69/23 art 30.
[33] ibid. articles 31 and 32.

require substantial technical complexity and long implementation timelines.[34] In addition, Account Servicing Payment Service Providers have expressed dissatisfaction with the cost structure imposed by PSD2. Account Servicing Payment Service Providers are required to provide access to APIs free of charge,[35] while bearing the full cost of development and maintenance. Scholars have observed that this has created weak incentives for banks to invest in high-quality APIs, leading some institutions to rely excessively on adapted customer interfaces rather than dedicated solutions.[36] This demonstrates a structural imbalance within PSD2: while the Directive has aimed to promote competition and innovation, it has also imposed uneven burdens on CIs, raising uncertainties about the long-term sustainability of market fairness.

II Big Techs as a Competition Risk in the EU Payments Market

(a) Big Tech's Advantages in the Payment Sector

From a competitive advantage perspective, Big Tech benefits from structural advantages that traditional CIs in general and regulated Payment Service Providers in particular cannot easily replicate. First, they enjoy powerful network effects derived from their existing integrated consumer platforms in e-commerce, search engines, and social media.[37] Big Tech business models generate a 'data–network–activity' loop that allows direct interactions among large numbers of users, producing vast volumes of user data that are then used as key inputs for data-driven services.[38] Second, their size, global reach, and data-driven capabilities make them potential substitutes for CIs in certain payment functions.[39] Since data access is a core component of the open banking framework, PSD2's provision granting third parties access to bank account data has inadvertently created opportunities for Big Tech to leverage their data and network advantages, thereby strengthening their position within the financial services ecosystem.

[34] Lucy Warwick-Ching, 'Open Banking: What Is It and How Can You Benefit from the New Rules' (*Financial Times,* 17 January 2019) <https://www.ft.com/video/713c5ceb-0521-4ce1-be1d-990724ef64f3> accessed 10 December 2025.
[35] Commission Delegated Regulation (EU) 389/2018 (n 32) article 30(3).
[36] Colangelo (n 11) 5; Opinion EBA/Op/2022/06 (n 19) 87.
[37] Janina Harasim, 'FinTechs, BigTechs and Banks—When Cooperation and When Competition?' (2021) 14(12) Journal of Risk and Financial Management 10.
[38] Hyun Song Shin, 'Big Tech in Finance: Opportunities and Risks' (BIS Annual General Meeting, Basel, 30 June 2019) 1 <https://www.bis.org/speeches/sp190630b.pdf> accessed 31 January 2026.
[39] Harasim (n 37) 10.

Notwithstanding the strong competitive advantages held by Big Tech, regulating them under a distinct regime is challenging due to their complicated interactions with CIs. Harasim suggests that Big Tech can interact with banks either through competition or 'coopetition'.[40] This dual role as both supplier and competitor raises concerns about conflicts of interest, market concentration, third-party dependencies, and systemic risk.[41]

(b) Potential Exploitation of Big Tech's Dominant Market Position

Under PSD2, Payment Service Providers are subject to strict regulation as they must meet capital requirements, comply with strong customer authentication standards, manage operational risks, report incidents, and bear legal liability for unauthorised transactions.[42] Meanwhile, Technical Service Providers fall outside the financial regulatory framework applicable to Payment Service Providers as their activities are typically limited to back-end functions such as data processing and storage, authentication services, and IT maintenance.[43] This regulatory design becomes problematic since many Big Tech companies have increasingly become active in the payments ecosystem.[44] Jans states that while Big Tech firms do not provide payment services directly, their business models often extend far beyond neutral back-end support.[45] In practice, Big Tech increasingly operates at the front end of the payments market by offering user-facing interfaces, digital wallets, and embedded payment solutions.[46] Even when holding payment services licences in the EU under PSD2, some Big Tech companies (e.g. Google) often choose to operate as Technical Service Providers.[47] This creates an undesirable legal vacuum that undermines PSD2's objective of establishing a level playing field in the payments market.[48] Furthermore, as discussed above, Account Servicing Payment Service Providers are required under PSD2 to share data with Third-Party Providers. Colangelo argues that these data-sharing obligations are unbalanced and

[40] ibid. 11.
[41] ibid. 12.
[42] PSD2 (n 1) articles 7, 74, 75, 96, 97 and 98.
[43] PSD2 (n 1) article 3(j).
[44] Jans (n 20) 150.
[45] ibid.
[46] Jans (n 20); OECD, 'Competition in Mobile Payment Services – Note by the European Union' (20 May 2025) 3 <https://one.oecd.org/document/DAF/COMP/WD(2025)10/en/pdf> accessed 10 December 2025.
[47] European Commission, 'A Study on the Application and Impact of Directive (EU) 2015/2366 on Payment Services (PSD2)' (*European Commission*, 2023) 104 <https://www.ecri.eu/sites/default/files/a-study-on-the-application-and-impact-of-directive-ev0423061enn.pdf> accessed 11 December 2025.
[48] Jans (n 20) 323.

thus, not only facilitate the entry of non-financially regulated players, such as Big Tech companies and data aggregators, but may also pose potential risks to financial stability.[49]

The above risks are illustrated by the example of Apple Pay. Apple is well-known for a highly integrated digital ecosystem that generates network effects, creating barriers to entry for rivals.[50] Leveraging its data and ecosystem advantages, Apple launched Apple Pay in 2014 as a contactless payment solution for iPhones, reaching over 535 million users globally by 2024. [51] Several banks have collaborated with Apple to allow their cardholders to make in-store mobile payments via Apple Pay.[52] Although Apple Pay itself is not classified as an Account Servicing Payment Service Provider or Third-Party Provider under PSD2, it provides a front-end interface through which regulated payment services are initiated.[53] By limiting access to the Near-Field Communication (NFC)[54] function on iOS devices, Apple prevents other Payment Service Providers from developing competing digital wallets with equivalent functionality. This has led to antitrust investigations by the European Commission, which preliminarily found that Apple abused its market power by limiting access to essential technical infrastructure.[55] Regarding the open banking sector, although currently implemented only in the UK, Apple Pay has initiated its integration into Apple Wallet. This integration enables users to access real-time account balances and transaction histories, and utilise this information to facilitate payments or gain insights within the app.[56]

[49] Colangelo (n 11) 2, 11.
[50] Carsten Krause,'Case Study: Apple's Ecosystem Strategy – Building Loyalty and Revenue Through Integration and Innovation'(*The CDO Times*, 21 November 2024) <https://cdotimes.com/2024/11/21/case-study-apples-ecosystem-strategy-building-loyalty-and-revenue-through-integration-and-innovation/> accessed 11 December 2025.
Jans (n 20) 323.
[51] Capgemini Research Institute, *World Payments Report 2025* (2025) 28<https://elements.visualcapitalist.com/wp-content/uploads/2024/09/1725979076554.pdf> accessed 11 December 2025.
[52] OECD (n 46) 3.
[53] Jans (n 20) 306.
[54] Apple Developer, 'NFC' <https://developer.apple.com/design/human-interface-guidelines/nfc> accessed 11 December 2025.
[55] OECD (n 46) 4.
[56] Apple, 'New Apple Pay Feature Helps Users More Conveniently Access Their Most Relevant Account Information and Make Informed Purchases' (*Apple,* 16 November 2023) <https://www.apple.com/uk/newsroom/2023/11/new-apple-pay-feature-helps-users-access-account-information-more-conveniently/> accessed 12 December 2025.

This raises concerns that while PSD2 aims to enhance competition, its practical effect may be the consolidation of data-driven financial services in the hands of a few dominant Big Tech.[57]

D SHAPING FUTURE EU PAYMENTS LEGAL FRAMEWORK

I Payment Services Directive 3, Payment Services Regulation and Financial Data Access Regulation

Since 2023, the EU has recognised key weaknesses of PSD2, notably shortcomings in open banking and an uneven playing field between banks and non-bank Payment Service Providers. In response, the European Commission proposed PSD3 and PSR as a legislative package to revise the EU legal framework on payments.[58] Besides amending PSD2, PSD3 also repeals the E-Money Directive 2 (EMD2)[59] with the purpose of integrating electronic money services into a single payment services framework.[60] The PSR, proposed alongside PSD3, replaces the operational rules of PSD2 with directly applicable provisions.[61] It seeks to standardise open banking access, customer authentication, and fraud prevention across the EU.[62]

From a competition perspective, the PSD3 proposal introduces specific obligations for Account Servicing Payment Service Providers, including requirements to maintain dedicated data access interfaces, provide 'permissions dashboards' for users to manage open banking consent, and comply with detailed minimum technical standards for data access.[63] The aim is to reduce barriers faced by Third-Party Providers offering account information and payment initiation services. This goal was reinforced in the first reading of the proposed PSD3, where the European Parliament

[57] Massimo Preziuso and others, 'Open Banking and Inclusive Finance in the European Union: Perspectives from the Dutch Stakeholder Ecosystem' (2023) EIF Research and Market Analysis Working Paper 2023/94, 4 <https://www.eif.org/files/records/eif_working_paper_2023_94.pdf> accessed 12 December 2025.
[58] European Parliament, 'Briefing EU Legislation in Progress - Payment services framework' (2025) 1 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/775891/EPRS_BRI(2025)775891_EN.pdf> accessed 12 December 2025.
[59] European Parliament and Council Directive 2009/110/EC of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC [2009] OJ L 267.
[60] PSR (n 3) 1.
[61] ibid. 2.
[62] ibid.
[63] PSD3 (n 2) Explanatory Memorandum.

raised the need for supporting easier market access for smaller and non-bank Payment Service Providers.[64] The latest text further clarifies this objective by explicitly prohibiting discriminatory practices and listing 'prohibited obstacles' to data access.[65] Accordingly, authorised open banking providers must be able to access payment account data on a non-discriminatory basis.[66] It is evident that this framework remains strongly focused on facilitating market entry for Third-Party Providers, with limited consideration of CIs' operational, technology costs and incentives. Notably, PSR removes the obligation for Account Servicing Payment Service Providers to maintain a costly 'fallback interface' alongside APIs, thereby slightly reducing compliance burdens for them.[67] Nevertheless, competition is still primarily framed around equal access to payment data rather than a broader rebalancing of roles between banks and non-bank Payment Service Providers.

Regarding Big Tech and data-driven competition, the European Parliament has also recognised potential competition risks posed by those companies, particularly due to their extensive networks and data advantages.[68] However, PSD3 itself has not addressed these concerns. PSR partially responds to Big Tech involvement by regulating Technical Service Providers that participate in strong customer authentication, such as Apple supporting mobile wallets.[69] It requires contractual outsourcing arrangements between Technical Service Providers and Payment Service Providers,[70] ensuring that issuing Account Servicing Payment Service Providers retain adequate oversight over strong customer authentication processes conducted via third-party interfaces.[71] Although imposing more obligations on Technical Service Providers, this approach seems to target security and accountability rather than the structural market power of Big Tech.

[64] European Parliament legislative resolution of 23 April 2024 on the proposal for a directive of the European Parliament and of the Council on payment services and electronic money services in the Internal Market amending Directive 98/26/EC and repealing Directives 2015/2366/EU and 2009/110/EC [2024] C/2025/3724.
[65] Charles Elliott, Lavan Thasarathakumar, and Virginia Montgomery, 'Final texts for PSD3 and PSR Awaited as European Parliament and Council of EU Announce Provisional Political Agreement' (*Hogan Lovells*, 15 December 2025) <https://www.hoganlovells.com/en/publications/final-texts-for-psd3-and-psr-awaited-as-european-parliament-and-council-of-eu-announce-provisional> accessed 15 December 2025.
[66] ibid.
[67] PSR (n 3) article 35(2).
[68] PSR (n 3) 6.
[69] Jans (n 20) 191.
[70] PSR (n 3) article 87.
[71] Jans (n 20) 191.

The FiDA proposal, with the aim of extending data access beyond payments to a wide range of financial services under an 'open finance' model, represents a more fundamental intervention.[72] It introduces Financial Information Service Providers, licensed entities that may access financial data with customer consent to provide data-driven services.[73] Under the proposal, Big Tech firms are not excluded from becoming Financial Information Service Providers since access depends primarily on authorisation and user consent, not the access subject. Muçi argues that allowing Big Tech and 'gatekeepers'[74] to access financial data could further consolidate their dominant position, given their existing cross-sector datasets and analytical capabilities.[75] Accordingly, she suggests limiting Big Tech access to financial data in the EU to prevent excessive data concentration and market dominance.[76] EU institutions and several Member States share similar opinions. Notably, Germany has supported proposals to exclude 'gatekeepers' from FiDA's data-sharing framework.[77] The stated objectives are to protect EU digital sovereignty, ensure a level playing field, and safeguard the EU financial ecosystem.[78] Germany's core argument is a consistent continuation of its domestic legal approach. In 2021, Germany introduced section 19(a) of the German Act against Restraints of Competition, empowering the Federal Cartel Office[79] to impose ex ante behavioural restrictions on digital companies with 'paramount significance across markets' to prevent abusive data-driven dominance before harm occurs.[80] Although there is no explicit statutory prohibition, Germany's legal approach indicates a structural concern about Big Tech's

[72] European Commission, 'Framework for Financial Data Access' <https://finance.ec.europa.eu/digital-finance/framework-financial-data-access_en> accessed 13 December 2025.
[73] FiDA (n 4) Recital 31.
[74] 'Gatekeepers' in this case is interpreted in accordance with the Digital Markets Act (DMA), being a 'gatekeeper' is a large digital platform that holds a significant and durable intermediary position, controlling access between end users and other businesses, and whose market power allows it to act as a 'gateway' that can either enable or restrict competition in the digital market.
[75] Eugerta Muçi, 'The EU Open Finance Proposal: Opening the Gates to Financial Services Data' (*Oxford Business Law Blog*, 15 December 2023) <https://blogs.law.ox.ac.uk/oblb/blog-post/2023/12/eu-open-finance-proposal-opening-gates-financial-services-data> accessed 14 December 2025.
[76] ibid.
[77] Barbara Moens and Paola Tamma, 'EU to block Big Tech from new financial data sharing system' (*Financial Times*, 21 September 2025) <https://www.ft.com/content/6596876f-c831-482c-878c-78c1499ef543> accessed 14 December 2025.
[78] ibid.
[79] Federal Cartel Office is Germany's most important competition authority, operating independently under the Federal Ministry for Economic Affairs and Energy, see <https://www.bundeskartellamt.de/EN/Bundeskartellamt/AboutUs/aboutus_node.html> accessed 1 February 2026.
[80] Competition Act of Federal Republic of Germany (*Gesetz gegen Wettbewerbsbeschränkungen)* (as amended to 25 October 2023), s 19(a)<https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html> accessed 1 February 2026.

control over data, including financial data and the connection between data and competition. Indeed, this regulatory design is grounded in a comprehensive risk-based approach. Beyond the competition risks presented by Big Tech in the payments market, as examined in Section C.II, their expansion into the financial sector also raises significant concerns regarding financial stability, as well as privacy and data protection.[81] Given the sensitive nature of personal financial data, the proposal to restrict Big Tech's access to such data has been carefully considered from multiple perspectives that extend beyond the competition aspect alone.

By contrast, some argue that such exclusions are protectionist in nature, restrict consumer choice, and risk undermining innovation by preventing users from sharing their data with service providers they prefer.[82] However, this argument focuses excessively on opportunities of innovation while presuming that any capable company can safely access financial data and overlooking the practical challenges of supervision, behaviour monitoring, and cross-border regulatory compliance. To date, FiDA has not yet been finalised; nevertheless, any option to restrict Big Tech's access must be carefully evaluated to ensure a balance between the objectives of the EU payments legal framework and the risks and opportunities arising from opening financial data access.

II Reform Considerations

Future reforms of PSD3, PSR and FiDA should place greater emphasis on achieving a balanced and sustainable competitive framework, rather than focusing only on facilitating market entry for non-bank Payment Service Providers. Since open banking obligations must reflect banks' operational capacities, risk management duties and strategic incentives, so implementation does not undermine their ability to invest, innovate, and maintain financial stability, regulators are suggested to ensure the active involvement of banks and other financial institutions in the regulatory design process.[83] Targeted regulatory support is particularly important for smaller and

[81] Shin (n 38) 4.
[82] Matthew Kilcoyne, 'EU Should Not Block Big Tech from Financial Data Access' (*Center for Data Innovation*, 7 November 2025) <https://datainnovation.org/2025/11/eu-should-not-block-big-tech-from-financial-data-access/#:~:text=The%20European%20Union%20is%20moving,budgeting%2C%20or%20holistic%20investment%20advice> accessed 14 December 2025.
[83] Akyildirim (n 17) 17.

medium-sized CIs. These institutions often face disproportionate compliance costs when upgrading IT systems, APIs, security tools and internal governance frameworks.[84] Tailored regulatory guidance, appropriate implementation timelines and technical assistance could help address these challenges. [85] Supporting smaller CIs during the transition to open banking might mitigate the initial adverse impacts and contribute to a more level playing field across the financial services sector.

Moreover, PSD3 and PSR should consider addressing asymmetries in liability allocation.[86] Take the PSD3 proposal on unauthorised transactions as an example: when a payment is initiated via a Payment Initiation Service Provider, the Account Servicing Payment Service Provider is required to refund the payer immediately and, where applicable, restore the account to its pre-transaction state.[87] Requiring Account Servicing Payment Service Provider to act as the primary point of reimbursement for unauthorised transactions, even where payment initiation service providers are responsible, irrespective of which party was at fault, may impose disproportionate burdens on banks and distort competitive neutrality.[88] In allocating liability for unauthorised transactions initiated through a payment initiation service provider, it may be appropriate to consider the Account Servicing Payment Service Provider's ability to prevent such transactions, as this can help ensure that responsibility is assigned proportionately. Rebalancing liability rules would support fairer competition between Third-Party Providers and Account Servicing Payment Service Providers (the majority of which are CIs). [89]

In addition, open data access should be complemented by a reciprocity principle. As suggested by Di Porto and Ghidini, reciprocal data-sharing obligations between banks and Big Tech would help prevent free-riding, reduce data power imbalances, and promote effective competition.[90] If large digital companies are beneficiaries of the access-to-account rule, competitive balance requires that

[84] ibid. 18.
[85] ibid.
[86] Jans (n 20) 243.
[87] PSD3 (n 2) article 56(4).
[88] Jans (n 20) 243.
[89] ibid.
[90] Fabiana Di Porto and Gustavo Ghidini, '"I Access Your Data, You Access Mine": Requiring Data Reciprocity in Payment Services' (2020) 51(3) International Review of Intellectual Property and Competition Law 308.

banks be granted a corresponding right to access Big Tech data that can likewise be exploited to improve digital payment services.

Finally, the scope of data access under FiDA also requires careful reconsideration, especially in relation to Big Tech designated as 'gatekeepers' under the Digital Market Act. Allowing such firms unrestricted access to financial data may enable them to replicate banks' data-driven models, leverage data and analytical capabilities, and further consolidate their market power. However, any reform should also consider other goals of EU payment regulations, including safeguarding and prioritising consumer choice as stated in the FiDA proposal.[91] Excluding certain entities from accessing financial data raises serious concerns about contradicting the fundamental principles of open banking and open finance, and may undermine the original objectives of earlier pro-competitive reforms. [92] As analysed above, financial data is the central focus of open banking and open finance frameworks. Hence, rather than prohibiting access by particular entities, regulation should consider governing how financial data may be accessed and used. This can be achieved by classifying financial data according to levels of sensitivity and by calibrating corresponding access rights and processing requirements.

At the same time, supervisory oversight over participating entities can be strengthened to manage associated risks. This data-centred approach aligns with the view of the Head of Research at the Bank for International Settlements, who argues that policy responses to Big Tech in finance must move beyond traditional banking regulation.[93] Instead, a 'regulatory compass' should be taken into account, where financial regulation, competition law, and data protection law are combined to achieve effective outcomes. [94] A similar emphasis on cross-disciplinary regulation and supervision has been highlighted by the Expert Group on Regulatory Obstacles to Financial Innovation in the

[91] FiDA (n 4) recital 2.
[92] Giuseppe Colangelo and Oscar Borgogno, 'Open Banking and the Ambiguous Competitive Effects of Data Portability' (April 2021) Competition Policy International Antitrust Chronicle <https://competitionpolicyinternational.com/wp-content/uploads/2021/04/5-Open-Banking-and-the-Ambiguous-Competitive-Effects-of-Data-Portability-By-Oscar-Borgogno-Giuseppe-Colangelo-.pdf> accessed 1 February 2026.
[93] Shin (n 38) 4.
[94] ibid.

context of technology-enabled innovation in the financial sector. [95] In practice, coordinated regulation and supervision by the Australian Competition and Consumer Commission and the Office of the Australian Information Commissioner is strongly promoted to ensure that access to financial data is transparent, purpose-limited, and compliant with both the Privacy Act and the Consumer Data Right Rules.[96] Taken together, this model demonstrates the feasibility of a legal framework that balances privacy protection, competition objectives, and data access rights in a coherent and integrated manner.

E CONCLUSION

In summary, the proposed EU regulatory initiatives **(**PSD3, PSR, and FiDA) represent a comprehensive effort to modernise the payments and financial data ecosystem. PSD3 and PSR seek to address the weaknesses of PSD2 by improving open banking, standardising customer authentication, and ensuring equal access to payment account data for Third-Party Providers.[97] These measures are designed to facilitate market entry, especially for FinTech companies, while slightly reducing operational burdens for CIs through simplified compliance requirements. However, the framework seems to remain primarily focused on access equality rather than broader role rebalancing or cost considerations for incumbent CIs. Regarding the dominance of Big Tech in the payment market, PSD3 and PSR largely addressed security and accountability requirements rather than balancing structural market power. FiDA, by contrast, represents a more transformative approach to financial data access. By introducing licensed Financial Information Service Providers, FiDA allows data-driven services across the financial sector, promoting innovation and open finance while protecting consumer rights.[98] However, allowing Big Tech participation raises concerns about market concentration and dominance due to their data and analytical advantages. Proposals from certain member states, including Germany, suggest limiting Big Tech access to

[95] Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG), *30 Recommendations on Regulation, Innovation and Finance - Final Report to the European Commission* (2019) 20 <https://finance.ec.europa.eu/document/download/98a331c4-6700-4355-b545-cb97a49f13c2_en?filename=191113-report-expert-group-regulatory-obstacles-financial-innovation_en.pdf> accessed 2 February 2026.

[96] Office of the Australian Information Commissioner, 'OAIC submission to Select Committee on Financial Technology and Regulatory Technology' (10 December 2020) <https://www.oaic.gov.au/engage-with-us/submissions/oaic-submission-to-select-committee-on-financial-technology-and-regulatory-technology> accessed 2 February 2026.

[97] PSR (n 3) 2.

[98] FiDA (n 4) recital 31.

financial data to safeguard EU digital sovereignty, ensure fair competition, and protect the broader financial ecosystem.[99] However, balancing these objectives with consumer choice and innovation remains a critical policy challenge.

Considering future reforms, a balanced and sustainable competitive framework requires comprehensive evaluation. This includes actively involving banks and other financial institutions in the regulatory design process, providing tailored support for smaller CIs and addressing liability asymmetries to prevent disproportionate burdens. Such measures aim to prevent free-riding, reduce data power imbalances, and enhance sound competition within the EU payments market. In respect of the emergence of Big Tech in the payment sector, a 'regulatory compass' should be taken into account, where financial, competition, and data protection regulation and supervision are combined to achieve effective outcomes.[100]

Overall, the EU's evolving regulatory framework seeks to harmonise multiple objectives: promoting open access and innovation, maintaining financial stability, ensuring market fairness, and protecting consumers. By combining targeted obligations, careful oversight of Big Tech's participation, and support for smaller credit institutions, PSD3, PSR, and FiDA collectively aim to create a payments ecosystem that is secure and competitive, laying a foundation for sustainable growth in Europe's financial services sector.

[99] Moens (n 77).
[100] ibid.

ADVANCING POST-CONFLICT ECONOMIC, SOCIAL, AND CULTURAL RIGHTS THROUGH GRASSROOTS STRATEGIC PUBLIC INTEREST LITIGATION: A NORTHERN IRELAND CASE STUDY

Nate Johnson[*]

A INTRODUCTION

I Setting the Scene in Northern Ireland

Historically, international human rights (IHR) advocacy has taken the form of naming violations through fact gathering and shaming states into changing laws or practices.[1] Some scholars suggest this method is less effective in fulfilling economic, social, and cultural rights (ESCRs), which can lack clear violators, violations, and remedies, and may require collaboration, resource distribution, data-gathering, and monitoring.[2] This debate underscores the historic marginalisation of ESCRs within the IHR regime.[3] ESCRs have faced criticisms of vagueness, unenforceability, non-justiciability, resource-dependency, or polycentrism.[4] While some IHR scholars increasingly re-consider these criticisms,[5] these debates have persisted in Northern Ireland (NI) since at least 1998.

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[1] Kenneth Roth, 'Defending Economic Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2004) 26 Human Rights Quarterly 63, 64-70; Leonard Rubenstein, 'How International Human Rights Organizations Can Advance Economic, Social, and Cultural Rights: A Response to Kenneth Roth' (2004) 26 Human Rights Quarterly 845, 847-848.

[2] Roth (n 1) 64-69; Rubenstein (n 1) 849.

[3] Philip Alston, *International Human Rights: Text and Materials* (NYU Law 2024) 249-56.

[4] ibid. Roth (n 1); Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13 Human Rights Brief 1; Susan Kang, 'The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly' (2009) 31 Human Rights Quarterly 1006, 1023; Lon Fuller, 'The Forms and Limits of Adjudication' (1979) 92 Harvard Law Review 353.

[5] Aoife Nolan, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' (August 2007) NYU Centre Human Rights and Global Justice Working Paper No. 15 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434944> accessed 11 February 2026; Paul O'Connell, 'Let Them Eat Cake: Socioeconomic Rights in an Age of Austerity' in Aoife Nolan (ed), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Bloomsbury 2013) 71.

In 1998, the Belfast/Good Friday Agreement (BGFA) established new institutional dynamics to achieve a peaceful end to conflict in NI by incorporating IHR norms into new governance dynamics.[6] These dynamics included a power-sharing Executive and mutual veto powers.[7] Unfortunately, these same innovations have resulted in government shutdowns and limited progressive legislation, closing opportunities for human rights-based legislative reform through traditional naming and shaming.[8] This difficulty is compounded in the context of ESCRs, which play second fiddle to civil and political rights (CPRs), lack specific enumeration, and are not protected by a dispute resolution forum in the BGFA.[9]

The failure to adequately protect ESCRs in the BGFA is not surprising as they are not only marginalised in IHR, but also in transitional justice mechanisms.[10] Transitional justice mechanisms are those 'associated with a society's attempt to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation'.[11] These mechanisms were traditionally shaped by retributive justice, which emphasises individual criminal accountability for CPRs violations at the expense of ESCRs protections.[12] Recently, certain transitional justice scholars have recognised this shortcoming and splintered into a new area of scholarship called transformative justice. In short, transformative justice shifts the focus of

[6] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (entered into force 2 December 1999) 2113 UNTS 473 (BGFA) Declaration of Support', s. 2 ('we firmly dedicate ourselves to… the protection and vindication of the human rights of all.'); BGFA, Strand 1.

[7] ibid. See also, Rory O'Connell, Lina Malagón and Fionnuala Ní Aoláin, 'The Belfast/Good Friday Agreement and Transformative Change: Promise, Power, and Solidarity' (2024) 57 Israel Law Review 4, 25.

[8] O'Connell, Malagón, and Ní Aoláin (n 7) 25; see also, Martin Melaugh, 'Devolved Government in Northern Ireland' (*CAIN Web Service*) <https://cain.ulster.ac.uk/issues/politics/government.htm> accessed 11 February 2026; see also, Jen Ang, 'Public Interest Litigation in Northern Ireland' (*Lawmanity,* September 2024) 9 <https://pilsni.org/wp-content/uploads/2024/10/Public-Interest-Litigation-in-Northern-Ireland_final.pdf> accessed 11 February 2026.

[9] O'Connell, Malagón and Ní Aoláin (n 7) 18-20; see also, BGFA Strand 3, 'Rights, Safeguards and Equality of Opportunity,' Human Rights (emphasising equal opportunity in all social and economic activity); BGFA Strand 3, 'Rights, Safeguards and Equality of Opportunity,' Economic, Social and Cultural Issues.

[10] Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 IJTJ 339, 341-42; Rory O'Connell, Lina Malagón and Fionnuala Ní Aoláin, 'Are Economic, Social and Cultural Rights Sidelined in Peace Agreements? Insights from Peace Agreement Databases' (2022) 26 Gonzaga Journal of International Law 25, 28.

[11] United Nations (UN), 'Transitional Justice and Economic, Social and Cultural Rights' (2014) UN Doc HR/PUB/13/5 5.

[12] Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69, 70; see also Vesuki Nesiah, 'Doing History with Impunity' in Karen Engle, Zinaida Miller and DM Davis, *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016) 102-12; Mahmood Mamdani, 'Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa' in Engle, Miller and Davis (n 14) 351-53; Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell Law Review 1069, 1082.

transitional justice from CPRs to ESCRs, retribution to reparation, and top-down to bottom-up design and implementation of traditional transitional justice mechanisms.[13] These developments are relevant to NI, which is itself a transitional society.[14]

Despite these developments, the BGFA's lack of attention to ESCRs and the difficulty of legislative reform in NI mean strategic public interest litigation (SPIL) has become a creative tool to sharpen ESCRs protections and build a human rights-based society post-conflict.[15] SPIL has altered human rights norms internationally.[16] And, in NI, individuals, NGOs, and human rights bodies have used SPIL to force the hand of government by litigating the BGFA itself,[17] post-Brexit agreements,[18] and rights to social security,[19] education,[20] language,[21] or economic development.[22] SPIL can achieve material effects, such as changes to law and policy affecting the conduct of litigants, groups, and government,[23] or symbolic effects, such as impacting perceptions and understandings of rights and their protections.[24]

[13] Paul Gready, 'Introduction' in Paul Gready and Simon Robins, *From Transitional Justice to Transformative Justice* (Cambridge University Press 2019) 27; see also, Dustin Sharp, 'Interrogating the Peripheries: The Preoccupation of Fourth Generation Transitional Justice' (2013) 26 Harvard Journal International Law 149, 157.
[14] This article refers to NI as a 'transitional' and 'post-conflict' society interchangeably.
[15] Ang (n 8) 9; see also, Malcolm Langford, 'Domestic Adjudication and Economic, Social, and Cultural Rights: A Socio-Legal Review' (2009) 6 IJR 91; Colin Harvey, 'Human Rights and Equality in Northern Ireland' (2005) 57 NILQ 215, 232.
[16] Kathryn Sikkink, *The Justice Cascade: how human rights prosecutions are changing world politics* (WW Norton 2011); Gianluca De Fazio, 'Legal opportunity structures and social movement strategy in Northern Ireland and southern United States' (2012) 53 International Journal Of Comparative Sociology 3; Malcolm Langford, 'The impact of public interest litigation: the case of socio-economic rights' (2021) 27 AJHR 505, 517-23.
[17] Gordon Anthony, 'Public Law Litigation and the Belfast Agreement' (2002) 8 EPL 401, 405-16.
[18] Sarah Craig, Claire Lougarre and Rory O'Connell, 'EU Developments in Equality and Human Rights: Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland: Update Paper on Developments post January 2022' (November 2024) 117-32 <https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/DMU/EU-EqualityHumanRights-BrexitImpactUpdate-Nov2024.pdf> accessed 11 February 2026.
[19] *In the Matter of Lorraine Cox's Application* [2020] NIQB 53.
[20] *Coláiste Feirste's Application* [2011] NIQB 98.
[21] *In re Conradh na Gaeilge's Application* [2022] NIQB 56.
[22] *In the Matter of an Application by the Committee on the Administration of Justice for Judicial Review* [2025] NIKB 16.
[23] Cesar Rodriguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 Texas Law Review 1669, 1679-81.
[24] ibid. See also, The Atlantic Philanthropies, 'Using the Law to Secure Social Change on the Island of Ireland' (2015) 5.

II Introducing the Study

The use of SPIL to strengthen both human rights protections in post-conflict societies, like NI, and perceptions of those rights and their protections could have wider impacts if it catered to the needs and perspectives of the advocates, grassroots and NGOs who pursue SPIL. To identify those needs and perspectives and with ethical approval from the Ulster University School of Law Filter Committee, the author conducted empirical, qualitative data gathering in the form of questionnaires and semi-structured interviews of human rights and equality advocates and organisers across NI.[25]

The member organisation list of the Belfast-based Public Interest Litigation Support (PILS) project, NI's only legal project helping NGOs pursue SPIL,[26] was used to identify 105 NGOs and grassroots organisations that have pursued or expressed interest in pursuing SPIL in NI.[27] Of the 105 organisations contacted for participation, 13 individual advocates representing 15 organisations agreed to participate in the questionnaire.[28] The author also conducted three one-on-one interviews with advocates working in disability,[29] environmental,[30] and education rights,[31] and

[25] Rodriguez-Garavito (n 23) 1679.
[26] Ang (n 8) 6. PILS was founded 'to break down the cost and knowledge barriers that prevent fellow human rights organisations from using the law to achieve change.' PILS, 'Our story' (*Pilsni.org*) <https://pilsni.org/our-story/> accessed 11 February 2026.
[27] The author interned at PILS and was asked to explore member organisations' perspectives on and satisfaction with the functions of SPIL, generally, and PILS, specifically.
[28] Questionnaire response of representative of national security and human rights organization Rights and Security International (RSI) (London, England, 16 May 2025) (RSI 16/5/25(Q)); questionnaire response of grassroots socioeconomic rights advocate at Participation and Practice of Rights (PPR) (Belfast, Northern Ireland, 20 May 2025) (PPR 20/5/25(Q)); questionnaire response of women's rights advocate at Women's Support Network (WSN) (Belfast, Northern Ireland, 20 May 2025) (WSN 20/5/25(Q)); questionnaire response of human rights and disability rights advocate at the Human Rights Consortium (HRC) and NW Forum for People with Disabilities (NW Forum) (Belfast, Northern Ireland, 21 May 2025) (HRC and NW Forum 21/5/25(Q)); questionnaire response of representative of two environmental rights and climate justice groups advocating for rights of nature (Northern Ireland, 30 May 2025) (EnR 30/5/25(Q)); questionnaire response of education rights advocate (Belfast, Northern Ireland, 2 June 2025) (EdR 2/6/25(Q)); questionnaire response of representative of concerned local residents' group No Gas Caverns (NGC) advocating for environmental and climate justice in context of gas infrastructure project (Northern Ireland, 3 June 2025) (NGC 3/6/25(Q)); questionnaire response of mental health rights advocate (Belfast, Northern Ireland, 6 June 2025) (MHR 6/6/25(Q)); questionnaire response of physical health care and disability rights advocate (Belfast, Northern Ireland, 9 June 2025) (DR 9/6/25(Q)); questionnaire response of leading housing rights advocate (Belfast, Northern Ireland, 10 June 2025) (HR 10/6/25(Q)); questionnaire response of housing rights solicitor (Belfast, Northern Ireland, 11 June 2025) (HR 11/6/25(Q)); questionnaire response of volunteer housing rights advocate (Belfast, Northern Ireland, 13 June 2025) (HR 13/6/25(Q)); questionnaire response of environmental rights advocate at Environmental Justice Network Ireland (EJNI) (Belfast, Northern Ireland, 16 June 2025) (EJNI 16/6/25(Q)).
[29] Interview with representative of disability rights organisation (Belfast, Northern Ireland, 24 June 2025) (DR 24/6/25(I)).
[30] Interview with environmental rights advocate at NGC (Belfast, Northern Ireland, 8 July 2025) (NGC 8/7/25(I)).
[31] Interview with education rights advocate (Belfast, Northern Ireland, 25 June 2025) (EdR 25/6/25(I)).

one interview with one advocate each from Participation and Practice of Rights (PPR) and Rights and Security International (RSI).[32] Respondents from PPR, RSI, No Gas Caverns (NGC), Environmental Justice Network Ireland (EJNI), NW Forum for People with Disabilities (NW Forum), Human Rights Consortium (HRC), and Women's Support Network (WSN) consented to having their organisational affiliations identified. The remaining respondents did not. All individual respondents are kept anonymous.

The goal of this data gathering is to unpack the extent to which advocates believe SPIL achieves legal change or accountability and affects perceptions of ESCRs protections and NI as a human rights-based society. In principle, this data might strengthen understanding of how different forms of human rights advocacy can affect belief in the accessibility and strength of rights and the ability to build a human rights-based society. While the project is context specific to NI, it anticipates to have wider relevance to other post-conflict societies and organisations considering SPIL.

This article consists of five Parts, structured around the findings and analysis of this empirical data. Following from context provided in this Introduction, Part B defines SPIL and situates this definition within its historical and international lineage, ending with SPIL's current role in NI human rights advocacy. Through original, empirical research, Part C explores advocates' definitions and uses of SPIL as well as their perspectives on the extent to which SPIL drives legislative or legal change in a post-conflict society, holds government accountable and meets community needs, provides recognition, understanding, or a language of legal rights, and contributes to a rights-based post-conflict society. Despite varying levels of faith in SPIL's ability to meet any one or a combination of these goals, it is clear that all respondents believe SPIL helps build a human rights-based society, particularly a post-conflict one like NI. Part D situates these findings within the context of the wider scholarship on the development of rights protections in NI as a transitional society with a history of violent conflict. And, finally, Part E summarises the findings and addresses areas of further research.

[32] Interview with grassroots socioeconomic rights advocate at PPR and representative of national security and human rights organisation RSI (Belfast, Northern Ireland, 26 June 2025) (PPR and RSI 26/6/25(I)).

B CONTEXTUALISING SPIL ON THE GLOBAL STAGE

SPIL's definition has plagued public interest, strategic litigation, impact, test-case, and cause lawyers for decades.[33] For the purposes of this article, SPIL is defined as the use of legal channels to achieve an impact on the social, political, or legal situation of not only the parties to a case, but also a broader segment of the population, whether defined by a shared disadvantage or rights violation. This definition is intentionally broad to encapsulate legal activities that fall within the Venn diagram of 'strategic', 'public interest', and 'human rights' litigation.

I Growing Stages

SPIL has its roots in public interest law movements associated with the US and India.[34] In the US, SPIL grew from legal services for the poor into a tool to incite federal government action on behalf of historically disenfranchised Americans.[35] During the conservative Reagan era, however, public interest law and lawyers internationalised, exporting rule of law-based programs through the language of human rights.[36] Similarly, SPIL in India began with cases against executive agencies on behalf of disadvantaged sections of society and developed into a tool for environmental protection, anti-corruption, education, rule of law, and good governance.[37] SPIL's growth was in part due to India's robust civil society and the particularities of its Constitution, which allows for complementary readings of fundamental rights and directive principles, innovative judicial remedies, and judicial activism in the face of a weak Executive.[38] Since these early stages, SPIL has exploded globally, particularly to protect ESCRs. SPIL has seen success in promoting housing rights in South Africa, water and sanitation rights in India, healthcare rights in Colombia, education rights in the US,[39] and rights to social security, accommodation, and public housing in the UK.[40]

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[33] Scott Cummings, 'The Pursuit of Legal Rights – And Beyond' (2012) 59 UCLA Law Review 506, 517-24; Michael Ramsden and Kris Gledhill, 'Defining strategic litigation' (2019) 38 CJQ 407, 425; Kris Van der Pas, 'Conceptualising strategic litigation' (2021) 11 Oñati Socio-Legal Series S116, S126-30.

[34] Ramsden and Gledhill (n 33) 410. See also, Van der Pas (n 33); Surya Deva, 'Public interest litigation in India: a critical review' (2009) 28 CJQ 28; Scott Cummings and Louise Trubek, 'Globalizing Public Interest Law' (2008) 13 UCLA Journal of International Law & Foreign Affairs 1, 6-7.

[35] Scott Cummings, 'The Internationalization of Public Interest Law' (2007) 57 Duke LJ 891, 899-900. See also, *Brown v Board of Education* 347 US 483 (1954).

[36] ibid. 896-97, 970, 1011, 1035. See also, Cummings and Trubek (n 35) 23-26, 28-29, 37-39.

[37] Deva (n 34) 27.

[38] ibid. 30-31.

[39] Langford (n 15) 92-93; see also, Langford (n 16) 517-23.

[40] Michael Farrell, FLAC, 'The role of litigation: Giant Leaps and Baby Steps' in *A Deficit of Protection-Economic, Social and Cultural Rights in Ireland* (Amnesty International Conference, Ireland, 22 November 2025) <https://www.flac.ie/assets/files/pdf/the_role_of_litigation_amnesty_conference_22nov2012.pdf> accessed 11

II Coming to NI

NI has fallen victim to the historic marginalisation of ESCRs that IHR and transformative justice scholars lament.[41] First, ESCRs simply receive less attention in the BGFA.[42] Second, according to Cahill-Ripley, certain communities in NI have not mobilised around ESCRs in the same way as CPRs, leading to a rights silence and lack of vernacularisation of human rights generally and ESCRs specifically.[43] Without a knowledge or language of ESCRs, these communities cannot name their needs as they relate to such rights.[44] The combination of a lack of ESCR voice,[45] non-constitutionalisation of ESCRs,[46] and the weakened NI Executive limits opportunities for the traditional forms of human rights advocacy in NI.[47]

As a result, NI advocates have increasingly resorted to SPIL to build the human rights-based society promised in the BGFA.[48] This is despite the markedly quiet role of SPIL and 'lawyerly mobilisation' in NI during the civil rights period,[49] when, as De Fazio argues, there existed a perceived lack of legal opportunity structures, no justiciable rights to housing or employment, and a general distrust of the legal system.[50] Now, advocates across the island of Ireland use SPIL to

February 2026; Alice Donald and Elizabeth Mottershaw, 'Evaluating the Impact of Human Rights Litigation on Policy and Practice: A Case Study of the UK' (2009) 1 Journal of Human Rights Practice 339; Future Climate Info, 'Historic Judgment Rules Air Pollution Contributed to Child's Death' (*Future Climate Info,* 2020) <https://futureclimateinfo.com/judgement-air-pollution-childs-death/> accessed 11 February 2026; Lisa Vanhala, 'Successful Use of Strategic Litigation by the Voluntary Sector on Issues Related to Discrimination and Disadvantage: Key Cases from the UK' (Jan 2017) The Baring Foundation: Working Paper No. 3 on Better Use of the Law by the Voluntary Sector <https://cdn.baringfoundation.org.uk/wp-content/uploads/2017/01/WorkingPaper3.pdf> accessed 11 February 2026.

[41] Langford (n 16) 507-12; Zinaida Miller, 'Effects of Invisibility: In Search of the Economic in Transitional Justice' (2008) 2 IJTJ 266, 275-76, 281-89.

[42] O'Connell, Malagón and Ní Aoláin (n 7) 18-20.

[43] Amanda Cahill-Ripley, 'Foregrounding Socio-Economic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights' (2014) 2 NQHR 183, 184-85, 188, 192-96.

[44] ibid.

[45] ibid.

[46] Northern Ireland Human Rights Commission (NIHRC), 'A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland' (*NIHRC,* 10 Dec 2008) <https://nihrc.org/assets/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf> accessed 11 February 2026; see also, Colin Harvey, Anne Smith and Kevin Henratty, 'A Bill of Rights for Northern Ireland: Polling Results' *(Human Rights Consortium*, 2021).

[47] O'Connell, Malagón and Ní Aoláin (n 7) 18; See also, Ang (n 8) 9.

[48] Ang (n 8) 9.

[49] Kieran McEvoy, 'What did the lawyers do during the "war"? Neutrality, Conflict and the Culture of Quietism' (2011) 74 MLR 350, 359; see also, De Fazio (n 16) 4-5, 11-14, 15.

[50] De Fazio (n 16) 14-17.

impact law reform and policy,[51] such as that relating to Irish Travellers, children, social welfare, and the environment.[52] NI advocates also use SPIL as a coercive method to achieve equality where the Northern Ireland Act 1998 section 75, duty to assess the equality impact of policies and oversight thereof fail.[53] The growing utility of SPIL in NI raises the need to clarify how advocates pursuing it feel it affects their rights, protections, and understandings of both. The empirical findings outlined below address participating NI advocates' definitions and usages of SPIL and the extent to which they view SPIL achieves its material and symbolic goals as they relate to ESCRs in NI.

C THE STATE OF SPIL IN NI: WHAT THE ADVOCATES SAY

I Defining SPIL

This article defines SPIL as the use of legal channels to achieve an impact on the social, political, or legal situation of not only the parties to a case, but also a broader segment of the population, whether defined by a shared disadvantage or rights violation. The participating advocates from NI similarly define SPIL based on its outcomes, who these outcomes affect, and/or on whose behalf these outcomes are sought. According to them, SPIL's outcomes include changing law, policy, or practice and holding the government accountable for violating legal obligations.[54] Given the impact of these outcomes on broad segments of the population, issues of public concern, or general social injustice, SPIL affects more than the parties to a case.[55] Like scholars, NI advocates highlight that SPIL is typically brought by or on behalf of groups that face disadvantage or vulnerability

[51] The Atlantic Philanthropies (n 24); Brian Kearney-Grieve, 'Public Interest Litigation: Summary of a meeting of organisations from Northern Ireland, the Republic of Ireland, South Africa and the United States' *Atlantic Philanthropies* (May 2011) <https://www.atlanticphilanthropies.org/wp-content/uploads/2016/04/PublicInterestLitigationExchange_Summary.pdf> accessed 11 February 2026.

[52] Mel Cousins, 'How public interest law and litigation can make a difference to marginalized and vulnerable groups in Ireland' (*FLAC*,6 Oct 2005) <https://www.flac.ie/assets/files/pdf/cousins_flac_061005.pdf> accessed 11 February 2026; see also, Atlantic Philanthropies (n 24); Susan Hansen, 'Strategic Litigation' (*Atlantic Philanthropies,* 2018) Atlantic Insights <https://www.atlanticphilanthropies.org/wp-content/uploads/2018/11/Atlantic_Insights_Strategic-Litigation_11_19.pdf> accessed 18 March 2025; Ciara Brennan and others, 'Linking the Irish Environment' (*EJNI*, June 2023) <https://ejni.net/wp-content/uploads/2025/07/Linking_the_Irish_Environment.pdf> accessed 11 February 2026.

[53] Northern Ireland Act 1998, s 75; see also, Harvey (n 15) 232; Christopher McCrudden, 'Mainstreaming Equality Law in the Governance of Northern Ireland' (1999) 22 Fordham International Law Journal 1696.

[54] PPR 20/5/25(Q); RSI 16/5/25(Q); WSN 20/5/25(Q); HRC and NW Forum 21/5/25(Q); NGC 3/6/25(Q); EdR 2/6/25(Q); MHR 6/6/25(Q); DR 9/6/25(Q); HR 13/6/25(Q).

[55] PPR 20/5/25(Q); RSI 16/5/25(Q); WSN 20/5/25(Q); EJNI 16/6/25(Q); DR 9/6/25(Q); HR 10/6/25(Q); HR 11/6/25(Q); HR 13/6/25(Q); and EnR 30/5/25(Q).

based on social marginalisation, visibility, or financial means.[56] NI advocates also believe SPIL plays only one part in a 'multi-pronged approach' to achieving the broader social and political goals of these communities.[57]

II Using SPIL

In NI, advocates believe that SPIL must be 'part of a range of tools'[58] or a 'combination' of methods,[59] that are 'responsive to… the ones impacted' by violations.[60] Some advocates prefer 'resolutions that lie outside court',[61] making use of direct action,[62] or education and training to increase awareness and 'reinforce shared demands'.[63] Others pursue media campaigns that raise publicity, increase fundraising, and pressure decision-makers.[64] Still others prefer policy advocacy, which allows for reasoned arguments supporting certain positions, like the economic and educational benefits of an integrated education system in NI.[65] Unfortunately, decisionmakers beholden to particular historic political identities in NI may not genuinely engage with reasoned policy arguments and may 'only really respond… to a most serious threat of litigation',[66] that brings them 'kicking and screaming to the necessary and right actions'.[67]

Thus, legal action remains the 'strongest' method of achieving certain goals, according to NI advocates.[68] One example occurred, when NI Minister for Education Paul Givan rejected integration for Bangor Academy and Rathmore Primary, despite both schools voting to integrate

[56] WSN 20/5/25(Q); NGC 3/6/25(Q); EnR 30/5/25(Q); MHR 6/6/25(Q); DR 9/6/25(Q); HR 10/6/25(Q), Cummings (n 33) 523.
[57] DR 9/6/25(Q).
[58] HR 10/6/25(Q).
[59] EJNI 16/6/25(Q).
[60] PPR 20/5/25(Q).
[61] HR 13/6/25(Q).
[62] PPR 20/5/25(Q); HR 13/6/25(Q).
[63] HR 13/6/25(Q). See also, HRC and NW Forum 21/5/25(Q); MHR 6/6/25(Q); DR 9/6/25(Q); HR 13/6/25(Q).
[64] PPR 20/5/25(Q); RSI 16/5/25(Q); WSN 20/5/25(Q); HRC and NW Forum 21/5/25(Q); NGC 3/6/25(Q); EJNI 16/6/25(Q); EnR 30/5/25(Q); EdR 2/6/25(Q); MHR 6/6/25(Q); DR 9/6/25(Q); HR 10/6/25(Q); HR 11/6/25(Q); HR 13/6/25(Q).
[65] EdR 2/6/25(Q).
[66] NGC 8/7/25(I).
[67] ibid.
[68] EdR 25/6/25(I); WSN 20/5/25(Q).

by clear majorities.[69] An education advocate brought Givan's rejection to the NI Assembly for debate, but received the unsatisfactory response that 'there's nothing more [the Assembly] can really do'.[70] This advocate resorted to the 'threat of legal action' to reassure parents of their power to 'pursue [their] public affairs and policy… goals' and achieve redress for violations of the Integrated Education Act (Northern Ireland) 2022, which requires the government to 'encourage, facilitate, and support' integrated education.[71] The judicial review proceedings have built on the successes of past cases.[72] Clearly, SPIL is an important tool in achieving its goals and effects in NI.

III Achieving SPIL's Goals and Effects

Participating advocates discussed these material and symbolic goals and effects,[73] including the extent to which SPIL: (a) drives legislative or legal change; (b) holds government accountable or meets community needs; (c) affects perceptions and understandings of rights; and (d) builds a human rights-based society in NI.

(a) Driving Legislative and Legal Change in a Post-Conflict Society

The majority of participating advocates believe SPIL changes government conduct or policy to varying degrees in NI. At least six advocates across rights issue areas in NI believe SPIL lays bare government policy failures to meet human rights standards.[74] To some, the mere 'threat of litigation' can lead to 'absolute change'[75] or 'ensure more care is taken over policy' affecting those in NI.[76]

Others view changes to NI government policy or conduct as only resulting from successful litigation that creates binding legal obligations on government actors, as seen in the impressive

[69] EdR 25/6/25(I); see also, Robbie Meredith, 'Givan rejects schools' bids to become integrated' (*BBC,* 8 Jan 2025) <https://www.bbc.com/news/articles/c390914zkd9o> accessed 11 February 2026.
[70] EdR 25/6/25(I).
[71] ibid. See also, Integrated Education Act (Northern Ireland) 2022, s 4(1).
[72] EdR 25/6/25(I); see also, *Drumragh Integrated College's Application* [2014] NIQB 69.
[73] Rodriguez-Garavito (n 23) 1679-80.
[74] EJNI 16/6/25(Q); NGC 8/7/25(I); EnR 30/5/25(Q); EdR 2/6/25(Q); DR 9/6/25(Q); HR 13/6/25(Q).
[75] NGC 8/7/25(I). See also, RSI 16/5/25(Q).
[76] NGC 3/6/25(Q). See also, NGC 8/7/25(I) ('I think it's only that background sort of threat that it could be taken further that actually encourages governments to… listen.').

Irish language rights movement in NI.[77] That success relied on other methods, including policy advocacy.[78] One reason for this is the nature of judicial review in NI, which merely challenges government decision making processes rather than the decision itself.[79] This undermines SPIL's ability to materially change a government policy decision, as 'the court will often send the question back to the body to re-make it'.[80] In fact, some judicial reviews have resulted in NI developers thanking one environmental rights advocate for 'mak[ing] their projects better' by identifying needed adjustments for future applications.[81] This is just one limitation in affecting policy change in NI. Another, identified by O'Connell, Malagón, and Ní Aoláin, includes the NI Assembly's failure to pass progressive human rights legislation due to government collapses and mutual veto powers, both of which are explicitly mandated by the BGFA.[82]

Some argue it is precisely because of these consociational arrangements that SPIL must play a prominent role in policy development. For example, one disability rights advocate argues that, due to years of conflict, 'social care legislation has fallen decades behind that of other parts of the UK'.[83] NI's 'patchy' social care law dates to the 1970s and has not been updated because the 'Assembly has collapsed so many times and [NI has] been left without a government [and] without legislators'.[84] By comparison, England's Care Act 2014 is 'much neater', is 'all in one place', 'uses modern language' and is 'designed for today's way of life'.[85] NI's inadequate social care law and training for the carers who implement it have created particularly harsh consequences, including death, for individuals switching from child to adult care services.[86] As a result, that same advocate

[77] WSN 20/5/25(Q); HRC and NW Forum 21/5/25(Q); MHR 6/6/25(Q). For discussion of Irish language rights context, see PPR 20/5/25(Q); 'Irish language returns to Belfast courtroom for first time in 300 years' *Irish Legal News* (Belfast, 16 Jan 2024) <https://www.irishlegal.com/articles/irish-language-returns-to-belfast-courtroom-for-first-time-in-300-years> accessed 11 February 2026; Robbie McVeigh, 'Irish Medium Education and the "Statutory Duty": A Rights Perspective' (2022) Conradh na Gaeilge and Committee on the Administration of Justice <https://caj.org.uk/wp-content/uploads/2022/11/Irish-Medium-Education-and-the-%E2%80%98Statutory-Duty.pdf> accessed 11 February 2026.
[78] HR 10/6/25(Q); RSI 16/5/25(Q).
[79] RSI 16/5/25(Q); NGC 8/7/25(I); PPR and RSI 26/6/25(I); MHR 6/6/25(Q).
[80] RSI 16/5/25(Q).
[81] NGC 8/7/25(I).
[82] O'Connell, Malagón and Ní Aoláin (n 7) 25.
[83] DR 9/6/25(Q); See also, DR 24/6/25(I).
[84] ibid.
[85] ibid.; See also, Care Act 2014.
[86] DR 24/6/25(I);See also, Maria McCann, 'Belfast Health Trust failed young woman with severe disability – ombudsman' (*BBC*, 22 Nov 2023) <https://www.bbc.com/news/uk-northern-ireland-67490059> accessed 11 February2026.

obtained a legal opinion on the appropriate interpretation of NI's personal assistant training policy and submitted it to the Department of Health.[87] A Ministerial report on such interpretation is expected from the Department, showing the potential for threats of legal action to affect policy in the face of legislative failure.[88] In this way, SPIL has tangibly filled legislative gaps resulting from governance dynamics that are derived from the specific transitional justice mechanisms adopted in NI, such as consociational governance dynamics.

Other advocates agree that SPIL is required to cut through the political roadblocks that have only grown since NI's peace process.[89] One education rights advocate argues that despite numerous integrated education initiatives since the BGFA,[90] including 'Fair Start' and the Integrated Education Act,[91] efforts to publish an adequate Integrated Education Strategy were stymied by repeated government collapses.[92] This is because 'if the Assembly isn't sitting, legislation can't be brought forward'.[93] As a result, this advocate has resorted to SPIL to speed up the political processes slowed down by such collapses.[94] According to this advocate, 'the mere threat of legal action has… strengthened [the Integrated Education] strategy' because now 'it's published, and… it's more fit for purpose'.[95] This reveals SPIL's role in shaping or developing policy in the face of an historically intransigent governing body.

Paradoxically, one environmental rights advocate has relied on SPIL to slow down government decision making processes.[96] For this advocate, the 'lack [of] democratic maturity' in NI due to the recent peace process has left the government 'vulnerable' to profit-driven development opportunities in areas of outstanding natural beauty.[97] As a result, planning decisions are made

[87] DR 9/6/25(Q)' See also, DR 24/6/25(I).
[88] DR 24/6/25(I).
[89] PPR and RSI 26/6/25(I).
[90] BGFA Strand 3 'Rights Safeguards Equality of Opportunity' Economic, Social, and Cultural Issues, s 4.
[91] Expert Panel on Educational Underachievement in Northern Ireland, 'A Fair Start' (May 2021) <https://www.education-ni.gov.uk/sites/default/files/publications/education/A%20Fair%20Start%20-%20Final%20Report%20and%20Action%20Plan.pdf> accessed 11 February 2026; Integrated Education Act (Northern Ireland) 2022; See also, EdR 25/6/25(I).
[92] EdR 25/6/25(I).
[93] ibid.
[94] ibid.
[95] ibid.
[96] EnR 30/5/25(Q).
[97] ibid.

without adequate community input or consideration of environmental consequences,[98] resulting in local challenges to developments such as the Owenreagh Craignagapple and Mulloclogher Wind Farms.[99] Advocates argue that such ill-conceived applications harm not only the rights of nature, but also rights to democratic participation in local planning.[100] Arguments that tie contemporary difficulties in ensuring human rights protections to NI's recent peacebuilding efforts mirror those of O'Connell, Malagón, and Ní Aoláin.[101]

As suggested by the advocates working in disability, education, and environmental rights, SPIL helps develop rights policies by cutting through political processes both hindered by bureaucracy or government collapse and sped up by lack of adequate participation or oversight. This is seen in cases protecting the Irish language, developing interpretations of antiquated social care policy, strengthening parental power over school integration, or disrupting harmful development projects. Clearly, SPIL affects policy despite political hang-ups stemming from the BGFA.

(b) Holding the Government Accountable and Meeting Community Needs

Many of the participating advocates view SPIL as an effective means of holding the government accountable for rights violations but are sceptical of its ability to fulfil community needs. Advocates working in disability, education, and women's rights across NI state that SPIL 'can feel like the only option' or 'the ultimate way' to hold the Executive accountable 'for failure to take action' on particular issues.[102] This includes repeated inaction on NI's Anti-Poverty or Integrated Education strategies or failure to domestically implement international disability rights standards from the United Nations Convention on the Rights of Persons with Disabilities.[103] Two environmental rights advocates go further. One argues the primary purpose of SPIL is to 'provide… accountability in relation to bad actors, poor governance and decision making by the

[98] ibid.
[99] ibid. See also, Department for Infrastructure, Application accompanied by an Environmental Statement, 'The Owenreagh Craignagapple Wind Farm Development,' Application No. SPD/2023/0981/F; Proposal of Application Notice, 'Mulloclogher Wind Farm,' Application No. SPD/2023/0976/PAN.
[100] ibid.
[101] O'Connell, Malagón and Ní Aoláin (n 7).
[102] WSN 20/5/25(Q); HRC and NW Questionnaire; EdR 2/6/25(Q); EdR 25/6/25(I).
[103] ibid.

executive'.[104] The other suggests courts are essential in filling the 'gap in oversight and accountability for weak environmental governance in Northern Ireland'.[105]

Some advocates are more tepid. One with experience litigating incidents related to the conflict in NI states that many victims, survivors, and families are still 'waiting for justice decades after the alleged incidents occurred'.[106] For example, the family of murdered NI human rights solicitor Patrick Finucane has not received justice despite decades of legal investigations uncovering collusion between British forces and the Loyalist paramilitaries responsible for the murder.[107] The legacy of conflict has also undermined some housing rights advocates' faith in SPIL's ability to achieve accountability or meet community needs. One argues that despite the surplus of housing needed in Catholic Nationalist Republican areas and the declining need in Protestant Unionist Loyalist areas, both paramilitaries and so-called peace walls still 'dictat[e] where people can and can't live'.[108] One advocate argues 'more should be done to challenge… religious inequality in housing provision given its significance in [NI's] history'.[109] This would raise alarm bells for De Fazio, who argues that a lack of access to actionable housing rights for Catholics in NI contributed to feelings of closed legal opportunities, leading to violence.[110] It also supports Cahill-Ripley's identification of an ongoing rights silence around ESCRs.[111] These effects suggest that resorting to SPIL to achieve accountability for past inequalities or paramilitary involvement therein have not come to fruition.

Views on the role of SPIL in filling need gaps are further mixed. For example, some advocates have used SPIL to gain access to securitised information regarding legacy cases or child homelessness rates in NI.[112] Others acknowledge that SPIL allows communities 'at risk of exclusion' in NI to identify their needs and bring them to the attention of those in positions to

[104] EnR 30/5/25(Q).
[105] EJNI 16/6/25(Q).
[106] RSI 16/5/25(Q).
[107] Pat Finucane Centre, 'Pat Finucane' (*Patfinucanecentre.org*) <https://www.patfinucanecentre.org/pat-finucane> accessed 11 February 2026; see also, Martin S. Flaherty, 'Making Hope and History Rhyme: The Cory Inquiry and Transitional Justice in Northern Ireland' (2020) 44 Fordham International Law Journal 233.
[108] PPR and RSI 26/6/25(I). See also, HR 13/6/25(Q); HR 10/6/25(Q); PPR 20/5/25(Q).
[109] PPR 20/5/25(Q).
[110] De Fazio (n 16) 4-5, 11-14, 15, 17.
[111] Cahill-Ripley (n 43) 184-85, 188, 192-96.
[112] PPR and RSI 26/6/25(I).

address them.[113] Environmental rights advocates support this notion. One states that SPIL fills gaps by 'helping people assert their rights'.[114] Another believes SPIL 'empower[s] communities to have their needs met' by requiring the government to consider community interests.[115] And a third argues that publicising environmental scandals in NI through SPIL can 'give credence to the idea that the community need and interest is secondary to other interests', such as profit.[116] Indeed, both this advocate and Agriculture Minister Andrew Muir exposed the Department of Agriculture, Environment and Rural Affairs' 'Going for Growth' industrial development strategy as contributing to the 55% surge in pollution of Lough Neagh.[117] As a result, this advocate and others have pursued SPIL to name and halt similar catastrophes across NI.[118] Thus, SPIL might meet community needs by giving advocates a platform to name and publicise them.

(c) Providing Recognition, Understanding, and a Language of Legal Rights

Advocates believe SPIL achieves recognition of rights violations, understandings of the law and legal language, and feelings of empowerment to varying degrees. The true believers of SPIL's symbolic effects have experienced them in their own work. One free speech advocate suggests that 'the impacted… communities are… shaping the language themselves,' rather than their lawyers.[119] By engaging with SPIL, which requires working alongside larger groups of impacted communities, 'lawyers understand or… engage more in the language and experiences of… the affected individuals', who then increasingly use 'legalised rights based language'.[120] This creates a 'natural process' whereby the experiences of litigants and the legal language of lawyers merge to define the parameters of violations in a way that is understandable to the public and courts alike.[121] One

[113] DR 9/6/25(Q).
[114] EJNI 16/6/25(Q).
[115] NGC 3/6/25(Q).
[116] EnR 30/5/25(Q).
[117] ibid. See also, Philip Bradfield, 'Agriculture Minister Andrew Muir slams DAERA's Going for Growth strategy – saying it was followed by a 55% surge in pollution behind Lough Neagh blue green toxic algae crisis,' *Belfast News Letter* (Belfast, 21 Aug 2025) <https://www.newsletter.co.uk/news/politics/agriculture-minister-andrew-muir-slams-daeras-going-for-growth-strategy-saying-it-was-followed-by-a-55-surge-in-pollution-behind-lough-neagh-blue-green-toxic-algae-crisis-5283775> accessed 11 February 2026.
[118] EnR 30/5/25(Q). See also, NGC 3/6/25(Q); Friends of the Earth, 'No Gas Caverns legal win: protecting Larne Lough' (*Friends of the Earth*, 27 Jun 2024) <https://friendsoftheearth.uk/climate/no-gas-caverns-legal-win-protecting-larne-lough> accessed 11 February 2026; Louise Cullen, 'Supreme Court rejects gas cavern appeal bid' (*BBC*, 20 Dec 2024) <https://www.bbc.com/news/articles/c0mvx12m30do> accessed 11 Feb 2026.
[119] PPR and RSI 26/6/25(I).
[120] ibid.
[121] ibid.

advocate saw this in practice in NI specifically, when families with whom she worked on a housing rights campaign gained confidence in using rights-based language and applied it to a completely separate campaign on disability rights.[122]

In NI, individuals with disabilities, parents pursuing integrated education, and residents challenging developments also feel empowered to pursue and protect legal rights by SPIL. One disability rights advocate emphasised how 'access to legal counsel and [being] prepared to use it' led to her sitting on an oversight group within NI's Department of Health to review personal assistant training policies.[123] For this advocate, this was an example of how SPIL allows individuals without 'a voice in society' to identify their needs 'in a way that's meaningful… and understandable for [them]', resulting in feeling 'empowered… and supported to do something about [their] circumstances'.[124] Similarly, when parents pursued legal action to challenge Minister Givan's denial of Bangor Academy's integration, they felt that achieving integration was 'something we can actually do'.[125] And, a successful legal challenge to the granting of marine licenses for gas storage caverns in Larne Lough,[126] 'changed the mindset of everybody' involved from feeling like, 'you're never going to win' to feeling like, 'you can take government on and you can win'.[127] These successes 'affected positive change' for others, who now understand they can achieve an 'extraordinary thing' through SPIL.[128]

This is not the case for all advocates across NI. One argues that SPIL's ability to provide clarity on legal rights is 'contingent on how clearly any litigation is explained to the public', or the 'extent to which the public is involved in driving a case'.[129] For instance, SPIL might be accompanied by a publicity campaign,[130] which 'helps define the scope and extent of rights'.[131] With publicity,

[122] ibid. For a discussion of the PPR Right to a Home campaign, see PPR, 'Right to a Home: Take Back the City' (*Nlb.ie*) <https://www.nlb.ie/campaigns/right-to-home> accessed 11 February 2026.
[123] DR 24/6/25(I).
[124] ibid.
[125] EdR 25/6/25(I).
[126] *In the matter of an application by No Gas Caverns and Friends of the Earth Ltd for Judicial Review* [2024] NICA 50.
[127] NGC 8/7/25(I); see also, Friends of the Earth (n 117); Cullen (n 117).
[128] NGC 8/7/25(I).
[129] HR 13/6/25(Q).
[130] See, e.g., PPR and RSI 26/6/25(I).
[131] EJNI 16/6/25(Q).

SPIL enables 'more challenges to be brought to the attention of the public', allowing more citizens to 'realise and understand that they have rights and the power to affect change'.[132] According to a women's rights advocate in NI, this can help people 'understand that the rights they have are being violated'.[133] For example, in one case, over 100 women joined a complaint against manufacturers of vaginal mesh implants that had for years caused traumatic complications and chronic pain but had gone un-addressed due to medical misogyny.[134] These campaigners hope the successful settlement of that case will encourage thousands of other women who have suffered to seek similar redress.[135] Therefore, the role played by the public in bringing and publicising SPIL amplifies its recognition and empowerment effects.

Still, other advocates argue that SPIL provides recognition and understanding of rights insofar as it nurtures groups with shared interests and goals. For example, SPIL allows environmental organisers in NI 'to build relationships with others and win friends and allies'[136] or brings housing rights campaigners 'together to simply enjoy one-anothers [sic] company and learn from one-another'.[137] SPIL thus gives 'hope to those who may feel disenfranchised by the legal system due to a lack of knowledge, expertise, or finances'.[138] This supports Langford's argument that SPIL mobilises potentially fragmented social movements[139] by re-situating historically excluded groups as central players in SPIL's 'confrontation with status quo power relations'.[140]

Despite this promise, some NI advocates remain sceptical due to a general inability of the public to 'articulate their sentiments based on human rights'.[141] While individuals 'can identify unfairness',[142] they may not be 'overly aware of how public litigation works or why [one] would

[132] NGC 3/6/25(Q).
[133] WSN 20/5/25(Q).
[134] Hannah Devlin, '140 Women in England receive payout for vaginal mesh implant complications' *The Guardian* (19 Aug 2024) <https://www.theguardian.com/society/article/2024/aug/19/140-women-in-england-receive-compensation-for-vaginal-mesh-implant-complications> accessed 11 February 2026.
[135] ibid.
[136] EnR 30/5/25(Q).
[137] HR 13/6/25(Q).
[138] EnR 30/5/25(Q).
[139] Langford (n 16) 513.
[140] ibid. See also, Rodriguez-Garavito (n 23) 1679-80.
[141] DR 24/6/25(I). See also, PPR 20/5/25(Q); MHR 6/6/25(Q).
[142] DR 9/6/25(Q).

use it'.[143] This might be because the particular issue is 'not widely spoken about' or individuals 'weren't… part of campaigns'.[144] One disability rights advocate suggests, in that context, this is due to a lack of disabled activists in NI who can speak the language of human rights fluently.[145] And, a mental health rights advocate suggests this is because 'generally few people if any understand… their own rights'.[146] This indicates a need to include the public in both SPIL and publicity campaigns in NI and beyond.

Even those members of the public who feel they have a general understanding of human rights law and language 'often have different conceptions of their rights to the courts'.[147] When individuals believe they have a 'slam dunk' case, but courts disagree, this can undermine a litigant's faith in their understanding of rights, rights language, or rights protections.[148] This occurs when a judicial review is decided on a procedural issue, rather than the merits of the rights claim, for example. Such a result can leave advocates thinking the decision 'hasn't addressed or touched upon the actual issue'.[149] At worst, this raises fears of repeat rights violations; at best, it engenders feelings of dissatisfaction and confusion.[150] This is particularly stark in equality law cases, where courts and the NI Equality Commission remain deferential towards the mere existence of equality impact assessments despite documented discrimination.[151] Failure to follow through on valid complaints not only undermines faith in equality processes, but also fails to combat inequality.[152] Despite this scepticism, advocates in NI still believe SPIL contributes to a human rights-based society.

[143] PPR 20/5/25(Q).
[144] ibid.
[145] DR 24/6/25(I).
[146] MHR 6/6/25(Q).
[147] RSI 16/5/25(Q).
[148] PPR and RSI 26/6/25(I). See also, NGC 8/7/25(I).
[149] PPR and RSI 26/6/25(I).
[150] ibid.
[151] ibid. See also, McCrudden (n 53) 1769-70.
[152] Robbie McVeigh, 'Screened Out Without Mitigation: Returning Equality in NI to the Margins' (27 Jun 2025) Equality Coalition 6-7 <https://caj.org.uk/wp-content/uploads/2025/06/Screened-Out-Without-Mitigation-Equality-Coalition.pdf> accessed 11 February 2026.

(d) Building a Human Rights-Based Society

All of the participating advocates believe SPIL contributes to a human rights-based society by achieving at least one or some combination of the above goals and effects.[153] In fact, according to one housing rights advocate, building 'a fairer and more just society' in NI is the primary purpose of SPIL.[154] Many advocates across rights issue areas argue that SPIL gives strength to a rights-based society insofar as it upends traditional power dynamics. For example, an environmental rights advocate argues SPIL grants 'those without the necessary financial resources for litigation the opportunity to challenge decisions and authority', without which 'it is not an equal or rights based society'.[155] A mental health rights advocate similarly suggests 'litigation and financial redress' are 'the key route to impacting upon leaders and budget holders'.[156]

By allowing members of the NI public who are marginalised due to immigration status, disability, gender identity, ethnicity, or otherwise to challenge the actions of the government, SPIL empowers them to play a role in determining how their rights are protected.[157] SPIL achieves this by 'restoring dignity and enforcing rights which create a more balanced legal landscape'.[158] Advocates argue SPIL 'can empower individuals to see how rights can be enforced'[159] by helping 'people assert a broad range of rights where [they] are threatened or impinged upon'.[160] In this way, SPIL returns power to the NI public and strengthens faith in a human rights-based society.[161]

IV What this Means for Advocates in NI

Advocates in NI generally agree that SPIL benefits disadvantaged populations and should be used within a constellation of advocacy methods. Yet, the extent to which advocates believe SPIL achieves its material purposes varies. Most view SPIL as affecting policy change by putting

[153] PPR and RSI 26/6/25(I); PPR 20/5/25(Q); RSI 16/5/25(Q); WSN 20/5/25(Q); HRC and NW Forum 21/5/25(Q); NGC 3/6/25(Q); EnR 30/5/25(Q); EdR 2/6/25(Q); MHR 6/6/25(Q); DR 9/6/25(Q); HR 10/6/25(Q); HR 11/6/25(Q); HR 13/6/25(Q); EJNI 16/6/25(Q).
[154] HR 10/6/25(Q).
[155] NGC 3/6/25(Q).
[156] MHR 6/6/25(Q).
[157] HRC and NW Forum 21/5/25(Q).
[158] HR 10/6/25(Q).
[159] HR 11/6/25(Q).
[160] EJNI 16/6/25(Q).
[161] HR 13/6/25(Q).

representatives … feet to the coals'.[162] This is essential in the context of NI, where post-conflict dynamics both slow legislative processes and speed up potentially harmful development decisions. While some advocates are adamant that SPIL is the only way to hold government actors accountable for their actions, others have reservations due to ongoing inequalities or conflict-related injustices. Insofar as advocates believe SPIL meets community needs, some argue it increases access to information or allows individuals to name and publicise those needs.

Similarly, not all advocates firmly believe in the symbolic effects of SPIL. Some strongly assert that it provides non-lawyer litigants a greater recognition and language of rights, contributing to fuller legal understandings and empowering them to pursue cases in court. Others view SPIL's role as more limited, having symbolic effects only insofar as it creates community or clarifies rights through publicity campaigns. Yet, every advocate believes that SPIL builds a human rights-based society. This is mostly the result of individuals from disadvantaged communities challenging the actions of the powerful.

D MOVING FORWARD

The perspectives of NI advocates and grassroots organisers on SPIL's definition, history, and uses, including as a tool to protect ESCRs within post-conflict societies, are essential in NI. This is because SPIL helps confront a peacebuilding infrastructure that has limited protection for the same ESCRs that communities lacked throughout decades of violent conflict.[163] This article thus provides an important contribution to understanding how SPIL impacts on ESCRs in a post-conflict society.

I Defining and Locating SPIL

The definitions and history of SPIL found in international and scholarship mirror those provided by the advocates on the ground in NI. Cummings, Van der Pas, and Duffy define SPIL by its effects on the social, legal, or political situation of social groups.[164] Scholars writing about SPIL

[162] EdR 25/6/25(I).
[163] O'Connell, Malagón and Ní Aoláin (n 7) 18-32.
[164] Cummings (n 33) 523. See also, Van der Pas (n 33) S128.

in NI similarly emphasise its role in overcoming financial or knowledge barriers,[165] and its use to fill governance gaps.[166]

The participating grassroots advocates and NGOS in NI recognise these dynamics. They believe SPIL allows communities to overcome hurdles in knowledge, finances, or visibility.[167] As in the US, SPIL in NI started from the need to effect change when other means of advocacy failed to do so.[168] Like India, it grew due to a weak NI Executive and Assembly, unable to legislate for rights to a healthy environment, education, housing, or healthcare.[169] Like the scholars defining SPIL, NI advocates also define SPIL by its effects beyond the parties to a case.[170] In this way, participating advocates bolster the definitions and histories of SPIL provided by legal scholars.

II Defending ESCRs and Promoting Transformative Justice

ESCRs have suffered marginalisation within IHR legal practice generally and transitional justice mechanisms specifically.[171] O'Connell, Malagón, and Ní Aolain argue NI is no different, given the lack of protection for ESCRs in the BGFA and limitations on progressive legislation resulting from consociational arrangements.[172] Cahill-Ripley expressly identifies the ongoing rights silence around ESCRs within some of the very communities involved in the conflict and peace process in NI.[173] This suggests that the BGFA's arrangements have not addressed De Fazio's concerns regarding closed legal opportunity structures around ESCRs and their contribution to conflict.[174] Luckily, SPIL cuts through these concerns.

Just as Langford, Rodriguez-Garavito, and Nolan argue, SPIL gives effect to oft-maligned ESCRs,[175] and the participating advocates believe SPIL promotes ESCRs in the face of political

[165] Ang (n 8) 7; Cousins (n 52); Hansen (n 52); Kearney-Grieve (n 51).
[166] Ang (n 8) 9.
[167] WSN 20/5/25(Q); NGC 3/6/25(Q); EnR 30/5/25(Q); MHR 6/6/25(Q); DR 9/6/25(Q); HR 10/6/25(Q).
[168] RSI 16/5/25(Q); DR 9/6/25(Q); HR 10/6/25(Q).
[169] EJNI 16/6/25(Q); NGC 8/7/25(I); EnR 30/5/25(Q); EdR 2/6/25(Q); DR 9/6/25(Q); DR 24/6/25(I); HR 13/6/25(Q); PPR and RSI 26/6/25(I); EdR 25/6/25(I).
[170] PPR 20/5/25(Q); RSI 16/5/25(Q); WSN 20/5/25(Q); EJNI 16/6/25(Q); DR 9/6/25(Q); HR 10/6/25(Q); HR 11/6/25(Q); HR 13/6/25(Q); and EnR 30/5/25(Q).
[171] Alston (n 3) 249-56. See also, Roth (n 1).
[172] O'Connell, Malagón and Ní Aoláin (n 7) 25; O'Connell, Malagón and Ní Aoláin (n 10) 28.
[173] Cahill-Ripley (n 43) 184-85, 188, 192-96.
[174] De Fazio (n 16) 11-14, 15.
[175] Langford (n 15) 92-93. See also, Langford (n 16) 517-23; Rodriguez-Garavito (n 23) 1679-81, 1687; Nolan (n 5).

passivity.[176] For instance, where government collapses or mutual veto powers have stymied social care legislation, integrated education, anti-poverty strategies, or Irish language promotion across NI, SPIL has forced government action.[177] And, where nascent democratic participation in planning has resulted in inadequate consultation or consideration of environmental costs for NI's areas of outstanding natural beauty, SPIL has slowed down rapid development.[178]

This is not to say that NI advocates invariably view SPIL as a cure-all. Some believe SPIL is ineffective on its own,[179] or has not lived up to its potential, particularly relating to conflict legacy or housing inequality,[180] as De Fazio might argue.[181] Still others do not believe SPIL meets community needs beyond providing an avenue to name such needs as legal rights,[182] implicating Cahill-Ripley's rights silence.[183] This might be due to the fact that SPIL does not provide direct services, but rather seeks broader social, political, or legal ends.[184] Despite these reservations, advocates' views that SPIL changes policy or achieves accountability indicate agreement with scholars on SPIL's material impacts. This suggests SPIL contributes to transformative justice by promoting ESCRs where traditional transitional justice mechanisms have failed to do so, as in the case of NI.

III Shaping Perceptions

Beyond its material impacts, scholars and advocates agree that SPIL's symbolic effects should not be underestimated.[185] For Langford, SPIL helps individuals feel as though the law actually protects their rights by confronting the power dynamics that curtail them.[186] Rodriguez-Garavito identifies

[176] DR 24/6/25(I); PPR and RSI 26/6/25(I); EdR 25/6/25(I) ('you might not support us and you're against us, but you actually are legally obliged by this act to [implement an Integrated Education Strategy]. And… you're still not going to do it well, we're going to go down legal action….').
[177] DR 24/6/25(I); EdR 2/6/25(Q); EdR 25/6/25(I); WSN 20/5/25(Q); PPR 20/5/25(Q).
[178] EnR 30/5/25(Q); EJNI 16/6/25(Q).
[179] HR 10/6/25(Q); RSI 16/5/25(Q).
[180] RSI 16/5/25(Q); PPR 20/5/25(Q); PPR and RSI 26/6/25(I).
[181] De Fazio (n 16) 11-14, 17.
[182] DR 9/6/25(Q); NGC 3/6/25(Q); EnR 30/5/25(Q).
[183] Cahill-Ripley (n 43) 184-85, 188, 192-96.
[184] DR 24/6/25(I) (stating that the loss of a devoted disability rights advocate at the Law Centre NI was a major loss for the community).
[185] PPR and RSI 26/6/25(I).
[186] Langford (n 16) 513.

this phenomenon in the context of re-defining forced displacement as a human rights issue in Colombia.[187] These symbolic effects also exist for advocates in NI.

Participating advocates believe SPIL contributes to their perception of society as a human rights-based one.[188] SPIL facilitates mutual exchange of language between lawyers and impacted communities, creating a shared understanding of legal rights.[189] That greater understanding of the law breeds confidence in using legal language when pursuing protections or redress.[190] For example, campaigners might use the legal rights-based language of one campaign to pursue another.[191] This confidence empowers advocates to pursue rights protections in healthcare, education, or environmental justice across NI.[192] Community empowerment builds coalitions around these particular rights issues, as campaigners share information and experience.[193] Thus, SPIL might indeed bind fractured social movements, as Langford suggests.[194]

Such findings do respond to the concerns of Cahill-Ripley and De Fazio. The development of a shared legal language as a result of SPIL might 'vernacularise' ESCRs for the very communities Cahill-Ripley identifies as lacking an ESCR voice.[195] And, while De Fazio suggests that distrust towards the legal system contributed to past violence in NI,[196] the increased use of SPIL to challenge power structures now contributes to belief in a human rights-based society.[197] Thus, the symbolic effects of SPIL address some of the shortcomings in ESCRs protections in NI arising from its past conflict and peace process.

[187] Rodriguez-Garavito (n 23) 1687.
[188] NGC 8/7/25(I); PPR 20/5/25(Q); RSI 16/5/25(Q); WSN 20/5/25(Q); HRC and NW Forum 21/5/25(Q); NGC 3/6/25(Q); EnR 30/5/25(Q); EdR 2/6/25(Q); MHR 6/6/25(Q); DR 9/6/25(Q); HR 10/6/25(Q); HR 11/6/25(Q); HR 13/6/25(Q); EJNI 16/6/25(Q).
[189] PPR and RSI 26/6/25(I).
[190] ibid.
[191] ibid.
[192] DR 24/6/25(I); EdR 25/6/25(I); NGC 8/7/25(I).
[193] EnR 30/5/25(Q); HR 13/6/25(Q).
[194] Langford (n 16) 513.
[195] Cahill-Ripley (n 43) 184-85, 188, 192-96. See also, PPR and RSI 26/6/25(I).
[196] De Fazio (n 16) 4-5, 14-17.
[197] NGC 8/7/25(I); PPR 20/5/25(Q); RSI 16/5/25(Q); WSN 20/5/25(Q); HRC and NW Forum 21/5/25(Q); NGC 3/6/25(Q); EnR 30/5/25(Q); EdR 2/6/25(Q); MHR 6/6/25(Q); DR 9/6/25(Q); HR 10/6/25(Q); HR 11/6/25(Q); HR 13/6/25(Q); EJNI 16/6/25(Q).

E CONCLUSION

The findings of this article are important to the growing understanding of SPIL and its effects on human rights law and advocates in a post-conflict society. They also give rise to further research questions. How does a society develop a universal language of ESCRs? What constitutes accountability for ESCRs violations? What are the necessary follow-up steps to implement successful SPIL cases? How do advocates in other post-conflict societies feel about SPIL and its potential? These questions are worth considering for future research.

For now, NI human rights NGOs, organisers, and grassroots advocates believe SPIL serves the following functions to varying degrees. First, at least in part, SPIL drives legal change on ESCRs and equality issues. For example, SPIL influenced NI's Integrated Education Strategy when the Assembly did not act. Second, SPIL provides accountability for rights violations. This is common in environmental rights cases, where SPIL publicises developers' bad actions, but less so in conflict-related cases, where accountability is often delayed. Third, SPIL is less likely to meet community needs because it seeks broader social, political, and legal outcomes, meaning direct legal services for individual litigants are not the sole or primary aim of SPIL. Fourth, SPIL helps to recognise legal rights and violations, clarify the law, build confidence to pursue claims, and empower social movements. For some, SPIL must be accompanied by publicity campaigns to achieve these ends. For others, the language of law and legal rights may be too exclusionary for SPIL to clarify to laypeople. Even still, to the extent that advocates believe SPIL fulfils these goals or upends power dynamics, they also believe it contributes to NI as a human rights-based, post-conflict society

IN SEARCH OF ALGORITHMIC FAIRNESS: ADDRESSING AI-RELATED DISCRIMINATION IN THE EU EMPLOYMENT SECTOR

Marzia Gabrielli[*]

A INTRODUCTION

Artificial Intelligence (AI) is rapidly transforming the workplace. Data-driven instruments or 'Algorithmic Management' (AM) tools are being deployed by companies and public institutions to hire, direct, evaluate, and sometimes even dismiss workers.[1] Fuelled by complex machine learning algorithms, these devices promise to enhance the scale and speed of management operations, while optimising both time and labour costs. During the recruiting process, they can assist or completely replace human managers by processing thousands of applications and identifying within seconds the most promising candidates. Equally, during the employment relationship, they can continuously monitor and evaluate workers' performance to determine pay, promotions, shift allocations, or even termination decisions. [2]

Despite the multiple benefits brought by this new managerial model, an increasing amount of evidence reveals that, when approached without care, algorithmic management tools can lead to discrimination and systemic bias.[3] Errors such as the input of flawed, inaccurate or unrepresentative data into algorithms' code, or equally, the wrong selection of 'class labels', can cause these systems to produce biased and discriminatory outcomes affecting thousands of workers, on grounds explicitly prohibited by law.[4] This is specifically what happened to one of the

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[1] Alina Köchling and Marius Claus Wehner, 'Discriminated by an Algorithm: a Systematic Review of Discrimination and Fairness by Algorithmic Decision-Making in the Context of HR Recruitment and HR Development' (2020) 13 Business Research 795 <https://link.springer.com/article/10.1007/s40685-020-00134-w> accessed February 2026.

[2] Charles A Sullivan, 'Employing AI' (2018) 63 Villanova Law Review 395, 398-404.

[3] Lionel Robert, Casey Pierce and others, 'Designing Fair AI for Managing Employees in Organizations: A Review, Critique, and Design Agenda' (2020) Human–Computer Interaction 35(5–6) 545–575 <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/153812/Robert%20et%20al.%202020%20AI%20Fairness%20New%20Proof.pdf?sequence=6> accessed 10 May 2025.

[4] Solon Barocas and Andrew Selbst, 'Big Data's Disparate Impact' (2016) 104 California Law Review 671, 677-692.

largest tech companies in the world, Amazon, which, in 2014, began working on an automated recruiting device to streamline the hiring process. [5] Trained on resumes submitted by workers over a 10-year period, the system operated just like the company's product rating feature, assigning to each candidate a score between one and five. At that time, the company's workforce was mostly made up of men which resulted in the system autonomously learning to systematically disadvantage and, in certain cases, completely exclude all women applying for technical-related positions.[6]

While Amazon arguably represents one of the most extreme examples of algorithmic bias, the risks associated with AM tools are becoming increasingly perceptible. Research conducted by the European Economic and Social Committee (EESC) in 2017 revealed that the use of similar systems in the employment sector can exacerbate structural inequalities and reinforce patterns of discrimination, disadvantaging women and members of vulnerable communities.[7] Similarly, in 2020, the AI Now Institute reported that the false perception of neutrality in AI systems can allow algorithmic discrimination to persist and, in some cases, worsen over time, ultimately affecting workers' job opportunities, career progression and economic security. [8]

Legislators and policymakers all around the world are therefore seeking to establish regulatory measures to mitigate the harmful impact of AI-driven technologies in the workplace, where power dynamics and information asymmetries undermine workers' bargaining power.[9] In this regard, the European Union (EU) introduced in 2024 the first horizontal regulation specifically addressing AI-related risks: the Artificial Intelligence Act (AI Act).[10] This regulation classifies AI systems

[5] BBC, 'Amazon Scrapped 'Sexist AI' Tool' (*BBC*, 10 October 2018) < https://www.bbc.com/news/technology-45809919> accessed 10 May 2025.
[6] ibid.
[7] Opinion of the European Economic and Social Committee 2017/C 288/01 of 31 August 2017 on 'Artificial intelligence — The consequences of artificial intelligence on the (digital) single market, production, consumption, employment and society' (own-initiative opinion) [2017] OJ C 288/1.
[8] Sarah West, Meredith Whittaker and Kate Crawford, 'Discriminating Systems: Gender, Race, and Power in AI' (*AI Now Institute*, 01 April 2019) < https://ainowinstitute.org/publications/discriminating-systems-gender-race-and-power-in-ai-2> accessed 10 May 2025.
[9] Sandra Watcher, Brent Mittelstadt and Chris Russell, 'Why Fairness Cannot be Automated: Bridging the Gap Between EU Non-discrimination Law and AI' (2021) 41 Computer Law and Security Review 105567.
[10] European Parliament and Council Regulation (EU) 1689/2024 of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2003] OJ L2024/1689 (AI Act).

into four different categories and requires high-risk systems (such as the ones adopted in employment context) to undergo strict conformity assessments.

The AI Act, however, is not the only European instrument which could be used to mitigate algorithmic bias. The EU Employment Equality Directive and the EU Racial Equality Directive lay down specific prohibitions against direct and indirect discrimination of workers, based on grounds such as race and ethnic origin, religion or belief, age, sexual orientation and disability.[11] EU data-protection laws also include several provisions that can indirectly mitigate and counter the risks associated with algorithmic management.[12] These provisions include, *inter alia*, the right to information and explanation in relation to any automated data process, as well as the right not to be subject to automated decisions capable of producing significant legal effects on data subjects. While these instruments establish meaningful safeguards, their application in the employment sector is marked by several limitations and enforcement issues which significantly undermine their effectiveness, ultimately giving rise to a legislative gap.

This paper aims to examine the extent to which the European Union legal framework addresses and regulates discrimination arising from the use of AM Systems in the workplace, and to identify both existing gaps and possible solutions. It begins by offering a contextual introduction to algorithms, Machine Learning and Automated Decision-Making systems in order to facilitate an understanding of their functioning and impact on workers. It subsequently highlights the issue of algorithmic discrimination through the work of Solon Barocas and Andrew D Selbst, who first identified six main sources of bias, and examines the cases of Amazon and Deliveroo. The article then considers the extent to which the EU legal framework protects and safeguards workers subject to similar managerial practices, providing a series of recommendations on how to strengthen worker protection at both EU and Member States' level.

[11] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Employment Equality Directive); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Racial Equality Directive).

[12] European Parliament and Council Regulation (EU) 679/2016 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1 (GDPR).

B ALGORITHMIC MANAGEMENT IN THE WORKPLACE: CONCEPTUAL BACKGROUND AND DEFINITIONS

Algorithmic Management (AM) can be understood as the partial or full delegation of managerial functions to data–driven instruments, designed to accomplish tasks such as workers' recruiting, monitoring, performance evaluation and data-collection.[13] Examples of AM practices can be observed in the most popular tech companies, such as Google, where predictive analytics routinely screens thousands of profiles each day and recommends candidates to company recruiters. Traces of automation can also be found in customer call centres, warehouse logistics, and ride-sharing platforms, where sophisticated programs examine employees' interactions with customers to evaluate their performance and generate personalised recommendations.[14]

As the name suggests, AM tools largely rely on algorithms for their functioning. These can be defined as a complex set of rigid instructions or rules designed to autonomously accomplish a task, often leveraging advanced statistics and computational power.[15] In order to operate, algorithms require two elements: a 'code', responsible for transcribing problems in mathematical terms, and 'training data', understood as a set of input variables that the machine can learn from.[16] When properly trained, algorithms can replicate certain aspects of human decision-making, demonstrating capabilities such as event forecasting, item categorisations or resource allocation, especially useful in employment contexts. The most basic algorithmic systems, for example, can be used by managers to monitor employees' sick days and schedule a meeting when predefined thresholds have been exceeded.[17]

[13] Tamás Gyulavári and Emanuele Menegatti, *Decent Work in the Digital Age*, (1st edn, Hart Publishing 2022) 231.
[14] Min Kyung Lee, 'Understanding Perception of Algorithmic Decisions: Fairness, Trust, and Emotion in Response to Algorithmic Management' (2018) 5(1) Big Data and Society 1-16.
[15] Alex J Wood, 'Algorithmic Management Consequences for Work Organisation and Working Conditions' (2021) JRC Working Papers Series on Labour, Education and Technology, No 2021/07, European Commission <https://www.econstor.eu/bitstream/10419/233886/1/1757203559.pdf> date accessed 25 February 2026.
[16] Raphaële Xenidis and Linda Senden, 'EU Non-Discrimination Law in the Era of Artificial Intelligence: Mapping the Challenges of Algorithmic Discrimination' in Ulf Bernitz and others (eds), *General Principles of EU law and the EU Digital Order* (Kluwer Law International 2020), 4-20.
[17] Steven Rolf, 'AI and Algorithmic Management in European Services Sectors: Prevalence, Functions, and a Guide for Negotiators' (2024) Uni Global Union 5 < https://library.fes.de/pdf-files/bueros/bruessel/21073.pdf> accessed 10 May 2025.

Increasingly, managerial algorithms are being supplemented by complex systems known as Machine Learning (ML), designed to autonomously learn from experience by processing large data sets provided by human agents.[18] As one of the most advanced forms of artificial intelligence, ML systems can deductively identify patterns, adapt procedures and generate new algorithms, all in pursuit of implied objectives to be attained in a cost-efficient manner. Amazon's recommendation algorithm, for example, can determine which products are likely to interest customers by analysing data related to their profile history, preferences and browsed categories.[19] Similarly, the ML algorithm used by Deliveroo named 'Frank', can predict the exact delivery time of orders by considering factors such as the type of food purchased, traffic conditions, and the rider's distance from the customer's house.[20]

Because ML systems can be trained to replicate patterns of human thinking, they are frequently used in the development of 'Automated Decision-Making' (ADM) systems, a form of AI often applied in employment settings. Although definitions vary widely, the European Commission's Directorate for Communications Networks, Content and Technology, defined ADM as, 'software systems that autonomously or with human involvement, take decisions or apply measures relating to social or physical systems on the basis of personal or non-personal data, with impacts either at the individual or collective level'.[21] In employment contexts, ADM systems can structure working conditions and remotely manage workforces, by using data to coordinate activities and achieve specific outcomes. During the recruitment process, they can support or even replace human managers, by screening thousands of resumes and evaluating applicants. This is the case of Austria, where the Public Employment Service agency, responsible for overseeing citizens' employment opportunities, routinely relies on a profiling algorithm to classify job seekers into three different categories based on their employment prospects.[22]

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[18] Antonio Aloisi and Valerio De Stefano, *Your Boss is an Algorithm* (1st edn, Bloomsbury Publishing 2022) 4.
[19] Sara Baiocco and others, 'The Algorithmic Management of Work and its Implications in Different Contexts' (*International Labour Organisation Background paper 9*, 21 June 2022) < https://www.ilo.org/publications/algorithmic-management-work-and-its-implications-different-contexts> accessed 10 May 2025.
[20] ibid. 13.
[21] European Commission's Directorate for Communications Networks, Content and Technology, 'Algo:Aware, Raising Awareness on Algorithms' (2018) < https://actuary.eu/wp-content/uploads/2019/02/AlgoAware-State-of-the-Art-Report.pdf> accessed 10 May 2025.
[22] Doris Allhutter and others, 'Algorithmic Profiling of Job Seekers in Austria: How Austerity Politics Are Made Effective' (2020) 3 Frontiers in Big Data 5.

I Working for an Algorithm: The Case of Amazon Workers

While the use of AM systems can be traced back to platform-mediated work, recent years have witnessed the parallel expansion of similar practices into more traditional employment settings, to manage permanent and full-time employees, including delivery drivers, parcel carriers or warehouse workers.[23] Among the several companies embracing this trend, Amazon arguably represents one of the most extreme examples. The company operates its warehouses almost completely through the use of technological systems, responsible for directing, monitoring and evaluating workers. An investigation by the New York Times in 2015 revealed the complex operations behind Amazon's UK 'fulfillment centre' in Hemel Hempstead, where more than 40,000 square meters of shelving hold millions of products each year.[24] According to the report, once a customer places an order through the e-commerce platform, Amazon's algorithm immediately locates the item within the inventory and sends a worker to retrieve it.[25] To maximise efficiency, products in the fulfilment centres are not organised logically, such as by category, but instead are randomly stored on shelves to facilitate 'human pickers' to identify the correct products without wasting time. Once collected, the items are then scanned several times with a barcode device to ensure accuracy before being processed for delivery.[26]

A further investigation conducted by the BBC News in 2015 revealed that in multiple Amazon facilities, including the one in Hemel Hempstead, workers use handheld devices that count down the seconds they have to retrieve the next orders.[27] They might be required to pick an average of 1200 products daily, approximately two every minute, to meet their performance and productivity goals. The report also uncovered the company's continuous evaluation of workers' performance, carried out through the use of internal algorithms and a specific software system, the 'Anytime Feedback Tool', which allows employees to share criticism and appraisals towards one another.[28]

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[23] ibid. 2.
[24] Jodi Kantor and David Streitfeld, 'Inside Amazon: Wrestling Big Ideas in a Bruising Workplace', *New York Times* (New York , 15 August 2015) < https://www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html> accessed 10 May 2025.
[25] ibid.
[26] ibid.
[27]Chris Baraniuk, 'How Algorithms Run Amazon's Warehouses' (*BBC*, 18 August 2015) < https://www.bbc.com/future/article/20150818-how-algorithms-run-amazons-warehouses> accessed 10 May 2025.
[28] ibid.

C INSIDE THE COMPUTER: HOW DOES DISCRIMINATION HAPPEN?

The risks associated with the use of AM tools within the employment sector were formally recognised at the European level in 2017, when the European Economic and Social Committee (EESC) issued an Official Opinion on the societal and economic impact of AI. The Opinion highlighted that the development of such systems occurred in environments predominantly consisting of young, white men, with the result of cultural and gender disparities being embedded in systems' codes. The Opinion also warned against the false perception of objectivity and neutrality of ADM systems, which are frequently biased and unexplainable.[29] In light of the above, this Section aims to investigate the underlying causes of this phenomenon through the work of Barocas and Selbst, who, in a landmark article, identified the six main ways in which ADM systems can generate biased results.[30]

I Intentional Discrimination

Intentional discrimination occurs when programmers deliberately instruct algorithms to unfavourably consider or completely exclude certain groups of candidates, based on prohibited grounds such as race, gender or sexual orientation.[31] While this practice is largely prohibited in most European countries, the opaque functioning of algorithms might render discrimination harder to detect and especially to prove. In a 2023 Report commissioned for the anti-discrimination department of the Council of Europe, researchers studying intentional algorithmic discrimination considered the example of Target, a US Retail Store which developed an algorithm capable of predicting with reasonable accuracy whether female customers were pregnant by simply screening their purchase history. While Target relied on these 'pregnancy prediction scores' to generate targeted marketing, organisations and employers might rely on similar evaluations to exclude or disadvantage job seekers.[32]

[29] EESC (n 7).
[30] Solon Barocas and Andrew D Selbst, 'Big Data's Disparate Impact' (2016) 104 California Law Review 671.
[31] Frederik ZuiderveenBorgesius, 'Discrimination, Artificial Intelligence, and Algorithmic Decision-Making' (*Council of Europe*, 2018) < https://pure.uva.nl/ws/files/42473478/32226549.pdf> accessed 10 May 2025.
[32] ibid. 13.

II Biased, Inaccurate or Unrepresentative Data

Equally, discrimination may arise from the input of biased data sources replicating existing patterns of inequality.[33] As previously explained, algorithms, especially ML, learn to recognise patterns and correlations by analysing large datasets known as 'training data'. When this is inaccurate or biased, the algorithmic output will inevitably reproduce these biases, a phenomenon defined as *'*garbage in, garbage out*'*.[34] In automated recruiting, algorithms trained on past employment records may learn to discriminate against certain groups if those groups were underrepresented in the training data.[35] Similarly, the use of incomplete or inaccurate data not representative of the target population might cause algorithms to struggle to recognise candidates within certain social groups.[36]

III Target Variables and Class Labels

Discrimination might also stem from the use of 'target variables*'* and 'class labels.' As explained by Barocas and Selbst, target variables refer to the outcome or result that the system user wishes to achieve by using the algorithm, while class labels represent mutually exclusive values inherent to the algorithm's outcome.[37] To better understand how these can lead to discrimination, we can consider the example of performance evaluation algorithms, where employers indicate the characteristics or 'class labels' typical of a 'good' or 'desirable' employee, the 'target variable'. If these were to include someone who is rarely or never late, the algorithm might unfavourably consider workers from lower social classes who rely on public transportation to reach their employment location.[38] Similarly, if employers prioritised workers with low absenteeism rates, the algorithm might unfavourably consider those struggling with disabilities, who require them to take a higher number of sick leaves and days off. Women might equally be disadvantaged, as they are

[33] Ignacio Cofone, 'Algorithmic Discrimination Is an Information Problem' (2019) 70(6) Hastings Law Journal 1389.
[34] Barocas and Selbst (n 4).
[35] Xukang Wang and others, 'Algorithmic Discrimination: Examining its Types and Regulatory Measures with Emphasis on US Legal Practices' (2024) 7 Frontiers in Artificial Intelligence 1.
[36] ibid. 3-4.
[37] Janneke Gerards and Raphaële Xenidis, 'Algorithmic discrimination in Europe: Challenges and Opportunities for Gender Equality and Non-Discrimination Law' (*European Commission Publications Office*, 2021) 39 < https://op.europa.eu/en/publication-detail/-/publication/082f1dbc-821d-11eb-9ac9-01aa75ed71a1> accessed 10 May 2025.
[38] Rossana Ducato and Patricia Živković, 'Algorithmic Discrimination: a Blueprint For a Legal Analysis' (2023) 7 EU and Comparative Law Issues and Challenges Series 205.

more likely to stay at home and take care of their sick children.[39] Consequently, in choosing the criteria of a good employee, the algorithm might have a performative effect and discriminate based on prohibited grounds such as health or gender.[40]

IV Feature Selection

Another reason for biased outcomes can be attributed to the selection of features by the user of AI systems. Users may be required to select certain features that they would like to be captured by the target variable. In automated recruitment systems, this might include candidates who studied abroad or hold degrees from highly ranked universities. While the selection of these features is not directly discriminatory, it can still produce discriminatory outcomes against candidates from lower socio-economic backgrounds who lack the financial means to pursue similar educational opportunities.[41]

V Proxy mechanisms, or correlation without causation

Lastly, algorithms might inadvertently discriminate by identifying proxies – patterns or correlations used to predict target variables that are, directly or indirectly, associated with membership in a protected group. This phenomenon, known as 'redundant encoding', typically occurs unintentionally when sensitive characteristics such as race, age or gender are implicitly encoded in other data variables. A clear example of this dynamic arises in online recruitment, where algorithms are trained to select candidates among a large pool of job seekers.[42] To determine who is worth hiring, algorithms typically begin by analysing data of successful employees who already work for the company, to identify patterns associated with 'good' performance. These evaluations are then used to screen and rank new applicants based on the extent to which they exhibit these traits. However, since algorithms can only detect correlation rather than causation, not all these traits will necessarily be indicative of actual competence. If a company's most successful employees have predominantly been men, the system will consider typical masculine

[39] ibid. 207.
[40] Gyulavári and Menegatti (n 13).
[41] Xenidis and Senden (n 16).
[42] ibid.

traits, such as masculine language, as indicators of strong job performance.[43] As a result, the system will uprate all applications containing similar features, leading to biased and discriminatory outcomes. A notable example is the recruitment system developed by the company Gild, which, on multiple occasions, concluded that the most promising candidates had to be named Jared and play lacrosse.[44]

While the use of proxies is common among most ML algorithms, their discriminatory effects are particularly difficult, if not impossible, to eliminate.[45] This is because even if protected characteristics such as race or gender were to be completely excluded from training datasets, algorithms could still identify them through other data variables. If a performance evaluation system learned that workers from a certain area were more likely to be late, and if in that area there was a high concentration of Black residents, the algorithm could treat location as a proxy for race, and associate poor job performance with racial origin.[46]

D EXAMPLES OF ALGORITHMIC DISCRIMINATION: THE CASES OF AMAZON AND DELIVEROO

The discriminatory risks associated with the use of ADM systems within the employment sphere have been well documented over the years. One of the most notable cases occurred in 2014, when Amazon's engineering team began working on a ML algorithm designed to replace humans in the hiring process. Trained on resumes submitted by workers over a 10-year period, the system operated just like the company's product rating feature, assigning to each candidate a score between one and five.[47] Less than a year later, however, the project was abandoned, as it became clear that the algorithm was not screening applicants in a gender-neutral way. Particularly, because Amazon's workforce was mostly made of men at the time, the algorithm autonomously learned to unfavourably consider female candidates applying for technical-related positions. All resumes containing the word 'women', such as 'National Women's Chess Champion*'* or 'Women's Rugby Team*'* were discarded by the system, favouring those with typical masculine language, such as

[43] Aislinn Kelly-Lyth, 'Challenging Biased Hiring Algorithms' (2021) 41(4) Oxford Journal of Legal Studies 899.
[44] Lori Andrews and Hannah Bucher 'Automating Discrimination: Ai Hiring Practices and Gender Inequality' (2022) 44(1) Cardozo Law Review 145.
[45] ibid. 147.
[46] Borgesius (n 31).
[47] BBC (n 5).

'executed' or 'captured'.[48] Similarly, all applications referencing attendance at all-women colleges or high schools were automatically rejected. The experts who worked on the project revealed that while the algorithm's code had been changed more than five hundred times in extensive trials aimed at eliminating bias, it proved virtually impossible to prevent the system from generating discriminatory outcomes.[49] As a result, the company officially stopped working on the project in 2015, despite having used the system on multiple occasions to assist recruiters in the selection process.[50]

Amazon's biased algorithm, however, was not an isolated case. In 2019, an Italian court declared the algorithm developed by the food-sharing company Deliveroo capable of indirectly discriminating against workers on grounds of disability and for reasons related to freedom and trade union activity.[51] The case originated from the Italian General Confederation of Labour (CGIL), an Italian trade union which filed a complaint before the court of Bologna alleging that Deliveroo's reputational ranking system breached the principle of equal treatment as laid down by the Employment Equality Directive.[52]

At the time, the company operated through a complex self-service booking (SSB) system, which allowed riders to flexibly prearrange working sessions. Every Monday, they could log into the Deliveroo app and choose the geographical areas and time slots in which they wanted to receive delivery requests during the week.[53] To allocate these shifts, the platform relied on a reputational ranking algorithm which profiled riders based on two parameters, reliability and participation. Workers who did not join a previously booked session or those who cancelled a ride with less than twenty-four hours' notice would get a low reliability score. Based on these scores, riders were categorised into three groups – high rank, medium rank and low rank, with different access times to the SSB calendar.[54] Individuals in the highest rank group, could access the calendar in the

[48] ibid.
[49] Andrews and Bucher (n 44).
[50] BBC (n 5).
[51] Tribunal of Bologna, Order no 2949/2019, 31 December 2020.
[52] Employment Equality Directive (n 11).
[53] Marco Piccininni, 'Counterfactual Fairness: The Case Study of a Food Delivery Platform's Reputational Ranking Algorithm (2022) 13 Frontiers in Psychology 4.
[54] Ilaria Purificato, 'Behind the Scenes of Deliveroo's Algorithm: the Discriminatory Effect of Frank's Blindness' (2021) 14(1) Italian Labor Law 169.

morning and book up to 40 hours of work per week, while those in the low rank group gained access only six hours later, and consequently could only book a couple of hours of work per week.[55]

The Italian General Confederation of Labour argued that the system envisaged by Deliveroo discriminated against riders adhering to trade unions' initiatives, as those who took part in collective actions, including strikes, would receive a lower reputational score and consequently fewer work opportunities.[56] The court agreed with the Union, concluding that the algorithm used by the company gave rise to indirect discrimination. Particularly, the court held that, due to a specific design choice, the system did not distinguish between workers who were absent from work for futile reasons and those who, instead, were absent for legitimate reasons, ultimately affecting workers' rights to strike, form and join trade unions. Individuals with disabilities, those suffering from illness and workers caring for a sick minor were also found to be disproportionately disadvantaged by the system.[57]

As noted by the judgment, Deliveroo's ranking system constituted a case of intentional algorithmic discrimination. [58] Because circumstances such as work accidents and system malfunctions were treated by the platform as exceptions that did not affect riders' scores, the algorithm could have been programmed to consider the reasons behind riders' absences.[59]

I Inside the Black Box: An Invisible and Potentially Massive Discrimination

Moreover, as illustrated in Deliveroo's case, due to the scale and speed at which algorithms operate, discrimination can potentially reach massive levels and affect thousands of workers at once. Unlike humans, whose cognitive biases vary depending on circumstances, discriminatory biases embedded in an algorithm's code are applied automatically and systematically to a myriad

[55] Vincenzo Pietrogiovanni, 'Deliveroo and Riders' Strikes: Discriminations in the Age of Algorithms' (2021) 7(3) International Labour Rights Case Law 317-321.
[56] ibid.
[57] Tribunal of Bologna (n 51).
[58] ibid.
[59] ibid.

of cases at once, reinforcing stereotypes and prejudices.[60] The Italian Data Protection Authority, responsible for overseeing data and privacy rights in Italy, estimated that the ranking algorithm employed by Deliveroo caused approximately 8,000 riders to be treated unfairly.[61]

Discrimination can also become harder to detect and correct due to the so-called 'black box' problem, whereby algorithms, especially ML, produce outputs which they do not and cannot justify. As Kleinberg explains, this phenomenon can largely be attributed to the complex mechanisms of the newest deep learning models, where several sets of algorithms, known as multilayered neural networks, disaggregate data into thousands of hidden layers to better identify correlations and increase the system's predictive accuracy.[62] The consequence is, however, that there is no clear or logical pathway guiding us from the input to the output and equally, the machine itself is unable to explain how it has reached a certain conclusion.[63] To further complicate the matter, in most cases, not even the experts who designed the model are able to understand or foresee its outcomes. Programmers might have a general knowledge of how data moves through each layer of the network or how values are assigned to specific variables, but they will never know how the system finds and combines vector embeddings – numerical representations that capture the relationships between different types of data.[64] This helps to explain why, in the previously discussed Amazon case, programmers who worked on the automated recruiting tool changed its code multiple times but could not prevent it from producing discriminatory outcomes. This lack of transparency poses a significant challenge in algorithmic discrimination cases, where it is crucial to determine whether employers' decisions rest on deliberately wrongful reasons.[65]

[60] Défenseurdesdrotis, 'Algorithms: Preventing Automated Discrimination' (2020) < https://www.defenseurdesdroits.fr/sites/default/files/2023-07/ddd_rapport_algorithmes_2020_EN_20200531.pdf> accessed 10 May 2025.
[61] BrevetiNews, 'The Italian Data Protection Authority Punishes Deliveroo for Discriminatory Algorithms Against Riders' *Brevettinews*(Italy, 28 September 2021) <https://brevettinews.it/en/internet-domains/the-italian-data-protection-authority-punishes-deliveroo-for-discriminatory-algorithms-against-riders/> accessed 10 May 2025.
[62] Jon Kleinberg and others, 'Discrimination in the Age of Algorithms' (2018) 10 Journal of Legal Analysis 113–174.
[63] Mohammad Hossein Jarrahi and others, 'Algorithmic Management in a Work Context' (2021) 8(2) Big Data and Society 1-14.
[64] Marco Peruzzi, *Intelligenza Artificiale e Lavoro: Uno Studio su Poteri Datoriali e Tecniche di Tutela* (1st edn, Giappichelli 2023)11-23.
[65] Biasi Marco, *Diritto del Lavoro e Intelligenza Artificiale*, (1st edn, Giuffrè Francis Lefebvre 2024) 225-250.

E THE ROBUSTNESS OF EXISTING LAW

The European legal framework contains several instruments which could, in principle, address the discriminatory outcomes associated with the use of AM tools in the employment sector. These include non-discrimination law, data protection and the newly introduced AI Act.[66] A closer inspection, however, reveals that these instruments are not always effective when confronted with the black box nature of AI systems, ultimately leaving a legislative gap. Section E aims to analyse these instruments, and for each of them, outline their strengths and weaknesses, with a view to identifying possible solutions.

I EU Non-discrimination and Employment Law

The principle of non-discrimination finds expression in European law in a number of legal provisions protecting individuals from unequal treatment based on characteristics such as gender, race, ethnic origin, disabilities, religion or belief, age, and sexual orientation.[67] In the employment field, this principle is implemented through three key directives, the Gender Recast Directive,[68] which prohibits gender discrimination in the employment sphere, the Race Equality Directive,[69] which mandates equal treatment irrespective of racial or ethnic origin, and the Employment Equality Directive, which lays down a general framework against workplace discrimination.[70]

Under these directives, both direct and indirect instances of discrimination are addressed. Direct discrimination is defined as a situation in which 'a person is treated less favourably than another is, has been or would be in a comparable situation' due to their membership in a protected group.[71] In the context of algorithmic management, this encompasses situations where decision makers explicitly instruct algorithms to unfavourably consider workers or candidates based on certain protected characteristics. These cases however, are rather rare, as directly inputting discriminatory variables into an algorithm's code is likely to significantly reduce its predictive accuracy.[72]

[66] AI Act (n 10).
[67] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 10.
[68] European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23 (Gender Recast Directive).
[69] Racial Equality Directive (n 11).
[70] Employment Equality Directive (n 11).
[71] ibid. art 2(2)(a).
[72] Philipp Hacker, 'Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination under EU law' (2018) 55(4) Common Market Law Review 1143–1186.

Additionally, the prohibition of differential treatment based on protected characteristics is a legal obligation generally recognised within employment contexts. Consequently, the main risk tackled by cases of direct discrimination concerns, where employers try to hide a disparate treatment through complex proxy variables, is that the variables cannot be read *ex post*, making direct discrimination materially impossible to prove.[73]

By contrast, indirect discrimination occurs when an apparently neutral provision, criterion or practice puts a member of a protected group at a particular disadvantage compared to others.[74] Unlike direct discrimination, which cannot be justified, indirect discrimination can be objectively justified when the discriminatory conduct occurs in pursuit of a legitimate aim and when the means of achieving that aim are appropriate and necessary. In algorithmic management contexts, therefore, indirect discrimination is likely to capture a wide array of cases, including situations of 'garbage in, garbage out' where the training data is biased or unrepresentative of certain social groups. Because indirect discrimination focuses on discriminatory outcomes rather than algorithmic rules, parameters and codes, victims of discrimination will not have to open the 'black box' and demonstrate how the algorithm operates.[75] For example, in Deliveroo's case, although the Court did not have extensive access to the algorithm used by the company, the discriminatory effects produced by it provided sufficient grounds to establish a case of indirect discrimination, offering redress to those affected.[76]

Despite the numerous safeguards provided by EU non-discrimination law, there are several obstacles that victims face when dealing with cases of algorithmic discrimination. First, the opacity of ML models might render discrimination particularly hard to recognise and to prove, irrespective of whether discrimination stems from an intentional masking or an unintentional process.[77] To establish a *prima facie* case of discrimination, victims should demonstrate a statistical disparity between the impact of the algorithmic process on the protected and comparable group, which would require, at a very minimum, knowledge of the algorithmic output and the group affiliations

[73] ibid. 1153.
[74] Employment Equality Directive (n 11).
[75] Xenidis and Senden (n 16) 20.
[76] Tribunal of Bologna (n 51).
[77] Xenidis and Senden (n 16) 9-15.

identified by the system.[78] Such information, however, is almost impossible to obtain when dealing with 'black box' algorithms that cannot justify their outputs. Additionally, as established by the CJEU in *Meister,* employers are in principle not obliged to grant access to similar information, although a refusal might be considered as an element indicating the presence of algorithmic discrimination.[79]

Even if plaintiffs were able to gather enough evidence to establish *a prima facie* case of discrimination, the possibility of objectively justifying disparate treatments would significantly hinder their case. In fact, once plaintiffs present facts from which it can be presumed that there has been indirect discrimination, the burden of proof shifts onto defendants, who must prove the legitimate aim and proportionality of the system used. In *Danfoss*, the Court established that in cases of algorithmic discrimination, the opaque nature of AI systems must be made 'transparent' with respect to the criteria used to generate discriminatory outcomes.[80] However, because in such cases the underlying reason for disparate treatment is precisely the algorithmic score, the exposition of the legitimate aims and a demonstration of the algorithm's predictive accuracy are likely to satisfy the *Danfoss* standard, and shift the burden back onto applicants.[81] As a result, it would then be the responsibility of the applicants to prove the inadequacy of the system, by pointing towards the use of biased data or wrong class labels, which, however, would prove impossible without having access to the code or without possessing any technical knowledge.[82]

Several other factors might further discourage workers from seeking legal redress. The co-involvement of humans and machines in decision-making processes might pose a significant obstacle to the identification of the individual responsible for the violation among the designers, developers, and employers involved in the algorithmic process.[83] Equally, the presence of intellectual property rights and trade secrets surrounding systems' codes might render evidence

[78] ibid. 16-23.
[79] Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] OJ 165 ECLI:EU:C:2012:8.
[80] C-109/88 *Handels-og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, acting on behalf of Danfoss [1989] EU:C:1989:383,[15-16].
[81] ibid. In *Danfoss,* the Court held that in similar cases, defendants are not under an obligation to explain how AI systems work. Rather, it is sufficient to demonstrate that such systems serve a legitimate aim and are proportionate.
[82] ibid.
[83] Christine Carter, 'Why The Algorithmic Recruiter Discriminates: The Causal Challenges of Data-Driven Discrimination' (2024) 31(3) Maastricht Journal of European and Comparative Law 333–359.

impossible to gather even with the employer's help.[84] Lastly, the horizontal nature of employment relations might significantly restrict the material scope of non-discrimination laws, as most equality rights have only been substantiated in directives which *per se* lack direct horizontal effect and will only be applicable to private relations once transposed into Member States' laws. Therefore, even if the CJEU has confirmed the horizontal direct effect of the general principle of non-discrimination and Article 21 of the EU Charter of Fundamental Rights,[85] it is still open to debate the extent to which workers will be able to enforce their equality rights in light of existing restrictions and the private nature of employment relationships.[86]

II Data Protection Law

Another regulatory tool that can be invoked to address algorithmic discrimination is data protection law. In the European Landscape, data protection finds expression in the General Data Protection Regulation No 679/2016, or GDPR, introduced in 2016 to oversee data protection and privacy rights within the Union.[87] It is directly applicable in all Member States and covers both private and public relationships, including employment ones.

While the GDPR does not exclusively deal with algorithmic discrimination, it contains a number of provisions that can, indirectly, prevent and counter the discriminatory effects associated with AI systems. Article 14(2)(g), for example, establishes the so-called 'right to explanation', which grants individuals the possibility to receive 'meaningful information about the logic involved, as well as the significance and the envisaged consequences' of automated decision making.[88] In the same vein, Article 15(1) GDPR empowers data subjects, including workers, to verify whether someone is using their data and whether they are subject to automated decisions.[89] It is specifically under Article 15 GDPR that, in 2022, several trade unions and civil society organisations affiliated

[84] ibid.
[85] Charter of Fundamental Rights of the European Union [2000] OJ C364/1, art 21.
[86] C-144/04 *Werner Mangold v Rüdiger Helm* [2005] EU:C:2005:709;
C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co*. KG [2010] EU:C:2010:21;
C-441/14 *Dansk Industri (DI) contre Succession Karsten Eigil Rasmussen* [2016] EU:C:2016:278;
C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V*. [2018] EU:C:2018:257.
[87] GDPR (n 12).
[88] ibid. art 14(2)(g).
[89] ibid. art 15(1).

with 'UNI Global Union' assisted Amazon warehouse workers in filing data access requests to verify the company's data processing practices.[90]

Most importantly, the GDPR recognises a higher level of protection for the so-called 'sensitive' personal data, which bears a higher risk of discrimination for individuals. This category includes data relating to individuals' racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic and biometric data, health status, and sexual orientation.[91] However, the most important safeguard against algorithmic discrimination is contained in Article 22 GDPR, which grants individuals the right not to be subject to automated decisions producing significant legal effects.[92] This prohibition is only relative, as there are three exceptions which justify automated decisions: when they are necessary for entering into a contract; when authorised by Union or Member State law; or when they are based on data subjects' explicit consent.[93] Consequently, in employment contexts, the scope of Article 22 GDPR is significantly restricted.

There is one last instrument that could be particularly relevant against AI-related discrimination, the 'Data Protection Impact Assessment' (DPIA), an extensive analysis performed by data controllers when processing is likely to result in high risks for the rights and freedoms of data subjects.[94] While the meaning of 'high risks' is not explicitly addressed by the provision, Article 35(5) offers a non-exhaustive list of activities requiring a similar assessment, which include, *inter alia*, automated decision making.[95] The provision also requires employers to involve in the assessment both workers and 'Data Protection Authorities' (DPAs), independent bodies responsible for overseeing the correct application of the GDPR.[96] They can rely on their investigative powers to access data-driven systems, examine their functioning and obtain confidential documentation covered by IP rights.

[90] UNI Global Union, 'Under the GDPR, Amazon Workers Demand Data Transparency' (*UNI Global Union*, 14 March 2022) < https://uniglobalunion.org/news/gdpr_amazon/> accessed 10 May 2025.
[91] GDPR (n 12) art 9.
[92] ibid. art 22.
[93] ibid. art 22(2).
[94] ibid. art 35.
[95] ibid. art 35(3)(a).
[96] ibid. art 51.

Overall, while the GDPR affords meaningful protection against information asymmetries and data processing practices, a closer inspection reveals that it is not suited to tackle the discriminatory risks posed by AM tools.[97] This is largely because the GDPR relies on the concept of consent as a legal basis, which fails to recognise the different bargaining power between employers and employees.[98] As observed by the European Data Protection Board (EDPB), workers are never in a position to 'freely give, refuse or revoke their consent', rendering most GDPR provisions inadequate in the context of workplace and employment relationships.[99] This is especially true when considering the exceptions contained in Article 22 GDPR, which allow employers to take automated decisions capable of significantly affecting workers either by obtaining their consent or by invoking the necessity requirement in their employment contracts.[100]

At the same time, the provisions that could, in principle, protect workers from algorithmic discrimination are significantly restricted in scope. The right to explanation, for example, does not contain any provisions specifying the extent of the information that employers are required to provide workers when dealing with algorithmic decision-making processes, nor does it overcome the 'black box' issue of complex AI systems.[101]

Additionally, employers are allowed to deny access to an algorithm if necessary to protect the rights and freedoms of others or if the algorithm's code is covered by intellectual property rights.[102] Such a refusal can also be granted in cases where automated decisions involved human oversight or if data subjects were not significantly affected by the latter.[103] It is specifically relying on such

[97] Halefom Abraha, 'Regulating Algorithmic Employment Decisions through Data Protection Law' (2023) 14(2) European Labour Law Journal 172–191.
[98] ibid.
[99] European Data Protection Board, 'Guidelines 05/2020 on Consent Under Regulation 2016/679' (*European Data Protection Board*, 4 May 2020). <https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf> accessed 10 May 2025.
[100] GDPR (n 12) art 22.
[101] Lauritz Aastrup Munch, Jens Christian Bjerring, and Jakob Thrane Mainz, 'Algorithmic Decision-making: The Right to Explanation and the Significance of Stakes' (2024) 11(1) Big Data and Society < https://journals.sagepub.com/doi/10.1177/20539517231222872> accessed 10 May 2025.
[102] GDPR (n 12) art 15(4).
[103] ibid. art 22.

an exception that, in 2022, a Dutch Court ruling on an algorithmic transparency case involving Uber denied access to the company's AI system.[104]

Finally, the GDPR suffers significant enforcement problems when applied to the issue of algorithmic discrimination.[105] For example, while Article 39(5) GDPR provides that workers or their representatives should be involved in the DPIA, they will only be consulted when deemed appropriate by the employer, who can further restrict the consultation process for the protection of commercial and public interests or for the security of processing operations.[106] Similarly, while Article 36 GDPR provides that data protection authorities should be consulted in all processing activities indicated as 'high risks' in DPIA assessments, employers can be exempted from such an obligation if they find sufficient measures to mitigate these risks. The DPIA's results are also not published or made available to workers, who, consequently, have no opportunity to voice their concerns. [107]

III The Artificial Intelligence Act (AI Act)

The last instrument to consider when dealing with algorithmic discrimination is the AI Act, the first comprehensive framework regulating AI in the EU.[108] Entered into force in August 2024, the AI Act aims to promote trustworthy and sustainable AI while respecting individuals' fundamental rights and freedoms. It applies to all sectors, except for the military, and covers both private and public relationships, including employment ones.[109] While the Act's main purpose is not to ensure non-discrimination as such, a hint of equality rights can be felt throughout the whole text of the Regulation. Recital 6 for example, affirms that the Act seeks to establish a regulatory framework in line with the fundamental rights enshrined in Article 2 of the Treaty on the Functioning of the European Union (TFEU) which includes, *inter alia*, equality and non-discrimination.[110] To achieve this aim, the AI Act takes a risk-based approach, categorising AI systems into four different risk levels – minimal, limited, high and unacceptable risk, each with its own set of requirements and

[104] *Rechtbank Amsterdam*, Case C/13/687315 HA RK 20-207, ECLI:NL:RBAMS:2021:1020 (March 11, 2021), [4.35].
[105] Ducato and Živković (n 38).
[106] GDPR (n 12) art 39(5).
[107] ibid. art 36.
[108] AI Act (n 10).
[109] ibid. Recital 9 and 24.
[110] ibid.Recital 6.

restrictions. Most of the text, however, concerns high-risk systems, listed in Article 6.[111] These include AI software deployed in sensitive areas such as biometrics, education, law enforcement, migration, and especially employment, where there is a higher risk of discrimination. In this regard, Recital 57 highlights that AI applications used within the employment sphere 'may perpetuate historical patterns of discrimination, for example against women, certain age groups, persons with disabilities, or persons of certain racial or ethnic origins or sexual orientation.'[112]

Therefore, before entering the European market, high-risk systems must undergo a 'conformity assessment' to minimise their potential risks. To pass this assessment, providers must comply with specific requirements listed in Title III of the AI Act, which include the establishment of appropriate data governance practices, the production of technical documentation and records of the system's processes, and the maintenance of high standards of accuracy, robustness and cybersecurity.[113] Among these obligations, there are several provisions which are particularly relevant to the issue of algorithmic discrimination. Article 10(3) requires systems providers to conduct appropriate training, validation and testing of systems' datasets, and to identify possible 'biases, gaps or shortcomings' therefore addressing the phenomenon of 'garbage in, garbage out'.[114] Article 13 requires AI systems to be designed and developed in such a way as to allow deployers to understand algorithm outputs, facilitating transparency and accountability.[115] Finally, Article 27 mandates the obligation to conduct a 'Fundamental Rights Impact Assessment' (FRIA) prior to the deployment of all high-risk systems, to evaluate their impact on individuals' fundamental rights and to identify possible mitigating measures to counter those risks.'[116]

The conformity assessment requirements set out in Title III are also complemented with harmonised standards produced by external private bodies, such as the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC), tasked with the creation of guidelines aimed at interpreting the AI Act.[117] Once all

[111] ibid. art 6.
[112] ibid. Recital 57.
[113] ibid. art 10, 11, 12, 15.
[114] ibid. art 10(3).
[115] ibid. art 13.
[116] ibid. art 27.
[117] ibid.art 40.

these requirements have been satisfied, high-risk systems acquire a 'CE' marking, certifying their compliance with Union law and allowing their free movement within the internal market.[118] After their deployment, if individuals believe that their rights have been infringed upon by an AI system, they can lodge a complaint with the competent market surveillance authority and request an explanation concerning any automated decision that has produced significant legal effects on them.[119]

Moreover, while the AI Act provides new opportunities to mitigate AI-related discrimination, there are several issues which significantly hinder its effectiveness when applied to the employment sector. The first, and perhaps most critical, relates to the AI Act's self-assessment, risk-based approach, which is not suited for protecting human rights. Compliance is primarily left to the discretion of systems' providers, who are under no obligation to publish their findings, limiting accountability and transparency.[120] The conformity assessment requirements used to screen AI systems are also largely based on harmonised standards developed by private bodies that lack direct democratic legitimacy and are often dominated by industry representatives. Civil society actors are excluded from these working groups, and those who are involved are usually not allowed to vote, speak or submit their opinions.[121]

Another significant issue concerns the enforcement regime envisaged by the AI Act, which involves multiple actors among certification bodies and market surveillance authorities but falls short in providing an adequate enforcement mechanism against rights violations.[122] Workers subject to algorithmic discrimination cannot rely on any specific provision nor directly invoke the AI Act against their employer. This is because, as an EU Regulation, the AI Act lacks direct horizontal effect and cannot be directly enforced against private parties.[123] This lack of enforceability is further hindered by the Act's lenient regulatory regime, which allows for numerous exceptions and derogations.[124] Article 6(2) provides that high risk systems which would

[118] ibid. art 48.
[119] ibid. art 85 and 86.
[120] Sandra Wachter, 'Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond' (2024) 26(3) Yale Journal of Law & Technology 672.
[121] ibid. 690.
[122] ibid. 693.
[123] Federico Pedrini, *Law in the Age of Digitalization* (1st edn, Aranzadi 2024) 85.
[124] ibid. 10.

ordinarily fall within Title III can be exempted from such a classification if they are intended to perform a narrow procedural or preparatory task, or equally, if they are used to improve the result of a previously completed human activity, therefore granting significant discretion to developers in deciding how to categorise their systems.[125] Similarly, while Article 27 establishes the obligation to conduct an evaluation of the impacts that high-risk systems might have on individuals, this obligation only concerns public bodies and private entities offering public services. As a result, if a private company or an employer adopts a high-risk system for recruitment or automated management, the latter will not be subject to such an evaluation.[126] These issues have been further complicated by the overall vague formulation of the Regulation, which repeatedly fails to establish a clear substantive standard for determining when discrimination has taken place.[127] Article 10(2)(f), for example, states that data sets used to train AI systems must be subject to training, validation and testing to detect possible biases likely to lead to discrimination under EU law, therefore, leaving the judgment of what constitutes unequal treatment to existing legislation, which, as previously seen, is not designed to deal with the complex nature of algorithmic bias.[128] Consequently, it has been argued that the introduction of the AI Act added another layer of regulation without necessarily changing much, especially considering that some of the most promising provisions, including the ones on facial recognition, are, if anything, less stringent than the GDPR.[129] However, unlike the GDPR, the AI Act leaves little to no space for collective representation and social partnership, preventing workers and job applicants from having access to the technical documentation of high-risk systems adopted by employers under Article 11.[130]

F SHAPING ALGORITHMIC ACCOUNTABILITY: PROVIDING SOLUTIONS FOR NEW PROBLEMS

The current EU legislative framework therefore lacks a regulatory instrument capable of adequately addressing the discriminatory risks posed by AM tools. Under anti-discrimination law,

[125] AI Act (n 10) art 6(2).
[126] ibid. art 27.
[127] Watcher (n 9).
[128] AI Act (n 10) art10(2)(f).
[129] Jeremias Adams-Prassl, 'Regulating Algorithms at Work: Lessons for a "European Approach to Artificial Intelligence"' (2022) 13(1) European Labour Law Journal 30.
[130] AI Act (n 10) art 11.

workers are in a hopeless legal position. Not only do they have to establish a *prima facie* case of discrimination with little to no evidence, but they also need to point to the source of algorithmic bias without any technical knowledge or access to the system's code. The situation does not get any better under data-protection law, which fails to recognise information and power asymmetries between workers and employers and allows for broad exceptions in the employment field. Not even the recently introduced AI Act ensures better safeguards, as compliance is primarily left to the discretion of systems' providers, and workers have no guaranteed access to technical documents on the systems' functioning, limiting accountability and transparency. In light of the above, Section F will consider possible solutions to improve workers' rights and strengthen labour protections.

I Algorithmic Management and Collective Bargaining

While scholars' opinions diverge greatly, there seems to be consensus on the need to enhance the role of trade unions and collective bargaining.[131] As noted by Aloisi, power dynamics inherent to workplace relationships might render the assertion of individual rights harder in the context of AI decision-making, causing employees to struggle to access their data and determine whether the latter is accurate or biased.[132] Trade unions, by contrast, can overcome these issues by concluding collective agreements laying down sector-specific safeguards, such as transparency obligations aimed at improving the accountability of automated decision-making systems. Currently, however, regulatory instruments on collective regulation of algorithmic management do not generally confer any enforceable right on workers' representatives.

Article 88 GDPR recognises the importance of collective bargaining and allows Member States to introduce stricter rules governing the use of ADM systems in the workplace, for purposes such as recruitment, management and equality monitoring.[133] Nonetheless, as pointed out by the French Force Ouvrière, France's largest labour union, the Article is limited in scope. It was not specifically designed to contrast algorithmic discrimination, and therefore, it might not be able to address

[131] Valerio De Stefano and Simon Taes, 'Algorithmic Management and Collective Bargaining' (2022) 29(1) European Review of Labour and Research 21.
[132] Aloisi and De Stefano (n 18).
[133] GDPR (n 12) article 88.

technical-related concerns.[134] Similarly, while Article 80(2) GDPR empowers workers to mandate a non-profit entity, organisation or association to submit a claim on their behalf, the latter does not envisage a specific legal role for unions.[135]

Consequently, one of the easiest solutions for the EU to tackle algorithmic discrimination would be to strengthen unions' role in discussions concerning the adoption and use of ADM devices in the workplace. As Gaudio explains, unions are overall in a more favourable position to fill this justice gap. They can increase awareness around the risks of algorithmic management by providing employees the necessary knowledge to successfully exercise their rights and recognise instances of algorithmic discrimination that would otherwise go undetected.[136] Additionally, since data processing practices generally affect the whole workforce, trade unions are more likely to be aware of breaches and gather evidence to prove that violations occurred. Unions might also possess the financial means to consult external experts, fundamental to comprehending complex technical issues and provide insights into the technical side of the claim.[137] During the pre-trial phase, for example, experts can help lawyers to have a better understanding of the functioning of an AI system, while during the trial, they can be appointed as expert witnesses to evaluate the system's design and functioning.[138] Moreover, due to their institutional position, unions can increase coordination among workers and prevent them from filing multiple claims without previously consulting their colleagues, lowering the overall costs of litigation. Most importantly, unions, unlike individuals, are not exposed to risks of retaliation, which places them in a better position to attract media attention and press coverage. This can encourage companies to comply with workers' demands, litigate less aggressively or adopt corrective action.[139]

As seen in Deliveroo's case, unions' efforts to contrast algorithmic discrimination can extend beyond collective bargaining to include co-determination and strategic litigation.[140] For example,

[134] De Stefano (n 131).
[135] GDPR (n 12) art 80(2).
[136] Giovanni Gaudio, 'Litigating the Algorithmic Boss in the EU: A (Legally) Feasible and (Strategically) Attractive Option for Trade Unions?' (2024) 40(1) International Journal of Comparative Labour Law and Industrial Relations 91.
[137] ibid. 9-10.
[138] ibid.
[139] ibid.10-11.
[140] De Stefano (n 131), page 27-28.

in Norway, civil society and trade unions challenged an employer's decision to maintain invasive automated decision-making practices in the workplace before the national data protection authority.[141] In Spain, social partners together with the government negotiated an agreement to provide access for trade unions to any platform system capable of affecting employees' job position, including hiring, maintenance and termination thereof.[142] In the United Kingdom, instead, unions concluded collective agreements to guarantee the establishment of sub-committees responsible for examining data processes, together with the commitment to not dehumanise the workplace and allow managers to retain their key decision-maker roles.[143] Lastly, in Italy, trade unions such as CGIL, CISL and UIL successfully obtained a local collective agreement with a food-delivery platform to ensure human oversight over algorithmic decision-making. The agreement not only guaranteed employees' right to information but also established specific limits on the use of automated decision-making systems by the employer.[144]

II Stepping in: Asking the European Union for a Legislative Action

Alternatively, to safeguard workers' rights, the EU could rely on Article 153 TFEU to adopt a new Directive defining minimum standards on the design and use of AM systems in the workplace, enabling individual and collective access to the information used by such systems.[145] The introduction of a new Directive would close the current legislative gap since, as seen in the previous Section, there currently is no instrument under EU law that grants workers unconditional access to systems' functioning.[146] The AI Act requires providers of high-risk systems under Title III to produce certain technological documentation which cannot be accessed by workers or their representatives.[147] Equally, the GDPR lays down a right to explanation with regard to automated decisions, which is subject to multiple exceptions and derogations: it cannot be invoked if the system's code is covered by intellectual property rights or if it is necessary to protect the rights and freedoms of others.[148] The newly introduced Platform Work Directive instead is stronger, providing information rights in relation to the 'categories of decisions' and 'main parameters' used

[141] ibid. 29.
[142] ibid. 29.
[143] ibid. 30.
[144] ibid. 31.
[145] Treaty on European Union (n 67) art 18.
[146] Kelly-Lyth (n 43) 152–171.
[147] AI Act (n 10).
[148] GDPR (n 12).

by AM systems.[149] The Directive, however, has a limited scope: it only applies to platform workers, and it does not discuss what equality outcomes and standards should be maintained by such systems. Therefore, even with access to information, workers might not have sufficient knowledge and protections to bring forward a discrimination claim.

A new Directive instead could grant all workers the right to access and revise algorithmic decisions, as well as the possibility to deny the use of ADM systems in the workplace if not previously discussed with workers' representatives.[150] It would be possible to establish specific criteria to determine when algorithmic discrimination has taken place, finally clarifying the legal obligations of employers regarding transparency, accountability, and redress mechanisms. Finally, a new directive could strengthen the enforcement of collective bargaining rights of trade unions, including the right to information, consultation and participation. These arguments were already presented in June 2023 by the European Trade Union Confederation (ETUC) and Industrial Europe, which held a conference on algorithmic discrimination to highlight the shortcomings of the current regulatory framework.[151]

III A Legislative Reform

Another possible solution for the EU to address AI-related discrimination involves clarifying the scope of current instruments.[152] This is especially true in relation to the GDPR, whose scope has never been clarified in relation to employers' data practices. Article 29 Working Party, the former body responsible for the protection of privacy and personal data, released an Opinion in 2017 on data processing at work, which has not been updated or endorsed by the European Data Protection Board (EDPB), the new advisory body.[153] The EDPB should release new guidelines on personal data processing in the employment field, especially addressing algorithmic discrimination, to reduce the risks associated with the use of ADM systems.[154] Alternatively, as suggested by the

[149] European Parliament and Council Directive (EU) 2024/2831 of 23 October 2024 on improving working conditions in platform work [2024] OJ L2024/2831.
[150] Kelly-Lyth (n 43) 169.
[151] ETUC, 'ETUC Resolution Calling for an EU Directive on Algorithmic Systems at Work' (*ETUC*, 6 December 2022) <https://www.etuc.org/en/document/etuc-resolution-calling-eu-directive-algorithmic-systems-work> accessed 10 May 2025.
[152] Abraha (n 97).
[153] ibid. 157.
[154] ibid.

Committee on Employment and Social Affairs, the EU could expand the scope of the Platform Work Directive to cover all workers subject to automated or semi-automated decisions, offering safeguards to standard employees as well. Such a proposal was already mentioned in a 2022 European Parliament Report, which suggested expanding the scope of the Directive to all workers.[155]

IV Legislative Action at the Member States Level

Finally, while waiting for a more robust legislative framework, Member States can address AI-related discrimination by relying on Article 88 GDPR.[156] As mentioned earlier, Article 88 empowers Member States to introduce, either by law or collective agreements, stricter rules on workers' data processing for purposes such as recruiting, management, and equality monitoring.[157] While the provision is severely underutilised, some Member States have already relied on it to provide stronger safeguards for employees. Germany, for example, used Article 88 GDPR to enact the Federal Data Protection Act (BDSG), which came into force in May 2018. The BDSG leverages GDPR's opening clauses and establishes, in Section 26, specific requirements on data processing and consent in employment-related contexts.[158] Similarly, in 2019, Finland supplemented the GDPR by amending the Act on Protection of Privacy in Working Life, which requires employers to collect data only from the employees themselves, avoiding secondary sources. The Act also provides that data processing must take place according to strict requirements and only when necessary.[159] At the same time, Member States can address AI-related discrimination when transposing instruments such as the Information and Consultation Directive,[160] and the Transparent and Predictable Working Conditions Directive.[161] Both directives establish a legal framework which promotes transparency and accountability in employment

[155] European Parliament, 'Report on the Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work (2021/0414(COD)) (European Parliament, 21 December 2022) <https://www.europarl.europa.eu/doceo/document/A-9-2022-0301_EN.html> accessed 10 March 2026.
[156] Abraha (n 97).
[157] GDPR (n 12) art 88.
[158] Bundesdatenschutzgesetz (Federal Data Protection Act) (BDSG) 30 June 2017.
[159] Laki yksityisyyden suojasta työelämässä (Act on the Protection of Privacy in Working Life) (759/2004).
[160] European Parliament and Council Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L080 (Information and Consultation Directive).
[161] European Parliament and Council Directive 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L186 (Transparent and Predictable Working conditions Directive).

relationships.[162] The former grants workers a right to information and consultation that can be used to understand how AM tools function,including how they allocate tasks, evaluate performance and suggest promotions. Contrarily, the latter provides for a set of employment rights which allow workers to be informed on essential aspects of work.

When transposing these directives into their national laws, Member States can impose specific obligations on employers to disclose and explain the use of algorithmic management in the workplace. Italy made an explicit reference to algorithmic management when implementing the Transparent and Predictable Working Conditions Directive through Legislative Decree No 104/2022.[163] This requires employers to clearly disclose the use of AI-related systems at all stages of the employment relationship, along with detailed information on the type of data collected. It also mandates the adoption of cybersecurity measures to protect workers from possible data breaches and misuse.[164]

G CONCLUSION

The paper examined whether the EU legal framework could regulate the discriminatory risks posed by AM tools in the European employment sector. Based on the analysis conducted, it can be concluded that the EU currently struggles to adequately protect workers subject to similar managerial practices. Existing legislation contains no direct provision addressing algorithmic discrimination and those that do so indirectly face numerous limitations and enforcement issues which severely undermine their effectiveness.

The first instruments considered involved non-discrimination laws and the Employment Equality Directives, which prohibit direct and indirect discrimination of workers, based on grounds such as gender, race, ethnic origin, disabilities, religion or belief, age and sexual orientation. However, as workers lack access to AI systems and insight on how they function, it becomes materially impossible for them to demonstrate instances of unequal treatment.

[162] Europfound, 'Anticipating and Managing the Impact of Change Regulatory Responses to Algorithmic Management in the EU' (*Europfound,* 2024) <https://www.eurofound.europa.eu/en/resources/article/2024/regulatory-responses-algorithmic-management-eu> accessed 1 March 2025.
[163] ibid.
[164] Decreto legislativo (Legislative Decree) 104/2022.

The analysis then turned to data protection laws and the GDPR.[165] While these laws contain provisions which could mitigate the discrimination risks –including the right to explanation, to information, and the right not to be subject to automated decisions – its application remains limited. Employers and systems providers can exclude workers and their representatives from oversight measures and restrict access to evidence on grounds such as intellectual property or the rights and freedom of others.[166]

The paper also examined the 2024 AI Act, which classifies AI-systems by risk and imposes requirements on high-risk systems used in employment.[167] The Act provides weak investigatory measures and allows for broad exceptions in both the public and private sectors. Compliance is primarily left to the discretion of systems' providers, and workers have no guaranteed access to technical documents on the systems' functioning.

In light of the above, the paper proposed several reforms. First, it suggested strengthening the role of trade unions in discussions concerning the adoption and use of ADM devices, to increase accountability and transparency. Second, it encouraged the EU to take further legislative action, by either adopting a new Directive or by expanding the scope of existing instruments, to define minimum standards on the design and use of AM systems and to grant workers the right to access algorithm decisions. Finally, it recommended Member States to adopt complementary rules on workplace data processing under Article 88 GDPR, including stricter safeguards in recruitment, management and monitoring practices.[168]

Ultimately, finding a single or definitive solution to automated discrimination might be difficult to achieve given the rapid evolution and opacity of AI systems. Future research should consider the adoption of a multidisciplinary approach that combines legal, technical and ethical perspectives, ensuring accountability and fairness.

[165] GDPR (n 12).
[166] ibid. art 39(5).
[167] AI Act (n 10).
[168] GDPR (n 12) art 88.

THE CASE FOR ABOLISHING JURY-TRIALS

Gregor McCullagh*

A INTRODUCTION

> The jury trial is the apotheosis of the amateur. Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?[1]

The shortcomings of the jury-trial have long been apparent and have been subject to criticism for many years, as the above citation illustrates. However, while there is a growing body of work examining particular issues with juries, there appears to be a dearth of academic commentary examining all the issues pertaining to juries in one place, and there is virtually no academic work considering abolition of the jury-trial model. One rare exception is the article of R J O'Hanlon appearing in the Irish Jurist in 1990,[2] which the author regards as being well-ahead of its time. Over thirty years later, while jury-trials have undergone significant reform across the common law world,[3] in Ireland they have, in a sense, been frozen in time. However, this article will argue that even the much-reformed juries of Australia and New Zealand are not sufficient to overcome the flaws inherent in trial by jury. While some of the issues, particularly those relating to constitutional arguments are viewed through an Irish lens, the substance of the arguments in this article are equally applicable across the common law world, and perhaps even beyond in other jurisdictions which use juries.

This article will discuss six problematic elements of the jury-trial: the frail logical underpinnings of the jury-trial, jury secrecy, the conformity of the jury-trial to the European Convention on

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[1] George C Thomas III and Barry S Pollack, 'Rethinking Guilt, Juries and Jeopardy' (1992) 91(1) Michigan Law Review 1, 1.

[2] R J O'Hanlon, 'The Sacred Cow of Trial by Jury', (1990) 27 Irish Jurist (ns) 57.

[3] Mark Coen, Niamh Howlin, Colette Barry and John Lynch, 'Judges and Juries in Ireland: An Empirical Study' (UCD 2020), 4.

Human Rights, the effectiveness of juries in criminal trials, the undue burden placed on jurors by virtue of jury service, and the representativeness of juries.

While the article follows a certain structure, the sequence in which the various deficiencies of the jury-trial are addressed should not be considered fixed. As the reader will come to appreciate, all the issues are intrinsically linked. For example, jury secrecy perpetuates the legitimacy which jury decisions enjoy, partly by disguising any bias that may have weighed on the outcome. However, research to assist jurors make better decisions is hindered by the jury secrecy rule. Similarly, the jury is criticised for not being representative enough, but the fact is that jury service is deeply unpopular and so people try to avoid it as much as possible. This is partly due to the financial hardship imposed by the commitment to jury duty which in turn leads people to avoid jury service.

In this sense, the links between the various elements should not be forgotten. The article takes the structure that follows simply because it is convenient to start by considering the underpinnings of the jury-trial in order to demonstrate why reform discussions are appropriate. It then looks at the problems with the institution of the jury, which can broadly be considered as comprising secrecy and efficacy, before finally considering the people behind the jury — the jurors — assessing how they fit into the picture.

B LOGICAL UNDERPINNINGS OF THE JURY-TRIAL

The jury-trial developed in response to the withdrawal, in 1215, of papal support for trial by ordeal, which had, until then, been used to determine guilt in England. Whilst continental legal systems were more advanced, in England it took some time before the vacuum was filled by the jury-trial.[4] When first introduced in England, juries decided whether accused persons would be tried for crimes, determined guilt, and resolved monetary disputes.[5] The role of the jury has since been significantly curtailed. Grand juries no longer exist on this side of the Atlantic[6] and the role of juries in civil cases has been confined to defamation, although legislation currently before the Oireachtas would abolish this function also.[7] However, in the criminal justice system, the jury-

[4] R J O'Hanlon (n 2) 58-59.
[5] R J O'Hanlon (n 2) 59-60.
[6] ibid. 59.
[7] Defamation (Amendment) Dáil Bill (2024) 67.

trial is alive and well and, importantly in Ireland, rests on constitutional footing as part of the right to a trial in due course of law; for all serious crimes, the accused has the right to be tried on indictment.[8] But why is the jury-trial considered fundamental to procedural fairness, and is such a characterisation justified?

I Jury-Trial: An Indispensable Pillar of Freedom

The principal justification for jury-trial is that it checks Government power and ensures citizens will have a say in the administration of justice. Lord Devlin famously waxed lyrical about how jury-trial would prevent any tyrant from imposing oppressive laws as, ultimately, the freedom of the citizen would rest in the hands of twelve of his countrymen, describing jury-trial as the 'lamp that shows that freedom lives'.[9]

However, in the modern democratic state, in which there exist far more constraints on executive power, it has to be asked whether it is still appropriate for juries to disapply laws with which they disagree. This is especially the case in Ireland, where all laws passed by the Oireachtas benefit from the presumption of constitutionality and where constitutionally suspect laws are often referred by the President to the Supreme Court before coming into place under Article 26 of the Constitution. It is hard to see how it could ever be appropriate for a jury of lay-deciders to find that a law is unconstitutional where it is presumed to be just the opposite. Indeed, if a law had been referred under Article 26 and its constitutionality confirmed by the Supreme Court, it is difficult to accept that this could be disapplied by a group of twelve people with no legal knowledge.

Similarly, the notion of the jury-trial as a bulwark of the freedom of the citizen is less apparent in a country like Ireland, where fundamental rights, including the right to a trial in due course of law, are enshrined in a written constitution.[10]

So, while the jury-trial may have been an important brake on abusive state power in the past, it is doubtful whether it still does or should even play such a role.

[8] Bunreacht na hÉireann Article 38.
[9] Patrick Devlin, 'Trial by Jury (Hamlyn Lectures, 8th series)' (Stevens, 1956) as cited by R J O'Hanlon (n 2) 65.
[10] ibid.

II Collective Wisdom

The second main justification for the jury-trial is that the collective wisdom of twelve randomly selected jurors is better placed to discover the truth of the case than one judge acting alone. However, as O'Hanlon points out, there is no evidence supporting this notion.[11] In fact, the idea of collective wisdom may be something of a myth, as there is nothing to prevent one or more dominant personalities within the jury imposing their will on the other jurors.[12] This is exacerbated by the absence of oversight resulting from the jury secrecy rule. And so, there may be little 'collective' about the wisdom brought to bear on the proceedings.

Moreover, the 'wisdom' which the jury brings to the trial is not necessarily legal wisdom. An Australian study indicates that, on morally ambiguous questions equated with offences against the person, jurors were less likely to rely on formal law and tended to reach their decisions using their own common-sense judgment.[13] This goes much further than what the role of the jury is understood to entail. While the idea of the jury checking state power by disapplying oppressive or unfair rules may, in the past, have been justifiable, it is clear that juries deciding cases, not based on the law but rather on their gut feeling, is not a desirable method for determining legal disputes in the modern day. Criminal offences are designed the way they are specifically because we believe that it is only under those specific circumstances that someone should be deprived of their liberty.

Perhaps the only area where jury-trials are appropriate is that wherein the Irish Government seeks to abolish them — in relation to defamation. In such cases, the jury is uniquely qualified to determine whether a statement is such as to injure a person's reputation in the eyes of reasonable members of society. This was expressly recognised as the reason for the retention of juries in this area following their abolition in relation to other civil actions. However, the same cannot be said in relation to criminal law, which is dominated by complex tests which pose difficulty to even the most experienced jurists.

[11] R J O'Hanlon (n 2) 68.
[12] ibid. 68.
[13] Catriona McKay, Mark Nolan and Michael Smithson, 'Effectiveness of Question Trails as Jury Decision Aids: The Jury's Still Out' (2014) 21(4) Psychiatry Psychology and Law 492, 506-507.

The jury-trial emerged from a very particular set of historical circumstances and the idea that it remains the most effective form of criminal decision-making nearly 700 years later should be re-examined. Furthermore, the ideals underpinning the legitimacy of the jury-trial stem from a time when there were far fewer checks on State authority and the spectre of oppressive decision-making loomed much larger than it does today. The idea that a modern jury would disapply laws with which it disagrees is probably undesirable, particularly in the increasingly polarised political climate of today. Indeed, such a function is likely at odds with the functioning of the modern state and as such the justification of the lay jury is severely weakened.

The foregoing demonstrates that the jury-trial is not the indispensable constituent of democracy which it is often characterised as, and such false notions about its importance should not stand in the way of critically considering its role and potential abolition.

The various problematic elements of the jury-trial which fall to be examined are: jury secrecy compliance with international human rights standards; the efficacy of jury-trials, the undue burden of jury service on jurors themselves, and the representativeness of the Irish jury.

C JURY SECRECY

'The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi'.[14]

One of the key features of the common law jury-trial is jury secrecy. This principle means that juries need not, and indeed cannot, be required to provide reasons for their decisions. Jury secrecy is not comparable to voter secrecy, because it is not just secrecy about an individual personal choice, but rather secrecy as to the reasons for determining another person's guilt or innocence. In this sense it is an important public decision for which no reasons are given. The idea of jury secrecy is so intrinsically linked with the notion of the jury-trial that it often escapes scrutiny. However, if one takes pause to consider jury secrecy, a number of difficulties become apparent.

[14] *Skidmore v Baltimore & Ohio R.R. Co*. 167 F 2d 54 (2d Cir 1948).

Firstly, it must be asked, what other decision-maker benefits from such a privilege in a modern democratic state? Indeed, what decision-maker would be trusted who decides in secret, against an unknown set of values, and against whose decision there is no appeal? Yet this is exactly the task with which juries are entrusted. They determine guilt in relation to the most serious crime without providing any basis for their decision and without any scrutiny of how their decision was made. McHugh describes one of the main justifications for jury secrecy as being the preservation of public confidence in the system.[15] However, this argument suffers from an inherent weakness. It seems to suggest that, if we knew how juries decided issues, we would not trust them to do so. Might it not be more appropriate, then, to say that it is ignorance which is preserving confidence? Accountability is usually the order of the day in terms of boosting public confidence in institutions, yet jury-trials have remained shrouded in mystery, and the prevailing argument seems to be that this is a good thing. Secrecy is exacerbated by the fact that appeal courts are extremely reluctant to overturn jury decisions, for fear it would undermine public confidence in the jury-trial.[16] Indeed, the facts as found by the jury cannot be overturned and it is usually the judge's charge which grounds an appeal with counsel attempting to argue that the judge misdirected the jury as to the law.

Another argument in favour of jury secrecy is that, by shielding jurors from public scrutiny, reluctance to serve on a jury can be alleviated.[17] This argument can be considered in various ways. It is true that in many jurisdictions — and especially in Ireland — where there is little enforcement, people are generally very reluctant to serve on juries. However, the main reasons for such reluctance are generally considered to relate to the inconvenience, long-time commitment and potential financial hardship which jury duty entails. So, while it may be true that secrecy makes jurors more comfortable to serve, there are a host of other issues which render jurors reluctant to serve which should also be addressed if this is to be relied on as an argument in favour of the secrecy rule.

[15] Michael McHugh, 'Jurors' Deliberations, Jury Secrecy, Public Policy and the Law of Contempt' in Findlay and Duff (eds) *The Jury Under Attack* (Butterworths, 1987) 62.
[16] Rick Sarre, 'Appeal Judges are Reluctant to Overturn Jury Verdicts. So Why did They do it for George Pell?' *The Guardian* (London, 7th April 2020).
[17] Michael McHugh (n 15) 63.

Further justification for jury secrecy is found in the notion that it would be unfair to hold jurors accountable in the same way as public officials, as they are simply ordinary individuals who have been involuntarily transplanted into the criminal justice system by virtue of jury service.[18] However, it is submitted that, in exercising their role in a criminal trial, jurors are occupying a significant role in the administration of justice, regardless of how they came to be in the position. Take, for example, offences that need not be tried on indictment; if they are tried summarily, then the role which otherwise would have fallen to a jury will be exercised by a judge, who is clearly a public official and who clearly must give reasons for their decision. As such, juries and judges essentially occupy the same role. It flows naturally from this that the standards of accountability applied to each ought to be the same. If anything, it is submitted that there ought to be more checks and balances on juries given their lack of legal training. The author is not alone in the belief that jurors, in exercising their function, are in essence public officials. Sutton argues that during their service, jurors could well be considered "quasi-state officials" given the significant state function which they are fulfilling.[19] It follows that the decisions of juries should not be allowed to avoid any form of accountability by virtue of jury secrecy.[20] Other authors go less far, but still recognise that the jury, in occupying a fundamental role within the legal system, should be subjected to some form of reasonable scrutiny.[21]

In Ireland, jury secrecy also hampers academic research as it is currently unclear whether interviewing former juries is permitted.[22] This significantly restricts the ability of researchers to develop tools to assist juries in their deliberations, or indeed to identify problems in how the system currently operates. So, while arguments about jury reform or abolition may be ill-received on the basis that there is no evidence of shortcomings, this is, in effect, a result of the system's current design and not a point of strength in the defence of juries. Little is known about the deficiencies of jury verdicts, simply because little is known about jury verdicts at all.

[18] Jessica Sutton, 'Salvaging the Jury in Sexual Violence Trials: A Requirement for Reasoned Verdicts' (2020) 4 New Zealand Women's Law Journal 66, 81.
[19] ibid.
[20] ibid.
[21] Michael McHugh (n 15) 65.
[22] Mark Coen and others (n 3) 148.

It may also be prudent to recall the origin of the broad common law prohibition on juror testimony about deliberations. In *Vaise v Delaval*,[23] one party sought to challenge the verdict on the basis of sworn statements from jury members stating that they had based their verdict on the outcome of a coin toss. Lord Mansfield rejected the affidavits, thus creating the rule we know today. Given that this is the origin of the prohibition, it cannot be denied that the jury secrecy rule has the potential to protect unsatisfactory jury decision-making.

Another issue perpetuated by jury secrecy is the potential of bias. Behind closed doors, it is impossible to know the effect of extrinsic considerations on jury reasoning. The general verdict means that any biases weighing on the deliberations are sheltered from scrutiny. While judicial directions often seek to address bias, research indicates that jurors do not necessarily obey instructions, and even if jurors are amenable to instructions, they often do not understand them.[24] This is part of a wider problem of competence which will be discussed in due course. For the moment, it suffices to say that jury secrecy lends itself to the problem of bias, which is the most widely recognised shortcoming of the jury-trial.

Finally, while jury secrecy is often defended on the basis that it is necessary to protect jurors from external pressure, this is not to say that it is sufficient. It was for this reason that the Special Criminal Court was established in Ireland. Here, judges alone try offences which would usually require a jury; the rationale being that jurors in such gangland and terrorism cases may feel pressured not to find against defendants for fear of retaliation.

Given the shortcomings of jury secrecy, it is appropriate to consider whether reforms could be introduced to address the concerns relating to jury secrecy or whether abolition is the only viable option. The two reforms most clearly applicable to the bias problem relate to the judge's charge to the jury and the provision of reasoned verdicts.

[23] *Vaise v Delaval* (1785) 99 ER 944.
[24] Emily Henderson and Duncan Harvey, 'Myth-busting in Sex Trials: Judicial Directions or Expert Evidence?' (2015) Archbold Review 5, 5.

The judge's charge is the summing up that takes place at the end of a criminal trial, before the jury retires to deliberate and consider their final verdict. The purpose is to summarise the case made by both sides and to refresh the jurors' memory on the evidence presented in the trial.[25] It is also widely acknowledged as being essential in ensuring the jury use the correct legal framework when making their decision.[26] While some jurisdictions provide precise wordings for the explanations to be used, others prefer optional suggestions which judges are free to use or not.[27] While in Ireland there are no such guidelines, Howlin et al. demonstrate that in practice there is a lot of collaboration between judges, along with the use of foreign bench books by Irish judges when crafting their charges.[28] It is submitted that if judges' charges were to be used to effectively address the issues pertaining to jury secrecy then some form of standardisation would be necessary. However, in most jurisdictions where specimen charges have been introduced, concerns about excessive rigidity have arisen,[29] and therefore it may be difficult to achieve the correct balance.

Furthermore, the judge's charge may be incapable of fully addressing issues which may arise in the jury's decision making. Internationally, there is significant discussion as to whether the phrasing of legal directions takes sufficient account of the limited legal knowledge which jurors possess.[30] Research indicates that jurors may struggle to apply legal directions[31] and that even specific instructions addressing jury bias may be ineffective.[32] So while the judge's charge may appear to be a straightforward solution which does not require significant change to the current design of the criminal trial, it may prove insufficient to address the issues identified with jury secrecy.

[25] Mark Coen and others (n 3) 25.
[26] *DPP v Curran* [2011] 3 IR 785, 810.
[27] Mark Coen and others (n 3) 25.
[28] ibid. 28-32.
[29] ibid. 34.
[30] ibid. 38.
[31] Jonathan Clough, Ben Spivak, James R P Ogloff, Yvette Tinsley, and Warren Young, 'The Judge as Cartographer and Guide: The Role of Fact-Based Directions in Improving Juror Comprehension' (2018) 42(5) Criminal Law Journal 278, 297.
[32] Kathryn R Klement, Brad J Sagarin and John J Skowronski, 'Accusers Lie and Other Myths: Rape Myth Acceptance Predicts Judgments made about Accusers and Accused Perpetrators in a Rape Case' (2019) 81(1-2)Sex Roles16.

The other solution which may be considered is the requirement of reasoned verdicts, allowing for an assessment of the adequacy of the jury's reasoning.[33] Sutton advocates for the introduction of reasoned verdicts in sexual offences trials, arguing that requiring reasons would enhance jury accountability.[34] Sutton further argues that the need to express their reasoning on paper would force the jurors to consider, more critically, how they reached a verdict, thus enhancing the accuracy of decisions.[35] It has also been suggested that in the same way judges approach their task carefully because they know that their judgment must stand up to public scrutiny, if jurors were required to provide reasons, they too would take a more refined approach to their duties.[36] The author agrees that jurors would less readily let their gut instinct decide if they knew that they would have to explain the decision they were making afterward. However, the benefits of such a reform requiring reasoned verdicts are dependent on jurors producing coherent reasons.[37]

In Spain, juries are required to provide reasons for their decisions.[38] However, in the years following the introduction of the system, many juries only provided skeletal reasoning, which shed little light on how conclusions were reached.[39] Since then, Spain has grappled with the adequacy of juries' reasons, with different courts taking varied views of this adequacy assessment. Supporters of the minimalist approach argue that succinct reasoning is not required because a jury verdict is not the same as the judgment of a court.[40] This is reminiscent of arguments defending the unreasoned verdict model and indicates that requiring reasoned verdicts might not cure the shortcomings of jury-trials. It is also interesting to note that this argument, that juries are not judges and therefore should not be held to the same standard, seems to acknowledge the inferior decision-making power of juries. However, rather than hold juries to a higher standard to make up for this shortcoming, it instead excuses them from accountability. This seems neither logical nor legally desirable.

[33] Jessica Sutton (n 18) 77.
[34] ibid. 81-83.
[35] ibid. 83.
[36] ibid. 83.
[37] ibid. 82.
[38] Stephan C Thamen, 'Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v. Belgium*' (2011) 86(2) Chicago-Kent Law Review 629.
[39] ibid. 630.
[40] ibid. 634.

In short, requiring juries to provide reasons for their decisions has the potential to expose improperly motivated decisions, but not to cure them. However, the usefulness of reasons may also be watered down if the Spanish experience is replicated and juries provide only scant, skeletal reasoning in complex cases. If reforming the jury is insufficient to address its shortcomings, then the abolition of juries should seriously be considered to ensure that cases are decided on the merits and not on the basis of irrelevant considerations. Questions about the compliance of the Irish jury-trial with international human rights standards also point to the same conclusion.

In summary, jury secrecy poses a number of hazards with regards accountability and bias. Even an enhanced judge's charge may be unable to cure this. Similarly, a move from the general verdict to reasoned decisions may have little impact. An additional impediment to reform is the fact that in the common law tradition, the link between juries and jury secrecy is not easily broken. This being the case it may be difficult to reform juries in a manner that is widely acceptable. Furthermore, it has been suggested that in Ireland jury secrecy lies on constitutional footing.[41] This being the case, it may be more practical to abolish the jury-trial rather than reform it, given that a referendum would appear to be necessary in either case.

D JURY-TRIALS AND THE ECHR

'Freedom lives and thrives in other countries which have abandoned, or have never enjoyed, the great bulwark of freedom [that the jury-trial is characterised as representing].'[42]

The current Irish jury-trial may be suspect from a human rights law perspective, due to the fact that Irish juries, as discussed above, adhere to the principle of jury secrecy. In *Taxquet v Belgium*,[43] the applicant challenged his murder conviction on the grounds that the jury had not provided reasons for its verdict.

While the Grand Chamber stopped short of finding jury-trial inconsistent with Article 6, such a finding should not be ruled out in future. This is particularly true in relation to the Irish jury, which

[41] Mark Coen and others(n 3) 149.
[42] R J O'Hanlon (n 2) 65.
[43] *Taxquet v Belgium* App no 926/05 (ECtHR, 16 November 2010).

owes its legitimacy to the fact its deliberations are shrouded in mystery and, as such, is not a model of procedural transparency. In this regard, the Irish Government submission in *Taxquet*, that there had never been a complaint that the jury system lacked transparency,[44] is difficult to accept. Previously, the Chamber decision in *Taxquet* prompted then-Executive Legal Officer to the Chief Justice to comment that '*Taxquet* should shake the easy complacency regarding the merits of the Irish mode of jury trial' and 'start a meaningful reform process to address the various deficiencies that have been identified over the years.'[45] No such debate on the merits of the Irish jury-trial gained traction, though this article seeks to change that.

However, even discounting future developments, Irish jury-trials may already be breaching the Convention. While the Grand Chamber found that Article 6 did not require jurors to give reasons for their decision,[46] this was subject to the important qualification that:

> [n]evertheless for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.[47]

The ECtHR continued to the effect that; Article 6 requires determining whether sufficient safeguards were in place not only to avoid any risk of arbitrariness but also to enable the accused to understand the reasons for his conviction.[48] Roberts suggests no lay jury system could satisfy Article 6 if the test were the elimination of any risk of arbitrariness, although he says that such an interpretation is stretching the meaning of the decision to untenable lengths.[49] However, the current jury system would appear to be at odds with even some basic protection from arbitrariness. Certainly, the evidence indicating that jurors regularly base their reasoning on extrinsic factors grounded in their own notions of the law[50] does little to comfort this concern. The same findings also undermine the argument, made by the Irish Government in *Taxquet*, that the judge's directions to the jury provide sufficient safeguards against capricious decision-making.[51] Moreover, the

[44] ibid. [76].
[45] Tom Daly, 'An Endangered Species? The Future of the Irish Criminal Jury System in Light of *Taxquet v. Belgium*', (2010) 20(2) Irish Criminal Law Journal 34, 36.
[46] *Taxquet v Belgium* (n 43) [90].
[47] ibid.
[48] ibid. [92].
[49] Paul Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?' (2011) 11(2) Human Rights Law Review 213, 234.
[50] Catriona McKay and others (n 13) 506.
[51] *Taxquet v Belgium* (n 43) [77].

English case of *R v Young*[52] serves as a stark reminder that it is not enough to simply trust jurors to do a good job. There, the jury consulted a ouija board in order to contact the deceased victim and ask about the murder. Clearly, some sort of control must be exercised to ensure that jury decision-making is of sufficient quality.

An examination of the second requirement for the safeguards in *Taxquet* is also interesting. While law-reform arguments are often examined from the perspective of the victims of crime, it may in this case be useful to frame the issue differently. Taking one of the most common offences tried by jury in Ireland, we may ask whether a person convicted of rape in Ireland is capable of understanding the reasons for the conviction. If not, then this is contrary to the Convention as per the Grand Chamber's decision. Given that practitioners struggle to understand why juries decide as they do in sexual offences trials,[53] it follows that an accused would equally be none the wiser. It appears therefore that the use of juries in such trials is not in line with the Convention even as the law stands with the significant carve-outs afforded by the Grand Chamber.[54]

Finally, it is interesting to note that *Taxquet* has led a number of European jurisdictions to impose reason-giving requirements on criminal verdicts, including France,[55] the only non-common law country to intervene in the proceedings. It should also be noted that France has since significantly reduced the role of the jury-trial, abolishing it for most rape cases.[56] While Ireland is often exceptional with respect to its legal system, becoming the only country to hold on to an outdated form of criminal trial is something that should be avoided. Signs that Ireland is moving in that direction should cause concern and encourage reform of the jury-trial similar to that which was undertaken by Belgium following the ruling.

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[52] *R v Young* [1995] QB 324.
[53] Melissa Denes, 'The Inside Story of Two Rape Trials: "It's as bad as I've Ever Known it"' *The Guardian* (London, 17 January 2024).
[54] Paul Roberts (n 49) 234.
[55] Mathilde Cohen, 'The French case for requiring juries to give reasons: safeguarding defendants or guarding the judges?' in Jacqueline E Ross and Stephen C Thaman (eds) *Comparative Criminal Procedure* (Elgar 2016) 422.
[56] Scottish Legal News, 'France: Juries abolished for most rape trials as lawyers decry attack on legacy of 1789' (*Scottish Legal News*, 03 January 2023) <https://www.scottishlegal.com/articles/france-juries-abolished-for-most-rape-trials-as-lawyers-decry-attack-on-legacy-of-1789> accessed 25 March 2025.

In short, while those who defend the jury-trial may have taken comfort from the ultimate ruling in *Taxquet*,[57] it appears that even the lower standard demanded by Strasbourg is not satisfied in the Irish jury system as it stands.

The concerns of the Strasbourg Court centre on the capacity of the current Irish jury-trial to vindicate the right to a fair trial, but there are also other issues of efficacy to be considered.

E EFFICACY OF JURY-TRIALS FOR CRIMINAL PROCEEDSINGS

'While the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour.'[58]

I Juror Comprehension

Sunderland described jury verdicts as being liable to three sources of errors, relating to the facts, the law and the application of the facts to the law. An error in any of these is disguised by the fact the verdict forms an individual compound, in which the constituent parts cannot be ascertained.[59] Support for this view is found in successive research showing lay people struggle to understand and apply legal directions.[60] In relation to sexual offences, the Victoria Law Reform Commission said that jurors face an extraordinary task in absorbing and applying such a complex body of law.[61] Indeed, academic study has revealed that jurors struggle to understand substantive directions regarding consent in rape trials.[62] This is particularly concerning given its absence is the essential ingredient of the offence, and so not understanding consent means not understanding rape. In such circumstances, a jury cannot be said to properly judge such a trial.

[57] Paul Roberts (n 49) 222.
[58] Edson R Sunderland, 'Verdicts, General and Special' (1920) 29(3) Yale Law Journal 253, 259.
[59] ibid. 258.
[60] Jonathan Clough and others (n 31) 297.
[61] Victorian Law Reform Commission, *Jury Directions Final Report* (VLRC 17-2009) 119.
[62] Jonathan Clough and others (n 31) 297.

Aids for jury decision-making have been introduced to varying degrees across the common law world and while many Irish judges are open to the idea of written materials for jurors,[63] the efficacy of such materials has been questioned.

One popularly proposed form of written material is the question trail. A question trail functions like a verbal flowchart to guide jurors through elements of a criminal offence by using a series of questions in which legal tests are embedded within the facts of the case.[64] However, research specifically examining their efficacy found that they neither improved consistency of verdicts nor increased references to law in place of references to extrinsic factors,[65] one of the particular concerns with regards sexual offence trials.

It follows from these findings that the benefits of providing written tools to enhance jury decision-making are doubtful and certainly seem to do little to centre the reasoning behind verdicts on formal law. In this sense, written materials fail to meaningfully address the problems with juror competence.

II Juries and Sexual Offences

As alluded to above, the use of jury-trial poses particular difficulties in the context of sexual offences. This is largely due to the compound effect of bias and jury secrecy. Entrusting the determination of sexual offences to lay deciders is problematic given the large proportion of the public who subscribe to rape myths.[66] One Irish study found that 40.2% of respondents believed rape allegations were often false, while 30% believed women wearing revealing clothing invited rape.[67]

Such statistics would mean that — picking a random sample of twelve people from the population — between four and five members of the jury are predisposed to disbelieving complainants. And

[63] Mark Coen and others (n 3) 161.
[64] Catriona McKay and others (n 13) 498.
[65] ibid. 505.
[66] Gregor McCullagh, 'Securing a Rape Conviction at Trial: A Sisyphean Task?' (2024) University of Galway Law Review 108, 123.
[67] Hannah McGee, Madeleine O'Higgins and Ronán Conroy, 'Rape and Child Sexual Abuse: What Beliefs Persist About Motives, Perpetrators, and Survivors?' (2011) 26(17) Journal of Interpersonal Violence 3580, [3586].

with little to no checks on bias inside the jury room, there is nothing to stop such opinions from displacing impartial, evidence-based decision-making. It should of course be noted that judges, too, may be similarly susceptible to rape myths — though this can often be ascertained from the written judgement[68] and thus, action can be taken to correct such reliance, which is not the case with juries, which, as mentioned above, provide no reasons for their decisions.

Indeed, jury secrecy has the potential to aggravate this problem further. There is no way of knowing whether the collective wisdom theory accurately reflects the reality of jury deliberation.[69] Juries are a sum of their component jurors and all jurors are different. Some are more vocal while others are more passive. There is no reason, then, why one juror could not infect others with their biases. This is particularly damaging in the context of rape myths, to which a number of jurors are likely to subscribe.[70] Furthermore, research indicates that providing information debunking rape myths is largely ineffective,[71] and so, once rape myths have been introduced into the jury's reasoning, there is little that can be done to remove them.

However, jurors themselves are not the only ones to blame. Reliance on rape myths may also creep into jury deliberations from other sources. Research indicates that rape myths are routinely drawn upon by defence counsel in order to discredit complainants.[72] Despite so-called "myth-buster" directions given by judges, these remain relevant for juries and in fact there is no correlation between the giving of such directions and the conviction rate.[73] So even direct instructions of the judge do little to address shortcomings in the efficacy of jury reasoning.

Indeed, one particular drawback of the jury-trial as compared with a judge-only trial is that a jury is less capable of identifying and resisting the influence of such tactics employed by counsel.[74] On the other hand, judges, who in Ireland were, for the most part, barristers before joining the bench,

[68] See for example *R v G* [2008] UKHL 37 as explained in Claire McGlynn, 'Feminist activism and rape law reform in England and Wales' in Claire McGlynn and Vanessa Munro (eds), *Rethinking rape law: international and comparative perspectives* (Routledge 2011) 145-146.
[69] R J O'Hanlon (n 2) 68.
[70] Gregor McCullagh (n 66) 124.
[71] Kathryn R Klement and others(n 32).
[72] Olivia Smith and Tina Skinner, 'How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials' (2017) 26(4) Social & Legal Studies 441, 449.
[73] ibid. 454.
[74] Gregor McCullagh (n 66) 125.

are alive to the tactics employed by barristers in their argumentation and are therefore better positioned to avoid falling into the trap of biases which counsel may seek to introduce.

The appropriateness of the jury-trial for sexual offences is difficult, if not impossible to defend. Hardy's arguments in this regard are deeply unsatisfactory. In particular, her assertion that judges cannot be subjected to the same checks and balances as the jury because they do not represent a cross-section of society[75] cannot be sustained. As we have seen, juries sustain little practical accountability and, as we shall see below, they also do not represent an accurate cross-section of society.

Finally, doubts about the efficacy of jury-trials for sexual offences pertain not just among researchers but also among policy makers. Indeed, France, one of the largest non-common law users of juries has seen fit to abolish jury-trials for most rape cases.[76]

A simple comparison of the juries and judges illustrates why the latter is better placed to adjudicate sexual offence trials. Juries do not benefit from training against the influence of bias, nor are they experienced in setting their personal opinions aside in the same way that judges are. The potential for improperly motivated decisions looms ever larger when empirical evidence showing that juries base their reasoning primarily on extrinsic factors is considered. This is especially problematic in relation to sexual offences, where it is widely known that large proportions of the public subscribe to views which are at odds with social realities and the law itself and where legal counsel deliberately draw on the biases of the jury to influence trial outcomes.

II Jury-Trial and the Irish Language

While the discussion thus far has focused on the shortcomings of the jury in achieving justice, the jury-trial also poses a threat to the accused's right to a fair trial. This is because the use of juries for the trial of serious offences entails a significant encroachment on the accused's linguistic rights.

[75] Joanna Hardy, 'Judging the Jury: Why Rape Trials can Still be in Safe Hands' (*Law Society Gazette*, 11 December 2018) <https://www.lawgazette.co.uk/commentary-and-opinion/judging-the-jury-why-rape-trials-can-still-be-in-safe-hands/5068627.article> accessed 25 February 2026.

[76] Scottish Legal News (n 56).

In *MacCarthaigh v Ireland*,[77] it was held that there was no right to an Irish-speaking jury as this would give rise to an artificially shrunken jury. In *O'Maicín v Ireland*,[78] it was confirmed this was the case, even in relation to a case taking place in the Gaeltacht. These decisions, while motivated by the exigencies of social reality, are nonetheless difficult to defend.

Irish is, according to the Constitution, the first national language,[79] and clearly having a situation where constitutionally appointed decision-makers are unable to carry out their function in that language is problematic in itself. However, it may also impact the efficacy of the proceedings. In a criminal case, and especially one in the adversarial system, the testimony of the accused is of paramount importance. However, it is not just what is said that is significant but also how it is conveyed. In the context of the U.S. system, Shulman points out the problems arising from non-English speaking defendants not being judged on their own words. The words attributed to the accused are those of the interpreter and no matter how good the interpreter, no translation will ever perfectly convey the defendant's reactions and responses during the trial.[80]

While in a US context this is clearly unfortunate for Spanish speakers who find themselves on trial, it might be said to be one of the vicissitudes of not speaking the de facto official language of the country in which they live. However, in Ireland it is clearly a grave breach of the defendant's constitutional rights. By opting to exercise their linguistic rights and give testimony in Irish, the defendant not only forgoes the opportunity of having the jury directly consider their testimony but also risks a less favourable outcome due to the exercise of such a right.

Shulman cites research indicating that U.S. juries are often biased against non-English speaking defendants, thus disadvantaging them from the outset.[81] While no such research exists in Ireland, there is no reason to think such prejudice would not be replicated here. Human psychology dictates that people have a more negative perception of things they cannot understand and there is no reason why this would not extend to a juror's perception of an accused who chooses to speak Irish. While

[77] *MacCarthaigh v Ireland* [1999] 1 IR 200.
[78] *O'Maicín v Ireland* [2014] 4 IR 586.
[79] Bunreacht na hÉireann Article 8.
[80] Michael Shulman, 'No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants' (1993) 46(1) Vanderbilt Law Review 175, 177.
[81] ibid.

in reality, given the low number of Irish speakers, this is only likely to affect a small minority of the population, it is nonetheless deeply unsatisfactory. It is also a deficiency of the jury-trial which clearly applies equally to other jurisdictions, and given its damaging effects, should be given special consideration in all multi-lingual societies.

In the Irish case, this is a strong reason in support of abolition, given that the practical constraints grounding the decisions in *O'Maicín* and *MacCarthaigh* still prevail today. On the other hand, judges are required to have a certain level of Irish and as such are much better positioned to receive direct testimony from those wishing to be heard in the first national language of the State.

In short, the efficacy of juries relates to three fundamental flaws. Juror comprehension is insufficient for the tasks which they are assigned. Similarly, they are ill-equipped to deal with the potential biases especially pertinent to sexual offences. Furthermore, the jury as an institution may be inappropriate for multi-lingual societies, particularly in Ireland where it is not fit to try those who wish to plead in Irish.

The fundamental problem with jurors as decision-makers is that they lack the experience, qualifications and legal knowledge for such a role. Consequently, they struggle to apply the law, are particularly vulnerable to bias, and tend to base their reasoning on extrinsic factors rather than focusing on the evidence before them. Alternative remedies have proven deficient in curing these difficulties.

Indeed, the expenditure of money and time in developing the decision-making capabilities of jurors is illogical, when sitting in the same courtroom is a professional who possesses all those characteristics that the juror lacks. Given the financial constraints of the criminal justice system, it is illogical to train each incoming set of temporary decision-makers in the hope that they might be somewhat more competent when they can never hope to perform their role as well as a professional judge might. In this sense, efficiency demands that we abolish jury trials for criminal offences.

F THE UNFAIR BURDEN OF JURY SERVICE

'[Jury service has] an emotional aspect to it and the jury's worked very hard and it's very tiring and it's very difficult.'[82]

While much of this article has appeared critical of the jury as an institution, the author has significant sympathy for jurors themselves. They are expected, with little guidance and no expertise, to digest enormous amounts of information during trials which can last weeks and then decide complex legal tests in order to reach a decision.

However, the hardship of jury service goes well beyond the actual complexity of the work itself. Serving on a jury may place a significant emotional toll on jurors, sometimes resulting in vicarious or secondary traumatisation.[83] Indeed, a review compiling research in eighteen different studies found that up to 50% of jurors experience signs of trauma, which — for some jurors — last for months after the trial.[84] Studies indicate that jury deliberation and not harrowing evidence is the greatest cause of stress,[85] and so limiting the type of cases that are heard by juries would not necessarily resolve this problem. In other words, it is not just the crimes that we suppose would be difficult to judge which impact jurors' wellbeing, it is the whole jury process.

That being said, it may nonetheless be especially unreasonable to expect juries to determine cases of sexual crime. Various sources of trauma have been identified which are especially relevant to sexual offences including harrowing testimony, descriptive evidence, and the perception of cross-examination of complainants being antagonistic.[86] While practitioners in the area have, to a certain extent, agreed to be subjected to these trauma sources, jurors do not volunteer for the burdens to which they are subjected by the obligations of jury service.[87] Indeed, a person might have gone

[82] Mark Coen and others (n 3) 133 (Per Judge 9).
[83] ibid.132-133.
[84] Michelle Lonergan, Marie-Ève Leclerc, Mélanie Descamps, Sereena Pigeon and Alain Brunet, 'Prevalence and Relevance of Trauma – and Stressor-Related Symptoms Among Jurors: A Review' (2016) 47 Journal of Criminal Justice 51.
[85] Emma Welsh, Noelle Robertson, Lana Ireland and Graham Davies, 'The Impact of Jury Service on Scottish Jurors' Health and Well-Being' (2020) 59(1) Howard Journal of Criminal Justice 3, 12.
[86] Mark Coen and others (n 3) 132-133.
[87] Michael McHugh (n 15) 65.

their whole life trying to avoid such sources of distress and now, owing to jury service, find themselves involuntarily confronted by them.

Further support for the argument relates to the composition of juries. Given the number of people who been victims of sexual crime,[88] there is a high chance that someone serving on a jury may be or may know a victim of a sexual crime. It seems quite inappropriate to compel such a person to serve on a jury in a sexual offences trial. Research indicates women faced with cases relevant to prior trauma are particularly at risk for posttraumatic symptoms.[89] While one would hope that direct victims could have themselves excused, it would be up to them to approach the judge to this end and ultimately it would be a matter of judicial discretion whether to accede to the request.

Furthermore, the emotional burden which a sexual offences trial may impose on a jury is particularly problematic due to the absence of counselling services for jurors. In comparison to other jurisdictions, Ireland lacks any structured system of support for jurors.[90] However, as many of the studies cited above were carried out in other jurisdictions, it is clear that the emotional burden of jury-trials is by no means limited to Ireland. This demands further consideration of whether it is ethical to submit jurors to such experiences.

The foregoing highlights the unduly harsh burden which is imposed on those called to serve on a jury. Jurors are thrown into the deep end with no legal training and expected to apply unfamiliar legal tests to complex facts in order to determine guilt or innocence. The pressure of this, combined with lengthy trials and the lack of compensation mean jury service is not for the faint of heart. As noted above, jurors have done nothing to expose themselves to such trauma and indeed may have strived to avoid it. On the other hand, judges are experienced in such matters and have also volunteered to subject themselves to these conditions. In such circumstances, it appears more appropriate to leave the task of criminal adjudication to professional decision makers, as opposed to amateurs compelled to serve.

[88] Central Statistics Office, 'Sexual Violence Survey 2022 – Main Results' (*CSO*, 19 April 2023) <https://www.cso.ie/en/releasesandpublications/ep/p-svsmr/sexualviolencesurvey2022mainresults/> accessed 9 April 2024.
[89] Michelle Lonergan and others (n 84) 58.
[90] Mark Coen and others (n 3) 133.

G REPRESENTATIVENESS OF JURIES

For much of their history, juries were drawn from a narrow sect of society, namely men owning property of a certain minimum value. As O'Hanlon puts it, 'the pendulum has now swung very far from the previous position',[91] and now jury-service is open to all citizens on the register of electors. This is subject to some sensible restrictions with some people being ineligible and others deemed disqualified. Among those who are ineligible for jury service are certain public officials, legal professionals and members of An Garda Síochána and the Defence Forces, while disqualification applies to those convicted of certain crimes.

On paper, this leaves the remaining jury pool relatively wide, however the reality is very different. A number of categories of individuals can be excused as of right, including full-time students, ship masters, pilots and medical practitioners.[92] Additionally, the County Registrar may excuse a person who shows good reason for such excusal.[93] The Citizens Information website indicates that very often self-employed people will also be excused from jury service.[94] Colloquial evidence suggests that very often judges will excuse those with particular caring or work responsibilities.

Suddenly then, the pool of jurors appears significantly smaller. Indeed, the Irish Times reports that in 2019, of the 42,840 people called for jury service, a staggering 29,682 were excused.[95] The Irish jury therefore, cannot be said to be the representative cross-section of society it is purported to be. This undermines arguments, such as those made by Hardy[96] that the benefit of the jury is its representativeness.

One serious barrier to a representative jury is the fact that jurors are not paid for their service. While employees are required to be treated as though they were working for the time spent on the jury;[97] for self-employed persons, jury service poses a significant problem. This has been met with an unofficial, but virtually automatic practice of excusing self-employed persons from jury service,

[91] R J O'Hanlon (n 2) 61.
[92] Juries Act 1976, s 9(1).
[93] ibid. s 9(2).
[94] Citizen Information, 'Jury Service' *(Citizen Information,* 13 January 2023) <https://www.citizensinformation.ie/en/justice/courtroom/jury-service/#ld921f> accessed 01 March 2025.
[95] Ruadhrí Giblin, 'Serving on an Irish jury: 'It's Very Daunting' *The Irish Times* (Dublin, 09 March 2020).
[96] Joanna Hardy (n 75).
[97] Juries Act 1976, s 29.

which though unsatisfactory seems logical. Certainly, requiring such a person to undertake unpaid service which could last months, would be constitutionally suspect given that property rights protected by the Constitution have been understood as including the right to earn a livelihood.[98] However, it means that quite a significant number of people are excluded from the jury pool.

While the Law Reform Commission recommended a flat rate payment for jurors in 2013,[99] this never came to fruition. Moreover, this may not be sufficient to remedy the financial hardship imposed by jury service.[100] Given that jury service imposes such hardship on jurors, it is not difficult to see why it is viewed so negatively by the public. Indeed, applying wider economic logic, if you fail to adequately remunerate people, you encourage them to devote less attention to their work. In the context of a criminal trial, this poses a serious threat to the constitutional right of the accused to a fair trial.

One limitation on those eligible for jury service which this article does endorse is its limitation to citizens. The logical underpinning of juries being that they can disapply laws which run contrary to what is considered right by the People as a collective, it is clear they play a role in determining what laws should apply. The role of law-making is primarily vested in the Oireachtas which gets its legitimacy from the People. However, not everyone is entitled to vote in Dáil elections. In essence, it is a role considered to belong to Irish citizens. Its extension, by referendum, to British citizens[101] was largely a response to the threat by the Thatcher administration to remove the equivalent right from Irish citizens living in the United Kingdom.[102] So if decisions as to what laws should be enacted belong to Irish citizens (as exercised through voting in Dáil elections) then it is logical that decisions impacting the application of those laws and their compatibility with social values (as expressed through jury decisions) should also be left to Irish citizens. Further support for this is drawn from the fact that the jury, in exercising its functions, is performing a constitutional role. Given that responsibility for amending the Constitution rests solely with Irish citizens it is logical that the constitutional function inherent in the jury-trial be similarly assigned.

[98] *Murtagh Properties v Cleary* [1972] IR 330.
[99] Law Reform Commission, *Jury Service* (LRC 107 - 2013) 116.
[100] Mark Coen and others (n 3) 129-130.
[101] Ninth Amendment to the Constitution, 1984.
[102] Ireland Act 1949.

Finally, in the context of this discussion, it should be noted that an extension of jury service to non-citizens would not resolve the representation issues outlined above which all stem from the relatively broad exceptions allowed to the obligation to serve on a jury. Non-citizens, too, have jobs which would allow them to be excused. As such there is no justification for extending jury service beyond Irish citizens, as this is neither desirable, nor does it solve the problems causing an artificially shrunken juror pool.

At this juncture, it may be appropriate to sound a note of caution in relation to arguments claiming that the Irish jury is not socially diverse enough. The role of the 12 jurors is to act as an impartial decision-maker. As such, we should not strive to fill the jury with those likely to agree with one side or another due to their background. This is what is done in the United States during the juror selection process, where each side attempts to find juror candidates who will likely be sympathetic to their case. One need look no further than the now-infamous OJ Simpson decision to see the problems this can cause. In fact, there are now AI tools being offered to help legal teams enhance jury selection in their favour.[103] This is clearly not right and runs contrary to the intended objective of the jury representing a cross-section of society. Instead, it is recommended that a system is created wherein every juror, regardless of their social background, bases their decisions solely on the evidence presented to them.

Of course, this would not be a concern if, instead of jury-trials, such decisions were left to judges. Judges have special bias training available to them[104] and are experienced at leaving their own personal views outside the courtroom.[105] Moreover, where a judge does not do so, there is always a written judgment from which biases in the decision-making can be gleaned, and the possibility of an appeal.

In short, the logic of the jury is that it represents a cross-section of society. However, this is clearly not the case with regards the Irish jury-trial, whose participants are in a sense those unlucky enough not to be excused. That being said, arguments about juror diversity should be approached with

[103] See for example juryanalyst.com.
[104] Mary Carolan, 'New to the Bench: Judges to be Trained for the First time' *Irish Times* (Dublin, 17 September 2021).
[105] R J O'Hanlon (n 2) 66.

caution. Extending jury eligibility to non-citizens would not cure the problems which cause the jury to be unrepresentative of the population as a whole. As the jury does not reflect the cross-section of society which it claims to, there cannot be said to be any additional value brought to the trial by its decision-making, contrary to what is often claimed. Making the jury more representative would require serious investment, educating people of the importance of jury service as a civic obligation and covering at least some of the costs incurred by serving jurors. As is the case with many proposed reforms to the criminal justice system, there is simply not the political will to do this.

All the difficulties that arise in trying to ensure the jury is representative could be avoided much more simply and at far less cost if juries were simply abolished and their role performed by a judge. Judges, as a result of their legal training, already understand the serious issues at play in a criminal trial. They are also trained to think critically, and even the most casual perusal of the court reports is testament to the fact that judges, despite their similar background, do not all see things in the same way.

H CONCLUSION

This article has shown that the presumed legitimacy of the jury-trial as a necessary constituent of democracy is not without issue and should not prevent serious consideration of the continued relevance of such an institution today. The jury is no longer an essential barrier against oppressive state power. Similarly, its presumed role in disapplying laws seems to be at odds with the functioning of the modern state.

Jury secrecy poses a serious problem in terms of accountability, but various possible solutions suffer from serious drawbacks. The judge's charge and reasoned verdicts are both insufficient to prevent bias from creeping into the jury's reasoning and powerless to exercise a control on decisions motivated by improper reasoning.

Moreover, most countries in the Council of Europe do not employ jury-trial, with some traditional adherents moving away from it in recent years. The use of the traditional jury-trial not only isolates

Ireland among its peers but may also be contrary to the Convention's requirements for a fair trial. This is one of several problems which is caused by jury secrecy.

The effectiveness of juries is also doubtful. This is in part due to bias, which may stem from a number of sources and has been of particular concern with respect to sexual offences. This efficacy problem is compounded by jury secrecy, which makes such errors impossible to difficult to detect and therefore virtually impossible to correct.

Another problem with the efficacy of juries relates to their comprehension. There is significant evidence demonstrating that this understanding is insufficient to properly judge the issues with which they are confronted. Reforms to address comprehension barriers appear to be unsuccessful and may be prohibitively costly. These shortcomings in efficacy speak strongly for abolition of the jury-trial, because they could be significantly improved by professional judges without any additional cost.

Another advantage of transferring criminal adjudication to professional decision-makers relates to the burden of determining criminal responsibility. The jury-trial subjects' citizens, against their will, to enter a world which they have probably spent most of their lives trying to avoid, before giving them the very difficult task of making decisions which will change the lives of their fellow citizens. This appears to be an undue burden to place on the public, especially absent clear signs that it is preferable to trial by judge alone.

In this context, the finding that the Irish jury is not representative of the population as a whole, stands in stark contrast to the idealist view of the jury model. Indeed, it serves to undermine the notion that the jury represents a cross-section of society and as such provides additional value in the form of collective wisdom. The absence of any clear benefits to jury-trial serves to reframe the abolition question in terms of why preserve an institution that serves no good purpose but has the potential to do a great deal of mischief.

In essence, the case for abolition stems from the fact that the jury-trial is — in a sense — inherently flawed, and that the only solution which will address all the problems identified above is the complete removal of juries from the criminal justice system.

In short, the jury of today does not reflect the values which it is said to espouse, being neither a representative cross-section of society, nor a bulwark of democratic freedom. Furthermore, lay decision-making has been shown to be insufficient in protecting the interests of those concerned by the criminal justice system. It is therefore prudent to extend the role of judges in the domain in which they are already qualified and retire the jury as a mode of criminal trial.

THE APPLICATION OF THE EXCLUSIONARY RULE ON DEFENCE EVIDENCE OBTAINED IN BREACH OF CONSTITUTIONAL RIGHTS IN IRELAND

Paulina Andrea Larco Constantino*

A INTRODUCTION

In Ireland, the criminal process operates under the rule of law and is governed by the Irish Constitution and European law. These establish mandatory rules that must be followed by both citizens and state agents, meaning that the criminal process needs to take cognisance of various rights and safeguards into its process and seek to balance the rights of the accused person with the powers of the state agencies, which represents the interests of society. This directly relates to human rights and their protection within the criminal process, in the words of Amatrudo and Blake, 'We now live in a world which thinks through the legislative implications of criminal justice with one eye on human rights'.[1] It is in this context that the Irish criminal process is not only subject to its national law but also to international human rights instruments. As a consequence, the guarantees and values present in Irish criminal justice need to be interpreted according to the latter.

Within Irish law, the European Convention on Human Rights (ECHR) constitutes an important framework for the protection of fundamental rights. Among the numerous values enshrined within the ECHR, the right to a fair trial constitutes one of the essential pillars of the criminal process in the Member States of the Council of Europe.

Under article 6 of the ECHR,[2] the right to a fair trial establishes the following:

(1): 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing (...)'.[3]

(3): 'Everyone charged with a criminal offence has the following minimum rights:

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[1] Anthony Amatrudo and Leslie William Blake, *Human Rights and the Criminal Justice System* (Routledge 2015).

[2] European Convention on Human Rights, art 6.

[3] European Convention on Human Rights, art 6 (1).

(b): to have adequate time and facilities for the preparation of his defence'.[4]
(d): to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[5]

On the other hand, under national law, Article 38.1 of the Irish Constitution provides 'No person shall be tried on any criminal charge save in due course of law'.[6] In relation to this, Doyle and Hickey observed that 'the rather vague 'due course of law' allows courts to develop new requirements of fairness as the context requires'.[7] Taken together, these sources establish certain limits for the accused to guarantee minimum conditions within the criminal process. It is in this context that the admission or exclusion of evidence becomes important. The exclusionary rule details the circumstances in which a court cannot accept evidence because it was obtained in a way that breaches the constitutional rights of the accused.[8]

The jurisprudence in Ireland regarding this rule remained firmly established until 2015, with the courts interpreting the law in favour of excluding evidence obtained unconstitutionally in order to defend human rights. However, in 2015, the Court adjusted its position in *DPP v JC*.[9] This case is significant because in *DPP v JC*, Clarke J reformulated the test governing the admissibility of unconstitutionally obtained evidence. He held that such evidence will not be excluded where the breach of constitutional rights was inadvertent and did not involve a deliberate or conscious violation. In striking a balance between competing constitutional rights and values, Clarke J articulated a specific test.[10] Consequently, terms such as 'inadvertence', 'good faith', and 'deliberate and conscious breach of constitutional rights' have assumed relevance as they are part of the new test established by the case which:

[4] European Convention on Human Rights, art 6 (3)(b).
[5] European Convention on Human Rights, art 6 (3)(d).
[6] Article 38.1.
[7] Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd edn, Clarus Press 2019) 288.
[8] Aisling O'Connell, 'Case Comment: DPP v JC' (2017) 1 Irish Judicial Studies Journal 66.
[9] *DPP v JC* [2015] IESC 31.
[10] O'Connell (n 8) 67.

> allows for evidence obtained in inadvertent breach of constitutional rights to be admitted at trial while evidence obtained in knowing, reckless or grossly negligent breach must be excluded, except in exceptional circumstances.[11]

Although this new interpretation of the rule has been examined by academics, professionals and judges, the discussion has always been centred on the prosecution evidence, focusing on the protection of the accused by excluding material obtained in breach of constitutional rights. Far less focus, however, has been on the debate that concerns the exclusion or admission of defence evidence obtained under the same circumstances. The latter leads to various issues. In particular, it requires consideration of the application of the rule where the accused has obtained evidence that may be sufficient to support their acquittal. In this context, it raises the question of whether the exclusionary rule exists solely to protect the accused or whether it could also operate to their disadvantage. More fundamentally, the application of the rule to all parties within the criminal process depends on the rationale underlying it. Finally, it is questionable whether the administration of justice is served by excluding relevant evidence from the determination of guilt or innocence.

In the absence of sustained analysis regarding the exclusion or admission of this evidence, this article examines the reasons for taking the issue into consideration. Specifically, the legal implications in cases where defence evidence is obtained by the accused in breach of constitutional rights but supports either their acquittal or mitigating circumstances. In order to demonstrate what has been detailed so far, the exclusionary rule will be examined as one of the most important aims of the criminal process. Its underlying purpose, its functionality, and the proposal of a new test in cases of unlawfully gathered evidence by the defence will also be considered. Thus, it could be concluded that defence evidence obtained in breach of constitutional rights should be included under certain circumstances and requirements. Consequently, the application of the rule does not lead to the same conclusion when applied to defence or prosecution evidence although they aim to protect the same party within the criminal process: the accused and their rights involved in it.

[11] Yvonne Marie Daly, 'Overruling the Protectionist Exclusionary Rule: DPP v JC' (Dublin City University 2015) 10 <https://doras.dcu.ie/20947/1/JC_for_Doras.pdf> accessed 7 December 2025.

B THE PURPOSE OF THE CRIMINAL PROCESS IN IRISH CONSTITUTIONAL LAW

Analysing the purpose of the criminal process is central to the debate concerning the exclusionary rule. Whether a due process, or crime control model is adopted, both the Irish Constitution and Irish jurisprudence indicate that a central objective of the criminal process is to determine the guilt or innocence of a person. Due to the lack of regulation in Irish law, it becomes necessary to pay attention to what the jurisprudence and doctrine have established. A good example of this would be *Dunne v DPP*,[12] where Hardiman J recognised that the Gardaí are under a duty to seek out and preserve all evidence bearing upon the issue of guilt or innocence.[13] This case establishes an obligation on the prosecution not only to accuse but also to gather and preserve the evidence available. This should be interpreted and aligned with the fundamental aim of seeking the truth. If all the evidence is required, it is because this is the only way to determine whether an individual has committed a crime or not. Moreover, it is important to outline that the sentence recognises that this is a burden of the State. The State needs to look for all the evidence available, which is doubtful since the defence does not have equal tools to gather the evidence, affecting their right to a fair trial. This raises the issue of whether the legitimacy of the criminal process lies in securing convictions, or in ensuring that criminal liability is imposed only upon those who are in fact guilty.

As argued by Weigend, the truth is an essential element in the criminal process, and it is in that context that the law needs to re-establish social peace after the suspicion that a crime may have been committed. To achieve this duty, it becomes necessary to answer questions such as what happened, who committed the crime and how it was committed.[14] The objective of the criminal process is to reach precise determinations as well as fair procedures. To obtain this result, there are some principles and values that may be safeguarded.[15] It has been argued that:

> Alongside the maintenance of social order and the expression of social norms, the criminal justice system … has a range of other functions … . For example, we can say that one of the purposes of the criminal justice system is the punishment of

[12] *Dunne v Director of Public Prosecutions* [2002] 2 IR 305.
[13] ibid 3.
[14] Thomas Weigend, 'Truth in Criminal Law and Procedure: The Erosion of a Fundamental Value' (2019) 28 Jurídica International 29 <https://www.juridicainternational.eu/public/pdf/ji_2019_1_28.pdf> accessed 7 December 2025.
[15] Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edn, Oxford University Press 2019) 444.

> offenders. This is manifest in sentences to prison or 'punishment in the community' in the form of community penalties … .[16]

Moreover, one of the overarching aims of the criminal system is the regulation of the criminal activity within the limits that are in charge of protecting the citizen from a 'wrongful treatment and wrongful conviction'.[17]

Taking all this into account, it is possible to say that the criminal process should not be led just by the idea of convicting but also by looking for the truth. The final stage of the process, which is a conviction, must be guided by this principle; if not, the process would rest on the appearance of justice, without any purpose behind it. This point is illustrated in *People (Attorney General) v O'Brien,*[18] where Kingsmill Moore J held that judges should retain a discretion to admit illegal evidence since the public interest is in detecting and punishing crime.[19] He further observed that, '...In every case a determination has to be made by the trial judge as to whether the public interest is best served by the admission or by the exclusion of evidence of facts ascertained...'.[20]

As it is possible to see, a wrongful conviction is an issue that the judges must always bear in mind. The existence of guarantees in the process operates in favour of the people, in particular, the person against whom the power of the State is against, which is the accused. These principles and values work mainly to the benefit of the accused, as they are the party who is put in a position of disadvantage. In *DPP v JC*,[21] as Doyle and Hickey stated:

> ... the question of unconstitutionally obtained evidence raises a conflict between two competing values: the protection of rights and the administration of justice. This issue necessarily arises in the context of a criminal trial. This is part of the courts' core constitutional function to administer justice. The administration of justice is prejudiced by the exclusion of any relevant and reliable evidence.[22]

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[16] Azrini Wahidin and Nicola Carr, *Understanding Criminal Justice: A Critical Introduction* (Routledge 2012) 18.
[17] ibid 20.
[18] *People (Attorney General) v O'Brien* [1965] IR 142.
[19] Doyle & Hickey (n 7) 290.
[20] ibid 290-291.
[21] *DPP v JC* (n 9).
[22] Doyle & Hickey (n 7) 266 - 297.

The points outlined above are linked to the pursuit of the truth and its connection to the proper administration of justice. The only way to fulfill the function to administer justice is to have all the evidence available. Furthermore, it is important to distinguish which type of evidence is excluded since it may be essential for the determination of criminal liability. In this context, both roles of the court, administering justice and defending personal rights may clash, and in such cases, the latter role should not be unqualified.[23] The only way to avoid the problem described above is to place before the judges all the available evidence, which includes, in particular, the defence evidence. Since the prosecutor is in charge of the investigation, the defence does not have as many opportunities to obtain evidence on its own, and that may lead to judicial 'tunnel vision'. Moreover, the latter has been identified as one of the principal contributors to miscarriages of justice. Empirical research consistently points to factors such as eyewitness error, police and prosecutorial misconduct, false confessions, ineffective assistance of counsel, 'tunnel vision' and forensic science errors as primary causes of wrongful convictions.[24] It becomes necessary to consider the defence possibilities where the accused possesses enough unconstitutionally obtained evidence to prove their innocence, but are unable to put that evidence before the judges due to the application of this rule.

In such cases, what should hold more importance in order to achieve the proper administration of justice? If the process seeks the truth, how can defence evidence be excluded when it may be essential for determining the accused's criminal liability? Even when other aims of the criminal justice system are taken into account, they lose coherence if the individual convicted did not in fact commit the offence. In relation to crime prevention, it is argued that crime may be reduced as individuals may fear the consequences of committing a crime.[25] Consequently, convicting an innocent individual cannot contribute to reducing criminal behaviour. Similarly, rehabilitation is based on reforming wrongful conduct, which cannot arise where no offence was committed. Finally, the deterrence rationale in the context of the exclusionary rule will be examined in the following section, as it relates directly to the State (police, Gardaí, and other agencies) rather than to the accused.

[23] ibid 297.
[24] Katrina Mendham, 'Convicting the Innocent? An Analysis of the Causes of Miscarriages of Justice in Ireland 1993–2022' (MA Comparative Criminology and Criminal Justice thesis, Maynooth University 2022) 8.
[25] Wahidin and Carr (n 16) 18-19.

Whether the crime control or due process model applies in Ireland, the criminal process must always pursue the truth. Should this line of reasoning not be followed, and crucial defence evidence is excluded, the risk of a wrongful conviction increases. This would constitute a major problem, particularly as the standard of proof required for a conviction is beyond reasonable doubt.

C THE RATIONALE OF THE EXCLUSIONARY RULE

There are various stakeholders involved in the criminal process. Undoubtedly, the two parties that stand out the most are the State and the accused. The State has the power to lead the investigation against the latter, who has little tools to confront this. Much of the criminal process therefore involves the exercise of the State's power over individuals and intrusions against personal liberty, raising questions as to the justification and regulation of such powers. [26] Thus, all of the safeguards present in the process such as the right to legal representation, the right to silence, the presumption of innocence and the right to cross examine witnesses, exist to protect the accused. The individual's procedural rights submitted to judicial proceedings serve as a mechanism to limit the arbitrary and oppressive deployment of power by State authorities.[27] The principles of equality of arms and prosecutorial disclosure will be discussed briefly later in this article, as they are directly related to the positions of the State and the accused within the criminal process, particularly due to structural asymmetry.

When reflecting on the reasons behind the existence of the exclusionary rule, it can be seen that it is part of these safeguards or mechanisms designed to guarantee the right to a fair trial and all the principles involved within. The exclusion of evidence obtained in breach of constitutional rights is thought to protect the rights of the accused and the asymmetry existent in the process between them. Moreover, the exclusionary rule operates in a way that requires the State and its agencies to fully respect the rights enshrined in the Constitution. As explained by Hamilton, unconstitutionally obtained evidence can be admitted in a trial as long as the officers of the State make the claim that

[26] Lucia Zedner, *Criminal justice* (Oxford University Press 2004) 116.
[27] Omkar Sidhu, *The Concept of Equality of Arms in Criminal Proceedings under Article 6 of the European Convention on Human Rights* (Intersentia 2017) 9.

they are unaware of the breach, which is often referred to as the 'green garda' rule.[28] She also outlined that, 'Evidence obtained unlawfully or unconstitutionally should be excluded so that the courts and judges are not implicated in, or seen as condoning, the illegal behaviour of investigating authorities of the state'.[29]

Accordingly, a criminal process requires a clear and coherent policy regarding the admissibility of evidence obtained in breach of a suspect's rights.[30] The exclusionary rule was made to protect the accused from the enormous power of the State, which has the burden of convincing the court of the guilt of the accused.[31] It may be difficult to distinguish between the reason for the exclusionary rule and its aims; however, the two are quite connected. The rule exists not only to compensate for the asymmetry between the State and the accused, but also, as a consequence of this, it has a deterrence purpose.

The purpose of the deterrent effect is to exclude evidence obtained in contravention of constitutional rights in order to dissuade State officers from violating constitutional rights when gathering evidence for a trial.[32] In cases involving defence evidence, it is not possible to argue that the exclusion would serve a deterrent function, since the material is gathered by the accused. Consequently, no State officers are involved in violating constitutional rights, and the deterrence aim of the rule would lack any meaningful basis in this context. Nonetheless, it could be argued that the exclusionary rule serves a protectionist rationale, for instance, the protection of constitutional rights. In this view, the exclusion of unlawfully obtained evidence may be justified whether it is collected by State officers or private individuals.

However, in cases where defence evidence obtained in breach of constitutional rights is sufficient to support an acquittal or mitigating circumstances, exclusion may undermine the rights the rule seeks to protect. In such circumstances, a more appropriate response may lie in prosecuting the

[28] Irish Council for Civil Liberties, 'A Revolution in Principle: Assessing the Impact of the New Evidentiary Exclusionary Rule' (2020) 8 <https://www.iccl.ie/wp-content/uploads/2020/10/A-Revolution-in-Principle.pdf> accessed 7 December 2025.
[29] ibid 9.
[30] Yvonne Marie Daly (n 11).
[31] Thomas O'Malley, 'Chapter 4, Section 6 Burden and Standard of Proof', *The Criminal Process* (1st edn, Round Hall 2009) 4-23.
[32] Irish Council for Civil Liberties (n 28) 9.

accused for any offences committed in the course of obtaining the evidence, rather than excluding material relevant to the determination of guilt or innocence. If the exclusionary rule is applied in those cases, the court would exclude the defence evidence even in circumstances in which it helps to show the accused's innocence. The following analysis leads to the question of,if taking the rationale of the exclusionary rule into account, is it fair to exclude the evidence in cases where this exclusion would prejudice the accused and weaken a fair process whose purpose is to be certain of the truth?

With this in mind, it is necessary to recognise that there are additional ways to protect the accused apart from the exclusion of evidence, and one of them involves doing exactly the opposite; admitting the defence evidence obtained in breach of constitutional rights when it supports an acquittal or a determination of their criminal liability. Echeverría argues that evidentiary rules perform a protective function for the accused, operating as safeguards designed to uphold the rights of the defence.[33] It has been said that the central challenge for the State is to ensure that crime control measures are balanced with due respect for the interests of the accused.[34] That is, the procedural guarantees of the accused within the criminal process which operate as mechanisms designed to counterbalance the extensive powers of the State. Moreover, it is well established that fair trial rights reflect respect for the dignity of citizens:[35]

> In *People (DPP) v McMahon, McMeel and Wright*, the Supreme Court held that a trial judge's decision, as to whether or not to exercise his discretion to exclude illegally obtained evidence, would involve a balancing of the competing public interest in the solving of crime on the one hand, as against the public interest in the fair trial of the accused on the other.[36]

It seems that the most reasonable solution is to admit defence evidence in cases where it would be determinant of the guilt or innocence of the accused. Given that the reasoning of the rule is to

[33] Isabel Echeverría Donoso, *Los derechos fundamentales y la prueba ilícita. Con especial referencia a la prueba ilícita aportada por el querellante particular y por la defensa* (Ediciones Jurídicas de Santiago 2010) 74. In English: *"Fundamental rights and illegally obtained evidence. With special reference to illegally obtained evidence presented by the private plaintiff and by the defence"*.
[34] Sidhu (n 27) 1.
[35] Sidhu (n 27) 2.
[36] Vicky Conway, Yvonne Daly, and Jennifer Schweppe, *Irish Criminal Justice: Theory, Process and Procedure* (Clarus Press 2010) 80.

protect the accused, it becomes an essential protection to admit evidence where it would guarantee a fair trial for the accused. Furthermore, this may also contribute to ensuring the due course of law, as admitting such evidence could reduce excessive delay during the process, thereby benefiting the accused.

D THE CURRENT SITUATION IN IRISH LAW

As previously mentioned, Irish law must be interpreted in accordance with international regulation. Regarding this, the burden to prove, either the guilt or innocence of the accused, rests on the prosecutor.[37] Although this burden is not expressly regulated, the principle appears in Article 38.1 of the Irish Constitution, which refers to a trial 'in due course of law';[38] in Article 6 of the ECHR, which guarantees a 'fair trial';[39] and in national jurisprudence, such as *The People (DPP) v Dunne*.[40]

Similarly, the Garda Síochána Act 2005, under the section 7(1)(f) provides: 'The function of the Garda Síochána is to provide policing and security services for the State with the objective of bringing criminals to justice, including by detecting and investigating crime ...'.[41] Notwithstanding the fact that the Gardaí have the burden and, consequently, the control of the investigation, it is essential to examine to what extent the accused possesses the capacity to obtain evidence in their favour. When analysing the Irish process, the presence of safeguards are noticeably working in favour of the accused. For instance, the principles of equality of arms and prosecutorial disclosure. Both of these are crucial for the accused's defence and the construction of their theory of the case.

Nonetheless, there is a lack of regulation of the accused's ability to request investigating steps from the Gardaí, meaning that the only option available is to request them informally. The Gardaí have the discretion to ignore the requests, or accept them without time limits, all bearing no legal consequences. As a result, the criminal justice system fails in this particular area. It is crucial for the accused to have the right to request investigating steps from the officials, and the Gardaí should

[37] O'Malley (n 31).
[38] Article 38.1.
[39] ECHR (n 2).
[40] *Dunne v Director of Public Prosecutions* (n 12).
[41] Garda Síochána Act 2005, s 7(1)(f).

be obligated to conduct them, especially if they could help clarify the facts, influencing the process of the investigation and, therefore, the court's final determination. Some authors have recognised the relevance of the victim's evidence, acknowledging that it may be crucial for the success of the prosecution:

> ... It is rare to find a prosecution which can be brought successfully without the evidence of the victim, and it is therefore not in the interests of a prosecutor to have a disgruntled victim whose disillusionment may lead to a refusal to give evidence.[42]

However, this focus is open to criticism as it is possible to establish that the defence's evidence is just as important as the victim's evidence. Moreover, the defence's evidence may be more relevant, as the accused would try to prove their innocence with greater impetus than the victim, since it is the accused whose rights would be affected in the case of convicted.

E ALTERNATIVE RESPONSES: TEST OF 'BALANCING OF RIGHTS' AND SEPARATE PROSECUTION OF THE ACCUSED

The solution to this issue is twofold. Firstly, a special test should be applied by judges in these particular cases. Not all the evidence gathered unconstitutionally by the defence should be admitted, this will depend on the particular circumstances of the case. Secondly, if the accused has committed a crime while gathering unconstitutional evidence, they will need to be prosecuted for those offences. The admission of the evidence at trial does not imply the tolerance of the criminality; rather, it is important to treat these two matters as independent.

Regarding the test proposed, judges will need to take into account the seriousness of the constitutional rights which were violated, in comparison with the rights involved in the case per se. In other words, they need to balance both rights at issue. Should the judges be presented with a case of murder, and the defence obtains exculpatory evidence infringing the right to privacy of the 'victim' to prove their innocence, they might admit this evidence in the trial since the right to life is greater than the right to privacy. A different example shows that, if judges are presented with a case of robbery, and in order to prove their innocence, the accused gathered evidence

[42] James Hamilton, 'The Prosecutor and the Victim' Centre for Criminal Justice and Human Rights 4th Annual Conference, Cork (11th June 2010).

causing injury to an individual, the evidence might be excluded, as the right to physical integrity could not be seen as important as the right to property.

The court's decisions must be properly justified, providing reasons for their judgment. Judges have a duty to justify their judgment, whether they choose to exclude or admit defence evidence obtained in breach of constitutional rights. They need to analyse in depth the specific circumstances of the case, and how the balance between the rights could be solved to achieve both the duty of a proper administration of justice, and the protection of constitutional rights.

On the other hand, it is necessary to prosecute the accused for the offences that might be committed in the act of gathering exculpatory evidence. The fact that the court might admit defence evidence obtained in breach of constitutional rights does not necessarily mean that those offences would be tolerated by the system. Therefore, they need only to be addressed as distinct and separate issues. Consequently, the accused individual who committed a crime, whether it carries more or less weight than the violated right that led to the first trial, needs to be prosecuted by justice in order to fix that breach and prevent impunity.

F CONCLUSION

Taking everything above into consideration, this assessment sets out that, although the exclusionary rule has been widely discussed, the analysis has always been focused on the prosecution evidence and its protection of the accused's rights. However, little has been discussed about the reverse dimension of this rule, leaving unresolved situations in which the defence has gathered evidence in breach of constitutional rights, in circumstances in which such material is crucial in determining the result of the case. The analysis took different arguments into account that support the idea of admitting unconstitutional defence evidence.

Firstly, it was established that within the aims of the criminal justice system, the one that fulfills the process is the seeking of the truth. Judges need enough evidence to know what happened, where it happened, when it happened, and who did it. The latter question assumes relevance in the process, since the risk of convicting an individual who did not commit the crime constitutes a major problem. At the same time, when considering other aims of the criminal justice process,

such as the prevention of crime and rehabilitation, both make sense if the person who is being convicted is the person who actually committed the crime. Otherwise, the aims would not exist in reality, it is not possible to prevent crime if the court convicts an individual who did not commit an offence. As well as this, there would not be any rehabilitation effect in circumstances in which the person is innocent. Therefore, the criminal process needs to look for the truth, and to reach that, it is necessary for the judges to have all the available evidence before them.

Secondly, it is highly recommended to consider the reasoning behind the exclusionary rule. The rule exists due to the power of the State, it acts as a guarantee to deal with the asymmetry between the State and the accused. However, if there is a scenario in which the Gardaí do not interfere, and the accused is the person who gathers the evidence in breach of constitutional rights, how would this rule be applied? In this case, the rule loses all its reasoning, the defence is not abusing its power since they do not have any of it. The application of this rule can only be understood in the context of the State gathering evidence against the accused. The asymmetry that the rule seeks to overcome appears only in this context.

Thirdly, national legislation does not provide any possibility for the accused in terms of formally requesting investigating steps. This issue constitutes a significant issue since the defence does not have the same ability to gather evidence, being subject to the Gardaí discretion to decide whether or not to carry out the requested investigative measure. Consequently, given the current legislation in Ireland, it becomes essential to provide to the defence effective tools to counterbalance the wide discretion that the Gardaí have. It is unacceptable that the individual against whom the machinery of the State is being used is not given any effective procedural mechanism to collect evidence capable of supporting their theory of the case. This does not mean that the burden of investigation and persuasion of the court might be in the defence. However, the defence must have formal guarantees to request diligence from the Gardaí. Otherwise, it becomes clear that the defence evidence obtained unconstitutionally may be admitted in the process as it constitutes the only way of the defence to gather evidence.

This analysis indicates that a conceptual distinction must be made when applying the exclusionary rule to the prosecution and to the defence evidence. When the rule is applied to unlawfully obtained

evidence of the prosecution, reasons such as the deterrence effect, the limitation of State power, and the right to a fair trial, completely justify the exclusion as it balances the asymmetry between the accused and the defence. In contrast, when unconstitutionally obtained material is gathered by the defence, the function of the rule changes in the opposite way. In these particular situations, the exclusion of evidence would undermine the accused's rights rather than protect them, since the material may be crucial to establish their innocence or mitigating circumstances.

Nonetheless, it is important to bear in mind that the admission of evidence does not mean the toleration of crime. Should the accused commit an offence while gathering evidence, they need to be brought to court in order to be prosecuted for committing the crime. In addition, the court must examine the particular circumstances of the case, with the application of the test of balancing rights in order to know whether the unlawful evidence is worth its admission in the trial. This involves a complex analysis, where the court might examine the rights present in the primary trial and the rights violated from the gathering of evidence.

In summary, unlawful defence evidence may be admitted when it is indispensable to the court to reach a fair proper administration of justice, that is, convicting the individual who actually committed the crime concerned.

ADDRESSING GAPS IN INTERNATIONAL HUMAN RIGHTS PROTECTION: A CRITICAL ANALYSIS OF THE PROPOSED CONVENTION ON THE RIGHTS OF OLDER PERSONS

Princess Gloria Sunny-Joe*

A INTRODUCTION

In April 2025, the United Nations Human Rights Council adopted Resolution 58/13 by consensus, establishing a new Open-Ended Intergovernmental Working Group mandated to draft a legally binding international instrument on the human rights of older persons.[1] This body is distinct from the original Open-Ended Working Group on Ageing (OEWGA), which was created in 2010 by General Assembly Resolution 65/182 to consider the existing international framework for the human rights of older persons and to identify possible gaps.[2]

Endorsed by more than eighty Member States, this landmark step represents the culmination of sustained advocacy over several decades. As underscored by the Assistant Secretary-General for Human Rights, Ilze Brands Kehris, the moment calls for the closure of persistent conceptual and legal lacunae by developing standards tailored to older persons, in order to ensure their full and effective enjoyment of all human rights.[3]

This article advances two central arguments. First, whilst legitimate concerns about treaty proliferation exist, the distinctive character of age-based discrimination, its universality, its invisibility within existing frameworks and its often-fatal consequences justify a compelling rationale for a dedicated convention. Second, and more fundamentally, the regional instruments developed by the Organisation of American States (OAS) and the African Union (AU) demonstrate, not merely that binding standards are achievable, but that the process of convention-making itself generates profound political transformation. Drawing on Baxi's concept of the

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[1] UNHRC Res 58/13 (3 April 2025) UN Doc A/HRC/RES/58/13.

[2] The original Open-Ended Working Group on Ageing (OEWGA) was established by UNGA Res 65/182 (21 December 2010) UN Doc A/RES/65/182. Resolution 58/13 creates a distinct intergovernmental working group mandated specifically to elaborate a legally binding instrument.

[3] UN OHCHR, 'ASG Brands Kehris Calls For International Legally Binding Instrument on the Human Rights of Older Persons' (Statement, 8 May 2025).

'production of politics' through human rights instruments,[4] this article argues that the significance of the proposed Convention on the Rights of Older Persons (CROP) lies not only in the formal legal obligations it will codify but also in the mobilisation, visibility and normative recognition it will engender.

This article proceeds as follows. Part B examines the specificity of age-based harm, demonstrating through jurisprudential analysis, particularly that of the European Court of Human Rights (ECtHR) in the *Carvalho* and *Nurcan Bayraktar* cases, that existing frameworks systematically fail to recognise ageism as discrimination, while also addressing the intersectional dimensions of age-based harm. Part C analyses the current normative framework, focusing on the limitations of the Committee on Economic, Social and Cultural Rights' (CESCR) General Comment No 6 and soft law instruments, and draws on O'Rourke's analysis of the anti-torture norm's relevance to older persons' care. Part D confronts the proliferation critique directly, engaging with fragmentation scholarship and drawing instructive comparisons with the Convention on the Rights of the Child (CRC). Part E draws comparative lessons from regional instruments with expanded analytical assessment. Part F consolidates these analyses and makes a case for CROP, incorporating reflections from the recent Geneva session, whilst Part G assesses the path forward.

B THE SPECIFICITY OF AGE-BASED HARM: BEYOND DEMOGRAPHIC IMPERATIVES

The demographic rationale for CROP is compelling, but not in itself determinative. Mégret's analysis reveals that ageing possesses unique characteristics that distinguish it from other protected grounds: universality (everyone ages), heterogeneity (spanning active sexagenarians to centenarians) and diminishing advocacy power precisely when protection is most needed.[5] With an estimated 1.2 billion persons worldwide aged 60 years and above, a figure anticipated to rise to 2.1 billion by 2050,[6] and persons aged 65 years and over expected to surpass the global population of children under 18 by 2080,[7] the magnitude of demographic change is undeniable. Nevertheless,

[4] Upendra Baxi, 'Too Many, or Too Few, Human Rights?' (2001) 1 HRLR 1, 8.
[5] Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11 HRLR 37, 44–46, 60.
[6] UN DESA, 'International Day of Older Persons' (United Nations, 2025) <https://www.un.org/en/observances/older-persons-day> accessed 15 December 2025.
[7] ibid.

population trends alone cannot justify the creation of a specialised treaty; the decisive question is whether older persons are exposed to distinct forms of harm that remain insufficiently addressed within existing human rights regimes.

The available evidence indicates that this requirement has been satisfied. Mégret demonstrates that older persons are routinely marginalised within prevailing human rights regimes, not through overt exclusion but through more subtle forms of neglect: the absence of age-specific guarantees in core universal treaties, the 'striking paucity' of sustained engagement in treaty body reporting, and the enduring tendency to conceptualise ageing primarily as a question of health or social welfare rather than one of rights, autonomy and human dignity.[8] The jurisprudence of the ECtHR highlights this gap with particular clarity. In *Carvalho Pinto de Sousa Morais v Portugal*,[9] the domestic court reduced compensation for a 50-year-old woman's loss of sexual function, reasoning that 'sex is not as important' for women of her age.[10] While the ECtHR found violations of Articles 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, its analysis focused on gender stereotyping rather than age discrimination.[11] As Mantovani, Spanier and Doron note, European human rights law continues to struggle to detect age as an autonomous and distinctive ground of discrimination, even in cases where ageism is manifest and unequivocal.[12]

The subsequent decision in *McDonald v United Kingdom* further illustrates the Court's reluctance to engage meaningfully with the specific situation of older persons. The applicant, a sixty-seven-year-old disabled woman, challenged her local authority's decision to withdraw night-time care assistance and instead provide incontinence pads, despite the fact that she was not incontinent. The Court acknowledged that the withdrawal of care engaged Article 8, recognising that it conflicted with the applicant's 'strongly held ideas of self and personal identity' and that 'the very essence of the Convention was respect for human dignity and human freedom'. However, the majority afforded the state a wide margin of appreciation in balancing individual care needs against

[8]Mégret (n 5) 38, 49–50.
[9]*Carvalho Pinto de Sousa Morais v Portugal* App no 17484/15 (ECtHR, 25 July 2017).
[10]ibid [52].
[11]Eugenio Mantovani, Benny Spanier and Israel Doron, 'Ageism, Human Rights, and the European Court of Human Rights: A Critical Analysis of the *Carvalho v Portugal* Case (2017)' (2018) 11(2) DePaul J Soc Just 1, 13–14.
[12]ibid 1.

budgetary constraints, declining to interrogate whether the state's approach to organising older persons' care reflected systemic age-related devaluation. This contrasts with *JL v Italy*, where the same Court conducted a rigorous analysis of gender-based stereotyping in judicial reasoning about sexual violence, demonstrating the analytical sophistication that becomes possible once a mature normative framework exists for a particular form of discrimination. The absence of such a framework for age discrimination leaves courts without the conceptual tools to identify and address ageist reasoning. O'Rourke's analysis of the *McDonald* case in her discussion of inadequate continence care is instructive, demonstrating how paternalistic decision-making about older persons' care needs operates as a form of situational powerlessness that the anti-torture norm should address.

The more recent case of *Nurcan Bayraktar v Türkiye*[13] further illustrates this doctrinal limitation. The applicant, an older woman, challenged her treatment in proceedings where age-based stereotypes influenced the assessment of her credibility and the gravity attributed to the harm she suffered. The ECtHR acknowledged the presence of stereotypical reasoning in the domestic proceedings and found a violation of the Convention.[14] Significantly, however, the Court's analysis again subsumed the age dimension within its broader stereotyping framework, declining to develop a distinct analytical approach to age-based discrimination. While the Court referenced *Carvalho* in its reasoning, it did not build upon that precedent to articulate autonomous principles governing ageism.[15] The pattern that emerges from these cases is revealing: even where the ECtHR recognises the presence of age-related stereotypes, it consistently absorbs them into gender-based or other established discrimination categories, thereby failing to develop the autonomous age-discrimination jurisprudence that a dedicated normative framework would necessitate.

By contrast, the Court's approach to gender stereotyping in *JL v Italy*[16] demonstrates the analytical rigour that becomes possible when a well-developed normative framework exists. In *JL*, the Court conducted a detailed examination of how gender stereotypes pervaded the domestic court's

[13] *Nurcan Bayraktar v Türkiye* App no 27094/20 (ECtHR, 27 June 2023).
[14] ibid [74]–[76].
[15] ibid [80]–[82]. See also Mantovani, Spanier and Doron (n 11) 14–15 on the ECtHR's reluctance to develop autonomous age-discrimination jurisprudence.
[16] *JL v Italy* App no 5671/16 (ECtHR, 27 May 2021).

assessment of the complainant's credibility in a sexual violence case, identifying specific stereotypical assumptions and articulating clear standards for their identification.[17] The sophistication of this analysis reflects decades of normative development through instruments such as the Convention on the Elimination of All Forms of Discrimination against Women and its associated jurisprudence. The absence of an equivalent framework for age discrimination explains why the ECtHR's treatment of ageism remains comparatively underdeveloped, reinforcing the case for CROP as a catalyst for doctrinal maturation.

I Intersectionality and Compounded Vulnerabilities

The cases discussed above also illuminate a critical intersectional dimension that a dedicated convention must address. Older persons do not experience discrimination solely on the basis of age; rather, age intersects with gender, disability, race, socioeconomic status and other characteristics to produce compounded forms of disadvantage. The *Carvalho* case exemplifies this intersection: the domestic court's reasoning reflected not merely ageism but the convergence of age and gender stereotypes, producing an assumption that older women's sexuality is inherently diminished. Similarly, *Nurcan Bayraktar* reveals how age and gender combine to undermine older women's credibility before judicial bodies.

The COVID-19 pandemic starkly demonstrated these intersectional dynamics. Breau's research reveals that older persons' disproportionate mortality rate during this time resulted not merely from biological vulnerability, but from systemic failures such as healthcare rationing explicitly deprioritising elderly patients, institutional neglect and ageist policy assumptions.[18] These failures were compounded for older persons with disabilities, those from ethnic minority backgrounds, and those in lower socioeconomic groups, who faced multiple and overlapping barriers to accessing healthcare and social support. Similarly, Baird's post-earthquake study of the city of Canterbury, New Zealand, revealed that disaster response frameworks systematically overlooked the needs of older persons, treating them as passive recipients of assistance rather than as rights-holders with

[17] ibid [133]–[141].

[18] Susan Breau, 'Lessons From COVID-19 with Respect to the Positive Obligations of States to Protect Older Persons in the Event of Disasters' (2022) 5 YIDL 32, 38–45.

distinct entitlements.[19] Furthermore, Chirwa and Rushwaya note that the position of older persons in many African contexts is marked by a deep-seated paradox: despite cultural norms that emphasise reverence and respect for elders, many experience intensifying economic insecurity, expanding familial responsibilities, social marginalisation and heightened exposure to neglect and abuse.[20]

O'Rourke's monograph, *Human Rights and the Care of Older People*, provides a compelling framework for understanding these intersectional harms. Her analysis demonstrates that the care context is a primary site of rights violations for older persons, and that ageism, variously described within human rights literature as structural, institutional, macro, interpersonal, and intersectional, operates to obscure the human experience of suffering, affecting even the legal actors called upon to interpret and apply human rights norms.[21] O'Rourke contends that older people are being systematically subjected to ill-treatment in contravention of the anti-torture norm by state administrations, health and social care professions, and organisations involved in care provision.[22] Her detailed examination of care settings, particularly the case study of inadequate continence care, reveals that older persons experience a distinctive combination of vulnerabilities, such as physical dependency, the denial of assistance with basic bodily needs, and institutional power imbalances, that existing human rights instruments were not designed to address and that current interpretive approaches have proven inadequate to remedy.[23]

These harms share a common source: they arise from the failure of existing legal instruments to recognise age-specific vulnerabilities, particularly where age intersects with other grounds of discrimination. Broad anti-discrimination provisions fall short when decision-makers, including judges, fail to see age-based assumptions as discriminatory. The structural invisibility of ageism allows discriminatory effects to persist unintentionally. Practices such as healthcare rationing

[19] Natalie Baird, 'Disasters, Human Rights and Vulnerability: Reflections from the Experiences of Older Persons in Post-Quake Canterbury' (2019) 2 YIDL 314, 326.

[20] Danwood Chirwa and Chipo Rushwaya, 'Guarding the Guardians: A Critical Appraisal of the Protocol to the African Charter on the Rights of Older Persons in Africa' (2019) 19 HRLR 53, 55.

[21] Maeve O'Rourke, *Human Rights and the Care of Older People: Dignity, Vulnerability, and the Anti-Torture Norm* (OUP 2024) 1–4.

[22] ibid 5–7.

[23] ibid 150–152.

disadvantage older patients. Mandatory retirement policies and judicial assumptions about diminished autonomy or sexuality illustrate entrenched ageist norms that current human rights instruments inadequately address. CROP has the potential to fill this critical gap by explicitly identifying and delineating the specific forms that discrimination assumes in the context of ageing, with particular attention to intersectional dimensions. In a manner analogous to the Convention on the Rights of Persons with Disabilities (CRPD), which reconceived disability as arising from societal barriers rather than individual impairment,[24] CROP could reframe ageing not as an inevitable decline but as a life stage warranting robust rights-based protections. The symbolic and instructive impact of the convention, rendering visible that which has long remained obscured, may prove as significant as its legal provisions.

C THE EXISTING FRAMEWORK: THEORETICAL COVERAGE AND PRACTICAL GAPS

Some critics argue that current human rights instruments sufficiently protect older persons when interpreted expansively, a position that warrants careful consideration. The Universal Declaration of Human Rights[25] and the core international covenants, the International Covenant on Civil and Political Rights (ICCPR)[26] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[27] apply universally, irrespective of age. Notably, the CESCR addressed older persons explicitly in General Comment No 6, acknowledging that while the Covenant contains no specific references to older persons, they remain entitled to the full spectrum of rights it guarantees.[28] Nevertheless, General Comment No 6 illustrates the inherent limits of interpretive strategies. Adopted in 1995, it notes that state reports 'have not provided any information in a systematic way on the situation of older persons' beyond social security data,[29] a situation that remains largely unchanged nearly three decades later. Whilst the General Comment provides

[24] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) preamble (e) and art 1.

[25] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

[26] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[27] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[28] CESCR, General Comment No 6: The Economic, Social and Cultural Rights of Older Persons (8 December 1995) UN Doc E/1996/22, para 10.

[29] ibid para 14.

valuable guidance, it lacks the legally binding force of treaty provisions. States are under no formal obligation to implement its recommendations, and the CESCR have no dedicated mechanisms to monitor issues affecting older persons. Mégret contends that while the CESCR have issued a General Comment on older persons' rights, international treaties carry a distinct advantage: they come with a 'force obligatoire' that can significantly impact domestic policy, particularly when monitored by a dedicated treaty body.[30] Similar claims were made prior to the adoption of the CRPD. Its transformative effect in reframing disability, producing targeted jurisprudence, and institutionalising rights claims demonstrates that specialised instruments achieve outcomes beyond the reach of interpretive approaches.

O'Rourke's analysis powerfully reinforces this point. She argues that while a dedicated convention will provide important new articulations of rights, the full potential of such an instrument will be realised only through sustained interpretive engagement with the detailed doctrinal frameworks that implement those rights in practice.[31] The OHCHR has confirmed this assessment. In a 2021 working paper prepared for the OEWGA, the OHCHR observed that 'the conceptual limitations of existing instruments appear to be a significant factor' contributing to the 'fragmented and inconsistent coverage of the human rights of older persons in law and practice'.[32] The OHCHR added that reliance on existing bodies to consider ageing-related issues would likely prompt 'only incremental change' to the widespread 'silences, neglect and relative invisibility of human rights issues of central concern to older persons'.[33]

The ECtHR's handling of *Carvalho* exemplifies this issue regarding the absence of a binding legal framework. Whilst acknowledging that age may constitute 'other status' under Article 14 of the ECHR,[34] the Court subsumed it under gender, thereby failing to establish autonomous age-discrimination jurisprudence. As Mantovani, Spanier and Doron note, European human rights law routinely overlooks age as a distinct ground, even when ageism is evident.[35] Their critique is

[30] Mégret (n 5) 48, 64.
[31] O'Rourke (n 21) 218–219.
[32] OHCHR, 'Update to the 2012 Analytical Outcome Study on the Normative Standards in International Human Rights Law in Relation to Older Persons' (March 2021) 1.
[33] ibid 4–5.
[34] *Carvalho* (n 9) [45].
[35] Mantovani, Spanier and Doron (n 11) 1.

apposite: without frameworks attuned to age, courts revert to familiar categories, leaving age-specific harms unaddressed. The authors express frustration at the ECtHR's reluctance to acknowledge that age-based classifications can, in certain contexts, raise legitimate human rights concerns.[36] Thus, the absence of binding international standards explicitly prohibiting age discrimination enables this doctrinal gap.

Moreover, the CEDAW Committee's General Recommendation No 27 on older women,[37] alongside soft law instruments such as the 1991 Principles for Older Persons,[38] and the 2002 Madrid International Plan of Action on Ageing,[39] offer normative guidance but carry no legally binding force. Following fourteen years of assessing these lacunae, the OEWGA recommended a binding instrument as its first option,[40] and Resolution 58/13 accepted this recommendation.[41]

D CONFRONTING THE PROLIFERATION CRITIQUE

The most sophisticated critique of CROP concerns treaty proliferation and fragmentation, operating on both practical and systemic levels. Practically, states often submit late or incomplete reports under existing obligations, and a new treaty with monitoring requirements could strain capacity, especially in developing countries. Systemically, multiplying specialised treaties risks normative incoherence. However, this argument is overextended: applied universally, it would preclude any new human rights instrument, including the CRPD, which was adopted despite comparable concerns.

Baxi's insight reframes the issue: the key is not the burden of additional treaties but whether the 'production of politics' they generate, with visibility, mobilisation and normative recognition, justifies it.[42] Experience with specialised conventions for children, women and persons with disabilities shows that dedicated instruments drive advocacy, focus jurisprudence and embed rights

[36]ibid 13.
[37]CEDAW Committee, General Recommendation No 27 on Older Women and the Protection of Their Human Rights (16 December 2010) UN Doc CEDAW/C/GC/27.
[38]UNGA Res 46/91 (16 December 1991) UN Doc A/RES/46/91.
[39]Madrid International Plan of Action on Ageing (2002) UN Doc A/CONF 197/9.
[40] Report of the OEWGA on its fourteenth session (31 May 2024) UN Doc A/AC.278/2024/2, para 15.
[41] UNHRC Res 58/13 (n 1) para 1.
[42] Baxi (n 4) 8.

claims in institutional architectures that general instruments cannot replicate. Practical measures, which include streamlined reporting, coordinated scheduling and targeted technical support, can reduce compliance burdens.

I Instructive Comparisons: The Convention on the Rights of the Child

The history of the Convention on the Rights of the Child (CRC)[43] offers a particularly instructive parallel. Prior to its adoption, critics similarly argued that children's rights were adequately protected under existing general instruments and that a dedicated convention was unnecessary. Van Bueren's account of the CRC's development demonstrates that the general human rights framework proved insufficient to address the distinctive vulnerabilities of children, precisely because it was designed around the paradigm of the autonomous adult rights-holder.[44] The CRC's subsequent near-universal ratification and its transformative impact on domestic legislation, judicial reasoning and policy development vindicated the decision to create a specialised instrument. Critically, the CRC did not merely replicate existing rights in a child-specific form; it introduced genuinely novel concepts, including the best interests of the child principle and the evolving capacities doctrine, that reshaped the entire field.

The scale of political resistance to a dedicated older persons' instrument has been significant. In 2012, 109 countries abstained from the UN General Assembly vote giving the OEWGA its additional mandate to propose the contents of an international legal instrument.[45] Where the CRC introduced the concept of evolving capacities to capture the progressive acquisition of autonomy by children, a CROP must address the conceptually distinct challenge of supporting persons whose decision-making capacity may be diminishing, without thereby legitimising paternalistic restrictions on autonomy. Mégret has argued that the specificity of age-based harm, particularly with its combination of physical vulnerability, social marginalisation, and institutional neglect,

[43] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

[44] G Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff 1995) 12–15.

[45] Léon RL Poffé, 'Towards a New United Nations Human Rights Convention for Older Persons?' (2015) 15(3) HRLR 591, 594. See also O'Rourke (n 21) 10, citing Poffé.

requires its own normative vocabulary, just as the CRC required new concepts to capture children's distinctive position.[46]

II The Fragmentation Concern

The systemic fragmentation concern is more significant. The International Law Commission's 2006 study cautioned that treaty specialisation risks producing multiple partial systems rather than a coherent and integrated framework.[47] Fragmentation in human rights is primarily an institutional issue: it arises less from conflicting substantive norms than from divergent institutional preferences and structural biases across treaty bodies. Applied to CROP, the worry is that a dedicated Committee on Older Persons could develop jurisprudence at odds with the CRPD Committee's interpretations of ageing-related disability issues.

Recent scholarship, however, suggests that these concerns about fragmentation are overstated. Peters contends it is 'time to bury the f-word', noting that international courts and treaty bodies already employ coordination tools to manage potential conflicts, such as cross-referencing, systemic interpretation and inter-body dialogue.[48] Her detailed empirical analysis demonstrates that the international legal order has developed sophisticated mechanisms for managing normative pluralism, and that the feared consequences of fragmentation have largely failed to materialise.[49] The drafters of CROP can formalise such mechanisms, obliging its monitoring body to engage with the CESCR, CRPD Committee and other relevant treaty bodies. Importantly, the CRPD offers a precedent: it complements rather than displaces general frameworks whilst establishing disability-specific standards. CROP could function similarly in this regard.

The definitional question of who qualifies as 'older' is often cited as another challenge to CROP's coherence. While the UN generally uses 60 as a threshold,[50] this is arbitrary and culturally contingent. Unlike sex or disability, age exists on a continuum, rendering the 'older persons'

[46] Mégret (n 5) 44–46.

[47] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682, paras 8–9.

[48] Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 ICON 671, 672.

[49] ibid 685–690.

[50] CESCR, General Comment No 6 (n 28) para 9.

category highly heterogeneous. Mégret contends that any future convention should strike a balance between chronological thresholds and flexibility, allowing for national, local and functional variations rather than rigid age limits.[51] Doron and Apter have similarly argued that a functional rather than strictly chronological approach to defining the convention's personal scope would better accommodate cultural and demographic diversity whilst maintaining normative coherence.[52]

E LESSONS FROM REGIONAL INSTRUMENTS

I The Inter-American Convention on Protecting the Human Rights of Older Persons

The OAS adopted the Inter-American Convention on Protecting the Human Rights of Older Persons on 15 June 2015, making the Americas the first region to establish binding standards for the rights of older persons.[53] Its 27 substantive articles establish comprehensive rights including equality, dignity, independence, autonomy, health, work, education, housing and accessibility.[54] The Convention's broad scope reflects a holistic conception of ageing, encompassing physical, psychological, social and economic dimensions, and extending beyond protection from harm to positive entitlements such as access to services, societal participation and opportunities for self-fulfilment.

Most significantly, Article 12 introduces an autonomous right to long-term care, a normative innovation recognising that care needs in older age constitute a distinct rights claim beyond general health or disability frameworks.[55] This provision addresses what Mégret identifies as a defining feature of ageing: the potential need for sustained, comprehensive support not fully captured by existing rights categories. O'Rourke's analysis reinforces this position. She argues that states' positive obligations should be recognised to include a duty to ensure access to consensual care, encompassing the provision of decision-making support and care services for those who lack

[51] Mégret (n 5) 43.

[52] Israel Doron and Itai Apter, 'The Debate Around the Need for an International Convention on the Rights of Older Persons' (2010) 50 Gerontologist 586, 590–592.

[53] Inter-American Convention on Protecting the Human Rights of Older Persons (adopted 15 June 2015, entered into force 11 January 2017) OAS Doc AG/RES.2875 (XLV-O/15) (OAS Convention).

[54] ibid arts 5–31.

[55] ibid art 12. See also Mégret (n 5) on the normative innovation of autonomous care rights; O'Rourke (n 21) 6–7 on states' positive obligations to ensure access to consensual care.

sufficient resources.[56] The right to care encompasses healthcare, social support, assistance with daily activities and the entitlement to receive care in dignity-preserving environments. It illustrates how specialised instruments can produce substantive normative advances unattainable through the interpretation of general treaties. The Convention also establishes a Conference of States Parties and Committee of Experts, with individual petition mechanisms administered through the Inter-American Commission on Human Rights.[57]

Its impact, however, is constrained by low ratification: nearly a decade after adoption, only 12 of the 35 OAS member states (Argentina, Belize, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Peru, Suriname and Uruguay) have acceded, while key regional powers such as the United States, Canada and Brazil remain outside the treaty framework.[58] The Committee has only recently become operational, leaving jurisprudential development at an early stage. What then accounts for the Convention's limited ratification? Its extensive scope may paradoxically deter adoption, as states are reluctant to assume wide-ranging obligations across multiple policy areas simultaneously. However, the adoption of a flexible age threshold (60 and above) while permitting states to apply lower limits,[59] demonstrates that definitional challenges are manageable. Poffé has documented the political difficulties that have attended the older persons' convention project, evidenced by the significant abstentions in key General Assembly votes.[60] Accordingly, in drafting CROP, it may be prudent to consider a more focused initial instrument, supplemented by optional protocols addressing additional rights, to encourage broader and more rapid ratification.

II The African Union Protocol

The AU Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, adopted in January 2016, entered into force on 4 November 2024 after securing

[56] O'Rourke (n 21) 150–152, arguing that adequate care for basic needs is an obligation under the anti-torture norm grounded in human dignity.

[57] OAS Convention (n 53) arts 35–36.

[58] Organization of American States, 'Inter-American Convention on Protecting the Human Rights of Older Persons (A-70): Signatories and Ratifications' <https://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons_signatories.asp> accessed 18 December 2025.

[59] OAS Convention (n 53) art 2.

[60] Poffé (n 45) 594–596 on the political difficulties attending the older persons' convention project.

15 ratifications.[61] It supplements Article 18(4) of the African Charter, which states only that 'the aged and the disabled shall also have the right to special measures of protection'.[62] The Protocol expands this limited provision into concrete guarantees, including equality, access to justice, protection from harmful practices, social protection and healthcare.[63]

Several provisions address issues specific to the African context. Article 8 prohibits harmful traditional practices, directly targeting witchcraft accusations against older women, which have led to documented violence and fatalities.[64] The health provisions articulated in Article 15 reflect the realities of under-resourced healthcare systems.[65] This contextualisation illustrates that international instruments can integrate regional specificities, offering a valuable lesson for CROP's universal design.

However, Chirwa and Rushwaya's detailed critique highlights notable shortcomings. First, they contend that the Protocol suffers from imprecise drafting of its substantive obligations. Many provisions employ progressive realisation language without clarifying the minimum core obligations that states must fulfil immediately, thereby weakening the justiciability of the rights guaranteed.[66] In settings of pervasive poverty, provisions contingent on available resources may further limit the effective enforceability of older persons' rights.[67] Second, the Protocol's intersectional provisions are insufficiently developed. While Article 8's prohibition of harmful practices addresses the intersection of age and gender in the context of witchcraft accusations, the Protocol does not systematically address the compounded disadvantages faced by older persons with disabilities, older persons from ethnic minority backgrounds or older persons in situations of displacement.[68] Third, and perhaps most critically, rather than creating a dedicated monitoring body, the Protocol assigns oversight to the existing African Commission on Human and Peoples'

[61]Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (adopted 31 January 2016, entered into force 4 November 2024) (AU Protocol).

[62]African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 18(4) (African Charter).

[63]Chirwa and Rushwaya (n 20) 56.

[64]AU Protocol (n 61) art 8.

[65]ibid art 15.

[66]Chirwa and Rushwaya (n 20) 60–65.

[67]ibid 66.

[68] ibid 72–75.

Rights, whose relationship with the African Court remains poorly defined.[69] As Chirwa and Rushwaya caution, adoption alone is insufficient; meaningful protection for older persons requires both ratification and effective implementation.[70]

III Comparative Analysis and Lessons for CROP

A systematic comparison of the two regional instruments yields several analytically significant lessons for the proposed CROP. The first and most fundamental is that both instruments conclusively challenge the notion that binding standards for older persons are unnecessary or impractical. Their very existence demonstrates that states can agree on age-specific rights obligations, thereby rebutting the argument that existing general instruments suffice. The OAS Convention's introduction of the autonomous right to care and the AU Protocol's prohibition of harmful practices against older persons represent genuine normative innovations that would not have emerged from the interpretive expansion of general treaties.

Second, the comparative analysis demonstrates that effective monitoring is crucial to the realisation of treaty rights. The OAS Convention's integration with the established machinery of the Inter-American Commission on Human Rights offers structurally stronger enforcement than the AU Protocol's reliance on the African Commission, an already overburdened body with an imprecisely defined relationship to the African Court.[71] This contrast carries a clear implication for CROP: the proposed convention should establish a dedicated committee with clear mandates for periodic reporting, individual communications and inquiry procedures, rather than relying on existing treaty bodies that lack the specialised expertise needed to engage meaningfully with older persons' rights.

Third, Chirwa and Rushwaya's critique of the AU Protocol's imprecise drafting underscores the importance of justiciable precision in CROP.[72] The Protocol's reliance on progressive realisation language without clearly defined minimum core obligations has created uncertainty about the extent of states' immediate duties. O'Rourke's analysis of the anti-torture norm demonstrates that

[69] ibid 79–82.
[70] ibid 82.
[71] Chirwa and Rushwaya (n 20) 78.
[72] ibid 82.

effective rights protection requires not merely the proclamation of abstract entitlements but the development of a detailed doctrinal framework that gives operational content to those entitlements. Her examination of inadequate continence care identifies concrete sources of older persons' situational powerlessness, including prejudicial stereotyping, paternalism, and inaccessible complaints mechanisms, which mean that a universal CROP must be drafted with sufficient specificity to address.[73]

Fourth, both instruments illustrate the tension between comprehensive rights catalogues and practical enforcement. The OAS Convention's ambitious scope, encompassing 27 substantive articles, may have contributed to its limited ratification, while the AU Protocol's more focused approach has achieved broader (if still insufficient) acceptance. This suggests that CROP should prioritise a core set of immediately justiciable rights, supplemented by optional protocols that allow progressive expansion of the rights framework as political consensus develops.

Fifth, the ratification histories of both instruments demonstrate that initial reluctance can be overcome through sustained advocacy. The AU Protocol's eventual attainment of 15 ratifications, sufficient for entry into force, after eight years illustrates the importance of persistent civil society engagement.[74] Mégret's observation that specialised instruments create their own constituency of advocates is directly relevant here: the very existence of a convention generates pressure for ratification by creating a framework around which advocacy can coalesce.[75]

Sixth, the relationship between regional and universal instruments should be complementary rather than competitive. The OAS Convention and AU Protocol have created normative precedents and generated implementation experience that can inform universal standard-setting. Doron and Apter have argued that this incremental, multi-level approach to norm development may ultimately prove

[73] O'Rourke (n 21) 7, 164–172. O'Rourke's analysis of the anti-torture norm demonstrates that effective rights protection requires a detailed 'doctrinal framework'—a body of principles, rules, concepts and case law—giving operational content to rights, and identifies concrete sources of older persons' situational powerlessness including stereotyping, paternalism, and inaccessible complaints mechanisms.

[74] Mégret (n 5) 60–64.

[75] Chirwa and Rushwaya (n 20) 82.

more effective than a single top-down negotiation, provided that the regional instruments are understood as building blocks toward, rather than substitutes for, a universal convention.[76]

F SYNTHESIS: THE CASE FOR CROP

The analysis strongly supports the adoption of CROP, albeit with caveats. The case rests on three interrelated pillars. Firstly, substantive: older persons experience distinct, systemic harms that existing instruments inadequately address, as evidenced by jurisprudential gaps even where general protections nominally apply. *Carvalho*, *McDonald* and *Nurcan Bayraktar* illustrate how, without dedicated normative frameworks, courts revert to familiar discrimination categories, rendering age-based harms effectively invisible. The intersectional dimensions of these harms, particularly the compounded disadvantages experienced by older women, older persons with disabilities and older persons in care settings, further underscore the inadequacy of general instruments. O'Rourke's detailed case studies of older persons' care-related mistreatment, particularly her analysis of inadequate continence care and deprivation of liberty for care purposes, provide extensive evidence of how structural ageism operates to deny dignity and autonomy in institutional settings.

Secondly, institutional: current treaty bodies do not systematically monitor the rights of older persons, and soft law instruments such as General Comment No 6 lack binding authority, dedicated oversight and mechanisms for individual complaints. The OHCHR has confirmed that existing instruments' 'conceptual limitations' contribute to 'fragmented and inconsistent coverage' that existing bodies are unlikely to remedy through incremental interpretation alone. O'Rourke's analysis demonstrates that the care of older people has been systematically excluded from the mainstream human rights agenda, with consequences that are starkly visible in the widespread suffering documented in institutional care settings across jurisdictions.

Thirdly, specialised conventions generate what Baxi calls the 'production of politics' that extends beyond the legal text itself. The CRC's transformative impact on the conception of children's rights demonstrates the power of dedicated instruments to reshape not only legal obligations but

[76]Doron and Apter (n 52) 593–595.

broader social understandings of vulnerability and agency.[77] The regional experience reinforces this argument. Both the OAS Convention and AU Protocol show that binding standards are feasible, that rights specific to older persons, such as the right to care and protection from harmful practices, enhance normative value, and that sustained advocacy can overcome initial reluctance to ratify. Their limitations, which include low ratification, imprecise provisions and weak monitoring, offer instructive lessons for the creation of CROP rather than reasons to oppose its adoption.

I Essential Elements of the Proposed Convention

Drawing upon the foregoing analysis, six essential elements can be identified that a CROP must contain if it is to achieve transformative impact.

Firstly, an autonomous right to freedom from age discrimination, encompassing direct discrimination, indirect discrimination, denial of reasonable accommodation, and discrimination by association. Unlike the scattered and residual coverage of age discrimination in existing instruments, this right must be self-standing, clearly defined, and supported by detailed guidance on the forms of stereotyping and prejudice that constitute ageism. The *Carvalho*, *McDonald* and *Nurcan Bayraktar* jurisprudence analysed in Part B demonstrates precisely why such an autonomous framework is necessary: without it, even sympathetic courts lack the conceptual tools to identify and address age-based discrimination as a distinct category of harm.

Secondly, a right to care must feature as a central and justiciable provision. The analysis has shown that access to adequate, person-centred care is not merely a welfare aspiration but a precondition for the enjoyment of virtually all other rights by older persons who require assistance with daily living. This right should contain both immediately justiciable components, including protection from abuse, informed consent requirements, and accessible complaints mechanisms, and progressively realisable components, including the development of community-based care infrastructure and the training and fair remuneration of care workers.

[77] Van Bueren (n 44) 378–382 on the CRC's transformative impact on domestic legislation.

Thirdly, robust protections for legal capacity and supported decision-making. Building upon Article 12 CRPD, a CROP must address the specific challenges associated with cognitive changes in older age, providing a framework for supported decision-making that respects autonomy while acknowledging the reality of diminishing capacity. The convention must firmly reject the substituted decision-making paradigm that continues to govern the treatment of older persons in many jurisdictions.

Fourthly, a right to social, economic and political participation. The social isolation experienced by many older persons is both a cause and consequence of their normative invisibility. A CROP must establish affirmative obligations on states to promote older persons' active participation in public life, including through the elimination of age-based barriers to employment, political participation, and access to education and technology.

Fifthly, requirements for disaggregated data collection and intersectional analysis. The invisibility of older persons in statistical frameworks contributes directly to their invisibility in policy. A CROP must impose obligations on states to collect and publish data disaggregated by age in combination with other characteristics, enabling evidence-based identification of compounded vulnerabilities and targeted policy responses.

Finally, a dedicated Committee on the Rights of Older Persons, equipped with the authority to receive individual communications, conduct inquiries, and issue general comments developing the convention's jurisprudence. The comparative analysis of regional instruments has demonstrated that monitoring mechanisms grafted onto existing bodies lack the specialised expertise and institutional mandate needed to generate the sustained attention that older persons' rights require. A dedicated treaty body would serve as the institutional engine for the convention's progressive development, much as the Committee on the Rights of Persons with Disabilities has done for the CRPD.

O'Rourke's analysis demonstrates that while a dedicated convention will provide new articulations of rights, more effective protection of older persons will also require engagement with the detailed

doctrinal framework implementing established rights such as the anti-torture norm.[78] She notes that newly articulated entitlements in such a convention are likely to include rights to care services, support for family and informal carers, independent living and inclusion in the community, and support for the exercise of equal decision-making capacity.[79] The treaty body's role in developing such frameworks through general comments, concluding observations, and individual communications procedures will be essential to translating the convention's substantive guarantees into operative protections.

Legitimate concerns about treaty proliferation can be mitigated through careful institutional and normative design. CROP should be framed as complementary to existing instruments, with explicit obligations on its monitoring body to coordinate with other treaty bodies. The treaty body's role in developing frameworks for implementation will be essential to translating the convention's substantive guarantees into operative protections. Targeted technical assistance can strengthen states' reporting capacity. Substantively, the instrument should strike a balance between breadth and precision, privileging clear, justiciable obligations over purely aspirational formulations. Finally, flexible age thresholds, modelled on the OAS approach, can accommodate cultural variation without sacrificing normative coherence.

Most importantly, CROP should function not only as a legal instrument but as a driver of social transformation. Drawing on Baxi's theoretical framework,[80] the convention's significance lies not solely in the rights it will codify but in the political and social processes it will catalyse. The 'production of politics' generated by CROP with the creation of advocacy networks, the institutionalisation of older persons' participation, the reframing of ageing as a rights issue constitutes a transformative process that extends far beyond the formal legal text.[81] The instrument

[78] O'Rourke (n 21) 218–219.

[79] ibid 12. O'Rourke notes that newly articulated entitlements in a dedicated convention are likely to include rights to care services, support for family and informal carers, independent living and inclusion in the community, and support for the exercise of equal decision-making capacity.

[80] Baxi (n 4) 8.

[81] ibid 12–15.

should embed participatory mechanisms that secure older persons' meaningful involvement in implementation, as Mégret[82] and O'Rourke[83] emphasise.

The recent first session of the new intergovernmental working group in Geneva has provided early indications that the international community takes this mandate seriously.[84] Reports from the session confirm that discussions addressed the scope, definitions and monitoring mechanisms of the proposed instrument, with broad consensus on the need for a dedicated convention. Significantly, delegations emphasised the importance of intersectional approaches and the inclusion of older persons in the drafting process,[85] reflecting the concerns articulated throughout this article. The Global Alliance for the Rights of Older Persons and other civil society advocates have already demonstrated the power of older persons' movements to influence international processes;[86] excluding them risks reproducing the paternalism the instrument seeks to dismantle. Thus, institutionalising their participation within CROP's governance structures would sustain this momentum. Negotiations must therefore position older persons as active rights-holders rather than passive beneficiaries.

G CONCLUSION

Resolution 58/13 represents a pivotal moment in international human rights law and in the long campaign for the human rights of older persons. After decades of relative marginalisation within general frameworks, older persons are now emerging as a central subject of normative concern. This article has argued that the case for CROP rests on firm foundations: the distinctiveness of age-based harms, evidenced by failures in healthcare allocation, disaster response and judicial reasoning, as demonstrated by the ECtHR's treatment of ageism in *Carvalho* and *Nurcan Bayraktar*; the insufficiency of existing frameworks, reflected in the absence of systematic monitoring and the limits of interpretive approaches, as both the OHCHR's analysis and

[82] Mégret (n 5) 60.

[83] O'Rourke (n 21) 218–221.

[84] UNHRC, 'Summary of the first session of the open-ended intergovernmental working group for the elaboration of a legally binding instrument' (Geneva, February 2026). Reports from civil society observers and participating delegations confirm broad consensus on the need for a dedicated convention.

[85] ibid. Delegations emphasised the importance of intersectional approaches and the inclusion of older persons in the drafting process.

[86] Global Alliance for the Rights of Older Persons, 'Historic decision: Governments decide to start drafting an international convention' (GAROP, 3 April 2025) <https://rightsofolderpeople.org> accessed 15 December 2025.

O'Rourke's examination of care and the anti-torture norm powerfully demonstrate; and the transformative capacity of specialised instruments, as evidenced by regional experience in the Americas and Africa and by the analogous trajectory of the CRC.

Concerns about treaty proliferation, while warranting serious consideration, do not ultimately outweigh these factors. Treaty fatigue is a genuine concern but can be addressed through careful institutional design, including streamlined reporting, coordination among treaty bodies and targeted technical assistance. Fears of fragmentation are increasingly regarded as overstated, given the growing use of coordination techniques by courts and monitoring bodies. Nor is the definitional challenge insurmountable: the flexible age-threshold model adopted by the OAS Convention illustrates how normative coherence can coexist with contextual variation. None of these objections justifies denying older persons the dedicated protections long afforded to other groups facing structural vulnerability.

The path ahead is not without obstacles. The political resistance of key states, the practical challenges of drafting a convention that is both normatively ambitious and capable of attracting broad ratification, and the risk of reproducing paternalistic approaches in the guise of protection will all require sustained diplomatic effort and strategic concession. Yet as the experience of the CRC demonstrates, the objections that now seem insurmountable were equally forceful before the adoption of the children's rights convention, and the CRC's near-universal ratification has vindicated the decision to proceed. Baxi's challenge is that new instruments must address genuine normative gaps. That challenge has been met by the evidence assembled in this article. The gap confronting older persons is genuine, pervasive, and demonstrably resistant to resolution through existing mechanisms.

The proposed CROP must contain an autonomous right to freedom from age discrimination, a justiciable right to care, robust protections for legal capacity, guarantees of social participation, requirements for disaggregated data, and a dedicated monitoring body. These are not aspirational goals; they are the minimum elements necessary to ensure that the Convention achieves the transformative impact that older persons' circumstances demand. The international community has recognised the rights of children, women, persons with disabilities, and migrant workers

through dedicated conventions. The exclusion of older persons from this normative architecture is an anomaly that Resolution 58/13 has now created the institutional framework to remedy. As Chirwa and Rushwaya caution, however, normative recognition without ratification and implementation risks remaining hollow.[87] The limited uptake of the OAS Convention and the AU Protocol's reliance on an already overburdened African Commission highlight the persistent gap between aspiration and realisation. CROP's ultimate significance will therefore depend not only on its textual content but on its capacity to reshape how ageing is understood within human rights discourse: from vulnerability to be managed to agency to be enabled, and from decline to be accommodated to a life stage deserving equal dignity and respect.

CROP offers an opportunity to address these deficiencies, not simply by adding another instrument to an already crowded legal landscape but by reconfiguring the conceptual architecture of rights in older age. If realised effectively, it can make visible long-ignored harms, articulate previously unnamed injustices and provide the institutional mechanisms needed to translate principle into protection. Resolution 58/13 has initiated the process; the responsibility now lies with the international community to ensure that its outcome matches the gravity of the cause

[87]Chirwa and Rushwaya (n 20) 76.

OCEAN CONSERVATION IN AREAS BEYOND NATIONAL JURISDICTION: RECENT LEGAL DEVELOPMENTS

Julius Berrien*

A INTRODUCTION

Long regarded as vast, inexhaustible, and beyond the reach of lasting harm, the high seas have revealed themselves to be neither boundless nor infinitely resilient. The illusion of abundance has yielded to a sterner truth. Human activity, when unchecked by foresight or law, can exhaust even the greatest of commons.

This article examines recent turns in the international law of the sea and asks whether they mark a genuine advance in the protection of the high seas. The focus will be on the Biodiversity Beyond National Jurisdiction Agreement, efforts to adopt a global plastics treaty, the development of a mining code by the International Seabed Authority, and the advisory opinion on climate change of the International Tribunal on the Law of the Sea.

A problem-solution-evaluation strategy will be used, combined with a legal doctrinal analysis. The paper begins by outlining the foremost threats to the marine environment beyond national jurisdiction. The study proceeds by critically examining recent normative developments in the international law of the sea relevant to these regions. At the end, the article aims to answer the question of what these legal developments mean for ocean conservation.

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B ENVIRONMENTAL IMPACTS

I Overfishing

Global fisheries have surged since the 1950s,[1] and excessive fishing has caused dramatic crises such as the collapse of cod stocks in 1992,[2] and the Peruvian anchoveta crisis.[3] Over 37% of monitored fish stocks are currently overfished.[4] Industrial fishing also harms non-target species such as seabirds, turtles, and cetaceans.[5]

The international law of the sea protects fish stocks in a twofold manner. Coastal States are responsible for protecting and managing fish populations in their exclusive economic zones (EEZs).[6] On the high seas, States bear a collective responsibility for the preservation and sustainable use of fish stocks, and a duty to cooperate to this end.[7] States collaborate in regional fisheries management organisations (RFMOs) to conserve marine resources, though — despite the proliferation of these organisations — fish populations continue to decline.[8]

II Plastic Pollution

Similarly to fishing, plastic production vastly expanded during the 20th century, with an estimated 10 million metric tons of plastic annually ending up in the seas now making up 80% of marine pollution.[9] Plastic debris threatens marine wildlife, with 267 species affected, including 86% of

[1] Gabrielle Carmine and Guillermo Ortuño Crespo, 'Un-Tangled: How the Global Ocean Treaty Can Help Repair High Seas Mismanagement' (Greenpeace International, 2024) 6.
[2] Lawrence C Hamilton and Melissa J Butler, 'Outport Adaptations: Social Indicators Through Newfoundland's Cod Crisis' (2001) 8 Human Ecology Review 5.
[3] Nathan Clarke, 'Chimbotazo: The Peruvian Revolution and Labor in Chimbote, 1968–1973' in Carlos Aguirre and Paulo Drinot (eds), *The Peculiar Revolution: Rethinking the Peruvian Experiment Under Military Rule* (University of Texas Press 2017) 268.
[4] Marine Stewardship Council, 'Overfishing' (*Marine Stewardship Council*) <https://www.msc.org/what-we-are-doing/oceans-at-risk/overfishing> accessed 20 November 2024.
[5] Clara Dell, 'The Problem of Bycatch and How It Harms Marine Life, Explained' (*Sentient Media*, 1 December 2023) <https://sentientmedia.org/bycatch/> accessed 20 November 2024.
[6] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS art 56.
[7] ibid. arts 116-119.
[8] Rosemary Rayfuse, 'Regional Fisheries Management Organizations' in Donald Rothwell, Alex Oude Elferink, Karen Scott, and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 440.
[9] Philip J Landrigan and others, 'Human Health and Ocean Pollution' (2020) 80(1) Annals of Global Health 9.

sea turtles, 44% of seabirds, and 43% of marine mammals.[10] Plastics harm organisms,[11] and disrupt oceanic ecosystems.[12] Additionally, plastic production is energy-intensive, generating nearly two billion tonnes of CO_2 annually, contributing significantly to global warming.[13]

Marine plastic pollution incurs significant long-term economic, ecological, and cultural costs, with annual losses of $3,300 to $33,000 per tonne in lost ecosystem services.[14] Despite these problems, global plastic production is growing, with less than 10% undergoing recycling.[15] 35-40% of current production is single-use plastics, and this fraction is subject to steady yearly increases.[16]

III Deep-sea Mining

Increasing attention is being paid to metals found at the sea floor. While seabed mining is already practised in territorial seas and EEZs, no permits for mining in areas beyond national jurisdiction (ABNJ) have been issued to this day. Scientists warn that deep-sea mining (DSM) will have cataclysmic repercussions for the marine environment. DSM involves remotely operated vehicles that scrape the ocean floor to collect polymetallic nodules and crusts, a process that physically removes the habitat of organisms that dwell on or around the nodules.[17] Sediment plumes caused by collector vehicles and carried on by oceanic currents can suffocate organisms and redistribute nutrients as well as pollutants, thereby disrupting ecosystems.[18] Restoring deep-sea ecosystems is technically difficult, financially costly, and may never be achievable in a meaningful timeframe as sediments accumulate at the slow pace of one millimetre every 1000 years.[19]

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[10] David W Laist, 'Impacts of Marine Debris: Entanglement of Marine Life in Marine Debris Including a Comprehensive List of Species with Entanglement and Ingestion Records' in James M Coe and Donald B Rogers (eds), *Marine Debris: Sources, Impacts, and Solutions* (Springer-Verlag New York 1997) 102.

[11] José GB Derraik, 'The Pollution of the Marine Environment by Plastic Debris: A Review' (2002) 44 Marine Pollution Bulletin 842.

[12] Prulley Uneputty and SM Evans, 'The Impact of Plastic Debris on the Biota of Tidal Flats in Ambon Bay (Eastern Indonesia)' (1997) 44 Marine Environmental Research 233.

[13] Livia Cabernard and others, 'Growing Environmental Footprint of Plastics Driven by Coal Combustion' (2022) 5 Nature Sustainability 139.

[14] Nicola J Beaumont and others, 'Global Ecological, Social and Economic Impacts of Marine Plastic' (2019) 142 Marine Pollution Bulletin 189.

[15] Philip Landrigan and others, 'The Global Plastics Treaty: Why is it Needed?' (2023) 402(10419) The Lancet 2274.

[16] ibid.

[17] Spoorthy Raman, 'Mining the Sea Floor: Implications for Biodiversity' (2023) 73 Bio Science 328.

[18] Daniel OB Jones, Diva J Amon and Abbie SA Chapman, 'Deep-Sea Mining: Processes and Impacts' in Maria Baker, Eva Ramirez-Llodra and Paul Tyler (eds), *Natural Capital and Exploitation of the Deep Ocean* (Oxford University Press 2020).

[19] European Academic Science Advisory Council, 'Deep Sea Mining: An Overview of the Scientific, Environmental, and Societal Considerations' (*easac,* June 2023)

DSM exacerbates climate change by destroying seabed animals that store carbon in their skeletons, preventing them from trapping CO_2, which illustrates the interconnectedness of marine environmental issues.[20] Deep-sea ecology and mining impacts are still poorly understood. Understandably, there are increasing calls for a moratorium on DSM until reliable data is available.

IV Climate Change Impacts

Oceans absorb approximately 90% of heat and 20-30% of CO_2,[21] making them the primary buffer of the global climate system. This role comes at a growing ecological cost. Changes in ocean temperature affect the survival and spatial distribution of species, especially if oxygen levels also change.[22] Higher temperatures drive coral bleaching, leading to reduced growth, increased disease, and large-scale reef mortality.[23] Ocean warming also causes marine organisms to migrate to waters that suit their temperature needs. Some species are moving toward higher latitudes or into deeper waters where they alter the local ecosystems.[24] In addition, rising sea-levels imperil coastal ecosystems. Habitats such as mangroves, salt marshes, and coastal wetlands are increasingly impacted by erosion and flooding.[25] These environmental changes also place growing pressure on human coastal communities with more frequent flooding, land loss, and salinisation of freshwater threatening infrastructure, agriculture, and livelihoods.[26]

<https://easac.eu/fileadmin/user_upload/EASAC_Deep_Sea_Mining_Web_publication_.pdf> accessed 3 December 2024.

[20] Terri A Souster and others, 'Quantifying Zoobenthic Blue Carbon Storage Across Habitats Within the Arctic's Barents Sea' (2024) 10 Frontiers in Marine Science 2.

[21] Florencia Cerutti-Pereyra and others, 'Vulnerability of Eastern Tropical Pacific Chondrichthyan Fish to Climate Change' (2024) 30(7) Global Change Biology 2.

[22] ibid.

[23] Nan Hu, Paul E Bourdeau and Johan Hollander, 'Responses of Marine Trophic Levels to the Combined Effects of Ocean Acidification and Warming' (2024) 15 Nature Communications 7.

[24] Camille Parmesan and Gary Yohe, 'A Globally Coherent Fingerprint of Climate Change Impacts Across Natural Systems' (2003) 421(6918) Nature 37.

[25] Robert J Nicholls and Anny Cazenave, 'Sea-level Rise and its Impact on Coastal Zones' (2010) 328(5985) Science 1517–1520.

[26] Poh Poh Wong and others, 'Coastal Systems and Low-lying Areas' (2014) in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects* (Cambridge University Press) 380–382.

The absorption of carbon from the atmosphere causes ocean acidification, which damages reefs[27] as well as shell-building organisms.[28] When ocean water warms, its capacity to hold oxygen decreases. Simultaneously, higher water temperatures speed up the metabolisms of cold-blooded species, increasing their demand for oxygen. This mismatch hampers aerobic performance, growth, reproduction, and survival. As a result, habitable zones shrink, species move or die off, and ecosystems deteriorate. The destructive effects of rising ocean temperatures and lower oxygen are thus mutually reinforcing.[29]

C LEGAL DEVELOPMENTS

Part VII of the United Nations Convention on the Law of the Sea (UNCLOS) governs the high seas, requiring States to cooperate, conserve marine living resources, and achieve the maximum sustainable yield.[30] Part XII focuses on marine environmental protection. States are obligated to preserve the marine environment and mitigate various types of pollution.[31] Article 194(5) provides for the protection and preservation of rare and fragile ecosystems and habitats of imperilled species. Papanicolopulu notes that this is often seen as the legal basis for establishing Marine Protected Areas (MPAs).[32]

Regarding the high seas, UNCLOS does not go beyond those general principles. UNCLOS lacks specific actions, mechanisms, or procedures that States must adopt for maritime conservation. Moreover, UNCLOS makes no explicit mention of ABNJ or biodiversity, save for the fleeting reference to at-risk organisms in article 194(5). The gaps in UNCLOS are partially filled by treaties and bodies such as the Convention on Biological Diversity (CBD), the Barcelona Convention, OSPAR, and a plethora of international fishing bodies (IFBs).

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[27] ibid. 1.
[28] Florencia Cerutti-Pereyra and others, 'Vulnerability of Eastern Tropical Pacific Chondrichthyan Fish to Climate Change' (2024) 30(7) Global Change Biology 2.
[29] Curtis Deutsch, Andreas Ferrel, Brad Seibel, Hans-Otto Pörtner and Raymond B. Huey, 'Climate Change Tightens a Metabolic Constraint on Marine Habitats' (2015) 348(6239) Science 1132; Hans-Otto Pörtner and Rainer Knust, 'Climate Change Affects Marine Fishes through the Oxygen Limitation of Thermal Tolerance' (2007) 315(5808) Science 95.
[30] United Nations Convention on the Law of the Sea, arts 117-119.
[31] ibid. arts 192, 194(3).
[32] Irini Papanicolopulu, 'Marine Biodiversity Beyond National Jurisdiction' in Maria da Glória Garcia and António Cortês (eds), Blue Planet Law (Springer Nature, 2023) 111.

The general problem with regional treaties and organisations is that they do not cover ABNJ in their entirety, and that only coastal States of that specific region ratify them, which lets third States 'off the hook'.[33] The international seabed ('the Area'), on the other hand, is governed by the regime of Part XI of UNCLOS article 136, which characterises the Area and its resources as a common heritage of mankind. Article 156 establishes the International Seabed Authority (ISA), tasked with regulating mineral-related activities in the area; it ensures that these activities benefit all of humanity and that resources are sustainably managed. UNCLOS leaves the task of regulating DSM to the ISA, thus does not have its own regulations in this regard.

However, the ISA has not yet passed such a regulatory framework. Marine litter is addressed by a number of initiatives and regional measures.[34] However, these instruments are geographically limited, lack universal participation, or are not specifically designed to tackle marine plastic pollution. Hence, such instruments only resolve a small part of the commons problem and leave numerous States without detailed legal obligations to protect the marine environment. As Hugo notes, there is nothing that properly responds to obligations under article 207(4) of UNCLOS to 'endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources'.[35]

I BBNJ Agreement

In the early 2000s, UN member States began discussing the need for a new treaty that would close the gaps in the law of the sea regarding the governance of biodiversity in ABNJ. Negotiations began with a Preparatory Committee (2016-2017), followed by an Intergovernmental Conference

[33] ibid. 109-113.

[34] Ocean Plastics Charter (adopted 9 June 2018, G7 Summit 2018); *G20* Action Plan on Marine Litter (adopted 2017, G20 Summit); Honolulu Strategy (adopted 2011, UNEP); Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (adopted 1995, UNEP); Manila Declaration on the Global Partnership on Marine Litter (adopted 2012, UNEP/NOAA); Stockholm Convention on Persistent Organic Pollutants (adopted 22 May 2001, entered into force 17 May 2004); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992); Annex V; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 120.

[35] Hugo Torbjørn Graff, 'The Case for a Treaty on Marine Plastic Pollution' (*Norwegian Academy of International Law*, November 2018) <https://intlaw.no/wp-content/uploads/2018/11/The-case-for-a-TMPP-Nov-2018-WEB.pdf> 13 accessed 20 November 2024.

(2018-2021).[36] The UN General Assembly formally adopted the Biodiversity Beyond National Jurisdiction (BBNJ) Agreement in June 2023.[37] On 19th September 2025, Morocco became the 60th country to ratify the BBNJ Agreement.[38] Article 68(1) of the BBNJ Agreement sets a 120-day countdown to the treaty's entry into force, beginning with the deposit of the 60th ratification. Accordingly, the treaty entered into force on 17th January 2026.

The BBNJ Agreement constitutes the world's first comprehensive and binding agreement specifically addressing biodiversity in ABNJ. The treaty covers four topics. In Part II, the agreement deals with marine genetic resources. Part III sets out a framework for area-based management tools (ABMTs), including MPAs and strategic environmental assessments (SEAs). Part IV details requirements for environmental impact assessments (EIAs). The fifth part of the BBNJ Agreement provides for capacity building and technology transfer.

States can submit proposals for ABMTs with scientific and stakeholder input.[39] The Conference of the Parties (COP) makes decisions, often by consensus, and can adopt emergency measures.[40] Monitoring and review ensure the effectiveness of these tools, with adjustments made based on science.[41] An opt-out mechanism allows States to ditch conservation measures under certain conditions.[42] Article 18 ensures ABMTs, including MPAs, do not apply within national jurisdictions or influence sovereign disputes, preventing their instrumentalisation for territorial claims, and balancing conservation goals with State sovereignty and economic interests.

Part IV constitutes an operationalisation of article 206 of UNCLOS which requires States to assess potential harmful effects of planned activities. Articles 27-39 of the BBNJ agreement address

[36] Pascale Ricard, 'The Advent of the 2023 BBNJ Agreement: A Preliminary Analysis' (2024) 53 Environmental Policy and Law 428.
[37] ibid.
[38] Annika Hammerschlag, 'Nations Ratify the World's First Treaty to Protect International Waters' (*AP News,* 19 September 2025). <https://apnews.com/article/high-seas-treaty-marine-diversity-15061c0624d8e472603401b479870904> accessed 23 September 2025.
[39] Agreement under the United Nations Convention of the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (adopted 2023), art 19.
[40] ibid, arts 22-24.
[41] ibid, art 26.
[42] ibid, art 23(4).

various aspects of Environmental Impact Assessments (EIAs) in ABNJ, emphasising prevention, cumulative effects, and support for developing states.

(a) Key Advantages

The BBNJ Agreement leverages one of the most powerful tools of maritime conservation: MPAs. All four major threats to ABNJ identified at the beginning of this article are mitigated through MPAs. MPAs serve as sanctuaries for species affected by overfishing and changing ocean conditions. Fishing is usually forbidden or at least restricted, allowing fish populations to recover and eventually spill over into adjacent areas. If ship traffic is not altogether banned, the overboard discharge of wastes is outlawed in MPAs, preventing plastic debris from entering vulnerable ocean zones. By supporting healthy ecosystems, MPAs enhance the resilience of marine environments amidst the climate crisis.

EIAs play a crucial role in conserving marine biodiversity by evaluating potential environmental damage through human activities before it occurs. Prior to the adoption of the BBNJ Agreement, a patchwork of sectoral, global, and regional instruments addressed different aspects of human activity related to the high seas. However, these instruments failed to provide a comprehensive framework. The BBNJ Agreement fosters coordination and establishes clearer and more consistent obligations for EIAs in ABNJ.[43]

Groundbreaking is the BBNJ Agreement's systemic and integrated approach. The treaty links biodiversity to climate change, as seen in the preamble and some provisions (see articles 1 and 7). Ricard observes that this constitutes the first explicit integration of climate change and biodiversity in international law.[44] The BBNJ Agreement establishes a normative hierarchy where the treaty's objectives are integrated into the frameworks of existing international fisheries bodies (IFBs). The treaty sets out biodiversity conservation in ABNJ as a foundational goal and compels international fishing bodies to prioritise biodiversity by embedding the goal into their mandates and activities. Parties to the BBNJ Agreement are required to promote the treaty's objectives in their IFBs

[43] Zhiwen Li and Bo Zhang, 'Internationalization of EIA Rules in the BBNJ Agreement: Impediments and Possible Solutions' (2024) 167 Marine Policy 1.
[44] Pascale Ricard, 'The Advent of the 2023 BBNJ Agreement: A Preliminary Analysis' (2024) 53 Environmental Policy and Law 429.

according to article 8(2). This overall approach has been characterised as 'systematization through orchestration'.[45] The long and inclusive negotiation process as well as the balanced package deal addressing diverse concerns yield additional legitimacy to the BBNJ Agreement, as Abegón-Novella observes.[46]

Moreover, the BBNJ Agreement shows an unusual momentum. The threshold of 60 ratifications was reached after just a few years, contrasting sharply with UNCLOS which took more than a decade to enter into force. UN Secretary General Guterres spoke of momentum and enthusiasm for ocean conservation that was difficult to find in the past.[47] Also, sector bodies like BIMCO have begun briefing and engaging members on the BBNJ Agreement which might be an indicator for growing sector attention and active compliance planning.[48]

(b) Key Deficits

A notable drawback of the BBNJ Agreement is its lack of enforcement mechanisms. The way in which the COP will fulfil its mandate to enhance cooperation and coordination with IFBs remains unclear, in particular given that the COP lacks direct regulatory power over other bodies. The COP's decision-making powers are restrained by the requirement to consult with relevant international fishing organisations. Much, if not all, depends on States being willing to use the BBNJ Agreement to put pressure on their IFBs to improve environmental performance. The reluctance of States to raise issues with their IFBs could seriously hamper the success of the BBNJ Agreement. The decision to establish MPAs still rests with member States. When it comes to EIAs, States possess significant discretion as well. A system subjecting EIAs to global oversight that many have called for is absent from the treaty.[49] The opt-out mechanism that allows States to ditch conservation measures further undermines the effectiveness of the framework. Article 18, which

[45] Rakhyun E Kim, 'The Likely Impact of the BBNJ Agreement on the Architecture of Ocean Governance' (2024) 165 Marine Policy 5.
[46] Marta Abegón-Novella, 'Making Sense of the Agreement on Biodiversity Beyond National Jurisdiction: The Road Ahead' (2023) 53 Environmental Law and Policy 442.
[47] United Nations, 'Secretary-General's press conference at Ocean Conference' (*United Nations*, 10 June 2025) <https://www.un.org/sg/en/content/sg/press-events/2025-06-10/secretary-generals-press-conference-ocean-conference-scroll-down-for-french> accessed 16 July 2025.
[48] BIMCO, ''High Seas' Agreement to enter into force in January 2026' (BIMCO, 24 September 2025) <https://www.bimco.org/news-insights/bimco-news/2025/09/24-bbnj/> accessed 12 October 2025.
[49] Zhiwen Li and Bo Zhang, 'Internationalization of EIA Rules in the BBNJ Agreement: Impediments and Possible Solutions' (2024) 167 Marine Policy 2.

exempts areas under national jurisdiction of coastal States from the regulatory scope of area-based management tools (ABMTs), constitutes another significant compromise, as Ricard notes.[50]

Moreover, the excessive use of soft law, as indicated by the frequent occurrence in the text of phrases such as 'may share' or 'may include', risks rendering the treaty ineffective.[51] During the negotiations, it was decided to leave some issues unresolved or to address them at a later stage such as, for example, the legal status of marine genetic resources and intellectual property rights.[52] This narrowing of scope risks losing momentum and delaying essential regulations to a future instrument that might never come about. Though the treaty establishes a financing mechanism, funding remains uncertain and could restrain the success of the treaty.[53]

Despite the initial momentum of the BBNJ Agreement, key operational rules are still pending. The treaty's operative power rests on COP decisions and institutional design choices such as rules of procedure and data systems that were not fixed in the text. The treaty's momentum could thus be lost.[54]

II Global Plastics Treaty

In March 2022, the UN Environment Assembly adopted Resolution 5/14 entitled 'End Plastic Pollution: Towards an International Legally Binding Instrument' which aims to implement a globally binding and enforceable plastics treaty. An Intergovernmental Negotiating Committee (INC) was tasked with concluding the treaty by the end of 2024. In December 2024, the 5th session of the INC finished without an agreement. At the 6th INC session in August 2025, negotiations remained deadlocked and inconclusive. Deep disagreements among States over key aspects prevented the adoption of the convention. There is a draft version (Chair's Draft) that grants insights into what the finished convention could look like.

[50] Pascale Ricard, 'The Advent of the 2023 BBNJ Agreement: A Preliminary Analysis' (2024) 53 Environmental Policy and Law 431.
[51] Marta Abegón-Novella, 'Making Sense of the Agreement on Biodiversity Beyond National Jurisdiction: The Road Ahead' (2023) 53 Environmental Law and Policy 454.
[52] ibid. 456.
[53] Malou Estier, 'Protecting Our Oceans for Future Generations' (*UNU-CPR,* 9 June 2025) <https://unu.edu/cpr/blog-post/protecting-our-oceans-future-generations> accessed 28 December 2025.
[54] High Seas Alliance, 'From 60 to Global: What Happens Next for the High Seas Treaty?' (*High Seas Alliance*, 9 October 2025) <https://highseasalliance.org/2025/10/09/from-60-to-global-what-happens-next-for-the-high-seas-treaty/> accessed 28 December 2025.

(a) Key Advantages

A key positive point is the comprehensiveness of the Chair's Draft. A combination of binding rules and voluntary measures ensure accountability while allowing for flexibility. Moreover, the text demonstrates sensitivity to state sovereignty which is likely to enhance ratification prospects. By framing planning, reporting, and assessment obligations in relatively flexible terms, the text increases political acceptability amongst states wary of international oversight. The document includes the crucial goal of transitioning to a circular economy and addresses the entire lifecycle of plastics. The goal of reducing plastic pollution from both land-based and sea-based sources is mentioned.[55] Extended producer responsibility, crucial for incentivising producers to reduce plastic use and improve recycling, is present in the draft.[56]

The document prescribes decision-making mechanisms that avoid consensus-based traps, preventing single states from blocking progress.[57] Importantly, article 10 provides financial support mechanisms for developing countries. Article 11 complements article 10 by addressing capacity building, technical assistance, and technology transfer. Another commendable aspect is the inclusion of detailed provisions for monitoring, reporting, and reviewing progress in articles 12, 14, and 15. This implementation support architecture also includes a scientific advisory body.[58]

(b) Key Deficits

Regrettably, a cap on plastic production was not included in the 2025 draft. The 2024 text, at least, included the idea of a cap on virgin plastic production. Production caps are a primary prevention measure reducing pollution at its source.[59] The modification of the 2025 draft thus constitutes a serious weakness. The draft does not explicitly determine limits on single-use plastic production

[55] Article 1 defines the goal of the treaty to protect the environment and human health from the effects of plastic pollution, including in the marine environment.

[56] United Nations Environment Programme, *Chair's Revised Text Proposal – 15 August 2025 as at 00.48* (Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution, including in the Marine Environment, 15 August 2025) <https://resolutions.unep.org/incres/uploads/chairs_revised_draft_text_proposal_-_15.08.25_at_00.482.pdf> accessed 27 November 2025 art 7(3).

[57] According to article 22(3), Parties must first seek consensus. However, if consensus fails, amendments may be adopted with a three-fourths majority. Articles 23(3)(b)-(c) allow singles States to opt-out rather than blocking the adoption of annexes.

[58] ibid, art 19.

[59] Landrigan (n 15) 2275.

either, although it encourages states to reduce, manage, and prohibit the manufacture, import, and export of problematic plastics.[60] Additionally, the proposal does not require comprehensive regulation of all chemicals in plastics or include provisions for mandatory disclosure, traceability, independent toxicity testing, or post-market surveillance. A ban on plastic combustion is absent from the treaty draft. However, article 7(1) requires Parties to manage waste in an environmentally sound manner with explicit reference to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

No call for ending subsidies for fossil-fuel-based plastics or funding for alternatives can be found in the text. Terminating subsidies for fossil-fuel-based plastics and making funding available for plastics not based on carbon through international investment comparable to renewable energy funding would meaningfully improve environmental outcomes by addressing the problem upstream.[61]

The document is particularly weak when it comes to incentive mechanisms and enforcement. Trade restrictions against states that do not join the treaty would be the most effective incentive mechanism. Tessnow von Wysocki and Le Billon stress the importance of a treaty design that ensures an interplay between incentives and deterrence to avoid the freerider problem.[62] However, article 2(c) of the proposal explicitly clarifies that measures to combat plastic pollution should avoid creating trade barriers.

Moreover, the document does not call for a total ban on microplastics but merely addresses them under article 5(c), calling for measures to reduce leakages of plastics into the environment. The document also lacks globally binding and measurable targets for plastic reduction. It encourages Parties to establish national action plans with specific objectives, but the absence of clear global milestones and action plans impairs its enforceability.

[60] Chair's Draft 2025, art 4.
[61] Landrigan (n 15) 2276.
[62] Ina Tessnow von Wysocki and Philippe Le Billon, 'Plastics at Sea: Treaty Design for a Global Solution to Marine Plastic Pollution' (2019) 100 Environmental Science & Policy 95.

The hybrid financial mechanism, although pragmatic, disguises unresolved disagreements over mandatory contributions and differentiated obligations. Private sector participation risks amplifying existing power asymmetries, particularly when profit-driven actors are granted formal roles in funding, technology transfer, and capacity building.

All in all, the Chair's Draft 2025 sacrifices environmental effectiveness to maintain the negotiation process. By removing or diluting contested clauses, the proposal seeks to avoid a collapse of negotiations. It thereby increases the chances for future incremental improvements through COP decisions. However, it does so at the expense of substantive ambition.

III The ISA Mining Code

There is mounting pressure on the ISA to approve a mining code (MC). In 2021, Nauru triggered a rule contained in section 1, paragraph 15, subparagraph (b) of the Agreement on Part XI of UNCLOS which obliges the ISA to finalise and adopt the MC within 24 months (the 'two-year rule'). The deadline for the adoption of the MC expired on 9th July 2023 without a MC having been adopted. The ISA Member States announced they would continue negotiations with a view of adopting the MC at the 30th session of the ISA in 2025. However, the 2025 session ended without a final regulatory framework for commercial DSM. The Member States agreed to continue negotiations at the 31st session in 2026.

The payment regime for DSM remains controversial. UNCLOS mandates an economic assistance fund for developing countries facing harm from DSM, but this compensation system is still pending, delaying the broader DSM regulatory framework.[63] Another unresolved issue is the equitable sharing of financial benefits with proposals for a direct distribution model or a pooled fund supporting scientific and environmental efforts.[64]

The definition of permissible environmental harm remains unclear, with no agreement on criteria for 'serious harm' or 'effective protection'. ISA aims to establish legally binding environmental thresholds, but concerns about scope and timeline persist.[65] Contractors are required to collect

[63] Chris Pickens and others, 'From What-if to What-now: Status of Deep-sea Mining Regulations and Underlying Drivers for Outstanding Issues' (2024) 169 Marine Policy 6.
[64] ibid.
[65] ibid, 7-8.

baseline environmental data, but concerns remain regarding data quality. The ISA plans to establish binding standards for data collection. Draft regulations propose test mining before full exploitation, but opinions differ on its necessity and regulatory framework.[66] Contractors must establish preservation and impact reference zones (PRZs and IRZs), but regulatory frameworks for their operation remain underdeveloped.[67]

The proposed environmental compensation fund faces disagreement on its structure and eligibility for claims.[68] Regional environmental management plans (REMPs) are being developed, with concerns about their legally binding nature and transparency.[69] The ISA's role in regional environmental assessments is not clearly defined, and monitoring of cumulative impacts is needed.[70] The ISA is working on inspection and enforcement structures but faces disagreements over the roles of inspectors.[71] UNCLOS' 'state sponsorship' system holds states accountable for contractors' actions, but clarity on effective control is still lacking.[72]

Draft regulations for reviewing exploitation plans are not fully debated, and issues like evaluation criteria and stakeholder consultation remain unresolved. Disagreements persist over data confidentiality and public consultation. The ISA also needs more independent expertise to support decision-making. Finally, effective public participation is hindered by inconsistent practices, restrictive data rules, and a lack of outreach strategy.[73]

Pickens and others note that the MC constitutes both an opportunity and a challenge; a historic chance to establish an environmental framework before damage has occurred.[74] However, the ISA's inability to finalise the MC within the mandated time indicates systemic inefficiencies. It also highlights the difficulty in balancing diverse interests such as environmental conservation, economic exploitation, and benefit sharing. Prolonging negotiations creates opportunities to find

[66] ibid, 8-9.
[67] ibid, 9.
[68] ibid, 10.
[69] ibid.
[70] ibid, 11.
[71] ibid, 11-12.
[72] ibid, 13.
[73] ibid, 13-15.
[74] ibid, 19.

better solutions and build consensus. Although, it also risks undermining the credibility of the ISA and eroding good will among stakeholders. A timely adoption of the MC is desirable as it would set a benchmark that would influence mining practices around the world, but also within national jurisdictions.[75] Even though an ISA MC would not apply to seabed mining within national jurisdiction, UNCLOS article 208 requires coastal states to adopt laws for the prevention of pollution from seabed activities. These national laws must meet, at least, the ISA's environmental standards.

However, considering the potential environmental damage and given the significant regulatory gaps, starting DSM must not be rushed. The ISA must strike a delicate balance to ensure that the final MC is environmentally sound, internationally equitable, and aligned with long-term global interests. Much speaks in favour of a moratorium on DSM which would provide time for thorough scientific evaluation and regulatory refinement, ensuring that adequate weight is accorded to maritime conservation.

Pressure on the ISA is escalating. In March 2025, The Metals Company began negotiations with the US government to obtain authorisation for DSM.[76] This development raises the stakes of the prolonged inability of the ISA to finalise the MC. Pursuing permission for DSM outside the ISA framework risks fracturing the international seabed regime into overlapping claims, divergent rules, and inconsistent enforcement which is precisely what Part XI of UNCLOS was designed to avoid.

IV ITLOS Advisory Opinion

On 12th December 2022, the International Tribunal on the Law of the Sea (ITLOS) was asked to provide an advisory opinion clarifying the obligations of states under UNCLOS to protect and preserve the marine environment in relation to climate change.[77] The request was made by the

[75] Uwe Jenisch, 'Tiefseebergbau: Mining Code quo Vadis?' (2023) 45 Natur und Recht 169, 175.
[76] Karen McVeigh, 'Canadian Company in Negotiations with Trump to Mine Seabed' (*The Guardian,* 28 March 2025)<https://www.theguardian.com/environment/2025/mar/28/deep-sea-mining-international-seabed-authority-canadian-the-metals-company-tmc-negotiations-trump-us> accessed 2 May 2025.
[77] Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion of 21 May 2024) ITLOS Rep 2024, 31, [1]–[3] (hereinafter ITLOS Advisory Opinion).

Commission of Small Island States on Climate Change and International Law.[78]

The key issue was whether anthropogenic GHGs fall under the definition of 'pollution of the marine environment' and the exact nature of state obligations in fighting pollution. In order to determine state duties, ITLOS interpreted UNCLOS and considered external rules stemming from the United Nations Framework Convention on Climate Change, Kyoto Protocol, Paris Agreement, and Montreal Agreement.[79] ITLOS noted that the relationship between UNCLOS and external rules is formed through rules of reference, for example, article 237 of UNCLOS.[80]

As the tribunal highlighted, the rules of reference showcase the openness of UNCLOS to other legal frameworks. Referring to article 31 of the Vienna Convention on the Law of Treaties, in particular paragraph 3(c), ITLOS observed that UNCLOS and external rules must be interpreted consistently and, if possible, in a way that generates a single set of compatible obligations.[81]

ITLOS opined that anthropogenic GHG emissions into the atmosphere meet the criteria for marine pollution,[82] which brings anthropogenic GHG emissions into the scope of article 194 of UNCLOS.[83] States are thus obligated to take all necessary measures to control and reduce GHGs in accordance with UNCLOS article 194(1), and to avoid transboundary harm to other states in accordance with UNCLOS article 194(2). The tribunal held that, in the case of GHGs, the meaning of 'all necessary measures' must be determined objectively by referring to science.[84] The ITLOS advisory opinion characterises the nature of state obligations to mitigate GHGs as a more stringent version of due diligence duties, containing common but differentiated responsibilities and precautionary reasoning.[85]

[78] ibid.
[79] ibid, [137].
[80] ibid, [132].
[81] ibid, [136].
[82] ibid, [179].
[83] ibid, [193].
[84] ibid, [208].
[85] ibid, [243].

(a) Key Advantages

The ITLOS advisory opinion on climate change represents a game-changing development in the international law of the sea. The ITLOS statement possesses the potential to drive major advancements in the protection of the ocean, including ABNJ, from climate change. The tribunal's key finding that anthropogenic GHGs fall under the definition of pollution, either as substances or as energy, triggers UNCLOS article 194. This turns UNCLOS into a basis for state obligations to address climate change, both mitigation and adaptation.[86] Furthermore, the definition now covers all sources of GHG emissions, sea-based as well as land-based sources, which is expected to have far-reaching consequences for years to come.[87]

The ITLOS advisory opinion is not legally binding. However, it is likely to have ripple effects extending to other international courts, domestic courts, and national governments. Already on 23rd July 2025, the International Court of Justice (ICJ) issued an advisory opinion on the obligations of states in respect to climate change, which, according to experts, built on and extended the reasoning of ITLOS.[88] On 3rd July 2025, the Inter-American Court of Human Rights (IACHR) delivered an advisory opinion on climate change and human rights. Despite not directly relying on or citing the ITLOS statement, the IACHR advisory opinion reflects the same emerging consensus and serves as an example of convergent legal reasoning. Arguably, the ITLOS opinion helped to normalise the idea that climate change gives rise to binding international legal obligations, an understanding that is also reflected in the statements of the ICJ and the IACHR.

The ITLOS opinion adds pressure on states to take stronger climate action, potentially leading to higher ambitions.[89] Corporations are likely to face increased scrutiny and, anticipating regulatory shifts, may proactively raise their standards. The tribunal's explanations on the interplay between UNCLOS and other regulatory frameworks is a step towards a harmonious understanding of state obligations to mitigate climate change.

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[86] British Institute of International and Comparative Law, 'Rapid-Response Reflections on the ITLOS Advisory Opinion' (30 May 2024) 15:10 – 15:20, <https://youtu.be/sWjeJ0qR2uI?si=5_OLUvJlEOdcG5bJ> accessed 25 November 2024.
[87] ibid, 06:15 – 07:10.
[88] Maria Antonia Tigre, Maxim Bönnemann and Antoine De Spiegeleir, *The ICJ's Advisory Opinion on Climate Change* (Max Steinbeis Verfassungsblog, 2025).
[89] British Institute of International and Comparative Law (n 86) 16:00 - 16:10.

Of notable importance is the place that science, in particular the International Panel on Climate Change (IPCC), occupied in the thinking of the judges. Moreover, none of the participants challenged the authoritative value of IPCC reports. Finally, the advisory opinion demonstrates the nature of UNCLOS as a living treaty. Even though the convention is 40 years old and does not contain the term 'climate change', it proves adaptable.

(b) Key Deficits

The non-binding nature of the ITLOS advisory opinion represents a major constraint, making its effectiveness dependent on the goodwill of states rather than compulsory enforcement. States are not legally required to follow the tribunal's interpretation, and there are no direct sanctions if they choose to ignore it. Consequently, political and economic interests may lead to selective or partial implementation, undermining coherence and resulting in inconsistent climate efforts. Without other international and national courts adopting and applying its reasoning, the ITLOS advisory opinion may never become operational law.

D CONCLUSION

Recent developments in the law of the sea collectively signal progress in protecting the ocean in ABNJ but remain constrained by implementation challenges and other unresolved issues. The BBNJ Agreement established a comprehensive framework for effective biodiversity protection in ABNJ. However, gaps remain such as the lack of enforcement mechanisms and excessive state discretion which could limit the treaty's effectiveness.

UN Member States repeatedly failed to agree on a global plastics treaty. Compared to the 2024 treaty draft, the 2025 text has been significantly watered down. Major weaknesses include the absence of plastics production caps and binding global targets. However, concessions such as these might preserve chances for an agreement in the future. The ISA's MC constitutes a historic chance to regulate DSM before environmental damage occurs, but numerous unresolved issues remain and delay its adoption. The Metal Company seeking authorisation for DSM from the Trump

administration raises the stakes of the prolonged inability of the ISA to finalise the MC and threatens to undermine ISA's authority, thus imperilling global ocean governance as a whole.

The ITLOS advisory opinion strengthens climate action by recognising GHGs as marine pollution under UNCLOS. Despite its non-binding nature, the advisory opinion has already influenced other courts and is likely to have further ripple effects both globally and domestically.

UNLOCKING CONSTITUTIONAL RIGHTS: PASSWORD COMPULSION AND PRIVILEGE AGAINST SELF-INCRIMINATION IN *POPTOSHEV V DPP*

Billy Kieran Daly*

A INTRODUCTION

Every smartphone user in Ireland now faces a stark legal reality; refusal to disclose your password when your device has been lawfully seized constitutes a criminal offence. In *Poptoshev v DPP* (*Poptoshev*),[1] the Supreme Court unanimously upheld the constitutional validity of provisions compelling password disclosure under the Criminal Justice (Theft and Fraud Offences) Act 2001 (2001 Act). Charleton J, delivering judgment for a five-judge court, held that passwords exist 'independent of the will',[2] once created, analogous to physical keys rather than testimonial evidence.[3] This landmark decision stands as the first Supreme Court ruling on password compulsion, addressing the collision between criminal procedure and digital privacy. Whilst defensible within existing doctrine, this note examines the practical implications of such a ruling while arguing that the 'independent of will' criterion may be too formalistic and fails to protect constitutional rights adequately when applied to mental contents existing solely in memory, and that the Court's proportionality analysis inadequately addresses the erosion of the privilege against self-incrimination in the digital age.

B BACKGROUND

The Garda National Economic Crime Bureau investigated Mr Yavor Poptoshev for suspected revenue offences, company law offences, and offences of making a gain or causing a loss by deception.[4] In January 2024, Gardaí obtained a search warrant under section 48(2) of the 2001 Act to search Poptoshev's residence.[5] During the execution of the warrant, Gardaí seized two smartphones and a computer. When requested to provide passwords to access these devices, Poptoshev refused. He was arrested and subsequently charged with three offences under sections

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[1] *Poptoshev v DPP* [2025] IESC 47.

[2] *Poptoshev v DPP* [2024] IEHC 721; see also *Poptoshev* (n 1).

[3] *Poptoshev* (n 2) 2 (Bradley J).

[4] Criminal Justice (Theft and Fraud Offences) Act 2001, s 48(2).

[5] *Poptoshev* (n 1) 3.

48 and 49 of the 2001 Act for failing to comply with the statutory requirements to provide passwords.[6]

Poptoshev brought judicial review proceedings seeking a prohibition order against the charges and declaratory relief that sections 48(5)(b)(i), 49(1)(c), and 49(2) of the 2001 Act were unconstitutional.[7] The appellant contended that compelling password disclosure constituted a disproportionate interference with the privilege against self-incrimination. The High Court dismissed the application, holding that smartphones were considered 'computers' within the meaning of the 2001 Act and that the privilege was not engaged as passwords existed independent of the applicant's will.[8]

Poptoshev sought and obtained leave to appeal directly to the Supreme Court on 6 May 2025, the Court being satisfied that exceptional circumstances warranted bypassing the Court of Appeal.[9] On 24 November 2025, the Supreme Court unanimously dismissed the appeal, with Charleton J delivering the judgment.[10]

C ISSUES

The appeal raised two principal issues. First, whether smartphones seized during the search constituted 'computers' within the definition set out in section 48 of the 2001 Act, enacted before the era of modern smartphones.[11] Second, and more fundamentally, whether the compelled disclosure of passwords to lawfully seized devices violated the constitutional privilege against self-incrimination protected under Articles 38.1 and 40.3.2° of the Constitution,[12] alongside article 6 of the European Convention on Human Rights (ECHR).[13] Poptoshev contended that the statutory provisions, which empower the password demands, criminalise refusal, and authorise arrest, constitute a disproportionate interference with this privilege.[14]

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[6] Criminal Justice (Theft and Fraud Offences) Act 2001, ss 48(5)(b)(i), 49(1)(c), 49(2).
[7] *Poptoshev* (n 1) 5.
[8] *Poptoshev* (n 2) 119-121.
[9] *Poptoshev v DPP* [2025] IESCDET 57.
[10] *Poptoshev* (n 1).
[11] 2001 Act (n 4) s 48.
[12] Bunreacht na hÉireann, Articles 38.1, 40.3.2°.
[13] European Convention on Human Rights Act 2003, s 6.
[14] Poptoshev (n 1) 16–18 (Charleton J).

D JUDGMENT

I Smartphones as 'Computers'

Applying principles of literal interpretation, the Court held that smartphones fell within the ordinary and natural meaning of 'computers' within the 2001 Act.[15] The Interpretation Act 2005 permits courts to account for technological advancement when construing legislation.[16] Citing *DPP v Quirke* (*Quike*),[17] wherein Charleton J observed that the term 'cell phone' is misleading shorthand, modern smartphones are 'minicomputers that also happen to have the capacity to be used as a telephone.'[18] The seized devices therefore landed within the search warrant's parameters.[19]

The Court distinguished from *Quirke,* noting that in *Poptoshev*, the sworn information surrounding the warrant application had specifically referenced the potential need for passwords to computers, including mobile phones.[20] This satisfied the requirement that judicial authorisation for digital searches must be explicit, ensuring the District Judge understood the warrant's scope included compelling password disclosure.[21]

II Privilege against Self-Incrimination

The Court's central holding addressed whether compelling password disclosure engaged the privilege against self-incrimination. Adopting Bradley J's High Court analysis, Charleton J held that it did not.[22] The Court applied the established distinction between protected evidence 'dependent on the will' of the suspect, and the unprotected evidence existing 'independent of the will'.[23]

[15] ibid. 12.
[16] Interpretation Act 2005, s 6.
[17] *DPP v Quirke* [2023] IESC 5.
[18] ibid.
[19] *Poptoshev* (n 1) 120.
[20] ibid.
[21] ibid.
[22] ibid. 119.
[23] ibid.

Relying heavily on the English Court of Appeal decision *R v S (F),*[24] the Court reasoned that passwords, once created, exist independently of the suspect's will even when retained only in memory.[25] The key passage from *R v S (F)* draws an analogy that the key to computer equipment is no different from the key to a locked drawer, it is a neutral object.[26] Just as the physical key provides access without being incriminating in itself, a password merely functions as a neutral access mechanism; the potentially incriminating evidence lies in the device's contents, rather than in the password.[27]

The Court acknowledged the privilege's importance but concluded it protects against compelled testimony about one's conduct or knowledge, not against providing neutral 'keys' to pre-existing evidence.[28] Having found the privilege unengaged, the Court nonetheless addressed proportionality. Applying the test from *Heaney v Ireland*,[29] Charleton J held that any interference with constitutional rights based on this set of facts was minimal and justified by the legitimate aim of investigating serious crime effectively.[30] Critical safeguards existed and were adequately employed: judicial authorisation via warrant, detailed sworn information, and lawful possession of the devices.[31]

E ANALYSIS

I The Formalism of 'Independent of Will' Test

The Court's reasoning that passwords exist 'independent of the will' once created is conceptually problematic when applied to information residing exclusively in human memory. The distinction between evidence 'dependent on will' and 'independent of will' emerged from cases that concerned physical evidence, such as blood samples, fingerprints, and pre-existing documents.[32] A blood sample can be extracted; a document can be seized without requiring the suspect to

[24] *R v S (F) and A(S)* [2008] EWCA Crim 2177.
[25] *Poptoshev* (n 1) 120.
[26] *S (F)* (n 24) 20.
[27] *Poptoshev* (n 1) 119.
[28] ibid.
[29] *Heaney v Ireland* [1994] 3 IR 593.
[30] *Poptoshev* (n 1) 119.
[31] ibid. 121.
[32] See *Heaney* (n 29); *Re National Irish Bank* [1999] 3 IR 145.

communicate the contents. The suspect's cooperation may be necessary, but it does not require testimonial disclosure.

Passwords occupy a fundamentally different space. However, the Court's adoption of the physical key analogy from *R v S (F)*[33] obscures this distinction. A physical key can be found, photographed, or duplicated without the keyholder's knowledge; a memorised password cannot be obtained without the suspect actively communicating that information. The 'neutral key' metaphor breaks down: compelling disclosure transforms a mental fact into evidence through testimonial communication.[34] Unlike biometric decryption, requiring only a physical act performed upon the suspect, a memorised password exists nowhere except as knowledge retained in the suspect's mind, making compelled disclosure a form of testimonial compulsion.[35]

The Court's reliance on *R v S (F)* is particularly questionable given that English courts acknowledged that the defendant's knowledge of the password may itself be incriminating,[36] yet upheld the legislation on proportionality grounds rather than denying that the privilege was engaged.[37] The question is not whether passwords physically exist once created, but whether compelling their disclosure from memory constitutes testimonial self-incrimination. This places Ireland at odds with substantial common law jurisprudence. US courts have recognised that password compulsion is testimonial, requiring 'extensive use of "the contents of [one's] own mind"'[38] violating the Fifth Amendment protections.[39] Canadian courts have similarly held that password demands violate the privilege against self-incrimination.[40] While not binding, these decisions demonstrate the conceptual difficulties in characterising password disclosure as non-testimonial.

[33] *Poptoshev* (n 1) 119 (Charleton J); *S (F)* (n 24).
[34] Orin S Kerr, 'Compelled Decryption and the Privilege Against Self-Incrimination' (2019) 97 Texas Law Review 767, 779.
[35] *US v Hubbell* 530 US 27 (2000).
[36] *S (F)* (n 24) 21.
[37] ibid. 25-27.
[38] *Hubbell* (n 35) 43.
[39] ibid.
[40] *R v Boudreau-Fontaine* [2010] QCCA 1108, 39.

This tension extends to article 6 of the ECHR, which enshrines the right to a fair trial, including the privilege against self-incrimination.[41] The European Court of Human Rights in *Saunders v United Kingdom*[42] recognised that this privilege protects against 'improper compulsion'[43] to provide evidence. By characterising password disclosure as non-testimonial, *Poptoshev* potentially circumvents article 6 protections without adequately justifying this departure.

II Proportionality and the Erosion of Privilege in the Digital Age

Even accepting the Court's reasoning that passwords themselves are 'neutral', the judgment's proportionality analysis inadequately addresses a critical consequence: once the password is compelled, all evidence on the device becomes potentially admissible. In *Re National Irish Bank*, Barrington J established that while compelled statements cannot themselves be used to convict, evidence discovered as a result of compelled disclosures is not automatically tainted.[44] Irish law adopts a narrower view than US doctrine, which protects against both direct use and 'fruits' of compelled testimony.[45]

Applied to *Poptoshev*, this has profound consequences. The compelled password unlocks essentially a person's entire digital life,[46] which all becomes potentially admissible. While the password may be 'neutral,' its compelled disclosure provides comprehensive access to what the US Supreme Court described as the 'privacies of life.'[47] The privilege is effectively circumvented, as the suspect has been legally compelled to provide the key to unlock evidence of their own potential criminality.[48]

The Court's assessment of 'minimal' interference is difficult to reconcile with reality.[49] Beyond the six-month sentence for refusal,[50] the substantive impact involves compelled access to digital

[41] ECHR, article 6.
[42] *Saunders v United Kingdom* (1996) ECHR 65.
[43] ibid. 22.
[44] *Re National Irish Bank* (n 32) 219.
[45] *Kastigar v United States* 406 US 441 (1972) 457.
[46] *Riley v California* 573 US 373, (2014) 28.
[47] ibid. 393.
[48] Kerr (n 34) 786.
[49] *Poptoshev* (n 1) 121.
[50] Criminal Justice (Theft and Fraud Offences) Act 2001, s 49(1)(c).

data containing vastly more intimate information than previous generations ever maintained physically.[51] Modern smartphones function as extensions of human memory, with the European Court of Human Rights recognising electronic devices meriting enhanced privacy protections precisely because they contain such comprehensive records of private life.[52] Characterising compelled access to this digital space as 'minimal' understates its constitutional significance.

Moreover, the safeguards identified operate at the wrong stage. Judicial authorisation concerns search authorisation, not password compulsion.[53] Once a device is lawfully seized, section 49 of the 2001 Act makes refusal criminal without any additional oversight.[54] Poptoshev's argument for *inter partes* judicial authorisation specifically for password compulsion should have merited more substantial analysis than dismissal as 'cumbersome.'[55] Administrative convenience cannot justify dispensing with safeguards protecting fundamental rights. This erosion is particularly concerning given society's increasing dependence on encryption for digital privacy. If passwords can routinely be compelled with minimal scrutiny,[56] encryption provides no practical protection against state access.

III Legislative Response

The inadequacy of the current legal framework, including that of *Poptoshev's* reasoning, has prompted legislative action. The proposed Garda Síochána (Powers) Bill 2026,[57] establishes a two-tier authorisation framework absent from the 2001 Act. Unlike the provisions examined in *Poptoshev,* which treated device seizure and password compulsion as a single step, the Powers Bill splits the process: Part 3 governs physical device seizure, while Part 4 requires a separate District Court authorisation for data access.[58] This tiered approach reflects a constitutional sensitivity that the judgment in *Poptoshev* lacked; the idea that compelling access to encrypted digital content raises different privacy concerns from the seizure of a regular physical object.

[51] *Riley* (n 46).
[52] *Bărbulescu v Romania* (2017) 65 EHRR 31, 80-81.
[53] *Poptoshev* (n 1) 121.
[54] Criminal Justice (Theft and Fraud Offences) Act 2001, s 49(2).
[55] *Poptoshev* (n 1) 32.
[56] TJ McIntyre, 'Digital Evidence and the Irish Criminal Justice System' (2020) 30 Irish Criminal Law Journal 54, 12.
[57] Garda Síochána (Powers) Bill Dáil Bill (2026) 3.
[58] ibid. ss 18–19 (Part 3), s 29 (Part 4).

The Powers Bill subjects password compulsion to an explicit necessity and proportionality test,[59] requiring the issuing judge to be satisfied that authorisation is both 'necessary and proportionate'[60] before Gardaí may compel disclosure. This addresses the procedural gap where the Court's assertion that interference was 'minimal and justified'[61] lacked meaningful engagement with less intrusive alternatives. However, the Powers Bill does not address the privilege of self-incrimination in password compulsion. Despite the academic commentary highlighting this constitutional tension,[62] the Powers Bill authorises compulsory disclosure without resolving whether such compulsion violates Article 38.1's guarantee of a trial in due course of the law.[63]

The urgency of this reform underscores the issues in *Poptoshev*. Rather than providing constitutional guidance, the Court's interpretations forced the Oireachtas to build a digital evidence framework on the foundations *Poptoshev* failed to lay: clear principles governing when and how the State may compel access to what Charleton J described as the 'digital space apart from the physical space.'[64]

F CONCLUSION

The Supreme Court's decision in *Poptoshev* upheld password compulsion provisions through the application of an 'independent of will' test. This formalistic approach fails to recognise that compelling disclosure of memorised passwords is fundamentally testimonial, distinguishing them from the physical evidence upon which preceding judgments were made. The proportionality analysis inadequately addressed compelled access to years of digital life. The swift legislative response through the Garda Síochána (Powers) Bill 2026 acknowledges these shortcomings, introducing tiered authorisation and explicit proportionality requirements. Yet, even this reform avoids whether compelling memorised passwords can constitute self-incrimination constitutionally. *Poptoshev*'s reliance on physical evidence analogies proves inadequate for an increasingly digital era. This judgment missed an opportunity to establish principled limits on state

[59] ibid. s 18(1)(b).
[60] ibid.
[61] *Poptoshev* (n 2); *Heaney* (n 29).
[62] TJ McIntyre and Maria Helen Murphy, 'Accessing Digital Evidence in Criminal Matters: An Inadequate Irish Legal Framework' in Vanessa Franssen and Stanisław Tosza (eds), *The Cambridge Handbook of Digital Evidence in Criminal Investigations* (CUP 2025), 321.
[63] Bunreacht na hÉireann, Article 38.1.
[64] *Quirke* (n 17) 99.

power to compel access to the comprehensive digital records central to modern privacy and autonomy.