



# COVID-19 restrictions in Ireland and Northern Ireland: a comparison of the legal framing of reasonableness

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## ABSTRACT

In 2020, Ireland and Northern Ireland implemented separate legislative strategies to tackle COVID-19, despite the island comprising a single epidemiological unit. This article evaluates and contrasts the framing of ‘reasonable excuses’ in the regulations adopted by Ireland and Northern Ireland between March and December of 2020. It submits that the rejection of an ‘all-Ireland’ approach, side by side lack of effective regulatory coordination and enforcement, likely had implications for transmission in each state.

The regulations have entailed far-reaching incursions on civil liberties, often without providing the public with a clear evidence base. The complexity of the legislation as well as conflicting government guidance, contributed to a climate of public confusion, which created subsequent difficulties for enforcement, notably in the border regions. Insufficient coordination undermined measures by allowing for loopholes to be exploited. The article reflects on the human rights implications thereof, focusing on transparency and proportionality.

**Keywords:** COVID-19; Ireland; Northern Ireland; European Convention on Human Rights; reasonableness; human rights; free movement; article 8; foreseeability.

## INTRODUCTION

The island of Ireland is comprised of two separate jurisdictions, one sovereign and one part of the United Kingdom (UK), but both are closely connected for the purposes of public health and an area

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of North–South Cooperation.<sup>1</sup> As the border is free from physical crossings courtesy of the Common Travel Area (CTA), the two jurisdictions can furthermore be considered a single epidemiological unit.<sup>2</sup> Yet, at the outset of the COVID-19 pandemic, the respective legislatures adopted curious ‘one island, two strategies’ legislative approaches. In other words, the Northern Ireland Assembly rejected an all-Ireland approach to coronavirus restrictions, yet neither nation imposed border controls.

The Irish/Northern Irish decision to maintain its invisible border is distinct from other European Union (EU) countries. While borderless travel has become an expectation for many Europeans, in 2020, EU member states closed borders or restricted entry to bring the pandemic under control. This included countries subject to the Schengen agreement with (like Ireland and Northern Ireland) historically fluid borders and close cultural ties, such as Denmark and Sweden, Denmark and Northern Germany, Sweden and Norway, and Austria and Germany.<sup>3</sup> Furthermore, given the eventual imposition of border checks on the Irish side of the border in February 2021, nearly one year after the beginning of pandemic restrictions, the attempt to keep the border invisible while not coordinating restrictions may ultimately be regarded as a failed experiment.<sup>4</sup>

Although the Brexit negotiations have heightened international interest in the border, the variations in the restrictions in Ireland and Northern Ireland in response to the COVID-19 pandemic have received limited legal analysis. Nolan et al explore the public health restrictions in both jurisdictions from a political perspective but do not explore the legal nuances.<sup>5</sup> Legal literature analyses the respective regulations separately, for example, the Northern Irish regulations,<sup>6</sup> the difference

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- 1 Jess Sergeant, ‘[North–South cooperation on the island of Ireland](#)’ (*Institute for Government* 1 July 2020). For the purposes of animal health, the island is a single epidemiological unit.
  - 2 For an analysis of the Common Travel Area, see Graham Butler and Gavin Barrett, ‘Europe’s “other” open-border zone: the Common Travel Area under the shadow of Brexit’ (2018) 20 *Cambridge Yearbook of European Legal Studies* 252–286.
  - 3 For an update on temporary restrictions, see European Commission, ‘[Temporary reintroduction of border control](#)’.
  - 4 SI 168/2021, Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) Regulations 2021, s 4.
  - 5 Ann Nolan, et al, ‘Obstacles to public health that even pandemics cannot overcome: the politics of COVID-19 on the island of Ireland’ (2021) 32(2) *Irish Studies in International Affairs* 225–246.
  - 6 Daniel Holder, ‘From special powers to legislating the lockdown: the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020’ 71(4) (2020) *Northern Ireland Legal Quarterly* 537–555.

between the regulations in the four nations of the UK,<sup>7</sup> and aspects of the Irish Government's response to COVID-19.<sup>8</sup>

In this article, we seek to fill this gap by analysing and comparing COVID-19 restrictions on movement in Ireland and Northern Ireland. In the forthcoming analysis, we explore the regulations on movement applied in both jurisdictions, highlighting inconsistencies. We consider that, because of the invisible border, legislative differences can have an impact on the effectiveness of the restrictions, not least because of limits on enforcement mechanisms. It is logical that less restrictive measures in a neighbouring borderless jurisdiction, without public health justification, will have implications on transmission.<sup>9</sup> At the same time, we recognise that these differences fall within the discretion of the legislature and that, as COVID-19 was a novel virus, countries often pursued a trial and error approach, not driven by a strong evidence base. Furthermore, public health is not immune to ethno-nationalist politics, which have undoubtedly played a role in both responses. As the pandemic continues, we highlight, firstly, lessons the two legislatures can learn from each other's regulations and, secondly, that a disparate approach can undermine the effectiveness of public health legislation on a borderless island. We focus on 2020, given that the regulations are frequently amended.

Ireland and the UK are party to several relevant international treaties, including the European Convention on Human Rights (ECHR), which has been incorporated through the Human Rights Act 1998 (UK) and the European Convention on Human Rights Act 2003 (which applies in Ireland). Several rights have been restricted by the regulations discussed in this article, spanning article 8 (respect for private and family life), article 9 (freedom of religion) and article 11 (freedom of assembly and association). Notably, the UK has not ratified the Fourth Protocol of the ECHR on free movement, while Ireland has done so

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- 7 Akash Paun, Jess Sargeant and Alex Nice, 'A four-nation exit strategy, how the UK and devolved governments should approach coronavirus' (*Institute for Government* 6 May 2020). Tom Hickman QC, Emma Dixon and Rachel Jones, 'Coronavirus and civil liberties in the UK, judicial review' (2020) 25(2) 151–170. See also Barry Colfer, 'Herd-immunity across intangible borders: public policy responses to COVID-19 in Ireland and the UK' (2020) 6(2) *European Policy Analysis* 203–225.
  - 8 Eoin Carolan and Ailbhe O'Neill, 'Ireland: legal response to COVID-19' in Jeff King and Octávio L M Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to COVID-19* (Oxford University Press 2021). See also Conor Casey, Oran Doyle, David Kenny and Donna Lyons, 'Ireland's emergency powers during the COVID-19 pandemic' (*Irish Human Rights and Equality Commission* 24 February 2021).
  - 9 Emeline Han et al, 'Lessons learnt from easing COVID-19 restrictions: an analysis of countries and regions in Asia Pacific and Europe' (2020) 396(10261) *The Lancet* 1525–1534.

and incorporated same in schedule 3 of the 2003 Act. Neither state derogated from the ECHR during the COVID-19 pandemic.<sup>10</sup>

### Introduction to the Irish and Northern Irish responses

Although Ireland and Northern Ireland have adopted broadly similar approaches to tackling the pandemic, they have not acted in coordination. Ireland implemented a lockdown following the first coronavirus death, while the UK, including Northern Ireland, was slower to introduce restrictions.<sup>11</sup> Northern Ireland has largely followed the UK's approach, which has been criticised for initial delays,<sup>12</sup> dismissing experts and ignoring warning signs.<sup>13</sup> Ireland instead acted more promptly and often followed advice from leading actors in global health, including the World Health Organization (WHO) and the European Centre for Disease Prevention and Control when making regulatory decisions.<sup>14</sup> On the other hand, the Irish Government has been criticised for non-transparent decision-making and its relationship with the National Public Health Emergency Team (NPHE).<sup>15</sup> The North–South differences are recognisable not only in their approaches to expert advice, but also in their testing capacity, contact tracing and timing of school closures. The legal approach of both countries has been driven by use of statutory instruments (regulations) made by the respective Minister/Ministry of Health pursuant to the relevant legislation; in Ireland, the Health Act 1947 (No 28 of 1947) (as amended by the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (No 1 of 2020)); in Northern Ireland, the Public Health Act (Northern Ireland) 1967.

Health is devolved to Northern Ireland, yet, due to the haste of the situation, the Northern Irish Assembly initially opted to be included in the English approach.<sup>16</sup> On 28 March 2020, Northern Ireland made its own regulations, which were first amended on 24 April. On 12 May

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10 Council of Europe, 'Derogations COVID-19'.

11 A timeline of these events is found in Ann Nolan et al (n 5 above).

12 Allyson M Pollock et al, 'COVID-19: why is the UK Government ignoring WHO's advice?' (2020) *British Medical Journal* 368.

13 Richard Horton, 'Coronavirus is the greatest global science policy failure in a generation' *The Guardian* (London, 9 April 2020).

14 Health Service Executive (HSE), 'COVID-19 operations reports and policies'.

15 See further Conor Casey, David Kenny and Andrea Mulligan, 'Public health governance: the role of NPHE' in Alan Eustace, Sarah Hamill and Andrea Mulligan (eds), *Public Health Law during the COVID-19 Pandemic in Ireland* (COVID-19 Legal Observatory, Trinity College Dublin, 2021).

16 Anne-Maree Farrell and Patrick Hann, 'Mental health and capacity laws in Northern Ireland and the COVID-19 pandemic: examining powers, procedures and protections under emergency legislation' (2020) 71 *International Journal of Law and Psychiatry* 101602.

2020, the Northern Irish Executive published a five-stage recovery plan for the easing of the ongoing restrictions. The initial Health Protection Regulations were amended 11 times before being revoked. Thereafter, the Northern Ireland Department of Health made the Health Protection (Coronavirus Restrictions) Regulations No 2 (Northern Ireland) 2020 on 23 July, which were amended 25 times in the period between July and December 2020.

In Ireland, the first regulation made was the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) Regulations 2020, coming into operation on 8 April. The Minister of Health made approximately 10 different sets of statutory regulations with a total of 13 amendments throughout 2020.<sup>17</sup> Ireland also established a recovery plan on 15 September called the ‘Resilience and Recovery 2020–2021: Plan for Living with COVID-19’, which included a ‘Framework for restrictive measures’ comprised of five different levels.<sup>18</sup>

Recognising the benefits of coordination, in April 2020, the Irish and Northern Irish Ministers of Health entered into a political, non-binding Memorandum of Understanding on the COVID-19 response.<sup>19</sup> The Ministers agreed to, in the interests of consistency, adopt regular public messaging, including for vulnerable groups. The Agreement sets a loose policy agenda, noting that the public health approaches in the jurisdictions will not always mirror each other but good information sharing should ‘help to mitigate negative consequences’. However, as discussed in this article, this loose agreement has often failed to materialise into effective regulatory coordination, resulting in gaps.

From the outset, schools and retail outlets in the South were ordered to close while neighbouring counties in the North remained free of such restrictions for a week longer, despite being mere minutes apart.<sup>20</sup> Northern Ireland’s testing rate was also lower than Ireland.<sup>21</sup> In terms of quarantine upon arrival, Northern Ireland largely followed the UK approach, initially including a significant number of countries in ‘travel corridors’.<sup>22</sup> At one point, Northern Ireland had ‘opened up’

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17 Numerous statutory instruments have been in place, but for our purposes, we will focus on restrictions on movement.

18 Government of Ireland, ‘Resilience and recovery 2020–2021: plan for living with COVID-19’ (2020).

19 Northern Ireland Executive, ‘Memorandum of Understanding’ (2020).

20 ‘The Irish Times view on Covid-19 restrictions: an all-island approach is vital’ *Irish Times* (Dublin, 15 October 2020).

21 Farrell and Hann (n 16 above).

22 NI Direct, ‘Coronavirus (COVID-19): travel advice’ (2020).

to 58 countries, whilst Ireland only allowed entry from 15 without self-isolation.<sup>23</sup>

The decision to take separate approaches while maintaining an open border has been criticised.<sup>24</sup> In Ireland, high case numbers in border counties has been a cause of concern in light of Northern Ireland's initially less restrictive approach. There have been concerns that tighter restrictions in either jurisdiction would lead consumers to cross the border, thus causing spikes in the less restrictive jurisdiction or importing cases.<sup>25</sup> While it is unproven whether the spike in cases in border counties can be attributed to these divergent policies, Northern Ireland public health doctor, Dr Gabriel Scally, claimed this was 'the most likely explanation'.<sup>26</sup> Another aspect is that workers resident in Northern Ireland but working in Ireland were not able to avail of pandemic financial support in Ireland.<sup>27</sup>

Yet, in 2020, the Irish Government was resolute that closing the border between Ireland and Northern Ireland was not an option.<sup>28</sup> Ireland even opted to diverge from EU measures restricting travel from third countries to ensure that the land border remained open.<sup>29</sup> The Irish approach appeared to be that, with regular border crossings from those with family, work and schooling commitments in both countries, it would present extensive practical and operational challenges to implement, notwithstanding the inevitable political difficulties. Furthermore, the backdrop of the contentious Brexit negotiations loomed large, undermining both cooperation and border controls. Meanwhile, for political reasons, the Northern Irish Assembly preferred to chart its own course or follow the English approach where perceived necessary.

In the forthcoming analysis, we focus on the differences in the reasonable excuses that citizens in each jurisdiction could rely on to leave home under the respective regulations in 2020.

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23 Marie O'Halloran, 'Martin adopts "passive stance" on all-Ireland health, claims McDonald' *Irish Times* (Dublin, 29 July 2020).

24 Sergeant (n 1 above).

25 Shawn Pogatchnik, 'Ireland's divided coronavirus policies' (*Politico* 27 November 2020).

26 Paul Cullen, 'Coronavirus: border county case spike unlikely to be "spillover" from North, says Holohan' *Irish Times* (Dublin, 28 April 2020).

27 Colin Murray, 'The COVID-19 crisis across the Irish border' (*UK in a Changing Europe* 14 May 2020).

28 Ibid 21.

29 Ibid.



## REASONABLE EXCUSES

Both jurisdictions imposed a restrictive approach, ordering individuals to remain at home, unless the reason for leaving fell under reasonable excuses. Here we highlight differences in the approaches, focusing on exercise, essential items, cocooning/shielding recommendations, obtaining money, the care and welfare of animals, attending places of worship, and visiting cemeteries/ graves. These statutory instruments (regulations) restrict various rights protected under the ECHR, which will also be integrated in the ensuing discussion. Generally, we find an absence of clarity in the restrictions, which is a central aspect of the requirement that restrictions be ‘in accordance with the law’.

### Exercise

On 27 March 2020, the Taoiseach announced that everyone in the state should stay at home until 12 April 2020 unless they had a reasonable excuse, which included physical exercise, to leave their home. The use of the word ‘include’ in the list of excuses confirms that the list is non-exhaustive. Exercise was, however, limited to a two-kilometre radius from ‘home’ and was only permitted either alone or with other persons residing in the relevant residence.<sup>30</sup> The legal basis for these restrictions was not published until 8 April 2020, meaning that they remained advisory until that point. The guidance was eventually codified in the Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) Regulations 2020, made by the Minister for Health. The time between the Government announcing the guidelines and the restrictions coming into force was delayed, which was likely as a result of government lawyers taking time to closely review the regulations given the unprecedented circumstances.<sup>31</sup>

The Irish regulations have at various times imposed limitations on kilometre radius, the persons with whom, and places where, it is permitted to exercise. The two-kilometre radius remained in place until 5 May 2020, when the radius increased to five kilometres.<sup>32</sup> A further change on 18 May included a provision providing that exercise could be undertaken outdoors with a maximum of three other persons who do not reside in the relevant residence (still within the five kilometre radius).<sup>33</sup> On 8 June, the regulations changed to allow for

30 Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19), Regulations 2020, s 4(2)(i).

31 Paul Cullen and Conor Gallagher, ‘Coronavirus: minister signs regulations giving Gardaí powers to enforce lockdown’ *Irish Times* (Dublin, 7 April 2020).

32 The Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19), (Amendment) (No 2) Regulations 2020, s 3(b).

33 Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19), (Amendment) (No 3) Regulations 2020, s 5(c).

organised outdoor activities to occur with up to 14 other people. It was recommended that one stay within their own county or within a 20-kilometre radius.<sup>34</sup> On 22 October, the regulations reverted back to the five-kilometre radius for a period of six weeks as the country went back into Level Five, with no reference as to whether exercise had to occur alone or with members of the relevant household.<sup>35</sup> From 1 December, there was a staggered easing out of lockdown restrictions until 17 December.<sup>36</sup> Over the Christmas period, restrictions were further relaxed to allow for household mixing.<sup>37</sup>

Northern Ireland took a different approach to restrictions on exercise. The Department of Health made the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 on 28 March without the draft being laid before and approved by the Assembly, due to the perceived urgency. Section 5 contained provisions relating to restrictions on movement, imposing limitations as to when individuals could leave their home. Exercise was included as one of the 'reasonable excuses' that could be relied upon in order to leave home. Once again, the list can be considered non-exhaustive due to the use of the word 'includes'. The regulation did not impose a kilometre radius on exercise, but did restrict with whom one could exercise to 'either alone or with other members of (one's) household'. This rule remained in place until 23 July when the requirement for a reasonable excuse to leave home was removed from the regulations.<sup>38</sup> Thereafter, Northern Ireland put in place a two-week 'circuit breaker' lockdown from the end of November. During this time, the Government advanced a strong stay at home message, urging the public to stay indoors unless for essential purposes, including to exercise. The regulations were amended on 27 November<sup>39</sup> to permit 'outdoor exercise if the participants are one individual or are members of one household'.

Although the Northern Ireland regulation did not indicate how often exercise could be taken nor how far individuals were allowed to travel to exercise, government guidance suggested that if one left one's

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34 Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No 2) Regulations 2020, s 5.

35 Health Act 1947 (Section 31A - Temporary Restrictions) (COVID-19) (No 8) Regulations 2020, part 2, s 5(2)(x).

36 Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) (No 9) Regulations 2020.

37 Department of the Taoiseach, 'Briefing on the Government's response to COVID-19' (*Gov.ie* 22 December 2020).

38 Health Protection (Coronavirus, Restrictions) No 2 Regulations (Northern Ireland) 2020.

39 Health Protection (Coronavirus, Restrictions) (No 2) (Amendment No 17) Regulations (Northern Ireland) 2020, s 2(4)(c).



residence to exercise this could be done only once a day.<sup>40</sup> Further recommendations suggested to stay close to home to exercise.<sup>41</sup> Some exceptions to this guidance included that, if the individual or their child had a medical need such as a learning disability, then exercise was allowed more than once per day.<sup>42</sup> The Police Service of Northern Ireland (PSNI) advised that ‘as the vast majority of people can exercise from their home, travel to exercise may not be deemed necessary’.<sup>43</sup> In a post on the PSNI Facebook page an Assistant Chief Constable stated that when enforcing the regulations regarding restrictions on movement, ‘we understand it is not possible to be definitive in each case, but officers will treat each case on its own merits and in a professional and proportionate manner’.<sup>44</sup> Public confusion regarding the rules around exercise also prompted the Northern Ireland Executive to make a public statement to clarify the restrictions.<sup>45</sup> The statement noted that, ‘for example, a drive to a safe space or facility would be permitted. However, taking a long drive to get to a beach, or resort where numbers of people may gather is unlikely to be regarded as reasonable, even for exercise.’ It can be deduced from this statement that, when carrying out exercise, discretion was left to police to determine what was appropriate and reasonable in the circumstances. Whilst offering greater flexibility, this could create subsequent enforcement problems and pose difficulty for individuals’ ability to act within the law.

Although the Irish approach adopted a greater level of clarity in comparison to Northern Ireland, in Ireland there has also been confusion. Some wrongly interpreted the radius to apply to all reasonable excuses under the regulations, not only exercise, leading the Taoiseach to tweet a clarification.<sup>46</sup> Furthermore, the approach to exercise in Ireland can be criticised for being far-reaching and lacking a clear evidence base. Evidence suggests that outdoor transmission of Covid-19 is rare.<sup>47</sup> We therefore question whether the kilometre radius restriction was proportionate and underpinned by clear public health benefit. Furthermore, there remain concerns as to how flexible

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40 ‘[Lockdown: what are the rules?](#)’ (*Community Development and Health Network* 1 May 2020).

41 Ibid.

42 Ibid.

43 Ibid.

44 PSNI, ‘[ACC Todd Update](#)’ via Facebook (16 April 2020).

45 Amanda Ferguson, ‘[PSNI welcomes move to clarify rules on exercising during pandemic](#)’ *Irish Times* (Dublin, 25 April 2020).

46 Justin Treacy, ‘[2km radius – how far is that exactly?](#)’ (*RTE* 28 March 2020).

47 Tommaso Celeste Bulfone et al, ‘[Outdoor transmission of SARS-CoV-2 and other respiratory viruses: a systemic review](#)’ (2021) 223(4) *Journal of Infectious Diseases* 550–561. See also Hua Qian et al, ‘[Indoor transmission of SARS-CoV-2](#)’ (2020) 31(3) *Indoor Air* 639–645.

the exercise rules were in terms of the length of the period of exercise. In other words, when would the reasonable excuse to exercise ‘expire’? Could an individual remain outdoors all day and rely on the reasonable excuse of exercise? In other European countries, such as France, proof was required when leaving home.<sup>48</sup> In both Ireland and Northern Ireland, proof of a reasonable excuse by way of a form was never required.

A key issue for Northern Ireland relates to the guidance stemming from Westminster, especially at the beginning of the COVID-19 pandemic. According to a report from the Joint Select Committee on Human Rights, there have been discrepancies between government guidance and the underpinning regulations.<sup>49</sup> The example given in the report relates to exercise. Guidance recommended that persons only exercise once a day despite regulations in both England and Northern Ireland not imposing a limit on the number of times an individual could exercise.<sup>50</sup> In May, the UK Prime Minister announced that individuals could exercise for ‘an unlimited amount’, despite no changes to the regulations regarding frequency of daily exercise.<sup>51</sup> This fuelled public confusion,<sup>52</sup> especially among the devolved regions. The London School of Economics and Political Science highlighted this confusion through a small study conducted with 200 participants in May 2020. When asked whether the UK Government or the devolved administrations were in charge of lockdown measures, half of all respondents incorrectly said it was the UK Government.<sup>53</sup>

Exercise is not expressly protected as a human right. However, the restrictions amount to limitations on the right to private life and, in the case of Ireland, freedom of movement. Such inferences must be in accordance with law and necessary (in this case, for the protection of health). The European Court of Human Rights has repeatedly held that laws must be ‘accessible and foreseeable’.<sup>54</sup> The Northern Irish restrictions do not appear to meet these requirements. Furthermore, we question whether near total prohibitions on exercise under these

48 ‘This is how France’s new coronavirus lockdown permission form works’ (*The Local Europe* 25 March 2020).

49 Joint Committee on Human Rights, ‘The government’s response to COVID-19: human rights implications’ (*Parliament.uk* 21 September 2020), paras 45–46.

50 Ibid.

51 Institute for Government, ‘Written evidence from the Institute for Government (RCC 12t)’ (June 2020)

52 Vikram Dodd and Helen Pidd, ‘Police acknowledge confusion over UK lockdown rules’ *The Guardian* (London, 27 March 2020).

53 Stephen Cushion et al, ‘Different lockdown rules in the four nations are confusing the public’ (*London School of Economics* 22 May 2020).

54 *Sunday Times v The United Kingdom* App no 6538/74 (ECHR, 26 April 1979), para 49.

circumstances were necessary, that is, proportionate to the aim pursued.

The restrictive approach to exercise suggests that governments may have viewed this necessary purpose with suspicion or as an ‘easy’ means of bypassing the regulations unless strictly curtailed. This approach seems ironic given that governments generally encourage citizens to exercise for the good of their health. From a human rights and public health perspective, a less restrictive approach that builds trust through outlining the potential risks of exercising in groups may be more successful in achieving the desired result and avoiding increases in sedentary behaviour.

### **Essential items**

Furthermore, individuals were permitted to leave home for the purpose of obtaining essential items. However, the phrasing of the regulations again differed between the two jurisdictions.

The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020, section 5 allowed obtaining ‘basic necessities’, described as including ‘food and medical supplies for those in the same household or for vulnerable persons’ as a reasonable excuse for leaving home. The use of the word ‘including’ suggests that the definition of a basic necessity was not strictly limited to food and medical supplies. In addition, the regulation added ‘to obtain supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person’ as a reasonable excuse. On 11 June,<sup>55</sup> the list of reasonable excuses was amended to include ‘to obtain goods from any businesses that are open’. This implies that, rather than obtaining a specific item, the legal basis underlying the purpose of the trip related instead to the list of essential businesses that were allowed to open at the time.

In Ireland, the public was advised not to leave their homes unless they had to shop for essential food, beverages and household goods, to collect a meal or collect medicines and other health products among other reasonable excuses. The aforementioned kilometre radius limit did not apply to individuals seeking to access essential services.<sup>56</sup> Once the advice had been codified, the wording changed to state that a reasonable excuse included,<sup>57</sup> ‘to go to an essential retail outlet for the purpose of obtaining items or accessing services in the outlet for

55 Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 (Amendment 6), s 4.

56 Department of Taoiseach, ‘[Briefing on the government’s response to COVID-19 - Saturday 28 March 2020](#)’ (*Gov.ie* 28 March 2020).

57 Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No 8) Regulations 2020, s 4.

yourself or others in the residence or for a vulnerable person'. Rather than describing items as essential, the regulation suggested that the retail outlet being open implied the items in it were, by definition, essential.

The regulations did make explicit reference to what items could be obtained, including: food, beverages, fuel, medicinal products, medical devices or appliances, other medical or health supplies or products, essential items for the health and welfare of animals, or supplies for the essential upkeep and functioning of the person's place of residence. During Ireland's second lockdown, retailers were urged to separate essential and non-essential goods such as food and clothing.<sup>58</sup> Under new rules, stores were restricted to selling products necessary for the 'essential upkeep and functioning of places of residence and businesses'.

The key difference between Northern Ireland and Ireland's approach was the wording of the text, with Northern Irish regulations using the term 'basic necessities' and Irish regulations referring to 'items from essential retail outlets'. The initial list under the Irish regulations appears to have had greater flexibility since items did not have to be regarded as 'a necessity'. The rules also had greater clarity by providing a non-exhaustive list of potential items to ease confusion. It could be said that the Northern Irish rules provided equal flexibility as basic necessities could be broadly interpreted. However, this raises questions as to whether items not classed as food or medical supplies can be considered as necessities and from whose perspective. For example, what a young woman and an older man consider essential is likely to differ. Furthermore, in parts of the UK and Ireland, police were accused of interrogating shoppers over the necessity of their purchases.<sup>59</sup> Pictures from Dublin show the Gardaí stopping individuals on the street and inspecting their shopping bags,<sup>60</sup> despite lacking legal powers to do so.

Another issue arising once again relates to the expiry of said excuse.<sup>61</sup> Would an individual be obliged to return home immediately after the purchase of necessities? How long was reasonable for a trip to an essential outlet? In the UK, the confusion led to a clarification of the regulations to establish that there must be a reasonable excuse

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58 Conor Pope, 'Large retailers modify stores and block off non-essential products' *Irish Times* (Dublin, 27 October 2020).

59 Cherry Wilson, 'Coronavirus: shoppers face "essential items" confusion' (*BBC News* 2 April 2020).

60 Zoe Drewett, 'Police threaten to search shopping trolleys to check you're only buying essentials' *Metro* (London, 9 April 2020).

61 House of Commons, Public Administration and Constitutional Affairs Committee, *Parliamentary Scrutiny of the Government's Handling of Covid-19: Fourth Report of Session, 2019–21* (10 September 2020) 14–15.

for leaving home and for *remaining* outside of the home – changing the wording to require an excuse to both ‘leave’ and ‘be outside of your residence.’<sup>62</sup> In situations where the wording of legislation is ambiguous, the use of general terms should be interpreted in a way that safeguards basic rights of the individual.<sup>63</sup> To do otherwise and interpret such rules in a way that curtails personal liberty would be contrary to the long-standing principle of legality.<sup>64</sup> Legislation passed in both Ireland and Northern Ireland risked falling into the latter category, in the sense that powers were being exercised in a much broader manner than originally intended.

### **Cocooning/shielding recommendations**

In both countries, older persons and those considered ‘vulnerable’ were advised to stay at home. In Ireland, the Government advised those considered vulnerable to remain at home and limit their social contacts, a phenomenon dubbed ‘cocooning’. Whilst the regulations did not make reference to specific age groups, a vulnerable person was defined as someone who required assistance because he or she was ‘particularly susceptible to the risk posed to health by Covid-19, or not in a position to leave his or her place of residence due to reasons related to the spread of Covid-19 or otherwise’.

Guidance from the Health Service split the level of risk into ‘very high risk’ and ‘high risk’, with those over 70 classified as very high risk. Those falling within this category were advised that ‘you need to stay home as much as possible’. Despite providing detailed advice on what to do in certain situations as a very high-risk individual, ultimately, the guidance was advisory. The Health Service website advised citizens to ‘use your best judgement’ to avoid higher-risk situations.<sup>65</sup> This mixed messaging through the use of the words ‘need’ and ‘should’ likely caused public confusion around the nature and enforceability of the recommendations.<sup>66</sup> While these recommendations were not subject to legal challenge, the High Court has noted that, while the Executive is entitled to provide health advice, such advice could be subject to judicial review where it portrays recommendations as having legal status.<sup>67</sup>

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62 Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020.

63 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131

64 *Ibid.*

65 HSE, ‘[Staying safe if you are at very high risk – advice for people at very high risk from COVID-19](#)’ (31 December 2020).

66 Katharina Ó Cathaoir and Ida Gundersby, ‘[The rights of elders in Ireland during COVID-19](#)’ (2021) 28(1) *European Journal of Health Law* 81–101.

67 *Ryanair DAC v An Taoiseach & Others* [2020] IEHC 461.

In Northern Ireland, similar recommendations were present from 23 March 2020, although the term ‘shielding’ was used. The definition of vulnerable persons was split into two categories,<sup>68</sup> ‘vulnerable’ and ‘clinically extremely vulnerable (CEV)’. People over the age of 70 were classified as vulnerable. Unlike Ireland, Northern Ireland paused its shielding recommendations from 31 July 2020.<sup>69</sup> Yet, advice from 26 December for those clinically extremely vulnerable was that they should not attend the workplace even if they were unable to work from home.<sup>70</sup> Prior to this, CEV individuals were advised that it was safe to attend work if ‘proper measures to ensure social distancing are in operation in the workplace’. The Health Service website made clear that ‘this is advice only’ and that ‘people are free to make their own judgements’. Despite the clear reference to the advisory nature of the guidance, confusion could have arisen given the reference to shielding being paused alongside the introduction of more stringent advice on entering the workplace. This advice could appear contradictory and confusing to the public and, ultimately, infringe the requirement of a valid legal basis under article 8 ECHR.<sup>71</sup>

### Obtaining money

Whilst both Ireland and Northern Ireland included ‘obtaining money’ as a reasonable excuse to leave home, each country enacted this provision at different times. In Ireland, ‘to obtain money for yourself, someone in the residence or a vulnerable person’ was included in the list of reasonable excuses in the initial regulation on 8 April 2020.<sup>72</sup> Whereas in Northern Ireland, leaving home to obtain money was not added until 15 May,<sup>73</sup> nearly two months after lockdown began. This possible oversight had the potential to adversely affect certain groups who use cash at higher rates, such as the elderly or marginalised groups. Throughout the pandemic, there has been concern that a move away from cash for hygiene purposes could adversely affect certain groups.<sup>74</sup>

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68 NI Direct Government Services, ‘Coronavirus (COVID-19): definitions of “clinically extremely vulnerable” and “vulnerable”’.

69 Department of Health for Northern Ireland, ‘Live life COVID-aware’.

70 See n 68 above.

71 Ibid.

72 Health Act 1947 (Section 31a – Temporary Restrictions) (COVID-19) Regulations 2020, s 4.

73 Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 (Amendment 2), s 5(2).

74 Siran Kale, “‘You can’t pay cash here’: how our newly cashless society harms the most vulnerable’ *The Guardian* (London, 24 June 2020).



### **The care and welfare of animals**

Similarly, each country took a different approach to the inclusion of care and welfare of animals as a reasonable excuse. In Ireland, the initial government advice included ‘farming purposes’, described as either food production or the care of animals, as a reasonable excuse.<sup>75</sup> However, when the initial regulations were published on 8 April 2020, ‘farming purposes’ was not included in the list of exceptions. There was, however, reference to being able to leave home to obtain items from an essential retail outlet,<sup>76</sup> including ‘essential items for the health and welfare of animals’. Farming was also listed as an essential service under schedule 2 and seeking veterinary assistance was included as an exception under section 4. Whether the culmination of these provisions was what was meant by ‘farming purposes’ in the government briefing on 28 March is unclear. In Northern Ireland, the phrase ‘farming purposes’ was not referred to in the regulations. Reference to ‘the care and welfare of animals’ was not added as a reasonable excuse until 7 June.<sup>77</sup> It is unclear whether individuals were fined or warned for caring for animals during the pandemic. The absence of such a reasonable excuse could suggest a deprioritisation of animal welfare or that a level of flexibility was exercised for some purposes, but not for others (such as exercise).

### **Attending places of worship**

During the initial lockdown in Northern Ireland, attending a place of worship was not considered a reasonable excuse until 19 May 2020.<sup>78</sup> This could likely be defined as attending a place of worship for individual prayer, as places of worship did remain open for certain events such as weddings in accordance with the guidelines. In-person religious services resumed from 29 June 2020.<sup>79</sup> During the second lockdown, the Executive initially decided to keep places of worship open only for weddings, civil partnerships and funerals. However, backlash from religious leaders led to a revision of the rules,<sup>80</sup> allowing churches to

75 See n 56 above.

76 Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No 8) Regulations 2020, s 4.

77 Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 (Amendment 5), s 3.

78 Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 (Amendment 3), s 5(2).

79 Naomi Holland, ‘Coronavirus: what will church services look like in the “new normal”?’ (*BBC News* 28 June 2020).

80 Jayne McCormack, ‘Coronavirus: NI churches to remain open for individual prayer’ (*BBC News* 24 November 2020). See also Peter Moore, ‘Church leaders express disappointment at places of worship shutting under latest COVID-19 restrictions’ (*Q Radio* 22 November 2020).

remain open for individual prayer over the two-week lockdown from 27 November.

In contrast, in a Post Cabinet statement on 24 March,<sup>81</sup> the Deputy Prime Minister of Ireland stated that, ‘all places of worship are to restrict numbers entering at any one time to ensure adequate physical distancing’. These measures were in reference to lawful gatherings such as weddings or funerals as well as individual prayer. For public prayer or attending services, churches were closed until 20 July 2020,<sup>82</sup> but remained open for individual prayer subject to health and safety measures.<sup>83</sup> Places of worship then closed again following additional lockdown measures and public services were moved online.

These restrictions amount to a limitation on freedom of religion. At the same time, high transmission rates may justify closure of places of worship, particularly if distance requirements and adequate hygiene standards cannot be guaranteed. A 2021 judicial review petition before the Scottish Court of Session confirms the illegality of the enforced closure of places of worship during the pandemic.<sup>84</sup> The court held that the closure was unlawful as it amounted to a disproportionate infringement of the petitioner’s human rights under article 9 of the ECHR given that less intrusive measures could have been used.<sup>85</sup> In Lord Braid’s opinion, the respondents had not ‘fully appreciated’ the importance of article 9 rights in the drafting of the regulations.<sup>86</sup>

Whilst an in-depth examination of the role of the courts in upholding qualified rights is outside the scope of this article, some consideration must be given to the dichotomy between the courts and the Executive in times of a political turmoil. The *Dolan*<sup>87</sup> case provides a clear example of the judiciary taking a different approach to the Scottish Court of Session and deferring to the Government upon concluding the matter to be of political nature. In the context of COVID-19, where scientific knowledge was limited at the beginning of the pandemic, the court held that the Government had taken decisions to reduce the risk of transmission based on expert advice, making judicial intervention inappropriate. This is in similar vein to cases related to national

81 Irish Government News Service, ‘Post Cabinet statement, an Taoiseach, Leo Varadkar’ (24 March 2020).

82 Patsy McGarry, ‘Coronavirus: church leaders urge people to stay resolute amid pandemic restrictions’ *Irish Times* (Dublin, 4 May 2020).

83 Charles Collins, ‘N Ireland leaders welcome move to open churches for private prayer’ (*Crux* 19 May 2020).

84 *Judicial Review of the Closure of Places of Worship in Scotland, Opinion of Lord Braid* [2021] CSOH 32.

85 *Ibid* para 127.

86 *Ibid* para 120.

87 *Dolan and Others v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605.

security, whereby the courts have traditionally taken a more passive approach. Yet, arguably, the difference for our purposes is the collective element (the rights of an entire population in contrast to individual breaches) and extensiveness (the spectrum of rights triggered) of the infringements, with freedom of religion accounting for only part of this.

### **Visiting cemeteries/graves**

Initially, visiting a grave or cemetery was not included in the list of reasonable purposes in either jurisdiction. From 24 April 2020, Northern Ireland included visiting cemeteries as a necessary purpose,<sup>88</sup> aligning with England. In Ireland, the regulations did not order cemeteries to close during the lockdowns but travelling thereto was not a reasonable excuse.

In a speech, the Deputy First Minister, Michelle O'Neill, stated that the Executive was 'very mindful of people's mental health at this time and recognise the comfort that visiting the graveside of a loved one brings'.<sup>89</sup> Yet, the logic behind the delay in adding visiting gravesites to the list of reasonable excuses is unclear. The issue caused tension within the Northern Ireland Executive, with the Democratic Unionist Party and Ulster Unionist Party suggesting that cemeteries could reopen on a controlled basis whilst Sinn Féin and Alliance opposed the suggestion.

The Executive claimed that the eventual policy change was an attempt to strike a balance between protecting public health and preventing further mental suffering being inflicted on individuals. It has been described as a 'proportionate' and 'low risk' decision.<sup>90</sup> According to the BBC, the change in the regulations was a result of pressure from the public.<sup>91</sup> Deputy First Minister, Michelle O'Neill, stated she had 'listened carefully' to calls from the public.<sup>92</sup> Church leaders reacted positively to the new regulations, deeming them to be 'sensible and compassionate'.<sup>93</sup>

Ireland took a different approach. Cemeteries were not ordered to close (this decision was at the discretion of the local authorities), however, visits thereto were also not listed as reasonable purposes.

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88 Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020, s 4(a).

89 Northern Ireland Executive, 'Executive approves opening of cemeteries on restricted basis' (24 April 2020).

90 'Coronavirus: first cemeteries reopen following policy change' (*BBC News* 25 April 2020).

91 Ibid.

92 Ibid.

93 Ibid.

According to then Health Minister, Simon Harris, if the cemetery in question was within the individual's kilometre radius, visiting was permitted.<sup>94</sup> This seems incorrect. Instead, an individual visiting a cemetery within their kilometre radius would have to be doing so for exercise (or other permitted purposes). Later, visiting graves was added to the government website, though not the regulation itself.<sup>95</sup>

The public health basis for excluding cemetery visits from COVID restriction exceptions is unclear. As the Northern Irish Executive noted, the activity is low risk given it takes place outdoors and offers the ability to adhere to social distancing. Funerals were still permitted throughout the lockdowns in both countries, albeit with limited numbers. It is furthermore a ritual of comfort at the time of an unsettling pandemic, where mental health is being negatively impacted. It was reported that one individual was impaled on a fence in an attempt to access a cemetery to visit his wife's grave.<sup>96</sup> We therefore question whether the Irish approach was a proportionate restriction on the right to private and family life given the limited public health gain.

Having introduced the main reasonable excuses, we now comment on enforcement thereof.

## ENFORCEMENT

The enactment of the regulations to combat COVID-19 across Ireland and Northern Ireland led to a meaningful increase in police powers, which must be utilised in accordance with human rights and civil liberties. In a report on policing performance of the Gardaí, the Policing Authority highlighted that

These powers quite significantly infringe on our rights to liberty, assembly and association and for many, the right to a family life. However, it is of great national importance, and indeed a matter of life and death, that the spread of the virus is limited to the greatest extent possible.<sup>97</sup>

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94 William Dunne, 'Simon Harris confirms beaches and graveyards are open but public need to "cop on"' *Irish Mirror* (Dublin, 18 May 2020).

95 Department of Taoiseach, 'Your guide to upcoming changes' (*Gov.ie* 15 September 2020).

96 Phillip Bradfield, 'Coronavirus: pensioner impales himself on cemetery railings trying to visit wife's grave during Covid-19 lockdown' (*Belfast News Letter* 21 April 2020).

97 Policing Authority, 'Policing performance by the Garda Síochána in relation to COVID-19 regulations. Report on the exercising of powers under the Health Act 1947 (Section 31 – Temporary Restrictions) (COVID-19) Regulations 2020' (May 2020) 3.

The criminalisation of previously normal and legal conduct requires scrutiny given the potential for disparate application of rules, disproportionate responses and discrimination.

Enforcement of regulations must be reasonable, necessary and proportionate.<sup>98</sup> In both Ireland and Northern Ireland, police were ordered to implement regulations in accordance with the ‘four E’s’ – engage, explain, encourage and enforce.<sup>99</sup> Both Policing Authorities committed to a ‘policing by consent’ approach and emphasised that enforcement should only be used if necessary. The Gardaí were afforded five powers under emergency legislation: to direct a person to comply with the regulations; to arrest for failure to comply with such a direction; to demand a person’s name and address; to arrest for failure to comply with the demand for name and address; and, finally, to arrest for failure to comply with the regulations.<sup>100</sup> In Northern Ireland, police officers ‘may take such action as is necessary to enforce any requirement imposed by regulation 3, 4 or 6’.<sup>101</sup> This may include directing a person to return home, removing a person to their home, dispersing a gathering or arresting an individual for breaching regulations.<sup>102</sup>

The powers given to the police in terms of enforceable penalties have changed throughout the course of the pandemic, with both countries increasing the level of fines towards the end of 2020. In Northern Ireland, the least stringent form of penalty was a warning, otherwise known as a ‘Community Resolution Notice’. Until March 2021, police had issued around 1795 of these warnings, most likely for non-serious breaches or potential breaches of the regulations.<sup>103</sup> Police could also issue fines to individuals over the age of 18 starting from £200 and rising to £1000 for breaches such as failure to isolate or attending a gathering that exceeds the allowed number of individuals.<sup>104</sup> As of March 2021, police had issued around 1758 of these penalties. In 2020, if unpaid, these types of notices could also be punishable by summary conviction with a fine of up to £5000.<sup>105</sup>

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98 Ibid.

99 Minister of Justice Statement, *Ad Hoc Committee Meeting* (6 January 2020), 4. See also, Policing Authority, ‘*Report on policing performance by the Garda Síochána during the COVID-19 Health crisis*’ (18 December 2020) 3.

100 Ibid 3. See also, Health Act 1947, s 31(a).

101 Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020, s 7(1).

102 Northern Ireland Policing Board, ‘*Report on the thematic review of policing response to COVID-19*’ (2020).

103 NI Direct Government Services, ‘Coronavirus (COVID-19) Regulations: compliance and penalties’.

104 Ibid.

105 Ibid.

In Ireland, police had access to the aforementioned powers from 8 April until 8 June 2020 when restrictions were eased and some of the penal provisions were revoked.<sup>106</sup> Subsequently, further provisions were enacted and sanctions included a fine of up to €2500 and/or up to six months' imprisonment under the 1947 Health Act. From 22 October 2020, when the country moved into Level Five lockdown, amendments to legislation meant that a new system of 'tiered fines' came into place, including on-the-spot fines of up to €500.<sup>107</sup> According to a report from the Policing Authority, the Gardaí relied on their enforcement powers 859 times between 8 April and 5 December 2020.<sup>108</sup>

One can question whether these fines were proportionate. In *Lacatus v Switzerland*, the European Court of Human Rights found that penalties imposed for begging violated article 8. The applicant was fined 500 CHF, which she could not pay. As a result, a custodial sentence of five days was imposed. The court found that, under the circumstances, the sentence was almost inevitable given the applicant's 'precarious and vulnerable situation'.<sup>109</sup> It concluded that the penalty was not proportionate as the state had not established that 'less restrictive measures would not have achieved the same or a comparable result'.<sup>110</sup> While the UK Joint Committee on Human Rights has criticised the UK fixed penalty notice system as 'two tiered' and potentially disproportionate,<sup>111</sup> the Irish fine system can lead to a criminal conviction for failure to pay, similar to the *Lacatus* case. Although the contexts differ, the *Lacatus* judgment opens up the possibility that a fine and criminal sentence might breach article 8 if, for example, the individual were destitute with no means of paying and this was not taken into account.

The Irish police force also made use of a large number of roadblocks as part of its wider COVID response. From 11 May to October 2020, over 120,000 checkpoints were set up. Whilst most of these took place during the initial lockdown period, during the Level Five lockdown there were around 6000 checkpoints per week.<sup>112</sup> Throughout the pandemic, there have been tailbacks on the motorways in bordering counties, especially around the Donegal area, with drivers seeking

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106 The Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19), (Amendment) (No 2) Regulations 2020.

107 Department of Health, 'Press release on additional enforcement powers for breaches of COVID-19 regulations' (Gov.ie 20 October 2020).

108 Ibid.

109 *Lacatus v Switzerland* App no 14065/15 (ECHR, 22 February 2021), para 109.

110 Ibid para 114.

111 Human Rights (Joint Committee), 'The government's response to Covid-19: human rights implications of long lockdown' (27 April 2021).

112 Department of Health (n 107 above).



to avoid checks by taking backroads.<sup>113</sup> Yet, the effectiveness of the checkpoints is questionable, with the vast majority of road users appearing to have a reasonable excuse for travelling.<sup>114</sup> For example, a checkpoint at a motorway on 1 May 2020 found that only two vehicles had made non-essential journeys out of a total of 3300 that were checked.<sup>115</sup> This can call into question the proportionality of the measure, given that individuals were required to account for their apparently legal behaviour. At the same time, the roadblocks may have had a deterrent effect, which is more difficult to measure.

Ireland's use of armed police at checkpoints raises questions as to whether the policing strategy can be reconciled with broader policy aims to avoid engaging in enforcement practices if possible. The Police Commissioner addressed these concerns and stated that the use of armed officers was to enable the continued policing of serious crimes, further stating that armed officers have uncovered criminals at checkpoints.<sup>116</sup> Adopting checkpoints that were introduced to enforce COVID regulations for other policing purposes appears to be an inappropriate repurposing of the initial objective of the checkpoints. This illustrates rules intended to prevent the spread of COVID-19 being used as a proxy for broader policing objectives and becomes more troubling when considered alongside the lack of consultation and debate regarding the regulations.

The Garda Síochána Ombudsman Commission (GSOC) had received over 169 complaints by 8 June 2020 from the public on the enforcement of COVID regulations by police.<sup>117</sup> A Police Ombudsman Statutory Report Investigation into policing in Northern Ireland established that there had been 136 complaints made by the public relating to the police and COVID regulations between 28 March and 31 October 2020.<sup>118</sup> Almost a quarter of all complaints received by the Police Ombudsman related to enforcement concerns in the context of gatherings at funerals as well as queuing outside of shops.<sup>119</sup>

A significant barrier to the fair and effective enforcement of COVID regulations is the coherence of the rules. Legislation that creates new criminal sanctions must be laid out in a clear and transparent manner;

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113 Orla Ryan, 'Long tailbacks reported as Operation Fanacht gets underway' (*The Journal* 7 October 2020).

114 See n 102 above, 7.

115 Ibid.

116 Ibid 12.

117 Garda Ombudsman, 'Update on complaints relating to COVID 19' (8 June 2020).

118 Police Ombudsman for Northern Ireland, 'Public statement by the Police Ombudsman pursuant to section 62 of the Police (Northern Ireland) Act 1998, an investigation into police policy and practice of protests in Northern Ireland' (22 December 2020) 3–5.

119 Ibid.

this is especially true for legislation that creates offences for what would, ordinarily, be considered perfectly normal behaviour. Ensuring that an individual has fair warning that what they are about to do could constitute committing a crime is a fundamental aspect of the rule of law.<sup>120</sup> For this reason, the state has a duty to create regulations that are both accessible and reasonably straightforward to interpret – as echoed in recommendations from the Northern Ireland Policing Board.<sup>121</sup> In both Ireland and Northern Ireland, the regulations were brought in as emergency legislation. The lack of opportunity for legislative scrutiny, combined with the rate of amendments made to the regulations, generates a climate of uncertainty and contributes to difficulties with enforcement. As a result, there must be scope to excuse a reasonable amount of ignorance and not place an unfair burden on citizens when exercising and enforcing such powers.<sup>122</sup>

The speed of amendments presents challenges for how regulations are understood and applied in practice, with police seemingly given no advance notice of approaching changes. The Northern Ireland Department of Health's Chief Environmental Health Officer stated, 'we do share with the PSNI ... information on changes that have been made as soon as possible afterwards, usually the following day if the changes to the legislation were made in the evening'.<sup>123</sup> The Policing Board in Northern Ireland wrote to the Minister of Health, stating that

it is ... unequivocal that you have a duty to provide clarity (underpinned by legal advice) as to how Regulation 5 should be interpreted. It is imperative that both the PSNI and the public are provided with clear, comprehensive and unambiguous guidance as to what constitutes unlawful behaviour under the Regulations.<sup>124</sup>

In addition, mixed messaging from the Government on the wording of the regulations and official guidance may have contributed to widespread confusion and undermined public confidence in the regulations. The regulations are lengthy and somewhat unclear, potentially contributing to flawed interpretation by police. Whilst a non-exhaustive list provides for instances when an excuse is considered reasonable, it could imply that only the activities listed are permissible, resulting in confusion for both the police and the public.

In the early stages of the pandemic, the police service in Northern Ireland was criticised for its approach to enforcement, with some

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120 Andrew Ashworth, 'Ignorance of the criminal law, and duties to avoid it' (2011) 74(1) *Modern Law Review* 4–7.

121 *Ibid.*

122 *Ibid.*

123 Northern Ireland Assembly, Committee for Health, 'Official report: minutes of evidence, Committee for Health, meeting on Thursday 18 June' (18 June 2020).

124 See n 102 above.

suggesting it was going further than provided for by the legislation. One report displayed examples of police ordering a woman to leave her front garden and go indoors, whilst another individual was instructed to return home by police whilst driving her autistic son to a familiar park for exercise.<sup>125</sup> As a result of inconsistent policing approaches and continued ambiguity, senior officers in Northern Ireland contacted the Department of Health to seek clarity on the regulations in order to enable fairer enforcement.<sup>126</sup>

Further, the nature of the regulations requires probing from police to determine whether members of the public are breaching rules; it is not immediately clear whether those outside of their residence have a reasonable excuse. Without any requirement to provide evidentiary proof or to rely on a listed excuse, police are left with a significant degree of discretion in deciding what can or cannot be classified as reasonable. In England and Wales, the Crown Prosecution Service determined that all of the 44 individuals initially charged with breaches of the regulations were incorrectly charged.<sup>127</sup> If the onus on how to interpret regulations remains with police, greater coordination and transparency is required to prevent arbitrary penalties being applied. Ultimately, incorporating a more transparent public health approach could potentially assist in addressing these issues by directing attention to vectors of transmission rather than policing individuals participating in low-risk activities.

## **ANALYSIS OF LEGAL LOOPHOLES ACROSS THE BORDER**

The porous nature of the border side by side a two-Ireland approach has resulted in certain challenges and legal loopholes. Whilst increased border regulation has become a major strategy in the suppression of the virus across the world, including countries with similarly fluid borders, tensions surrounding these discussions are uniquely palpable in Ireland. The issue of the Irish land border remains politically charged and, when closures have been suggested as an available tool to control the spread of the virus, it has generated both societal and operational concerns.<sup>128</sup>

An initial dilemma was coined the ‘Dublin loophole’, whereby passengers were able to evade quarantine rules in the UK by rerouting

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125 Sam McBride, ‘Sam McBride: the police’s made-up Coronavirus law ought to unsettle anyone who understands democracy’ (*Belfast News Letter* 18 April 2020).

126 See n 94 above.

127 Crown Prosecution Service, ‘CPS announces review findings for first 200 cases under coronavirus laws’ (15 May 2020).

128 Murray (n 27 above).

their return journey through Dublin airport.<sup>129</sup> This was then addressed in Northern Irish regulations, ensuring that self-isolation must be followed by anyone who had been outside of the CTA in the last 14 days, regardless of whether the flight was routed via Dublin airport.<sup>130</sup> However, the so-called ‘Belfast loophole’ remained, whereby arrivals from Britain into Northern Ireland with onward journeys to Ireland were able to avoid self-isolation recommendations. Furthermore, rather than having an arrangement in place requiring only one form for arrival on the island of Ireland, each country created its own passenger locator form. Despite repeated calls from Northern Ireland for the states to share information,<sup>131</sup> the Tánaiste responded that there were some formatting issues and details to work out before this could be done but gave assurances that it would be resolved. Since then, the Irish Government has agreed to provide data from the passenger locator forms to Northern Ireland.<sup>132</sup>

Moreover, in 2020, if police identified an individual resident in the neighbouring jurisdiction in breach of regulations, they could not enforce sanctions. For example, if an individual from the North travelled to the South without reasonable excuse, the Gardaí could only advise them to turn back. In other words, no effective enforcement mechanisms, pecuniary or otherwise, were available. The General Secretary of the Association of Garda Sergeants and Inspectors, Antoinette Cunningham, highlighted that this was of particular concern to the Gardaí, who were left with limited means of combating breaches of the regulations in border regions from those travelling to the South for the day.<sup>133</sup> As of February 2021, the Gardaí were empowered to enforce fines against those travelling into the country from the North in breach of travel rules. The new system allowed for fines of up to €100 to be sent to an individual’s home address in the North. The fines could apply to those who are ‘not ordinarily resident in the State’ who are travelling in the state ‘without reasonable excuse’.<sup>134</sup> The new powers

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129 Holder (n 6 above) 537–555.

130 Committee on the Administration of Justice, ‘Passenger quarantine and the Common Travel Area (CTA): the Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020’ CAJ Briefing Note No 2 (June 2020).

131 “‘Really regrettable’ Irish Government is not sharing passenger information – O’Neill’ (*RTE* 18 January 2021).

132 Pat Leahy, ‘Why is there no serious engagement on joint North–South approach to Covid?’ *Irish Times* (Dublin, 28 January 2021).

133 Conor Lally, ‘Covid-19: restrictions mismatch “difficult” for gardaí meeting North daytrippers’ *Irish Times* (Dublin, 26 April 2020).

134 Health Act 1947 (Section 31A – Temporary Restrictions) (COVID-19) (No 10) (Amendment) (No 2) Regulations 2021, s 4(a).

did not extend to forcibly returning someone across the border nor to ordering them across the border.

## CONCLUSION

In 2020, Ireland and Northern Ireland adopted separate approaches to COVID-19, while keeping their shared land border open. Both jurisdictions adopted legal approaches that in many ways mirrored those of England, Wales and Scotland: frequently amended regulations, often backed up by fines or criminal sanctions that imposed a legal obligation on individuals to stay at home unless their purpose fell within certain exceptions. These restrictions amounted to far-reaching incursions on numerous rights, including the right to family and private life, freedom of movement and freedom of religion.

This article has reviewed the reasonable purposes allowed for in both jurisdictions and identified discrepancies. While Nolan et al concluded that there was ‘significant public health policy alignment’ during the first wave, we have identified several areas of legislative non-alignment.<sup>135</sup> By comparing the approaches, we have questioned whether the restrictions in some cases were proportionate with reference to the ECHR. We echo the recommendation of Casey et al that human rights expertise should be mainstreamed in pandemic decision-making.<sup>136</sup> For example, in relation to exercise, we recognise that the Irish approach was clearer and easier for citizens to orientate themselves regarding compliance. Yet, we have not found that the Government put forth a compelling case for why exercise within a kilometre radius was necessary and proportionate to the public health aim. Similar questions can be asked with regards to the visiting of graves; did the public health benefit outweigh the limitation on movement and private life? Other purposes were left out at various stages, such as obtaining money or the care and welfare of animals, perhaps highlighting the haste with which the regulations were enacted. We posit that with better coordination between the two jurisdictions, some of these gaps could have been avoided as they seem to mainly have been oversights, not conscious political choices or prioritisation. The absence of a one-island approach further led to several legal loopholes in terms of enforcement, which may have undermined the effectiveness of both countries’ restrictions.

In general, the lack of clarity as to the rules in both jurisdictions has been criticised. Both states have mixed guidance and legal requirements, sometimes framing the former in terms of orders like ‘must’. At times,

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135 Nolan et al (n 5 above) 246.

136 Casey et al (n 15 above) 102.

the governments and the police forces have acted in a manner that suggests they misunderstood the regulations. Furthermore, the use of social media to correct the public's understanding of the law can also be questioned with reference to foreseeability. The potential for confusion is especially problematic from the standpoint of proportionality in light of the far-reaching nature of the interferences, and the fact that they were often underwritten by criminal sanctions. In the UK generally, fixed penalty notices were often used, which an individual cannot appeal, meaning that individuals may have paid fines even where they did not in fact breach the law.

Ultimately, this article submits that a more coordinated public health response was required to effectively combat the challenge presented by COVID-19 on the island of Ireland. Failure to do so resulted in restrictions on numerous human rights that were not always accompanied by sound legal or public health reasoning. The ambiguity surrounding these provisions generated a climate of unpredictable policing practices, with no clear public health rationale. All of these issues share a common thread, namely the role that borders can play in responding to a global, viral threat. In considering these points, it is fair to conclude that the response on the island of Ireland often lacked clarity, transparency and sometimes explicit justifications with regards to protecting public health.