Submission to the Review of the Administration of Civil Justice (a)

From: Kieran Fitzpatrick, Anbally, Corofin, Co. Galway[1]

Category of contributor - Member of the public [Wordcount = 1904]

Submissions to be sent to - submissions@civiljusticereview.ie **by 12pm Friday, 16th February 2018.**

(a) Improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure;

1) All laws/procedures/rules that impact or potentially impact on the operation of the civil justice system need to be subject to transparent public consultations, and all rules committees should conduct their proceedings in public, unless there are exceptional circumstances for not doing so, in which case the reasons for those circumstances should be outlined to the greatest degree possible.[2] Many of the current laws/rules often inflate legal costs and give effect to inequalities in the context of disputes between lawyers and clients.[3] Public participation would help reduce the propensity towards regulatory capture, whereby lawyers are often overly involved in rules formation.[4]

2) Replace sworn Affidavits with Statutory declarations - Rather than "making oath", a signed declaration should suffice; a person should be required to sign a document to the effect that he/she understands that the statement made is for the purpose of evidence before a court, and that he/she understands that he/she may be prosecuted (for perjury) for signing a document he/she knows to be false, or if he/she is reckless as to the truth of the document. Perjury also needs to be codified in statute law, with a lower threshold for conviction than currently under the common law.[5] Each of these steps would reduce costs while not compromising fairness.

3) Continued reliance on the common law in regard to contracts, in the context of intervening EU consumer rights law, such as *unfair terms of contract*, is anachronistic and overly complex. The *EU Principles of Contract Law*, could be used as a template for the codification of contract law, in general. This would position Ireland to better facilitate contracts in commercial transactions, between US and other EU countries. A more detailed and consolidated version could be drafted for contracts between consumers and businesses, which would take account of EU consumer laws.

4) The Irish constitution is excessively complex in regard to the court system, and needs to be shortened considerably. The complexity does not protect the citizens' rights of access to a court, which is what a constitution should do.

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[1] No confidentiality is requested in relation to my submission.

[2] For example, Article 15. 8.1° of the constitution requires that "sittings of each house of the Oireachtas shall be public."

[3] Some rules appear to exceed the "principles and policy" test as delegated legislation, and in some instances, seeks to overrule primary legislation, in a Henry VIIIth fashion.

[4] As I explain in another submission, the LSRA Act 2015 represents a failure of public participation and a consequent imbalance it the rights afforded to lawyers as opposed to consumers of legal services.

[5] See: article by Carol Coulter, The 'haphazard state' of perjury law, *The Irish Times (2003)* https://www.irishtimes.com/opinion/the-haphazard-state-of-perjury-law-1.357008

A general provision in regard to the Supreme court should suffice, followed by a provision similar to Article 6 of the ECHR, but without the restrictive interpretation of civil rights that is sometimes applied to Article 6 ECHR.

For example--- "Citizens and legal persons are entitled to access to an independent court which applies fair procedures to resolve any legal dispute in a timely manner." The organization of such courts, other than the Supreme court shall be at the discretion of the Oireachtas, with due regard to separation of powers, and the efficient operation of the justice system.

This would allow for specialised courts, such as family courts, or environmental courts. We need a unified legal profession and allow for the specialisation of practice from the outset of a lawyer's career. This would facilitate easier development of a lawyer career, and also allow judges to be appointed to specialised courts with far fewer years of practice. This would better follow the European civil law approach to civil justice, which is far more affordable and allows women to play a more balanced role in the judiciary. In Europe, women make up about 51% of judges, while only about 30% in Ireland and the UK. A model of appointment of judges based on a long career as a general practice lawyer lends itself to a system that results in fewer women as judges and less diversity in the legal professions, due to the difficulty of becoming established. More specialisation, allows for easier development of lawyer careers, and judicial careers, greater diversity and more balanced women participation, leading to lower costs and better access to justice.

5) The principle of *iura novit curia* needs to be applied, in any cases involving constitutional issues, at least by the higher courts. The courts should be free to suggest that a matter may involve a constitutional matter, particularly where the state is involved as one of the parties, even if the matter is not raised by the lawyers on either side.

There are several cases, where the courts have suggested that a constitutional issue may be at play, but do not raise the matter when deciding the case. The public have an interest in ensuring that the constitution is adhered to, and especially so when the government is one of the parties. The court should raise a constitutional concern, of its own volition, and allow both sides to made submissions on the matter. The extra costs from the extra time involved in the case, should be borne by each side, and not be "shifted" to the losing or winning party (at least unless the losing party is the state, in which case modest costs should be awardable, in the range of €25,000 to €50,000.) The threat of costs, means that lawyers often decline to raise a constitutional issue, as the costs of doing so may be prohibitive. Also, it appears (though I'm not certain of this) that the system demands that when a legal action is taken, the system demands that a constitutional challenge be initiated as a separate claim. If this is correct, then this system needs to be reformed, such that two actions can be brought as a single amalgamated action. The CJEU has already ruled in the case of *Impact v Ireland* (Prelim Reference) that the requirement to take two separate legal actions is not compatible with the EU principle of effectiveness.

Sudurski argues that there should be decentralised application of the constitution by courts in Poland, as in the US, and that, "the Constitution proclaims direct application of the Constitution – which means that if in the view of a judge a sub-constitutional provision clashes with the Constitution, the former should be disregarded and the latter applied directly."

The failure to apply the *iura novit curia* principle, and the amalgamation of actions, results in inefficient legal actions, and the unnecessary continuance of unconstitutional laws. A pro-active approach, with fairer cost-shifting rules, would better vindicate separation of powers and help put a brake on unconstitutional legislation by the Oireachtas and facilitate a more efficient enforcement of rights.

6) Justice delayed is justice denied. The state should be liable for prolonged delays in setting legal actions down for trial, or in the delivery of judgements. There needs to be full transparency in regard to scheduling/prioritising cases. (This is detailed in another submission in more detail).

Compensation should be automatically payable to litigants, when cases are delayed past certain time periods, where the state is responsible for the delay. This would incentivise efficiency, and the application of the appropriate resources to ensure that persons can vindicate their rights. Delays in excess of 18 months in putting a matter down for trial, or in excess of six months (post trial) for the delivery of a judgement, should attach a payment of €20 per day to each party, which should be increased to €30 per day, if the state is the defendant.

7) Circuit court cases should be recorded on video, and this should form the basis of any appeal to the High Court. Each side should be invited to make written submissions (on appeal), with oral hearings generally limited to 30 minutes by each side. The system of *de neuvo* hearings is expensive and favours richer litigants, who can benefit from the additional threat of costs to frighten persons of lessor wealth.

8) The jurisdiction of the Circuit court should be increased to €150,000 and appeals to the high court in cases with a value in excess of €30,000 should be assessed by a panel of three HC judges.

9) Motions for Judgement in Default of Appearance or Judgement in Default of Defence should be amalgamated; there should be one motion for "Judgement in default of Appearance and/or Defence".

10) Legal actions before the district court, where the limit is €15,000 should be less formal and more flexible. The limit on small claims action should be increased to €10,000 and the range of cases covered should be expanded, to include disputes other than business to consumer claims. The fee of €25, currently payable, should be payable by the losing party – the current system is a violation of an EU directive on small claims (and also violates Article 6 ECHR). All EU consumer protection laws need to be applicable to all small claims. Paralegals (persons with law degrees) should be allowed to represent persons in civil actions in cases up to a value of €10,000.

11) **Offers into Court -**

Where offers are made into court to deflect adverse costs orders and which may result in reverse cost-shifting (I'm unsure of the exact operation of the rules), then caution needs to be exercised, such that the dice is not loaded towards "repeat players" (insurance companies, for example) as this can be very unfair to one-off litigants. Game theory predicts that insurance companies are better positioned to estimate a likely award and can tailor offers to minimise pay-outs and reduce legal costs. The rules need to be modified to not deprive vulnerable court users (whose representatives don't have access to databases accessible by insurance companies) of a fair evaluation of compensation by a court. Fairness needs to be prioritised over efficiency, and efficiency incentives need to be carefully tailored. One-off-litigants, as vulnerable court users, should not be expected to play "Casino Royal" against

actuarial equipped insurance companies, when the stakes are not at all balanced, as “repeat players” can homogenise their wins and losses while, while one-off-litigants, perhaps subject to life-changing injuries, are expected to play Russian-roulette with their futures.

12) Fee Arrangements

The 1625 Maintenance and Champerty Act needs to be repealed. Maintenance and champerty should be allowed in human rights/environmental/constitutional challenges against the state or state agencies and most tort actions against the state, in business v (large) business cases, and in consumer v business cases, when the business has a turnover above a certain limit (perhaps €10million).

Contingent fee arrangements should be facilitated, and the current ban which prevents linking fees to the value of a case, or an award needs to be repealed. It obstructs the ability of a client to set an upper limit on fees that might be levied, and is also anticompetitive, as clients cannot easily compare/negotiate fee arrangements offered by competing lawyers. [6]

[6] The Brehon law system whereby lawyers could keep between one sixth and one third of the winnings had a lot of merit.

Submission to the Review of the Administration of Civil Justice (b)

From: Kieran Fitzpatrick, Anbally, Corofin, Co. Galway[7]

Category of contributor - Member of the public [Wordcount = 448]

Submissions to be sent to - submissions@civiljusticereview.ie **by 12pm Friday, 16th February 2018.**

(b) Reviewing the law of discovery;

The general rule in the US is to require that the respondent (the party to whom a discovery request has been made) pay the costs of discovery.

The advantage with this rule, is that the person doing the discovery is best placed to control and minimise the costs of discovery. If the costs are shifted to the losing party, at the end of the case, then this creates perverse incentives to inflate the costs and to deploy inefficient methods. The party against whom more complex discovery requests are likely to be made, will often be large businesses, or government agencies (hospitals, for example), and transferring the cost to the respondent better ensures access to justice, in such cases.

In business versus business cases, the costs overall are minimised, by the American approach, so society benefits overall, as the lower costs help keep the costs of goods and services lower. Also, in some cases, a business will be the respondent, while in other cases, it will be the applicant, so in the long term, any unfairness is likely to be evened out, by a respondent-pays rule.

In the case of *McPeek v Ashcroft*[8], the US varied its traditional rule, to apply a "marginal utility" approach (or a proportionality analysis), such that the respondent would bear the costs, when it is likely to provide relevant information, but when it is unlikely to produce relevant evidence, the costs of discovery (or part of the costs) could be shifted to the applicant.

The *McPeek* approach seems most fair, and helps discourage expensive "fishing expeditions", while allowing applicants access to (likely to be) relevant documents without the threat of adverse costs. The court is tasked with assessing discovery requests which are unlikely to yield relevant information, and the applicant can then withdraw a request if the cost is excessive.

Another tactic adopted by US courts, is to order a test-run of discovery of some information, and then assess the cost to benefit ratio of doing more extensive discovery.[9]

I recommend the *McPeek* approach, but this also requires alteration of the loser-pays rule which dominates litigation in Ireland, and generally stifles access to justice (persons of straw excepted).

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[7] No confidentiality is requested in relation to my submission.
[8] *McPeek v Ashcroft* 202 F.R.D. 31 (D.D.C. 2001).
[9] *Barrera v Boughton*, Case No. 3:07cv1436 (RNC). (D. Conn. Sep. 30, 2010).

Submission to the Review of the Administration of Civil Justice (c)

From: Kieran Fitzpatrick, Anbally, Corofin, Co. Galway[10]

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Submissions to be sent to - submissions@civiljusticereview.ie **by 12pm Friday, 16th February 2018.**

(c) Encouraging alternative methods of dispute resolution;

The "Big Stick" of Costs already deters

The best way of encouraging ADR is to maintain a high legal costs system. As Ireland has the most expensive legal costs system in the world, then, we should not have to engage in too much persuasion. However, oftentimes, persons (especially Americans, who are not familiar with Irish cost-shifting rules) can be lured into litigation, by a lack of awareness of the Prohibitive Costs system, due to the historical secrecy surrounding outcomes. Most court judgements fail to detail whom has been ordered to pay the costs, even though this is sometimes the most important part of the judgement.

Hence, full transparency in relation to legal costs adjudications (access to documents/hearings/outcomes) would help to deflect misunderstandings of how expensive litigation is in Ireland. This would require significant amendment of the LSRA-2015 Act.

Normal litigation is Healthy and Necessary:

Caution needs to be exercised, such that pro-active measures to encourage ADR may be counter to community interests. **A certain level of litigation is actually healthy for society and democracy.** - Ireland already has the second lowest level of civil-litigation in the democratic world (only beaten by India), as reflected in the fact that we have only one sixth of the average number of judges per capita of the 47 members of the Council of Europe.[11] By allowing open justice to operate along with a normal level of litigation, the real effects of laws are better understood – this has several benefits to society:

1. Unfair laws are brought to the public's attention – this then facilitates a dialogue between the public and the Oireachtas, and allows necessary reform to be initiated.
2. Awareness of the law is furthered when people are informed of interesting cases via the media - this awareness can encourage compliance with various laws, which people might otherwise be unfamiliar with. Court reporting of litigation educates the public on the law.
3. Human rights issues are brought into the public domain - and various prejudices which can be held by the majority, can be challenged in a public forum facilitating public engagement with issues that might otherwise be swept under the carpet. See ECHR cases, such as Louise O'Keefe/David Norris/Keegan -v Ireland. If such public interest cases are funnelled into private settlements, the public good that can flow from such cases is bypassed. Private settlement of sexual harassment cases can allow persons to continue to harass others, without any public

[10] No confidentiality is requested in relation to my submission.

[11] If one were to assume that criminal and family law take up 2/3rds of judicial time, then, the one sixth ratio, would more likely suggest that civil litigation outside of family law, is participated in **18 times** less often than the average of the 47 COE states.

warning. Similarly, public harm which might result from unsafe products can be aggravated, if some persons who are injured are invited into private settlements. In some cases, the public interest is undermined and private benefits enhanced (perhaps unconscionably), when two parties are facilitated in engaging in public-law enforceable private settlements. Hence, the public interest is not always served by driving litigation into the private sphere.

4. In the US, which otherwise, has one of the most accessible civil justice systems in the world, semi-coerced arbitration removes many consumers of their effective access to justice rights. Notional concepts of choice, in a market where all service providers for a particular product, require consumers to sign contracts with ADR clauses, tilts the adjudicative arena towards big business interests. ADR usually removes consumers rights to *class actions* --- and imbalances the scales of justice: Big companies can pool the resources (property) of many persons and defend their property interests collectively, while consumers are forced to defend their rights alone --- This violates consumers' rights to freedom of association, and , in any event, creates an inequality of arms, due to an inequality of the threat of costs, as costs are often payable by the losing side, or at least the arbitrator's costs. Allowing the well-financed (shareholders) to pool their property interests in a "group" action (the company), while simultaneously denying consumers the right to defend their property rights, as a group, reflects on the dysfunctional nature of most democracies worldwide, where Big Business interests invariably trump citizens' rights and violates the social contract between citizens and the state.
5. By allowing persons to litigate, in public, conflicts which might otherwise boil over into violent disorder is avoided, and the concerns of the public in mediating justice is facilitated.

For all the above reasons, **the state should generally refrain from COERCING persons into private ADR systems**. Encouragement should be of a more passive nature, such as providing Negotiation Rooms near or in court buildings, which could be rented-out to would-be-litigants at low cost.

Also, by introducing coercion, one is also introducing bias; when parties enter mediation/arbitration, other than by choice, the mediator/arbitrator knows that the coercion is inevitably driven either by state interests or big business interests, in stifling access to justice, and that favouring the state/big business is the best way of increasing work. In the US, many large businesses include Arbitration Clauses in contracts in an oligopolistic fashion, providing no real choice for consumers/employees. They know that Arbitrators will subconsciously favour big business to ensure a steady stream of work. Coercion (and semi-coercion) into ADR and impartiality cannot co-exist.

I have to submit that the recent Mediation Bill, 2017 is a clear example of how NOT to encourage ADR. It represents an indictment of Ireland's failure to grasp the real issues around access to justice and dispute resolution. The Bill seeks to intimidate persons into ADR by the threat of further legal costs, as though, that threat was not great enough already. It does so in a manner that violates fair procedures and international practice in regard to effective mediation.

Mediation Act, 2017 – How NOT to facilitate ADR:

While the Bill purports to reduce costs, it seriously risks increasing costs-

> **The Costs Section**: **Section 21**, allows a court to consider an unreasonable failure to consider or attend Mediation, in deciding to award costs in the main proceedings. – The Bill prescribes that a court can take account of how a party responds to a suggestion to mediate, in awarding costs in the main legal dispute. – This is problematic as it effectively coerces persons to engage in a private contract, under the threat of adverse costs. This interferes with a person's right of access to the courts, which is a constitutional right. Justice Clarke recently said;

"I consider that it can be said that there is at least an arguable case that the constitutional right of access to the court may include an entitlement that that right be effective,… there is an increasing problem emerging in relation to that constitutional entitlement."[12]

A number of constitutional rights are being infringed here: a. The freedom to contract, b. The right of access to courts (due to further prohibitive costs). -

Freedom of contract:

A mediation service is a private contract. Hence, if the state coerces a person to mediate, with the threat of a financial penalty, the state is interfering in a person's freedom of contract. Many lawyers contend that this is a violation of fundamental freedoms, and a violation of property rights as one has to pay half of the costs. The exigencies of the common good do not apply, as a person may be coerced to partake in a charade to avoid getting a bad recommendation from the Mediator to the Judge.

It is a much greater interference to coerce persons into private contracts, in order to access justice. Some states, coerce persons to obtain legal representation to attend a court, but this may be called into question, if a state does not have an adequate system of legal aid[13] (and Ireland does not). In fact, Ireland advances the *no foal no fee* system as a means of poorer persons getting access to justice.

The mediation system is not compatible with the *no foal no fee* system as the lawyers cannot usually recoup the costs of mediation. Hence, indigent persons may be denied access to justice, and middle-income persons may be denied access due to the increase in the costs of litigation, due to the coerced Mediation stage. **Solicitors and barristers are required under the Bill to advise their clients of "the benefits of mediation", but without this advice being qualified, thus interfering in the freedom of lawyers to act in the best interests of their clients**. Clearly, there are situations where mediation is not a suitable option, due to prior comments from an opposing party, that no settlement will be entertained.

Prohibitive Costs:

The system of awarding legal costs generally, is already prohibitively expensive; hence, being subjected to the threat of more costs than normal, may make the costs of access to the courts even more prohibitive. A litigant must now also take account of the costs of mediation, even if the costs are usually shared equally. Further, the Bill [S.20] allows a judge to impose the mediator costs on either side (see- S. 20(1) - "Unless ordered by a court…"). This further discretion adds to the magnitude of the threat of costs, making justice less accessible.

The Bill clearly adds to the costs of litigation.[14] Firstly, a solicitor must make a statutory declaration to the effect that she has advised her client of the benefits of mediation. Both measures will demand a lawyer's time, which the client will have to be charged for. There is no provision for the provision of legal aid for indigent litigants, or for a waiver of costs of a mediator, for indigent litigants.

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[12] See para 2.9 of *Persona v Minister for Public Enterprise* [ESAT] [2017] IESC 27 http://courts.ie/Judgments.nsf/0/DCDE288AAE8FD4C4802581290038DBC0

[13] See *Airey v Ireland* ECHR 1978

[14] The Law Reform Commission recognised that costs could increase – See para 3.100: - 'As noted in the 2010 Jackson *Final Report of the Review of Civil Litigation Costs in England and Wales* —Mediation is not, of course, a universal panacea. The **process can be expensive** and can on occasions result in failure.' ; [LRC Report here.]

In Canada, the Supreme Court has held that a waiver is required for indigent litigants as well as for those who may face hardship due to court hearing fees:

> *"[46] A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum — as tacitly recognized by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts".*[15]

The section of the Canadian Constitution (S.96) referred to by the court is similar to Article 35 of the Irish Constitution. The Court also cited the *rule of law* as a basis for ensuring access to justice:

> *"The connection between access to justice and s. 96 is further supported by considerations relating to the rule of law. The s. 96 function and the rule of law are inextricably intertwined. As access to justice is fundamental to the rule of law, it is natural that s. 96 provide some degree of constitutional protection for access to justice. Concerns about the rule of law in this case are not abstract or theoretical. If people cannot bring legitimate issues to court, laws will not be given effect, and the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed."*[16]

In the context of the Bill, the judge is not afforded any right to waive mediation fees for either indigent litigants or those subject to financial hardship, and the Legal-Aid Act precludes access to assistance in most civil cases outside of family law, and in any event, the Legal Aid Act does not authorise assistance for mediation services.[17] Hence, the (unregulated) mediator's fees pose a serious additional obstacle for persons seeking access to the courts in Ireland. In the US, mediators are often provided at low hourly rates, with subsidies offered for indigent litigants.[18]

Clear violation of EU law:

The CJEU in the case of *Alassini* stated that the principle of effectiveness of EU law, on the right to judicial protection, could only be protected, if **a coerced arbitration system**, provided, '**that it does not give rise to costs – or gives rise to very low costs – for the parties'**. [19] A subsequent (2015) EU Directive on ADR codified the *Alassini* rule for consumers. The court emphasised that the right of access to a court was a general constitutional principle common to member states:

> *"Secondly, it should be borne in mind that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has also*

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[15] *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2014 SCC 59, [2014] 3 S.C.R. 31 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14375/index.do

[16] Ibid.

[17] S.27 of the Legal Aid Act, 1995 appears to require that aid can only be given for, "such proceedings conducted before an officer of such court or tribunal", and a mediator is not such an officer.

[18] See: American ABA (2017) Conference Materials , Day One.

[19] See para 67 of *Rosalba Alassini v Telecom Italia SpA* (C-317/08) http://curia.europa.eu/juris/document/document.jsf?text=&docid=79647&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=588253

been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union (see Mono Car Styling, paragraph 47 and the case-law cited)"[20]

In normal litigation, currently, lawyers are incentivised to negotiate on the steps of the court, rather than months in advance, as at that stage, both side lawyers can charge for a full day's hearing, even if the case is settled. There is already a HUGE incentive to settle, due to the threat of adverse legal costs. Under the Mediation Bill, shortly after a case has started, the court may direct the parties to engage in mediation. This puts the less financially strong party at a huge disadvantage, as it will have to "play along" with the judge's suggestion. The case will have to be suspended, meaning that costs for a full day will already have been incurred. A Mediation day will have to be scheduled, to go through the motions of mediation, to avoid being sanctioned by a later costs order, for failing to participate. Then following a possible failed Mediation, a new hearing will have to be scheduled. This means that a case that might have taken one day of court will take at least two days, and the further costs of one day's mediation will be incurred. This could increase the ultimate costs of the case by up to 100%. -The litigant will (normally) have to pay half the costs of the mediator, the cost of their own lawyer/lawyers for the mediation, and potentially, the costs of both sides lawyers for two days sitting of the court.

There is research showing that the higher the overall threat of costs, the more a negotiated outcome will favour what are called "repeat payers", such as insurance companies or large companies providing goods or services to consumers. The repeat players effectively get some of the higher legal costs "refunded", as by dragging out proceedings, they up the stakes for financially challenged opponents, thus bouncing many of their opponents out of the ring, so to speak.[21]

Section 17(1) of the Mediation Bill says ---

"… the mediator shall prepare and submit to the court a report which shall set out— (a) where the mediation did not take place, a statement of the reasons as to why it did not take place, …".

The Mediator can identify as a "troublemaker", one of the parties. The Mediator therefore is not able to play the normal neutral role of a mediator, but becomes a spy who assesses the obstinacy of the participants.

Hence, the court is to be informed of the reasonableness or unreasonableness of a party to partake in mediation, by the mediator. This is problematic, from a number of angles. If a party cannot agree a fee with a mediator, because it is too high, for example, how can a mediator make such a report?

Secondly, if two parties to a dispute agree a mediator, but shortly thereafter, one party seeks to pull out of the mediation, then that party risks a negative report being presented to the judge. The whole point of settlement talks is to allow a collaborative environment, but, if one party assesses that the costs of the mediation will be too high, then that party may be subject to a negative report by the mediator to the judge, if the mediation did not take place, but was earlier set up to take place. This allows a third party to the proceedings (the mediator) to influence the judge to award costs against the mediation-cancelling party. This is an unfair ground for awarding costs, and a third party, who

[20] Ibid, para 61.

[21] Repeat player defendants take advantage of the risk aversion of privately funded, one shot plaintiffs by engaging in hard bargaining; defendants either refuse to make offers or make offers considerably under the likely value of the case. Further support for this conclusion is provided by a mid-1980s study of settlement negotiations in 220 High Court cases by Timothy Swanson of the economics department at University College in London. In only 53 percent of the cases studied in which plaintiffs were privately funded did defendants make settlement offers, compared to 66 percent of the cases with Legal Aid plaintiffs and 90 percent of the cases financed by unions. http://users.polisci.wisc.edu/kritzer/research/law_misc/engrule.htm

now has a conflict of interest (as her salary is dependent on the continuation of the mediation), is allowed to interfere, in what should be a fair adversarial contest; which is the determination of who should be responsible for the costs of the litigation.

Whereas, part of the Bill states that persons should enter mediation voluntarily, the fact that a judge can consider a failure to attend, in awarding costs [S.21], totally undermines such voluntariness. There is a clear element of coercion.

What is Contract Coercion?

"Contract coercion occurs when a contract agreement is entered into under conditions involving harm or threats of harm. In the US, State and federal laws require contracts to be entered into "knowingly" and "willingly" by all parties. Thus, if a party signs a contract due to coercion, the contract generally will not be considered legally enforceable."[22]

In practice, **90 % to 95% of cases are naturally settled via a process of voluntary negotiation**. The state should not be driving more litigants out of the courts.[23] There is already an excessive costs incentive to settle or negotiate, without further state coercion. This is a disproportionate interference in a person's right of access to a court, as it will inevitably push up the overall costs, as a litigant will have to pay at least half the cost of mediation, with little choice, due to the threat imposed, for failing to partake in mediation. The state could charge for court costs, with a waiver for indigent litigants, as a more proportionate means of pressuring persons to settle. Also, there is no evidence that mediation will reduce the costs of litigation (even if successful) as the lawyers involved will seek to charge the same level of fees as applies to litigation.

International experience suggests that arbitration can often be more expensive than litigation, in resolving International disputes, due to the very high costs of the Arbitrators. Mediators' fees could similarly escalate, particularly, if persons are coerced to hire them.

Also, normally, settlement matters (failures etc.) are not allowed to be brought to a court's attention, this is a common law principle based on the privilege of settlement talks. Hence, in the context, of where the state has failed to reform the legal costs system, and where the CJUE has already ruled that costs are prohibitively expensive,[24] the Mediation Bill will up the costs further, when the Mediation is not successful. Litigants should be free in such circumstances, without any financial threat, to assess whether they wish to engage in Mediation or not.

Lord Justice Dyson said, "*It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest of terms. It is quite another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on the right of access to the courts."*[25]

For example, the CJEU has held (in an Irish Prelim reference) that coercing litigants to engage in two separate legal actions to vindicate a right undermines the EU principle of effectiveness, in the context

[22] http://www.legalmatch.com/law-library/article/contract-coercion.html
[23] See dissenting opinion of Justice Clarke, in the recent *Persona v Min of PE* [2017] IESC 27 (maintainance/champerty) case.
[24] See CJEU case C-427/07 *Commission v Ireland* (Re costs of environmental litigation). http://curia.europa.eu/juris/liste.jsf?language=en&num=C-427/07
[25] *Halsey v Milton Keynes General NHS Trust* (2004) EWCA (Civ) 579 at para. 9

of access to a court. [26] See also an EU report on arbitration, which states, "In Italy, similar laws (attempting to introduce mandatory arbitration in the field of public procurement) have been declared illegitimate by the Constitutional Court."[27]

The coercion to partake in mediation may be constitutional, provided certain caveats are met, as outlined by the CJEU in the *Alassini* case above, most particularly, that the alternative system does not give rise to other than very low costs.

Also, the fact that the Mediation can be prescribed by the judge, post the commencement of proceedings, also adds to the potential costs, as it can interrupt the litigation in a costly fashion. The equivalent principle of effectiveness of judicial protection, should also be seen to be an unenumerated right under the Irish constitution, particularly since the CJEU has stated, that the principle emanates from the constitutional traditions of member states. And the Bill prescribes that a judge can award the costs of the mediator against either party.

It should also be noted, in the *Alassini*, that the obligation to enter a free (or low cost) arbitration scheme, was prescribed by contract, such that, a consumer could theoretically avoid engaging in the contract. However, the obligation in the case of coerced Mediation, is totally unavoidable, if a person seeks to exercise their right of access to the courts.

I accept that the law could possibly require that litigants, turn up to a mediation process, provided that such a process was (i) at a very low cost, and (ii) was an automatic requirement. However, the Bill enforces a high-costs regime, and allows a judge to propose mediation, with the threat of sanction. I contend that each of these **three internationally unusual elements**: (1) high-cost, (2) being judge directed and (3) sanction imposition, each seriously compromises a litigant's right of access to an impartial court. The independence of the Mediator is also compromised, by the requirement to make a potentially troublemaker-fingering report; this calls into question, as to whether the goal sought to be pursued is objectively meaningful.

Impartiality:

Also, the impartiality of the judge may be undermined: If a person refuses a judge's recommendation, to mediate, as they believe that the law is on their side, and/or they cannot afford the extra costs of mediation, the judge may be affronted by such a failure to heed the judge's advice. Objectively, litigants will be afraid to refuse, as they will be going against the advice of the judge.

The ECHR court has held that both a subjective and objective approach needs to be taken when assessing the impartiality of a court; hence, because a person will inevitably feel that the judge will be affronted by a refusal, they won't be free to refuse, even if the cost of Mediation is not an issue for them. The only way to avoid such an interference in the objective impartiality of the court, is to avoid informing the court which party scuppered the mediation process.[28] This is the approach which is taken currently (for good reason) and the approach taken by most countries in the world. However, the Mediation Bill requires the Mediator to report to the court, as to whom the "troublemaker" was (the reasons why the mediation did not take place).

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[26] C268/06 *Impact v Minister for Agriculture* 2006 CJEU http://curia.europa.eu/juris/liste.jsf?language=en&num=C-268/06#

[27] http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf

[28] The Irish Supreme Court has set a low threshold for finding that objective impartiality is compromised, in such cases as *Goode Concrete*.

Further, S.17 also requires that the report be given to the judge BEFORE the main case is heard, and therefore UNNECESSARILY interferes in the court's impartial assessment of the main case. While, the Bill purports to only allow the judge to take account of a party's unwillingness to partake in the Mediation, for the purposes of awarding costs, the reality is that the Mediator must present her report PRIOR to the hearing of the main case; this needlessly permits the judge to be prejudiced by the report, in deciding the main case.[29] It must be inferred that the Bill seeks to intimidate litigants to partake in Mediation, to avoid (I) an adverse costs order and (II) to avoid prejudicing the judge in the main proceedings. Otherwise, the Mediators report would be made post the main proceedings, but before the costs award decision. This approach should be seen to be unconstitutional *per se*.

Further, most cases that proceed to court will already have been subject to "settlement talks", between the party's lawyers. Certain threats may be made at such talks, which leaves one party clear that the other party does not want to settle. For example, a large company may be unwilling to settle a consumer claim, to avoid creating a precedent for other consumers. The company may play hard-ball, and make clear that they will fight the case all the way to the Supreme Court, and drag the case out for years. But, when invited to engage in Mediation, such a company can pretend to mediate, knowing it has superior resources. The consumer will not want to partake in mediation, as she will know, that it has no prospect of success. However, due to "settlement" privilege, that litigant will not be able to tell the court of the reason it does not want to partake in mediation. The Bill does not allow for such circumstances, and the litigant may get a bad report from the mediator. Indeed, even if a company in such a circumstance did not explicitly issue such a threat (which it could easily deny), it may well be implied by the circumstances.

It is well recognised that judges can be prejudiced by how parties behave in settlement negotiations (or mediation). Wayne Brazil says,

> "Judges are especially likely to resent litigants or lawyers who try to use the cost and delay of litigation to gain an advantage to which they know they are not entitled."[30]

Hence, because the Bill requires that the mediator's report is presented to the judge BEFORE the main hearing of the case, the report could seriously prejudice the judge in the main case.

The failure of the Bill to limit the risk of prejudicing the judge, by directing that the mediator report to be only given to the judge, post the main case (and just before the decision on costs), demonstrates the unnecessary risk created; this disrespects the independence of judges demanded by the constitution, and is unconstitutional. In contrast, when (Calderbank) payments are offered into court, the court is not advised until the costs determination phase.

The threat of adverse costs for failing to engage in mediation, despite claims that mediation is voluntary, amounts to a *de facto* coercion to mediate; this violates EU law and international best practice,[31] and further entrenches the use by the Irish legislature of the "Big Stick" as the instrument of choice in facilitating the more financially secure to lord it over challengers in most legal disputes.

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[29] The Mediator has a vested financial interest in fingering an "unwilling" party, as her payment is tied *inter allia* to the length of the mediation process, and will want to be able to subtly refer to the drastic consequences (an exorbitant adverse costs order in the main proceedings) of not "playing along".

[30] Wayne D. Brazil , 'Protecting the Confidentiality of Settlement Negotiations', Berkeley Law School 965 http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1911&context=facpubs

[31] Jennifer W. Reynolds, Luck v. Justice*: Consent Intervenes, but for Whom?* 14 PEPP. DISP. RESOL. L.J. 245, 268 (2014).

Conclusion-

The state should not engage in ADR "encouragement", other than by the passive facilitation of mediation or other ADR systems. Other encouragement should be limited to publishing judgements, including court cost orders, allowing open access to documents in costs disputes, and full publication of costs-disputes-outcomes on the courts' website.

The "Big Stick" of adverse costs is a quite ample deterrent to litigation already. Aided by open justice, this is more than a sufficient encouragement to engage in settlement talks when appropriate. Fortifying the "Big Stick" by threatening more costs for failing to engage/consider/partake in ADR converts ADR from a voluntary process into an Orwellian routine, and exemplifies the state's hostility to citizen rights being vindicated by independent adjudicative arenas. The passage by the Oireachtas of such legislation should alarm citizens who believe that rights should be accessible.

Submission to the Review of the Administration of Civil Justice (d)

From: Kieran Fitzpatrick, Anbally, Corofin, Co. Galway[32]

Category of contributor - Member of the public [Wordcount = 1170]

Submissions to be sent to - submissions@civiljusticereview.ie **by 12pm Friday, 16th February 2018.**

(d) Reviewing the use of electronic communications including e-litigation and possibilities for making court documents (including submissions and proceedings) available or accessible on the internet

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More efficient/transparent procedures - All documents need to be capable of being submitted and accessible online. Access to data in relation to the operation of the civil justice system is obstructed by the rather chaotic system for the issuance of civil bills/court actions. A Bill can be lodged with the circuit/high court and served at any time in the following year. Many such actions are never actually "served" on the defendant/respondent. Hence, for example, a journalist cannot know or find out, how many defamations suits were served in 2016 and how many were set down for trial, and how many trials were held. The system needs to be transparent; the status [whether; filed/served/queried/set down/settled/heard etc] of all lawsuits or pending lawsuits should be accessible online.

Media outlets sometimes report that a "lawsuit" has been filed in the High Court, but fail to clarify that the suit may never be "served". This can distort the public's perception of a case, and the level of real litigation occurring; ideally, the "serving" period should be reduced to one month.

Open Justice—

Separation of powers demands checks and balances on all three branches of government. Open Justice provisions should act as a check on judicial power as well as facilitating oversight of individual court decisions. A refusal to allow relatively unrestricted access to court documents, prevents real public oversight of court actions --- for example, if the public cannot see documents that are presented to the court, then the public cannot properly play its oversight role. "In order meaningfully to exercise the right to open justice, members of the public (and the media) cannot simply be relegated to the role of spectator."[33]

There is a risk that courts may not respond to key arguments presented by the parties of a case, if documents are not accessible, and members of the public do not attend a particular case, which is often the case. The ECHR court has held that courts need to respond to the key arguments advanced by the parties to a case and provide reasons for accepting or rejecting the arguments.[34] Access to court

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[32] No confidentiality is requested in relation to my submission.

[33] See para 47 of *City of Cape Town v South African National Roads Authority Limited & others* (20786/14) [2015] ZASCA 58 (30 March 2015)

[34] See para 123 of *Kristiana Ltd. v Lithuania (Application no. 36184/13)*, 6 February 2018.

documents is the only way of letting the public oversee the courts in making decisions, so as to provide better confidence to the public in the fairness of proceedings.

Also, open justice facilitates a necessary dialogue between the courts, the media, the public and legislators. Any restrictions hinder that dynamic dialogue, which democracy requires.[35] This is why TV cameras need to be allowed into the courts. Website-casting of most cases should be standard.

In June 2017, the South African constitutional Court held that –

> "courts ought not to restrict the nature and scope of the broadcast unless prejudice is demonstrable and there is a real risk that such prejudice will occur – mere conjecture or speculation that prejudice might occur ought not to be enough."[36]

The Court stated,

> "There simply can be no logic in a court permitting journalists to utilise the reporting techniques of the print media but not permitting a television journalist to utilise his or her technology and method of communication, being the broadcasting and recording of proceedings, despite the fact that 'live camera footage will be more accurate than a reporter's after-the-fact summary'.[37]

There is extensive research indicating that humans behave much better when subject to public oversight, and even perceptions of oversight alter human behaviour.[38] Anonymity and diffusion of responsibility, particularly, when made routine, can undermine human's capacity to act fairly. Thomas Jefferson advised, "Whenever you do a thing, act as if all the world were watching." This is why decision makers need to be subject to maximum oversight.

The default position of all courts needs to be:

1) open access to all documents

2) cameras in the courts

3) accessible outcomes in written form

4) Open Court – meaning access for people to attend, such that attendees can see all evidence presented. Currently, lawyers often refer to documents that are viewable by the court and the opposite party, but not by the public attending the court. This is a manifest obstruction of open justice, and needs to be remedied. This can easily be done by requiring all exhibits to be photographed and posted online (via the court's website); these documents could then be downloaded by court attendees on their laptops/smartphones contemporaneously, using court facilitated Wi-Fi.

By allowing access to all documents, litigants including lawyers can access templates in order to draft court documents - this will increase the standard of drafting, allow for easier training of lawyers, and lower legal costs.[39]

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[35] K Fitzpatrick, "Courts need to expand view of open justice" *Irish Times* of 16 June 2014 available at http://www.irishtimes.com/news/crime-and-law/courts-need-to-expand-view-of-open-justice-1.1831537

[36] *The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others* (425/2017) [2017] ZASCA 97 (21 June 2017) http://www.saflii.org/za/cases/ZASCA/2017/97.pdf

[37] Ibid, para 44.

[38] Sander van der Linden, 'How the Illusion of Being Observed Can Make You a Better Person', (May 3, 2011) https://www.scientificamerican.com/article/how-the-illusion-of-being-observed-can-make-you-better-person/

[39] Seth Barrett Tillman, 'Time to open up courts and let justice be seen' (*Independent.ie*, 22 August 2012)

Safeguards (Applied Sparingly) –

Concerns may arise in some cases, where certain documents lodged in court may be particularly scandalous and/or not directly related to the substance of a dispute. A 3-day time delay could be applied between lodgement with the court and publication on the internet. This would give the opposite party time to consider whether the documents need to be sequestered by the judge. However, the threshold for not publishing documents should be a high one, and the judge assigned to a case, should have to give reasons for not publishing, or for any redactions, where that is sufficient.

Reduce Paper Documents -

Currently, lawyers, and their assistants often drag multiple heavy boxes of documents into court, which sometimes take up seating in the court which should be available for the pubic. Often, of these thousands of pages of documents, only a few may be needed to be referred to in the course of a trial; this results in an enormous waste of both physical effort and work done in preparing and packing such documents, when all this could be avoided by electronic filing, whereby a particular document could be found electronically. Costs can be lowered by dispensing with printed documents as much as possible.

http://www.independent.ie/opinion/analysis/seth-barrett-tillman-time-to-open-up-courts-and-let-justice-be-seen-26889857.html

Submission to the Review of the Administration of Civil Justice (e)

From: Kieran Fitzpatrick, Anbally, Corofin, Co. Galway[40]

Category of contributor - Member of the public [Wordcount = 4981]

Submissions to be sent to - submissions@civiljusticereview.ie **by 12pm Friday, 16th February 2018.**

(e) Achieving more effective and less costly outcomes for court users (especially vulnerable users).

Introduction –

Real justice requires access to justice, which requires effective access to courts, which requires that courts be accessible without the threat of prohibitive costs. Some 90%, or an even higher percentage, of people in Ireland have no realistic access to justice, due the prohibitiveness of the costs associated with legal actions via the courts.[41] I must submit that the Irish system of access to justice is permeated with unfair procedures, unconstitutional laws, and conflicts of interests, which means that most court users in Ireland are vulnerable users.

The Need for CCOs (Costs Capping Orders)

In the *ex parte* application by Dymphna Maher[42], the applicant effectively sought an assurance from the High court that any adverse costs would not be prohibitively expensive, if her lawsuit was subsequently deemed not to have fallen under the ambit of the special costs regime (related to some environmental cases).

Justice Hedigan insisted that there was no legal authority to permit him to make the order sought by the applicant. However, he observed that:

> *[It was] very arguable that the absence of some legal provision permitting an applicant to bring such a motion, without exposure to an order for costs, acts in such a way as to nullify the State's efforts to comply with its obligation to ensure that costs in certain planning matters are not prohibitive. As things stand, I have no power to change this. "*

This case along with 12 other cases were appealed to the Supreme Court on an *ex parte* basis. The SC court held that it could not award such an assurance, on an *ex parte* basis, as the other side (the EPA) needed to be heard first.[43]

The SC decision in *Coffey* means, in effect, that any person seeking to access the courts in Ireland is threatened with financial ruin, even if just seeking a CCO.

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[40] No confidentiality is requested in relation to my submission.

[41] Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, (See paragraphs 93, 94 and 95).

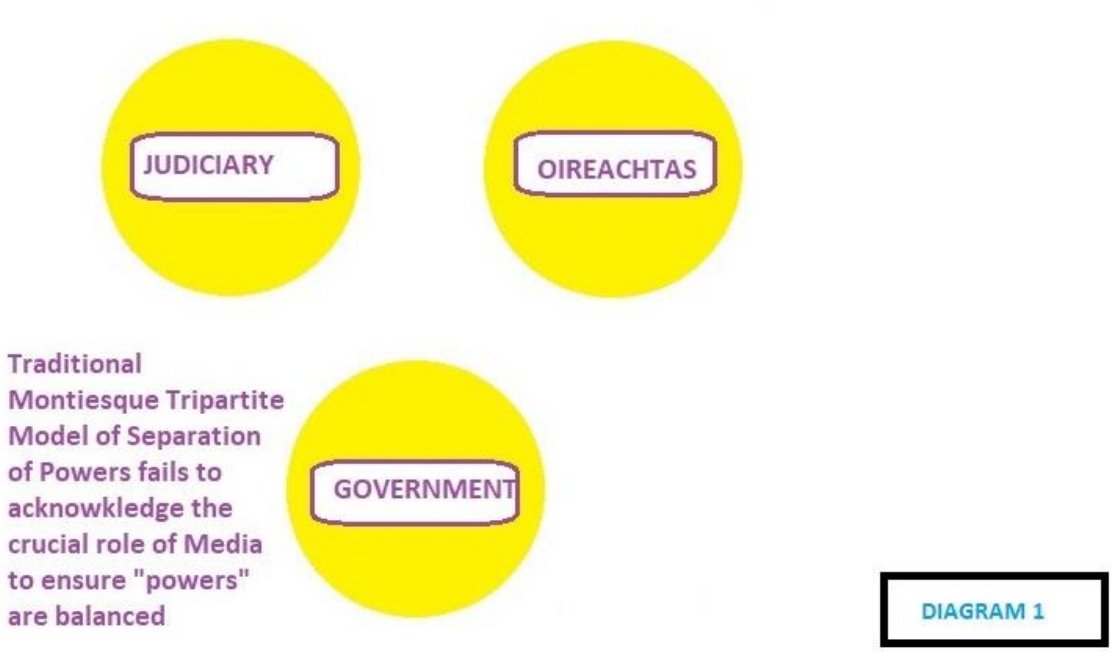
[42] In the matter of an application by Dymphna Maher [2012] IEHC 445

[43] See *Coffey v EPA* [2013] IESC 11

The court failed to proportionately balance the right of access to the courts as a conflicting right to the property rights of government, particularly in the context of the need for real separation of powers. The judicial sphere of power is rendered inaccessible to most citizens, when the loser-pays-rule is applied to challenges to executive power, and the judicial sphere of power is inappropriately diminished; this undermines the checks and balances necessary in a liberal democracy.

Separation of powers

By dividing power between the traditional three spheres, the courts, the government, and the Oireachtas, we help to disperse power and make less probable the accumulation of power to one person, or a small elite, as often happens in what are referred to as illiberal democracies. Diagram 1, below, displays the traditional Montesquieu view of three spheres of power.



However, the (Montesquieu) tripartite division of power, is a poorly developed theory. This is largely, because, it generally fails to engage with the level of real power held by each of the three spheres, in practice.

The second flaw, is that there should really be five spheres of power, and not three; the people should be seen as the most important sphere, while the media should be viewed as an important sphere also, whose vitality is essential to real democracy.

When populist governments such as those in Hungary and Poland interfere in the independence of the Judiciary, civil society rightly condemns such interferences as rule of law/separation of powers violations. Prof. Sadurski, writing about Poland, said that once illiberal democracies, "begin dismantling separation of powers, constitutional checks and democratic rights, they undermine democracy itself", although such regimes "want to be liked or even loved, at least by a significant segment of the electorate."[44]

[44] Wojciech Sadurski, (January 2018) – 'How Democracy Dies (in Poland): A Case Study, of Anti-Constitutional Populist Backsliding', 14 ; See at: http://ssrn.com/abstract=3103491

However, what is less recognised as a separation of powers incursion, is when governments significantly, and disproportionately restrict access to the courts, by maintaining prohibitive legal costs regimes, amplified by inefficient legal procedures, or less commonly, by restricting the standing of persons who can take constitutional challenges. **The judicial sphere of power is significantly diminished, by the maintenance of a prohibitively expensive legal costs system by the legislature.** The UK Supreme Court recently recognised that high fees could deter access to justice: it said;

> "In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade."[45]

Ireland is particularly challenged by its prohibitive legal costs system, for which there is little political support for reform. This stems from a generally held consensus amongst most politicians that it is preferable to maintain a system that reduces opportunities for holding government decisions to account, via the courts. Opposition politicians generally play along and seek to instead gain political kudos for pursuing injustice issues, which in more balanced legal systems would be pursued by the victims via accessible courts. The lure of relatively unconstrained power when opposition "gets its turn" in power also feeds the continuance of a no-reform agenda.

The inaccessibility of Irish courts to most citizens, is probably best exemplified by how few persons seek to use them to pursue civil matters, as evidenced by the fact that Ireland has the fewest judges per capita in Europe, with one sixth of the average per capita number of judges.

Barack Obama in an academic paper on the US criminal justice system, suggested that there should be a "coequal" sharing of power between the three branches of government, so as to ensure that there is real separation of powers. He said;

> "The Constitution separates the executive, legislative, and judicial powers into three coequal branches of government, all of which have independent roles in shaping the criminal justice system."[46]

I agree, though what constitutes an equal distribution of power is disputable. However, power parity can only be pursued when the costs of access to the courts are both **modest and predictable**. This is not the case in Ireland currently, and though courts often refuse to impose adverse costs in cases which involve constitutional challenges, this policy is not predictable, with a requirement being sometimes expressed that a particular challenge must reach a certain threshold of novelty or/and be of exceptional public importance.[47] The positioning of such thresholds is impossible for lawyers to predict in advance, which means that most persons of means are deterred from taking legal actions in Ireland and cannot therefore perform their duties as "guardians of the Constitution", as referenced by the Supreme Court in *McKenna-2 v AG* (1995) case. Without willing citizen-guardians, the constitution is reduced to the equivalent of a security hut, without security guards.

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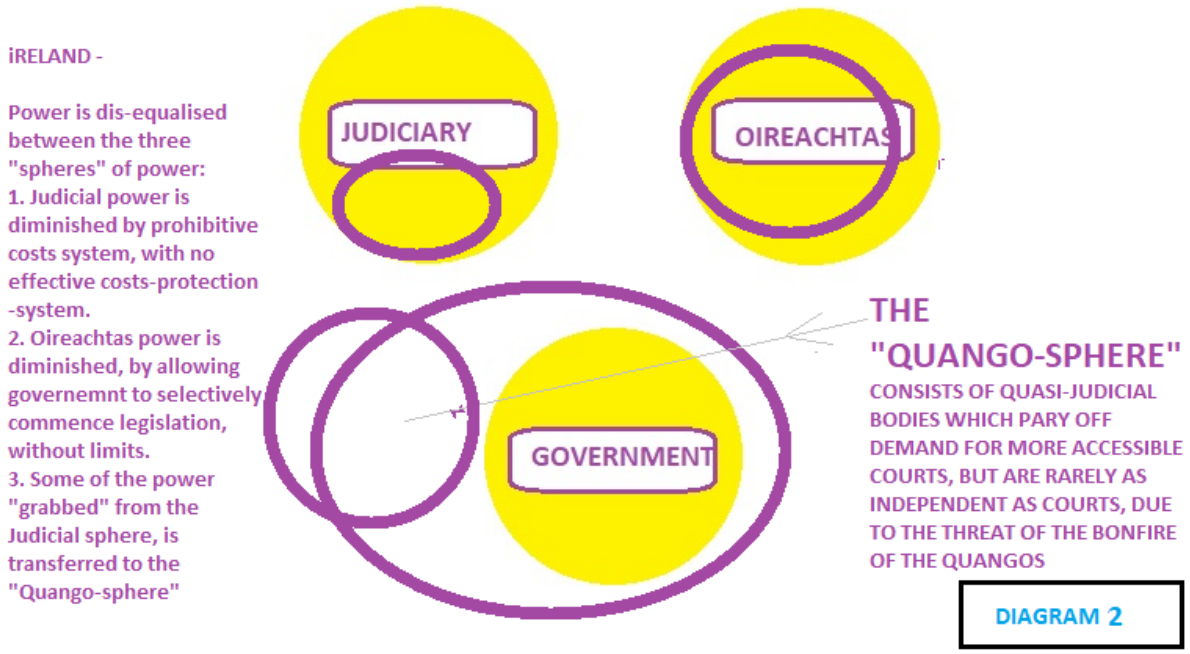
[45] *Unison v Lord Chancellor* [2017] UKSC 51

[46] Barack Obama, 'The President's Role In Advancing Criminal Justice Reform', 130 (3) Harvard Law Review (Jan 2017). https://harvardlawreview.org/2017/01/the-presidents-role-in-advancing-criminal-justice-reform/

[47] See Irish Times report—'However, there was "insufficient degree of novelty" in the legal issues raised to warrant exercising an "exceptional" jurisdiction to depart from the normal costs rule, she held.'---- https://www.irishtimes.com/news/crime-and-law/courts/high-court/denis-o-brien-must-pay-costs-of-failed-action-over-d%C3%A1il-comments-1.3068568

The prohibitive level of costs in Ireland coupled with the absence of access to CCOs means that there is a significant imbalance in the real power held by the judicial sphere and the executive sphere as represented by the purple circles in Diagram 2 below; Some of the power "grabbed" by the government is transferred to the "quango-sphere", which helps parry-off demands for real reform:



In contrast, the South African Constitutional Court has held that in cases against the state or state entities, citizens should be allowed to take cases in constitutional, human-rights or environmental cases, with both the protection of **no adverse costs orders** should they lose, and with the **right to recover costs from the state** when they win. In a recent constitutional case, Justice Chris Jafta said that in *Biowatch* (a 2009 environmental case), the Constitutional Court had laid down a general rule relating to costs in constitutional matters. [48] -

> **"The rule seeks to shield unsuccessful litigants from the obligation of paying costs to the state. The underlying principle is to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights," he explained.**

The lockdown of the "catch 22" in the *Coffey* case, is also to be questioned in the context of the recent AG (Bobek) Opinion in the *NEEP v Eirgrid & AG* (2015) case.[49]

AG Bobek responded to a preliminary reference query as to whether the NPE (Not Prohibitively Expensive) requirement should apply to all elements of a judicial procedure and said:

> "… **the requirement that a procedure be 'not prohibitively expensive' pursuant to Article 11(4) of the aforementioned directive will generally apply to the challenge as a whole."**

[48] https://www.timeslive.co.za/news/south-africa/2017-10-31-biowatch-costs-principle-should-be-embraced-by-lower-courts-concourt/

[49] http://curia.europa.eu/juris/document/document.jsf?text=&docid=195752&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=115147#Footref40

Hence, this suggests, if confirmed by the CJEU, that all elements of a procedure are subject to an NPE requirement, to avoid a chilling effect. The AG said that seeking to separate claims would introduce a **lack of predictability**, which would not be NPE compliant:

> "In relation to those grounds covered by the NPE rule, costs must remain modest. In relation to others, they might be significant. (33) Any unpredictability as to which side of the line a ground falls will inevitably act as a disincentive to allege that ground. As already mentioned above, (34) such a disincentive is in itself in conflict with the NPE rule."

The logic of the AG opinion, is that there is a need to introduce a CCO procedure, which is NPE compliant, in order to comply with EU law. The AG stated that,

> "Prohibitively expensive justice also conflicts with the principle of effectiveness — to the extent that can be distinguished from the right to effective judicial protection under Article 47 of the Charter — since, by definition, it renders the exercise of EU law rights 'impossible or excessively difficult'".

This raises the prospect that CCOs may also be required in all cases involving EU law, not just environmental cases in the context of Ireland's costs regime.

Article 47 overlaps with Article 6(1) ECHR, and the ECHR court has signalled a need for costs to be not prohibitive. In *Austin v UK* [50] , though the court dismissed the applicant's claim for failure to exhaust her national remedies, the court did say that (para 40),

> "Nevertheless, while the Court would not exclude the possibility that the State's responsibility under the Convention could potentially be engaged in such a case, in view of its findings at paragraphs 41-44 below it is not necessary for it to reach any firm conclusion as to whether Article 8 or Article 1 of Protocol No. 1 were applicable in the present case."

Hence, international pressure from the CJEU, the ECHR, the UN ACCC and the EU Commission may eventually coerce Ireland to provide meaningful access to justice. A failure to do so will also risk damaging Ireland's reputation as a country that adheres to the rule of law, which could deter international investment.

In this context, and in the context of pursuing the public interest, I submit that a low-cost procedure be statutorily established to allow persons to seek a CCO, which is NPE compliant. In an earlier public consultation, run by the Dept. of Environment, I submitted the below proposal, though I have modified this proposal somewhat to apply to all CHE (Constitutional/Human/Environmental) rights:

I propose the following CCO procedure:

1. **Allow an applicant to apply for an CCO costs protection declaration, initially, on an *ex-parte* basis via a written submission and/or a hearing if necessary.**
2. **If a judge determines that there is a reasonable chance that the application, meets a threshold of having a "reasonable chance of success", then an CCO proposal notice should be then served on the respondent. If the respondent accepts the proposal, then the CCO is established. If the respondent seeks to challenge the proposal, then a hearing is set down for a ruling.**

[50] App. 39714/15

3. **Only one lawyer[51] should be allowed to recover costs to represent either the applicant or the respondent at such a hearing. The recoverable costs of such a hearing should be set at a maximum of €1500.00 .**
4. **If an CCO is then established, then a recoverable cost cap should apply to the main hearing of the substantial matter of the dispute relating to a CHE rights matter. I suggest that the applicant's costs liability to the respondent should be set at a maximum of €5,000 for all legal persons.**
5. **Where the sum of €5,000 is still prohibitive for persons of low income and wealth, then an earmarked fund should be created, to provide legal aid to assist such persons to pay part of the €5,000 contingency.[52] This fund should be administered by an independent agency (such as the Legal Aid Board) on a priority basis - taking account the public interest in the case.**
6. **The above rules are proposed to apply to all CHE cases, where the defendant/respondent is the state or a state emanation.**
7. **The applicant's recoverable costs (those payable to a prevailing applicant, by the respondent) should be capped at €25,000, with permission being given to the court to increase this level to a maximum of €75,000 in cases which make a significant contribution to the public good. Lawyers should be allowed to engage in any fee arrangements with their clients, subject to fair contract terms. (All sums are inclusive of VAT).**
8. **Applicants seeking to defend a case on appeal (by respondent) should retain the €5000 cap, as a global cap, but should be entitled to recover up to an additional €5000. Applicants seeking to appeal a negative decision, should be allowed to seek an additional CCO, which should be set by the court at between €1000 and €5000, on top of the original €5000, depending on the public interest nature of the dispute. Allegations that a case is frivolous should only be entertained at CCO hearings, as the threat of retrospective analysis undermines the predictability of any costs protection system.**

These proposals are modest, proportionate, fair and do not put any undue burden on the state's resources.

Balancing conflicting constitutional Rights:

The English rule (Loser pays rule) on legal costs does not balance two conflicting rights – (1) the property rights of winning litigants, and (2) the right of persons to have access to the courts, without being threatened by unpredictable and prohibitive legal costs.

Notionally, proponents of the English rule claim that winners are entitled to be 100% vindicated, and so be in a position to cover all their legal costs. However, this is a very narrow view, which fails to assess the big-picture consequences: (a) winners are also threatened, up to the point of winning, and can be threatened as defendants, in circumstances where they have no chance of recovery of costs from penny-less plaintiffs. (b) the English rule creates all sorts of conflicts of interests and market distortions, which enormously inflate the costs payable.[53] (c) wealthy litigants can threaten persons of lessor wealth, with adverse costs, such that the case is determined more often by issues of fear,

[51] Many EU countries use "one lawyer" systems. Ireland's suggestion that a so-called "common-law" system requires multiple lawyers is outdated and disproportional.
[52] Further legal assistance could be provided, where necessary, using a job-bridge program for newly qualified solicitors or barristers at a low cost. The ECR case (C-279/09) of *DEB v Germany* should also be considered.
[53] See comments of chairman of the 1990 the Fair Trade Commission's report on lawyers.

rather than justice. (d) the state, and most government actors become unaccountable, as the decision makers are immune from costs (lumped on taxpayers, often, with little transparency), but can pursue political goals, or engage in abuse of power, with no financial downside, and can still threaten all challengers with financial ruin; this inequality of arms, means that citizens are generally unable to challenge the unconstitutional laws and conduct of government.

Hence, the English rule is not compatible with a real constitutional democracy:

Costs Allocation Rules incentivises **Unfair Adjudication Rules** which also incentivises **Inefficiencies** into the system.

Because the government is allowed to intimidate its challengers with unlimited adverse costs, it then wants to MAXIMISE those costs, so as to bolster its threat and avoid oversight; High Legal Costs has been the default lever of choice for all governments since the commencement of the state; the "Big Stick" is maintained to bounce its opponents out of the ring, and this has so far been achieved with little condemnation by international institutions, which have largely failed to recognise the stealth threat that prohibitive costs represents as a threat to the rule of law.

The Big Stick undemocratically deters citizens and/or NGOs from challenging the government when it passes unconstitutional laws, or acts unconstitutionally - this allows the government to pander to its own electoral constituency while depriving less well represented persons access to rights protection, leading to violations of minority rights and individual rights. When populist demands call for adjudicative processes which affect specific rights of connected groups, QUANGOs are often created in order to parry off populist demands for accessible justice. The substitute QUANGO justice can rarely be as independent as courts, and the outcomes are often secretised, thus bypassing democratic oversight.

Hence, the **government passes unfair laws for legal costs adjudication**, so as to frighten all challengers – this allows it to exercise power with minimum oversight.

A few observations of the LSRA-

The LSRA [2015][54] has not yet been fully commenced as legislation.

The Bill introduces a new Judicial Review system[55] for the ADR system to be operated under the auspices of the new legal services "Authority".[56] At first glance, this represents a credible alternative to the unfair rules (the 15% rule and 8% stamp duty) applicable to the LCA system. However, a closer analysis raises questions as regards compliance with international human rights norms. I refer to my submission to the ACCC for a more detailed analysis.[57]

[54] http://www.irishstatutebook.ie/eli/2015/act/65/enacted/en/pdf
[55] S. 63 (1).
[56] S. 8 and S. 9.
[57] See my two submissions of June 2016, regarding the LSRA Act- http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envpppubcom/acccc2014113-ireland.html

Under the LSRA, the charging of excessive fees will no longer be deemed to be misconduct, unless grossly excessive.[58] This was objected to, by the lay members of the Law Society complaints committee, **but ignored by the government.**[59]

Note also, that where lawyers face costs which may be imposed by the Authority, these costs are often capped, as under S. 71(5) (h) – which caps costs at €5,000 or S. 80 (4), where costs are capped at €1,000., but there is no cost-capping for clients' costs.

The above imbalanced rules reflect on a political system that refuses to engage in any public consultations in relation to such an important deficiency in Irish governance, as identified by the Troika and others.

The statute of limitations as regards submittal to the LCA process is reduced from 12 months (Taxation) to either 6 or 3 months.[60] My reading is that if the lawyer extracts her payment from the retained funds of her client (even without consent), the lawyer can benefit from the 3 month limit, as it appears that the fees can be deemed to have been paid. This appears to be a kind of "grab and gain" law; this reflects the lack of public participation in the drafting. The LCA costs adjudication process does not permit the adjudicator to evaluate the quality of the work done by a lawyer in the provision of legal services, as this is not one of the 16 factors to be considered in the LSRA.

The legal costs adjudication of lawyer-own-client costs by the LCA takes into account any written agreement between the client and the lawyer[61], but importantly, it does not mandate a written agreement and is not mandated to take into account the absence of any such agreement, or the unreasonableness of the lawyer in failing to provide an accurate written quotation, or the failure of the lawyer to more clearly outline her likely costs or the means of calculating them. Also, where there is no written agreement between the lawyer and her client, but a verbal agreement has been reached, it appears that no consideration will be allowed to be given to such a verbal agreement by the LCA.[62] Nor is there any requirement upon the lawyer to advise her client that should a written agreement not be entered into, a list of criteria will form the basis of the means of adjudicating any dispute and that any verbal agreement may have no legal status. The client is usually unaware of the severe consequences of their failure to demand a written agreement.

Even though S. 150[63] itemises several requirements which a lawyer must follow in regard to the provision of an estimate of likely costs, any failure to adhere to these requirements **can** be disregarded in assessing the lawyer's fees, **if** this is in the interests of justice,[64] as this failure is not one of the

[58] S. 51 (1) [misconduct] (l). consists of seeking an amount of costs in respect of the provision of legal services, that is grossly excessive,

[59] Mark Tighe, *Legal Services Bill fears ignored* , The Sunday Times (p.6) 17 April 2016 – "In a letter released under the Freedom of Information Act, the lay members warned the department: "The only effect of including the word 'grossly' before 'excessive' is to weaken the position of the client who makes a complaint. A valid defence [can be] that while the fees may be 'excessive' they are not 'grossly excessive'." " http://www.thesundaytimes.co.uk/sto/news/ireland/article1687993.ece

[60] S. 154 (7). (Most contracts enjoy a six-year statute of limitations.)

[61] S. 155 (6).

[62] S. 151 (3). - An agreement under subsection (1) shall constitute the entire agreement between the legal practitioner and the client… . See also the disregard in S. 157(6) - "… in the interests of justice…"

[63] Legal practitioner to provide notice of conduct of matter, costs, etc.

[64] See the disregard in S. 157(6) - "**unless**"… "… in the interests of justice…".

factors on the list of factors to be considered.[65] [66] All the matters to which the LCA has to have regard to, do not include such a failure, but includes a multiple of other factors, many of which are likely to inflate the costs.[67] In this context, it is important to recall the findings of the Competition Authority that most persons do not reach any written agreement in advance – "…solicitors and barristers generally don't quote a fixed price".[68]

The government has never explained why it does not allow a contract dispute between a lawyer and her client to be contested in the same manner as any other contract dispute for professional services[69], which can be litigated in court, where **all** factors can be taken into consideration.[70] Instead, it provides two choices for resolving legal costs disputes (for own lawyer-fees):

1. A quasi-judicial process via the LCA office. OR
2. An alternative (quasi-arbitral) process via the Fees Tribunal under the Authority.

The ADR process (No.2) precludes availing of the LCA process once a determination is made.[71] This new ADR process should not be accepted as an acceptable alternative system of adjudication of own-lawyer costs, as compared to the LCA process[72] and it should therefore be held to be unfair. The LSRA unfortunately provides few clear measures designed to lower costs or enhance access to justice.

Conclusion[73] -

The inefficiency of the legal system is simply reflective of a deeper malaise in the system – the failure of successive governments to respect separation of powers. Disarming the government of its "Big

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[65] *The State (Cussen) v Brennan* [1981] IR 181 applies – Factors, not outlined in legislation cannot be entertained in a decision. (See para 195 *Cussen*) - "Therefore, the introduction of the Irish test by the Commissioners was in excess of the statutory powers vested in them"; See also - *Dunne v Donohoe* [2002] 2 IR 533 – The court stated that adding requirements (the need to have secure storage) to the awarding of gun licences, the superintendant was acting *ultra vires* of the provisions of the Firearms Acts. - "By imposing extra 5rconditions, the superintendant was assuming the power of the legislature, thus violating the Constitution's provision that only the Oireachtas can enact law."

[66] This approach could be assessed as a breach of the unfair terms of contracts directive or the unfair omissions section of the Unfair Commercial practices directive of the EU (both transposed into Irish law). However, there appears to be no judicial remedy available to plead these claims, under Irish Law, as all contract disputes relating to legal costs are directed to a determination by the LCA process. Of course, in practice, such claims are unlikely to ever be made, for the simple reason that those persons who are not aware of the importance of having a written agreement, are also unlikely to be aware of their rights being potentially violated under infrequently used consumer protection laws.

[67] The number of factors to be considered are scattered within the Act; see S. 155 (Subs 1 to 6) and the ten or so items outlined in Schedule 1 of the Act. (Near the end of Act).

[68] See page 28 of the 2006 competition authority CA report .

[69] This system may violate the EU principle of equivalence in regard to professional fee disputes.

[70] Deference to any specialist knowledge of LCAs can hardly be decisive, since the selection criteria for LCAs is similar as for normal judges (10 years experience as a lawyer (S.148(1)(d)) rather than 12 years for judges), and does not require any extra qualifications, notwithstanding that LCAs may gain knowledge through experience.

[71] See S. 61 (10) – "Where pursuant to this section a dispute regarding a bill of costs between the client and the legal practitioner is resolved, the client shall not thereafter be entitled to seek adjudication of the bill of costs under Part 10 unless such adjudication forms part of the resolution."

[72] I refer to my earlier submissions in regard to the unfair rules applicable to the LCA process, in particular to the 15% rule (Now- S. 158(2)), the 8% stamp duty (separate secondary legislation- S.I. No. 24/2014) and the redaction of client's names (Now- S. 140 (5) (c) – "where subsection (3) (b) applies, the client concerned may not be identified, whether by name, address, or economic activity").

[73] For more detailed analysis, I refer to my three submissions to the LSRA here- http://lsra.ie/en/lsra/pages/submissions

Stick" will be a difficult task. But, as long as the government can threaten most of its citizens with the costs of between three and four lawyers, when there is no evidence that one is inadequate in most cases (the norm in Europe/USA), and allows those costs to be assessed using laws that violate fair procedures, any proposed reforms will likely be sidestepped by government if they lower costs other than in a minor fashion.

The priorities of reform need to be:

1) Costs allocation - recoverable costs need to be capped[74].

2) Costs adjudication - procedures need to be fair/transparent; this means that documents need to be accessible online, and outcomes published. The manner in which contracts are formed between lawyers and clients need to adhere to ALL consumer protection laws, such that lawyers should not be allowed to seek any costs which have not been specifically authorised, in advance, by clients. A system that allows lawyers to issue a bill to a client, after legal services have been performed, without an upper cap having been agreed before the services were provided, is not allowed in most European states, and should be viewed as an unfair term of contract.

3) The process/rules by which cases are allocated/prioritised should be fully transparent[75] and TV cameras should be allowed into court, by default.

[74] Most former colonies of the UK have veered from the use of the "English rule" and adopted various "recoverable-cost-capping" systems ; The US (since 1853), Canada(since 2007), the UK (since March 2017, for a broad range of claims), and even Ireland has effectively acknowledged that the English rule is not suitable for access to environmental justice (see 2011 Miscellaneous (Environmental) Provisions Act, and S.50 of the 2010/2011 Planning Acts).

[75] This important aspect of the justice system needs to be subject to a separate public consultation which is first preceded by an outline of how the current system operates, as it is difficult to critique a system, without having detailed knowledge of how it currently works. See - ECHR "delay cases" such as *Doran v Ireland*.