



COVID-19 and legal responses on the island of Ireland: introducing the key themes

Ollie Bartlett

Maynooth University

Neil Maddox

Maynooth University

Ronagh McQuigg

Queen's University Belfast

Andrea Mulligan

Trinity College Dublin

Correspondence email: r.mcquigg@qub.ac.uk

The COVID-19 pandemic is a public health emergency that is unprecedented in scope. As of April 2022, approximately 500 million confirmed cases of COVID worldwide have been reported to the World Health Organization (WHO), with in excess of 6 million deaths as a result of the virus.¹ In Northern Ireland, there have to date been around 700,000 confirmed cases and over 3000 deaths due to the virus,² whilst in the Republic of Ireland, there have been approximately 1.5 million confirmed cases, with around 7000 deaths.³ This special issue will examine key legal themes that have characterised and conditioned the responses to the pandemic in both jurisdictions on the island of Ireland, as well as connect these themes to developments outside of Ireland.

The special issue arose from a virtual symposium which took place in December 2020, and which was organised jointly by the Irish Association of Law Teachers and the Northern/Ireland Health Law and Ethics Network. The symposium aimed to provide a forum in which researchers who were studying the legal issues arising from COVID-19 policy responses could share insights and discuss connections between their work. Other such fora had already been set up on the island of Ireland and were conducting very interesting work – this symposium hoped to build on this platform by offering perhaps the first opportunity for legal scholars across the island of Ireland and

1 WHO, 'WHO coronavirus (COVID-19) dashboard'.

2 Department of Health, 'COVID-19 Statistics Northern Ireland'.

3 WHO, 'Ireland situation'.

beyond to come together in order to understand how their work on COVID-19 responses might have synergies with that of like-minded colleagues.

The response to the symposium call was heartening, with scholars based across Europe coming together in a one-day, online format to present a mixture of work at various stages of progress. It was clear from the event that interest amongst the legal academic community for debating the legal problems raised by government responses to COVID, as well as the manner in which COVID has exacerbated existing societal issues, runs deeper and broader than many realised. Scholars at the symposium shared insights across a diverse range of legal fields, from human rights to data protection to competition law. This indicated – much as is already known – that COVID has caused problems that can be studied from most legal disciplinary perspectives. It also indicated that there is more dynamic scholarship being conducted by legal academics with a connection to the island of Ireland than many at the event might have thought. Consequently, we hope that through the pages of this special issue we can illustrate the breadth of work that is being conducted on the impact of COVID on this island, and in so doing encourage others to bring forward their own work on what is surely the most all-enveloping societal event of recent history.

The Guest Editors would like to express their thanks in particular to Mark Flear, the Chief Editor of the *Northern Ireland Legal Quarterly*, who gave his time generously to leading the organisation of the symposium, as well as to the initiation of this special issue. We would also like to thank the participants of the symposium for a stimulating debate, the fruits of which are reflected in the pages of this special issue, as well as to the anonymous reviewers who very kindly read and commented on the article drafts. Particular thanks go to Heather Conway, the Co-Editor of the journal, for her support during the process of developing this special issue, as well as to Marie Selwood for her editorial assistance.

It is notable that the responses of the two jurisdictions on the island of Ireland to the pandemic have diverged in many respects, as is analysed in the first two articles in this collection. As Mary Dobbs and Andrew Keenan discuss, pandemics highlight the issue of multilevel governance and where and how powers should be allocated. This issue comes clearly into focus in epidemiological units where internal jurisdictional boundaries exist, as in the case of the island of Ireland. In April 2020, the respective Departments of Health in Northern Ireland and the Republic of Ireland signed a memorandum of understanding which recognised the need for cross-border cooperation in dealing with the pandemic. However, whilst there have been some elements of cooperation and coordination, the governance approaches in the

two jurisdictions have appeared to remain largely independent of each other. The authors thus consider whether the proposed cooperative approach was appropriate in light of subsidiarity and the surrounding context; whether the largely independent approaches by the Republic of Ireland and Northern Ireland were appropriate; and whether a two-island approach might provide a viable alternative.

The article by Katharina Ó Cathaoir and Christie MacColl also discusses the divergences in approach between the two jurisdictions, and considers the two separate legislative strategies which were adopted to tackle COVID-19, despite the island comprising a single epidemiological unit. The authors argue that adopting conflicting approaches, while maintaining an open border, was potentially counterproductive to viral suppression and threatened public compliance. The article evaluates and contrasts the framings of ‘reasonable excuses’ adopted by the Republic of Ireland in the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) Regulations 2020 and Northern Ireland in the Health Protection (Coronavirus Restrictions) Regulations No 2 (Northern Ireland) 2020. The authors analyse the differing approaches to restrictions on movement and identify discrepancies between the framing of reasonableness in terms of *inter alia* exercise, visiting cemeteries and essential items; and argue that a lack of clear reasoning, alongside the publication of complex legislation and conflicting government guidance, ultimately contributed to a climate of public confusion and created difficulties for enforcement. The article also explores the transparency, clarity and proportionality of coronavirus restrictions more generally and considers the broader implications on human rights.

The next article in this special issue focuses on reshaping relationships between the state and the market during a pandemic. As Emma McEvoy discusses, one of the legislative responses to the COVID-19 pandemic has been the loosening of public procurement rules and policies. Under normal circumstances, the process for procuring medical supplies is time-consuming and administratively burdensome, but in March 2020, the European Union Public Procurement Directives were relaxed to allow procurers to follow quick and simplified procedures. Allowing for the rapid procurement of COVID-19-related contracts was necessary to secure access to emergency supplies from a globally disrupted supply chain. However, the rules still remain in a relaxed state. The article questions if it is now appropriate to restore the full application of the rules and analyses both the positive and negative implications of the use of accelerated procurement procedures.

The special issue then proceeds to focus on data in the responses to the pandemic. Edoardo Celeste, Sorchá Montgomery and Arthit

Suriyawongkul examine digital technology and privacy attitudes in the context of COVID-19. The authors explain how the current pandemic is a 'technological' one, where digital tools are employed for multiple purposes, from contact tracing to quarantine enforcement. The adoption of these technologies gives rise to issues relating to the rights to privacy and data protection. However, privacy and data protection can only be restricted on justified and proportionate grounds, with a complete surrender deemed as compromising the essence of these rights. The authors argue that the widespread mistrust of public and private actors responding to the crisis evidences a divergence between the formal legality of the technological solutions adopted and the legal reality that brings about the Irish public's perception of government measures as potentially infringing their fundamental rights.

Maria Grazia Porcedda then explores the data protection implications of data-driven measures other than apps adopted in Ireland to contain the spread of COVID-19. The author argues that data protection must be approached as a qualified fundamental right enshrined in the Charter of Fundamental Rights of the European Union and given practical application by the implementation of the General Data Protection Regulation and the Data Protection Act 2018 at national level. The article analyses data-driven measures aimed at collecting personal data and special categories of personal data and highlights issues at the level of delivery which affect the legality of such measures in terms of fundamental rights. The author then provides suggestions for redressing the shortcomings of the measures in question.

The final section of the collection focuses on suffering during the pandemic. As Ronagh McQuigg argues, it must be remembered the COVID-19 pandemic has caused serious health concerns beyond actual cases of the virus itself. Since the onset of the pandemic, incidents of domestic abuse have increased dramatically around the world, including on the island of Ireland. Essentially, the lockdown measures which were adopted by many states, although necessary to limit the spread of the virus, have nevertheless had the impact of exacerbating the suffering of many victims of domestic abuse. Those already living in abusive relationships found themselves to be even more isolated and trapped in such situations, given the lockdown and social-distancing measures which have been imposed. In addition, the widespread anxiety caused by the COVID-19 pandemic in terms of health concerns and financial worries increased tensions within many relationships, all too often resulting in violence. The article discusses the increased levels of domestic abuse in Northern Ireland and the Republic of Ireland as a result of the pandemic, and analyses the steps taken in response by each jurisdiction. The author argues that, although meritorious steps were taken to respond to the increased rates of domestic abuse, essentially

the pandemic has exposed and exacerbated pre-existing problems with the responses of both jurisdictions to this issue.

The special issue also includes a commentary in which Ollie Bartlett revisits legislation put before the Dáil on the eve of the COVID-19 pandemic that sought to introduce a right to health into the Irish Constitution. The legislation stalled on account of the election of the 33rd Dáil in February 2020, followed closely by the first COVID lockdown, and the subsequent formation of a new coalition Government in June 2020. However, the author argues that the controversy surrounding policy choices that had to be made during the response to COVID-19, specifically the many which involved a choice between conflicting healthcare and public health priorities, reinforce the necessity of raising once again the debate about a constitutional right to health. As the author illustrates, many of the traditional arguments against constitutionalising a right to health are no longer sustainable in light of the collective experience of COVID. Consequently, a national debate on the future of the right to health in Ireland should no longer be avoided and, indeed, should be prioritised given the need to make reforms to resolve the inadequacies in the existing legal structure laid bare by COVID.