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Heekyoung Lee

Boston College Law School, heekyoung.lee@bc.edu

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O'KEEFFE v. IRELAND: THE STATE'S OBLIGATION TO PROTECT CHILDREN FROM SEXUAL ASSAULT IN STATE SCHOOLS

HEEKYOUNG LEE*

Abstract: Ireland's unique primary education system creates a national school system that is denominational, yet state-financed. The Irish government defers managerial duties to the Catholic Church, and this deference of duties relieves Ireland from liability. As a result, students in Ireland attending primary schools historically were not guaranteed legal protection from sexual assaults committed by faculty members. On January 28, 2014, the Grand Chamber of the European Court of Human Rights held in *O'Keeffe v. Ireland* that despite Ireland's delegation of authority to religious denominations, the State was obligated to protect students from sexual assaults. The court reasoned that the State had an obligation to guarantee Article 3 fundamental rights, because no one, especially vulnerable children in primary education, should be subject to inhuman treatment. The court also noted that such an obligation could not be absolved through the delegation of powers. This Comment examines the court's reasoning and argues that its decision leaves unanswered the scope of interpretation in future cases of abuse.

INTRODUCTION

In Ireland, upon the enactment of the Commission to Inquire into Child Abuse Act in 2000, the Ryan Commission was formed to investigate child abuse occurring primarily in reformatory and industrial schools.¹ The Ryan Commission stated in its 2009 report (the Ryan Report) that Irish schools faced a chronic case of physical and sexual abuse of students by clergy from the 1930s to the 1970s.² One such student was Louise O'Keeffe, who was subjected to sexual assaults by her school principal, Leo Hickey, in 1973.³ Hickey was later charged with 386 counts of sexual abuse involving twenty-one former students of Dunderrow National School.⁴

* Heekyoung Lee is a Staff Writer for the *Boston College International & Comparative Law Review*.

¹ Commission to Inquire into Child Abuse Act 2000 (Act No. 7/2000) (Ir.), <http://www.irishstatutebook.ie/eli/2000/act/7/enacted/en/html> [<https://perma.cc/MZK2-EJHS>]; *O'Keeffe v. Ireland*, 2014-I Eur. Ct. H.R. 155, 180.

² *O'Keeffe*, 2014-I Eur. Ct. H.R. at 180.

³ *Id.* at 165.

⁴ *Id.* at 166.

In *O'Keefe v. Ireland*, the Grand Chamber of the European Court of Human Rights (ECtHR) held that Ireland had violated Article 3 of the European Convention on Human Rights (European Convention) by failing to protect O'Keefe from the sexual assaults.⁵ In determining whether the State was obligated to protect O'Keefe and fellow pupils from the sexual assaults, the court noted that the events took place in 1973 and stressed that it would assess the State's obligation under the standards of 1973.⁶ The court held that because Article 3 guaranteed fundamental rights, especially to vulnerable children in the primary education context, the State was inherently obligated to protect children from harsh treatment.⁷

Part I of this Comment provides relevant background information on Ireland's primary education system, the facts of *O'Keefe v. Ireland*, and the procedural history of the case. Part II discusses the parties' contentions and the ECtHR's decision. Part III analyzes the court's judgment and discusses recent implications of the decision. It also argues that although the outcome of *O'Keefe* was correct, the ECtHR's holding was too broad, leaving many unanswered questions.

I. BACKGROUND

A. Primary Education in Ireland

Section 4 of the School Attendance Act of 1926 requires all children in Ireland between the ages of six and fourteen to attend school.⁸ In 1969, the education requirement was increased to the age of sixteen.⁹ In Ireland, most primary school-aged children attend state-financed and denominational national schools.¹⁰ The Department of Education and Skills reported in February of 1973 that ninety-four percent of primary schools were national schools.¹¹ Moreover, nearly all primary education students attended the state-financed and denominational national schools.¹²

⁵ *Id.* at 206–07.

⁶ *Id.* at 191.

⁷ *See id.* at 192–93.

⁸ School Attendance Act 1926 (Act No. 17/1926), §§ 2, 4 (Ir.), <http://www.irishstatutebook.ie/eli/1926/act/17/enacted/en/html> [<https://perma.cc/AKR2-7DJN>]; *see O'Keefe*, 2014-I Eur. Ct. H.R. at 173.

⁹ *See O'Keefe*, 2014-I Eur. Ct. H.R. at 173–74.

¹⁰ *See id.* at 174.

¹¹ *See id.*

¹² *Id.* The court also found that a large portion of the population attended Catholic-run denominational schools. *See id.* The court referenced the 1965 Investment in Education Report, which found that 97.6% of Irish students attended Catholic-run national schools, and that Catholic-run schools constituted 91% of all national schools. *Id.*

Irish national schools are governed by the 1965 Rules for National Schools under the Department of Education (1965 Rules).¹³ The court in *O’Keefe* noted that the 1965 Rules are legally controlling even though they are neither primary nor secondary legislation.¹⁴ In accordance with the 1965 Rules, a manager, clergyman, or other person recognized by the Minister of Education (Minister) oversees each national school.¹⁵ The school managers are responsible for directly governing the schools, appointing teachers, removing teachers subject to the approval of the Minister, and visiting their schools to ensure that they are complying with the 1965 Rules.¹⁶ The Minister and other authorized inspectors also have the ability to visit schools to ensure compliance with the 1965 Rules.¹⁷ As provided in Rule 161 of the 1965 Rules, inspectors serve as agents of the Minister and should inform the Minister of managers and teachers that infringe any of the 1965 Rules.¹⁸

B. Sexual Assaults at Dunderrow National School

Starting in 1968, Louise O’Keeffe was a student at Dunderrow National School.¹⁹ Five years later, in 1973, she was subjected to repeated sexual assaults by L.H., the school’s principal.²⁰ In 1971, the parent of another student alleged that her child was sexually abused by L.H..²¹ Although O’Keeffe’s parents were unaware of the 1971 allegation, other parents brought to their attention similar allegations concerning L.H..²² A meeting of parents chaired by the school’s manager, a local parish priest, was held to address the allegations.²³ The meeting resulted in L.H. taking sick leave.²⁴ Shortly after, he resigned from his position at Dunderrow National School in September 1973.²⁵ Despite the school’s knowledge of the sexual assaults and multiple visits from the school’s assigned manager, the sexual assault allegations were not reported to the inspector, police, or any other state authority.²⁶

¹³ *Id.* at 175; Dep’t of Educ., Rules for National Schools under the Department of Education (1965) (Ir.), <http://www.scoilulain.ie/wp-content/uploads/docs/rules-for-national-schools-1965.pdf> [<https://perma.cc/AK32-EMME>] [hereinafter Rules for National Schools].

¹⁴ *O’Keefe*, 2014-I Eur. Ct. H.R. at 175 (citing *Brown v. Board of Mgmt. of Rathfarnham Parish Nat’l Sch.* [2006] IEHC 178 (Ir.)).

¹⁵ Rules for National Schools, *supra* note 13, ¶ 15.

¹⁶ *Id.* at 8, intro.

¹⁷ *Id.* ¶ 11; see *O’Keefe*, 2014-I Eur. Ct. H.R. at 176.

¹⁸ *O’Keefe*, 2014-I Eur. Ct. H.R. at 176; Rules for National Schools, *supra* note 13, ¶ 161.

¹⁹ *O’Keefe*, 2014-I Eur. Ct. H.R. at 165.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *id.* at 165–66.

L.H. began teaching at another national school shortly after his resignation from Dunderrow National School until his retirement in 1995.²⁷ In 1995, an investigation was launched after a former student filed a complaint with the police.²⁸ At the conclusion of the investigation, L.H. was charged with 386 counts of sexual abuse involving twenty-one former students of Dunderrow National School.²⁹

C. Procedural History

O'Keeffe filed a civil complaint to the High Court in September 1998 against L.H. requesting damages for personal injuries suffered as a consequence of the sexual abuse.³⁰ She also filed a claim against the Minister and the State for: (1) negligence by the State for failing to implement measures to protect herself and others from the abuse by L.H., (2) vicarious liability of the State for L.H.'s actions as an employee of the State, and (3) liability of the State due to O'Keeffe's right to bodily integrity and the State's duty to provide primary education.³¹ On November 8, 1999, O'Keeffe received a default judgment against L.H. due to his failure to assert a defense.³² The High Court awarded damages in the amount of €305,104 to O'Keeffe.³³

Regarding the allegations against the State, the defendants applied to strike out the case, claiming that O'Keeffe had failed to establish a prima facie negligence case against the State.³⁴ The High Court agreed.³⁵ On January 20, 2006, the High Court held that because Dunderrow was under denominational management, vicarious liability did not attach to the State for L.H.'s sexual assaults.³⁶ The High Court also noted that there was no breach of a constitutional right where tort law protected the same right.³⁷ O'Keeffe appealed the vicarious liability claim to the Supreme Court of Ireland in May 2006.³⁸ She argued that the High Court's March 2004 ruling lacked support and that vicari-

²⁷ *Id.* at 166.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 167. In Ireland, the High Court is a court with full jurisdiction in all criminal and civil matters established under Article 34 of the Constitution of Ireland. Constitution of Ireland 1937 arts. 34, 37.

³¹ *O'Keeffe*, 2014-I Eur. Ct. H.R. at 167.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 168.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* The Supreme Court of Ireland acts as a court of final appeal and has appellate jurisdiction from a decision of the High Court when it believes "[t]he decision involves a matter of general public importance" or it would in "the interests of justice." Constitution of Ireland 1937 art. 34.

ous liability arising out of a manager's inaction was never addressed by the court.³⁹

On December 19, 2008, the Supreme Court dismissed the appeal, noting that the test for vicarious liability against the State was not met.⁴⁰ In addition, the court held that there could be no finding against the Minister because his governing duties were limited strictly to the school's academics and he therefore did not have direct control of L.H..⁴¹ Furthermore, the Supreme Court noted that the sexual abuse of O'Keeffe was not foreseeable because such acts were "unusual act[s], little discussed, and certainly not regarded as an ordinary foreseeable risk of attending at a school."⁴²

O'Keeffe appealed to the ECtHR on June 2009, relying on Articles 3,⁴³ 8,⁴⁴ and 14⁴⁵ of the European Convention and Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 1).⁴⁶ She argued that Ireland had failed its obligation under Article 3, Article 8, and Article 2 of Protocol 1 to protect children from sexual abuse.⁴⁷

II. DISCUSSION

A. Arguments of the Parties

O'Keeffe first argued that pursuant to Articles 3, 8, and 14 of the European Convention read together with Article 2 of Protocol 1, Ireland had a duty to organize its education system to ensure the protection of children, as facilitated in Article 42 of the Constitution.⁴⁸ She claimed that the State failed to provide sufficient legal obligations or guidelines to ensure that relevant actors would

³⁹ *O'Keeffe*, 2014-I Eur. Ct. H.R. at 168.

⁴⁰ *See id.* at 169–71.

⁴¹ *See id.*

⁴² *Id.* at 171 (quoting *O'Keeffe v. Hickey* [2008] IESC 72 (Ir.)).

⁴³ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention on Human Rights*]. Article 3 of the Convention provides in relevant part: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Id.*

⁴⁴ *Id.* art. 8. Article 8 of the Convention provides in relevant part: "Everyone has the right to respect for his private and family life, his home and his correspondence." *Id.*

⁴⁵ *Id.* art. 14. Article 14 of the Convention provides in relevant part: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground. . . ." *Id.*

⁴⁶ *O'Keeffe*, 2014-I Eur. Ct. H.R. at 185–86. Article 2 of Protocol 1 highlights every person's right to an education. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Protocol art. 2, *adopted* Mar. 20, 1951, E.T.S. No. 9 (entered into force May 2, 1968).

⁴⁷ *See id.*

⁴⁸ *O'Keeffe v. Ireland*, 2014-I Eur. Ct. H.R. 155, 185–86. Article 42 of the Constitution also provides in relevant part: "The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children." *Constitution of Ireland 1937* art. 42(1).

vigilantly monitor and cure possible ill treatment of children.⁴⁹ O'Keefe argued that publication of the Carrigan and Ryan Reports should have alerted the State that the national schools presented a risk of child abuse and prompted them to implement systems to safeguard children.⁵⁰ Second, she asserted that, as an advanced democracy, Ireland was obligated to provide public education.⁵¹ Moreover, even if Ireland were to fulfill this obligation via private entities, the national school system still should have incorporated regulations that better protected children.⁵² Finally, O'Keefe argued that the State could not rid itself of liability by claiming that she could have sought her education outside of the national school system as she did not have sufficient resources to do so.⁵³

The State, on the other hand, agreed with the Supreme Court's decision.⁵⁴ It asserted that the development and structure of the Irish primary education system, and thus, Dunderrow National School, was overseen and managed by the Catholic Church.⁵⁵ This unique structure, which evinced the will of the Irish populace, reflected the complete grant of control and management of schools to the denominations.⁵⁶ Furthermore, the State refuted O'Keefe's argument that the State should be required to run the primary education system, stating that the ideology behind this obligation was not a consistent principle held by all states.⁵⁷ The State also asserted that they were not liable for the failure to protect children from child abuse under Article 3 because Article 2 of Protocol 1 only guarantees that no student is precluded from receiving an education.⁵⁸ Pursuant to this argument, liability would be limited to the State's operational obligation of student protection.⁵⁹ Finally, the State argued that in 1973 there was an absence of evidence establishing that they had or should

⁴⁹ *O'Keefe*, 2014-I Eur. Ct. H.R. at 186. O'Keefe claimed that the State created neither primary nor secondary legislation to prevent the sexual abuse of children. *Id.* at 187. Although the State claimed it had established regulations, such as the 1965 Rules, O'Keefe alleged that such regulations were not primary or secondary legislation, had an unclear legal basis, were vague in applicability, and unavailable to the public. *Id.* Moreover, the State lacked an effective decision and complaints procedure and, as a result, was not notified of complaints of abuse. *Id.* at 186–87.

⁵⁰ *Id.* at 186. The Carrigan Report in 1931 proposed a variety of social and legislative reforms for the State to target sexual crimes against minors. *Id.* at 178. Furthermore, the Ryan Report revealed that industrial schools faced “widespread, chronic and severe” acts of physical and sexual abuse of children largely at the hands of clergy members. *Id.* at 180. Moreover, the State unmistakably had a duty to guarantee children received proper care, but the Department of Education and Skill did not sufficiently provide such care, as shown by the under reported abuse. *Id.* at 181.

⁵¹ *See id.* at 186.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 188.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

have had knowledge of the risk L.H. would abuse O’Keeffe or, more generally, that any teacher would abuse a student.⁶⁰

B. The Court’s Findings

On January 20, 2014, the Grand Chamber of the ECtHR found for O’Keeffe, noting that the State had an obligation to protect children from ill treatment, even in the national school system.⁶¹ As a result, the court concluded that the State had violated Article 3 of the Convention.⁶² In evaluating the claims, the court noted that because the case took place in 1973, they would assess the State’s alleged responsibility from the point of view of the facts and standards of 1973.⁶³

First, the court found that the State had a positive obligation to protect children from inhuman or degrading treatment or punishment.⁶⁴ The court recognized that the affirmative duty to ensure that children were not subject to such ill treatment should not be interpreted to place an excessive burden on the State, given the uncertainty of human nature.⁶⁵ The court, relying on *X & Y v. Netherlands* and additional recent cases, noted that the State should at a minimum provide “effective protection” and implement “reasonable steps” to prevent ill treatment of children and vulnerable people that authorities knew or should have known about.⁶⁶

In addition, the court held that the State’s positive obligation to protect students was especially prevalent given the primary education nature of the case.⁶⁷ Even in 1973, prior case law had already established that a positive obligation—in this case related to the right to education—could be imposed on the State by the Convention.⁶⁸ The court rejected the State’s claim that its liability was absolved simply because O’Keeffe elected to attend Dunderrow Na-

⁶⁰ *Id.* The State claimed there was insufficient evidentiary support to suggest there was an actual complaint received alleging L.H.’s abuse. *Id.* at 189.

⁶¹ *Id.* at 199.

⁶² *Id.*

⁶³ *See id.* The court noted that in examining such viewpoints, it would not take into consideration current recognition and understanding of the risk of sexual abuse of children in schools. *Id.* at 191.

⁶⁴ *Id.* at 192.

⁶⁵ *Id.*

⁶⁶ *Id.* (citing *X & Y v. Netherlands*, 91 Eur. Ct. H.R. (ser. A), ¶¶ 21–27 (1985)).

⁶⁷ *Id.*

⁶⁸ *Id.* at 193. The court relied on *Marckx v. Belgium*, a case previously cited to create a positive obligation guaranteeing a child’s integration into a family under Article 8. *See id.*; *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A), ¶ 31 (1979). The court also relied on *X & Y*, where it held that the State had not fulfilled its Article 8 positive obligation to protect mentally handicapped adolescents because of the State’s failure to enact laws punishing sexual advances towards them. *O’Keeffe*, 2014-I Eur. Ct. H.R. at 193; *see X & Y*, 91 Eur. Ct. H.R., ¶¶ 21–27. There, the court found that the State should have known of the risk to mentally handicapped teens and should have prevented the harm through effective legislation. *O’Keeffe*, 2014-I Eur. Ct. H.R. at 193; *see X & Y*, 91 Eur. Ct. H.R., ¶¶ 21–27.

tional School.⁶⁹ The court reasoned that O'Keeffe, as well as other students, did not have a "realistic and acceptable alternative" to attending a local national school.⁷⁰ The court also reasoned that the State could not avoid liability by delegating duties to private entities because it still had a duty to provide "sufficient mechanisms of child protection."⁷¹

Second, the court found that the State had not adequately safeguarded O'Keeffe from sexual assault while a Dunderrow student, failing in their Article 3 duty to provide her protection.⁷² Although the court recognized that Ireland's unique education system placed national schools outside of state control, the court rejected the State's claim that its liability was absolved as a result of that lack of control.⁷³ The court stated that even under this managerial system, the State's enforcement of criminal laws on sexual crime against minors suggested the State's knowledge of ill treatment of children.⁷⁴ The court also found that the State's duty to protect children from ill treatment was so inherent, the State should have known that a lack of protective measures could compromise the safety of students.⁷⁵ The court criticized the State for the lack of procedures and measures within the educational context and suggested that the State that could have, at the very least, prevented or addressed ill treatment through a detection or reporting system.⁷⁶ Legislation at the time did not procedurally make it possible for concerned parents to file claims directly to State authority, and legislation only made it an obligation for inspectors to oversee the performance of teachers and students.⁷⁷

⁶⁹ *O'Keeffe*, 2014-I Eur. Ct. H.R. at 194.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 199–200.

⁷³ *See id.* at 196–97.

⁷⁴ *Id.* at 197. The court noted that in 1935, Ireland specifically criminalized the sexual abuse of minors and that statistical evidence provided in the Carrigan Report found an alarming amount of sexual crime in Ireland. *Id.* at 196–97. The Carrigan Committee had recommended legislative changes and more severe criminal punishment on such sexual offenses, which lead to the adoption of the 1935 Act. *Id.* The 1935 Act created further criminalized sexual offences against young girls. *Id.* at 197. Moreover, the Ryan Report also showed a high number of complaints made to the State regarding sexual offenses against young children. *Id.*

⁷⁵ *Id.* at 197.

⁷⁶ *See id.* The court rejected the State's claim that the 1965 Rules for National Schools (1965 Rules) provided an appropriate reporting mechanism. *Id.* On the contrary, the court found that the 1965 Rules failed to outline any requirement that a state authority supervise the treatment of children in national schools, and did not provide a method for children or parents to go directly to a state authority with complaints. *Id.* Instead, complaints against teachers were directed to a non-state denominational manager, therefore dissuading parents from filing complaints directly to a state authority. *See id.* at 197–98.

⁷⁷ *Id.* at 198.

C. *The Dissent*

The dissenting opinion in *O’Keeffe* raised concerns regarding the outcome of the judgment.⁷⁸ First, the dissent disagreed on the issue of the timeliness of complaints, finding that there was not sufficient evidence to prove that parents would have complained more vigorously had regulations encouraged them to do so.⁷⁹ Second, the dissent disagreed with the majority regarding the extent of the State’s positive obligations, finding that the court incorrectly applied a retrospective interpretation of Article 3 and extended the scope of the obligation in such a way that future interpretation is not predictable.⁸⁰

III. ANALYSIS

O’Keeffe v. Ireland is not the only recent case that finds that Article 3 imposes a positive obligation on States to enact measures to ensure that individuals within their jurisdiction, especially young children, are not subjected to ill treatment.⁸¹ For example, in September 1998, the ECtHR found that the United Kingdom had violated Article 3 of the Convention by failing to adequately protect the applicant from child abuse from his stepfather.⁸² There, the court reasoned that the United Kingdom’s corporal punishment law permitting “reasonable and moderate physical punishment of the child” failed to protect the applicant when his stepfather beat him with a cane.⁸³ In addition, in May 2001, the ECtHR held that the United Kingdom had failed to protect children from ill treatment at home when the local authority failed to remove the abused children from their home.⁸⁴ These recent cases illustrate a modern trend towards imposing a positive obligation on states to take reasonable measures to protect and prevent children from ill treatment where state officials had constructive knowledge of the abuse.⁸⁵ However, these cases only raise questions concern-

⁷⁸ See *id.* at 214 (Zupancic, Gyulumyan, Kalaydjieva, De Gaetano, Wojtyczek, JJ., dissenting).

⁷⁹ See *id.*

⁸⁰ See *id.* at 214–15. The dissent suggested that the majority inaccurately interpreted the obligation of the State to prevent the risk of ill treatment in the education context by incorrectly merging the Article 3 duties with the implicit duty to assess “the risk of ill-treatment in the context of education” under Article 2 of Protocol 1. *Id.* at 216. The dissent feared the majority’s broad interpretation would expand the duties under the Convention and risk unpredictable interpretations of the State’s obligations. *Id.*

⁸¹ See *Z v. United Kingdom*, 2001-V Eur. Ct. H.R. 1, 4; *A. v. United Kingdom*, App. No. 25599/94, 27 Eur. H.R. Rep. 611, 624 (1998).

⁸² *A.*, 27 Eur. H.R. Rep. at 623–24.

⁸³ *Id.* at 614, 623–24.

⁸⁴ *Z*, 2001-V Eur. Ct. H.R. at 25.

⁸⁵ James Gallen, *O’Keeffe v. Ireland: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education*, 78 MOD. L. REV. 151, 158–59 (2015) (stating that additional cases regarding Article 3 affirm the extension of Article 3 obligations); see *Z*, 2001-V Eur. Ct. H.R. at 25; *A.*, 27 Eur. H.R. Rep. at 623–24.

ing states' responsibility to prevent physical abuse, while leaving unanswered questions regarding cases of psychological ill treatment.⁸⁶

A. Recent Impacts of the *O'Keefe Judgment*

In response to the *O'Keefe* judgment, the State must provide the Council of Europe with an action plan every six months, highlighting individual and general measures taken to protect students from abuse.⁸⁷ Most recently, in July 2016, the State submitted an action plan stating that the State had made press statements and covered the judgment in national media, made payment to applicant, and made additional general developments to further protect children from ill treatment in national schools.⁸⁸ Moreover, on November 19, 2015, the Children First Act (Children First) was enacted "for the purposes of making further and better provision for the care and protection of children."⁸⁹ Children First creates legal obligations on service providers such as schools and hospitals by requiring a designated individual be responsible for overseeing child protection concerns and reporting suspicions of child abuse.⁹⁰

Despite the State's recent attempts at enacting legislation as a result of the *O'Keefe* judgment, the proposed action plans and Children First have yet to be fully implemented.⁹¹ Certain sections of the Children First Act have been implemented in the past two years, and the Minister is likely to continue phasing in the remainder of the Act; however, until they have been signed into law,

⁸⁶ Gallen, *supra* note 85, at 160 (arguing that further clarification is necessary to determine whether there are implications for protection beyond physical ill treatment); see Z, 2001-V Eur. Ct. H.R. at 25; A., 27 Eur. H.R. Rep. at 623-24.

⁸⁷ "Children Cannot Wait Any Longer"—On Anniversary of *O'Keefe v. Ireland* ISPC Calls for Commencement of Children First Act, ISPC (July 29, 2016), <http://www.ispc.ie/news-media/news/children-cannot-wait-any-longer-on-anniversary-of-okeefe-v-ireland-ispc-calls-for-commencement-of-children-first-act/14806> [<https://perma.cc/DX97-3VDZ>] [hereinafter *Children Cannot Wait Any Longer*]; see Press Release, Dep't of Educ. & Skills, Ireland, Draft Action Plan in Response to Louise O'Keefe Case Published (Aug. 1, 2014), www.education.ie/en/Press-Events/Press-Releases/2014-Press-Releases/PR14-08-01.html [<https://perma.cc/9TND-NQWT>].

⁸⁸ GOV'T OF IR., ACTION PLAN: O'KEEFE V. IRELAND (2016), <https://www.education.ie/en/Learners/Information/Former-Residents-of-Industrial-Schools/Action-Plan-July-2016.pdf> [<https://perma.cc/KFH6-VZ57>]. The submitted Action Plan claims that (1) Ireland had been advancing changes in its child protection measures through phases in 1991/1992, 2001/2004, and again in 2011, (2) that a sub-committee within the Inter-Departmental Implementation Group on Children First is currently evaluating whether problems with child protection identified in the judgment have been appropriately remedied since, and (3) the State Claims Agency has completed an assessment of relevant litigation involving school abuse to identify cases that fall within the judgment's scope. *Id.* ¶¶ 4-13, 17.

⁸⁹ Children First Act 2015, at 5 (Act No. 36/2015) (Ir.), <http://www.irishstatutebook.ie/eli/2015/act/36/enacted/en/index.html> [<https://perma.cc/7XDF-6J9G>]; see also *Children Cannot Wait Any Longer*, *supra* note 87 (describing the implementation of the Children First Act).

⁹⁰ See Children First Act 2015 at 5; *Children Cannot Wait Any Longer*, *supra* note 87.

⁹¹ *Children Cannot Wait Any Longer*, *supra* note 87; *Children First Act 2015*, TUSLA, <http://www.tusla.ie/children-first/children-first-act-2015/> [<https://perma.cc/L83N-B857>].

Irish children may not have sufficient legal protection.⁹² The lack of urgency in enacting legislation reflects the government's hesitance to impose such requirements immediately, likely due to the distinct history of Ireland's public education system.⁹³ Because the Irish public system is so heavily dependent on the Catholic Church's management, the State likely fears imposing such duties on the Catholic Church due to possible pushback from the Catholic community.⁹⁴ The transition from a once self-regulated education system to a highly regulated one, thus, may still leave too many children unprotected in the immediate future.⁹⁵

Although the government has received criticism regarding the timing of phasing in the entirety of Children First, the language of the act does reflect the State's direct response to the *O'Keefe* judgment.⁹⁶ For instance, Section 14 of Children First requires that:

[W]here a mandated person knows, believes or has reasonable grounds to suspect, on the basis of information that he or she has received, acquired or becomes aware in the course of his or her employment or profession as such a mandated person, that a child—

- (a) has been harmed,
- (b) is being harmed, or
- (c) is at risk of being harmed,

he or she shall as soon as practicable, report that knowledge, belief or suspicion, as the case may be, to the Agency.⁹⁷

The ECtHR's judgment in *O'Keefe* depended largely on the fact that the State had no legal framework that protected children in the education system, which led to the State's failure to safeguard children from ill treatment.⁹⁸ In response to the judgment, Section 14 broadens the scope of liability by requiring the reporting of child abuse where the mandated person not only has knowledge of past and present abuses, but also when the person believes the child is at risk

⁹² *Children Cannot Wait Any Longer*, *supra* note 87.

⁹³ See *O'Keefe v. Ireland*, 2014-I Eur. Ct. H.R. 155, 195–96 (noting the important role of religious communities in the Irish primary education system from the early nineteenth century); *Children Cannot Wait Any Longer* *supra* note 87 (emphasizing the delay in enacting the Children First Act in its entirety).

⁹⁴ See *O'Keefe*, 2014-I Eur. Ct. H.R. at 195 (noting that the parties generally agreed on the structure of the Irish education system).

⁹⁵ See *id.* at 196 (stating that the Irish public school system has had a unique presence since the early 1920s and noting that the denominations had expressed a firm wish to retain their control).

⁹⁶ See *Children Cannot Wait Any Longer*, *supra* note 87; see, e.g., Children First Act 2015, § 14(1) (requiring mandated persons from reporting suspicions of child abuse).

⁹⁷ Children First Act 2015, § 14(1).

⁹⁸ See *O'Keefe*, 2014-I Eur. Ct. H.R. at 198 (emphasizing the lack of an effective regulatory framework, which if in place could have prevented such ill treatment).

of abuse.⁹⁹ As a result, if fully enacted, the broad scope of liability in Children First may lead to greater protection of children, especially in the educational context.¹⁰⁰

B. Future Uncertainty in Scope

The ECtHR made clear in *O'Keefe* that the State had “an inherent obligation . . . to ensure [the vulnerable children's] protection from ill-treatment, especially in the primary-education context, through the adoption, as necessary, of special measures and safeguards.”¹⁰¹ However, the language of the majority opinion is interesting in that it imposes such an obligation, not as an inherent requirement of the Convention, but as an obligation stemming from the State's role in public primary education.¹⁰² This novel approach creates uncertainty in the interpretation of inherent positive obligations rooted in articles outside of Article 3, and as mentioned in the dissent, may impose ideological visions on the best practices of public service.¹⁰³ In considering the impacts of the judgment, it is unclear whether the court will impose new positive obligations in future cases involving the duties of public servants.¹⁰⁴ For instance, the court could extend its logic in *O'Keefe* to create a positive obligation on the state to guarantee the freedom of religion under Article 9.¹⁰⁵

The ECtHR's judgment may also be interpreted narrowly to impose positive obligations only in the educational context.¹⁰⁶ The language of the judgment expressly states that positive obligations under Article 3 are inherent in the nature of government tasks, “especially in a primary-education context.”¹⁰⁷ As a result, the court may, in future cases, interpret *O'Keefe* narrowly in the educational context, rather than broadly stretching vicarious liability to situations outside of education.¹⁰⁸

⁹⁹ Children First Act 2015, § 14 (mandating persons to report child abuse).

¹⁰⁰ See *id.*; *O'Keefe*, 2014-I Eur. Ct. H.R. at 198 (finding a failure to place an obligation to inspect or monitor teacher behavior other than academic requirements).

¹⁰¹ *O'Keefe*, 2014-I Eur. Ct. H.R. at 192–93.

¹⁰² See *id.*; Renata Uitz, *Guest Post on Grand Chamber Judgment in O'Keefe v. Ireland: O'Keefe v. Ireland Brings Closure to Some, Uncertainties to Others*, ECHR BLOG (Feb. 12, 2014), <http://echrblog.blogspot.com/2014/02/guest-post-on-grand-chamber-judgment-in.html> [<https://perma.cc/9A86-ZVPB>] (noting that “the French version of the judgment makes it clear that the obligations foreseen . . . [are] in the very nature of the government's tasks in public primary education”).

¹⁰³ See *O'Keefe*, 2014-I Eur. Ct. H.R. at 214–15 (Zupancic, Gyulumyan, Kalaydjieva, De Gaetano, Wojtyczek, JJ., dissenting); Uitz, *supra* note 102 (finding that this novel approach may lead to a divergence in interpretation).

¹⁰⁴ See Uitz, *supra* note 102.

¹⁰⁵ See European Convention on Human Rights, *supra* note 43, art. 9; *O'Keefe*, 2014-I Eur. Ct. H.R. at 214–15 (Zupancic, Gyulumyan, Kalaydjieva, De Gaetano, Wojtyczek, JJ., dissenting).

¹⁰⁶ See *O'Keefe*, 2014-I Eur. Ct. H.R. at 192; Gallen, *supra* note 85, at 160.

¹⁰⁷ *O'Keefe*, 2014-I Eur. Ct. H.R. at 192–93.

¹⁰⁸ See *id.* at 199 (highlighting the importance of such an obligation in the primary education context); Gallen, *supra* note 85, at 160.

Finally, the court was unclear whether the State's liability under Article 3 is limited only to physical abuse.¹⁰⁹ For instance, whether Article 3 of the Convention protects children in Ireland facing discrimination that results in grave emotional and psychological harm, but not physical ill treatment, is an unsettled issue.¹¹⁰ With the rise of bullying awareness in the educational context, the decision may have implications for broadening the scope of liability by protecting students from discrimination or bullying in schools.¹¹¹

CONCLUSION

In *O'Keeffe v. Ireland*, the court found that Article 3 of the European Convention on Human Rights created a positive obligation on states to protect children from ill treatment, including sexual assault. Moreover, even if Ireland's unique public school system deferred managerial responsibilities to the Catholic Church, this did not absolve the State from liability. Although the outcome of the judgment was favorable for O'Keeffe and other victims of sexual abuse, the implications of the judgment are still unclear. The recent rise in awareness of psychological and emotional abuse in the educational context may influence the court to broaden the scope of liability in the same way that growing research on sexual abuse affected the *O'Keeffe* judgment. For example, in future cases the government may be liable for psychological ill treatment. Despite the likelihood of increased protection for students in Ireland, the government may continue to be liable only for positive obligations inherent in the primary education context.

¹⁰⁹ See *O'Keeffe*, 2014-I Eur. Ct. H.R. at 199 (mentioning an obligation and violation only in the context of sexual abuse); Gallen, *supra* note 85, at 160.

¹¹⁰ Gallen, *supra* note 85, at 160.

¹¹¹ *Id.*; see *O'Keeffe*, 2014-I Eur. Ct. H.R. at 199; see also Ashley Strickland, *Bullying Is a 'Serious Public Health Problem,' Report Says*, CNN (Dec. 2, 2016, 11:41 AM), <http://www.cnn.com/2016/05/10/health/bullying-public-health-zero-tolerance/> [<https://perma.cc/27VD-TQU9>] (noting that all fifty U.S. states have adopted or revised bullying laws in the last fifteen years).