How to argue a rights case in Irish constitutional law

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In his judgment for the majority in Gemma O'Doherty and John Waters v Minister for Health, *the chief justice upheld the decision of the Court of Appeal to refuse leave to the applicants to bring judicial review proceedings challenging the constitutionality of Covid "lockdown" measures. But the Supreme Court appeal in* Gemma O'Doherty *was about much more than the constitutionality or otherwise of those measures. O'Donnell CJ's judgment addresses itself to very general questions in respect of rights-based challenges to legislation in the Irish constitutional system. It assesses the standing of "the proportionality test" in Irish constitutional law. It considers the question as to where the "onus of proof" in respect of proportionality might lie. And it explores the role of policy-based or scientific evidence in such challenges.*

The majority judgment in Gemma O'Doherty *thus offers something of a roadmap to Irish lawyers and judges in respect of how to approach the tasks of arguing and adjudicating upon rights-based challenges to legislation in this particular constitutional ecosystem. And it is a judgment that is rooted fundamentally in a concern for legitimacy.*

1. Introduction

On the 15th April 2020, Gemma O'Doherty and John Waters went to the High Court where they sought leave to apply for judicial review to challenge the constitutionality of "lockdown" laws that had been introduced some days previously in response to the Covid pandemic. But they were not qualified lawyers, and they argued the case poorly. They could have argued it on the basis that some of the laws interfered with their constitutionally-protected rights more than was necessary to achieve the goal of controlling the spread of Covid-19. But they approached it largely on the basis that the pandemic itself was a hoax, and that the laws in question were the product of a conspiracy.[1] The judge refused to grant them leave, citing their "complete failure" to put on affidavit "some evidence which, if proven, could support" their claims.[2] The Court of Appeal upheld that decision in a judgment delivered in March of 2021.[3] And the following July the Supreme Court, by a 6-1 majority, agreed that Gemma O'Doherty and John Waters should not be granted leave to bring judicial review proceedings. O'Donnell CJ found that insofar as the applicants' argument was that the laws were the product of a conspiracy, then, in order to obtain leave, it would have been necessary for them to adduce "some plausible foundation in evidence" in support of such a claim.[4]

But the judgment of the chief justice for the majority in *Gemma O'Doherty* is about much more than what would have been required of the applicants in order to obtain leave. As we shall see, it addresses itself in a general way to the role and standing of the proportionality test in rights-based challenges to legislation in the Irish constitutional system. To what extent are Irish judges to be bound in their adjudication of such challenges by the *Oakes*-test, imported as it was from Canadian jurisprudence into Irish constitutional law in the mid-1990s?[5] It addresses itself to the question as to where the onus of proof lies in such challenges in the Irish constitutional system. Is it up to the litigant challenging an impugned measure to show why it involves a disproportionate interference with a constitutionally-protected right – as would seem to be implied by the doctrine of the presumption of constitutionality? Or might the onus shift to the State once an applicant shows a *prima facie* interference with rights – as per Canadian practice? And the judgment addresses itself to the role of policy-based evidence in such challenges in

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[1] See O'Donnell CJ, [2022] IESC 32, at [87]-[88]. See also Hogan J, [2022] IESC 32, at [9], where he refers to the claim that the legislative measures were "part of an effort to establish a new world order where citizens will be subjected to authoritarian control." See also Birmingham P, [2021] IECA 59, at [35].

[2] Meenan J, [2020] IEHC 209, at [54]-[55]

[3] Birmingham P, [2021] IECA 59.

[4] See O'Donnell CJ, [2022] IESC 32, at [X]

[5] *Heaney v Ireland* [1994] 3 IR 593.

the Irish constitutional system. Indeed this might be its most fundamental theme. How important, in arguing and adjudicating upon such cases, is expert or scientific evidence going to the soundness (or otherwise) of the policy objective sought to be achieved by an impugned measure, and of the necessity of the interference with rights in order to achieve it?

Thus, while in one lens the *Gemma O'Doherty* case might be seen as a lesson in *how not to argue* a rights-based challenge to legislation in Irish constitutional law (Exhibit A: the approach taken by Gemma O'Doherty and John Waters), in another, it offers a great deal more. The judgment of the chief justice represents something of a roadmap for Irish lawyers and judges in respect of how to go about arguing and adjudicating upon such a challenge. O'Donnell CJ and his colleagues appear to be concerned about a drift towards a culture in which such cases would come to be argued on the basis of policy-based evidence such that the courts, when exercising their function of reviewing legislation, would tend to morph into a kind of third legislative chamber. They appear to be concerned about an insufficiently mindful use by Irish lawyers and judges of foreign constitutional principles and practices – echoing concerns about the emergence a "homogenized global constitutional law" raised by the likes of John Finnis and Jeffrey Goldsworthy.[6] And the chief justice appears keen to emphasise – as he has repeatedly now over his thirteen years on the Irish Supreme Court – what he sees as the appropriate source and methodology for litigating constitutional cases in the Irish setting, namely "what the [Irish] Constitution says, and does not say… and the [institutional] system and order it envisages."[7]

The remainder of this article is in four parts. Part 2 gives an overview of the legislation and regulations that Gemma O'Doherty and John Waters sought to challenge and the nature and grounds of their claim. It offers a basic outline of the rulings of the High Court and Court of Appeal, and sets out the grounds upon which the Supreme Court granted leave to appeal in the case. Part 3 considers the judgment of the chief justice in greater depth, exploring what it has to say about those three fundamental questions under three sub-headings: i). the place of evidence, ii). the role of the proportionality test, and iii). the location of the onus of proof. It goes on in a fourth subsection to consider why it was that the Supreme Court refused leave to the applicants to bring judicial review (as we shall see, there is something of a plot twist in that respect). Part 4 turns to Hogan J's partial dissent. Part 5 situates the judgments for the majority and the minority within the broader scholarly debates around judicial review of legislation. It elaborates an argument that the O'Donnell CJ judgment might be understood as rooted fundamentally in a concern for legitimacy and as such, as among the more broadly significant

[6] Goldsworthy refers to "a global conversation about rights among judges of apex courts, who increasingly meet at conferences, share ideas, and cite and sometimes follow one another's judgments." He also refers to those who, as he sees it, embrace this drift into global and judge-centric constitutionalism conceiving of "the method of proportionality analysis developed by rights-enforcing courts throughout the world" as a kind of magic formula capable of providing an "independent, objective method of determining who is right" in those society-wide disputes about what justice requires in a given rights-context. See Jeffrey Goldsworthy, "Losing Faith in Democracy: Why judicial supremacy is rising and what to do about it" (Policy Exchange, 2015), at 5, 15. See John Finnis, "The Gray's Inn Lecture – Judicial Power: Past, Present and Future" (Policy Exchange, 2015), at 27. For similar legitimacy-based dubiousness in respect of the proportionality framework generally, see Noel Malcolm, *Human Rights and Political Wrongs* (Policy Exchange, 2017), especially chapter 2 ("The Balancing Act").

[7] That phrase is from his judgment in *Elijah Burke v Minister for Education* [2022] IESC 1, at [36] – which judgment is analysed elsewhere in this volume by Oran Doyle. He uses similar phrases in the *O'Doherty and Waters* judgment considered here, referring at one point [para 58] to the importance of "the structure and language of the Irish Constitution," and at another [para 61] to the "desirability of a close and coherent analysis of the Irish Constitution in its own terms." We see the influence of this thinking in early judgments such as that in *Pringle v Government of Ireland* – where he sets out the "very carefully drafted, nuanced provisions" in Art 29 before going on to explore in mundane-legalistic detail what implications those nuances might have in the context of Thomas Pringle's particular claim. [2012] IESC 47, at [5]. He offers scholarly elaboration on the theme in his "Sleep of Reason" article, inviting us to consider "more sceptically and rigorously the orthodox view that it is somehow inevitable that courts must go further than the boundaries implied by the text and language of the Constitution." See Donal O'Donnell, 'The Sleep of Reason' (2017) 40 Dublin U LJ 191, at 212. And the theme is again in evidence in recent judgments such as that in *Gorry v Minister for Justice* – where he conveys discomfort at the notion that contemporary judges could read down or soften the radical language of Art 41.1.1 on the supposition that the drafters of the clause had had "their metaphorical fingers crossed behind their backs." See [2020] IESC 55, at [38], or, for analysis, Tom Hickey 'Interpreting Natural Rights: *Gorry* and 'the Family' under Art 41' (2021) 43 (3) Journal of Social Welfare and Family Law 331.

judgments handed down by the Irish Supreme Court in recent times. That it effectively implores his colleagues and successors, when exercising their functions pertaining to the review of legislation under Art 34.3.2, to take more care to "place the legitimacy horse before the justice cart," and to thereby protect the capacity of the Constitution to function over the passage of time "as a form of adhesive that helps binds society together."[8]

2. Background

On 12th March 2020, following the spread of Covid-19 to Ireland, the then Taoiseach, Leo Varadkar, announced that the country would go into lockdown until the end of that month.[9] Two pieces of legislation were enacted within the next three weeks. The long title to the Health (Preservation and Protection in the Public Interest) Act 2020 contained detailed "recitals" setting out the background against which the Oireachtas considered it was enacting the measures in question and the objectives sought to be achieved:

> An Act, to make exceptional provision, in the public interest and having regard to the manifest and grave risk to human life and public health posed by the spread of the disease known as Covid-19 and in order to mitigate, where practicable, the effect of the spread of the disease, to amend the Health Act 1947 to confer a power on the Minister for Health to make regulations prohibiting or restricting the holding of certain events or access to certain premises and to provide for enforcement measures…[10]

The Act went on to insert a new section 31A into the Health Act 1947 which conferred a power on the Minister for Health to make regulations for preventing the spread of Covid-19. Subsection 1 of this new section allowed that such regulations could provide for restrictions "requiring persons to remain in their homes," for example, or for restrictions upon travel "to, from or within geographical locations" within the State, or upon the holding of events which, "by virtue of [their] nature, format, location or environment…could reasonably be considered to pose a risk of infection with Covid-19 to persons attending…" The Emergency Measures in the Public Interest (COVID-19) Act 2020, meanwhile, made certain changes to the Residential Tenancy Act 2004 affecting the ability of landlords to evict tenants in these exceptional circumstances, and to the Mental Health Act 2001, relating to how the Mental Health Tribunal could be constituted.

On the 8th April 2020, and on foot of this power conferred on him by the new section 31A, the Minister for Health, Simon Harris, introduced SI No. 121/2020. Art 4(1) of this Regulation provided that an applicable person "shall not leave his or her place of residence without reasonable excuse." Art 4(2) went on to enumerate an apparently non-exhaustive set of such excuses, which included, for example, the leaving of one's residence to "go to an essential retail outlet for the purpose of obtaining items including food," to "attend a medical appointment," to "exercise…within a 2 kilometre radius of that residence," or to "attend the funeral of another person who resided in the [same] residence before his or her death."[11] Art 5(3), meanwhile, made it an offence to "hold an event" unless it was a "relevant event," with the latter defined with reference to those reasonable excuses pertaining to leaving one's place

[8] This broader idea is elaborated in Donal O'Donnell, 'The Sleep of Reason' (2017) 40 Dublin U LJ 191, at 212. The phrase concerning the "legitimacy horse and the justice cart" is my own. See Tom Hickey, "Legitimacy – Not Justice – and the Case for Judicial Review" (2022) 42(3) Oxford Journal of Legal Studies 983, at 917.

[9] I rely here on the account offered by O'Donnell CJ, [2022] IESC 32, at [2]-[11].

[10] Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020, s 31A(2)(i), as quoted in O'Donnell CJ, [2022] IESC 32, at [3].

[11] It appears to be non-exhaustive insofar as it opens with the following phrase: "Without prejudice to the generality of what constitutes a reasonable excuse for the purposes of paragraph (1), such reasonable excuse includes…" This quite technical wording becomes important to Hogan J's partial dissent in the Supreme Court, as we shall see in Section 4 below.

of residence under Art 4(2). This Regulation was initially intended to have effect until the 12th April but by the terms of another Regulation, SI No. 128/2020, it was later extended until the 5th May.[12] It was later extended again until 18th May, and ultimately until the 8th June – when Ireland entered Phase 2 of its "Roadmap for Reopening Society and Business."[13]

Gemma O'Doherty and John Water's application for leave to bring judicial review proceedings was heard by Meenan J in the High Court on the 5th and 6th of May 2020. Their application appears to have been wide-ranging and unfocused. It included claims that the legislation and regulations referred to above had not been validly enacted in the first place – in part for reasons relating to the idea that the Government in office at the time was what is colloquially referred to as a "caretaker Government," and also for reasons relating to the fact that the Ceann Comhairle had limited the number of deputies present in the Dáil during the passage of the legislation owing to the requirements for social distancing.[14] But it also included more substance-oriented claims around the idea that the legislation and regulations were in any event repugnant to various provisions of the Constitution, including to Art 40.3 (personal rights), Art 40.4 (liberty), Art 40.5 (inviolability of the dwelling), Art 40.6 (the right to assemble peaceably) and Art 44 (free profession and practice of religion).[15] These included claims made against those amendments to the Mental Health Act 2001 and to the Residential Tenancy Act 2004. And they of course included those restrictions on movement envisaged by the new section 31A of the Health Act which, they claimed, were "wholly disproportionate to the incidence and effects of Covid-19."[16] Indeed that idea appears to have permeated the entirety of their application at all stages and indeed to have been at its core: that this legislative response, and the actions taken by the Minister on foot of the powers conferred on him by that response, was rooted in "fraudulent science."[17]

In a judgment delivered on the 13th May, Meenan J rejected the applicants' claims. He gave short shrift to the procedural elements (i.e. relating to the passage of the legislation) insofar certain provisions in the text of the Irish Constitution made it clear that there was no remotely arguable case on those fronts.[18] He gave equally short shrift to the claims relating to the amendments to the Mental Health Act 2001 and to the Residential Tenancy Act 2004 insofar as he found they had no standing to challenge them (i.e. they had not shown that they were in any way personally affected by them).[19] And this left those measures relating to the free movement of people and the prohibition of certain events. Meenan J was satisfied that these aspects of the measures were designed to affect every person residing in the State and that O'Doherty and Waters accordingly did have standing to challenge them. But the question then was whether they had established an "arguable case" that they were unconstitutional, as per the threshold set down in *G v DPP* for obtaining leave to bring judicial review proceedings.[20] Meenan J recognised that this was a low threshold whose purpose was to filter out claims with no prospect of success in a full hearing, and that the measures "undoubtedly restrict people's

[12] See Meenan J, [2020] IEHC 209, at [6].
[13] These extensions were effected by SI No. 152/2020, SI No. 174/2020, and SI No. 206/2020, respectively. For a very clear account, see judgment of Hogan J, [2022] IESC 32, at [60].
[14] Meenan J, [2020] IEHC 209, at [61].
[15] Meenan J, [2020] IEHC 209, at [40].
[16] Meenan J, [2020] IEHC 209, at [36].
[17] Meenan J, [2020] IEHC 209, at [39].
[18] Art 28.11 makes it clear that that the Taoiseach and other members of the Government, having resigned, "shall continue to carry on their duties until their successors shall have been appointed." Art 15.10 makes it clear that the Houses of the Oireachtas are masters of their own proceedings such that any question as to the numbers of members present when the legislation was passed was not justiciable. See Meenan J, [2020] IEHC 209, at [70]-[71].
[19] Meenan J, [2020] IEHC 209, at [57].
[20] The threshold was set out in the judgment of Finlay CJ in *G v DPP* [1994] 1 IR 374. See Birmingham P, [2021] IECA 59, at [48], Meenan J, [2020] IEHC 209, at [60].

constitutional rights."[21] But he was in no doubt that that Gemma O'Doherty and John Waters had failed to meet it. And seeing as the later appeal to the Supreme Court was essentially against this particular finding (i.e. after it had been upheld by the Court of Appeal), it is worth setting out Meenan J's reasoning directly:

> To begin to make an arguable case that these restrictions and limitations of rights are disproportionate, it was necessary for the applicants to put on affidavit some facts which, if proven, could support such a view. There was a complete failure by the applicants to do so... [They] questioned the accuracy of the figures given for the numbers of persons infected with Covid-19 and the number of deaths reported. They went a good deal further and maintained that the science involved was "fraudulent." Other than their views, the applicants identified no supportive expert opinion [for these claims]. Unfortunately, in making their case for leave, the applicants, who have no medical or scientific qualifications or expertise, relied upon their own unsubstantiated views, gave speeches, engaged in empty rhetoric and sought to draw an historic parallel with Nazi Germany – a parallel which is both absurd and offensive. Unsubstantiated opinions, speeches, empty rhetoric and a bogus historical parallel are not a substitute for facts.[22]

The Court of Appeal upheld this decision in March of 2021. Birmingham P had no hesitation in agreeing with Meenan J in respect of the passage of the legislation and the lack of standing in respect of the amendments to the Mental Health Act 2001 and the Residential Tenancy Act 2004.[23] And he agreed in respect of the other measures too. Yes, the applicants had standing to challenge them, but no, they had not made out an arguable case that they were unconstitutional. Birmingham P did not expressly state that expert scientific evidence would have been essential in order to reach the threshold, but it was strongly implied, just as it had been by Meenan J's reasoning. He thus referred to the "bald assertions" and "polemical tone" of the applicants' claims, citing their allegations of treason against the Irish Government and the "tremendous grip" held over that Government by Xi Jinping and the Chinese Communist Party.[24] "Far-fetched assertions," he concluded, "do not come close to meeting the *G v DPP* threshold."[25]

The applicants subsequently applied for leave to appeal against those rulings to the Supreme Court, but they added another component to their argument at this point – and it turned out to be significant. The High Court and Court of Appeal, they argued, had erred in imposing the onus of proof concerning the proportionality of the measures on them rather than on the State respondents.[26] The idea was that once they had established an interference with their constitutional rights – something was hardly in dispute in the context of the legislation and regulations concerning their freedom of movement, for instance – then the onus should shift to the State respondents to show why the interference was justified. And the idea was that in those circumstances it could hardly have been right that they would be refused leave on account of *their* failure to adduce evidence.[27]

This then formed an important part of the grounds upon which a panel of the Supreme Court, in a determination handed down in November 2021, granted leave to the applicants to appeal.

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[21] Meenan J, [2020] IEHC 209, at [77(4)].
[22] Meenan J, [2020] IEHC 209, at [54]-[56].
[23] Birmingham P, [2021] IECA 59, at [40]-[44].
[24] Birmingham P, [2021] IECA 59, at [35].
[25] Birmingham P, [2021] IECA 59, at [39].
[26] In the Application for Leave to Appeal, they referred to the "inappropriate imposition on the Appellants of the burden of proof regarding the proportionality of measures which by virtue of their exceptionality, scale and scope were prima facie ultra vires the Constitution and ought to have been treated as such by both the High Court and Court of Appeal." See O'Donnell CJ, [2022] IESC 32, at [23].
[27] See O'Donnell CJ, [2022] IESC 32, at [53].

Indeed those grounds were quite considered and precise, such that it might be helpful to quote from the determination directly, as O'Donnell CJ did in his judgment for the majority in its ruling on that appeal:

> Should leave to apply for judicial review have been granted in circumstances where the applicants had failed to lay any evidential foundation by way of reports or affidavits from scientific or medical experts regarding the proportionality of the Measures (other than those amending the Residential Tenancies Act 2004 and the Mental Health Act 2001…) so far as they concern in particular the rights to liberty, free movement and travel (Art 40.3.1 and Art 40.4.1); the inviolability of the dwelling (Art 40.5) and freedom of association (Art 40.6)? In particular, are the Measures on their face of such clear and significant impact upon the constitutional rights of every citizen that if their validity is challenged in judicial review proceedings leave to seek judicial review should be granted? If so, does the evidential burden shift to the parties denying invalidity to demonstrate the necessity and proportionality of the Measures even if the applicants have not advanced any evidence (scientific, medical or technical) of direct impact upon any person?[28]

The case before the Supreme Court thus took on this more particular focus. The question really was whether the applicants, in order to obtain leave to bring judicial review proceedings to challenge the measures, would have had to adduce evidence of a scientific nature tending to challenge the soundness of the policy enacted in them. (In the context, this would presumably have meant that O'Doherty and Waters would have had to adduce evidence grounded in the work of recognised experts in fields such as virology or epidemiology tending to cast doubt on the necessity for lockdown). It was this then that led the chief justice into that more general question around the place of policy-based evidence in challenges to the validity of legislation in the Irish constitutional system. And it was complemented by that closely related question as to where the onus of proof lay regarding the proportionality of the measures. It does not appear that O'Doherty and Waters managed to get as far as making the rather technical argument that Irish judges, having effectively imported Canadian proportionality into Irish constitutional law in *Heaney v Ireland* in the 1990s, should now import the attendant Canadian practice of onus-shifting in respect of proportionality too. But something like that idea was implied by that additional component to their argument at the Supreme Court stage. And it had been bubbling under the surface for a while in any event, having been raised previously in cases such *Marie Fleming v Ireland* and *PJ Carroll Ltd v Minister for Health*.[29]

3. O'Donnell CJ judgment

We saw in the Introduction that O'Donnell CJ wrote a judgment on behalf of a six-judge majority of the Supreme Court, and that Hogan J issued a partial dissent. The disagreement between Hogan J and his colleagues was not insignificant, as we shall see. But Hogan J appears to agree with everything that the chief justice says in respect these broader questions addressed in the judgment for the majority.[30] All seven judges (O'Donnell CJ, Irvine P, MacMenamin, O'Malley, Baker, Hogan and Murray JJ) were thus at one in respect of those questions concerning the place of evidence, the role of the proportionality test, and the matter of onus-

[28] As quoted in full by O'Donnell CJ, [2022] IESC 32, at [22].

[29] It was considered for instance in *Fleming v Ireland* [2013] IESC 19, where Denham CJ referenced "an argument [having been] advanced, derived it appears from Canadian jurisprudence, suggesting that the court should approach the question by first determining in general whether a right existed, whereupon the onus shifted to the State to justify by evidence any limitation…" But seeing as there was "no support in the jurisprudence of this Court for such an approach," Denham CJ reserved "for a case in which the issue properly and necessarily arises" the question as to "whether the approach…urged by the appellant…is required by, or compatible with, the Constitution." See O'Donnell CJ, [2022] IESC 32, at [52].

[30] As the chief justice puts it in the 91st paragraph of his 115-paragraph judgment, "the foregoing deals with matters upon which the Court is agreed." See O'Donnell CJ, [2022] IESC 32, at [91]. As for Hogan J, his remarks at paras 17, and especially at paras 46 and 47 of his judgment, appear to confirm as much.

shifting. But the questions are intimately related to one another in the context – the practice of onus-shifting, for instance, might be thought to tend to invite an emphasis on policy-based evidence insofar as such evidence might be thought necessary in order to discharge the onus.[31] And so O'Donnell CJ tends to consider them interchangeably throughout the main body of his judgment, making it sometimes quite challenging to grasp. In an effort at clarity, therefore, I shall consider what O'Donnell CJ says on these matters under three sub-headings. I shall then proceed, under a fourth sub-heading, to set out O'Donnell CJ's reasoning for the decision he hands down in respect of O'Doherty and Water's application for leave.

a) The place of policy-based evidence

The basic idea that the chief justice appears to want to convey in respect of policy-based evidence is that it has not traditionally been seen as critical, or even as necessary, in deciding rights-based challenges to legislation in Ireland, and that any trend away from that traditional position should be approached with some caution.[32] Early in the judgment, O'Donnell CJ offers *Norris v Attorney General* as an example of a case involving what he refers to as a claim of "facial invalidity" – where the claim is that a provision of legislation offends on its face against a provision of the Constitution. And he quotes approvingly from something Henchy J says in his famous dissent in that case:

> In a case such as the present, where the legal materials we are considering are written instruments (i.e. statutory provisions on the one hand and overriding constitutional provisions on the other), which are not amenable to the judicial development or extension which would be the case in regard to unwritten or case law, we must take those legal materials as we find them. The judicial function in a case like this is to lay the impugned statutory provisions down beside the invoked constitutional provisions and if, in light of established or admitted facts, a comparison between two sets of provisions shows a repugnancy, the statutory provisions must be struck down...[33]

Thus O'Donnell CJ recognises that something in the way of evidence may be required in order to establish standing in such a challenge (i.e. a plaintiff such as David Norris may have to show how they are affected by an impugned provision, unless it is so obvious as to be admitted by the State). But thereafter, and in respect of what we might think of as the substance of the claim, policy-based evidence may not be necessary or even especially useful. "The essential task of the Court," he suggests, "is to place the challenged statute against the Constitution as it has been interpreted and by a process of logical analysis and reasoning come to a determination on the validity of the provision."[34] And the Court is to proceed on the basis of what the chief justice evidently sees as the traditional court-based methodologies – "argument, analysis, inference, and logic."[35]

O'Donnell CJ does acknowledge that there are cases where courts will be drawn into the consideration of policy-based questions. He contrasts that "facial invalidity" type claim (think *Norris* or *Mary McGee*) with the "now common" proportionality-type case (think *Marie Fleming v Ireland* or *Daly v Revenue Commissioners*) – where the claim is not so much that a provision of legislation offends on its face against a constitutionally protected right but rather that it interferes with that right more than is necessary in order to achieve a legitimate policy

[31] See the comments to that effect at See O'Donnell CJ, [2022] IESC 32, at [62].
[32] See O'Donnell CJ, [2022] IESC 32, at [44].
[33] See O'Donnell CJ, [2022] IESC 32, at [46].
[34] See O'Donnell CJ, [2022] IESC 32, at [46].
[35] See O'Donnell CJ, [2022] IESC 32, at [45].

goal (i.e. that a less-intrusive method could have been employed to achieve the policy goal).[36] And he says that this focus on policy goals and alternative policy methods "may suggest that evidence on such matters is necessary" in such cases.[37]

There is no sense in which the chief justice is suggesting that its use is illegitimate in challenges to public, general legislation, or that courts should steer entirely clear of it when exercising their functions under Art 34.3.2 of the Constitution (i.e. when reviewing legislation). But he does say that these proportionality-type cases "present a particular dilemma" in that context.[38] He emphasises the differences in context between relying on evidence in litigation involving two private parties and relying on it where one or two individual citizens challenge legislation that affects many other citizens.[39] He gestures at a concern that these cases might become "a parade of [policy] experts" – which he says would be "neither necessary nor perhaps particularly desirable" (i.e. insofar as the validity of public, general legislation might come to depend on the impression an individual trial judge takes of the views elaborated by these experts on a given day).[40] And the strong implication overall is that Irish lawyers and judges, even when engaged in these proportionality-type claims, might be more cognisant of a distinction between policy-based considerations and other such essentially political material, on the one hand, and those traditional court-based or legal methodologies on the other.[41]

The chief justice clearly has his eye on broader developments here. But his analysis in respect of policy-based evidence does lead to a conclusion in respect of the decisions handed down by the High Court and Court of Appeal in the case. O'Donnell CJ was satisfied that the judges on those courts had found that such evidence (i.e. going beyond evidence establishing standing) was "*essential* in this case" in order to obtain leave and thus ultimately to successfully challenge the constitutional validity of legislation. And he concludes that that proposition, "at least at the level of general application at which it may have been expressed and understood, is incorrect."[42]

b) The role of the proportionality test

The Canadian proportionality test came under the spotlight at the Supreme Court stage of this case mainly in virtue of its implications for those other two questions – those in respect of policy-based evidence (i.e. that it might tend to invite an emphasis on such evidence insofar as there would be that focus on policy objectives and alternative means of achieving them) and of onus-shifting (i.e. that it might logically follow that Ireland, having imported the Canadian proportionality test, would import the attendant practice of onus-shifting too). But again the chief justice appears keen to make a broader point. He seems tuned in to this notion of the dominance of the proportionality framework in global constitutional thinking generally. And he appears to want to bring some rigour to how it is deployed by Irish lawyers and judges, or to counteract any tendency to lazily apply it.[43]

Thus he makes the pointed remark that "the term proportionality is now so widely used that it is important to remind ourselves that it is not a term used in the Constitution itself."[44] And he goes on to emphasise important differences between the text of the Canadian Charter of Rights

[36] See O'Donnell CJ, [2022] IESC 32, at [48].
[37] See O'Donnell CJ, [2022] IESC 32, at [48].
[38] O'Donnell CJ, [2022] IESC 32, at [48].
[39] See O'Donnell CJ, [2022] IESC 32, at [62].
[40] See O'Donnell CJ, [2022] IESC 32, at [81].
[41] See Hogan J's comments at paras 46-50 of judgment, which are very much in line with those of the chief justice.
[42] See O'Donnell CJ, [2022] IESC 32, at [80] (emphasis in original).
[43] See for example what he says at [2022] IESC 32, at [55].
[44] See O'Donnell CJ, [2022] IESC 32, at [49].

and Freedoms and the Irish Constitution.[45] The former has that blander approach (my phrase, not O'Donnell CJ's) where the various rights are set out in a uniform way – "Everyone has the right to X" and "Everyone has the right to Y." And then all of them are subject to that one limitations clause in section 1, the wording of which all but demands an *Oakes*-style proportionality analysis (and all but invites an onus-shifting approach).[46] Whereas the "structure and language of the Irish Constitution is quite different."[47] The various rights are formulated in ways that are distinct from one another: consider, for example, the novel formulations in respect of personal rights in Art 40.3, or in respect of freedom of assembly in Art 40.6.1. But then the different rights provisions appear to contemplate different levels of permissible limitation. In some instances the language is reminiscent of proportionality.[48] But in others it is as if the rights are beyond limitation entirely (e.g. the radical natural law language in Art 41.1.1, where the rights in question are deemed "inalienable and imprescriptible…antecedent and superior to all positive law.")[49] Thus lawyers and judges might be mindful in their application of proportionality in the Irish setting, not least in respect of the particular constitutional text at issue.[50]

In line with this, O'Donnell CJ suggests that when Costello J set out the Canadian test in that passage from his judgment in *Heaney v Ireland* that is now so routinely cited by Irish judges, he "did not seek to tie Irish law to developments in Canada or indeed to any other jurisdiction," and that his focus "was on the articulation of permissible limitations on rights rather than in formulating a strict and demanding test for such limitation."[51] And here – while he plainly has in mind that idea that the practice of onus-shifting should not be thought to have travelled across the Atlantic on the same boat as Dickson CJ's test in *R v Oakes* – what he says would seem to apply equally strongly to other aspects of theory and practice relating to the proportionality framework. It would seem to apply to that notion of the "Paretian" reading of that test discussed in the Irish setting by Brian Foley, for example, whereby that "minimal impairment" limb would be read in such a forensic manner that a court would be effectively obliged to strike down the measure unless satisfied that the legislature had managed to identify and employ the precise method of achieving the policy goal that does the least damage possible to the right consistent with achieving the goal.[52] That would be far too clinical an application of the test in any system in which the legislative power is vested in the legislature. But it would appear to be all but formally dismissed now in the Irish setting, following the comments of the chief justice in *Gemma O'Doherty*:

> While proportionality does provide some analytical structure for determining issues, it would be a mistake to treat it as an almost mathematical formula providing a scientifically measurable and repeatable result wherever and however applied…There remain wide areas which require judgment, such as the nature of the objectives sought to be pursued, whether it is justifiable, the nature of the restriction, and whether any lesser such restriction would achieve the objective, and most obviously the fundamental test of the proportionality of the

[45] See O'Donnell CJ, [2022] IESC 32, at [57], [58].
[46] Section 1 of the Canadian Charter reads: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
[47] See O'Donnell CJ, [2022] IESC 32, at [58].
[48] Examples might include that respect for personal rights is guaranteed "as far as practicable" in Art 40.3.1, and also the limitations envisaged by Art 40.4.1: "No citizen shall be deprived of his personal liberty *save in accordance with law*."
[49] I should point out that the chief justice does not get into this level of detail in the judgment, but he appears to be gesturing at these arguments. In any event, what I say here chimes with what O'Donnell J (as he then was) says in *Gorry v Minister for Justice* [2020] IESC 55. For analysis, see Tom Hickey 'Interpreting Natural Rights: *Gorry* and 'the Family' under Art 41' (2021) 43 (3) Journal of Social Welfare and Family Law 331.
[50] See O'Donnell CJ, [2022] IESC 32, at [57].
[51] See O'Donnell CJ, [2022] IESC 32, at [57].
[52] See Brian Foley, "The Proportionality Test: Present Problems" (2008) *Judicial Studies Institute Journal* 67, especially at 70-71.

> measure, which is normally the subject of the most contention in the decided cases. That involves judgments on the value to be attributed to the right involved, the assessment of the degree of interference and the value of the objective. None of these matters are capable of objective measurements on a single scale.[53]

The chief justice thus presents proportionality, for Irish constitutional purposes, less as a strict test and more as a "tool" that might in some contexts be helpful in illuminating the process of distinguishing between permissible and impermissible interferences with constitutionally-protected rights.[54]

c) The location of the onus of proof

As mentioned, that attention given to Canadian proportionality at the Supreme Court stage of this case is attributable mainly to its supposed implications regarding the onus of proof.[55] But again the chief justice seems keen to say more about this notion of onus-shifting, and to clear the matter up generally for Irish lawyers and judges. He thus presents what might be the strongest arguments in favour of the proposition that it might be applied in the Irish setting (i.e. aside from that now dismissed idea that it had come across on the same boat as the *Oakes* test). And these are that such an approach would be more protective of fundamental rights insofar as it would impose institutional pressure on Government to ensure that there was a satisfactory factual or scientific basis for introducing legislative measures affecting the rights of citizens, and that it would be generally fairer insofar as the State respondents would tend to have easier access to any such factual or scientific information than would an individual plaintiff such as a Marie Fleming or a Gemma O'Doherty or Robert and Henry Donnelly.[56]

Now, if the scepticism of the chief justice in respect of the standing of the proportionality test seemed to flow fundamentally from the text of the Irish Constitution, his scepticism in respect of these ideas flows from the institutional structure that that Constitution envisages. (It is here that it gets particularly difficult to disentangle the question relating to the role of evidence and that relating to the onus of proof). This notion that the Government has knowledge of the evidence supporting legislation which it should be obliged to disclose by way of discharging the onus "assumes that the legislative process is one based on evidence, and that evidential material exists that led to the collective judgement being made first at the executive, and subsequently at legislative, level."[57] But while most of us might hope that the Oireachtas would be informed by good scientific evidence when deliberating upon and enacting legislation, it is not *a requirement of the Irish Constitution* that that would be so:

> The Oireachtas is not an evidence-gathering, evidence-led legislative body. There is no requirement that the Oireachtas obtain or retain evidence or satisfy itself in relation to any particular state of affairs before it enacts provisions in what it considers to be the public interest. Instead, it is entitled to act upon its collective judgement as to the desirability of, or necessity for, legislation. If a court, on whatever judicial standard, can conclude that the judgement of the Oireachtas is not sufficient because of the view a trial judge takes of

[53] See O'Donnell CJ, [2022] IESC 32, at [57]. See how this might be thought to chime with Jeffrey Goldsworthy's thinking, set out in note x above.
[54] See O'Donnell CJ, [2022] IESC 32, at [49].
[55] And it is that idea that the chief justice has in mind when suggesting that it would "strain credulity to contend that the formulation of rights adopted in respect of the Irish Constitution in 1937 and subsequently amended from time to time, nevertheless carried latent within it precisely the same approach to be found in the terms of the Canadian Charter adopted in 1982, as subsequently interpreted by the Canadian Supreme Court." See O'Donnell CJ, [2022] IESC 32, at [58].
[56] See O'Donnell CJ, [2022] IESC 32, at [54], [66]. The judgment handed down by O'Malley J for the Supreme Court in *Robert and Henry Donnelly v Minister for Social Protection* [2022] IESC 31 is very much at one with the chief justice's judgment here on this onus-shifting point, and indeed more generally. For analysis, see Davy Lalor's contribution to this volume.
[57] See O'Donnell CJ, [2022] IESC 32, at [67]

> whatever expert or other evidence has been adduced in a particular piece of litigation controlled by the parties, then that perceptively shifts the balance between the branches, and suggests that legislation is a two-stage process, where legislation is enacted, and then subject to evidence-based review. There may be good reasons at the level of principle for adopting such a form of check and balance, but it is difficult to maintain that it is a balance adopted by the Irish Constitution.[58]

This institutional argument is supported then by the idea that what the Constitution actually envisages is a legislative process rooted fundamentally in ideas of democratic representation and responsiveness: "Legislation produced by the Oireachtas under the Constitution is an important democratic process which occurs in public, applies to the public generally and where, under the constitutional theory, the people's representatives debate the merits of any particular constitutional provision." [59] And the suggestion here appears to be that when legislators approve and thereby enact legislation, the statute that emerges is inevitably the product of compromise, and is inevitably approved for different reasons by different legislators. This again points to why courts should not be fundamentally concerned with the scientific coherence of the views expressed by any individual legislator (including any member of the Government, who as far as the Constitution is concerned, have no more standing as legislators than have other members of the Oireachtas). And it in turn explains why it is that the Irish courts have consistently held "that the task of interpreting legislation must be approached by reference to the language used in the enacted statute" and have "rejected the contention that a court was entitled to consider parliamentary debates."[60] It is "the collective view of the Oireachtas as expressed in the legislation which it adopted" that the court must interpret. And so we are back to that idea captured in the excerpt from Henchy J's dissent in *Norris*. Interpreting written instruments is the bread-and-butter method of lawyers and judges and courts. And the default position in the Irish setting, even in cases tending to invite a proportionality-type framework of analysis, is that judges should take the written legal materials that bear on the case "as they find them" and proceed on the basis of "argument, analysis, inference, and logic."

d) The outcome for Gemma O'Doherty and John Waters

There is something of a twist at the end of the Supreme Court judgment in *Gemma O'Doherty.* The position taken by O'Donnell CJ in respect of the onus of proof issue clearly went against the applicants. But the position taken in respect of the role of policy-based evidence could hardly have gone more in their favour. They had lost in the courts below on account of their failure to adduce evidence going to the lack of soundness of the policy enacted in the impugned measures. And the overriding message in the Supreme Court judgment is that the place for policy arguments is in the Oireachtas and other such democratic forums and not in the courts. So how is it after all of that – and after O'Donnell CJ had concluded that the proposition relating to policy-based evidence expressed by the judges on the High Court and Court of Appeal had been "incorrect" – that Gemma O'Doherty and John Waters still lose in the Supreme Court, and that they lose specifically on account of their failure to adduce policy-based evidence?

Well, it was on account of the apparently exceptional nature of O'Doherty and Water's case, and the exceptional way in which they had argued it. (In truth, the exceptionally inept way in

[58] See O'Donnell CJ, [2022] IESC 32, at [63].
[59] See O'Donnell CJ, [2022] IESC 32, at [63], [67]. This in turn is the basis for the doctrine of the presumption of constitutionality – which runs almost directly against the proposition that the onus of proof might shift in the manner supposed by Gemma O'Doherty and John Waters. And the chief justice points out that that doctrine has been "an accepted part of constitutional jurisprudence since at least *Pigs Marketing Board v Donnelly* [1939], the first case in which a statute was challenged under the new Constitution." O'Donnell CJ, [2022] IESC 32, at [64].
[60] See O'Donnell CJ, [2022] IESC 32, at [68], citing the reaffirmation of that principle by the Supreme Court in *Crilly v Farrington* [2001] 3 IR 267.

which they had argued it – assuming that their intention or primary aim had been the winning of the case in the law courts).[61] We saw in Section 2 that the long title to the Health Act 2020 contained detailed "recitals" setting out the background against which the Oireachtas considered it was enacting the measures in question and the objectives sought to be achieved. And when a statute does that, it means that when it is challenged a court is not left to speculate as to what might have been the policy goal in the minds of the legislators. It does not need to consult parliamentary debates for instance, nor is it left fundamentally reliant on policy-based evidence. But rather, a court can approach the question with reference to its bread and butter material – the language used in the enacted statute – and it can proceed on the basis of its traditional methodologies. (Like all good twists, therefore, this one is beginning to look like it was staring us in the face all along).

The point here is not that these recitals invariably render policy-based evidence necessary in order to obtain leave or to succeed more generally in these kinds of cases. But rather that an applicant's claim in such a case "must be assessed in light of the existence of the recitals."[62] And that leads us to the other factor rendering this an exceptional case – the more critical factor, it seems to me. This was that the applicants' claim was less that any particular measure went further than was necessary to achieve a legitimate objective and more that the pandemic itself was a hoax.[63] That is, that it was "based on a global conspiracy to undermine the rights of citizens…in pursuit of a global joint venture involving foreign states and substantial enterprises."[64] And in those exceptional circumstances – that is, when the claim was that the objectives set out in the recitals were not the true objectives sought to be achieved but rather were part of a broader conspiracy – then that "required some plausible foundation in evidence, and none was provided."[65] Indeed O'Donnell CJ went as far as to say that had the case been argued as a straightforward proportionality claim – that is, had they accepted the State's assessment of the seriousness of the pandemic "even for the sake of argument" and proceeded to argue that less intrusive means could have been used to control it in the public interest, then it would have been "possible to advance an argument without adducing their own evidence."[66]

4. Hogan J's partial dissent

Before getting to the substance of Hogan J's dissent, it is important to stress again that he in no sense dissented in respect of these broader questions (which I would see as the important questions for Irish constitutional lawyers into the future). In fact he described the position implied by the judgments of Meenan J and Birmingham P as "too absolutist," and pointed out that it is "quite often possible for an applicant to succeed in a proportionality-based challenge to the constitutionality of a law by simply establishing basic facts demonstrating that they have been affected by the operation of the impugned law..."[67] Indeed his comments in respect of legal methodology would similarly appear to be in line with those of the chief justice:

[61] I hasten to add that that is my phrase and not O'Donnell CJ's.
[62] See O'Donnell CJ, [2022] IESC 32, at [86]. 86. See also [83]. I should say that it was this *combined with something else* that rendered evidence necessary. That something else was the fact that a senior official in the Department of Health had provided each of the courts in this case with "extremely extensive affidavit evidence" which evidence included extensive documentation from and reports of the WHO and the European Centre for Disease Prevention and Control relating to the threats posed to public health by the Covid pandemic. See O'Donnell CJ, [2022] IESC 32, at [86], [88].
[63] See O'Donnell CJ, [2022] IESC 32, at [85].
[64] See O'Donnell CJ, [2022] IESC 32, at [87].
[65] See O'Donnell CJ, [2022] IESC 32, at [88].
[66] See O'Donnell CJ, [2022] IESC 32, at [90]. This chimes with O'Donnell CJ's insistence that cases in the "non-facial invalidity" category, i.e. cases like *Marie Fleming* which tend to be argued on the basis of a proportionality framework, "are in principle, and often in practice, capable of being addressed without expert evidence and of being resolved on the basis of analysis and argument." See O'Donnell CJ, [2022] IESC 32, at [82].
[67] See Hogan J, [2022] IESC 32, at [46].

> The constitutionality of a law is ultimately a matter for judicial assessment… [A decision to declare an enactment of the Oireachtas to be unconstitutional]… is generally based on a variety of considerations: constitutional text, precedent and constitutional history, reference to constitutional principles and analysis both here and abroad, regard for common law heritage, judicial experience, well known and widely available open source information and, ultimately, judicial reasoning and legal logic.[68]

It is important also to stress that Hogan J in no sense endorses the applicants' contentions in respect of the seriousness of the pandemic, nor does he dissent from his colleagues in respect of their finding that it was appropriate not to grant leave insofar as the applicants' claims relied upon the idea that the measures were the product of a conspiracy.[69] But Hogan J is mindful of the idea that "this will be the only case concerning the validity of the 2020 Regulations which is likely ever to make its way to this Court."[70] And he appears driven by two other factors: that the applicants had turned down the offer by the Supreme Court of *pro bono* legal representation – which he sees as having "considerably hindered the fair and proper presentation"[71] of the case – and the idea that the nature and extent of the restrictions were "unprecedented in the history of the State."[72] He suggested that the State had "come through a Civil War, the threat posed by extremists of both Left and Right alike in the 1930s, the Emergency/Word War II, a long running conflict in Northern Ireland and the intermittent threat to the institutions of the State and the democratic order posed by illegal organisations" and yet had never interfered in such severe ways with "personal liberty, home visits, religious observance and public assembly."[73]

Thus Hogan J dissented insofar as he would have granted leave to the applicants on three grounds. Here I shall do little more than mention two of them: that pertaining to the right to personal liberty under Art 40.4.1, and that pertaining to the inviolability of the dwelling under Art 40.5 combined with the right of association with relatives and friends flowing from Art 40.6.1. The former ground arose from those restrictions on movement outside of the home contained in Art 4 of the Regulations. (See Section 2 above for details of the restrictions in these Regulations). Hogan J was satisfied that these restrictions could be justified in the short term, which he measured "in the order of some three months or thereabouts." But once it came to be understood that Covid-19 was an "airborne virus," then "the case for assessing the proportionality of the legislative measures became stronger, certainly so far as restrictions on *outdoor* movement were concerned."[74] And so he was satisfied that the applicants "have indeed raised arguable grounds" in respect of the constitutionality of the measures "insofar as they restricted personal liberty of movement outdoors *from 1st July 2020 onwards*."[75]

As for the latter ground, Hogan J considered that it arose from the restrictions on home visits contained in Art 4(2) of the Regulations. And here again he was satisfied that there was no serious constitutional issue in the early stages of the pandemic, given the State's "very strong, if not, indeed, compelling" interest in regulating domestic conduct in the context of the pandemic.[76] But again – though acknowledging that the ground was "somewhat weaker" that

[68] See Hogan J, [2022] IESC 32, at [47].
[69] See Hogan J, [2022] IESC 32, at [10], where he says: "I can only regard it as tragic that they cannot see – or bring themselves to see – the real nature of the very serious public health threat which confronted the Government and the Oireachtas in the early months of 2020."
[70] See Hogan J, [2022] IESC 32, at [20].
[71] See Hogan J, [2022] IESC 32, at [26].
[72] See Hogan J, [2022] IESC 32, at [33].
[73] See Hogan J, [2022] IESC 32, at [33].
[74] See Hogan J, [2022] IESC 32, at [98] (emphasis in original).
[75] See Hogan J, [2022] IESC 32, at [102] (emphasis added).
[76] See Hogan J, [2022] IESC 32, at [109].

that concerning outdoor movement – he considered that the applicants should have been granted leave to seek a declaration that the restrictions on home visits were incompatible with 40.5 (inviolability of the dwelling) and 40.6.1 (association with relatives etc.) *insofar as they applied after 1st July 2020*.[77]

The third ground upon which he would have granted leave pertained to the right to assemble peaceably protected as it is by Art 40.6.1 of the Constitution – and Hogan J gives it much more attention than the other two. Eloquently as ever – and indeed insistent as ever upon the foundational importance of those liberal political rights envisaged by Art 5 and addressed in detail by Art 40.6.1 – he refers to the right to assemble peaceably as "part of the lifeblood of any free and democratic society,"[78] and to the constitutional commitment to democracy as an "inviolable…bedrock which lies beyond the capacity of either the Oireachtas or the Government to compromise, irrespective of the reasons for such restrictions or their motives for so acting."[79] And he sees the arguable ground for a violation as having arisen from Art 5 of SI No. 121/2020 when read in conjunction with Art 4 of the same Regulations. Recall that Art 5(3) made it an offence to "hold an event" unless it was a "relevant event," with the latter defined with reference to those reasonable excuses pertaining to leaving one's place of residence set out in Art 4(2). That list included matters such as leaving for the purposes of shopping for household necessities and for exercising within a 2km radius – but it did not include anything pertaining to assembly for peaceful protest. And while Art 4(2) opened with a phrase indicating that the list of excuses was not exhaustive, the specific reference in Art 5 to the enumerated activities set out in Art 4(2) led Hogan J to the conclusion that "*only* those activities" listed in it were capable of grounding a "relevant" event for the purposes of Art 5(3).[80] This in turn led him to the conclusion that the 2020 Regulations "did in fact make it a criminal offence to engage in any form of peaceful protest at least until 8th June 2020" – when Ireland entered Phase 2 of its "Roadmap for Reopening Society and Business."[81] Therefore an arguable case had been made out.[82]

The chief justice does respond to Hogan J's dissent in the closing section of his judgment for the majority, and main thrust of it was that Gemma O'Doherty and John Waters had made (almost) no argument at all along these lines. Indeed reading O'Donnell CJ's analysis it is hard to escape the conclusion that he is of the view that his esteemed colleague might as well have come down from the bench and argued the case himself on behalf of the applicants – and further, that he was effectively foisting a case upon them that they themselves had gone out of their way to deny (i.e. insofar as it would have meant accepting the official view as to the risks posed by Covid-19).[83] Thus the chief justice points out that the Regulations challenged by

[77] See Hogan J, [2022] IESC 32, at [112].
[78] See Hogan J, [2022] IESC 32, at [78].
[79] See Hogan J, [2022] IESC 32, at [80].
[80] For why it was not exhaustive, see note X above.
[81] See Hogan J, [2022] IESC 32, at [59].
[82] Indeed Hogan J went further. He was of the view that the ban on any form of peaceful protest likely continued to apply under the terms of the new SI No. 206/2020 that brought this Phase 2 into effect from the 8th June. Art 6 of that Regulation made it an offence to organise an event "for cultural, entertainment, recreational, sporting, social, community or educational reasons" – unless the maximum attendance did not exceed 15 persons. And while this provision might be read to imply that events not having to do with those reasons were fine and acceptable (i.e. peaceful protests, insofar as they are organized for essentially *political* reasons), this, in Hogan J's view, was hardly the most plausible reading of it in the context. This most recent SI No. 206/2020, after all, represented the legal dimension of a roadmap for a phased reopening, and the recitals contained within it again referred to the "immediate, exceptional and manifest risk posed to human life by the spread of Covid-19." And so it would be "surprising," in Hogan J's view, if the Minister, "by the words used in Art 6, had intended to allow unrestricted public protests, regardless of numbers, social distancing or any other similar considerations." See Hogan J, [2022] IESC 32, at [62]-[66].
[83] See O'Donnell CJ, [2022] IESC 32, at [114]. For the idea that the chief justice felt this way about his colleague's approach, see for example his reference at paragraph 95 of his judgment to the idea that the materials relied upon by Hogan J in his partial dissent were, "almost without exception…not mentioned in the judgments appealed against, the submissions, written or oral, for this Court, and so far as I can see, in the extensive submissions made to the High Court and the Court of Appeal, or indeed anywhere else in this case." See also his suggestion at paragraph 96 that his judicial colleague had effectively "remoulded or refashioned" the claim or focused upon a matter that that was "radically

Gemma O'Doherty and John Waters were limited in time to the period from the 8th April to 5th May 2020, and that the judgment of Meenan J which was appealed against had been delivered on 4th June. (See Section 2 above, where the relevant dates are set out).[84] And yet the grounds upon which Hogan J would have granted leave were largely applicable to elements of the regulations as they applied from dates in June and July, meaning that they "post-dated both the initiation of the proceedings and the decision of the High Court."[85]

The chief justice did acknowledge that there was a reference in a certain paragraph of an affidavit submitted by the applicants to the High Court to the right to protest – "Such section 5," they said at the time, in apparent reference to Art 5 of SI No. 121/2020 – "directly affects each of us and all persons…in preventing or impeding our right to peaceful assembly…for the purpose of peaceful protest…"[86] But this was a "fleeting" reference in one paragraph among written submissions running to well over a hundred pages, and in what was a broad and unfocused set of claims.[87] And in any event neither Gemma O'Doherty nor John Waters had submitted any evidence supporting their standing in respect of this particular claim in the first place. They had not attempted to show that they had been prevented from organising or attending such a protest or even that they had been discouraged from doing so by the fact of the existence of the provisions. And in O'Donnell CJ's view, it is an "important principle that if a persons seeks to challenge a measure they must show at a minimum that they were adversely affected by it, or reasonably anticipated such adverse impact."[88]

5. Legitimacy – *not justice* – and the practice of judicial review

In his famous article articulating what he sees as the core of the case against judicial review of legislation, Jeremy Waldron effectively makes the argument that his intellectual rivals – those scholarly proponents of judicial review led by the likes of John Rawls and Ronald Dworkin (and these days by the likes of Aileen Kavanagh and Rosalind Dixon) – support the institution of judicial review of legislation on the basis that it helps bring about more enlightened and morally considered laws and ultimately a *more just* social order.[89] And Waldron inspired a generation of sceptics of judicial review of legislation. Richard Bellamy's work is littered with references to notions of "virtuous and sagacious judges" whose views on questions of morality and justice are "treated as superior."[90] Richard Ekins refers to those who understand bills of rights as "obvious distillations of moral truth" and an attendant "rhetoric which trades on…the truth about human rights to assert a radical superiority of judicial views about justice."[91] And Jeffrey Goldsworthy attributes the support among the "tertiary educated, professional class" for judicial enforcement of rights to the fact that it "shifts power to people (judges) who are

and…fundamentally different to the case made by the appellants," and his suggestion at para 102 that the matters considered in Hogan J's judgment are "unmoored" from the claims made by the applicants and considered by the High Court.

[84] It bears mention that Meenan J's judgment itself states that it was delivered on "the 13th day of May," but this apparent discrepancy is unimportant here.

[85] See O'Donnell CJ, [2022] IESC 32, at [102] (emphasis in original). See note x above for why it was that even that third ground pertaining to the right to protest was in good part concerned with matters as they applied after the 8th of June.

[86] See O'Donnell CJ, [2022] IESC 32, at [106]. on the 1st May 2020

[87] See O'Donnell CJ, [2022] IESC 32, at [99], [105]

[88] See O'Donnell CJ, [2022] IESC 32, at [108].

[89] Waldron, "The Core of the Case Against Judicial Review" (2006) 115 *The Yale Law Journal* 1346. See especially his comment on page 1371 in respect of what he has "heard philosophers say…" See also his opening line from *Law and Disagreement*: "Since the publication in 1971 of John Rawls' book *A Theory of Justice*, political philosophers have concentrated their energies on contributing to, rather than pondering the significance of, disagreements about justice." Each is aware of rival views, says Waldron, yet focuses only on offering their own take to the world. It is "rare to find a philosopher attempting to come to terms with disagreements about justice within the framework of their own political theory." Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), at 1.

[90] See Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007), at 79, 177, 183.

[91] Richard Ekins, "Human Rights and the Separation of Powers" (2015) 34(2) *University of Queensland Law Journal* 217, at 221, 222, 223.

representative members of their own class, and whose educational attainments [and] intelligence... are thought more likely to produce enlightened decisions."[92]

I think these sceptics overstate this argument. I do not think it is true that the best scholarly proponents of judicial review make their case on the grounds that "judges know best" and that the institution therefore helps promote the overall *justness* of the body of laws making up the social order. But, as I have argued at length elsewhere, I do think that many scholarly proponents of judicial review – and many enthusiastic judicial practitioners of it – might do well to take more care to situate their arguments and practice in ideas pertaining to the concept of *legitimacy* rather than to the concept of *justice*.[93] That is, they might be driven less by questions concerning *what* might be the ideal and just social order, and more by questions concerning *how* the social order might appropriately be imposed upon citizens over time (i.e. acknowledging with some humility and reality that that there will always be disagreement on what the ideal and just social order might consist in).[94] They might be driven less by their sense of *what* might be the ideally "right answer," or the ideally just outcome, in the case immediately at hand, and more by questions relating to *how* the task of deciding the case might best be approached such that the court's decisions might tend to be accepted by the vast bulk of citizens over time (even in those cases when its decisions are seen by some as less than ideal or perhaps as unjust).

And these are ideas to which the chief justice seems particularly keenly attuned. We see it in his academic writing, and especially in the "Sleep of Reason" article that emerged from his keynote at the *Constitution at 80* conference in 2017. There, for example, he describes the tendency to criticize or praise cases for their results rather than their reasoning as "the recurrent bugbear of constitutional law."[95] And his most fundamental suggestion, reworking Goya's notion that in the sleep of reason monsters come, is that the more judges come to deviate from the restraints of judicial reason and legal process, and indeed from respect for "the boundaries implied by the text and language of the Constitution," the more likely it is that the standing of "the Constitution and the judicial interpretation of it" will decline, thereby diminishing its capacity to function "as a form of adhesive that binds society together."[96]

And we see this thinking lurking behind the main ideas in his judgment in *Gemma O'Doherty* too. (Indeed this is why I would see this judgment as the most broadly significant of those handed down by the Irish Supreme Court in 2022, and as amongst the most broadly significant it has handed down over the past decade or so). It informs his position as to the lack of standing of the applicants in respect of the "right to protest" element of the claim, for instance. The Irish Constitution does not empower the courts to "advise on the wisdom" of legislative measures nor does it envisage them reviewing such measures "in the abstract."[97] And the rules on standing established in *Cahill v Sutton* have a particular logic in the context of the function of judicial review of legislation. They guard against that function descending into a kind of third legislative forum where a disappointed voter (such as a Gemma O'Doherty or a John Waters) gets to re-litigate the fundamentally political arguments that had been threshed out and settled in the constitutionally-appropriate setting. And they also ensure that in those cases that do make it through the fundamentally legal arguments are threshed out and settled against the backdrop

[92] Jeffrey Goldsworthy, "Losing Faith in Democracy: Why judicial supremacy is rising and what to do about it" (Policy Exchange, 2015), at 13, 15.
[93] See Tom Hickey, "Legitimacy – not Justice – and the Case for Judicial Review" (2023) 42(3) Oxford Journal of Legal Studies 893.
[94] For analysis of the distinctiveness of these two concepts as a matter of political theory, see A John Simmons, "Justification and Legitimacy" (1999) 109(4) *Ethics* 739.
[95] See Donal O'Donnell, 'The Sleep of Reason' (2017) 40 Dublin U LJ 191, at 197.
[96] See Donal O'Donnell, 'The Sleep of Reason' (2017) 40 Dublin U LJ 191, at 212.
[97] See O'Donnell CJ, [2022] IESC 32, at [113]. The exception here is the Art 26 reference mechanism, of course.

of "real and tangible facts giving life and focus to the challenge." As the chief justice points out, when a court invalidates legislation it will normally be the case that that legislation has had the support of many citizens – they will have broadly approved of it as a matter of political justice or at least seen it as necessary in the public interest. And that surely requires that an individual challenging legislation by way of judicial review would be able to show how they had been affected or how such a momentous determination might be thought necessary in order to do justice to "perhaps the single individual who can show that his or her rights (and perhaps no one else's) have been invaded by the provision in question."[98]

We similarly see it lurking behind his insistence that the Court was not entitled to depart from basic procedural rules and practices because of the perceived "special and unusual features of the case."[99] Yes, his colleague in dissent had summoned highly plausible and impressive arguments as to why there might have been an impermissible interference with the right to peaceable assembly. But there would be plausible arguments in the opposite direction as well, including an argument – no more than gestured at by way of illustration by the chief justice – that Art 5 of SI No. 121/2020 did not involve any restriction on such an assembly at all.[100] The point was that the applicants had never argued the issue, nor did counsel for the State get a full and proper opportunity to respond to such arguments, nor did the Supreme Court judges have the benefit of the assessment of such arguments by the judges on the courts below. And so while the regulatory response to the pandemic was dramatic, and while it was possible to argue that aspects of it "were not justified by science or by any theory of social organisation or by broader philosophical concerns or were simply imprudent as a matter of practical politics," these are not questions that a court is entitled to consider:

> The fact that any legal challenge may cover the same ground also occupied by scientific or philosophical debate or political dispute should not obscure the fact that the legal question is a separate one and must be determined in accordance with law. It is, in my view, important that courts approach their task by applying the same standards which are applied to the resolution of any other dispute. That is *central to the legitimacy* of the exercise by the Court of the power of judicial review.[101]

But this thinking – what I would see as a kind of "legitimacy, not justice" thinking, or an insistence that, as I have put it elsewhere, the justice cart should not be put before the legitimacy horse – informs the position of the chief justice in respect of those broader questions on policy-based evidence and onus-shifting too.[102] His concern here is that an insufficiently mindful embrace of such practices by Irish lawyers and judges might tend over time to "blur the distinction between legislative and judicial decision-making."[103] This would be problematic in part because – much like the thinking in respect of the position taken on standing – it would tend to place judges in the position of super-legislators, insofar as they would be reviewing the policy choices of the regular legislators but, critically, on grounds having to do fundamentally with questions of *political justice* rather than on grounds having to do fundamentally with law or with their *legal* skills or experience or functions. And that form of judicial review of legislation could only be justified as a matter of political theory on the basis of some notion

[98] See O'Donnell CJ, [2022] IESC 32, at [113].
[99] See O'Donnell CJ, [2022] IESC 32, at [104].
[100] See O'Donnell CJ, [2022] IESC 32, at [109].
[101] See O'Donnell CJ, [2022] IESC 32, at [104] (emphasis added).
[102] See Tom Hickey, "Legitimacy – not Justice – and the Case for Judicial Review" (2023) 42(3) Oxford Journal of Legal Studies 893.
[103] See O'Donnell CJ, [2022] IESC 32, at [65].

that "judges know best," or, as Goldsworthy put it, are thought more likely to produce enlightened decisions.[104]

But this blurring of legislative and judicial decision-making would be problematic also in virtue of the text of the Irish Constitution and in particular the institutional structure it establishes and envisages (Which, as I suggested in the Introduction, has been the defining feature of his approach to interpreting the Constitution over his now thirteen years on the Supreme Court).[105] He stresses the fact that the drafters of the Constitution did consider the possibility of vesting the function of review of legislation in a *Conseil d'État*-style "council of wise citizens" that would have a wider membership including non-lawyers, but that they chose instead, quite deliberately, to vest it in the ordinary High Court, bound as it was by court procedures and comprising legally-trained judge members alone.[106] And he actually makes great play of the same point in that "Sleep of Reason" article.[107] There he suggests that that choice reflected a trust in the capacity of lawyer-judges to carry out the particular function effectively, which trust must have developed in part on foot of the track record of lawyers and judges over the centuries in adjudicating interpretive disputes in the more mundane-legalistic contexts of wills and contracts and statutes. And this, I think, explains that foundational emphasis in the judgment in *Gemma O'Doherty* on those traditional legal methodologies. Irish lawyers and judges, when arguing and adjudicating upon rights-based challenges to legislation, are not prohibited from considering policy-based evidence. But their essential task is to take the legislative provisions "as they find them," to "place them against the Constitution as it has been interpreted," and then "by a process of logical analysis and reasoning come to a determination on the validity of the provision."[108]

[104] Notice how O'Donnell CJ articulates the point: "The place for policy arguments is in the Oireachtas and in the wider democratic process. When legislation is challenged on the grounds of alleged repugnancy to the Constitution, it may be the case that a policy objection to the legislation is part of the motive for the challenge, but it is *central to the legitimacy of the process* that the position is maintained that a different question is being addressed, one of law and not politics or policy, and resolved in a different way, by legal reasoning and not democratic vote." See O'Donnell CJ, [2022] IESC 32, at [79] (emphasis added).
[105] See note x above.
[106] See O'Donnell CJ, [2022] IESC 32, at [113], [62].
[107] See Donal O'Donnell, 'The Sleep of Reason' (2017) 40 Dublin U LJ 191, at 209-210.
[108] See O'Donnell CJ, [2022] IESC 32, at [46].