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The Union in court, Part 3: *In Re Allister and Peeples' Applications for Judicial Review* [2023] UKSC 5

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INTRODUCTION

The precise content, scope and effect of the constitution of the United Kingdom (UK) has been a feature in some of the most controversial and polarising decisions in UK courts in recent years. One such decision, *In Re Allister and Peeples' applications for judicial review*,[1] concerned some of the most complex issues at the heart of this constitution – the limits (if any) to the sovereignty of the Crown in Parliament, the scope of the UK Government to enter into international agreements, the extent to which primary legislation is able to alter or modify domestic law (whether in form or substance) and the nature of Parliament's democratic legitimacy. In what was a largely unsurprising judgment, the Supreme Court appears to have indicated its unwillingness to delve too deeply into the foundations of the UK constitution. But beneath what may be considered a case of constitutional exhaustion at the UK's highest court, there lie some important lessons for how the constitution functions. The factual matrix relevant to *Allister* has been set out in detail in previous comments concerning the judgment of the High Court[2] and the Court of Appeal[3] and will not be covered in as much detail here. Instead, I critically explore the Supreme Court's judgment and argue that the Court's anxious endorsement of constitutional orthodoxy at times imperils its own reasoning.

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* PhD Candidate, School of Law. I am grateful to Dr David Capper for feedback on an earlier draft. Any remaining errors are my own.

1 [2023] UKSC 5, [2023] 2 WLR 457. Hereafter, I refer to this judgment as '*Allister*'.

2 Anurag Deb, 'The Union in court: Allister and others' Application for Judicial Review [2021] NIQB 64' (2022) 73(1) Northern Ireland Legal Quarterly 138.

3 Anurag Deb, Gary Simpson and Gabrian Tan, 'The Union in court, Part 2: Allister and others v Northern Ireland Secretary [2022] NICA 15' (2022) 73(4) Northern Ireland Legal Quarterly 782.

THE RELEVANT FACTS AND GROUNDS OF APPEAL

The Ireland/Northern Ireland Protocol to the UK–European Union (EU) Withdrawal Agreement[4] was a means of ensuring the UK's withdrawal from the EU while catering to the unique circumstances in Northern Ireland. Northern Ireland now marks the UK's longest land border with the EU (the border with Ireland)[5] and the Protocol keeps Northern Ireland within large parts of the EU Single Market in a goods and customs regime.[6] There are three key facts which arise from this arrangement, which also formed the three grounds on which the appeal was taken to the Supreme Court.

First, the effect of the Protocol is to create a customs and regulatory border along the Irish Sea, with the possibility of divergence between Northern Ireland and Great Britain. Since the coming into force of the Protocol, this divergence has translated into reality, with certain goods in Northern Ireland clearly marked as not being for the EU market,[7] and others free to be traded across the Irish border. An internal customs border within a country is unusual in itself, but for the UK, this border also appears to cut across the statutes which established the union between Great Britain and (now) Northern Ireland in 1800. Specifically, article VI of the Union with Ireland Act 1800[8] and the Act of Union (Ireland) 1800[9] provide for subjects of both Great Britain and Northern Ireland to be on the 'same footing' in respect of trade and privileges. The Protocol appears to breach these provisions and, thus, the foundational legal frameworks of the present-day Union (that is, the UK).

Second, and relatedly, by altering at least the effect of the terms under which the Union was established, the Protocol also appears to impact the constitutional status of Northern Ireland within the Union, but without a popular vote approving such a measure, in breach of the Northern Ireland Act 1998 (NIA)[10] and the Belfast (Good Friday)

4 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/01. On 27 February 2023, the UK and the EU agreed a package of measures around the implementation of (including amendments to) the Protocol, dubbed the Windsor Framework. However, *Allister* concerned the original Protocol, and thus the Windsor Framework will not be covered here. For this reason, I also refer to the 'Protocol' throughout this comment.

5 In this comment, I refer to the country as Ireland, and the island as 'the island of Ireland'.

6 See Protocol, arts 5–10.

7 Joanna Partridge, 'First "not for EU" labels appear on supermarket food in Northern Ireland' (*The Guardian* 23 August 2023).

8 Enacted by the Parliament of Great Britain.

9 Enacted by the Parliament of Ireland.

10 NIA, s 1(1).

Agreement (GFA)[11] which resulted in that statute. A version of this claim – that the UK's withdrawal from the EU in the face of Northern Ireland voting to remain within the latter was in breach of the same statute and the GFA – was made at the height of the *McCord* litigation,[12] and dismissed by both the High Court[13] and the Supreme Court.[14]

Third, the amendments to the constitutional settlement in Northern Ireland required by the Protocol were made by secondary legislation,[15] under sweeping powers of delegated legislation conferred by the European Union (Withdrawal) Act 2018 (EUWA). These powers include the ability to modify or amend primary legislation[16] – so-called 'Henry VIII powers' – and were used to amend the Northern Ireland Act 1998 to provide for the Northern Ireland Assembly to periodically vote on major aspects of the Protocol,[17] but by excluding this vote from the scope of the controversial[18] petition of concern.[19] The petition of concern has a significant role in Assembly proceedings, as it allows the vast majority of Assembly business to be subject to cross-community voting if a petition to this effect is presented and confirmed by a third of the Assembly's membership.[20] The issue here is that the EUWA contains a clear direction that in exercising any powers conferred by the statute, ministers must act in a way which is compatible with the NIA,[21] and the exclusion of the petition of concern appears to cut across its general character under the NIA.

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11 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (1998) 2114 UNTS 473, Multiparty Agreement (hereafter, GFA), Constitutional Issues, para 1(iii).

12 In Northern Ireland, this was *McCord and others' applications for judicial review* [2016] NIQB 85, but in England and Wales, the related case (and the more prominent of the two) was *R (Miller) v Brexit Secretary* [2016] EWHC 2768 (Admin).

13 [2016] NIQB 85, [153].

14 [2017] UKSC 5, [2018] AC 61, [135].

15 The Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020.

16 EUWA, s 8C(2).

17 NIA, s 56A and sch 6A.

18 The detail of the petition's controversial use is not relevant to this comment but, for further reading, see Alex Schwartz, 'The problem with petitions of concern' (*QPOL* 26 May 2015).

19 NIA, sch 6A, para 18(5).

20 Ibid s 42(1). Note the present s 42 replaced the original version of the same section via the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, s 6, but for this case and this comment, the differences between the original provisions of s 42 and the current provisions are immaterial.

21 EUWA, s 10(1)(a).

The Supreme Court was therefore faced with constitutional controversies which were foundational. After all, it is not every day that a case claiming a legal limit to the sovereignty of Parliament makes its way to the Supreme Court. The entrenched orthodoxy of parliamentary sovereignty being legally unlimited[22] may lead one to expect such challenges to be politely but firmly shown the door and denied any opportunity to climb the appellate hierarchy. But this is not the first time that a court – and the UK's highest court at that – has confronted this question, and previous answers have not been uniformly dismissive or uncreative.[23] So, it was far from outlandish for the Court of Appeal to have granted the *Allister* litigants leave to the appeal to the Supreme Court. For reasons which I will set out in detail further below, it is also important that a Northern Ireland case involving the justiciability of the Union's foundational parameters reached the Supreme Court.

THE COURT'S REASONING

Introduction

The unanimous judgment was authored by Lord Stephens JSC, the Court's sole Northern Ireland Justice. On the whole, it appears to be a ringing endorsement of constitutional orthodoxy: Parliament has spoken, the case is closed.[24] However, the judgment is not quite so straightforward.

The first ground: the 'subjugation' of article VI

To begin with, the fact that the appeal was taken only on three grounds (as highlighted in the previous section) means that much of the factual or legal combustibility of the case in the courts below effectively fizzled out before the Supreme Court. This is an important point when considering the space which *Allister* has come to occupy in the political discourse in Northern Ireland. Essentially, the issue under the first ground of appeal revolved around the Protocol's apparent breach of article VI of the Acts of Union. The appellants claimed that the UK Government was legally impotent to agree any treaty which conflicts with the 'same footing' requirements under article VI because these requirements bind the Crown's prerogative powers to make or enter

22 See eg A V Dicey, *Introduction to the Study of the Law of the Constitution* 3rd edn (Macmillan 1889) and Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press 1999).

23 See eg *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, particularly [102] per Lord Steyn.

24 Deb et al (n 3 above) 797.

into treaties on the international legal plane; that, consequently, the Protocol's apparent breach of the requirements under article VI is unlawful and that article VI prevails notwithstanding the provisions of the Protocol.[25]

Whether the Protocol breached article VI – the question which lay at the heart of *Allister* in the courts below – was not determined by the Supreme Court. In the absence of any appeal against the finding of both the High Court and the Court of Appeal that the Protocol was inconsistent with article VI, the Supreme Court proceeded on the basis that it was inconsistent, preferring to dispositively visit this issue at some other time.[26] Although much has been made of the Court's use of the word 'subjugation' in connection with the effect of the Protocol on article VI,[27] it is clear that this was not a finding of the Court, in the sense that the Court heard argument both for and against the claim of subjugation and decided the matter for itself. Indeed, the question of subjugation was not even significant in the Court's eyes, as Lord Stephens says: 'The debate as to whether the effect of article VI was suspended or modified or subjugated for as long as the Protocol was in existence is not of real significance.'[28] Instead, what was significant for the Court was the fact that Parliament had enacted the EUWA. Specifically, section 7A of the EUWA subjects everything in the statute book to 'all such … obligations and restrictions from time to time created or arising by or under the [UK–EU] withdrawal agreement', of which the Protocol is a part.[29] This, the Court determined, had answered the appellant's first ground of appeal.[30]

There are three main points to be made in relation to this ground. First, and somewhat unsurprisingly, the sovereignty of the crown in Parliament remains legally limitless. This is far from a glib reminder. The limitless nature of parliamentary sovereignty leaves Parliament legally unable to do only one thing: bind its successors.[31] This is why the Acts of Union do not (and could not) preclude the enactment of the EUWA or its subjugating effect over any part of the statute book. The question is instead one of much greater nuance: not whether Parliament is legally precluded from enacting the EUWA, but *how* the EUWA ought to be interpreted in its impact over the statute book. This

25 *Allister* (n 1 above) [52].
26 Ibid [54].
27 See eg Northern Ireland Affairs Committee, *Oral evidence: effect of paramilitary activity and organised crime on society in Northern Ireland*, HC 24, questions 496–557 (17 October 2023), questions 502 and 526 in particular.
28 *Allister* (n 1 above) [68].
29 EUWA, s 7A(1) and (2).
30 *Allister* (n 1 above) [64].
31 Dicey (n 22 above) 64.

leads to the second point: even as the Court seems to have poured cold water on the appellants' arguments in this context, it has left one door somewhat ajar.

In the Court of Appeal, the Lady Chief Justice (Dame Siobhan Keegan) had delved into the detail of article VI. Keegan LCJ had asked whether the reference to 'Ireland' in article VI (as it was enacted in 1800) could be read as a reference to Northern Ireland (which only came into existence some 120 years later) and whether the article's reference to 'encouragements and bounties' – in respect of which it required 'same footing' between Ireland and Great Britain – applied specifically to the manner in which the Protocol now regulated trade between Northern Ireland and Great Britain.[32]

Although the Supreme Court did not answer these questions, it considered these questions answerable – meaning that, at minimum, article VI of the Acts of Union is *justiciable*. This is important when considering that the general justiciability of the foundational parameters of the modern Union is not a settled question. In the Scottish context, for example, in *Sooy*, the Court of Session recently held that article XIX of the Treaty of Union 1707 (conferring on the newly established Parliament of Great Britain the competence to make laws for the 'better Administration of Justice' in Scotland) was not justiciable before Scottish courts.[33] Although the Court of Session was clear that the Treaty of Union was different from the Acts of Union,[34] the two impugned provisions in each case bear some important similarities. In *Sooy*, Lord Richardson held that article XIX was non-justiciable in part because what was meant by 'better' administration of justice was in essence a policy judgment beyond the competence of the courts.[35] But the same sort of argument could be made in respect of the 'same footing' requirement under article VI of the Acts of Union. The article in question requires 'same footing' between citizens of Ireland and Great Britain, *inter alia*, in relation to:

> … encouragements and bounties on the like articles, being the growth, produce or manufacture of either country respectively, and generally in respect of trade and navigation in all ports and places in the United Kingdom and its dependencies …[36]

At no point does the article, or indeed the rest of the statute, define 'same footing' with any precision. The expressions 'same footing'

32 Ibid [54]. In the Court of Appeal, the first question was posed with reference to the geopolitical changes as a result of partitioning Ireland, at [2022] NICA 15, [176]–[180] and the second question was posed at ibid [184].

33 *Sooy v Home Secretary* [2023] CSOH 93, [70]–[71] per Lord Richardson.

34 Ibid [14].

35 Ibid [70].

36 Union with Ireland Act 1800, art VI.

and 'better' presuppose a fixed point by which a comparison can be made – whether on either side of the Irish Sea or by reference to some baseline 'standard' of justice prevalent across pre-Union Scotland – and thus *measure* the effect of a parliamentary enactment under each requirement. In other words, the natures of the expressions are virtually identical. Thus, it seems unprincipled for one article to be justiciable but not the other. It is notable that Lord Richardson did not provide any reasons why the Treaty of Union was *legally* different from the Acts of Union. But this is an important reminder of the fact that the present Union is actually born from two Unions which, while historically and geopolitically distinct, may not be quite so distinct in a legal sense. It is therefore important for a case concerning the foundational aspects of the present-day Union to have come to the Supreme Court from Northern Ireland – providing a fresh perspective on questions which arise from time to time in Scotland.

The third and final point of analysis for this ground relates to the Supreme Court's palpable unwillingness to follow the High Court and Court of Appeal into the depths of constitutional history. It is one thing to point to a 200-year-old provision in the statute book which is still 'speaking'; it is quite another thing to try to interpret and enforce what it says. Drafting techniques of even a few decades ago may sometimes be considered imprecise when compared to present-day statutes,[37] to say nothing of the language of 1800.[38] This demonstrates the difficulty of applying the language of a bygone era to current facts in order to ascertain the legal import of such language.

But it is not merely the passage of time which makes the language of the Acts of Union difficult to interpret – it is also the fact that their provisions have seemingly never been enforced by any court, long before Brexit, EU membership or even the Partition of Ireland. Indeed, the Acts have largely only been used in the political arena. Of course, the lack of judicial enforcement does not, by itself, mean anything as to the legal consequences of the Acts of Union. But it is instructive to note that some of the biggest perceived threats to the apparent permanence[39] of the Union established in 1801 – the separation and disestablishment of the Church of Ireland,[40] the devolution of power

37 See eg *Farrell v Alexander* [1977] AC 59 (HL), 83B–D, where Lord Simon of Glaisdale distinguishes (in general terms) 'contemporary drafting techniques' in respect of a statute enacted in 1968, from previous statutes enacted in 1949.

38 See also, *Allister* [2022] NICA 15, [194], per Keegan LCJ.

39 Art I of the Act of Union (Ireland) 1800 (the Act of Union enacted by the Parliament of Ireland) states: 'Great Britain and Ireland to be united *for ever* from 1 Jan. 1801 (emphasis supplied)'.

40 See HL Deb 18 June 1869, vol 197, cols 166–167 (Second Reading of the Irish Church Bill).

to a partitioned Ireland[41] and even the almost-complete severance of constitutional ties between the UK and the Irish Free State[42] – were resolved in the political, rather than legal arena. This may point to the Acts of Union embodying politically rather than legally consequential elements – in other words, enforceable by political will rather than judicial fiat. Although any detailed exploration of this point is beyond the scope of this comment, it suffices to recall that politically (rather than legally) consequential statutory provisions are not unheard of – the codification of the Sewel convention (the convention that, in matters devolved to Scotland, Wales and Northern Ireland, the UK Parliament will not normally legislate without the consent of the Scottish Parliament, Senedd Cymru and Northern Ireland Assembly) being a recent and notable example.[43]

Most telling of all in this context is an aspect of the agreed solution to the Protocol impasse which brought the Democratic Unionist Party (DUP) back into Stormont.[44] Among the three statutory instruments which the DUP accepted, the Windsor Framework (Constitutional Status of Northern Ireland) Regulations 2024 (the Regulations) contains what Colin Murray calls 'constitutional surplusage' and not without reason.[45] The Regulations expand section 38 of the European Union (Withdrawal Agreement) Act 2020, which, as a section both 'recognising' the sovereignty of Parliament and declaring that it does not 'derogate from' that sovereignty is already surplusage writ large. The Regulations expand this section by including references to the Acts of Union as 'enactments which make provision about the constitutional status of Northern Ireland'.[46] Well, quite.

One of the biggest changes the Regulations seek to make is to the moving of Bills in Parliament which, if enacted, would affect trade between Northern Ireland and Great Britain. In this situation, the minister in charge of that Bill must make a statement that the Bill will not have a 'significant adverse effect' on this trade, or that they are unable to make such a statement, but the UK Government will nevertheless

41 See HC Deb 30 March 1920, vol 127, cols 1110–1115 (Second Reading of the Government of Ireland Bill).

42 See HC Deb 16 February 1922, vol 150, col 1283 (Second Reading of the Irish Free State (Agreement) Bill).

43 See *Miller/McCord* (n 12 above) [136]–[151], in which the Supreme Court discussed s 28(8) of the Scotland Act 1998, inserted by s 2 of the Scotland Act 2016.

44 See Northern Ireland Secretary, *Safeguarding the Union* (CP 1021, 2024).

45 Colin Murray, 'Saying nothing much at all, to general acclaim – the Windsor Framework Relaunch' (*EU Law and Analysis* 1 February 2024)

46 The Windsor Framework (Constitutional Status of Northern Ireland) Regulations 2024, reg 2(2)(c).

proceed with the Bill in question.[47] This kind of ministerial statement, encapsulating a government opinion neither relevant to the judicial act of statutory interpretation[48] nor by itself justiciable, demonstrates the continuing *political* relevance of the Union's foundational parameters. No part of the Regulations, or any of the other statutory instruments, involve the legal enforcement of the Acts of Union in general, or article VI in particular, whether by subjecting the rest of the statute book to these enactments or by repealing or amending any provision which contradicts them. Again, this is not to discount the possibility that article VI is legally enforceable – it is simply to point to the weight of history and politics as tending away from such enforceability.

The second ground: changes to the constitutional status of Northern Ireland

As previously set out, the Court dismissed the appeal on the second ground, namely that the lack of popular endorsement of the Protocol meant that giving it effect in domestic law via the EUWA breached the requirements of section 1 of the NIA – which provides that Northern Ireland remains part of the UK and will not cease to be so without popular endorsement in a border poll. In line with its earlier judgment in *Miller/McCord* (which was a much larger panel of 11 justices, all of whom were unanimous on this issue), the Court held in *Allister* that section 1 of the NIA subjected only one question relating to Northern Ireland's constitutional status to a public vote – whether it remains within the UK or reunifies with Ireland.

The Court's interpretation of section 1 of the NIA was unsurprising, not least because it does not appear to have been asked by the *Allister* appellants to consider departing from its remarks in this context in *Miller/McCord* (which would have required an enlarged panel of at least 13 judges). Thus, the reinforcement of the Court's opinion of the matter in *Miller/McCord* was all but guaranteed in *Allister*. This interpretation had (in the High Court at least) been characterised by the appellants as relating only to the 'last lowering of the Union flag'.[49] In the aftermath of the Supreme Court's judgment, the lead appellant James Allister KC remarked: 'The effect of the court finding is that it applies only to what would be the final handover of [Northern

47 Ibid reg 3(3).

48 See eg *Anderson v Scottish Ministers* [2003] UKPC D5, [2003] 2 AC 602, [7] per Lord Hope of Craighead and *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin), [2010] QB 98, [49] per Stanley Burnton J.

49 *Allister* [2021] NIQB 64, [120] per Colton J.

Ireland] to [Ireland] and the Union can be salami-sliced away up to that point.'[50]

In a major way, the Supreme Court simply confirmed the political and factual reality of the relationship between the UK state and Northern Ireland. Once in 2000, twice in 2001 and between 2002 and 2007, the UK had unilaterally imposed direct rule in Northern Ireland without referring the issue directly to its people.[51] Substantial changes to the jurisdiction's devolution settlement – the NIA – were made following almost every multi-party agreement to restore or reform the devolved institutions – again, with no direct public endorsement.[52] Between 2017 and 2020, Northern Ireland was the only part of the UK to be governed largely by civil servants with extremely tenuous democratic oversight,[53] a bizarre and heavily criticised[54] state of affairs which seems to have set a precedent for how the jurisdiction is governed, such 'governance' having returned following the collapse of devolution between 2022 and 2024.[55] No referenda were held to decide whether its people wanted the return of this 'indirect rule'.[56] Beyond some occasional handwringing, the failure to refer these substantial and at times seriously democratically deficient constitutional changes to the people of Northern Ireland seems to have elicited a much more muted reaction. The Union, meanwhile, has yet to crack, let alone crumble. Seen in this light, the UK Parliament has already unilaterally and continually remade the constitution of Northern Ireland without direct reference to its people. If the imposition of an internal trade border is a change which is substantially different, whether in fact or in degree, than any of these frequent changes in the last quarter century, then it is difficult to discern those reasons precisely.

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50 Adam Kula, 'Unionists claim vindication despite defeat in Northern Ireland Protocol case: here are the five applicants in their own words' (*The Newsletter* 8 February 2023)

51 Pursuant to the Northern Ireland Act 2000.

52 See, in particular, the changes to the make-up of the Executive brought about in the Northern Ireland (St Andrews Agreement) Act 2006 and changes to the timescale for executive formation and the petition of concern under the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022.

53 Under the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (see in particular s 3 of this Act) and subsequently the Northern Ireland (Executive Formation, etc) Act 2019.

54 Anurag Deb and Conor McCormick, 'The Bradley Bill and the cessation of constitutionalism in Northern Ireland' (*Admin Law Blog* 26 October 2018).

55 Under the Northern Ireland (Executive Formation, etc) Act 2022 and then the Northern Ireland (Executive Formation and Organ Tissue Donation) Act 2023.

56 See Adam Evans, 'From an experiment to a new normal: indirect rule in Northern Ireland' [2023] Public Law 549.

The third ground: the use of Henry VIII powers

The third ground of appeal, centring around the use of sweeping powers of delegated legislation conferred upon ministers by the EUWA, was treated somewhat surprisingly and – as I set out below – problematically.

The appellants' claim under this ground is a familiar one in the context of delegated legislation – that the terms of such legislation were overbroad and breached the restrictions of the parent statute which had enabled their making. In this context, the parent provision was section 8C of the EUWA. Section 8C(1) explicitly authorises a 'Minister of the Crown' (in this case, the Northern Ireland Secretary) to make secondary legislation such as 'the Minister considers appropriate' to do an array of things expressed in extremely general and wide terms, including 'to implement the Protocol'.[57] Section 8C(2) supercharges this power by permitting the legislation so made to 'make any provision that could be made by an Act of Parliament (including modifying [the EUWA])'. The combined breadth of the powers conferred on ministers, therefore, took centre-stage in the Court's reasoning, providing a complete answer to the appellants' concern about overbroad secondary legislation.[58] However, what preceded this point in the Court's judgment deserves some further scrutiny.

As set out above, the secondary legislation in question – the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 (the 2020 Regulations) – disapplied section 42 (the petition of concern) from the periodic Assembly vote on the question whether aspects of the Protocol will continue to apply to Northern Ireland. The 2020 Regulations were made to establish the procedure by which the Assembly would vote in this context, in line with article 18 of the Protocol which required it to do so. This conflicted with the (then) provisions of section 42, which allowed the petition of concern to be invoked in respect of any 'matter to be voted on by the Assembly'.[59] The lower courts had squared this circle mainly by pointing to the breadth of the powers of delegated legislation under section 8C. In the High Court, Colton J began with how broad these powers were,[60] before concluding that the substance covered by the 2020 Regulations – a matter of international relations – lay outside the Assembly's competence anyway, and thus would be outwith the matters it could vote on in any event (in other words, the petition of concern would not

57 EUWA, s 8C(1)(a).
58 Allister (n 1 above) [109].
59 NIA, s 42(1) (since superseded).
60 *Allister* [2021] NIQB 64, [166].

have applied in any event).[61] In the Court of Appeal, Keegan LCJ and Treacy LJ essentially followed the same course as Colton J had,[62] while McCloskey LJ additionally considered that article 18 of the Protocol was self-executing by virtue of being given effect (along with the rest of the self-executing elements of the Protocol) under section 7A of the EUWA.[63] McCloskey LJ further held that the democratic consent requirements under article 18 'could not co-exist harmoniously' with the petition of concern, thus necessitating the 2020 Regulations disapplying the latter. Thus, in McCloskey LJ's view (though not in the view of the majority of the Court of Appeal), the Protocol, as given effect in domestic law, had already provided both the impetus and the reason for the modifications made by the 2020 Regulations. The Supreme Court's view largely aligned with McCloskey LJ, as Lord Stephens explained: 'I consider that the correct starting point is section 7A of the [EUWA] to determine the modifications that had already been implemented in respect of the NIA.'[64] Thus, in the Supreme Court's view, the 2020 Regulations had simply added to modifications already made by the Protocol via the EUWA. But this is a problematic conclusion for two main reasons.

First, it is worth exploring in detail *why* both McCloskey LJ and the Supreme Court considered that the 2020 Regulations merely complemented an *a priori* modification of domestic law by the Protocol (via the EUWA). With respect, McCloskey LJ's reasons are difficult to parse – or indeed ascertain. The Lord Justice asks rhetorically: 'in what respects did this discrete element [article 18 of the Protocol] of the elaborate statutory withdrawal arrangements not become immediately self-implementing?'[65] He then considers, by reading the Protocol's stated purpose in article 1(3) ('this Protocol sets out arrangements necessary to address the unique circumstances on the Island of Ireland'), that such arrangements effectively necessitated that article 18 was self-executing, modifying domestic law to allow for the 2020 Regulations to be made.

In the Supreme Court, Lord Stephens did not explicitly hold article 18 to have been self-executing but considered that the 2020 Regulations were necessary to meet the article's obligations on the UK Government.[66] With respect, this is also difficult to parse. Lord Stephens begins by pointing to the terms of article 18 requiring the UK Government to 'provide the opportunity for democratic consent in

61 Ibid [182]–[190].
62 *Allister* [2022] NICA 15, [240]–[249].
63 Ibid [427] and [431].
64 *Allister* (n 1 above) [107].
65 *Allister* [2022] NICA 15 [427].
66 *Allister* (n 1 above), [107].

Northern Ireland'.[67] The UK Government is further required to provide this opportunity 'strictly in accordance with the unilateral declaration made by the United Kingdom'.[68] Lord Stephens considered this unilateral declaration – made by the UK on 17 October 2019 – overrode the cross-community voting provisions pursuant to section 42 of the NIA, thus having already modified domestic law prior to the making of the 2020 Regulations.[69]

When examining the unilateral declaration, it is clear that the UK considered the Assembly to be taken to have provided its consent 'if the majority of the Members of the Assembly, present and voting, vote in favour of the motion'.[70] But no part of the declaration disapplies or requires the disapplication of the petition of concern. And nor can any part of article 18 be interpreted to require such disapplication. Moreover, the existence of the petition of concern does not imply its successful trigger, so that the consent vote needs to be ringfenced from its application *in toto*.

The second problem with considering article 18 to have already modified domestic law is the evidence around why the UK Government considered it prudent to disapply the petition under the 2020 Regulations. This is detailed by Colton J in his judgment. A senior civil servant at the Northern Ireland Office stated on oath:

> This [democratic consent vote] served as the basis for a detailed process of negotiation with the EU, with the aim of incorporating specific provision for the people of Northern Ireland to have a meaningful opportunity to provide consent regarding any specific arrangements applied, in a manner that remained fully compatible with the Belfast (Good Friday) Agreement [which lies at the heart of the NIA]. As in any negotiations, this featured discussion and iteration of different options, all of which were assessed by the United Kingdom against those core principles. This took account of the negotiability and viability of any proposals that could be considered to provide a veto for any one party or community (as this began to emerge as an issue) – and the fact that political parties in Northern Ireland, the Irish government and the EU had all stressed that any such proposal would not provide the basis for an agreed solution.[71]

In Parliament, different reasons were provided for disregarding or rejecting the application of the petition of concern. On 19 October

67 Protocol (n 4 above) art 18(1).

68 Ibid art 18(2).

69 *Allister* (n 1 above) [108].

70 UK Government, Declaration by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the 'Democratic consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland (17 October 2019) para 3(b) and para 6.

71 *Allister* [2021] NIQB 64, [176].

2019, then Prime Minister Boris Johnson tied the simple majority requirement of the democratic consent vote to the simple majority threshold of the Brexit referendum.[72] When the draft 2020 Regulations were being debated, yet another reason for disapplying the petition of concern was provided: that the democratic consent vote was a matter of international relations and thus beyond the purview of votable matters in the Assembly.[73] The reasons proffered in Parliament were, in various guises, proffered in argument by the respondents in the High Court, Court of Appeal and Supreme Court. In the Supreme Court, Lord Stephens did not address these reasons, although he stressed that article 18 had created an obligation on the UK Government as regards the democratic consent vote, and this emphasis accords with the argument that the matter of the 2020 Regulations were in the realm of international relations (ie between the UK and the EU). However, in the absence of a clear finding by the Supreme Court as to whether the respondent's argument was accepted, it is difficult to state with any certainty whether the varying positions of the UK Government in Parliament influenced the Court's interpretation of the relevant obligation (under article 18). This in turn makes it difficult to ascertain the precise origin of the obligation to disapply the petition of concern.

It is clear that the public reasons provided by the UK Government (in Parliament) were different from those which influenced its negotiations in this regard with the EU. Quite simply, neither the idea of the consent vote being a matter of international relations, nor the majority threshold of the Brexit referendum occupied the minds of the negotiators; rather, it was the fact of the potentially democratically distortive effect of the petition of concern (it being possible for a third of the Assembly's membership to successfully veto a simple majority in the Assembly). None of these issues are reflected either in the text of article 18, or in the unilateral declaration. Ambiguity in the meaning of treaty provisions can be resolved by reference to a treaty's *travaux préparatoires*,[74] but the Supreme Court did not consider the meaning of article 18 ambiguous. Instead, it confidently imbued the provision with an obligation (the disapplication of the petition of concern) which is found nowhere in its text or the text of the unilateral declaration to which it refers.

The nebulousness of the origin of the obligation to disapply the petition of concern on the international plane (ie in the text of the Protocol) is disconcerting when considering the one aspect of the

72 Ibid [177]. See also HC Deb 19 October 2019, vol 666, col 581.

73 *Allister* [2021] NIQB 64, [178]. See also Delegated Legislation Committee Deb 26 November 2020, col 4.

74 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331, art 32.

Court's reasoning which is undoubtedly textual in origin. The Court pointed to section 7A as providing for the incorporation of the obligation in the domestic legal plane. As a result, the Court declared, the NIA stood modified in so far as the democratic consent vote was concerned because section 7A subjected the entire statute book to *inter alia* obligations created by or under the Withdrawal Agreement and parachuted into domestic law via the EUWA.[75] But pointing to the EUWA as the conduit by which the Withdrawal Agreement enters into and modifies domestic law (a matter not in issue) does not *determine* whether there is any obligation to convey through it. *Pace* Lord Stephens, starting with section 7A[76] does not assist in determining the appellants' claim in this context. Instead, the use of section 7A deflects from the real concern: that an obligation to disapply the petition of concern may be a rushed creation of the Court itself.

It is possible to avoid addressing both the reason the UK may have been obliged in the international plane to disapply the petition of concern, as well as whether (and to what extent) this *soi disant* obligation had already modified domestic law before the 2020 Regulations were made. The appellants pointed to section 10 of the EUWA, which obliges ministers to act in a way which is compatible with the NIA,[77] as the obstacle to the making of the 2020 Regulations. In the appellants' argument, the 2020 Regulations were incompatible with the NIA.[78] However, the power of delegated legislation conferred by section 8C, as previously set out, is sweeping. Specifically, section 8C(2) authorises such regulations to make provision 'that could be made by an Act of Parliament (*including modifying this Act*)' (emphasis supplied). Plainly, therefore, the 2020 Regulations could be taken to modify the EUWA, including the bar in section 10. It is a trite point that 'modification' does not have to be explicit – in the sense of repealing or amending statutory text – but can also be implicit (in the sense of modifying the effect of statutory text). This is made clear in the EUWA itself, section 20 of which declares, '"modify" *includes* amend, repeal or revoke (and related expressions are to be read accordingly)' (emphasis supplied). Any regulations made under section 8C are not constrained in how they might modify statutory provisions – subject to two explicit restrictions which are not relevant here,[79] these regulations are allowed to modify statutory provisions as the UK

75 *Allister* (n 1 above) [108].
76 Ibid [107].
77 EUWA, s 10(1)(a).
78 *Allister* (n 1 above) [87].
79 EUWA, s 8C(5A) (restrictions relating to the modification of the UK Internal Market Act 2020) and s 8C(7) (restrictions relating to the making of regulations pursuant to art 11(1) of the Protocol).

Government sees fit (subject, of course, to parliamentary approval). One may therefore consider the 2020 Regulations to have modified the effect of section 10, by ringfencing the disapplication of the petition of concern from its reach. This is purely a matter internal to the EUWA, without any reference to nebulous obligations or whether or not these obligations were outwith the Assembly's legislative competence. Any concerns about the 2020 Regulations being overbroad, moreover, have been effectively answered by Lord Stephens: the concern only properly arises when there is genuine doubt about the effect of the power to make delegated legislation. As Lord Stephens observed: 'There is no "genuine doubt about the effect" of section 8C. Rather, it is clear from the terms of section 8C(2) that Parliament has conferred the power by regulations made under section 8C(1) to amend primary legislation.'[80]

CONCLUSION

At the conclusion of the *Allister* litigation, we end where we began. Whatever the Parliaments of Great Britain and Ireland enacted in 1800, the UK Parliament in 2020 overlaid its will onto the entire statute book. No amount of theoretical possibility, or historical reading, was enough to persuade the Supreme Court to second-guess this statutory *fait accompli*. Perhaps, as the Windsor Framework and the package of measures leading to Stormont's return in February 2024 have shown, the litigation was less about the present-day legal enforceability of constitutional parameters laid down at a time ensconced in history, and more about creating political leverage to send UK and EU representatives back to the negotiating table. Whatever the historical or political legacy of *Allister*, the questions it raised have been and will continue to be debated in the pages and conferences of constitutional academia. For that at least, as I end this final part of the *Allister* series for the Northern Ireland Legal Quarterly, I am grateful.

80 *Allister* (n1 above) [109].