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The Northern Ireland Executive: politics, law and a rethink of judicial intervention

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ABSTRACT

The Northern Ireland Executive, comprising devolved Northern Ireland ministers and the Executive Committee, has had a long history of being successfully sued in the Northern Ireland courts, both by individual litigants and Executive members themselves. This history demonstrates, at times, a flagrant disregard for legal duties and the rules of proper administration, which, in Northern Ireland, subserve polarised and controversial political interests and priorities of the parties which comprise the Executive. However, when examining the case law, the Northern Ireland courts approach the question of judicial intervention in the same way as they would any other government. This sometimes leads to judicial restraint in granting relief, even in the face of intransigent and arguably bad faith behaviour by ministers or the Executive Committee, as two recent cases demonstrate.

In this article I explore the nature and operations of the Northern Ireland Executive, distinguishing it from other governments in the UK. Using this backdrop, I next critically evaluate two recent judgments of the Northern Ireland High Court which exemplify the existing (and limited) judicial approach in the face of Executive lawlessness. I contrast these judgments with two earlier judgments which I argue set out a better approach to remedying Executive lawlessness. Finally, I build on the approach found in these earlier judgments to set out a tentative framework for judicial intervention in and remedy of Executive lawlessness.

Keywords: Northern Ireland Executive; Belfast/Good Friday Agreement; judicial review; legal realism; devolution.

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INTRODUCTION

On 5 May 2022, elections were held to the Northern Ireland Assembly. Over the next few days, it became clear that, for the first time in the jurisdiction's history, there would be a nationalist First Minister and a unionist deputy First Minister, inverting an arrangement that has been the hallmark of Stormont Executives since Northern Ireland's present constitution was enacted. On 9 May, however, the leader of the largest unionist party who is entitled to nominate a deputy First Minister refused to do so, with his party also refusing to participate in the election of a new Speaker of the Assembly. Consequently, Northern Ireland had neither a functioning legislature, nor a fully functional Executive. Due to recent statutory reforms, this government limbo continued until a new Executive was formed in early 2024.

The Stormont Executive has a somewhat controversial history. Since the formation of the first Executive in December 1999, there have been only two seamless transfers of power following an election. More importantly, however, is the Executive's record in litigation, with the courts frequently having to adjudicate cases in which Northern Ireland ministers have put politics ahead of legal obligations. As I will explore in more detail in this article, the courts have generally tended to view the Executive in terms similar to other governments in the United Kingdom (UK). Thus, the predominant theory of judicial intervention in cases of unlawful conduct by the Executive is drawn from existing approaches to *general* unlawful conduct by public authorities.

The central argument in this article is simple: the Northern Ireland Executive is unlike other governments across the UK. Thus, the basis for judicial intervention must be commensurately different. In this regard, I explore two judgments early in the history of modern devolution in Northern Ireland as laying down an approach which is tailored to the uniqueness of the Northern Ireland Executive – and argue that these judgments are best understood as examples of legal realism.

This article is divided into three sections. First, I explore the nature of the Northern Ireland Executive, especially in comparison to other governments across the UK. Second, I explore two recent cases involving Executive misconduct, critically examining the shortcomings with the rationale for judicial intervention in those cases, and thus the actual relief ordered in those cases. Third, I explore the two judgments which I argue set out the most appropriate judicial approach, how these are best understood through legal realism and how a realist approach can be generalised in respect of the Northern Ireland Executive.

THE STORMONT EXECUTIVE: EINSTEIN, KEN AND OPPENHEIMER

Before examining the Stormont Executive in detail, it is important to set out what I mean by 'executive'. Unlike in Whitehall, a unified definition of executive power, formally vested in the Crown and politically exercised by ministers who are responsible, both individually and collectively, to Parliament, is not in keeping with either constitutional design or constitutional reality in Northern Ireland. For example, the character of the Stormont Executive being a mandatory, rather than voluntary, coalition does not lend itself easily to collective responsibility as individual coalition parties often espouse rival political ideologies. In any event, collective responsibility is absent in the constitutional design of Northern Ireland, given that the Northern Ireland Assembly has no power to withdraw its confidence in the Executive as a whole.[1]

Indeed, as will become clear in this article, the nature of the Stormont Executive being fundamentally different from how executive power is understood in the UK generally, is a crucial pillar of my argument. In order to understand the Stormont Executive, therefore, I adopt and draw on the 'three-tier' model of executive power set out by Conor McCormick, in which executive power in Northern Ireland comprises the Crown, devolved ministers and Northern Ireland departments (staffed by civil servants).[2]

Prescribing this three-tier structure are three important laws, which relate to the title of this section. The title mainly references a meme in which a screenshot from the film *Barbie*[3] is inserted into a scene from the film *Oppenheimer*.[4] The resultant picture shows, from left to right: Albert Einstein, Ken (from the Barbie universe of characters) and J Robert Oppenheimer. The meme is, in part, one of the reasons for this article: it was used by Dr Benjamin Yong in a post on X (formerly Twitter)[5] in which Yong indicated that Einstein signified the Ministerial Code (UK), Ken signified the Cabinet Manual (UK) and Oppenheimer signified the Ministers of the Crown Act 1975. I quoted Yong's post and stated: 'For Stormont: the Departments (NI) Order 1999 (signified by Einstein), the (Northern Ireland) Ministerial Code (signified by Ken),

1 In contrast to the Assembly's power to exclude individual ministers from office and disqualify entire parties from holding ministerial office, see NIA, s 30(1) and (2).

2 Conor McCormick, 'The three tiers of executive power in Northern Ireland' in Brice Dickson and Conor McCormick (eds), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Hart 2021) 223.

3 Greta Gerwig et al, *Barbie* (Heyday Films et al 2023).

4 Christopher Nolan, *Oppenheimer* (Syncopy Incorporated et al 2023).

5 Ben Yong, 'Ministerial Code, Cabinet Manual, Ministers of the Crown Act 1975'. (16 August 2023).

the Northern Ireland Act 1998 (NIA) (signified by Oppenheimer)'.[6] It is crucial to understand this reference by pointing out that, in the picture, Einstein looks pensive and/or resigned in period-appropriate attire (from the late 1940s and early 1950s), Ken looks focused while in clothing of unmatchable flamboyance, and Oppenheimer appears stern in clothing similar to Einstein (except that Oppenheimer is wearing a hat and Einstein is not).

The first of the three laws is the Departments (Northern Ireland) Order 1999, which subjects the exercise of every function of every Northern Ireland department to the 'direction and control of the [corresponding] Minister', 'at all times'.[7] This requirement was construed strictly in the *Buick* decision, so that departments could not exercise functions explicitly conferred on them in the absence of their corresponding minister,[8] with the Court of Appeal casting doubt (but not explicitly overturning) this finding.[9] The uncertainty left by the *Buick* decision, in circumstances where the Executive was not in office, prompted the UK Parliament to legislate a constitutionally unprecedented[10] form of 'government' for Northern Ireland – where civil servants were empowered (but not required) to exercise departmental functions in the absence of ministers, and under the guidance (but not direction) of the Northern Ireland Secretary.[11] Consequently, notwithstanding the Lords' reluctance,[12] the strictness of departmental functionality, originally envisaged as a solid line of democratic accountability from the department through the minister to the Assembly (as departments cannot *per se* be held to account by the Assembly) was effectively severed with relative impunity.[13] This is why the Departments (Northern Ireland) Order 1999 is signified by the pensive and/or resigned Einstein.

Second is the Ministerial Code which governs ministerial conduct and exercise of functions at Stormont. Its detail is covered below, but suffice it to say at this stage that, in sharp contrast with counterparts

6 Anurag Deb, 'Reply to Yong' (16 August 2023).

7 Departments (Northern Ireland) Order 1999, art 4(1).

8 *Buick's application for judicial review* [2018] NIQB 43, [39].

9 *Buick's application for judicial review* [2018] NICA 26, [51].

10 See eg Select Committee on the Constitution, Northern Ireland (Executive Formation and Exercise of Functions) Bill (HL 2017-19 211) paras 21–24.

11 Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, s 3(1).

12 Constitution Committee (n 10 above), para 24.

13 For details of this dramatic departure from ordinary constitutional governance in Northern Ireland, see Anurag Deb, 'The legacy of Buick: Northern Ireland's chaotic constitutional crucible' (2019) 23(2) Edinburgh Law Review 259–265 and Adam Evans, 'Northern Ireland, 2017–2020: an experiment in indirect rule' [2021] Public Law 471–480.

in respect of the Scottish, Welsh and UK Governments, the Northern Ireland Ministerial Code is justiciable[14] – ministerial conduct can be scrutinised and sanctioned on the basis of its provisions. This is signified by the flamboyantly dressed Ken, for reasons I will detail when exploring the Ministerial Code in greater depth below.

Third is (as covered in more detail below) the general scheme of the NIA, which both establishes the devolved institutions and sets out the outer boundaries of their powers and functions. This is the main statute which governs the modern devolution settlement in Northern Ireland, and as such most of what I explore in the rest of the article are a direct or indirect consequence of its provisions. This is also why this statute is signified by the stern and formal (hatted) Oppenheimer. It is also relevant (as I explain in greater detail below) that the character of Oppenheimer *in this scene* signifies the NIA.

Reverting to McCormick's three-tier analysis, his essential point rests in how the Stormont Executive is different, both in structure and in practice, from its counterpart at Whitehall and thus cannot be understood through the lens of uniformity and coherence with which the law examines the latter. Without rehearsing the breadth of McCormick's analysis, there are two main points relevant to the focus of this article.

First is the difference in *structure* between Stormont and Whitehall. Unlike the latter, in respect of which exists the legal fiction that there is *one* Secretary of State,[15] Stormont ministers are, at least to some extent, described separately in Northern Ireland's present-day constitution: the NIA. In part, this is because there are three different ways of allocating ministerial seats. The First and deputy First Ministers (nominal joint-heads of the Executive) are, respectively, candidates nominated by the largest party of the largest community designation in the Assembly ('Unionist', 'Nationalist' or 'Other')[16] and the largest party of the second largest community designation in the Assembly.[17] The Justice Minister is elected by cross-community voting in the Assembly.[18] The rest of Stormont's ministerial complement is allocated using the d'Hondt method, with each party in the Assembly getting ministerial

14 See eg *Central Craigavon Limited's application for judicial review* [2010] NIQB 73.

15 See eg *Harrison v Bush* (1855) 5 El and Bl 344, 352 (Court of Queen's Bench), per Lord Campbell CJ. In Northern Ireland, this rule has most recently been codified in the Interpretation Act (Northern Ireland) 1954, s 43(1). See also, *Re Quinn's application* [1996] NIJB 115 (NIQBD), 118, per Kerr J (as he then was).

16 NIA, s 4(5).

17 Ibid s 16A, but see s 16C for exceptions.

18 Ibid s 21A(3) and (3A).

seats proportionate to its size in the Assembly.[19] Thus, as McCormick observes, the First and deputy First Ministers have no 'substantive powers of ministerial patronage',[20] given that parties in the Assembly generally fill ministerial offices dependent on *their* seat strength in the Assembly, entirely independent of whether the two largest parties in the Executive want to draw ministerial colleagues from other parties.

But Stormont Ministers are not hermetically sealed from one another. A specific committee of the Assembly, the Executive Committee (EC), chaired by the First and deputy First Ministers, provides a forum for discussion and agreement in certain matters. These include matters referred to in the Belfast (Good Friday) Agreement 1998 (GFA),[21] the popular endorsement of which led to the NIA, those matters referred to the EC for being 'significant or controversial' and lying outside an agreed (and Assembly-approved) programme for government[22] (or any 'significant or controversial' matters when no programme has been approved)[23] or those 'significant and controversial' matters which have been referred by the First and deputy First Ministers to the EC for its consideration.[24]

The consequence of these conditions being set out in the NIA is that their interpretation is the responsibility of the courts. I return to this issue further below, but the important point here is that the courts have the function of interpreting what is significant and controversial policy for the purposes of referral to the EC, as the tests for the referral duties are set out in statute. The role of the courts in this process marks the NIA as among the more legalised constitutional settlements in the UK. This explains my use of Oppenheimer to signify the NIA in the *Barbie/Oppenheimer* meme in two ways: first, legalisation prescribes ministerial decision-making more strongly than Stormont's counterparts elsewhere in the UK, mirroring the stern formality of Oppenheimer's attire (he is hatted, in comparison to Einstein who, while dressed in similar attire, is hatless) in the meme. Second, in the relevant scene from Oppenheimer, the characters of J Robert Oppenheimer and Albert Einstein are presented at opposite stages in their professional lives. Oppenheimer, the decorated scientist and American hero, having played a huge part in bringing the Second World War to an end, has yet to experience the professional controversy and decline which follow him hereafter. By contrast, Einstein is, at this point in his career, a veteran of professional setbacks. The prescriptiveness

19 Ibid s 18(2)–(6).
20 McCormick (n 2 above) 232.
21 NIA, s 20(3).
22 Ibid s 20(4)(a).
23 Ibid s 20(4)(aa).
24 Ibid s 20(4)(b).

which entered the NIA in relation to ministerial decision-making was a direct consequence of the St Andrews Agreement 2006,[25] which set the stage for devolution to return to Stormont after its collapse very early into the settlement under the NIA.[26] The hopefulness with which these changes were brought about has since yielded to frustration at the hurdles involved in EC decision-making, most recently during the Covid-19 pandemic.[27] Far from acting as an enabler of collective decision-making, the EC's procedures for decision-making include a controversial cross-community approval, if at least three ministers vote to require such approval,[28] resulting in the criticism that the EC represents 'power-snaring' rather than power-sharing.[29] Indeed, as previously highlighted, the Northern Ireland Court of Appeal's judgment in *Buick*[30] prompted the Executive to move legislation through the Assembly to carve out exceptions to the collective decision-making processes in the EC.[31] Although fraught with difficulty and prone to deadlock, EC decision-making is a fundamental aspect of executive governance at Stormont, and ministers are statutorily deprived of authority to make decisions in breach of requirements to refer matters to the EC.[32]

Now, the nature of the EC itself is worth exploring in relation to the structure of executive power at Stormont. The EC is a committee of the Assembly,[33] and as such has no executive power of its own.[34] This stands in contrast with Northern Ireland's previous devolution model, in place between 1921 and 1973, in which primary executive power was exercisable by the Governor of Northern Ireland, aided and advised by an Executive Committee of the Privy Council of Northern Ireland, comprising Northern Ireland ministers appointed by the Governor.[35]

25 See eg the Northern Ireland (St Andrews Agreement) Act 2006, ss 5–7.

26 For background, see Brendan O'Leary, *A Treatise on Northern Ireland, volume 3: Consociation and Confederation* (Oxford University Press 2019) 236–240.

27 'Coronavirus: shutdown deadlock at Stormont was "politics at its worst"' (*BBC News* 12 November 2020).

28 NIA, s 28A(8)(c).

29 McCormick (n 2 above) 235.

30 *Buick's application for judicial review* [2018] NICA 26, in which the Court of Appeal found that a decision granting planning permission to an incinerator had been made in the absence of a minister, in circumstances where the decision could only have been made after the matter had been referred to and decided by the EC.

31 Executive Committee (Functions) Act (Northern Ireland) 2020.

32 NIA, s 28A(10).

33 Ibid s 20(1).

34 *Re Solinas' application for judicial review* [2009] NIQB 43, [30], per Morgan J (as he then was).

35 Government of Ireland Act 1920, s 8(5), as amended by the Irish Free State (Consequential Provisions) Act 1922, sch 1, paras 1(1) and 2(1).

This Executive Committee conducted itself as a cabinet, reducing the Governor's primary executive powers mostly to formality (much like the formality of executive powers belonging to the Crown).[36] The mainstay of cabinet governance during this early period was collective responsibility, with 'solo runs' rare enough to be both notable and controversial.[37]

A related matter is the extent to which Stormont ministers may collectively agree a common set of priorities during their terms in office. The GFA provides for a 'programme incorporating an agreed budget linked to policies and programmes, subject to approval by the Assembly, after scrutiny in Assembly Committees, on a cross-community basis'.[38] There is no duty to present such a programme, but only a direction that the EC 'will seek to agree' such a programme annually. The NIA, for its part, only mentions the programme with reference to what may or may not be significant or controversial,[39] but does not otherwise obligate such a programme to be agreed or moved for the approval of the Assembly. Indeed, no programme was in place (that is, approved by the Assembly) before the last Assembly was dissolved.[40]

Structurally, therefore, there is no unified conception of executive power among Stormont ministers. Ministers at Stormont act, not as 'administrative units within a single executive office'[41] but as legally distinct and only occasionally conjoined decision-makers, conditioned by the justiciable boundaries of their powers as provided for in the NIA. This becomes clear when looking at the practice of ministerial power at Stormont – the second major point in McCormick's analysis.

With various structural complexities and highly prescriptive decision-making processes, it might be a surprise that Stormont ministers manage to govern at all. Indeed, even before the impasse following the 2022 Assembly election, a single resignation has risked the collapse of the Stormont Executive on at least two occasions in the

36 See Harry Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government* (Stevens & Sons 1968) 350–352.

37 Ibid 356–357. Notably, Calvert suggests that Northern Ireland ministers at this time had greater latitude to disagree with government policy than their UK counterparts, but only because Northern Ireland, during this period, experienced continuous government by a single political party, so that 'much of the opposition to government will be contained within the ranks of the governing party': ibid 356.

38 Northern Ireland Secretary, *An Agreement Reached at the Multi-party Talks on Northern Ireland* (Cm 3883 1998), Strand One, para 20.

39 NIA, s 20(4).

40 Northern Ireland Assembly, *Committee for the Executive Office Legacy Report 2017–2022* (23 March 2022) 18.

41 McCormick (n 2 above) 232.

past five years.[42] Nevertheless, the Executive has managed to govern, and, even in its recent caretaker capacity, has managed to launch major initiatives to reform significant areas of law and governance.[43] To a major extent, governance at Stormont is conditioned by the unique, siloed structure of its Executive, with notable examples of ministers litigating against one another for acting in breach of various legal obligations, including those owed in respect of collective decision-making at the EC.[44]

The justiciability of ministerial action at Stormont is also enhanced by the fact that there is a statutory obligation to act in accordance with the Ministerial Code in force at Stormont,[45] unlike equivalent codes in force for the UK,[46] Scottish[47] and Welsh Governments,[48] none of which are legally enforceable. While Stormont's Ministerial Code is not itself codified in statute,[49] it is worth pointing out the way in which the NIA mandates that the Code be observed. Most of the provisions of section 28A (which covers the Code) concern what the Code must contain and how it must be amended. Section 28A(1), however, requires ministers to act in accordance with the Code, while 28A(10) deprives ministers of the authority to take decisions in breach of referral requirements to the EC (as canvassed earlier), which are themselves part of the Code,[50] in addition to being statutorily codified in the NIA (as above). Thus, there is a general duty to act in accordance with the

42 The first, leading to a total Executive collapse, was in 2017, due to the resignation of then deputy First Minister Martin McGuinness MLA arising out of the Renewable Heat Initiative scandal. See 'Martin McGuinness resigns as NI deputy first minister' (*BBC News* 10 January 2017). The second, in 2022, arose from the resignation of then First Minister Paul Givan MLA. See Damien Edgar and Eimear Flanagan, 'DUP: NI First Minister Paul Givan announces resignation' (*BBC News* 3 February 2022). The latter avoided an immediate or short-term total Executive collapse only because the NIA had been amended five days later to considerably delay such an outcome: see NIA, s 18(A1)(c), inserted by the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, s 2(3).

43 See, for example, a public consultation on the minimum age of criminal responsibility from the Justice Minister, Department of Justice, 'Long launches public consultation on the minimum age of criminal responsibility' (3 October 2022); and a public consultation into greater devolution of taxation powers launched by the Finance Minister, Department of Finance, 'Murphy launches consultation on devolution of fiscal powers' (4 October 2022).

44 McCormick (n 2 above) 236-237.

45 NIA, s 28A(1).

46 Cabinet Office, *Ministerial Code* (May 2022).

47 Scottish Government, *Scottish Ministerial Code: 2018 Edition* (February 2018).

48 Welsh Government, *Ministerial Code* (1 May 2016).

49 Not to be confused with the Code of Conduct for Ministers, which is codified, see NIA, sch 4, para 1.

50 Northern Ireland Executive, Ministerial Code (2007), para 2.4.

Code, which does not by itself deprive ministers of the authority to act if they breach the Code, while authority is specifically and automatically deprived if the referral duties are breached. This may be[51] an important distinction: ministerial conduct may not be *per se ultra vires* for a breach of the Code, except where the breach concerns matters which ought to be referred to the EC. This distinction reinforces the structural design of the Stormont Executive: if ministers are deprived of authority to act *only* in respect of a subset of executive matters which must be decided collectively, then Stormont ministers are permitted, outside of this subset, to act individually, with or without collective support or even tacit endorsement (subject to any legal constraints other than deprivation of authority). This explains why, in practice, Stormont ministers may quite validly go on lawful but controversial 'solo runs';[52] in that event, any corrective action lies in the political arena, rather than through judicial intervention. This is a major reason why I use Ken to signify the Ministerial Code in my adaptation of Yong's use of the *Barbie/Oppenheimer* meme. The unpredictability which results from an Executive which is not conceptually or practically unified can lead (and has led)[53] to the kind of chaos typified by Ken's flamboyance in comparison to his dour surroundings.

When Ministers are in breach of the EC referral duties, however, the extent of the legal constraints on executive powers at Stormont is quite broad. This is justiciability of a kind unknown to the UK, Scottish and Welsh Governments because judicially determining a policy to be significant or controversial results in a change of decision-maker (from a single minister to the EC) and, perhaps more importantly, involves judicial assessment of the *substance* of a policy in order to determine whether it is significant or controversial.

51 This is just a suggestion at this stage, given that only the Ministerial Code's referral duties have so far been tested in litigation before the courts.

52 McCormick (n 2 above) 236. Controversial solo-runs included then Education Minister Martin McGuinness' decision to eliminate primary school transfer tests in late 2002: see 'Fury as McGuinness scraps 11-plus exams' *Irish Examiner* (Cork 12 October 2002). This was also a trigger for the Ministerial Code adopted in 2006: see O'Leary (n 26 above), 251.

53 In terms of ministers judicially reviewing one another, an example of which forms a critical pillar of my analysis below.

In *Re Safe Electricity A&T's application for judicial review*,[54] Scoffield J went into extensive detail defining the 'significant' and 'controversial' labels. Notably, the judge considered that, while the EC would be the 'primary forum' for deciding what is significant, its word cannot be legally determinative of the question.[55] To like effect, while the primary responsibility for determining what is a controversial policy rests with the relevant minister and the EC, the Court would have the final say on the policy, with reference (at least in that case) to the popular reaction to the policy in question.[56] Of note is the judge's following observation: 'if the Executive parties were agreed on a course of action which caused universal public outcry, it could not plausibly be said that the matter was not controversial'.[57]

Now, Scoffield J did not set out a definitive test or parameters for determining what is or ought to be considered significant or controversial and was also clear that the standard of judicial scrutiny would not be high.[58] Nevertheless, by construing the statutory word 'controversial' in terms wide enough to encompass public opinion, the judge introduced an element of popular legitimacy into the kind of policy ministers are able to give effect to when acting alone. In other words, ministers must have regard to public opinion when exercising executive power.

The inability of ministers to act solely in certain significant or controversial matters is thus a legally enforceable restriction on ministerial authority with an inherently political element (popular legitimacy), which further conditions the executive power of Stormont ministers. This is a sharp contrast with Stormont counterparts in the UK, Scottish and Welsh Governments, which cannot conceivably be subject to judicial intervention even if those Governments acted demonstrably *against* widespread public opinion, so long as their

54 *Re Safe Electricity A&T's application for judicial review* [2021] NIQB 93. This was overturned on appeal ([2022] NICA 61), but Scoffield J's observations on the decision-making processes within the EC as well as the judge's exploration of 'significant' and 'controversial' were left untouched by the Court of Appeal. The lawful parameters of EC decision-making have since been explored in other decisions: *Re Bryson's application for judicial review* [2022] NIQB 4, *Re Mooreland and Owenvarragh Residents' Association's application for judicial review* [2022] NIQB 40 and *Re Rooney and others' application for judicial review* [2022] NIKB 34. All of these later decisions largely align with *Safe Electricity* insofar as EC decision-making is concerned. The Court of Appeal in *Re No Gas Caverns Ltd and Friends of the Earth Ltd*'s application for judicial review [2024] NICA 50 endorsed Scoffield J's approach, see [53] per Keegan LCJ.

55 *Safe Electricity* (n 54 above) [74]–[77].

56 Ibid [82]–[83].

57 Ibid [83].

58 Ibid [77] and [83].

actions satisfied the traditional grounds of judicial review (in addition to any specific statutory obligations).[59] Scoffield J's reasoning in *Safe Electricity* might raise concerns about the separation of powers in Northern Ireland, but the judge is not committing doctrinal heresy here. Historically, as well as presently, the separation of powers is a doctrine of means, not an end in itself. The broader purpose of the doctrine was to further the cause of good governance, the understanding of which derives from a variety of sources, including (historically) scripture[60] and natural law.[61] Scoffield J's nod to public opinion as relevant to (rather than determinative of) the lawful exercise of executive power is entirely consistent with this broader purpose. Moreover, the 'significant or controversial' threshold, in distinguishing between those decisions which can be unilaterally taken and those which must be taken collectively, represents a significant pillar of the machinery of government in Northern Ireland. Thus, it is vital for this pillar to be given a consistent meaning in law, so as to enhance certainty and stability in the operation of government. Consistency of legal meaning is a judicial function *par excellence*.

But judicial vigilance is not the only mechanism by which the Ministerial Code, and especially collective decision-making at the EC, is enforced. A third of the Assembly's members may petition the Assembly if concerned that a ministerial decision has breached the duty to act in accordance with the Ministerial Code,[62] triggering a duty of the Assembly Speaker to consult with Executive parties with a view to referring questions of this breach (including any specific breaches of the referral duties) to the EC for its determination,[63] if the subject of the alleged breach 'relates to a matter of public importance'.[64] Although the NIA does not define 'matter of public importance', Assembly Standing Orders make it clear that it is for the Speaker to certify whether the impugned ministerial decision is a matter of public importance.[65] This suggests that the ultimate decision on this question rests with the Speaker and that the opinions of the Executive

59 See eg *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

60 See eg John Locke, *An Essay Concerning Human Understanding with the Second Treatise of Government* (Wordsworth 2015) 325.

61 See eg Aileen Kavanaugh, 'The constitutional separation of powers' in D Dyzenhaus and M Thoburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 223, referencing at fn 19, Dimitrios Kyritsis, 'What is good about legal conventionalism?' (2008) 14(2) Legal Theory 135–166.

62 NIA, s 28B(1). But, by s 28B(2), a petition is not permitted more than once in respect of the same impugned ministerial decision.

63 Ibid s 28B(3)–(4).

64 Ibid s 28B(3).

65 Northern Ireland Assembly Standing Order No 29(5).

parties on this question may not be taken at face value, similar to Scoffield J's rejection of the idea that 'significant or controversial' (within the meaning of the NIA) can simply be decided by ministers and the EC.

The Ministerial Code aside, however, there are additional constraints codified in the NIA which are worth setting out. Most potent among these is the Pledge of Office, which includes the Ministerial Code of Conduct, both set out in schedule 4 of the NIA. The Pledge of Office represents a significant political constraint on Stormont ministers – a breach of any of its terms provides the trigger for excluding the errant minister from office by the Assembly, either by its own volition[66] or at the direction of the Secretary of State.[67] Entire parties may be excluded from ministerial offices if they are not committed to their potentially ministerial members observing the Pledge of Office.[68] Although these are political choices on the part of the Assembly (to exercise the powers available to it), so that it is unlikely that a failure to resort to any of these accountability measures would be justiciable, they demonstrate the powerful controls which the Assembly may exert over the Stormont Executive.

Two important consequences follow from the above structural and practical constraints which bind the Stormont Executive.

First, the political power dynamics between the legislature and the Executive in Northern Ireland are arguably an inversion of those in play at Westminster. At Westminster, with the rise of party discipline and party whips,[69] one of the biggest concerns for constitutional practice lies in the idea of the powerful executive whose policies and legislative initiatives are rubber-stamped by a 'sovereign Parliament acting at the behest of a complaisant House of Commons'.[70] By contrast, at Stormont, party discipline arguably enhances the fragmented and siloed nature of the Stormont Executive, whose ministers hold office independent of any party-political comity within the Executive and

66 NIA, s 30(1)(b).
67 Ibid s 30(6).
68 Ibid s 30(2).
69 See Jo Murkens, 'Democracy as the legitimating condition in the UK constitution' (2018) 38 Legal Studies 42–58.
70 See *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, [102] per Lord Steyn.

instead often concentrate inter-party rivalries (and occasionally outright hostilities)[71] while simultaneously working alongside these other parties.

Party-political polarisation in the Stormont Executive and the Assembly is a layered and complex matter. In a recent study by Matthew Whiting and Stefan Bauchowitz, the authors found that party-political positions around 'bread-and-butter' politics have tended to converge in Northern Ireland since the emergence of the modern devolved institutions, but polarisation remains in some significant areas, notably around culture and identity and the constitutional question of whether Northern Ireland ought to remain part of the UK or become part of a united Ireland.[72] Whiting and Bauchowitz's work certainly gives pause to the idea that devolved institutions in Northern Ireland are consistently polarised across the board. However, this study pre-dated the most recent collapse of the Stormont institutions, in which identity, culture and the constitutional question have taken centre-stage.[73] As such, 'bread-and-butter' politics at Stormont has taken somewhat of a backseat in this climate and the Stormont Executive is more disunified than perhaps at any other time in its history. A disunified Executive cannot, by its very nature, display enough strength to render the Assembly complaisant (were the Assembly to be fully functional).

The above discussion demonstrates that the Stormont Executive is, in practice and design, a weaker political institution than the Assembly.

The second consequence which follows is that the rule of law bites harder on the political manoeuvrability of the Executive than its counterparts in Scotland, Wales and Whitehall. There are two reasons for this. First, the design of the NIA demonstrates the scope of judicial scrutiny, not only on the outer boundaries of executive decision-making through traditional judicial review (which is, as a matter of general principle and subject to certain exceptions relating to high policy, always available against executive decision-making), but also the *inner* workings of decision-making at the Stormont Executive. As demonstrated in *Safe Electricity*, the highly prescriptive decision-

71 See eg the rivalries between the Ulster Unionist Party and the DUP (both parties in the existing Executive): Jonathan McCambridge, 'Scare tactics: Beattie accuses DUP of "whipping up hysteria over border poll"' *Belfast Telegraph* (Belfast 11 April 2022). See also the open hostility between the DUP and Sinn Féin over Irish language legislation (both parties were in the Executive at the relevant time): Noel McAdam, 'Arlene Foster's "feed the crocodiles" snap could come back to bite her' *Belfast Telegraph* (Belfast 7 February 2017).

72 Matthew Whiting and Stefan Bauchowitz, 'The myth of power-sharing and polarisation: evidence from Northern Ireland' (2022) 70(1) Political Studies 81–109, 96.

73 See the Address by the Leader of the DUP to the DUP Party Conference, 8 October 2022.

making processes concerning collective action through the Stormont Executive are susceptible to judicial scrutiny and determination. This is a natural consequence of language given a statutory footing: a court may interpret words contained in a statute as granting a decision-maker a very wide discretion and a commensurately narrow space for judicial intervention, but the important point is that the authoritative determination of such language is nevertheless *within* the responsibility of the court.

Second, and more importantly, the political weakness inherent in the design of the Stormont Executive leaves considerable space for the courts to occupy. This space is the result of statutory design meeting political reality. Consider that, in an ideal world, the parties comprising the Stormont Executive would, regardless of their political stripe, strive together in a spirit of comity to further the purpose of good governance in Northern Ireland.[74] If this does not happen, and instead a disunified, mutually recriminatory Executive finds itself deadlocked and unable to make decisions, the Assembly has a limited number of steps it *could* take, among the most potent being the censure and deprivation of ministerial office or its own dissolution for fresh elections.[75] But if even these do not occur because of politics, then there is a vacuum. Such a vacuum is a problem, not only as a general point, but in terms of the foundation of the Northern Ireland peace process.

The GFA, which brought an end to the decades-long, brutal and deadly conflict known colloquially as 'the Troubles', contains a number of interrelated sections. In its opening 'Declaration of Support', the parties to the GFA declare, 'we will endeavour to strive in every practical way towards reconciliation and rapprochement within the framework of democratic and agreed arrangements'.[76] These arrangements are then expanded into the GFA's three 'Strands': Strand One encompassing the devolved institutions (the Assembly and the Stormont Executive),[77] Strand Two, encompassing the North–South Ministerial Council (NSMC) as a forum for all-Ireland policy in defined areas,[78] and Strand Three, encompassing the British–Irish Council as a forum for cooperation across the UK (including its Crown Dependencies) and Ireland and the British–Irish Intergovernmental Conference for bilateral British–Irish cooperation.[79] These Strands

74 Similar to the actual statutory purpose contained in the Government of Ireland Act 1920, s 4(1): 'power to make laws for the peace, order, and good government of … Northern Ireland.

75 NIA, s 32(1).

76 GFA (n 38 above), Declaration of Support, para 5.

77 Ibid 5–10.

78 Ibid 11–13.

79 Ibid 14–16.

are described as 'interlocking and interdependent', within the broader canvas of differing political aspirations in Northern Ireland,[80] in respect of which the GFA commits its parties to 'exclusively democratic and peaceful means'.[81] It is not a reach, therefore, to say that the success of the peace process depends on these interlocking elements, of which devolution is a *sine qua non*. Conor Kelly and Etain Tannam describe the three Strands as 'central to peace and stability'.[82] Elizabeth Meehan sees in these interlocking strands the possibility of 'taming' totalitarian tendencies in both the unionist and nationalist communities, paving the way for more moderate 'tender' forces.[83] The interdependence of the three Strands was enough to give rise to accusations that the UK Government had breached the GFA when it suspended devolved government at Stormont in response to a series of political crises around decommissioning of arms, in the infancy of the NIA.[84]

Juridically, the centrality of the devolved institutions, and the importance of their success in ensuring peace in the jurisdiction was recognised by the House of Lords in *Robinson v Northern Ireland Secretary*, in passages which have reverberated in Northern Ireland jurisprudence ever since.[85] Indeed, *Robinson* demonstrates the important point that devolution in Northern Ireland has a particular purpose: 'an attempt to end decades of bloodshed and centuries of antagonism … [through] participation by the unionist and nationalist communities in shared political institutions'.[86] But this purpose also has an explicitly textual basis: the long title of the NIA states its purpose as 'implementing the [GFA]',[87] with multiple references

80 Ibid Declaration of Support, para 5.

81 Ibid Declaration of Support, para 4.

82 Conor J Kelly and Etain Tannam, 'The future of Northern Ireland: the role of the Belfast/Good Friday Agreement institutions' (2022) 94(1) The Political Quarterly 85–94.

83 Elizabeth Meehan, '"Britain's Irish question: Britain's European question?" British–Irish relations in the context of European Union and The Belfast Agreement' (2000) 26 Review of International Studies 83–97, 97.

84 See eg Colin Knox and Paul Carmichael, 'Devolution – the Northern Ireland way: an exercise in "creative ambiguity"' (2005) 23 Environment and Planning C: Government and Policy 63–83, 67–68.

85 *Robinson v Northern Ireland Secretary* [2002] UKHL 32, [2002] NI 390, [10]–[11], per Lord Bingham. On the enduring influence of this decision in Northern Ireland, see Gordon Anthony, 'Lord Kerr and the Northern Ireland Constitution' in Brice Dickson and Conor McCormick (eds), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Hart 2021) 90, fn 29.

86 *Robinson* (n 85 above) [10].

87 As recognised in *Robinson*: ibid [3].

to the GFA concerning, in particular, functions of the Stormont Executive.[88]

This tight weaving of the GFA into both statutory purpose and specific statutory duties therefore transcends merely the Agreement's use as an interpretational tool in statutory construction; the GFA demands to be, in certain circumstances, *positively* enforced through giving effect to the NIA. This is not a 'soft' incorporation of the kind recently excoriated by the Supreme Court,[89] but the product of parliamentary will expressed in clear and unambiguous statutory language. The NIA, therefore, unlike its equivalents in respect of Scotland and Wales, does not simply provide for government (or specific aspects of government), but government with a *purpose*. In the final section of this article, I detail how this purpose impacts the role of the courts in relation to the devolved institutions. However, before that, it is useful to look at the existing approaches adopted by the courts in Northern Ireland when faced with unlawful Executive conduct.

THE EXECUTIVE FACES THE COURT, AGAIN AND AGAIN

The history of the Stormont Executive facing judicial scrutiny can be briefly summarised as follows: if found to have breached legal obligations, the courts overwhelmingly order declaratory relief to that effect expressed in fairly narrow, *ex post facto* terms, with only rare examples of declaratory relief expressed in prospective terms and no examples of mandatory relief. In this section, I explore three decisions of the High Court: two particularly egregious examples of ministerial conduct, which nevertheless resulted in declaratory relief, and a third decision with which I contrast the first two cases in terms of reasoning and relief.

The first of the three cases is *McNern and Turley's applications for judicial review*,[90] which involved the failure by the First and deputy First Ministers to designate a department to administer a compensation scheme to victims of the Troubles, in breach of a statutory duty to do so.[91] This failure was a political manoeuvre: the

88 See eg NIA, s 20(3) (functions of the Executive Committee), s 52A(7) (participation by Northern Ireland Ministers in the NSMC), s 52C(5) (participation by Northern Ireland Ministers in Strand Two and Strand Three institutions) and s 64(1) (draft budgets).

89 See *R (SC, CB and others) v Work and Pensions Secretary* [2021] UKSC 26, [2022] AC 223, [91].

90 *McNern and Turley's applications for judicial review* [2020] NIQB 57.

91 Victims' Payment Regulations 2020, sch 1, para 2(1), authorised by the Northern Ireland (Executive Formation, etc) Act 2019, s 10.

First and deputy First Ministers (and latterly only the deputy First Minister) delayed the designation of a department in the hopes of getting a concession that the pension scheme would be substantially funded by the UK Government, and in order to expand the eligibility criteria for the pension scheme.[92] In the end, the First Minister was prepared to immediately designate a department, the political disputes notwithstanding, but the deputy First Minister was not so prepared.[93] As the Executive Office may only act with the agreement of both the First *and* deputy First Ministers, no designation could be made.[94] In these circumstances, the Executive Office argued that the Court should not involve itself in a quintessentially political dispute.[95] To say that the judge took a dim view of this argument would be to put the issue mildly. McAlinden J stated, 'This argument does not withstand even the most cursory form of scrutiny. It is, in reality, arrant nonsense dressed up in the guise of reasoned legal argument.'[96] In the end, the judge held that the Executive Office's failure to designate a department was unlawful.[97] The judge, however, declined to hold that the Executive Office was under a duty to defray the expenses of a designated department, in light of 'the degree of restraint that has to be exercised by the judiciary when scrutinising funding decisions made by public bodies',[98] a finding overturned on appeal.[99] The Court of Appeal, in exploring how funding should be determined, pointed to the prescriptiveness of the corresponding regulations, relating the exercise of political discretion back to statutory purpose.[100] In the event, the High Court had ordered a partial declaratory relief at first instance, which the Court of Appeal expanded.

The second case involved the febrile politics around the Ireland/Northern Ireland Protocol to the Withdrawal Agreement between the UK and the European Union (EU) (the Protocol), which keeps Northern Ireland, but not Great Britain, within certain aspects of the EU Single Market, resulting in a customs and regulatory border between the two. In September 2021, Jeffrey Donaldson, leader of the Democratic Unionist Party (DUP) (at the time, the largest party in the Northern Ireland Assembly and the party of then First Minister Paul Givan) laid

92 *McNern* (n 90 above) [20]–[21].
93 Ibid [21].
94 Ibid [22].
95 Ibid [25].
96 Ibid [26].
97 Ibid [30].
98 Ibid [32].
99 *Re Turley's application for judicial review* [2021] NICA 10, [31], per Sir Declan Morgan LCJ.
100 Ibid [31].

out plans to 'withdraw from the structures of Strand Two of the Belfast Agreement relating to north south arrangements' in protest at the continued application of the Protocol to Northern Ireland.[101]

DUP actions meant that the NSMC was unable to meet or operate.[102] In *Napier's application for judicial review*,[103] the DUP withdrawal was conceded as being unlawful, in breach of the NIA.[104] *Napier* returned to the High Court in December 2021,[105] with the First Minister relying on the fact that NSMC meeting dates and agendas had not been agreed jointly by him and the deputy First Minister, and thus, the First Minister asserted, the question of non-attendance did not arise as there were no scheduled meetings to attend.[106] Scoffield J characterised this argument as a 'wrecking or spoiling tactic',[107] but equally rejected the demand for *mandamus* forcing the First Minister to agree NSMC meetings, on the basis, *inter alia*, of the fundamentally political nature of Executive–NSMC relations, into which the Court's intervention would not be appropriate.[108] In the end, the DUP withdrawal was overtaken by the resignation of the First Minister,[109] and the continued failure to form a new Executive following Assembly elections in May 2022[110] meant that the NSMC was unable to meet, in any capacity,[111] since a sectoral meeting on Inland Waterways in November 2021.[112] The judge's exasperation with Executive politicking resulted in a sharp rebuke: 'it is both profoundly concerning and depressing that the respondents hope to secure political advantage by openly flouting their legal obligations'.[113] Nevertheless, the judge observed, 'in an area of such political contention as that in which these

101 Sir Jeffrey Donaldson, 'Sir Jeffrey Donaldson – "now is the time to act"' (9 September 2021). For reasons of both relevance and economy, I do not set out the detail of the Protocol.

102 D Young and R Black, '£1 billion peace funding "at risk" due to DUP boycott of north–south bodies' *Belfast Telegraph* (Belfast 15 September 2021).

103 *Napier's application for judicial review* [2021] NIQB 86.

104 Ibid [6].

105 *Napier* [2021] NIQB 120.

106 Ibid [22].

107 Ibid [48].

108 Ibid [70]–[71].

109 D Edgar & E Flanagan, 'DUP: NI First Minister Paul Givan announces resignation' (*BBC News* 3 February 2022).

110 J Webber and A Bounds, 'Northern Ireland's DUP rejects appeal to join power-sharing Executive' *Financial Times* (London 9 May 2022).

111 Dáil Éireann Debate, North–South Ministerial Council, Written Questions (210), 24 March 2022.

112 North–South Ministerial Council Joint Secretariat, Joint Communiqué: Inland Waterways Meeting (3 November 2021).

113 *Napier* (n 105 above) [83].

proceedings arise, the primary accountability mechanisms are likely to be in the political arena'.[114] No mandatory relief followed.

The third case provides a useful contrast to the two cases above. In *de Brun and McGuinness' application for judicial review*,[115] then First Minister David Trimble tested the limits of political discretion afforded within statutory obligations. Originally, the First and deputy First Ministers were required to jointly nominate ministers to both Councils to ensure cross-community representation in both.[116] The then Ministerial Code, which was approved by the Assembly after the formation of the Executive, provided that a minister with responsibility for an area being considered by the Councils may be 'normally' nominated to attend either Council.[117] Moreover, the NIA allowed a minister to authorise another minister who had been nominated to attend the Councils to enter into agreements for which the authorising minister was responsible[118] and required attending ministers to make reports to the EC and the Assembly following their attendance.[119] Finally, the GFA itself required that ministers (North and South) attending the NSMC 'be in a position to take decisions in the Council within [their] defined authority'.[120] The combination of the NIA, GFA and Ministerial Code thus strongly favoured ministers attending the Councils who were responsible for matters being discussed by the Councils. Trimble refused to nominate Sinn Féin MLAs Bairbre de Brun (then Minister of Health, Social Security and Public Safety) and Martin McGuinness (then Minister of Education) to attend the NSMC in respect of their responsibilities, in order to 'persuade Sinn Féin to use any influence it may have to secure decommissioning of paramilitary arms in accordance with the [GFA]'.[121] This was held to have breached the requirements of the NIA, not because Trimble was obliged to nominate *those* ministers, but because he had declined to nominate them for an improper purpose.[122] A point of interest here is what Kerr J (as he then was) did with relief in *de Brun*. The judge granted a declaration that Trimble had breached the NIA, but he also

114 Ibid.

115 *de Brun and McGuinness' application for judicial review* [2001] NIQB 3 (unreported) (Kerr J).

116 NIA, s 52(1) (superseded).

117 The Ministerial Code was not, at this time, put on a statutory footing. Since 2006, however, the Code is legislatively backed by NIA, s 28A, and the modern Code contains the same provision, albeit that it refers to NIA, s 52A, instead of s 52 (superseded by s 52A). See *Ministerial Code* (n 50 above) 10, para 3.1.

118 NIA, s 52(4) (superseded).

119 Ibid s 52(6) (superseded).

120 GFA (n 38 above) Strand Two, para 6.

121 *de Brun* (n 115 above), 3.

122 Ibid 23–24.

laid out the lawful parameters of the exercise of the relevant powers under the NIA – and crucially – the political flexibility possible *within* those parameters.[123] This flexibility was said to be possible because the exercise of the relevant powers by the First Minister was subject to 'soft-edged review',[124] referencing an earlier judgment in which Kerr J had applied *Tameside*.[125] *Tameside* is of course, a classic statement of public law principle: so long as a decision-maker takes relevant matters into consideration in discharging a legal duty which affords that decision-maker a degree of discretion, the weight given to any such matters is a determination of that decision-maker and not a court.[126] In *de Brun*, Kerr J outlined the matters which the First Minister was obliged to consider, setting out how to carry out the relevant duty lawfully.[127] Kerr J's decision was upheld on appeal, where, incidentally, Sir Robert Carswell LCJ (as he then was) also rejected the idea that the NIA was to be interpreted as allowing a minister to refuse to cooperate with the NSMC.[128]

The contrast between *McNern* and *Napier* on the one hand and *de Brun* on the other lies in two main areas: the reasoning and the relief. As to the first point, McAlinden J and Scoffield J both decisively rejected the idea that political considerations could influence or colour, far less override, the discharge of a legal obligation by ministers.[129] By contrast, Kerr J was more circumspect in *de Brun*: recognising the general unavoidability of political considerations in government, the specific unavoidability of political considerations in Northern Ireland's particular power-sharing context between two historically (and in certain circumstances, presently) opposed communitarian traditions, and the need for the law to enable a solution which allowed a government to work to fulfil the substantive purpose, rather than the letter of a legal obligation. Thus, even as Kerr J held that the First Minister had acted contrary to the purpose of section 52 of the NIA (which at that time concerned the operation of the NSMC), he nevertheless recognised that ministers could be unsuitable to be nominated to the NSMC if they worked against the GFA – a matter

123 Ibid 20 and 26.
124 Ibid 20.
125 *Re Williamson's application for judicial review* [2000] NI 281 (NIQBD), 293d, per Kerr J.
126 *Education and Science Secretary v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL), 1047D, per Lord Wilberforce.
127 *de Brun* (n 115 above) 26–27.
128 *de Brun* [2001] NI 442 (NICA), 451h.
129 Respectively, *McNern* (n 90 above), [27] and *Napier* (n 105 above) [48]–[49].

left undisturbed on appeal,[130] thus tacitly acknowledging the fact that political realities may modify the manner in which a legal obligation is discharged, but still fulfil its substance.

Kerr J's focus on workability of government also emerges in the way in which he granted relief. *De Brun* resulted in a declaration, but one which set out the manner in which the First Minister should in future approach the duty to nominate ministers to the NSMC so that the purpose of the NIA is fulfilled while allowing for some political influence in the fulfilment of that purpose: specifically, matters which must be considered, and matters which must not.[131] By contrast, by prefacing the declarations in both *McNern* and *Napier* with the severest criticism of political conduct, the High Court was (at least) implicit in its desire never to see such conduct again. In the case of the political conduct in *Napier*, a boycott of the NSMC exploded into a boycott of Stormont, putting devolved government on ice and demonstrating that, at times, the commanding voice of the law only echoes around a courtroom.

Faced with this situation, one must conclude either that the courts are impotent when facing political realities in Northern Ireland, or that the courts must change their approach to remedying Executive unlawfulness. Assuming that the first conclusion is unsustainable, in the next section I look at how the courts might usefully modify their approach to a badly behaved future Executive.

A REALIST APPROACH TO RELIEF

I begin this section with an analysis of *Robinson v Northern Ireland Secretary* and *de Brun* as examples of legal realism, before developing that analysis into a generalised approach to executive lawlessness and applying that approach to *Napier*.

Now, before analysing *Robinson* and *de Brun* in using legal realism, it is important to explore what legal realism is and how I use it in this article. Classical expositions of legal realism from jurists such as Oliver Wendell Holmes revolved around the notion that there is something to the law beyond logic, 'a judgment as to the relative worth and importance of competing legislative grounds … the very root and nerve of the whole proceeding'.[132] Fundamentally, legal realists criticise the deduction of legal rules from abstractions,

130 *de Brun* (n 115 above) 452a. The Court of Appeal, however, preferred to 'reserve [its] opinion on the correctness of this proposition until such time as it may become necessary to decide it'.

131 *de Brun* (n 115 above) 26–27.

132 Oliver Wendell Holmes, 'The path of the law' (1897) 10(8) Harvard Law Review 457, 466.

instead focusing on the evolution of law through a series of situations encountered in different cases, in which courts interpret and apply law with a thorough understanding of 'contemporary social reality', fitting the law to social practice.[133] Legal realism is not novel; indeed, it continues to be the subject of lively debate.[134] However, legal realism also suffers from problems. In a legal system with strong foundations in legal formalism – such as *stare decisis* – the fundamental *anti*-formalist lean of legal realism may hobble its effectiveness as a descriptive analytical tool.[135] More fundamentally, the focus of legal realism on the indeterminacy to be found in legal decisions,[136] or on attitudinal perceptions of individual judges,[137] strike at the very legitimacy of a legal system.

But I am not analysing the Northern Ireland legal system through a realist lens – and nor am I exploring the (potentially) many factors extrinsic to legal formalism which could be said to underlie the decisions in *Robinson* and *de Brun*. Instead, I focus on one such factor common to both decisions, and which the respective courts openly and explicitly considered – the operational circumstances in which devolved government had to function at Stormont.

In *Robinson*, the majority in the House effectively read a fixed statutory timescale as subject to the greater need to ensure a stable and workable devolved government. In *de Brun*, Kerr J held (and the Court of Appeal left open) the idea that executive ministers who worked to undermine the GFA may be excluded from the bodies established under its aegis. Neither point was decided through the application of precedent – to say otherwise merely begs the question. For example, in *Robinson*, the six-week timescale in the NIA was interpreted as being flexible on the basis of the lack of explicit strictness in the text, the futility of going to the polls seven weeks after the previous such exercise and as precluding any room for political manoeuvre, either by the Northern Ireland Secretary or the Assembly parties.[138] In *de Brun*, Kerr J would have allowed for *particular* political manoeuvring on the

133 Joseph William Singer, 'Legal realism now' (1988) 76(2) California Law Review 465, 500–501.

134 See eg Saoirse Enright, 'Is legal realism a reality? An analysis of how judicial personalities influence decision-making trends' (2021) 24 Trinity College Law Review 146–165 and Gerard Hogan, 'Should judges be neutral?' (2022) 73(1) Northern Ireland Legal Quarterly 74–101.

135 Frank B Cross, 'The new legal realism and statutory interpretation' (2013) 1(1) The Theory and Practice of Legislation 129–148, 138.

136 Andrew Altman, 'Legal realism, critical legal studies, and Dworkin' (1986) 15(3) Philosophy and Public Affairs 205–235.

137 George D Braden, 'The search for objectivity in constitutional law' (1948) 57(4) Yale Law Journal 571–594.

138 *Robinson* (n 85 above) [14].

basis of its immunity from review at common law.[139] Of course, one may analyse these decisions as hinging on a purposive reading of the NIA – being the establishment of functioning devolved government – but this takes purposiveness to an extremely general level, given that Parliament cannot be understood to legislate ineffectively. Rather, the *adaptation* of statutory provisions to the specific factual circumstances of a highly polarised and unpredictable administration is not a formal rule of statutory construction. In orthodox eyes, what the majority did in *Robinson* might even be fairly characterised as judicial legislation. Even more tellingly, although the GFA is directly referenced in both the long title and multiple provisions of the NIA, the latter does not generally incorporate the former – meaning that the GFA is not an independent source of domestic law in the dualist British constitution.[140] As such, formal rules of statutory interpretation would largely preclude the ability of the GFA to influence, far less alter, the effect of a statutory provision.[141]

McNern and *Napier* can both be contrasted with the realist approach in *Robinson* and *de Brun* by the focus in the former two cases on legal formalism. In both cases, the High Court framed the issues fairly narrowly: were specific legal obligations (respectively, the nomination of a Northern Ireland Department to administer a payment scheme to victims of the Troubles and the obligation to participate in the NSMC) breached? The answer was most obviously 'yes' on the particular *framing* of those issues. But government is never straightforward, and neither are the decisions taken in the pursuit of governance. The nomination of a department in *McNern* was tied up in the complex question of financial liability and the even more complex question of how the relevant scheme identified 'victims' within the broad, interlocking and bloody canvas of responsibility for violence during the Troubles.[142] In *Napier*, under the surface of the NSMC boycott simmered deeper and more fundamental questions of institutional stability and continued operability (as subsequent events showed).

Similarly, the question of relief in both cases also followed decidedly formalistic lines. McAlinden J declined to grant *mandamus* in *McNern* on the basis of being asked to intervene in matters of public finance, while Scoffield J in *Napier* declined to grant *mandamus* because, *inter alia*, the parameters of the *mandamus* sought in *Napier* were insufficiently precise, not premised on a clear statutory duty and risked future continued supervision by the Court – all matters distilled from

139 *de Brun* (n 115 above) 26.

140 *JH Rayner Ltd v Department of Trade* [1990] 2 AC 418 (HL).

141 This is the view adopted by Lord Hutton, in the minority in *Robinson* (n 85 above), see [61].

142 *McNern* (n 90 above) [20]–[21].

existing case law on *mandamus*.[143] Moreover, Scoffield J declined to grant *mandamus* to avoid compelling agreement between the relevant minister (the First Minister) and a third-party (the deputy First Minister, who was not a party in *Napier*)[144] when unknown but legitimate political factors may prevent agreement on a date and agenda for NSMC meetings between the First and deputy First Ministers.[145] These reasons are classically formalist: relief being focused only as between the parties to the case before the Court and the Court unwilling to wade into the political arena. However, the reality is somewhat different. Consider that Scoffield J's framing of the First and deputy First Ministers as individual decision-makers is unheard of in the NIA – they are *always* mentioned together as the joint heads of the consociational[146] Executive. Ordering one half of this pair to do something does not leave the other half to do what they please. Questions of the deputy First Minister's 'agency' to comply with an order in this regard,[147] therefore, are a little too idealistic.

The adherence to legal formalism goes to two of the main reasons identified by Scoffield J as militating against the grant of *mandamus*: general governmental compliance with non-coercive remedies and the judicial desire to avoid continuing superintendence of compliance with a remedy. Neither reason is unproblematic. The political conduct held to be unlawful in *Napier* continued more problematically than before, in breach of the two declarations ordered in that case.

Moreover, the court, as a general matter, is no stranger to the concept of continuing supervision of its orders, as each order contains an 'inherent liberty to apply to the court'.[148] Indeed, other jurisdictions have developed the *mandamus* jurisdiction into a 'continuing *mandamus*' to plug gaps in the availability of remedies where fundamental rights are breached.[149]

The reality of governance at Stormont is at the heart of my critique: addressing the narrow question of statutory breach with a commensurately narrow declaration provides only temporary relief, if at all, because it avoids the larger questions of social and political reality

143 *Napier* (n 105 above) [59].

144 Ibid [64].

145 Ibid [65].

146 In the Northern Ireland context, this word is generally used to describe the power-sharing Executive. Its modern development is attributed to, *inter alia*, Arend Lijphart, *The Politics of Accommodation, Pluralism and Democracy in the Netherlands* (University of California Press 1968).

147 *Napier* (n 105 above) [66].

148 *Halsbury's Laws of England* 5th edn (LexisNexis 2020) volume 12A, para 1567.

149 See eg Mihika Poddar and Bhavya Nahar, '"Continuing mandamus" – a judicial innovation to bridge the right–remedy gap' (2017) 10(3) National University of Juridical Sciences Law Review 555–608, 562–566.

which simmer and boil over in Northern Ireland, again and again. It is no answer to this point to say that the courts must be apolitical. This is because, as explored in the first section, the NIA mandates judicial intervention into executive affairs. Apoliticality, therefore, in the tradition of judicial orthodoxy developed in proximity to a politically functional and accountable executive (the UK Government), is deeply problematic when applied to Northern Ireland and the *reality* in which devolution has to function here. An appreciation of this reality demonstrates a singular failure of political accountability: despite the availability of sanctioning powers by the Assembly, as well as wide-ranging investigatory mechanisms on the basis of which such powers could be exercised,[150] a single but sweeping boycott is sufficient to reduce the Assembly to non-functionality and thereby render these powers unusable. In such circumstances, adherence to apoliticality as a consequence of legal formalism renders judicial intervention effective on paper only. That governance at Stormont and at Westminster are fundamentally different is made abundantly clear in circumstances where ministers in the UK Government have publicly spoken out against the civil service thwarting political accountability,[151] while the same Government moves repeated Bills through Parliament to continually authorise Stormont civil servants to govern without political accountability.[152]

The rather unambiguously worded invitation presented in this section for the courts to intervene in what is at heart a political dispute may be unpalatable to sceptics of judicial power more generally,[153] but it is important to appreciate that politicising clear legal obligations (for example, participation at the NSMC) is not a luxury afforded by the law. Moreover, although judicial power sceptics usually favour constitutional scrutiny and correction through political (and democratically accountable) institutions, where politicisation paralyses even these institutions, democratic arguments against judicial power lose much of their potency. Of course, while it is true that the breach of a declaratory order by a minister may lead to personal (rather than

150 See eg the investigatory functions of the Northern Ireland Assembly Commissioner for Standards in the Assembly Members (Independent Financial Review and Standards) Act (Northern Ireland) 2011, s 17(1)(b).

151 See eg 'Dominic Raab: resignation letter and Rishi Sunak's response in full' (*BBC News* 21 April 2023).

152 The Northern Ireland (Executive Formation etc) Act 2022, the Northern Ireland (Executive Formation and Organ and Tissue Donation) Act 2023 and the Northern Ireland (Interim Arrangements) Act 2023, all moved by the Northern Ireland Secretary.

153 See eg Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

official) liability,[154] the point here is that personal liability for the relevant minister would not have *remedied* the issue of the boycott of the Strand Two institutions – at least, not directly. Consider that personal liability for disregarding the declared law is resorted to when the 'mutual trust which underpins the relationship between the Government and the courts' breaks down.[155] If one act of political manoeuvring in breach of clear legal obligations is insufficient evidence of the breakdown of this trust, the previous section alone provides an additional recent example and others exist.[156] And where personal liability is considered, any order against the relevant minister cannot bind the minister's party. In circumstances where it is *party policy* to engage in a boycott, a personal order against the relevant minister may not remedy the boycott, which is the real problem when considering the operability of the devolution settlement. I pause here to acknowledge the arguments made by Gordon Anthony in his exploration of the 'constitutionalising function' for judicial review when applied in the Northern Ireland context.[157] Anthony explores the kind of judicial interventionism promised by the NIA and, while acknowledging the debates around 'normative assumptions about the judicial role and the merit of judicial activism', nevertheless concludes that, given the design of the NIA, 'the courts may be doing nothing more than safeguarding Northern Ireland's complex democratic settlement'.[158] This article can be seen, at least partly, as an attempt to build on Anthony's arguments.

So, how might the Northern Ireland courts approach unlawful executive behaviour so as to order effective relief? Legal realism mandates that the law ought to be interpreted in its particular social and political context.[159] In Northern Ireland, that context can be conceptualised as having a workable consociational government which can maintain peace and stability by involving Northern Ireland's rival communitarian traditions.[160] The GFA's three Strands feed into all these elements: the devolved, North–South and East–West

154 See eg *Craig v HM Advocate (for the Government of the USA)* [2022] UKSC 6, [2022] 1 WLR 1270, [46].

155 Ibid.

156 See eg *Re Rooney and others' application for judicial review* [2023] NIKB 34, in which the relevant minister stopped post-Brexit sanitary and phytosanitary checks into Northern Ireland in line with the political priorities of his party at the time: see [75]–[84].

157 Gordon Anthony, 'The quartet plus two: judicial review in Northern Ireland' in T T Arvind, Richard Kirkham, Daithí Mac Síthigh and Lindsay Stirton (eds), *Executive Decision-making and the Courts: Revisiting the Origins of Modern Judicial Review* (Hart 2021) 261–277.

158 Ibid 277.

159 Holmes (n 132 above) 474.

160 See eg O'Leary (n 26 above) 178.

institutions are mutually dependent, so that all three Strands, when fully functional, allow for disparate communitarian traditions to take part in governance, thereby maintaining peace and stability. A dysfunction in any one of these Strands negatively impacts the whole operation of the GFA: with no functioning Assembly and thus no functioning Executive, the NSMC and the British–Irish Council both sat unable to fully function.[161]

The above discussion boils down to a simple point: if the Strands, or any of them, are rendered dysfunctional, so too is the GFA and the NIA. This is why ministers are *statutorily* required to act in accordance with the Ministerial Code (as explored in the first section of this article), with the Pledge (within the Code) specifically obliging ministers to discharge their duties in good faith[162] and take part in all three Strands.[163] These elements are also given statutory weight in the Pledge of Office, which ministers must affirm before taking office.[164] These matters were considered in *Napier*, but only insofar as Scoffield J observed that the Pledge had been breached, without exploring what (if any) consequence should flow from this breach.[165] The Code and the Pledge are important not merely for having responsible government, but responsible government which acts in accordance with the provisions of the GFA.[166] Let us squarely acknowledge that this is not an ineluctable conclusion; rather, it is a *choice*, to interpret the operation of the NIA in a manner which gives effect to the overarching purposes of the GFA, bearing in mind the reality in which such purposes have to be achieved. The focus on purpose allows the courts, like in *Robinson*, to adopt a flexible approach to the interpretation of statutory text where necessary to fulfil the purpose(s) of the GFA. To a considerable extent, this choice is predetermined: it is the *explicit* purpose of the NIA to implement the GFA. Thus, questions of 'social advantage' are not so 'burning' in this context.[167]

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161 The British–Irish Council has met only once since the resignation of First Minister Paul Givan, as ministers cannot be nominated to attend Council meetings without there being a First and deputy First Minister. Consequently, Northern Ireland was unrepresented at the Council Ministerial Meeting on Social Inclusion of 21 October 2022. See British–Irish Council, Ministerial Meeting of the BIC Social Inclusion Work Sector 21 October 2022, Wales COMMUNIQUÉ (2022).

162 *Ministerial Code* (n 50 above) para 1.4(a).

163 Ibid para 1.4(cb).

164 NIA, ss 16A(9), 18(8) and 19(3)(b).

165 *Napier* (n 103 above) [41]–[42] and *Napier* (n 105 above) [79]–[80].

166 As superseded in operation by subsequent agreements such as the St Andrews Agreement 2006.

167 Holmes (n 132 above) 468.

A relevant starting position here is the requirement for ministers to discharge their duties in good faith. On this point, Scoffield J said:

> The court cannot force the respondents to contribute in good faith where they have set their face against this; nor can it mandate or secure agreement on issues to be discussed and agreed within the NSMC, which are matters well outside the proper territory of justiciability.[168]

With respect to the judge, this comment conflates two distinct issues: good faith and securing any outcome of NSMC business. It is true that securing agreement on issues to be discussed at the NSMC would involve the court effectively adopting the role of government, which is impermissible. By contrast, what is or is not a good faith discharge of statutory duties is well within the purview of the Court's expertise. Consider that subjective good faith requirements are built into the functioning of company directors, with the Court asking whether a director honestly believed that they acted in their company's interests.[169] Obviously, a minister in the Stormont Executive is categorically different from a company director. Nevertheless, it is possible to draw an analogy when considering the importance of having a workable devolved government. Consider that the Pledge of Office sets out not only a commitment to peace and non-paramilitarism,[170] but also 'the interests of the whole community represented in the Northern Ireland Assembly towards the goal of a shared future'.[171] On the facts of *Napier*, it is not difficult to conceive of an order for *mandamus* requiring the First Minister (in conjunction with the deputy First Minister) to comply with their statutory obligations bearing the above factors in mind. Nor is it a stretch to conceive that the DUP's policy of Protocol-related boycott would breach the good faith requirements of such an order.

Further, Scoffield J explores operational difficulties with *mandamus*. An order specifying that a certain minister attend the NSMC, the judge holds, may ultimately be ineffective at ensuring normal business at the NSMC because a minister picked by the Court (rather than by agreement between the First and deputy First Ministers) could be severely restricted in their decision-making ability at the NSMC by control exercised by the EC.[172] In short, because the EC's somewhat complex decision-making procedures have hobbled cross-cutting policies, Scoffield J was concerned that any minister at the NSMC,

168 *Napier* (n 105 above) [73].

169 *Re Smith and Fawcett* [1942] Ch 304 (EWCA), 306, per Lord Greene MR. See also *Regentcrest plc (in liquidation) v Cohen and Richardson* [2001] BCC 494 (EWCh), [120] per Jonathan Parker J.

170 Pledge of Office (Ministerial Code), 1.4(b).

171 Ibid 1.4(ca).

172 *Napier* (n 105 above) [72].

when faced with making decisions on cross-cutting matters, could be deprived of authority to make such decisions by operation of the cross-community veto at the EC. This is a perfectly valid concern which has been realised countless times.[173] But the Code and the Pledge, with their respective good faith requirements, reach into all aspects of ministerial office and function – including the EC. It is true that sustaining *mandamus* as regards NSMC attendance may require the policing of ministerial actions on a level hitherto unfathomable, but the alternative is the threat (subsequently realised) of a wilful Stormont collapse. Of course, the judge was alive to the nature of the DUP's political manoeuvring,[174] which makes the decline of *mandamus* all the more perplexing.

Drawing all of these threads together, the Northern Ireland courts, when faced with unlawful conduct by the Executive, must look beyond the formal language of the NIA, to its operation in light of the aims of the GFA. In doing so, it is not sufficient merely to consider how to remedy a breach of the formal enacted law, but also how to ensure that the remedy accounts for any problematic or bad faith political manoeuvring underlying that breach, having regard to the aims of the GFA as implemented by the NIA, which should be operationalised in good faith by Stormont ministers. In that respect, the idea of the Court exercising a *continuing* supervision of executive conduct is a matter of operational reality and, more fundamentally, operational necessity. Adapting the supervisory jurisdiction of a court to operational reality in order to uphold the rule of law is familiar territory to common law jurisdictions with which Northern Ireland shares its heritage.[175] While it is true that such adaptability is nowhere to be found in the text of either the NIA or the GFA, the court cannot shut its eyes to a breakdown of the collaborative spirit envisioned by and central to both texts, and the disastrous, governance-collapsing consequences of such a breakdown.

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173 See eg 'Cross-community vote – a brief history' *The Irish News* (Belfast 12 November 2020).

174 *Napier* (n 105 above) [81]–[82].

175 See eg *Re Manitoba Language Rights* [1985] 1 SCR 721 (Supreme Court of Canada), in which the Canadian Supreme Court found that Manitoba's monolingual statutes enacted after 1890 were all invalid, but they were deemed valid on a continuing basis for the period it would take the Manitoba legislature to produce authoritative French versions of such statutes, in order to avoid a significant legal vacuum.

CONCLUSION

This article focuses on the structural design of Northern Ireland's devolved institutions – most relevantly the Executive and the Assembly – as well as the circumstances in which those institutions have to function. Having explored this backdrop, the article looks at how the courts have responded to ministerial error and the frequently paralysing politicisation of legal obligations which have marked Northern Ireland's devolution settlement. It argues that some of these judicial responses have been inadequate to address a problem which has all but collapsed governance in Northern Ireland. Looking to the foundation of the Northern Ireland devolution settlement, this article argues for a different judicial approach – one which appreciates the role of the courts in the devolution settlement and the purpose of that settlement to enable a workable and stable cross-community government and calls for the courts to move beyond the formal language of law to protect its underlying intent.