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Through the unexpected death of Lord Kerr of Tonaghmore on 1 December 2020, Northern Ireland has lost the brightest star in its legal firmament. He was taken from his family, friends and admirers two short months after retiring from his unequalled period of service on the UK Supreme Court, just when he was at the start of the next chapter in his life and looking forward to spreading his wings in ways that were unavailable to him in his judicial capacity. His passing is a terrible blow, and he will be sorely missed by all who knew him.

Born in 1948, Brian Kerr spent his early years in Lurgan, County Armagh, and attended St Colman's College in Newry, County Down. By his own admission he 'stumbled' into a law degree at Queen's University Belfast and was called to the Bar a year after graduating, in 1970. His practice flourished, allowing him to take silk in 1983 and to become Senior Crown Counsel in 1988. He was involved in many leading cases, including appeals to the House of Lords and applications to the European Court of Human Rights.

Brian's talents as an advocate, and the reputation he gained for independence of thought, acute legal reasoning and complete integrity, made him an obvious choice for elevation to the High Court bench, to which he was appointed in 1993 aged just 44. He served in that capacity until 2004, when he succeeded Lord Carswell as the Lord Chief Justice of Northern Ireland, even though he had not first served as a Lord Justice of Appeal. He also chaired the Judicial Appointments Commission of Northern Ireland when it was first established in 2005.

In 2009 Sir Brian was to succeed Lord Carswell again, this time as a Lord of Appeal in the House of Lords, the last 'Law Lord' ever to be appointed because just four months later the Appellate Committee of the House of Lords was replaced as the UK's top court by the Supreme Court. Brian Kerr remained a Supreme Court Justice for 11 years, longer than any other holder of such a post to date. I calculate that he sat in no fewer than 283 cases during that time, delivering his own separate judgment in 112 cases.

As a lawyer and judge through almost the whole of the troubles in Northern Ireland, Brian Kerr was rigorously fair and impartial in all of his dealings. Barristers liked appearing with him, or before him, in court because he was unfailingly polite, scrupulously independent and, seemingly, perpetually cheerful. His work-rate was phenomenal, as were his dedication, loyalty and friendliness. As a judge he seemed to grow more and more liberal as he climbed the judicial ladder. In the Supreme Court he

was known for pushing the envelope on human rights issues, further even than the European Court of Human Rights was prepared to go, constrained as it is by a desire to keep pace only with 'the European consensus' on human rights. His dissents in the Supreme Court (almost a quarter of his judgments were at least partially dissenting) were always marked with the stamp of his distinctive humanity. He came to his conclusions based on logic and principle, never afraid to upset the applecart if doing so was in the interests of justice.

When it was announced that Lord Kerr would be retiring in the autumn of 2020, my colleague Dr Conor McCormick and myself felt it would be an appropriate time to try to compile a *Festschrift* in his honour. I am glad to say that we immediately garnered extensive support for the venture from a range of academic colleagues and secured a contract with Hart Publishing for a book due to be published towards the end of 2021, entitled *The Judicial Mind*. Brian was thrilled to learn that the project had been launched, and he kindly agreed to contribute a chapter of his own, reflecting on what others had written and on his own time on the bench. Little did Conor and I think that Brian would not live to see the book's completion, and it is extremely sad that it will now be a book *in memoriam* and without his presence at the launch.

On behalf of legal academics who use this journal, which Lord Kerr himself was proud of because its home is his *alma mater*, I extend deepest sympathies to his widow Gillian – herself a former academic colleague at Queen's – and to the whole family circle. Brian will long remain a model for all students of law at Queen's to follow. He will not now be able to take up the Honorary Professorship bestowed upon him last month, but his legacy to the Law School, and to the legal system of Northern Ireland, will forever be enormous.

Brice Dickson, Emeritus Professor of International and Comparative Law,
Queen's University Belfast

2 December 2020

Lord Kerr of Tonaghmore

I am grateful to the *Northern Ireland Legal Quarterly* for the opportunity to pay tribute to my former colleague and predecessor, Lord Kerr of Tonaghmore. I would like to associate myself, on behalf of Northern Ireland's judiciary, with Professor Dickson's tribute in the journal.

Lord Kerr's distinguished career has been summarily captured often in recent months for it is only in late September this year that he retired from the Supreme Court as its longest serving Justice, holding office since the Court's inception in 2009. It was the intention of Northern Ireland's Court of Judicature to welcome home one of our finest to mark his service and celebrate his renowned contribution to the administration of justice. Sadly, Brian's sudden passing leaves me to pay tribute to him in a different way.

I served under Brian Kerr as a High Court judge during his tenure as Lord Chief Justice of Northern Ireland. I had the benefit of working with not only a fine lawyer but a considerate, good humoured and compassionate colleague. Brian's contribution to the law is enshrined in his important and often fearless judgments but was also captured by his relentless challenge to all who served alongside him and to those who appeared in front of him, to think – always intensely. Brian reflected deeply on the cases he heard. He was thorough, thoughtful and adept at tempering legal reasoning with common sense.

Brian Kerr held judicial office for 27 years, moving from the High Court bench, to the Court of Appeal as Lord Chief Justice; from there to being the last Lord of Appeal in Ordinary in the House of Lords to becoming the youngest of the justices in the newly formed Supreme Court. Judicial office is an independent one, where decisions must be made individually and frequent periods of working alone are demanded. This was true for Brian too, but his ability to support, inspire and assist colleagues and support staff alike was immeasurable.

Brian was a pioneer in the courts of Northern Ireland and London. He recognised at an early juncture the importance of the use of IT in courts and the assistance judges needed to perform their roles as efficiently as possible. He established a legal team in the Office of the Lord Chief Justice to support judges in their administration of justice. When he moved to the Supreme Court, he was responsible for the judicial assistants' programme, based on the model he had established in Belfast. Likewise, he used his experience to advance the use of IT in the Supreme Court; as Lord Reed has recently noted, allowing that Court to operate effectively during the current pandemic.

Brian Kerr was the epitome of an independent judge. He was never afraid to challenge and provide counterbalance to different legalistic approaches. He never lost sight of the society he served or the interests of the vulnerable. He sought to hold the executive to account; to balance the intervention of the State with the individual rights of citizens. He was one of the justices who heard both the 2016 Article 50 Brexit case and the 2019 prorogation of Parliament case, in which he was described as 'an active and close questioner of the government's submissions'. The government lost both cases when the justices upheld Parliament's sovereignty and its powers to scrutinise legislation.

Shortly after his retirement, Brian noted that:

> The government's position ought to be strongly tested … It was an intensely interesting case. I failed to resist the temptation to ask questions.

Brian Kerr stood out for his willingness to ask questions in order that justice was served. His service to society was outstanding and the body of jurisprudence he leaves will continue to inform and benefit us for many years. A significant proportion of his judgments were dissenting – always questioning and thoroughly independently minded. It was my honour to have been his colleague and friend.

Sir Declan Morgan, Lord Chief Justice of Northern Ireland

3 December 2020

NILQ 71(4): 537–555

From special powers to legislating the lockdown: the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020

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Abstract

The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 were made through temporarily inserted provisions by Westminster's vast and rushed Coronavirus Act 2020. This itself limits duties to notify deaths to the coroner, despite Article 2 European Convention on Human Rights duties being particularly relevant to deaths in care homes and of frontline workers. The regularly amended March 2020 Northern Ireland regulations have themselves raised 'legal certainty' issues. Until June, official websites carried no accessible information as to their scope. Initial concerns on lack of clarity over matters such as driving for exercise gave way to greater controversy regarding the application of the regulations to the Black Lives Matter protests on 6 June 2020 through Police Service of Northern Ireland powers that had only been extended through an eleventh hour amendment the night before. The enforcement powers themselves are so widely drafted that they are reminiscent of the Special Powers Acts of the past. These issues are explored in this article.

Keywords: COVID-19; emergency legislation; Northern Ireland; Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020; Special Powers Acts; Black Lives Matter; Common Travel Area; inquests.

Introduction

Northern Ireland (NI) is no stranger to emergency legislation. From the Special Powers Acts,[1] Troubles-era legislation,[2] the 'normalised' and post-9-11 provisions,[3] and residual NI-specific measures,[4] such powers have been in place throughout its existence.

1 The Civil Authorities (Special Powers) Act (Northern Ireland) 1922 remained on the statute books for the lifetime of the Stormont Parliament. The legislation was repealed under direct rule (by the Northern Ireland (Emergency Provisions) Act 1973). For analysis on its operation see: Laura K Donohue, 'Regulating Northern Ireland: the Special Powers Acts 1922–1972' (1999) 41(4) Historical Journal 1089–1120.

2 Northern Ireland (Emergency Provisions) Act 1973. See also the Prevention of Terrorism (Temporary Provisions) Act 1974 and subsequent Acts.

3 The Terrorism Act 2000 provided permanent UK-wide provisions and replaced the Northern Ireland (Emergency Provisions) Act 1996 and the Prevention of Terrorism (Temporary Provisions) Act 1989. Post 2001, there were a further series of legislative provisions including: Anti-Terrorism, Crime and Security Act 2001; Terrorism Act 2006; Counter Terrorism Act 2008; Terrorist Asset Freezing etc Act 2010; Terrorism Prevention and Investigations Measures Act 2011; Protection of Freedoms Act 2012; and Counter Terrorism and Security Act 2015.

4 Justice and Security (Northern Ireland) Act 2007.

The COVID-19 pandemic presents a different type of proposition in that urgent and quite different provisions are required to save lives in the context of a public health emergency that is unprecedented in living memory.

Like all emergency law, such provisions must be compatible with human rights obligations that require restrictions to be *inter alia* proportionate, time-bound and non-discriminatory. There is also the requirement of legal certainty (in essence, the rules must be clear). There are also positive obligations, including duties to safeguard vital socioeconomic well-being, but also the 'right to life' duties under European Convention on Human Rights (ECHR) Article 2. These require public authorities to take all reasonable steps to save lives and also encompass duties to investigate certain deaths to which acts or omissions of public authorities may have contributed. This duty is of particular importance in the context of the UK having reportedly surged to have the highest COVID-19 death toll in Europe,[5] raising the prospects of thousands of additional avoidable deaths having been resultant from high-level policy decisions, and the urgent need to 'learn lessons' before any future surge.

The UK government chose not to utilise the existing Civil Contingencies Act 2004 and instead rushed through Westminster the vast Coronavirus Act 2020. This Act contains NI-specific provision and also temporarily inserts a new section in the existing Stormont-era Public Health Act (Northern Ireland) 1967 (PHANI 1967), augmenting wide regulation-making powers. It is the modified PHANI 1967 that enables the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 (NI COVID-19 Regulations), which constitute the principle emergency provisions in this jurisdiction introduced in response to COVID-19. The original NI COVID-19 Regulations were made, laid before the Assembly and came into force on 28 March 2020.

Whilst measures restricting movement, assembly and liberty are necessary in the context of a deadly pandemic, the NI COVID-19 Regulations are not without their issues. The enforcement powers for some regulations are so vague and arbitrary (providing that a 'relevant person may take such action as is necessary to enforce any requirement') they are reminiscent of the Special Powers Acts. Questions over legal certainty have also arisen. Initially, this concerned the extent the 'stay at home' rule permitted travel for exercise where initial Police Service of Northern Ireland (PSNI) statements were contradictory. In addition, there are issues with public dissemination and transparency, key conditions for the rule of law, since for several months there was no official public website where the restrictions under the NI COVID-19 Regulations were clearly set out. For the minority of the public who may be used to reading legislation, a consolidated version of the NI COVID-19 Regulations (which by 12 June 2020 had been amended six times) was also not available for some time. A brief period of legal limbo has also occurred between the announcement of certain changes and the law being duly altered. The problems this poses had been mitigated by a general policing response that had not been widely considered as heavy-handed. However, this changed in the context of the issuing of fines and other enforcement measures by the PSNI against Black Lives Matter anti-racism protests on Saturday 6 June 2020, making use of an extension of enforcement powers to outdoor gatherings, through an amendment to the NI COVID-19 Regulations

5 See Robert Booth and Pamela Duncan 'UK coronavirus death toll passes 50,000, official figures show' *The Guardian* (2 June 2020) citing research by Johns Hopkins University. <www.theguardian.com/world/2020/jun/02/uk-coronavirus-death-toll-nears-50000-latest-official-figures-show#maincontent>.

that had only been made and commenced the night before.[6] Whilst at the time of writing the direction of travel is to ease the regulations as part of the Executive roadmap out of lockdown, restrictions may be reintroduced in response to any second wave, providing an opportunity for necessary modifications in the interim.

In June 2020 a new separate set of regulations was also made by the NI Department of Health to enforce a 14-day 'self-isolation' rule for persons returning to Northern Ireland from outside the (UK/Ireland) Common Travel Area (CTA).[7] The regulations, made on a Friday and commenced the following Monday with limited prior Assembly scrutiny, contain significant ambiguities, particularly in relation to re-entry over the land border.

This commentary explores these issues in detail. It does so by first considering the applicable human rights law framework, before moving to look at the initial moves to legislate on these islands in response to the pandemic, and finally turning specifically to examine the outworking of the Coronavirus Act 2020 and the NI COVID-19 Regulations, paying specific attention to some of the key vagaries.

1 The human rights law framework

The framework provided by human rights law shapes the legislative response to the pandemic through both providing for positive obligations and limitations on the extent rights can be restricted. This includes the ECHR, directly applicable in the courts by virtue of the Human Rights Act 1998.

The positive obligations include binding duties under Article 2 ECHR (right to life) on public authorities to take all reasonable steps to save lives. The parameters of such obligations can be shaped by related international standards, including those in UN instruments on the right to health[8] and World Health Organization standards. Significant questions have arisen regarding the initial UK divergence from such standards in areas such as case finding, contact tracing and testing, along with preventing COVID-19 in care homes.[9]

The UK having surged to Europe's reported highest COVID-19 death toll points to countless thousands of additional avoidable deaths having consequently resulted from acts or omissions of public authorities. Such a context engages a broader set of procedural ECHR Article 2 duties to ensure there are prompt, effective investigations, independent of those responsible, into certain deaths. Domestically, the coronial inquest system can provide such a mechanism, whereby, for example, the contribution of acts or omissions of public authorities to the death of a frontline worker, including those resultant from government policy, could both be the triggering factor requiring an inquest

6 See 'Coronavirus: "Between 60 and 70" fines at anti-racism protests' *BBC News* (8 June 2020) <www.bbc.co.uk/news/uk-northern-ireland-52963039>; and 'Laws restricting protest in Northern Ireland "unacceptable"' Press Statement (Amnesty International and CAJ, 8 June 2020) <www.amnesty.org.uk/press-releases/laws-restricting-protest-northern-ireland-unacceptable>.

7 The Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020.

8 Including Article 12 (right to highest attainable standard of health) and other provisions (including Article 7(b) on rights to safe and healthy working conditions) under the UN International Covenant on Economic, Social and Cultural Rights (ICESCR).

9 For further discussion, see: 'Editorial: Covid-19: why is the UK government ignoring WHO's advice?' *British Medical Journal* (30 March 2020) 368 doi <https://doi.org/10.1136/bmj.m1284>; and written evidence to the UK Parliament from Dr Oliver Lewis (Barrister at Doughty Street Chambers, London, and Professor of Law and Social Justice at the School of Law, University of Leeds) and Dr Andrew Kirby (Associate Professor in Microbiology, School of Medicine, University of Leeds, UK) 'The UK government's guidance on combating coronavirus in care homes is inconsistent with WHO standards' (COV0043) <https://committees.parliament.uk/writtenevidence/2213/html/>.

and shape the parameters of the matters it examines. There is also the broader role of public inquiries ensuring 'lessons learned' lead to non-recurrence of failings. The present legislative basis is, however, not without its problems, with the controversial Inquiries Act 2005 permitting ministerial interference at numerous stages of a public inquiry.[10]

A broader set of positive obligations on the state party include those to ensure the socioeconomic well-being of the population during the emergency.[11]

The second limb of human rights obligations relates to the extent rights can be restricted in an emergency. In general, many rights protected by the ECHR are themselves qualified and can be restricted in accordance with their own limitation clauses. These provide for restrictions which are proportionate in pursuit of a legitimate aim including 'health' and the right to life of others. Many of the measures introduced to contain a pandemic will by their nature restrict rights such as rights to freedom of movement, freedom of assembly, and detention without trial (eg for purposes of testing, treatment or precautionary quarantining).

The general principles around these measures are that restrictions on such rights should: be proportionate, only used for the purpose of containing the pandemic and not unlawful collateral purposes;[12] be time-bound for only as long is as necessary; be applied in a non-discriminatory manner; and afford 'legal certainty'. The legal certainty requirements mean the rules need to be clear and the consequences for non-compliance foreseeable (particularly when they invoke criminal sanctions) to ensure citizens and law enforcement personnel alike can regulate their conduct.

More sweeping interference in rights at the time of an emergency will require a temporary derogation from human rights obligations. Under Article 15 of the ECHR a contracting state party can derogate from most ECHR rights for an emergency threatening the life of the nation to the extent strictly required by the exigencies of the situation.[13] A number of such derogations were made in respect of NI during the

10 The Inquiries Act 2005 was rushed through Parliament to replace all other statutory basis for a public inquiry on the back of the (still outstanding) commitment by the UK to hold a public inquiry into the death of Pat Finucane. For commentary, see *The Apparatus of Impunity?* (CAJ/Queen's University Belfast 2015) <https://caj.org.uk/2015/01/19/apparatus-impunity-human-rights-violations-northern-ireland-conflict/>.

11 For analysis of many of the issues, see Juan Pablo Bohoslavsky, 'COVID-19: Urgent appeal for a human rights response to the economic recession' (UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Geneva, 15 April 2020) <www.ohchr.org/EN/Issues/Development/IEDebt/Pages/COVID19-EconomicRecession.aspx>.

12 An example of the misuse of emergency-type powers for collateral (ie different) purposes, includes the current concerns regarding the use of counter-terrorism questioning powers in ports in the CTA for routine immigration control purposes. See BrexitLawNI, *Policy Report: Brexit, Border Controls and Free Movement* (Queen's University Belfast 2018) 23–24. The collateral use of a statutory power can be unlawful under UK law. See, for example, *R (CC) v Commissioner of Police of the Metropolis and Another* [2012] 1 WLR 1913.

13 ECHR Article 15 derogation in time of emergency:

'1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

'Troubles'. This can include ECHR rights such as rights to liberty and free assembly but does not extend to forced labour, torture, or measures that impinge on the right to life. The Council of Europe is to be notified of derogations. It is only a sovereign government that can apply for a derogation and not a devolved administration, or any other public authority. The latter scenario was highlighted early in the pandemic when Mr Justice Hayden in the England and Wales Court of Protection, dealing with the transfer of a person from a care home in the context of COVID-19, thought he could invoke a derogation from the ECHR on his own.[14]

The UK has not derogated from the ECHR in the context of the pandemic, and therefore all restrictions must be in conformity with the limitation clauses to ECHR rights. Internationally, human rights protection during states of emergency has remained a topic of key concern. The UN Special Rapporteur (UNSR) on counter terrorism and human rights, Fionnuala Ní Aoláin, produced a detailed report on human rights protection and states of emergency in 2018.[15] In March 2020, UNSRs and other UN Human Rights Experts urged states not to use COVID-19 emergency measures to suppress human rights.[16]

2 COVID-19: pandemic to St Patrick's day – the first moves to legislate

In the UK the first emergency regulations were laid at Westminster on 10 February 2020 and only applied to England.[17] The regulations were made under the English equivalent of the PHANI 1967 and as such relied on public health legislation and not the Civil Contingencies Act.[18] The regulations gave health professionals, and (strangely) the Secretary of State, powers to detain persons suspected of having COVID-19 for screening, assessment and isolation (quarantine). The regulations also provide police officers with powers to enforce detention and detain persons who abscond from detention. The UK government stated at the time that it might formalise the regulations across the devolved administrations with the introduction of a Coronavirus Bill.[19]

It was March before these regulations were accompanied by others elsewhere on these islands. St Patrick's Day (17 March) was a particularly busy day. In Scotland, the Health Minister placed the National Health Service (NHS) on an emergency footing, citing

14 *BP v Surrey County Council & Another* [2020] EWCOP 17 (25 March 2020) <www.bailii.org/ew/cases/EWCOP/2020/17.html> cited in Stevie Martin, 'A domestic court's attempt to derogate from the ECHR on behalf of the United Kingdom: the implications of Covid-19 on judicial decision-making in the United Kingdom' (*Blog of European Journal of International Law*, 9 April 2020) <www.ejiltalk.org/a-domestic-courts-attempt-to-derogate-from-the-echr-on-behalf-of-the-united-kingdom-the-implications-of-covid-19-on-judicial-decision-making-in-the-united-kingdom/>.

15 UN Doc A/HRC/37/52 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism' (UN General Assembly 1 March 2018) <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/52>.

16 Office of the UN High Commissioner for Human Rights, 'COVID-19: States should not abuse emergency measures to suppress human rights – UN experts' (Geneva, 16 March 2020) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>.

17 Health Protection (Coronavirus) Regulations 2020: see Department of Health and Social Care 'Secretary of State makes new regulations on coronavirus' (10 February 2020) <www.gov.uk/government/news/secretary-of-state-makes-new-regulations-on-coronavirus>. For a critique see Jim Duffy, 'Corona-vires: has the Government exceeded its powers?' (*UK Human Rights Blog*, 13 February 2020) <https://ukhumanrightsblog.com/2020/02/13/corona-vires-has-the-government-exceeded-its-powers/>.

18 Section 45R of the Public Health (Control of Disease) Act 1984 (chapter 22).

19 HL Deb 9 March 2020, vol 802, cols 426–7GC.

powers under section 1 and section 78 of the NHS (Scotland) Act 1978.[20] In Wales, regulations (similar to those in England) were laid before the Welsh Assembly.[21] The Irish Cabinet also approved the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020. This Bill covered a number of social protection measures, extra powers to restrict public events and travel, and further powers for medical professionals to detain and isolate potentially infected persons.[22]

Substantive emergency legislation was not progressed in NI at this time. There were a number of ministerial statements from the Health Minister Robin Swann MLA.[23] This included announcing on Monday 2 March 2020 that PHANI 1967 had been amended to include COVID-19 under the list of notifiable (infectious) diseases. In addition, the NI health visitor regulations were amended to include 'Coronavirus Disease (COVID-19)' under the list of diseases for which no charges can be levied against any person for NHS treatment.[24] This means persons who are not 'ordinarily resident' in NI (and hence classed as 'visitors'), including migrants who find themselves in an irregular immigration situation (possibly due to loss of employment because of the pandemic) can avail themselves of free treatment for COVID-19.

Other 'positive action' measures have also been legislated for. The Communities Minister Deirdre Hargey MLA brought in a new Discretionary Support Grant for living expenses due to Coronavirus and pushed through legislation to limit evictions to prevent homelessness during the crisis – extending the notice to quit from one to three months.[25] There are still some gaps in social protection for migrants due to the Home Office 'no recourse to public funds' rules.

A week on from St Patrick's Day and the initiation of a *de facto* lockdown in NI (as for example, many schools had closed their doors), the NI Assembly debated and passed a Legislative Consent Motion to what would become the Coronavirus Act 2020.[26]

3 The Coronavirus Act 2020

Rather than relying on the existing regulation-making powers in the Civil Contingencies Act the British government instead fast-tracked hefty new primary legislation: a move that has not gone without criticism.[27] What would become the 359-page Coronavirus Act was introduced into Westminster on 19 March 2020 and was law a week later. As set out in one critique by Professor Clive Walker and Dr Andrew Blick:

20 Scottish Government, 'Coronavirus (COVID-19): speech by Cabinet Secretary for Health and Sport' (17 March 2020) <www.gov.scot/publications/coronavirus-COVID-19-update-scottish-parliament/>.

21 Health Protection (Coronavirus) (Wales) Regulations 2020 SR 2020/308 (W 68).

22 Irish Government, 'Government approves legislation to support national response to COVID-19' (17 March 2020) <https://merrionstreet.ie/en/News-Room/News/Government_approves_legislation_to_support_national_response_to_COVID-19.html>. The Bill passed through Dáil Éireann then the Seanad on 19 and 20 March 2020 respectively.

23 Department of Health, 'DoH ministerial announcements and statements 2020' <www.health-ni.gov.uk/publications/doh-ministerial-announcements-and-statements-2020>.

24 Provision of Health Services to Persons Not Ordinarily Resident (Amendment) Regulations (Northern Ireland) 2020 NISR 2020/25.

25 Private Tenancies (Coronavirus Modifications) Act (Northern Ireland) 2020 (chapter 2).

26 Northern Ireland Assembly (24 March 2020) Legislative Consent Motion: Coronavirus Bill.

27 Andrew Blick and Clive Walker, 'Why did government not use the Civil Contingencies Act?' *Law Society Gazette* (London, 2 April 2020) <www.lawgazette.co.uk/legal-updates/why-did-government-not-use-the-civil-contingencies-act/5103742.article >.

> Rather than turning to the laws already in place to handle crises like the pandemic, Parliament fast-tracked the Coronavirus Act 2020 … with scant debate of its shabbily drafted contents over just seven days toward the end of March. Parliament then vanished into recess for four weeks. In addition, the government installed without any scrutiny in any form regulations under the [England] PHA [Public Health Act] 1984.[28]

One particular area of concern highlighted by these authors relates to duties around coronial inquests, with concerns raised that 'death certification and coronial interventions are short-circuited by section 18 by enabling a doctor to certify the cause of death without the death being referred to a coroner'.[29]

As alluded to earlier, the coronial inquest system provides a key mechanism whereby the state can discharge its procedural duties under ECHR Article 2 to ensure there are prompt, effective investigations, independent of those responsible, into certain deaths.

Section 18(3) (with reference to Part 3 of schedule 13 of the Act) modifies NI death registration and coronial legislation. The Coroners Act (Northern Ireland) 1959 places duties on medical practitioners, registrars, undertakers, cohabitees, or persons in charge of a residence where a deceased person was residing to notify the coroner of certain deaths. Normally, this includes deaths from illness and natural causes if a medical practitioner has not seen and treated the deceased within 28 days of their death. The Coronavirus Act, however, removes this requirement, meaning deaths attributed to natural causes, where the deceased has not been seen by a doctor, no longer have to be notified to the coroner.[30]

This means, despite the duties under Article 2 ECHR, that deaths in which acts or omissions of public authorities are a factor (including through a failure to regulate private sector providers) may no longer need to be referred to the coroner for investigation. This would include removing the obligation to notify from the owners of care homes where a resident has died from suspected COVID-19 without seeing a doctor in which issues relating to their care and circumstances may have played a part.

By contrast, in Scotland on 13 May 2020 the Lord Advocate James Wolffe QC instructed that deaths in the following categories be reported to the procurator fiscal (the Scottish equivalent of a coroner):

- all Covid-19 or presumed Covid-19 deaths where the deceased might have contracted the virus in the course of their employment or occupation.

28 Clive Walker and Andrew Blick, 'Coronavirus legislative responses in the UK: regression to panic and disdain of constitutionalism' (*Just Security*, 2 May 2020) <www.justsecurity.org/70106/coronavirus-legislative-responses-in-the-uk-regression-to-panic-and-disdain-of-constitutionalism/>.

29 Ibid.

30 Section 7 of the Coroners Act (Northern Ireland) 1959 (chapter 15).

'7 [Words* in s. 7 omitted (temp.) (26.3.2020) by virtue of Coronavirus Act 2020 (c. 7), Sch. 13 para. 26]: Duty to give information to coroner: Every medical practitioner, registrar of deaths or funeral undertaker and every occupier of a house or mobile dwelling and every person in charge of any institution or premises in which a deceased person was residing, who has reason to believe that the deceased person died, either directly or indirectly, as a result of violence or misadventure or by unfair means, or as a result of negligence or misconduct or malpractice on the part of others, or from any cause other than natural illness or disease [*for which he had been seen and treated by a registered medical practitioner within twenty-eight days prior to his death], or in such circumstances as may require investigation (including death as the result of the administration of an anaesthetic), shall immediately notify the coroner within whose district the body of such deceased person is of the facts and circumstances relating to the death.

- all Covid-19 or presumed Covid-19 deaths where the deceased was resident in a care home when the virus was contracted.[31]

The issue of inquests into deaths from COVID-19, particularly of frontline NHS staff, further became controversial following guidance issued in April by the Chief Coroner for England and Wales.[32] This guidance 'reminded' coroners that inquests were not the forum to address concerns 'about high-level government or public policy' and specifically told coroners not to look at provision of personal protective equipment (PPE) to NHS staff.[33] This led to the Committee on the Administration of Justice (CAJ) and other human rights organisations writing to the NI judiciary to raise concerns that such an approach was not compliant with ECHR Article 2 and seeking assurances that similar guidance would not be issued in NI. A prompt response was received from the Presiding Coroner, Mrs Justice Keegan, making clear 'there is no intention to issue guidance in this jurisdiction. Coroners in this jurisdiction will have discretion to investigate any death on a case-by-case basis, and will do so based on the individual merits of each case'.[34]

The Coronavirus Act contains measures which are NI-specific.[35] These include (under section 51, schedule 21) powers for public health officers (but also police and immigration officers) to detain 'potentially infectious persons' for health screening and assessment; and under schedule 22 powers vested in the First Minister and Deputy First Minister to restrict events, gatherings and close premises. Significantly, the Coronavirus Act also makes major changes to the PHANI 1967, schedule 18, inserting temporarily a new Part 1A. This new part provides sweepingly broad regulation-making powers vested in the NI Department of Health. This includes powers in section 25B over international travel (medical examination, quarantining etc of passengers). Section 25C empowers regulations that place duties on medical professionals and requirements on matters such as keeping children off school, restrictions on events or gatherings and burials. Powers also extend to compelling medical examination or quarantining and the closure of premises.

31 Crown Office and Procurator Fiscal Office, 'Revised guidance on reporting of deaths during coronavirus outbreak' (15 May 2020) <www.copfs.gov.uk/media-site-news-from-copfs/1883-revised-guidance-on-reporting-of-deaths-during-coronavirus-outbreak>.

32 Robert Booth, 'NHS staff coronavirus inquests told not to look at PPE shortages' *The Guardian* (London, 29 April 2020) <www.theguardian.com/society/2020/apr/29/inquests-nhs-staff-deaths-ppe-shortages>.

33 Chief Coroner HHJ Mark Lucraft QC, 'Guidance No 37 Covid-19 deaths and possible exposure in the workplace' (28 April 2020), paragraph 13 <www.judiciary.uk/wp-content/uploads/2020/04/Chief-Coroners-Guidance-No-37-28.04.20.pdf>.

'13. In the usual way, it is a matter of judgment for the individual coroner to decide on the scope of each investigation. The coroner must consider the question of scope in the context of providing evidence to answer the four statutory questions. Coroners are reminded that an inquest is not the right forum for addressing concerns about high-level government or public policy. The higher courts have repeatedly commented that a coroner's inquest is not usually the right forum for such issues of general policy to be resolved: see Scholes v SSHD [2006] HRLR 44 at [69]; R (Smith) v Oxfordshire Asst Deputy Coroner [2011] 1 AC 1 at [81]. In the latter case, Lord Phillips observed that an inquest could properly consider whether a soldier had died because a flak jacket had been pierced by a sniper's bullet, but would not "be a satisfactory tribunal for investigating whether more effective flak jackets could and should have been supplied by the Ministry of Defence." By the same reasoning, an inquest would not be a satisfactory means of deciding whether adequate general policies and arrangements were in place for provision of personal protective equipment (PPE) to healthcare workers in the country or a part of it.'

34 Correspondence from the Private Office of the Presiding Coroner to CAJ (4 May 2020).

35 The full range of powers and duties in the Coronavirus Act will not be set out in this commentary. The measures range from those to assist with the emergency registration provisions for medical and social work professionals to changing safeguards over surveillance powers.

Some safeguards are imposed on the regulation-making powers through sections 25D and 25E. Under section 25F the regulations may create new criminal offences. Under section 25P regulations are normally subject to prior Assembly scrutiny in draft followed by negative resolution, but an 'emergency procedure' under section 25Q enables passage without prior Assembly scrutiny when necessary 'for reasons of urgency'.

These regulation-making powers have become the basis of the main NI COVID-19 emergency regulations.

4 The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020

The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 (the NI COVID-19 Regulations) were made on 28 March 2020 by the Health Minister Robin Swann MLA using the PHANI 1967 powers augmented by the Coronavirus Act 2020. These regulations have to be reviewed every 21 days.

The first two regulations cover commencement, interpretation, the 'emergency period' and review process. Regulations 3 and 4 contain powers to close premises and businesses during the emergency. Notably, these powers are similar to those vested in the First Minister and deputy First Minister in the Coronavirus Act (the latter of which were not then commenced, presumably given the duplication).

The two other substantive provisions in the original NI COVID-19 Regulations are regulation 5, which obliges persons not to leave home without reasonable excuse, and regulation 6, which restricts gatherings of more than two persons in a public place, with limited exceptions. Regulation 7 then covers enforcement powers, while regulation 8 deals with offences and penalties.[36] The following commentary will focus on regulations 5 and 6, given the human rights impact of these regulations on matters such as freedom of movement, freedom of assembly and rights to family life.

5 Regulation 5: the 'stay at home' directive

Regulation 5 stipulates you should not leave your home 'without reasonable excuse'. Around a dozen 'reasonable excuses' for leaving your normal place of residence were originally listed, but the list is not exhaustive. It includes leaving home to get food or medicine, for essential work, seeking medical assistance, to escape risk of harm (relevant to domestic abuse), to move children in shared care arrangements and so on.

Another permitted reason for leaving your home is 'to take exercise either alone or with other members of their household'. There was some initial contestation as to whether you could drive to a place to then take exercise. The regulations themselves do not provide further interpretation of the provision and in practice clarification was left to the PSNI as the enforcement body. There were, however, contradictory messages. The PSNI often follows National Police Chiefs' Council (NPCC) guidance. Media coverage clarified that NPCC guidance permitted driving a reasonable distance to do exercise.[37] On the same day this was publicised, the PSNI appeared to take a different line with a senior officer stating that 'anyone travelling from home for exercise *if they do not need to* is in

36 Regulations 9–14 deal with fixed penalty notices for offences under the regulations and related enforcement procedures. Regulation 15 provides that the NI COVID-19 Regulations will expire within six months of coming into operation.

37 Jamie Grierson, 'Driving to take a walk is lawful during England lockdown, police told' *The Guardian* (London, 16 April 2020) <www.theguardian.com/world/2020/apr/16/driving-for-exercise-allowed-under-lockdown-rules-police-advised-coronavirus >.

breach of lockdown restrictions'.[38] *The Newsletter* reported that the PSNI in Carrickfergus went further by posting on Facebook 'Exercise begins and ends at your front door. By that I do not mean walking from your front door to your car to drive somewhere for exercise. This will not be tolerated …'.[39] In contradiction, the PSNI advice on its own website at the time was limited to 'encouraging' people not to drive to local beauty spots for their daily exercise. This was subsequently removed.[40]

The lack of legal certainty led to Executive discussion. On 24 April 2020 a statement was issued by the Executive Office (TEO) at the same time as an amendment was also made to the NI COVID-19 Regulations to allow persons to visit graveyards (subject to a duty on persons responsible for burial grounds to take all reasonable measures to ensure social distancing by the public). The TEO stated:

> The Executive has also agreed to amend the Regulations to clarify the circumstances in which a person can leave the house to exercise, including reasonable travel to exercise. 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.[41]

An amendment was then added stating that the regulations are still breached unless any 'associated travel' with exercise is reasonable.[42] It is, of course, only a breach of the regulations *per se*, rather than any associated guidance or advice (on matters such as social distancing), that triggers the use of enforcement powers.

By 23 April 2020 controversy over the use of PSNI enforcement powers led to a temporary direction that required the approval of a senior PSNI officer before a fine or community resolution notice (CNR) could be issued.[43] A few days later, on 28 April 2020, the Department of Health and PSNI issued a joint statement. This makes no reference to the 'drive for exercise' amendment and, rather than providing further guidance, only appears to add to the lack of legal certainty over the rules. The statement, which opens by curiously referring to the 'regulations on social distancing', instead emphasises officer discretion and states that individual answers for 'countless hypothetical scenarios' cannot be given.[44]

By 4 May 2020 385 fixed penalty notices and 655 CNRs had been issued. The temporary direction requiring senior officer approval was still in place at 7 May 2020. By this time the PSNI reported that the Police Ombudsman had only received 24 complaints

38 Julian O'Neill and Jayne McCormack, 'Coronavirus: travelling for exercise "breaching restrictions"' *BBC News NI* (Belfast, 16 April 2020) (emphasis added) <www.bbc.co.uk/news/uk-northern-ireland-52306568> .

39 Sam McBride 'The police's made-up coronavirus law ought to unsettle anyone who understands democracy' *The Newsletter* (Belfast, 18 April 2020) <www.newsletter.co.uk/news/politics/sam-mcbride-polices-made-coronavirus-law-ought-unsettle-anyone-who-understands-democracy-2541670>.

40 PSNI, 'COVID-19 advice and information' <www.psni.police.uk/advice_information/COVID-19/>.

41 The Executive Office, 'Executive approves opening of cemeteries on restricted basis' (24 April 2020) <www.executiveoffice-ni.gov.uk/news/executive-approves-opening-cemeteries-restricted-basis>.

42 Health Protection (Coronavirus, Restrictions) (Amendment) Regulations (Northern Ireland) 2020 NISR 2020/71, regulation 2(4)(b).

43 Rodney Edwards, 'PSNI chief tells officers to seek approval before issuing coronavirus fines' *Belfast Telegraph* (Belfast, 23 April 2020) <www.belfasttelegraph.co.uk/news/northern-ireland/psni-chief-tells-officers-to-seek-approval-before-issuing-coronavirus-fines-39151309.html>.

44 Department of Health, 'Joint statement by the Department of Health and the Police Service of Northern Ireland' (28 April 2020) <www.health-ni.gov.uk/news/joint-statement-by-department-health-and-police-service-northern-ireland >.

that were COVID-19 related, all in the 'less serious' category.[45] Whilst the initial policing response was not widely contested as having been heavy handed, action taken against Black Lives Matter protestors on 6 June 2020, proved particularly controversial, in part due to the use of extended enforcement powers which had only been commenced the night before through the 'emergency procedure'.[46]

Whilst the application of the regulations to the anti-racism protests is further covered below in relation to restrictions on gatherings, regulation 5 is also engaged as protestors still require a 'reasonable excuse' to leave home. There is no explicit 'reasonable excuse' to leave your home to participate in a protest. However, given the list is non-exhaustive and protest activity engages fundamental human rights under the ECHR (to freedom of assembly and expression etc) it would appear disproportionate to interpret regulation 5 as not permitting a person to leave their home for *any* expressive activity (which would include a one-person protest).

The most common form of expressive free assembly from the initiation of the regulations was the weekly clap for NHS and other essential workers whereby individual households congregated to clap at 8pm each Thursday. Save for persons with front gardens, this technically, in standing on the pavement, involved leaving your residence. Presumably, however, this socially distanced activity was rightly read as constituting a 'reasonable excuse' to leave your home.

On 19 May 2020 an amendment to the regulations added further 'reasonable excuses' to the explicitly permitted reasons to leave your residence, two of which were to take part in 'outdoor activity' and 'outdoor gatherings'.[47] Both concepts can be interpreted as permitting persons to leave their home for *inter alia* protest activity although neither is defined. The 'outdoor gathering' provision was linked to a new regulation 6A, which permitted 'outdoor gatherings' of up to six persons who are not members of the same household (or any number of persons who are members of the same household).

6 Regulations 6 and 6A – restrictions on gatherings

The original regulation 6 prohibited all gatherings *in a public place* subject to several limited exemptions.[48] This changed on 19 May 2020 when the restrictions became subject to regulation 6A on 'outdoor gatherings' of up to six persons. Regulation 6A is not qualified to a public place with the intention that it would also cover private spaces such as gardens.[49] The formulation of regulation 6A is, however, permissive, unlike regulation 6 which imposes a prohibition (but does not apply to private spaces, albeit persons from outside a household would still need a 'reasonable excuse' under regulation 5 to attend a gathering in a private space).

45 PSNI, 'Chief Constable's written report to Northern Ireland Policing Board, Thursday 7th May 2020 – COVID-19' (7 May 2020) paragraph 4(b)(f)(g) <www.psni.police.uk/news/Latest-News/070520-chief-constables-written-report-to-northern-ireland-policing-board-thursday-7th-may-2020----covid-19/>.

46 Amnesty International UK and CAJ (n 6).

47 Health Protection (Coronavirus, Restrictions) (Amendment No 3) Regulations (Northern Ireland) 2020 NISR 2020.84, regulation 2(3).

48 These exemptions included where all persons were from same household; for essential work purposes; to attend a funeral (although regulation 5(g) usually restricts attendees to household members and close family); or when 'reasonably necessary' to provide care, emergency assistance, fulfil a legal obligation or move house. In addition to qualified exemptions subsequently being added for marriage ceremonies, drive-in entertainment/worship.

49 Minister Lyons, Northern Ireland Assembly Official Report (16 June 2020, 5.30pm) Health Protection (Coronavirus, Restrictions) (Amendment No 4) Regulations (Northern Ireland) 2020.

In the NI COVID-19 Regulations, there is no interpretation of the term 'gathering'. The equivalent provision in COVID-19 regulations in England defines gathering (from 1 June 2020) as 'when two or more people are present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other'.[50]

The application of the regulations to protests became particularly controversial from Saturday 6 June 2020 in relation to the policing operation over Black Lives Matter protests in Belfast and Derry-Londonderry. Despite efforts to ensure social distancing at the protest, around 70 fines or CNRs were issued to anti-racism protestors, mostly at the Derry protest, with PSNI officers expressly citing breaches of regulation 6A over 'gatherings' of more than six persons. Contrast was also drawn with a counter-protest to the anti-racism protests the following Saturday (13 June 2020, the 'protect our statues' protest) where no fines or CNRs were issued, although evidence was gathered.[51] Complaints from Black Lives Matter protestors led to the Police Ombudsman launching an investigation into PSNI consistency in enforcing the NI COVID-19 Regulations at large gatherings.[52]

The enforcement action against anti-racism protestors prompted, among other matters, questions as to how 'gathering' was being interpreted, given that the protest organisers had gone to considerable efforts to ensure social distancing. This contrasted to a number of large social gatherings that had taken place prior to the Black Lives Matter protests and had not reportedly faced such enforcement action. Comparisons were even made between socially distanced protests and distanced queues for supermarkets, and in particular the IKEA Belfast store (the reopening of which had drawn considerable numbers).[53] Whilst an IKEA or supermarket queue would not lend itself to constitute a 'gathering' under the definition in English regulations, the lack of a definition in the NI COVID-19 Regulations leaves this contention more open.

A related question therefore concerns whether the anti-racism protests of 6 June 2020 should have been treated as one 'gathering' or as numerous separate 'gatherings' due to the express efforts of organisers to ensure the protests were socially distanced. A comparator can be drawn with those who participated in the expressive activity of the NHS clap on the pavement who were not considered to be one gathering. A further comparative example occurred several days after the anti-racism protests. Reportedly, around 100 people lined the streets of Ballymena to pay respects at a funeral but did so with social distancing in place, and without similar PSNI intervention.[54] At the time of writing, however, there is considerable political upheaval in relation to the provisions of regulations and the funeral of a senior republican in Belfast on Tuesday 30 June 2020, at a time when outdoor gatherings of up to 30 persons (with recommended social

50 Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No 3) Regulations 2020 SI 2020/558, regulation 2(7).

51 PSNI, 'Statement from Assistant Chief Constable Barbara Gray' (13 June 2020) <www.psni.police.uk/news/Latest-News/130620-statement-from-assistant-chief-constable-gray/>.

52 Police Ombudsman, 'Police Ombudsman to look at how police have enforced regulations on large public gatherings' (17 June 2020) <www.policeombudsman.org/Media-Releases/2020/Police-Ombudsman-to-look-at-how-police-have-enforc>.

53 See *BBC News* (n 6) and 'Coronavirus: long queues form as Ikea in Belfast reopens' *BBC News NI* (Belfast, 1 June 2020) < www.bbc.co.uk/news/uk-northern-ireland-52875389>.

54 'Funeral of Liam Neeson's mother Kitty held in Ballymena' *Belfast Telegraph* (Belfast, 9 June 2020) <www.belfasttelegraph.co.uk/entertainment/news/funeral-of-liam-neesons-mother-kitty-held-in-ballymena-39271444.html>.

distancing) were permitted. This has again raised questions, among other matters, as to whether large numbers of people lining the route of a funeral are to be treated as one or numerous separate gatherings, or even as part of the funeral.[55]

There are therefore significant legal certainty issues with the definition and interpretation of 'outdoor gathering', including when gatherings are to be considered as one or numerous different gatherings. As well as the policing operation itself, a further point of concern in relation to the application of the regulations related to the extension of enforcement powers over regulation 6A on the eve of the protests. This is explored further below.

7 Amendments to the NI COVID-19 Regulations, always 'by reason of urgency'?

The NI COVID-19 Regulations (of 28 March 2020) were first amended on 24 April 2020. By 30 June 2020, nine further amendment regulations had been made. All but the first amendment regulation have followed the NI Executive publishing (on 12 May 2020) its roadmap *Coronavirus: Executive Approach to Decision Making*, providing for a five-step process to move out of lockdown.[56]

Many amendments have therefore been to implement a gradual relaxation of restrictions. There have, however, also been 'technical' amendments, presumably to correct earlier oversights, gaps or drafting errors.[57]

The aforementioned regulation 6A permitting outdoor gatherings of up to six persons not from the same household was announced by the NI Executive on Monday 8 May 2020.[58] Accordingly and unsurprisingly, from Tuesday morning many persons went outdoors to meet family members and friends from outside their household for the first time since the lockdown. Technically, however, such gatherings during the daylight hours breached the regulations. The required amendment was not ultimately laid before the Assembly until 9am on Wednesday 20 May 2020 with it retrospectively coming into force on the Tuesday night at 11pm.[59] Whilst this issue many have passed largely unnoticed, it does highlight the risk of a brief gap between policy announcements and necessary legal changes.

Whilst from 19 May 2020 'outdoor gatherings' were permitted under regulation 6A, no consequential amendment was made to the regulations to extend the enforcement powers and offences for breaches of regulation 6A at the time. Amendment regulation No 4, of 21 May 2020, also did not make this change. The change was ultimately made by amendment regulation No 5 and proved controversial. The amendment was made and laid before the Assembly at 3pm and 5pm respectively on Friday 5 June 2020. Whilst other changes brought in by amendment No 5 did not come into force until 11pm on Sunday 7 June 2020, the provision that made regulation 6A an enforceable offence instead came into force at 11pm on the Friday itself – 5 June 2020 . The significance of this was

55 See, for example, Northern Ireland Assembly Official Report (30 June 2020, 5.30pm) Health Protection (Coronavirus, Restrictions) (Amendment No 5) Regulations (Northern Ireland) 2020.

56 The Executive Office, 'Executive publishes coronavirus recovery strategy' (12 May 2020) <www.executiveoffice-ni.gov.uk/news/executive-publishes-coronavirus-recovery-strategy >.

57 See, for example, amendments made by the Health Protection (Coronavirus, Restrictions) (Amendment No 2) Regulations (Northern Ireland) 2020 NISR 2020/82, regulation 2(4)(a); 2(5)(a).

58 The Executive Office, 'Executive daily update: initiatives to deal with coronavirus' (18 May 2020) <www.executiveoffice-ni.gov.uk/news/executive-daily-update-initiatives-deal-coronavirus-18-may-2020>.

59 Health Protection (Coronavirus, Restrictions) (Amendment No 3) Regulations (Northern Ireland) 2020 NISR 2020/84.

that the PSNI were then able to use the newly extended powers the following day at the Black Lives Matter protests.[60]

Among other matters, this brings into focus the use of the 'emergency procedure' to make amendments to the regulations. As set out above, the PHANI 1967 regulation-making powers have a standard procedure, under section 25P, requiring prior Assembly scrutiny, and an 'emergency procedure' under section 25Q whereby 'by reason of urgency, it is necessary to make the regulations without a draft being so laid and approved'. To date, however, *all* amendments to the NI COVID-19 Regulations have relied on the section 25Q emergency procedure. In human rights terms, amendments that actually ease restrictions will raise few issues, however, the difference with the amendment to regulation 6A was that it *extended* criminal offences. It is at best questionable whether this was necessary 'by reason of urgency' in advance of anti-racism protests, in a context whereby powers to enforce regulation 6A had not been available for several weeks since its introduction and other large gatherings had taken place.

One explanation for this was that the Department of Health intentionally fast-tracked the amendment and its commencement specifically to ensure the powers were available for the Black Lives Matter protests. Unless objective and reasonable justification for doing so can be provided, this would raise questions of differential and discriminatory treatment. An alternative explanation is that the timing of the amendment and its commencement were coincidental: the Department of Health was merely using the opportunity of a further amendment to make a technical fix to a previous drafting error. Whilst this account would not explain the accelerated commencement, it would also prompt questions as to whether the use of the section 25Q 'emergency procedure' was appropriate.

On 16 June 2020, the TEO Junior Minister Gordon Lyons MLA addressed the Assembly on the matter. The Minister stated the lack of enforcement powers over regulation 6A had been a 'drafting error' that was 'noticed and corrected on the same day' (ie 5 June 2020) by amendment regulation No 5. The Minister also stated that the PSNI had been 'unaware of the drafting error until it was drawn to their attention on the afternoon of the 5th June' but that he had been advised that the PSNI between 19 May and 5 June 2020 had not issued any fines (fixed penalty notices) for breaches of regulation 6A. The Minister added that the 'timing of the Black Lives Matter protest was purely coincidental, but the enforcement of the regulations is a matter for the PSNI'.[61] This draws further questions as to whether it was appropriate therefore to use the emergency procedure to extend criminal offences and related enforcement powers that the PSNI had apparently had no need for in the weeks from 19 May 2020 until the anti-racism protests.

On 11 June 2020 a further amendment regulation, No 6, amended the regulation 6A provision on 'outdoor gatherings' to increase the permitted number from six to 10 persons.[62] However, in a seemingly further drafting error, a consequential amendment was not made to the enforcement powers over regulation 6A meaning the PSNI were still

60 Health Protection (Coronavirus, Restrictions) (Amendment No 5) Regulations (Northern Ireland) 2020 NISR 2020/96, regulation 1(3).

61 Northern Ireland Assembly Official Report (16 June 2020, 5.30pm) Health Protection (Coronavirus, Restrictions) (Amendment No 4) Regulations (Northern Ireland) 2020.

62 Health Protection (Coronavirus, Restrictions) (Amendment No 6) Regulations (Northern Ireland) 2020 NISR 2020/103.

empowered to disperse gatherings of seven or more (rather than 11 or more) persons.[63] This was ultimately rectified on 25 June 2020 by amendment regulation No 8.[64] Subsequently amendment regulation No 9 extended the numbers for gatherings under regulation 6 or 6A to 30 persons.[65]

8 Legal certainty and publicly available information on the NI COVID-19 Regulations

A Department of Health website, with some short delays, has largely been the first place regulations are published, ahead of the statute law database.[66] This website initially provided no further information beyond links to the original NI COVID-19 Regulations and each amendment regulation. This finally changed on 5 June 2020 when accessible guidance was uploaded on the scope of the regulations.[67] A consolidated version of the regulations was also not uploaded until 12 June 2020. Prior to this, readers would have needed to piece together the various amendment regulations themselves.[68]

During this time the PSNI COVID-19 information website deferred to this Department of Health website and was otherwise limited to setting out what were the penalties for infractions against the regulations.[69] The Public Health Agency public information website also made only passing reference to some provisions in the NI COVID-19 Regulations.[70] The NI Direct website also contained limited information.[71]

Whilst some remedy was eventually provided on 5 June 2020, prior to this for over two months following the initial commencement of the NI COVID-19 Regulations no guidance accessible to the public that accurately reflected the scope of far-reaching emergency law was readily available.

9 Enforcement powers

Regulation 7 relates to powers to enforce the NI COVID-19 Regulations. Regulation 7(1) ominously and with echoes of the vagueness and arbitrary nature of the Special Powers Acts originally provided that: 'A relevant person may take such action as is necessary to

63 Health Protection (Coronavirus, Restrictions) (Amendment No 8) Regulations (Northern Ireland) 2020 NISR 2020/118, regulations 2(7) and 1(2).

64 Health Protection (Coronavirus, Restrictions) (Amendment No 9) Regulations (Northern Ireland) 2020 NISR 2020/121, regulations 2(3)(a) and 2(4).

65 See regulation 7(9A) of the NI COVID-19 Regulations (as amended up to Amendment No 6).

66 Department of Health, Health Protection (Coronavirus, Restrictions) (Northern Ireland) Regulations 2020 <www.health-ni.gov.uk/publications/health-protection-coronavirus-restrictions-northern-ireland-regulations-2020> (first published 28 March 2020, version updated 30 June 2020). The Statute Law Database is found at <www.legislation.gov.uk>.

67 Department of Health, 'Guidance on the restrictions in Northern Ireland and Public Health Advice' (5 June 2020 and subsequently updated 12 June 2020) <www.health-ni.gov.uk/publications/health-protection-coronavirus-restrictions-northern-ireland-regulations-2020>.

68 Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 NISR 2020/55 (consolidated to include SR 2020/71, SR 2020/82, SR 2020/84, SR 2020/86, SR 2020/96 & SR 2020/103) <www.health-ni.gov.uk/publications/health-protection-coronavirus-restrictions-northern-ireland-regulations-2020>.

69 PSNI (n 40).

70 Public Health Agency, 'COVID-19: information for the public', namely 'only go outside for permitted shopping, health reasons, work or exercise. If you go out, stay 2 metres (6ft) away from other people at all times. Groups of 4–6 people who do not share a household can meet outdoors, maintaining social distancing' <www.publichealth.hscni.net/covid-19-coronavirus/covid-19-information-public>.

71 NI Direct, 'Coronavirus (COVID-19): staying at home and self-isolation' <www.nidirect.gov.uk/articles/coronavirus-covid-19-staying-home-and-self-isolation>.

enforce any requirement imposed by regulation 3, 4 or 6'. This therefore covers regulations 3 and 4 (duties to close businesses and premises etc) and regulation 6 on public gatherings. (Enforcement over regulation 6A/6B was subsequently added.)

A 'relevant person' means a police officer or anyone else designated by the Department of Health for this purpose (to date on 15 May 2020 one designation order was also issued covering council officers).[72]

In relation to enforcement of the 'stay at home' rule, regulation 7(3) provides powers to direct a person to return to their residence, or remove them to same, when a relevant person 'considers' they have left their home without reasonable excuse. Save for the provision to 'direct a person to return' home being interpreted as permitting stopping that person, there are no stop and question powers or other provisions to facilitate officers ascertaining (where not obvious) whether a person has a reasonable excuse for being outside their residence.

10 Passenger quarantine: the other NI COVID-19 regulations

Two further and separate emergency regulations were made by the Department of Health on Friday 5 June 2020 using the modified PHANI 1967 powers.[73] These regulations were the statutory basis for a 14-day quarantine (through self-isolation) rule on incoming passengers as a preventative measure against imported cases of COVID-19 and came into force on Monday 8 June 2020 to coincide with similar regulations in England.

There was some prior, but limited, Assembly scrutiny of these regulations. In part due to the policy not being signed off despite such a system having been under discussion for some time.[74] The Irish government initiated its system on 24 April 2020.[75] The UK government confirmed its intention to take this measure as part of its COVID-19 recovery strategy in early May, with a subsequent ministerial statement setting out that devolved administrations would need to set out their own enforcement approaches.[76]

In common between Ireland and the UK are requirements on incoming passengers to fill in a COVID-19 passenger locator form, usually providing their details and address at which they will self-isolate for 14 days. The main difference is that the UK government draws its COVID-19 quarantine border around the whole CTA (the open border zone consisting of the UK, Ireland, Channel Islands and Isle of Man). The Irish government

72 Department of Health, 'Designations under the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020' (15 May 2020) <www.health-ni.gov.uk/publications/health-protection-coronavirus-restrictions-northern-ireland-regulations-2020>.

73 The main provisions are found in the Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020 NISR 2020/90. A second regulation made at the same time – the Health Protection (Coronavirus, Public Health Advice for Persons Travelling to Northern Ireland) Regulations (Northern Ireland) 2020 – *obliged* airlines/ferry companies on services directly to Northern Ireland from outside the Common Travel Area to provide information about the NI quarantine rules.

74 Committee for Health, Minutes of Proceedings and Minutes of Evidence (28 May 2020), item 6: 'SL1 The Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020'.

75 This was then set up on a statutory basis from 28 May 2020 under the Health Act 1947 (Section 31a – Temporary Requirements) (COVID-19 Passenger Locator Form) Regulations 2020 <www.irishstatutebook.ie/eli/2020/si/181/made/en/print>.

76 Home Office, 'Home Secretary announces new public health measures for all UK arrivals' (22 May 2020) <www.gov.uk/government/news/home-secretary-announces-new-public-health-measures-for-all-uk-arrivals>. For a broader narrative on the background see: CAJ, 'COVID 19, passenger quarantine and the Common Travel Area (CTA): how are requirements for 14 day self-isolation intended to work in the CTA?' (May 2020) <https://caj.org.uk/2020/05/19/covid-19-passenger-quarantine-and-the-common-travel-area-cta/>.

meanwhile (presumably in the context of the very high number of COVID-19 cases in Great Britain) draws its boundary around the island of Ireland, exempting passengers that travel from NI, but not those who travel from the island of Britain.

The passenger quarantine regulations have been controversial with the airlines and airports. In response to criticism from Belfast International Airport that the quarantine rules were 'ill-timed, ill-thought through and illogical' and a 'crazy, crazy idea', the First Minister Arlene Foster reportedly told *Good Morning Ulster* that the quarantine measures were a 'reserved issue' that the UK government would review every three weeks.[77] The NI regulations were, however, made by the NI Department of Health and are subject to review by the NI Department of Health every three weeks.[78]

The NI COVID-19 Regulations are made by powers under the PHANI 1967 that make reference to international rather than domestic passengers and follow the UK government position of drawing the boundary around the CTA.[79] In practice, this means inbound passengers to NI from places like Germany and Greece, with low COVID-19 rates, are subject to the 14-day self-isolation rule, but passengers on flights and ferries from England, where rates are high, are not.

The NI regulations do have the air of having been overly copied and pasted from their English equivalents. This is notable in the almost identical schedule 2 on exemptions to the NI self-isolation regulations that, among other matters, cover Channel Tunnel train crews and maintenance workers.[80] Whilst this addition may be immaterial, more problematic are provisions that relate to incoming passengers entering NI over the land border. This is manifest in obligations for the UK passenger locator form to be provided 'on arrival' in NI and in the definition of 'transit passengers'.

The NI (and England) international passenger regulations close what had been termed the 'Dublin loophole' in the UK media. This referred to passengers returning to the UK re-routing their journey through Dublin airport to evade the UK quarantine requirements. This issue is addressed by applying the self-isolation rules to arrivals who have been outside the CTA in the preceding 14 days.[81] The NI regulations do not, however, close the 'Belfast loophole' whereby, for example, London-based employees of a company travelling to Dublin re-route their journey via a London–Belfast flight with onward bus travel to Dublin. This risks creating public health issues at NI transport hubs should it happen on a significant scale.

A more immediate question relates to passengers arriving in Dublin Airport who then travel to NI either as NI residents or in 'transit' to Donegal.

Whilst the PHANI 1967 powers provide for the implementation of international agreements, no arrangement was entered into with the Irish government for reciprocal use of data from the UK and Irish passenger locator forms respectively (a reciprocal arrangement is in place if the form is completed in England, Scotland or Wales).

By way of illustration, the process for an NI resident arriving from outside the CTA into Belfast International Airport is fairly simple. Their travel operator under law will have had to

77 'Coronavirus: Quarantine "stake through the heart" of airport' *BBC News NI* (Belfast, 15 June 2020) <www.bbc.co.uk/news/uk-northern-ireland-53036386>.

78 Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020, SRNI 2020/90, regulation 11.

79 Specifically, temporarily inserted sections 25B and 25F(2).

80 Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020, SRNI 2020/90, schedule 2, paragraph 12.

81 Ibid regulation 3(1)(b) and 4(1)(b).

provide information on the self-isolation and form-filling requirements. The UK passenger locator form can be filled in online up to 48 hours before arrival, or in person at passport control on arrival at the airport where facilities will be available (the UK form is digital).

By contrast, it is not clear how an NI resident landing into Dublin Airport from outside the CTA can do this. They will fill in the Irish government's passenger locator form at passport control (ticking the exemption for onward travel to NI). However, the passenger is then required by law to provide the UK passenger locator form 'on their arrival' in NI. This provision does not appear to anticipate the common scenario whereby the passenger will be arriving in NI in a moving vehicle across the land border where there is no passport control. Nevertheless, this passenger will commit an offence for not providing the UK form 'on their arrival' (subject to a reasonable excuse defence).[82] Whilst the passenger can also provide the UK form up to 48 hours before arrival, it is not clear how the passenger will know this, or how passengers without a smartphone will fill it in.[83] Whilst NI law cannot place requirements in another jurisdiction, it is unclear why a reciprocal arrangement was not entered into to address this. Rather discussions were described as still 'ongoing' on matters such as information panels in each other's airports after the NI regulations had commenced.[84]

A further question faces passengers *transiting* through NI over land: for example, a resident of Donegal returning home having landed back in Dublin Airport from outside the CTA. Unlike NI residents transiting home over land through the Republic, there is no exemption for such persons. This is as the definition of 'transit passenger' in the NI regulations (mirroring that of its English counterpart) is drafted to only cover passengers who do not enter the jurisdiction (ie those passing through an airport international transit lounge).[85] The passenger is therefore required to know about and fill in the UK passenger locator form online 'on arrival' at the land border (or 48 hours before). However, it is not clear if the form can be completed satisfactorily, as it has to include a UK address at which the passenger is to self-isolate.[86] Details required of any onward travel from the UK also do not appear to contemplate a journey by car.[87] In addition to duties and related offences as regards filling out the UK form, such passengers are not among the exemptions to the requirement to self-isolate in NI.[88] Whilst the self-isolation requirement can end on departure from NI, this does not in itself remove the requirement.[89] Similar issues also arise for Donegal residents who return home via an NI airport. In summary, the provisions contain significant ambiguities in relation to their application to the land border.

82 Ibid regulation 3(2) and 6(1)(a).

83 For further detail, see: CAJ, 'Passenger quarantine and the Common Travel Area: the Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020 (CAJ Briefing Note No 2, June 2020) <https://caj.org.uk/2020/06/12/passenger-quarantine-and-the-cta/>.

84 Freya McClements, 'NI Executive seeks panels in ports and airports outlining quarantine rules' *Irish Times* (Dublin, 9 June 2020) <www.irishtimes.com/news/ireland/irish-news/ni-executive-seeks-panels-in-ports-and-airports-outlining-quarantine-rules-1.4274983>.

85 Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020, SRNI 2020/ 90, schedule 2, paragraph 5(2)) provides: "'transit passenger" means a person who, on arrival in the United Kingdom, passes through to another country or territory without entering the United Kingdom'".

86 Ibid schedule 1, paragraph 2(a)).

87 Ibid schedule 1, paragraph 2(J)).

88 Ibid. Exemptions (eg diplomats, cabin crew, transport workers) are set out in regulation 4(12)(d) and schedule 2.

89 Ibid regulation 4(7).

Conclusion

Whilst the NI COVID-19 Regulations may enjoy the novelty of being the only emergency legislation in Northern Ireland's existence that has garnered universal mainstream political support, they have not been without their problems.

The UK government, rather than relying on existing powers, rushed through the vast Coronavirus Act 2020. This amended existing Stormont-era public health legislation to vest wide regulation-making powers in the NI Department of Health. Health officials dealing with the broader pandemic have therefore been managing the NI COVID-19 Regulations, which include criminal offences and enforcement powers more familiar to justice officials.

Despite the duties under Article 2 ECHR to ensure prompt, effective investigations into certain deaths where acts or omissions of public authorities might have played a role, the Coronavirus Act 2020 temporarily amends NI coronial legislation to limit duties to notify the coroner of deaths. Whilst the Presiding Coroner has confirmed there is no intention in NI to issue guidance similar to the controversial provisions in England and Wales (that told coroners not to look at matters such as PPE shortages), similar provisions to those in Scotland (where instructions have been issued that deaths of frontline workers and care home residents must be referred to the coroner) have not been taken forward to date in NI.

Despite the decree-like nature of emergency regulation-making powers, regularly shifting policy necessitating resultant legislative amendments has been characterised by some gaps, errors and confusion. It took over two months for any accurate and duly updated official guidance on the scope of COVID-19 regulations to appear on an official website and slightly longer for a consolidated version of the regulations (that by then had been amended six times) to be made available.

Whilst the initial urgency to implement lockdown is apparent and many subsequent measures have eased lockdown, an 'emergency procedure' has been used for each amendment without prior Assembly scrutiny. This included to controversially extend criminal offences over gatherings on the eve of Black Lives Matter protests. There remain inconsistencies and ambiguities as to how, for example, 'gathering' is interpreted in relation to protest activity. There are also questions as to why an amendment to deal with what had been described as a drafting error to extend enforcement powers over outdoor gatherings became so 'urgent' on the eve of anti-racism protests, when the PSNI had hitherto neither tried to use such a power nor even noticed they did not have it.

A further set of NI-based regulations enforces a 14-day passenger self-isolation rule for persons entering NI from outside the UK–Ireland CTA. In part due to possible over-replication of provisions designed for England and the lack of a reciprocal agreement with the Irish government there are significant problems with these provisions. This is particularly the case for persons landing in Dublin airport who re-enter, or transit through NI via land and may unwittingly be caught by criminal offences given the construction of the regulations does not adequately anticipate such a scenario.

Whilst the current trajectory is for the easing of regulations, it is more than possible any second wave of the virus will prompt reintroduction as has happened in other places. There are plenty of lessons learned to be addressed in the interim.

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The legalisation of same-sex marriage in Northern Ireland

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Abstract

The saga which led to the legalisation of same-sex marriage in Northern Ireland offers some important lessons about the processes of law-making for that jurisdiction, together with broader lessons about how the European Convention on Human Rights could be applied in strategic litigation elsewhere. This commentary analyses four episodes in that saga. It begins by evaluating several failed attempts to achieve legalisation at the Northern Ireland Assembly, before considering two legal challenges which also failed in the High Court of Northern Ireland. The developments which eventually led to legal change through the Parliament of the UK are assessed thereafter, followed by an appraisal of the most significant legal features in a set of judgments handed down by the Court of Appeal in Northern Ireland shortly afterwards. It is concluded, in particular, that lessons in connection with how petitions of concern are deployed in the devolved legislature, as well as lessons about how the prohibition on discrimination contained in Article 14 of the Convention has been interpreted, are deserving of wider circulation and appreciation among LGBT rights campaigners in Northern Ireland and beyond.

Keywords: Northern Ireland; same-sex marriage; human rights; LGBT.

Introduction

The UK as a whole now recognises same-sex marriage in the domestic law of its three jurisdictions. This reform was first introduced to England and Wales by way of legislation which passed without serious controversy in 2013,[1] before being introduced to Scotland by way of similar legislation that passed by an even greater parliamentary majority at the devolved level in 2014.[2] Following a referendum, the Republic of Ireland also changed its law in 2015.[3] However, harmonising the law of Northern Ireland with these

1 Marriage (Same Sex Couples) Act 2013. See Lynne Featherstone, *Equal Ever After* (Biteback 2016).

2 Marriage and Civil Partnership (Scotland) Act 2014. See Kenneth McK Norrie, 'Civil partnership in Scotland 2004–14, and beyond' in Nicola Barker and Daniel Monk (eds), *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge 2015). Norrie records that in the Scottish Parliament the outcome of the final vote on same-sex marriage was 105 in favour to 18 against, which he contrasts with the Third Reading of the Marriage (Same Sex Couples) Bill in the House of Commons, which passed with 366 in favour to 161 against.

3 Marriage Act 2015. See Brian Tobin, 'Marriage equality in Ireland: the politico-legal context' in Frances Hamilton and Guido Noto La Diega (eds), *Same-sex Relationships, Law and Social Change* (Routledge 2020).

neighbouring jurisdictions was a prolonged enterprise, such that regulations providing for same-sex marriages there were not commenced until 13 January 2020.[4]

Within the Council of Europe, the UK is now one of 16 out of 47 member states to provide for full legal recognition of same-sex marriages. Those 16 states fall predictably onto the Western side of the map, however, with most Central and Eastern member states refusing to recognise same-sex relationships even by way of civil partnerships and similar alternatives to marriage.[5] The prolonged process of legalisation in Northern Ireland is likely to be of interest to law reform activists in those member states where traditional familial paradigms still prevail over the campaign for LGBT rights,[6] not least because social attitudes in Northern Ireland have long been characterised by similar strands of social conservatism.[7]

Indeed, this commentary seeks to outline four significant episodes in the saga which led to the legalisation of same-sex marriage in Northern Ireland for two related reasons. First, it is submitted that they offer general lessons about the processes for law-making in Northern Ireland. Second, it is suggested that they can contribute meaningfully to wider debates about the appropriate interpretation of the right to respect for private and family life (Article 8), the right to marry (Article 12) and, above all, the prohibition on discrimination (Article 14 and Protocol 12)[8] under the European Convention on Human Rights (ECHR). The episodes we have identified to this end are outlined chronologically in each of the next four segments of this commentary, followed by a number of summative observations about the saga in its entirety.

Episode 1: the Northern Ireland Assembly

Between 2012 and 2015, five successive debates and votes on the question of same-sex marriage were held in the Northern Ireland Assembly. Although the last of these, in November 2015, saw a majority of voting Members of the Legislative Assembly (MLAs) do so in favour of legislating for same sex marriage in Northern Ireland, this vote, like the four before it, was subject to the special cross-community support arrangements necessitated by a petition of concern.[9] When deployed by members of the Democratic Unionist Party (DUP) on each of the five occasions noted, this mechanism had the effect of requiring either 'parallel consent' or a 'weighted majority' before the associated measures

4 Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019. See 'Episode 3' below.

5 For an analysis of related phenomena when viewed from the perspective of the EU, see Richard C M Mole, 'Nationalism and homophobia in Central and Eastern Europe' in Koen Slootmaeckers, Heleen Touquet and Peter Vermeersch (eds), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave Macmillan 2016).

6 It is acknowledged that some feminist and LGBT activists do not regard same-sex marriage as a particularly desirable paradigm either. Barker, for instance, suggests that it 'makes lesbians and gays complicit in the labelling of casual sexual encounters as not responsible' and that 'it forecloses more imaginative kinship possibilities that move away from the privatized, nuclear family model'. See Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2012) 15. Also see Ryan Conrad (ed), *Against Equality: Queer Critiques of Gay Marriage* (Against Equality Publishing 2010).

7 See Frank Cranmer and Sharon Thompson, 'Marriage and civil partnership in Northern Ireland: a changing legal landscape' (2018) 30 Child and Family Law Quarterly 301.

8 Article 14 prohibits discrimination in 'the enjoyment of rights set forth in the Convention', whereas Protocol 12 provides for a general prohibition of discrimination in 'the enjoyment of any right set forth by law'. Protocol 12 has not been signed or ratified by the UK, but its interpretation is significant elsewhere.

9 Northern Ireland Act 1998, section 42.

could have advanced any further on the legislative agenda of the Assembly.[10] These political manoeuvres did not take place without some constitutional controversy, however, since the petition of concern had been conceptualised as a mechanism intended 'to manage divisive issues relating to nationalist or unionist culture and political identity, the institutions set up under the [Belfast (Good Friday)] Agreement or the legacy of the conflict'.[11] As such, the following overview of the five Assembly debates on same-sex marriage should be read with this conceptualisation of the petition of concern firmly in mind.

The first vote, which was defeated by 50 votes to 45 in October 2012, related to a short motion calling on the relevant Minister to 'introduce legislation' that would give effect to the belief that same-sex couples 'should have the right to marry in the eyes of the State'.[12] In opening the Assembly debate on this motion, the leader of the local Green Party at the time, Steven Agnew MLA, chose to frame his first submissions in the language of 'religious freedom'.[13] Mr Agnew referred in particular to 'devout Christian' couples of the same sex, who, due to the constraints of the Civil Partnership Act 2004, could not incorporate religious expression into any aspect of their ceremonies.[14] The arguments made by MLAs opposed to the 2012 motion were several and varied, but it suffices for our purposes to note that the opposition fell into three broad themes. First, it was suggested that the redefinition of marriage to encompass same-sex relations would represent the thin end of an ideological wedge. The possibility of the Assembly someday legislating for polygamous marriages, for instance, was raised more than once by Jim Allister MLA of Traditional Unionist Voice (TUV).[15] Second, it was argued that the right to a civil partnership was enough to satisfy the human rights obligations of the Assembly arising under the ECHR, and that same-sex marriage was therefore an unnecessary development. Third, concern was expressed in connection with the idea that religious organisations would find themselves subject to human rights litigation were they to refuse the celebration of same-sex marriages in their buildings.

The 2012 vote was followed in the debates of 2013, 2014 and 2015 by three more motions.[16] Although these motions would have failed on a simple majority basis, a petition of concern had been tabled against each of them as a precautionary measure.[17] The motion of 2014 was brought by Sinn Féin and referred to the 'other jurisdictions on these islands'[18] that had legislated for same-sex marriage (though, by this year, this could only have referred to other parts of the UK). In April 2015, a further motion tabled by Sinn Féin was introduced in the knowledge that a referendum on whether to amend the Constitution of Ireland 'to permit marriage to be contracted by two persons without distinction as to their sex' would take place the following month.[19]

10 Ibid, section 4(5). The 'parallel consent' method requires the support of a majority of the members voting, a majority of the designated nationalists voting and a majority of the designated unionists voting, whereas the 'weighted majority' method requires the support of 60 per cent of the members voting, 40 per cent of the designated nationalists voting and 40 per cent of the designated unionists voting.

11 Christopher McCrudden et al, 'Why Northern Ireland's institutions need stability' (2016) 51 Government and Opposition 30, 50–51.

12 Northern Ireland Assembly, Official Report (Hansard), 1 October 2012.

13 Ibid.

14 Ibid.

15 Ibid.

16 Northern Ireland Assembly, Official Report (Hansard), 29 April 2013; 29 April 2014; 27 April 2015.

17 Standing Order 28 of the Northern Ireland Assembly imposes a procedural requirement of advance notice where MLAs wish to present a petition of concern to the Speaker.

18 Northern Ireland Assembly, Official Report (Hansard), 29 April 2014.

19 See Tobin (n 3).

The final motion on same-sex marriage to come before the Assembly, in November 2015, was tabled on a cross-party basis, with members from Sinn Féin, the Green Party, and the Social Democratic and Labour Party (SDLP) joining forces.[20] The SDLP leader Colum Eastwood MLA opened this debate by emphasising that it was 'about civil marriage, not religious marriage'.[21] While this was a noticeable departure from the discourse used by Mr Agnew to introduce the debate on same-sex marriage three years previously, the change reflected a concerted emphasis on civil marriage in wider campaign efforts throughout the intervening time period.[22] In contrast, the basis and tenor of the contributions in opposition to the motion were very similar to those put forward on previous occasions. Mr Allister of the TUV, for instance, intervened in the debate to contend once again that same-sex marriage would be but one step on an inexorable path to polygamous marriage.[23] Notably, the Alliance Party MLA Trevor Lunn – who, as a local councillor, had once voted to block civil partnership ceremonies from taking place on council premises – responded to Mr Allister's 'silly points about polygamy'[24] by expressing his reconsidered view that 'marriage is the union of two people who love each other'.[25] It would become clear that Mr Lunn was not the only MLA to be persuaded by same-sex marriage advocates over the course of time when, following the conclusion of this debate, the November 2015 motion received a majority vote in its favour. Indeed, with the support of 53 members (41 nationalists, 4 unionists and 8 others) over the opposition of 52 members (51 unionists, 1 other), the simple majority which carried that motion would go on to infuse the next four years of activism in connection with the issue of same-sex marriage.

In fact, this episode in the saga which led to the legalisation of same-sex marriage had at least two longer-lasting effects. The first is that it would come to underpin several constitutionally charged debates about the way in which petitions of concern could damage the democratic credentials of the Assembly. While it is true that several criticisms of the petition of concern are 'overstated or misplaced' when viewed in light of the consociational system of government applicable to Northern Ireland,[26] it is also acknowledged that the procedure is open to abuse where it is 'used to block decisions which have nothing to do with community-specific nationalist or unionist interests'.[27] Given that community-specific considerations of this kind were noticeably absent from contributions to the Assembly debate in November 2015, several onlookers have interpreted this as a constitutionally unjustified abuse of the device.[28] Indeed, it is likely that this episode played an influential part in the reforms envisaged by the 'New Decade,

20 Northern Ireland Assembly, Official Report (Hansard), 2 November 2015.

21 Ibid.

22 A leading organisation behind the same-sex marriage movement called Love Equality, for example, defined itself as 'a campaign led by a consortium of organisations within Northern Ireland who are campaigning for the introduction of legislation in Northern Ireland for equal *civil* marriage for same sex couples'. See <https://loveequalityni.org/faqs/>. Emphasis added.

23 Northern Ireland Assembly, Official Report (Hansard), 2 November 2015.

24 Ibid.

25 Ibid.

26 See Rupert Taylor (ed), *Consociational Theory: McGarry and O'Leary and the Northern Ireland Conflict* (Routledge 2011).

27 McCrudden et al (n 11) 51.

28 See, for example, John McVey, *Reforming the Petition of Concern: From 'Concern' to Full Citizenship* (NIPSA 2019) 4.

New Approach' deal reached in January 2020, which included an agreement that use of the petition of concern 'should be reduced, and returned to its original purpose'.[29]

The second longer-lasting effect of this episode is that the Assembly has been prevented from deliberating on any of the details in connection with the legislation drafted in order to bring about same-sex marriage in Northern Ireland. In other words, the use of a 'pseudo-petition of concern'[30] has meant that the legislation later produced elsewhere to provide for same-sex marriage was deprived of input from the array of democratic representatives elected to the Assembly, whether in the plenary or the committee stages of the legislative process that would likely have followed the successful motion were it not for the requirement of cross-community support.

Episode 2: the High Court of Northern Ireland

Shortly after the legislative developments described above, two legal challenges were taken to the High Court of Northern Ireland in an effort to legalise same-sex marriage by reference to the evolutive human rights standards protected by the ECHR and given effect by the Human Rights Act 1998. Constitutional rights protected by the common law, such as the right to equality,[31] were not pressed in any of the proceedings.

The first case was initiated by an anonymised applicant known as *X* by way of a petition to O'Hara J in the Family Division.[32] Funded in part by the Public Interest Litigation Support Project, this challenge centred on a gay man who, after marrying his husband in London, sought a declaration recognising that his marriage was valid and subsisting under the law of Northern Ireland.[33] Given that legislation passed by the UK Parliament had provided that, under the law of Northern Ireland, 'a marriage of a same sex couple under the law of England and Wales is to be treated as a civil partnership formed under the law of England and Wales (and accordingly, the spouses are to be treated as civil partners)',[34] the court was effectively asked to interpret those provisions purposively in order to render them compliant with certain rights protected by the Human Rights Act 1998, or to make a declaration of incompatibility under that Act.

Following a somewhat cursory examination of the Strasbourg case law on Articles 8 and 12 of the ECHR,[35] the court decided that there was no basis for holding that there existed an obligation to provide for same-sex marriage under either of those rights. Moreover, the learned judge considered himself barred from adopting a more progressive domestic interpretation of the rights engaged by the case on account of higher court

29 *New Decade, New Approach* (January 2020) paragraph 9. Also see the ruling of the Court of Appeal in *Re Close's (Grainne) & Others' Applications* [2020] NICA 20 as set out under 'Episode 4' below.

30 McCrudden et al (n 11) 51.

31 See Colm O'Cinneide, 'Equality: a core common law principle, or "mere" rationality?' in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing 2020). Also see Brice Dickson, 'Common law constitutional rights at the devolved level', in the same volume.

32 *X's Petition* [2017] NIFam 12.

33 O'Hara J held at [15] that the right to a petition of this kind was provided by Article 31 of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989, notwithstanding several jurisdictional objections raised by the relevant department and by the Attorney General for Northern Ireland.

34 Marriage (Same Sex Couples) Act 2013, schedule 2(1), paragraph 2(1).

35 Article 9, the right to freedom of thought, conscience and religion, was also raised in argument, but the court did not believe that it merited a separate analysis. Article 14 was likewise raised in argument, but it was not so much as addressed in the judgment of the court. For a more thorough analysis of the Strasbourg case law as it stood around this time, see Helen Fenwick, 'Same sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the court's authority via consensus analysis?' (2016) 3 European Human Rights Law Review 249.

precedents suggesting that he could go no further than Strasbourg. One of the present authors has argued that, on the contrary, 'the future trajectory of Strasbourg jurisprudence on this issue is less than certain' and that 'it is within the powers of the senior judiciary to establish higher standards of human rights' than those enunciated at Strasbourg.[36] This latter viewpoint, in particular, is supported by several academic studies on the 'mirror principle' (in)famously delineated by the late Lord Bingham in *R (Ullah) v Special Adjudicator*.[37] Indeed, the clear finding that emerges from such studies is that 'domestic courts (and authorities, more generally) are not only allowed to go beyond Strasbourg jurisprudence, but are even expected to do so' in certain circumstances.[38] Some of the most recent research into this issue suggests that there are in fact at least six routes 'which might allow a judge to avert Strasbourg authority',[39] and highlights that a number of those routes were recently affirmed by the UK Supreme Court in *Hallam*.[40] In that case, the Supreme Court chose to follow a domestic precedent notwithstanding conflicting Strasbourg case law, but, as Graham has pointed out, some of the justices involved in the decision also felt able to 'justify a departure from clear, constant Strasbourg case law' on the ground that they simply disagreed strongly with it.[41] These studies, like the case law underpinning them, confirm beyond doubt that the interpretation of *Ullah* adopted by O'Hara J was highly contestable.

Before turning to significant developments which preceded the Court of Appeal's judgments, *X's Petition* must be distinguished from the separate High Court case decided alongside it in August 2017. The second case was initiated by a lesbian couple (Grainne Close and Shannon Sickles) and a gay couple (Christopher and Henry Flanagan-Kane) through an application for judicial review in the Queen's Bench Division,[42] though it was heard together with *X's Petition* before O'Hara J. Both couples were lawfully registered as civil partners in Northern Ireland.[43] Funded primarily by way of a personalised crowdfunding campaign, their challenge initially fastened upon the use of a petition of concern to obstruct the legalisation of same-sex marriage at the Northern Ireland Assembly. However, the fifth Assembly vote on this issue was worded in a way which called on the Northern Ireland Executive 'to table legislation to allow for same-sex marriage'.[44] As such, the motion in question did not carry any legislative weight in its own right, which is why, we suspect, 'that part of the case was not pursued'.[45]

Instead, the applicants in *Close* mounted a direct challenge against Article 6(6)(e) of the Marriage (Northern Ireland) Order 2003, which provides that, if both parties to a proposed marriage ceremony are of the same sex, that fact will constitute a 'legal impediment to marriage', meaning the Registrar General must take all reasonable steps to

36 Conor McCormick, 'Queerying petition X' (*Irish Legal News*, 25 August 2017) <https://www.irishlegal.com/article/ni-blog-queerying-petition-x>. Also see the text at nn 75–80 below.

37 [2004] UKHL 26; [2004] 2 AC 323 [20].

38 Nuno Ferreira, 'The Supreme Court in a final push to go beyond Strasbourg' [2015] Public Law 367, 369. Also see: Harry Woolf et al, *De Smith's Judicial Review* 8th edn (Sweet & Maxwell 2018) 734–737.

39 Lewis Graham, 'Hallam v Secretary of State: under what circumstances can the Supreme Court depart from Strasbourg authority?' (*UK Constitutional Law Association Blog*, 4 February 2019) <https://ukconstitutionallaw.org/2019/02/04/lewis-graham-hallam-v-secretary-of-state-under-what-circumstances-can-the-supreme-court-depart-from-strasbourg-authority/>.

40 *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279.

41 Graham (n 39).

42 *Close's (Grainne) & Others' Applications* [2017] NIQB 79.

43 Under the Civil Partnership Regulations (Northern Ireland) 2005.

44 Northern Ireland Assembly, Official Report (Hansard), 2 November 2015. Also see the text at (n 20) above.

45 *Close's (Grainne) & Others' Applications* [2017] NIQB 79 [3].

ensure such a marriage does not take place. O'Hara J dismissed the application for reasons largely indistinguishable from those underpinning the dismissal of *X's Petition*, though the court did express its interpretation of the Strasbourg case law in more emphatic terms. It was stated, for instance, that, even if it could be accepted that there was an international trend 'moving towards recognition of same sex marriage in more and more countries', there was '*no sign whatever* of the Strasbourg Court moving in that direction'.[46] These assessments are difficult to reconcile with a close reading of the case law, however, given that two Strasbourg judges had in fact highlighted in June 2016 that 'things may change' in so far as the court accords deference to the member states in deciding whether to legalise same-sex marriage.[47]

Episode 3: the Parliament of the UK

The institutions of devolved government for Northern Ireland came to a standstill in January 2017,[48] which meant that same-sex marriage advocates keen on bringing about law reform outside the courts were left with no alternative but to lobby for legislative change at Westminster. However, on account of the engrained nature of a constitutional convention providing that the UK Parliament would not normally legislate on devolved matters like marriage without the consent of the devolved legislature, it took some time before Westminster parliamentarians were willing to act.

Indeed, it was not until 27 March 2018 – over a year after the collapse of the devolved institutions – that the Conservative Party's Lord Hayward introduced a Private Member's Bill to the House of Lords 'to make provision for the marriage of same sex couples in Northern Ireland'.[49] Like the ten-minute-rule Bill introduced by Labour's Conor McGinn MP in the House of Commons the next day,[50] Lord Hayward's Bill made no further progress. Mr McGinn's speech to the Lower House explained that he had been moved to take action notwithstanding some reluctance to unsettle the devolution framework because it was his view that 'the Assembly being in cold storage should not mean that Northern Ireland remains a cold house for LGBT rights' and because same-sex marriage developments in other parts of the British Isles had left Northern Ireland in an 'anomalous' position.[51] The DUP released a statement in response to this failed attempt to change the law by way of a Private Member's Bill which expressed respect toward the fact that 'others take a different view on how marriage should be defined' but called for recognition of its 'mandated position' against the change.[52]

46 Ibid [15]. Emphasis added.

47 *Taddeucci and McCall v Italy* App no 51362/09 (30 June 2016), per the Concurring Opinion of Judge Spano, joined by Judge Bianku, citing *Schalk and Koph v Austria* App no 30141/04 (24 June 2010), paragraph 105.

48 For an explanation of the impasse, which finally ended in January 2020, see Brice Dickson, 'Devolution in Northern Ireland' in Jeffrey Jowell and Colm O'Cinneide, *The Changing Constitution* 9th edn (Oxford University Press 2019) 261–265.

49 Marriage (Same Sex Couples) (Northern Ireland) Bill [HL] 2017–19; HL Deb 27 March 2018, vol 790.

50 Marriage (Same Sex Couples) (Northern Ireland) (No 2) Bill [HC] 2017–19; HC Deb 28 March 2018, vol 638.

51 Ibid. See nn 1–3. Note, moreover, that same-sex marriage was made lawful in the Isle of Man by the Marriage and Civil Partnership (Amendment) Act 2016; in Guernsey by the Same-Sex Marriage (Guernsey) Law 2016; in Alderney by the Same-Sex Marriage (Alderney) Law 2017; and in Jersey by the Marriage and Civil Status (Amendment No 4) (Jersey) Law 2018. The Same-Sex Marriage (Sark) Law 2019 has since received Royal Assent and came into effect on 23 April 2020.

52 'MP quotes "wise men" in Camlough pubs as "same sex marriage" bill passes first stage' (*Armagh i*, 28 March 2018) <https://armaghi.com/news/northern-ireland-news/mp-quotes-wise-men-in-camlough-pubs-as-same-sex-marriage-bill-passes-first-stage/65511>.

The Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 directed the Secretary of State to issue certain guidance to senior officers of all the Northern Ireland departments, namely the civil servants who had assumed day-to-day responsibility for the running of devolved government during the political impasse. In particular, the Secretary of State was required by section 4(1)(b) to issue guidance on the 'incompatibility of the human rights of the people of Northern Ireland' with the continued enforcement of the prohibition on same-sex marriage, but the anodyne guidance produced by the Secretary of State did not lead to any substantive changes in practice.[53] Lord Hayward therefore made a further attempt to change the law in the early months of 2019 by way of an amendment to the Civil Partnerships, Marriages and Deaths (Registration etc) Bill.[54] This would have required the Secretary of State to make regulations providing for the introduction of same-sex marriage in Northern Ireland, but Lord Hayward was persuaded to withdraw his amendment in light of issues surrounding its 'phraseology and structure'.[55]

By July 2019, Northern Ireland had been without an Assembly and Executive for more than two years. In order to avoid the triggering of an election on account of the time limit on Executive formation set out in the Northern Ireland Act 1998, a Northern Ireland (Executive Formation) Bill was introduced to the Commons on 4 July 2019. The original purpose of the Bill was by then unremarkable: it would extend the ministerial appointment period provided for by the Northern Ireland Act 1998[56] and impose a duty on the then Secretary of State, Julian Smith MP, to report on progress towards the formation of an Executive in Northern Ireland.[57] When the Bill reached its Committee Stage in the Commons, however, Conor McGinn MP proposed the insertion of a clause which would require the Secretary of State to make regulations providing for same-sex marriage in Northern Ireland *unless* a Northern Ireland Executive was formed on or before 21 October 2019. The parliamentary debate on this motion was bookended by tributes to the lesbian journalist Lyra McKee, who had been killed in Londonderry three months previously and whose death had been associated with the 'political vacuum' created by the lack of an Executive.[58] A month after Ms McKee's funeral – which had been attended by senior politicians from both the UK and Ireland – her partner had called on the UK government to legislate for same-sex marriage in Northern Ireland at a rally in Belfast.[59] Mr McGinn's amendment passed through the House of Commons comfortably, albeit with the support of only one of the 18 MPs representing Northern Ireland constituencies.[60] The Bill then sailed through the House of Lords with similar levels of support after further amendments had been inserted to ensure that the regulations would include safeguards for the freedoms of religion and expression.

53 Northern Ireland Office, *Guidance Issued Under Section 4 of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018* (Cm 9749, December 2018) paragraphs 10–12.

54 HL Deb 1 February 2019, vol 795, col 1307.

55 HL Deb 1 March 2019, vol 796, col 414.

56 Clauses 1–2.

57 Clause 3.

58 See, for instance, HC Deb 9 July 2019, vol 663, col 187.

59 Henry McDonald, 'Lyra McKee's partner challenged UK government on same-sex marriage' (*The Guardian*, 18 May 2019) <https://www.theguardian.com/society/2019/may/18/lyra-mckee-partner-challenges-uk-government-on-same-sex-marriage-sara-canning-northern-ireland> .

60 Seven of these MPs belonged to Sinn Féin, however, meaning they did not vote in the division on account of that party's policy of abstentionism. See HC Deb 9 July 2019, vol 663, col 227.

Following the passage of the Northern Ireland (Executive Formation etc) Act 2019, it was expected that the Secretary of State for Northern Ireland would be placed under a legal duty to extend same-sex marriage to Northern Ireland in the form of regulations to be made on or before 13 January 2020[61] *unless* an Executive in Northern Ireland was formed on or before 21 October 2019 (in which case the duty would not come into force).[62] Similar duties to enable civil partnerships for opposite-sex couples and to liberalise the abortion laws applicable in Northern Ireland were included in this legislation, and, though these provisions fall largely outside the scope of this commentary, it should be noted that the latter duty in connection with abortion laws was the main cause of a failed attempt to revive the Assembly on 21 October 2019. This would have prevented all of the Secretary of State's associated duties from coming into effect, but, while the Assembly was successfully recalled on that date by virtue of a petition signed by 31 MLAs (27 DUP, 3 Ulster Unionist, 1 TUV), those who gathered in the Assembly chamber found themselves unable to elect a Speaker in the absence of cross-community support and were thereby prevented from conducting any legislative business.[63] The statutory deadline for Executive formation expired in due course thereafter, and so the Secretary of State, Julian Smith MP, set about the preparation of regulations to legalise same-sex marriage in accordance with his statutory duty to do so. Then, at last, the Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019 came into force on 13 January 2020.

The 2019 Regulations allow same-sex couples to form a civil marriage and permit opposite-sex couples to register a civil partnership,[64] though, as noted above, the latter provisions are not relevant for the purposes of this paper. It should be emphasised, however, that the regulations also provide for a range of related rights and entitlements for same-sex couples who avail of their new right to form a civil marriage. These related rights and entitlements span, *inter alia*,[65] the law on children and families,[66] the law on gender recognition,[67] as well as the law on pensions and social security.[68] In addition to these core components, moreover, there are at least three related features to note about this important instrument. The first is that by prescribing such detailed consequential amendments to various statutes in related areas of law, the possibility of further litigation over the implications of legalising same-sex marriage has been minimised considerably.

The second point to note is that the rights and entitlements afforded to same-sex couples are accompanied by a series of 'protections' for people who may oppose the concept of same-sex marriage in Northern Ireland. In particular, there are provisions which ensure that it is not unlawful discrimination for religious bodies to provide blessings only to same-sex or opposite-sex couples,[69] as well as provisions which prevent 'any discussion or criticism of marriage which concerns the sex of the parties' from constituting a hate crime *per se*.[70]

61 Northern Ireland (Executive Formation etc) Act 2019, section 8.

62 Ibid section 13(4).

63 See 'Abortion: NI politicians' bid to halt law changes fails' (*BBC News NI*, 21 October 2019) <https://www.bbc.co.uk/news/uk-northern-ireland-50115449>.

64 Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019, Part 2.

65 Ibid Part 10.

66 Ibid Part 4.

67 Ibid Part 5.

68 Ibid Parts 6–8.

69 Ibid regulations 133 and 163.

70 Ibid regulation 142.

The final point to note about this instrument is that, despite the breadth of issues addressed within its 84 pages, it is a non-exhaustive legal framework for same-sex marriage in Northern Ireland. In particular, the instrument does not introduce any provisions permitting religious same-sex marriages. Nor does it enable same-sex couples who have registered as civil partners in Northern Ireland to convert their registered status to a civil marriage (meaning that, in the interim, the only way that such couples can get married is to file for a disingenuous dissolution of their civil partnership). The UK government has, however, consulted on both of these issues with a view towards the introduction of further regulations which will address them in the near future, but in a way which takes 'the views of the people of Northern Ireland' into account.[71]

Episode 4: the Court of Appeal in Northern Ireland

Although the Court of Appeal had heard arguments in connection with the judgments of O'Hara J in *X* and *Close* in March and September of 2018, judgment was reserved on both appeals until April 2020.[72] As such, the outcome of both cases was met with rather less attention than would have been the case if legalisation had not been achieved in the interim by way of the legislative developments outlined above. For reasons that will be explained briefly hereafter, however, it would be wrong to classify the Court of Appeal's judgments as largely pyrrhic outcomes, both from the perspective of the litigants involved and from the broader perspective of human rights and anti-discrimination lawyers generally. While the Court of Appeal approved O'Hara J's dismissal of the jurisdictional objections levelled against the appellants in each case and dismissed further objections of a similar kind,[73] the appellate court's approach is otherwise notable for its dissimilarity from the court below in at least three respects.[74]

First, and to its credit, the court engaged in a closer analysis of the Strasbourg case law on Articles 8 and 12 of the ECHR,[75] including a fleeting reference to the decision in *Orlandi v Italy*,[76] which was handed down after O'Hara J delivered his judgments at first instance. Like O'Hara J, however, the Court of Appeal did not acknowledge an increase in the number of dissenting views on the Strasbourg Court. Nor did it place any particular weight on the tendency of Strasbourg jurisprudence to follow international *trends* (which are distinguishable from *consensuses*) in domestic state practices.[77] It is particularly

71 Northern Ireland Office, *Same-sex Religious Marriage in Northern Ireland: Government Consultation* (20 January 2020); Northern Ireland Office, *Marriage and Civil Partnership – Conversion Entitlements in Northern Ireland: Government Consultation* (20 January 2020).

72 *Re Close's (Grainne) & Others' Applications* [2020] NICA 20 (Morgan LCJ, Stephens and Treacy LJJ); *Re X's Petition* [2020] NICA 21 (Morgan LCJ, Stephens and Deeny LJJ).

73 *Re Close's (Grainne) & Others' Applications* [2020] NICA 20 [15]–[26]; *Re X's Petition* [2020] NICA 21 [10]–[13].

74 It is observed that the Court of Appeal has also substantially reframed the analytical framework adopted by justices of the High Court in other recent cases. For a very high-profile example, compare *Buick's Application* [2018] NIQB (Keegan J) with *Re Buick's Application* [2018] NICA 26 (Morgan LCJ, Stephens and Treacy LJJ).

75 *Re Close's (Grainne) & Others' Applications* [2020] NICA 20 [27]–[39]; *Re X's Petition* [2020] NICA 21 [19].

76 App no 26431/12 (14 December 2017). For a persuasive analysis of the shortcomings in this decision, especially when compared to the decision of the Court of Justice of the European Union in Case C-673/16 *Coman & Others v Inspectoratul General pentru Imigrări* [2018] ECLI:EU:C:2018:385, see Guido Noto La Diega, 'The European approach to recognising, downgrading, and erasing same-sex marriages celebrated abroad' in Hamilton and Noto La Diega (n 3).

77 See, in particular, the Separate and Joint Dissenting Opinion of of Judges Sajó, Keller and Lemmens in *Hämäläinen v Finland* (App 37359/09) 16 July 2014 [GC]. Also see David Harris et al, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press 2018) 741, where the authors agree that 'it can be supposed that Article 12 will in due course be interpreted as requiring [same-sex marriages]'.

regrettable that the Court of Appeal did not engage with the possibility of a 'right to remain married' being read into Article 12, as Strasbourg judges Sajó, Keller and Lemmens have suggested, given that further Strasbourg judges have since emphasised that the interpretation of Article 12 'is not static' and because the dignity of the couple in *X's Petition* would have benefited so clearly from such an incremental interpretation at common law.[78] The court was also much more engaged with developments in the domestic jurisprudence on its ability to interpret UK human rights in a manner which would go beyond the current interpretations delineated by Strasbourg. Referring to guidance recently reiterated by the UK Supreme Court,[79] however, it chose to align itself with Lord Mance's rather conservative approach to this matter and thereby eschewed the more liberal approach that has been commended by Lord Kerr and others.[80]

The second way in which the Court of Appeal's approach differed from the court below relates to the most significant aspect of its judgments, namely the invocation and application of Article 14 of the ECHR (the substance of which was not addressed at all by O'Hara J and therefore formed the implied basis of the Court of Appeal's decision to overturn his judgments). Whereas O'Hara J, having found no violation of Article 8 or 12, ended his analysis and application of the ECHR there, the Court of Appeal prudently went on to explore whether Article 14 was infringed in its own right. This step in the analysis of the court is, of course, entirely consistent with Strasbourg case law which, while respecting the 'parasitic' nature of Article 14,[81] has long held that a violation of Article 14 may exist even where there is no violation of the associated Convention rights which have activated it.[82] Indeed, leading commentators describe this as the principle 'that a state which goes beyond its obligations under a Convention right should do so in a non-discriminatory way'.[83]

Furthermore, in response to submissions from the Attorney General for Northern Ireland suggesting that the discretionary area of judgment doctrine in domestic law should import a 'manifestly without reasonable foundation' test,[84] so as to preclude members of the judiciary from considering an area of social policy such as same-sex marriage, the Court of Appeal was admirably firm in holding that 'strict scrutiny' is required in discrimination cases involving differences in treatment based upon sexual orientation.[85] Then, applying the standard test for discrimination arising within the ambit of a Convention right – namely an assessment as to whether persons in relevantly similar situations have been treated differently without a reasonable and objective justification[86] – the court in *Close* ruled that 'by the time of the delivery of the first instance judgment

78 See the Concurring Opinion of Judge Mits in *Ratzenböck and Seydl v Austria* App no 28475/12 (26 October 2017). Also see (n 47) above.

79 *Re Close's (Grainne) & Others' Applications* [2020] NICA 20 [40], citing *Commissioner of Police of the Metropolis v DSD and Another* [2018] UKSC 11, [2019] AC 196 [152]–[153].

80 For an overview of the different philosophies on this issue, see Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 39–43. Also see the text at nn 36–41 above.

81 We are persuaded that Article 14 is 'not quite the "parasite" sometimes alleged', however, given that it 'does not derive nourishment' from other ECHR articles without benefiting them reciprocally. See Oddny Mjöll Arnardóttir, 'Discrimination as a magnifying lens: scope and ambit under Article 14 and Protocol No 12' in Eva Brems and Janneke Gerrards (eds), *Shaping Rights in the ECHR* (Cambridge University Press 2015) 347.

82 *Belgian Linguistics* App no 1474/62 and others (23 July 1968).

83 Harris et al (n 77) 768.

84 For a compelling critique of this test, see Jed Meers, 'Problems with the "manifestly without reasonable foundation" test' (2020) 27 Journal of Social Security Law 12.

85 *Re Close's (Grainne) & Others' Applications* [2020] NICA 20 [43]–[45].

86 See, for example, *Kafkaris v Cyprus* App no 21906/04 (12 February 2008) [GC].

in this case in August 2017 … the absence of same-sex marriage in this jurisdiction discriminated against same-sex couples'.[87]

Importantly, the Court of Appeal's view on the justifiability of the prohibition on same-sex marriage was heavily influenced by temporal developments. It was emphasised that the balance between 'the legitimate aim of preserving the established nature of marriage'[88] and the rights of same-sex couples under Article 14 only became unfair, in the court's view, following reforms to the law in Scotland and Ireland when coupled with the collapse of the devolved institutions of government in Northern Ireland. On the significance of the former, the court explained that there 'are strong ties of kinship and friendship between many people in Northern Ireland and those countries' and that 'people look to them as the source of their identity and culture' to some extent,[89] while on the significance of the latter it said that adherence to traditional understandings about the division of competences within the devolution framework could not justify any continued interference with the rights of same-sex couples.[90]

Moreover, the judgment of the court in *X's Petition* placed a somewhat artificial emphasis on the date of the first instance judgment, namely August 2017, in that the court refused to hold that there was further discrimination against the petitioner at any point prior to that date.[91] While this could be criticised for curtailing the legal duration of the unlawful discrimination suffered by the couple involved, given that the last of the most relevant changes taken into account by the court had occurred by January 2017 (namely the collapse of the devolved institutions), it was a successful appeal nonetheless when viewed from August 2017 onward. With that said, it should be noted that the court did not accept that *X* was to be compared with same-sex couples whose marriage was not converted to a civil partnership on account of their choice to continue living in England and Wales. Instead, it regarded 'the true comparator' in *X's Petition* to be 'between those same sex couples who married in England and Wales and those heterosexual couples who did likewise'.[92] The appellants in *X* and *Close* were both vindicated by the court in any event, however, given that the judgments in their favour will presumably mean that they do not carry responsibility for legal costs and that they are entitled to claim damages for the unlawful discrimination that they have unjustifiably suffered.

The final way in which the Court of Appeal's judgment differed from the court below arises from its decision to resurrect arguments *ex propria motu* in connection with the legality of Northern Ireland MLAs tabling a petition of concern against 'matters seeking to advance, promote and protect human rights'.[93] Recalling that this device had been used to obstruct an otherwise successful motion calling for the legalisation of same-sex marriage, and that the 'statutory purpose of the petition of concern mechanism was to ensure protection for the traditions of both unionist and nationalist communities', the court cautioned that 'enhanced' judicial scrutiny will be required where the device is 'utilised to defeat the will of the Assembly on an issue dealing with a difference of treatment on the grounds of sexual orientation'.[94] Together with its binding invocation

87 *Re Close's (Grainne) & Others' Applications* [2020] NICA 20 [58].

88 Ibid [51]–[52].

89 Ibid [55].

90 Ibid [56]–[57].

91 *Re X's Petition* [2020] NICA 21 [18].

92 Ibid [25].

93 *Re Close's (Grainne) & Others' Applications* [2020] NICA 20 [3]–[4].

94 Ibid [54].

and application of Article 14, these *obiter dicta* will surely be interpreted as a signal that the Court of Appeal can be relied upon to enforce the principles of human rights and equality with independence and rigour if called upon to do so by the people of Northern Ireland in years ahead.

Conclusion

The saga which led to the legalisation of same-sex marriage in Northern Ireland is complex and, to a certain extent, incomplete. In this commentary, we have limited our analysis to four significant episodes in that saga and critically evaluated each of those episodes through a predominantly legal lens. As such, we wish to acknowledge that there remains considerable scope for further research into the socio-political forces involved in the saga, together with continued research into the long-term implications of the institutional developments concerned.[95]

With that said, in so far as the legal analyses that have been conducted in this paper go, we consider two central findings worthy of emphasis by way of conclusion. The first is that, should the recently restored Northern Ireland Assembly wish to legislate in the area of LGBT rights in the future, it is likely to be constitutionally problematic for a petition of concern to be used to interfere with any business of that sort. This is a consequence of the fact that the 'New Decade, New Approach' deal reached in January 2020 contained a firm political agreement to return the device to its original purpose,[96] together with the fact that the Court of Appeal has warned that enhanced judicial scrutiny will be applied in the event that a petition of concern is used to obstruct proceedings dealing with a difference of treatment on the grounds of sexual orientation. This is not to say that proposals in connection with LGBT rights are likely to pass all of the relevant stages required by the normal legislative process, of course, only that, because any attempt to use a petition of concern to block such issues from consideration would *probably* be inconsistent with the original purpose of the device, such an attempt is likely to be challengeable in a range of forums on that basis.

The second finding that ought to be underscored is in connection with the Court of Appeal's novel approach to the invocation and application of Article 14 of the ECHR. The general approach in litigation seeking to have a human right to same-sex marriage recognised under the ECHR, or at least a right to remain married where a member state has recognised a same-sex relationship in that way, has been to invoke Articles 8 and 12 (and sometimes 9) both alone and in conjunction with Article 14.[97] Given that the European Court of Human Rights has so far refused to recognise any such right framed in this way – though there is certainly cause to suspect that its position will change – it may be recalled that the Court of Appeal felt itself unable to depart from that line of Strasbourg jurisprudence. By ruling that the absence of a right to same-sex marriage was incompatible with Article 14 in its own right, however, the Court of Appeal nimbly avoided any inconsistency with the Strasbourg jurisprudence and, in so doing, devised an original form of legal argument that is at least theoretically capable of transplantation to

95 For some early examples of the interesting research emanating from other disciplines and perspectives, see Cevat G Aksoy et al, 'Do laws shape attitudes? Evidence from same-sex relationship recognition policies in Europe' (2020) 124 European Economic Review 103399; Bernadette C Hayes and John Nagle, 'Ethnonationalism and attitudes towards same-sex marriage and abortion in Northern Ireland' (2019) 40 International Political Science Review 455; Jocelyn Evans and Jonathan Tonge, 'Partisan and religious drivers of moral conservatism: same-sex marriage and abortion in Northern Ireland' (2018) 24 Party Politics 335.

96 For a definition of its original purpose, see the text at n 11 above.

97 See, in addition to the references provided under 'Episode 2' and 'Episode 4' above, Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2012) chapter 6.

other member states. The reasoning of the court was heavily reliant on contextual considerations, of course, but its cognisance of changes in the state practices of neighbouring jurisdictions could be capable of influencing the reasoning of the courts in some member states on the margins of Western Europe where same-sex marriage remains unlawful. While academics like Masuma Shahid have speculated that the ambit of Article 14 could be interpreted in a manner expansive enough to deal with equal marriage rights in this way,[98] the Court of Appeal in Northern Ireland appears to be the first judicial body to have formulated such a domestic basis for the right to same-sex marriage in practice. This much demonstrates that the full significance of the saga which led to the legalisation of same-sex marriage in Northern Ireland is perhaps yet to be seen.

98 Masuma Shahid, 'The right to same-sex marriage: assessing the European Court of Human Rights' consensus-based analysis in recent judgments concerning equal marriage rights' (2017) 10 Erasmus Law Review 184, 197.

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Proposals for copyright law and education during the COVID-19 pandemic

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Abstract

This article asks whether the catastrophic impact of the COVID-19 pandemic justifies new limitations or interventions in copyright law so that UK educational institutions can continue to serve the needs of their students. It describes the existing copyright landscape and suggests ways in which institutions can rely on exceptions in the Copyright, Designs and Patents Act 1988 (CDPA), including fair dealing and the exemption for lending by educational establishments. It then considers the viability of other solutions. It argues that issues caused by the pandemic would not enliven a public interest defence to copyright infringement (to the extent this still exists in UK law) but may be relevant to remedies. It also argues that compulsory licensing, while permissible under international copyright law, would not be a desirable intervention, but that legislative expansion to the existing exceptions, in order to encourage voluntary collective licensing, has a number of attractions. It concludes by observing that the pandemic highlights issues with the prevailing model for academic publishing and asks whether COVID may encourage universities to embrace in-house and open access publishing more swiftly and for an even greater body of material.

Keywords: copyright; fair dealing; public interest; open access; online learning; universities; education; COVID-19.

1 Background

In this article, we discuss the relationship between copyright and education in light of the COVID-19 pandemic. Our focus is on higher education in the UK, although many of our ideas will be relevant to primary and secondary education, and to education in other countries. Our research question is simple: does the catastrophic impact of COVID justify state intervention so that educational institutions can continue to serve the needs of their students?

Although the COVID pandemic is often described as unprecedented, the copyright-related challenges it poses are not new but reflect longstanding questions about the goals and appropriate scope of copyright. Thus, we have for many years debated the sort of accommodations that should be made in copyright law to support education, given the

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high use of copyright works in teaching and learning but the problems in leaving every such use to one-on-one rights negotiation.[1] Different countries have embraced different solutions, including free exceptions, compulsory licences and state-sanctioned mechanisms to encourage voluntary blanket licensing. With growth in the use of digital technologies in education, it has been asked whether reform is necessary.[2] In the Directive on Copyright in the Digital Single Market (DSM Directive), for example, a mandatory exception for education was introduced in response to the concern that there is uncertainty regarding the application of existing exceptions and limitations to digital and online uses.[3]

The COVID pandemic has produced a more extreme and urgent version of the existing situation. It has necessitated two changes at educational institutions that are of particular relevance to this article: first, the closure of libraries, meaning that staff and students cannot access physical holdings and are entirely reliant on their library's virtual collection; and second, the need to move teaching and assessment online. As noted above, the copyright issues revealed by these changes are not new. However, the ramifications are more profound because certain in-person solutions are not available. To illustrate, for books not held in digital form, students cannot read the physical copy in the library.[4] Lecturers cannot play audio-visual content in class but exclude that content from any lecture recording.[5] In addition, with many universities planning to modify their teaching so that students can study remotely (and perhaps from outside the UK) for all or part of the 20/21 academic year, we need to plan for a lengthy period in which many of our students might never set foot in a library or a classroom, even if such spaces have reopened.[6]

1 See generally E Hudson, 'The *Georgia State* litigation: literal copying in education' (2019) 82 Modern Law Review 508. Copying by educational establishments and libraries was a significant focus of the Whitford Committee: see Committee to Consider the Law on Copyright and Designs, *Report on Copyright and Designs Law* (Cmnd 6732, 1977) (Whitford Report). Before that, the Gregory Committee also considered copying for students in its analysis of fair dealing: see Copyright Committee, Report of the Copyright Committee (Cmnd 8662, 1952). The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) has since its inception dealt with education in (what is now) Article 10(2): see S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, volume I (2nd edn, Oxford University Press 2006), [13.44]–[13.45].

2 This expansion to the debate to consider digital technologies can be traced back a number of decades: see eg House of Representatives (Parliament of Australia), *Copyright Amendment (Digital Agenda) Bill 1999: Explanatory Memorandum* (1998–1999) 6 (goals of reform include to ensure that educational institutions, amongst others, 'have reasonable access to copyright material in the online environment'); K Crews, 'Distance education and copyright law: the limits and meaning of copyright policy' (2000) 27 Journal of College and University Law 15; J Secker, *Copyright and E-learning: A Guide for Practitioners* (Facet Publishing 2010) (a second edition was published in 2016, co-authored with C Morrison).

3 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Recital 19. This exception is contained in Article 5.

4 Reading a physical book in the library does not implicate any of the restricted rights of the copyright owner in sections 16–21 of the CDPA.

5 Playing a film in class may fall under the limitation in CDPA, section 34 which brings that act outside of the public performance right in section 19. However, if playing a film to students online implicates any of the restricted rights of the copyright owner, it will be the communication right in section 20, which is not caught by section 34. In Section 2 of this article, we discuss the legal analysis behind this statement and ask whether educators might instead turn to fair dealing for the purpose of illustration for instruction in section 32. But for now the point is that the copyright situation is clearer for in-classroom than for online use.

6 In saying this, we appreciate that many of our students will never visit a library even in normal conditions. Importantly, while for some this may reflect preferences regarding how to allocate their time (ie on pursuits beyond their academic studies), other students are highly reliant on online collections for other reasons, including disability, care responsibilities, work commitments and living arrangements.

Over the last few months, individuals from the UK education sector have articulated a number of concerns about the copyright impact of COVID.[7] One set of concerns revolve around pricing models for electronic content, for instance the huge discrepancies that can exist between buying the same book in hard copy and electronic form, and that publishers seem to be using price to encourage institutions to purchase aggregated access rather than individual items.[8] A second set of concerns relate to print items for which there is no digital version, such that institutions will need to digitise those items themselves if they require an electronic version. While many issues are logistical (for instance regarding staff access to the library and the resource-intensiveness of scanning), there are concerns that many copying requests will exceed the quantities permitted under the blanket licence with the Copyright Licensing Agency (CLA) and will not be caught by a free exception.[9] Third, there have been repeated questions about the use of audio-visual content given the complexity of rights in such material and the lack of a blanket licence (the nearest licence relating to broadcasts).[10] Finally, it has been asked whether copyright strategies that were devised for in-person classes can apply to equivalent teaching taking place online, including to students in other countries.

In this article we start in Section 2 by describing the prevailing copyright landscape. In presenting this material, one of our aims is to emphasise flexibilities in the existing system, especially under fair dealing. We then consider other possible accommodations, beginning in Section 3 with an expanded role for public interest arguments. We focus first on the public interest defence, which industry representatives have identified as a potential mechanism to give educational institutions greater scope to carry out unremunerated copying.[11] We identify a number of difficulties with this proposal,

7 See generally J Secker and C Morrison, 'Will the pandemic force universities to address the challenges of copyright?' (*Wonkhe*, Comment, 16 June 2020) <https://wonkhe.com/blogs/will-the-pandemic-force-universities-to-address-the-challenges-of-copyright-2/>.

8 See eg A Vernon, 'During this crisis, publishers must allow greater access to their content', *Times Higher Education* (London, 24 March 2020) <www.timeshighereducation.com/blog/during-crisis-publishers-must-allow-greater-access-their-content>; C McCluskey-Dean, 'Lobbying for fairer ebook access' (*Information in the Curriculum*, 12 May 2020) <https://blog.yorksj.ac.uk/infoincurriculum/2020/05/12/lobbying-for-fairer-ebook-access/>. For pre-pandemic analysis of the pricing of e-books and digital content, see eg R Morais, J Bauer and L Borrell-Damián, *EUA Big Deals Survey Report: The First Mapping of Major Scientific Publishing Contracts in Europe* (European University Association April 2018) <https://eua.eu/resources/publications/321:eua-big-deals-survey-report-the-first-mapping-of-major-scientific-publishing-contracts-in-europe.html>; J Secker, E Gadd and C Morrison, *Understanding the Value of the CLA Licence to UK Higher Education* (Universities UK (UUK)/GuildHE CNAC July 2019) <https://ukcopyrightliteracy.files.wordpress.com/2019/07/cnac-research-project-report-final-with-logos-1.pdf>.

9 See CLA UUK/GuildHE Higher Education Licence (2019–2022), full terms and conditions <https://cla.co.uk/sites/default/files/CLA-HE-Licence.pdf>. The CLA Licence covers copying from hard copy and digital sources and contains quantitative limits (typically 10 per cent or an article or chapter): clause 3.4. As discussed in Section 2.1, there have been temporary changes to the CLA Licence in response to COVID.

10 For discussion of the use of films and audiovisual works in online teaching, see E Hudson, 'Copyright guidance for using films in online teaching during the COVID-19 pandemic' (4 August 2020) <https://ssrn.com/abstract=3667025>. The Educational Recording Agency (ERA) offers licences to schools and universities to use, for educational purposes, television and radio programmes of its members. However, this licence applies only to broadcasts and not audio-visual content more generally. Full terms and conditions at <https://era.org.uk/app/uploads/2020/04/ERA-Licence-Schedule-2020.pdf>.

11 Eg letter from D Prosser (Executive Director of Research Libraries UK) and other signatories to G Williamson (Secretary of State for Education) and O Dowden (Secretary of State for Digital, Culture, Media and Sport) dated 30 March 2020 (RLUK letter), requesting a 'statement from government' that section 171(3) 'can be used as a defence by public libraries, research organisations and educational establishments for as long as the current crisis lasts'.

including that it would require a radical reconceptualisation of this (already controversial) defence. In contrast, there are more promising indications that public interest arguments might be relevant to remedies, notably injunctions. In Section 4, we consider licensing-based solutions. We start with compulsory licensing, which the UK government ruled out on the basis that it is 'likely to be incompatible with the international copyright framework'.[12] While we doubt this proposition as a matter of law, we accept that there are reasons why compulsory licensing is not a viable way forward at this time. That said, it is important that industry stakeholders reach negotiated solutions, and we suggest amendment of section 36 of the Copyright, Designs and Patents Act 1988 (CDPA) as one way to encourage this.

There are many issues that, for reasons of space and focus, we are unable to cover, including whether some publishers may be abusing a dominant position for the purposes of competition law.[13] That said, we include in Section 5 some brief remarks about whether COVID may provide further support for calls for the university sector to embrace open access not just for research but for teaching outputs such as textbooks.

2 The prevailing copyright environment

As noted in Section 1, different countries have adopted different mechanisms to facilitate the use of copyright works in education. In the UK, the clear policy choice has been to encourage the roll-out of voluntary blanket licences and to enact exceptions which permit certain uses without remuneration.[14] We deal with licensing and exceptions in turn.

2.1. Licensing

Educational institutions have a number of different licensing options beyond one-on-one or transactional negotiation, including joining the blanket licences offered by collectives such as CLA and ERA, and executing licences with the producers of subscription databases and other digital products. One might also refer, here, to using resources distributed under Creative Commons licences.[15] Although reliant on the copyright system for their operation, Creative Commons licences remove many of the usual impediments to licensing by being applied prospectively by the creator rather than negotiated with the user. They are also unremunerated, reflecting the sharing and remix philosophy that sits behind the Creative Commons movement.

During the pandemic, copyright owners and collectives have implemented a number of initiatives to support education. For instance, some publishers have increased access to online textbook platforms.[16] In mid-April, the CLA Licence was temporarily revised to increase the quantitative copying limits for printed books, meaning that universities were able to copy up to 30 per cent or three chapters, although not where a digital edition

12 Letter from A Solloway (Parliamentary Under-secretary of State – Minister for Science, Research and Innovation) to D Prosser dated 23 April 2020 (Solloway letter). The RLUK letter and the Solloway letter are each reproduced in full at <www.rluk.ac.uk/letter-to-ministers-copyright-and-enabling-remote-learning-and-research-during-the-covid-19-crisis/>.

13 For a summary of how the relevant legal principles might apply to the exploitation of intellectual property rights, see L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th edn, Oxford University Press 2018) 334–344.

14 Summarised in ibid 262–263.

15 See <https://creativecommons.org>; and see summary in Bently et al (n 14) 309–312.

16 See items linked to in C Morrison and J Secker, 'Copyright, fair dealing and online teaching at a time of crisis' (*UK Copyright Literacy*, 18 March 2020) <https://copyrightliteracy.org/2020/03/18/copyright-fair-dealing-and-online-teaching-at-a-time-of-crisis/>.

is 'available through commercial channels'.[17] These revised terms expired on 30 June 2020. At the time of writing, university representatives have been lobbying for the extended terms to be reinstated,[18] and for educational establishments to be able to secure affordable access to electronic content.[19] This reflects the concern that publisher responses to COVID were one-off, time-limited accommodations to help universities at a time when urgent steps were required, given the imposition of lockdown measures by the UK government. But for many universities, the disruption to teaching in the 20/21 academic year will be even more significant. It is one thing to move a relatively small amount of teaching online and to cancel in-person exams. It is another to teach students remotely for an entire academic year, including to those outside the UK, and possibly against the backdrop of a dramatic fall in university income.

2.2 Exceptions

Exceptions and limitations directed specifically to education are contained in sections 32 to 36A of the CDPA. Other exceptions are also relevant, such as: fair dealing for the purpose of quotation, research or private study, criticism or review, and caricature, parody or pastiche;[20] the libraries and archives provisions;[21] and exceptions for users with a disability.[22] We elaborate on some of these exceptions, below, but wish to preface this analysis by emphasising that there is much (often untapped) flexibility in these provisions.[23] While we are interested in assessing the merits of new interventions to respond to COVID, this is not to understate the power of existing provisions; and indeed we would urge the sector, especially when making representations to government and other stakeholders, not to concede too much by focusing on the limits and perceived uncertainty of current exceptions.[24]

As noted above, a number of fair dealing exceptions are relevant to education, but for the purposes of this article we focus on fair dealing for the purpose of illustration for instruction (section 32), which was introduced into the CDPA in 2014. This exception applies to all types of copyright work.[25] It can be used by those giving or receiving

17 See <https://cla.co.uk/sites/default/files/HE%20Licence%20Amendment%20Addendum.pdf>.

18 See letter from D Anderson-Evans (Chair, Copyright Negotiating and Advisory Committee, UUK) to J Bennett (Head of Rights and Licensing, CLA) dated 24 June 2020 <www.rluk.ac.uk/rluk-supports-the-uuk-cnac-call-for-the-extension-the-he-licence-terms>; M Reisz, 'Universities offered reprieve in pandemic book licensing battle' *Times Higher Education* (London, 11 July 2020) <www.timeshighereducation.com/news/universities-offered-reprieve-pandemic-book-licensing-battle>. On 20 August 2020, CLA announced that there would be a further change to the terms of the CLA Licence in response to COVID-19. This change means that institutions may copy up to two chapters or 20 per cent of print books of participating publishers. These revised terms are effective to 31 July 2021. For full details, see <https://cla.co.uk/HE-licence-terms-amended-covid19>.

19 See also 'Jisc and Universities UK call for publishers to reduce their fees to maintain access to essential teaching and learning materials' *(Jisc News*, 17 June 2020) <www.jisc.ac.uk/news/jisc-and-universities-uk-call-for-publishers-to-reduce-their-fees-to-maintain-access-to-essential-teaching-and-learning-materials-17-jun-2020>.

20 CDPA, sections 30(1ZA), 29(1), 29(1C), 30(1) and 30A, respectively.

21 Especially CDPA, sections 41 (interlibrary supply) and 42A (copying requests for published works).

22 Especially CDPA, sections 31B and 31BA (accessible copies made by authorised bodies).

23 See generally E Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (Cambridge University Press 2020). For analysis of section 32 and interpretations in the higher education sector, see C Morrison, *Illustration for Instruction and the UK Higher Education Sector: Perceptions of Risk and Sources of Authority* (MA Thesis, King's College London, 2018) <https://kar.kent.ac.uk/73310/>.

24 To illustrate, in the RLUK letter (n 11), concern was expressed that 'fair', in relation to education, is 'usually interpreted as, for example, a few lines of a poem, or a single book chapter'.

25 CDPA, section 32(1) (referring to 'a work', without limitation).

instruction or preparing for same[26] and is not limited to instruction taking place in educational institutions. The CDPA does not define 'illustration for instruction', and we see no reason to interpret this language narrowly. For instance, Recital 21 to the DSM Directive, discussing the new exception for the digital use of works for illustration for teaching, states that this provision 'should be understood as covering digital uses of works or other subject matter to support, enrich or complement the teaching, including learning activities'.[27] This can be contrasted with guidance issued in 2014 by the UK Intellectual Property Office which said that, to rely on section 32, 'the work must be used solely to illustrate a point',[28] and that the exception permitted 'minor uses'.[29] We believe these statements are unduly conservative and would frustrate the legislative goal of enhancing the use of digital technologies in education.[30] In this regard, we were pleased to read statements from the UK government in April 2020 that support a meaningful role for section 32 in online education, including that '[m]any materials used in presentations by teachers, including those which are streamed remotely to students, are likely to fall within [section 32]' and that '[i]t is likely that the courts will take a generous view of fair dealing during the present crisis, in particular where licences for the reasonable use of works are unavailable'.[31]

Applying this to teaching activities, we believe that section 32 can cover the inclusion of literary quotations, photographs and images on slides and in other learning materials distributed digitally to students, and the playing of musical and audio-visual works as part of online instruction. We believe that this can extend to entire works in some circumstances.[32] To give a straightforward example, consider teaching the case *Norowzian v Arks* to students studying intellectual property law.[33] In that case, Mr Norowzian alleged that copyright in his short film, *Joy* (approximately one minute in length), was infringed by a television advertisement for Guinness beer. We believe that playing both films in full is fair, so that students can properly understand the legal issues in the case and form their own view on the conclusion that there was no reproduction of a substantial part. Note that when giving this lecture in person the situation is more straightforward as section 34

26 Ibid section 32(1)(b).

27 And note Recital 22, stating, *inter alia*, that the exception or limitation should cover uses of works in the classroom and other venues via digital means, 'as well as uses made at a distance through secure electronic environments, such as in the context of online courses or access to teaching material complementing a given course'. The UK government has indicated that it does not intend to implement the DSM Directive: answer to Copyright: EU Action: Written Question – 4371 by Chris Skidmore dated 21 January 2020. However, it may be that the UK ends up implementing all or part of the DSM Directive (for instance, by reference to a future trade deal with the EU); plus these sorts of indication may provide evidence of the prevailing culture and acquis that remains relevant to interpreting UK provisions.

28 Intellectual Property Office, *Exceptions to Copyright: Education and Teaching* (Intellectual Property Office October 2014) 3.

29 Ibid 4.

30 Discussed in Hudson (n 23) 285.

31 Solloway letter (n 12).

32 It could be put against us that Recital 21 of the DSM Directive, which we cited earlier, states that '[i]n most cases, the concept of illustration would, therefore, imply the use only of parts or extracts of works'. But the Recital goes on immediately to say, 'which should not substitute for the purchase of materials primarily intended for the educational market'. This suggests the main issue is not quantity *per se* but market effect. Such a concept is not easy (as discussed in Hudson (n 1)), but we believe that for many copyright works used in teaching there is no economic interest that will be harmed by allowing that work to be viewed or watched by students, even in full – and especially where measures are taken to limit availability and re-use (eg by using lower-resolution images on slides, or by hosting content on password-protected VLEs to which only enrolled students have access).

33 *Norowzian v Arks Limited (No 1)* [1998] FSR 394; *Norowzian v Arks Limited (No 2)* [2000] FSR 363.

would also apply. The effect of that provision is that the performance of a dramatic work and the showing of a film to students at an educational establishment, for the purposes of instruction, are not public performances for the purposes of infringement. But playing a film in an online class or making it available to students via the virtual learning environment (VLE) may implicate other rights, including reproduction and, arguably, communication to the public.[34] For section 34 to apply, we would need to construe its language to also cover these other rights. While Kitchin J was minded to do something similar in *Football Association Premier League v QC Leisure* in relation to section 72, that approach was permitted because of the wording and legislative backdrop of that exception.[35] Furthermore, Kitchin J referred to section 34 in the course of his reasoning, stating that 'in so far as [the communication right] also confers rights in respect of some of the activities falling within [the public performance right] ... s. 34(2) cannot provide a defence'.[36] That is, Kitchin J saw section 34 as tied solely to public performance in a way

34 A claimant alleging infringement of the communication right in CDPA, section 20, would need to show that there was a communication, for instance through a file being made available or through content being transmitted to students. But even if this could be established, the university might seek to resist the proposition that any such communication was 'to the public', especially where the relevant film or extract was available only to students registered for that module via a password-protected VLE. For the communication right, the CJEU has stated repeatedly that the public 'refers to an indeterminate number of potential viewers and implies, moreover, a fairly large number of people': eg *GS Media BV v Sanoma Media Netherlands BV* (C-160/15) [2017] 1 CMLR 30 (Second Chamber), [36]. This emphasis on audience size can be contrasted, to a degree, with the approach to the public performance right in section 19, where factors such as the character of the audience have been significant: eg *Duck v Bates* (1884) 13 QBD 843. That said, in assessing whether a communication was to the public, courts have considered the cumulative effect of individual acts: eg *SGAE v Rafael Hoteles SL* (C-306/05) [2006] ECR I-11519 (Third Chamber), [38]; *Stichting Brein v Ziggo BV* (C-610/15) [2017] ECDR 19, [41]. Whether a university has infringed the communication right would therefore depend, *inter alia*, on whether the court assessed 'the public' by aggregating acts in different modules, over time and for different films. We should also emphasise that, even if a university succeeded on the section 20 point, it may still need to invoke an exception like section 32 in relation to the argument that it had infringed or authorised the infringement of the reproduction right.

35 *FAPL v QC Leisure* [2012] EWHC 108 (Ch), esp. [71]–[78]. That case related to the use by UK publicans of foreign decoder boxes to access the broadcast signal for football matches run by FAPL. On referral to the CJEU, it was held, *inter alia*, that the act of turning on the television in the pub, so that patrons could watch the football, was a communication to the public: *FAPL v QC Leisure* (Joined Cases C-403/08 and C-429/08) [2012] ECDR 8 (Grand Chamber). On return to the High Court, Kitchin J accepted that there was overlap between the (unharmonised) public performance right in section 19 and the (harmonised) communication to the public right in section 20. However, he also held that the publicans could have a defence under section 72. That provision stated that 'the showing … in public of a broadcast to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe copyright' in the broadcast and any film included in it. (This reference to films was subsequently removed by the Copyright (Free Public Showing or Playing) (Amendment) Regulations 2016 (SI 2016/565).) Kitchin J was able to reach this conclusion because the words of section 72 were unambiguous: the showing or playing of the broadcast does not infringe *any* copyright in the broadcast or any film included in it, and therefore applied to the rights in sections 19 and 20.

36 *FAPL v QC Leisure* [2012] EWHC 108 (Ch), [58].

that section 72 was not. However, as we have said, educators can instead turn to fair dealing in section 32 in relation to the use audio-visual content in online classes.[37]

The provision of digitised copies of readings might also fall within section 32, although the arguments are not quite as straightforward. For UK institutions, the need to explore fair dealing has been mitigated by the blanket licence offered by CLA.[38] In its usual form, that licence allows the copying of a chapter or article or up to 10 per cent of a published work. These limits have been temporarily lifted for the 20/21 academic year so that up to two chapters or 20 per cent of a print book may be copied.[39] But can UK universities digitise beyond the CLA limits by reference to fair dealing? We can envisage scenarios where the arguments for fair dealing are compelling, for instance where students need to read three chapters from a specialist title that is out of print. Here, one question is whether the required content can be selected by a lecturer but digitised by someone in the library. This is an issue because section 32 applies to dealings 'by a person giving or receiving instruction',[40] which could be interpreted to mean that a lecturer may not ask a librarian or teaching assistant to undertake the copying. We believe that section 32 ought not to be read in this way. First, it would suggest that the 'person' giving instruction cannot be a university or other establishment.[41] But for section 32 to function, it is necessary that it can be invoked by legal entities and not just individual members of staff. Second, section 32 does not contain the limits, found in section 29 (fair dealing for non-commercial research or private study), on copying by others.[42] Our interpretation also accords with university workflows and resourcing, for instance that librarians may have access to better copying equipment and be better placed to produce good quality scans.

But the big question is whether copying under section 32, as supplemented by the libraries and archives provisions, will get universities where they need to be in relation to

37 Although we give the example of including two short films in a copyright lecture, we believe that section 32 could even extend to playing feature films, as explained in detail in Hudson (n 10). Consider the teaching activities in Film Studies. In normal times, such departments routinely screen films in person, under section 34, often using DVDs owned by the university. With the shift to online teaching, we believe that universities can allow students to watch entire feature films by reference to section 32. In developing a fair dealing policy for such practices, universities may benefit from ensuring that their activities mirror, as far as possible, the circumstances in which they screen films in person. This might include only granting access to students in that module, and via a password-protected platform such as the VLE; only allowing access for a limited period; not allowing students to download films; monitoring student usage; not using section 32 for filmmakers or studios with (known) strong preferences regarding rights; and including a copyright warning in addition to the sufficient acknowledgment required by section 32.

38 Compare equivalent institutions in the USA, where it is common for fair use to be relied upon (along with other strategies) for material included in electronic reserves and posted to VLEs: see Hudson (n 23) 194–205. This application of fair use to such practices was challenged in the *Georgia State* litigation. For the most recent judgment in this litigation, see *Cambridge University Press v Becker* (ND Georgia, 2 March 2020); and for a summary of the litigation, see Hudson (n 1).

39 See n 18 and surrounding text.

40 CDPA, section 32(1)(b).

41 This would also reflect the usual approach in the case law, in which judges often do not differentiate between the person sued (often a legal entity) and the person who performed the act of copying: see J McCutcheon and S Holloway, 'Whose fair dealing? Third-party reliance on the fair dealing exception for parody or satire' (2016) 27 Australian Intellectual Property Journal 54; Hudson (n 23) 288–289.

42 CDPA, section 29(3). Paragraph (a) relates to librarians and states that they may not do anything which is not permitted by CDPA, section 42A (request-based copying for published works), while paragraph (b) applies to all other third-party copyists and prevents them from participating in systematic copying. As noted by Bently et al, section 29(3) means that 'lecturers are unable to use the research or private study defence where they make multiple copies of a work for their students': Bently et al (n 13) 243. The existence of paragraph (3) suggests that agency arguments are otherwise available.

required readings.[43] For many institutions, the issue is not copying smaller parts, as the CLA Licence provides a workable system for scanning articles, chapters and other extracts, plus VLEs can link to content in subscription databases. Instead, they are concerned about access to entire books where there is no digital version available on the market or that version is prohibitively expensive, subject to unduly restrictive licence terms, bundled with other (unwanted) content, etc.

To us, the most promising argument for unremunerated copying of entire works is a version of controlled digital lending (CDL), which has been implemented in the USA by reference to the first sale doctrine and fair use.[44] The central idea of this strategy – which we emphasise is highly controversial[45] – is that libraries can digitise lawfully acquired hard copy titles and then loan digitised as well as physical versions. A strict 'owned to loaned' ratio must be maintained.[46] If a library owns, say, three copies of a book and it lends a digital version, it must withdraw one of the physical copies while the digital copy is on loan. The conditions of loan should approximate those for a physical title, for instance that each digital copy is loaned to a single user for a period analogous to the loan of a physical work.[47] Technological interventions are required to limit copying and redistribution by the borrower.

43 As indicated in n 42, there are library exemptions under which students may ask to be supplied with a 'reasonable proportion' of a published work for their own private study: CDPA, section 42A. An important caveat to this provision is that the person making the request must declare that, to the best of that person's knowledge, 'no other person with whom the person … studies has made, or intends to make, at or about the same time as the person's request, a request for substantially the same material for substantially the same purpose'. Thus, while section 42A may be relevant to a student writing a dissertation on a topic of their own devising, it would not apply to compulsory reading set by a lecturer (this contravening the exclusion on systematic copying, given the implicit assumption – which we acknowledge is sometimes wrong – that more than one student will wish to undertake the reading).

44 For an overview CDL and its justification by reference to fair use, see D Hansen and K Courtney, 'A White Paper on controlled digital lending of library books' (Harvard Library Office for Scholarly Communication 2018) <http://nrs.harvard.edu/urn-3:HUL.InstRepos:42664235>. The authors trace the idea for CDL back to the 'pioneering article' by Michelle Wu: M Wu, 'Building a collaborative digital collection: a necessary evolution in libraries' (2011) 103 Law Library Journal 527.

45 One of the best-known practitioners of CDL is the Internet Archive (IA). The IA runs a large-scale digital preservation programme for books, historical documents and internet pages. It also runs an Open Library, in which members of the public may electronically borrow books that have been scanned by the IA. The IA's practices have long been criticised, but these objections intensified in 2020 following roll-out of a National Emergency Library <https://archive.org/details/nationalemergencylibrary>: see eg A Albanese, 'Authors Guild, AAP Outraged by IA's "National Emergency Library"' *Publishers Weekly* (North Hollywood, 30 March 2020) <https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/82861-authors-guild-aap-outraged-by-ia-s-national-emergency-library.html>. The key change in the National Emergency Library, compared with the Open Library, was that titles could be borrowed by multiple users simultaneously. On 1 June 2020, a complaint was filed by four major publishers against the IA in relation to its Open Library and National Emergency Library: *Hachette Book Group, Inc v Internet Archive* (Case 1:20-cv-04160, SDNY, 1 June 2020). In this complaint, the plaintiffs described IA's activities as 'willful mass copyright infringement' (paragraph 2) and alleged that IA 'defends its willful mass infringement by asserting an invented theory called "Controlled Digital Lending" ("CDL")—the rules of which have been concocted from whole cloth and continue to get worse' (paragraph 8). The National Emergency Library closed on 16 June 2020. The Open Library remains in operation. For an overview, see A Romano, 'A lawsuit is threatening the Internet Archive – but it's not as dire as you may have heard' (*Vox*, 23 June 2020) <www.vox.com/2020/6/23/21293875/internet-archive-website-lawsuit-open-library-wayback-machine-controversy-copyright>.

46 Hansen and Courtney (n 44) 2, quoting from the *Position Statement on Controlled Digital Lending by Libraries* <https://controlleddigitallending.org/statement>.

47 Ibid 3, also quoting from the *Position Statement*.

There are a number of issues with CDL. Perhaps the key issue is logistical rather than legal, namely the resources involved in scanning entire books and ensuring that the resulting files have the necessary digital rights management interventions applied. There are also questions about how CDL would apply to reference collections, bearing in mind that some university libraries do not maintain a circulating collection.[48] If a book may not be borrowed physically can it nevertheless be loaned digitally? In terms of the fair dealing analysis, there are limits in section 32 that are not found in the open-ended fair use exception of US law. The language of 'illustration for instruction' might seem inherently more confined than the illustrative purposes of 'teaching', 'scholarship' and 'research' in the US copyright statute.[49] One can also imagine fierce disagreement over the use of CDL for titles that are available commercially in digital form. One complaint seen repeatedly from universities is that prices for e-books are often many multiples of the hard copy version, even for single-user licences. But publishers would no doubt argue that there are good reasons for the price differential, and that CDL would involve such an obvious case of market substitution that no fair dealing analysis is tenable.[50]

It may be that, absent government intervention (discussed further in Section 4), a large-scale CDL scheme is unlikely to be rolled out in the UK any time soon. Nevertheless, the US experience with CDL may provide some useful ideas for UK institutions, for instance regarding the matters that might support CDL being a *fair* dealing,[51] and the sort of limits that might be placed on the accessibility and re-use of digital copies to buttress those arguments. We also observe that the legality of CDL in the UK may be bolstered by section 36A of the CDPA which states, without qualification, that 'copyright in a work is not infringed by the lending of copies of the work by an educational establishment'. This could be a very important supplement to fair dealing.[52] For section 36A to be relevant to CDL, 'lending' must not be limited to physical copies. This proposition is supported by the definition of 'lent out' in the Public Lending Right

48 Eg the collection of the Bodleian Library at the University of Oxford.

49 Copyright Act of 1976 (US), section 107.

50 As seen in the complaint against IA (n 45), especially paragraphs 52 (the IA business model is 'parasitic and illegal'), 65 ('IA directly harms the Plaintiffs' print and ebook markets in all market segments by providing competing substitutes for numerous original works currently available in their catalog'), and 119–127 (setting out various types of market harm said to be caused by IA's practices).

51 See Hansen and Courtney (n 44) 16–32 (arguments that support fair use for CDL include: lack of profit by the defendant library or university; CDL facilitates research and learning; the defendant must have already purchased the content being digitised; for out-of-print books, there is no current market for the work; although entire works can be digitised (which can tend against fair use), this is offset by limits on loan duration, DRM to prevent re-use, etc; any market effect of CDL mirrors that of lending physical works, which is permitted by the first sale doctrine; and in many instances, there is no functioning digital market).

52 Just as the first sale doctrine is important for CDL in the USA: see ibid 11–16, where the authors argue that that CDL 'closely mimics the economic transaction that Congress has already provided for through the first sale doctrine under Section 109' (11), and that this favours fair use. We also note that, in future, CDPA, section 40B, could have work to do. That provision allows libraries and educational establishments, amongst others, to 'make available to the public by means of a dedicated terminal on its premises' a work or copy of a work that 'has been lawfully acquired by the institution'. If 'on its premises' is read literally (as the CJEU seemed to do in *Technische Universität Darmstadt v Eugen Ulmer KG* (C-117/13) [2014] ECDR 23 (Fourth Chamber)), this will not help with electronic lending to recipients located elsewhere, even if over a secure network which permits viewing but not downloading. But if 'premises' is read more broadly – or if section 40B were amended in a post-Brexit world – then that provision could also be useful for facilitating online access to staff and students.

Act 1979, which includes digital lending;[53] and section 40A of the CDPA, in relation to lending by public libraries, which likewise applies to the lending of e-books.[54] Such a definition was also accepted by the Court of Justice of the EU (CJEU) in *Vereniging Openbare Bibliotheken v Stichting Leenrecht*.[55] The VOB, the Netherlands Association of Public Libraries, sought a declaration that digital lending of e-books fell within an existing remunerated exception in the Dutch Copyright Act.[56] The case was referred to the CJEU in relation to various questions under the Rental and Lending Rights Directive.[57] The CJEU stated that, while the right of rental relates only to tangible objects, lending is a separate concept and could extend to digital copies.

It might be argued that section 36A of the CDPA is superfluous insofar as it relates to the lending right in section 18A, as that right only relates to lending 'through an establishment which is accessible to the public'.[58] The argument that university libraries are not (usually) publicly accessible is supported by the definition of library in section 43A(2) of the CDPA, where that term means '(a) a library which is publicly accessible, or (b) a library of an educational establishment'. This would not necessarily render section 36A redundant, as its language suggests that it applies to *other* restricted rights that might be implicated in the course of lending.[59] This might conceivably include digitising hard copy titles in order to lend them,[60] along with any acts of reproduction

53 Public Lending Right Act 1979, section 5(2), as amended by the Digital Economy Act 2017, section 31(1) ("'lent out" means made available to a member of the public for use away from library premises for a limited time (including by being communicated by means of electronic transmission to a place other than library premises) and "loan" and "borrowed" are to be read accordingly').

54 CDPA, section 40A(1A)(d) states that in subsection (1), lending 'is to be read in accordance with the definition of 'lent out' in section 5 of [the Public Lending Right Act 1979]'. Section 40A provides that certain acts carried out by a public library do not infringe copyright when carried out in relation to books within the public lending right scheme. It was revised in 2017 to state that this exclusion only applies to e-books where 'the book has been lawfully acquired by the library' and 'the lending is in compliance with any purchase or licensing terms to which the book is subject': section 40A(1ZA).

55 *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (C-174/15) [2017] ECDR 3 (Third Chamber).

56 For a summary of events leading up to the test case brought by Vereniging Openbare Bibliotheken, see V Breemen, 'E-lending according to the ECJ: focus on functions and similar characteristics in *VOB v Stichting Leenrecht*' (2017) 39 European Intellectual Property Review 249.

57 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (RLD).

58 CDPA, section 18A; see also RLD, Article 2(1) (definition of lending limited to acts 'made through establishments which are accessible to the public').

59 Section 36A states that 'copyright … is not being infringed by the lending', without limiting that copyright to any particular rights. For similar arguments, see the discussion of CDPA, section 72, as interpreted by Kitchin J in *FAPL* (n 35).

60 For analysis of the same question in relation to the dedicated terminals exception in Article 5(3)(n) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (ISD) (in the UK, CDPA, section 40B), see *Technische Universität Darmstadt v Eugen Ulmer KG* (n 52), discussed in Hudson (n 23) 152–153. The CJEU accepted that Article 5(3)(n) 'would risk being rendered largely meaningless, or indeed ineffective, if those establishments did not have an ancillary right to digitise the works in question': [43]. The CJEU located this right in Article 5(2)(c), which permits member states to recognise an exception or limitation to the reproduction right 'in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage'. Without a directly equivalent provision in the CDPA, it has been suggested that UK institutions could digitise pursuant to the preservation copying exception in section 42.

and communication in effecting the digital loan.[61] Even if we are wrong on this extended reach of section 36A, institutions could still point to other exceptions to undertake these acts, such as fair dealing in section 32.[62] Whichever route is taken, it is clear that the library would not be able to digitise or make available a copy from an unlawful source.[63]

We wish to make two final points in relation to fair dealing. First, section 32 contains two further requirements that we have not yet mentioned: that the dealing is for a non-commercial purpose and that it is accompanied by a sufficient acknowledgment (unless this would be impossible).[64] The non-commercial purpose limitation is addressed to the dealing, meaning that the status of the organisation or establishment relying on section 32 is not determinative.[65] The need for a sufficient acknowledgment appears in a number of fair dealing provisions and is defined to mean identification of the work and its author.[66] This is not the same as a full-blown academic citation and can be satisfied by use of names, descriptions, logos etc.[67] Secondly, although this article has focused on section 32, university staff and students can rely on other fair dealing exceptions. We draw particular attention to fair dealing for the purpose of quotation, which was introduced

61 Applying *Nederlands Uitgeversverbond v Tom Kabinet Internet BV* (C-263/18) [2020] ECDR 1 (Grand Chamber), it is not obvious to us that CDL would necessarily involve a communication to the public. In that case, Tom Kabinet ran an online reading club. Members of the club could access a virtual market where they could buy 'second-hand' e-books. The CJEU indicated that there was a communication as Tom Kabinet made the digital files available to anyone who was a member of the reading club: [65]. Furthermore, it was 'to the public' as anyone could join the club, and there were no technical measures that limited the accessibility of files. This allowed the conclusion that 'the number of persons who may have access, at the same time or in succession, to the same work via that platform is substantial': [69]. In contrast, under CDL, files are transmitted to or accessed by individual users on a strict owned-to-loaned basis. Similar to the discussion of the screening of films to students (see n 34 above), much will turn on whether a court will nevertheless aggregate individual acts of borrowing to say that communication was to a sufficiently large group of people to constitute the public.

62 Compare G Spedicato, 'Digital lending and public access to knowledge' in J Lai and A Dominicé (eds), *Intellectual Property and Access to Im/material Goods* (Edward Elgar 2016) 154. Spedicato observes that digital lending in Europe typically occurs by reference to licensing agreements, as a 'wide consensus has emerged in Europe on the view that digital lending should not come under any of the exceptions or limitations provided for by the EU copyright system'. Spedicato says that digital lending implicates the making available right (which we discuss in n 61 above), but that there is no exception or limitation in Article 5 of the ISD that mirrors Article 6 of the RLD (which allows member states to derogate from the public lending right through the creation of public lending rights schemes). Even if this analysis is correct for public libraries, we believe that university libraries running CDL can point to a number of exceptions and limitations to justify digital lending, including ISD Articles 5(2)(c) (for the digitisation aspect) and (3)(a) and DSM Directive Article 5(1). For UK universities, concerns about compliance with Article 5 may recede if and when the UK is no longer bound by EU copyright law.

63 Similar *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (n 55), where the CJEU held that for a public lending exemption to apply as permitted by Article 6 of the Directive, the digital copy must not have been obtained from an 'unlawful source'. That conclusion was prompted by concerns about the circulation of pirated copies.

64 CDPA, section 32(1)(a), (c).

65 See Bently et al (n 13) 232–233, noting that an in-house education seminar might be non-commercial even if undertaken by a for-profit business and that not-for-profit entities may undertake commercial activities, such as selling academic books.

66 CDPA, section 178.

67 Eg in *Pro Sieben Media AG v Carlton UK Television Limited* [1999] FSR 610, 624–625, the requirement for a sufficient acknowledgment was satisfied by the appearance of a logo on a television programme.

into the CDPA 2014. This is a significant expansion to the fair dealing family and can apply to numerous acts by educators and students.[68]

In conclusion, many practices of educators and students fall within existing exceptions, including in an online environment. We have also argued that educators could make further use of exceptions, for instance in the digitisation and supply of reading materials that fall outside of the CLA Licence. But we recognise that the challenges posed by COVID cannot be answered solely by the existing exceptions. Some of our suggestions would be novel for UK universities, for instance that CDL-style reasoning might inform reliance on sections 32 and 36A. We can imagine universities being selective in any digitisation of larger extracts or entire works, for reasons that include both the resource intensiveness of scanning and the need to undertake a legal assessment of each work. In addition, for universities teaching students located overseas, there is the issue that copyright law is territorial. That means that if, say, a UK university makes digitised readings available to students studying in Australia, the question of whether there is infringement in Australia will be judged by reference to Australian law.[69] Although in many instances there will be similar exceptions elsewhere,[70] and for many uses a very low risk of any complaint, this represents a limit for exceptions analysis. Taken together, these issues illustrate why licensing solutions may be even more attractive for some uses, for instance if licence arrangements permit universities to access born-digital content or scans made by other institutions, and if the licence extends to students located around the

68 CDPA, section 30(1ZA); for an overview, see Hudson (n 10) (focusing in particular on the use of films and audio-visual works in online teaching); Hudson (n 23) 276–284. In July 2019, the CJEU handed down three judgments that considered quotation: *Pelham GmbH v Hütter* (C-476/17) [2019] Bus LR 2159 (Grand Chamber); *Spiegel Online v Beck* (C-516/17) [2019] Bus LR 2787 (Grand Chamber); and *Funke Medien NRW GmbH v Germany* (C-469/17) (Grand Chamber, 29 July 2019). Following those cases, a number of matters are clear in relation to the quotation exception in EU copyright law: it can apply to any type of copyright work; it can apply to entire works; and it is not necessary for the quotation to be made in a work that is also protected by copyright. The CJEU also clarified that member states enjoy discretion in the operation of certain elements of the quotation exception, namely the purposes for which quotation can be applied, proportionality and fair practice. Although it has been argued that quotation is not limited to any particular purpose (only requiring that the defendant has *a* purpose), in *Pelham v Hütter* the CJEU identified the 'essential characteristics' of quotation as use of a work or extract 'for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user': [71]. Although the CJEU suggested at [72] that music sampling might involve a quotation, the German Federal Court of Justice stated, on the return of the case, that none of quotation, parody or caricature apply to sampling. The court did, however, suggest that sampling might fall within pastiche: A Hui, '21 and illegal in all states? The German Pelham court confirms when sampling is illegal' (*The IPKat*, 5 May 2020) http://ipkitten.blogspot.com/2020/05/guest-post-21-and-illegal-in-all-states.html. For analysis of the pastiche exception, including the argument that it applies to sampling (amongst numerous other uses such as mash-ups and fan fiction), see E Hudson, 'The pastiche exception in copyright law: a case of mashed-up drafting?' [2017] Intellectual Property Quarterly 346. For analysis of quotation, see T Aplin and L Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press forthcoming 2020).

69 Liability will turn on the scope of rights and exceptions in the country in which the student is located. In the mandatory exception for education in the DSM Directive this is dealt with through a deeming provision that the use of works through secure electronic environments shall be taken to occur 'solely in the Member State where the educational establishment is established': DSM Directive, Article 5(3).

70 In Australia, there is no fair dealing exception for education, but there is fair dealing for research and study and an exception in section 200AB of the Copyright Act 1968 (Cth) for certain uses by cultural and educational institutions: for discussion of the latter, see Hudson (n 23) chapter 6. On 13 August 2020, the Australian government announced that it will make a series of reforms to the Copyright Act, including introducing a new fair dealing exception for non-commercial quotation and amending the existing education exceptions: Australian Government, Copyright access reforms (13 August 2020) <https://www.communications.gov.au/departmental-news/copyright-access-reforms>.

world. We return to licensing in Section 4. Before then, we consider in Section 3 another set of arguments in relation to copyright and COVID: whether educational establishments might be able to argue the public interest as a defence to copyright infringement or in the assessment of remedies. Might these arguments limit the need for licensing solutions?

3 The public interest

3.1 As a defence

As noted in the introduction, in its letter to the government, Research Libraries UK asked for confirmation that section 171(3) 'can be used as a defence by … educational establishments for as long as the current crisis lasts'.[71] Section 171(3) states that '[n]othing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise'. An initial question is whether this provision permits the recognition of a public interest defence in addition to the exceptions and limitations set out in the statute. Although the Court of Appeal answered this question in the negative in *Hyde Park Residence v Yelland*,[72] it changed approach in *Ashdown v Telegraph Group Limited*.[73] The court reasoned that the entry into force of the Human Rights Act 1998 meant that there may be cases – albeit rare – where a public interest defence was needed to protect the freedom of expression of the defendant. It is open to question whether this defence remains available following the CJEU judgments in *Spiegel Online* and *Funke Medien*.[74] In those cases, it was held that the harmonisation of exceptions and limitations under Article 5 of the ISD is exhaustive, and that member states may not recognise any further derogation from the author's exclusive rights by reference to provisions of the Charter of Fundamental Rights of the European Union. As such, the suggestion that UK universities might, during the pandemic, invoke a public interest defence to copyright infringement could be met with the knockdown argument that the defence no longer exists.

We could stop there, but we believe it is nevertheless useful to explore the public interest defence, especially given the possibility that, at the end of this year, the UK will no longer be bound by EU copyright law. As Jonathan Griffiths has said, 'we know remarkably little' about the public interest defence in copyright,[75] and so an important debate remains to be had about its scope. Perhaps the only thing that is clear, as Griffiths also notes, is that judges have shown little appetite to deny copyright claims on public interest grounds. In contrast, in other contexts, such as breach of confidence, misuse of private information and defamation, public interest jurisprudence is fairly mature. Given overlaps in the fact patterns that give rise to claims in copyright, breach of confidence and misuse of private information, a proper understanding of this latter group of claims is useful to determining its parameters in copyright.

71 RLUK letter (n 11).

72 [2001] Ch 143 (Aldous LJ with whom Stuart-Smith LJ agreed, Mance LJ dissenting). Although Aldous LJ rejected the proposition that there existed, in copyright, a public interest defence equivalent to that in the law of confidence, he accepted that there are limited circumstances where a court may refuse to enforce the copyright in a work because this would offend against the policy of the law. We return to this at n 81 below and surrounding text.

73 [2002] Ch 149.

74 Discussed above n 68, in relation to quotation.

75 J Griffiths, 'Pre-empting conflict – a re-examination of the public interest defence in United Kingdom (UK) copyright law' (2014) 34 Legal Studies 76, 77.

Public interest defences are commonplace in civil law claims. They safeguard meritorious interferences with personal and/or property rights. As is commonly noted, the term 'public interest' lacks precise or fixed definition, although its core meaning can be sketched easily enough, as a wide range of commentators (one of us included) have observed.[76] Whereas some commentators have criticised this imprecision, an alternative response is that this fuzzy penumbra provides judges with the discretion to ensure justice is served when novel fact patterns emerge.

Importantly, what unites these exceptional interferences with rights is that there is an underlying public interest *in the information itself* which justifies that interference. For example, in *Lion Laboratories v Evans*,[77] it was in the public interest to know that the claimant's breathalyser equipment, which was used by the police, may be inaccurate and so lead to unfair prosecutions. The misuse of private information jurisprudence has seen this exception swell to encompass the right to criticise morally wrong behaviour, as where a newspaper exposed the adultery of a former England football team manager.[78] We can therefore interpret the public interest defence as a sort of public policy exception that denies rights claims where the rights of others have been unduly harmed. Of course, as with all discretionary powers, it is susceptible to misuse (intentional or otherwise), for it can allow judges to take their own moral view and call it 'the public interest'.[79]

It is understandable, in the current climate, that educators might argue that COVID presents such novel circumstances that it is in the public interest to limit or suspend rights in copyright content. It is also understandable why they would be attracted to that idea, since it is well established that the presence of a public interest tends to operate as a 'determinative factor'[80] in deciding claims. But although it may appear intuitive this application of the public interest defence strikes us as unsustainable and deeply implausible, as it would contravene the operative normative reasoning inherent in the defence.

Whereas the *definition* of the term is flexible, its function is fixed. It is the lens by which the courts scrutinise qualities in the contested material itself – be that copyrighted, defamatory, private or confidential information – and not the wider context of the litigation. In this way, the 'public interest' acts as a sort of tiebreaker where two rights claims are otherwise ostensibly equivalent. Across the range of common law and equitable causes of action – from claims in breach of confidence and misuse of private information to defamation, copyright and even data protection – the question of a public interest defence only arises if the defendant can establish a *prima facie* right to counteract the original rights claim. Consequently, it may be said that the public interest defence is parasitic upon an underlying rights-claim capable of providing some *prima facie* justification for the breach.

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76 See eg E Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005); H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006); T Aplin, 'The development of the action for breach of confidence in a post-HRA era' [2007] Intellectual Property Quarterly 19; P Wragg, 'A freedom to criticise? Evaluating the public interest in celebrity gossip after Mosley and Terry' (2010) 2 Journal of Media Law 295; Griffiths (n 75).

77 [1985] QB 526.

78 *McClaren v Mirror Group Newspapers Limited* [2012] EWHC 2466; see also *Ferdinand v Mirror Group Newspapers Limited* [2011] EWHC 2454; *Terry v Persons Unknown* [2010] EWHC 119; and *Hutchinson v News Group Newspapers Limited* [2011] EWCA Civ 808.

79 For example, see criticisms of cases in P Wragg, 'The benefits of privacy-invading expression' (2013) 64 Northern Ireland Legal Quarterly 187.

80 *K v News Group Newspapers Limited* [2011] EWCA Civ 439, [23].

Most obviously, but not always, this countervailing right is freedom of expression under Article 10 of the European Convention on Human Rights. Alternatively, it may arise as the State's right to override personal or property rights so as to safeguard the public interest against breaches of national security or civil unrest or to protect (as in the case of COVID itself) the health and safety of citizens or their moral well-being. The State's interest, though, typically manifests in a negative form to deny the rights-claim. Indeed, we see this state interest in the limited public interest exclusion outlined by the Court of Appeal in *Hyde Park Residences Limited v Yelland*:

> [A] court would be entitled to refuse to enforce copyright if *the work is*: (i) immoral, scandalous or contrary to family life; (ii) injurious to public life, public health and safety or the administration of justice; (iii) incites or encourages others to act in a way referred to in (ii).[81]

In our paradigm, the university's claim does not fit the language of rights, whether relating to property, the person or the State. Although its conduct may support a noble, public-serving goal – such as access to education or information – its claim is too general and not rights-based. Universities are not saying, for example, that infringement of copyright amounts to or is in pursuance of a free speech claim, as it was in, say, *Ashdown v Telegraph Group*.[82] Nor are they saying that there is something about the copyright material *specifically* that warrants either dissemination to a wider group or suppression of that information. The claim is not that there is something within the materials that the public ought to know; nor is there is any moral or legal wrong disclosed in that material that universities wish to criticise. In fact, the material itself is largely irrelevant. Instead, the public interest claim relates to the costs of obtaining and licensing that content. Thus, the institution's response to copyright infringement is, and can be no more than, a plea of poverty. They cannot afford the price of compliance.

Properly speaking, this is not a public interest defence at all. It is more like a necessity defence which resides not in the material itself but in the social, political and economic environment in which the university is operating. The institution is claiming that in order to provide a quality educational service it had to infringe copyright. It might even point to the actions of copyright owners, for instance in relation to pricing, as compounding this need.[83] We agree with the concern that there are copyright-related impediments to teaching during COVID and appreciate that many universities are facing very worrying economic forecasts. But acceptance that this enlivens a public interest defence would give that defence an entirely new function, and one that could be difficult to contain. Although the current pandemic may be seen as exceptional, it is not *sui generis*. If judges were to tolerate the suspension of rights in this context, why not others where there is major economic and social upheaval? Thus, to the extent there still exists in UK copyright law a public interest defence, there are many problems in applying it as a general safety valve during the pandemic.

3.2. In the assessment of remedies

While the socio-economic climate cannot sustain a public interest defence to copyright infringement, there are more promising arguments that such circumstances may have a bearing on the assessment of remedies. In a claim for infringement, the copyright owner

81 *Hyde Park Residences Limited v Yelland* (n 72) [66] (emphasis added).

82 *Ashdown v Telegraph Group* (n 73). Even in that case, the public interest defence was unsuccessful.

83 As noted earlier, we have not discussed the competition law concern about abuse of dominant position.

will most likely seek a final injunction and damages for lost sales or licence fees. We deal with injunction and damages in turn.

Although the injunction is a discretionary equitable remedy and judges may therefore refuse an injunction and instead award damages in lieu,[84] in intellectual property law, a culture has arisen in which injunctions are generally granted as if of right. As illustrated most graphically by *Chiron v Organon Teknika*, this has been the case even where there is a strong public interest in having continued access to the defendant's infringing product.[85] There are a number of justifications for this approach, including that each intellectual property regime has already been crafted to reflect public interest concerns; that refusing to order an injunction has the practical effect of sanctioning the defendant's wrongful conduct; and that there are significant difficulties in judges calculating damages in lieu (especially where the infringing conduct may occur for many years into the future).

There are also signs, however, that UK courts are becoming more receptive to public interest arguments. Although such arguments have been accepted from time to time,[86] this has been very controversial.[87] It is therefore significant that in *Coventry v Lawrence*, the Supreme Court, in discussing the jurisdiction to award damages in lieu, emphasised the discretionary nature of the injunction and the need to consider all the relevant facts, including the public interest.[88] In addition, it has been suggested that for intellectual property cases, the availability of an injunction must be considered in light of the Enforcement Directive, which in Article 3 says that remedies must be fair, equitable, effective, proportionate and dissuasive, amongst other things.[89] Both *Coventry* and Article 3 were considered by Birss J in *Evalve Inc v Edwards Lifesciences Limited*, handed down in March 2020.[90] In that case it was held that the defendant's device, used to treat mitral valve regurgitation, infringed patents held by the claimants.[91] The defendant sought to resist an injunction on the basis that, in essence, many doctors preferred the defendant's product to that of the claimants. Birss J observed that the 'previous reluctance' to refuse an injunction stemmed from *Shelfer's Case*, but that the Supreme Court had concluded, in *Coventry*, that 'a more flexible approach should be taken'.[92] That said, he also held that, when applying *Coventry* to patent infringement, it remained necessary to consider how the patent system already embodies the public interest, just as Aldous J had done in *Chiron v*

84 Now found in Senior Courts Act 1981, section 50.

85 *Chiron Corporation v Organon Teknika Limited (No 10)* [1995] FSR 325. That case concerned the infringement of patents in relation to diagnostic tests for hepatitis. The defendants argued that the judge should award damages in lieu of an injunction, but these arguments were rejected. Although accepting that *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 did not describe exhaustively the circumstances in which such discretion could be exercised, and that the interests of the public might be relevant, Aldous J emphasised the various ways in which the patent monopoly is limited. Given these limitations, he concluded at 334 that 'it is a good working rule that an injunction will be granted to prevent continued infringement of a patent, even though that would have the effect of enforcing a monopoly, thereby restricting competition and maintaining prices. Something more should be established before the Court will depart from the good working rule suggested in the *Shelfer* case.'

86 Especially the (in)famous *Miller v Jackson* [1977] 1 QB 966, in which an injunction was declined on the basis that there was a public interest in playing cricket.

87 See eg J Heydon, M Leeming and P Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2015) [21-095] (describing *Miller v Jackson* as a 'judicial aberration').

88 *Coventry v Lawrence* [2014] UKSC 13, especially [123]–[124].

89 See especially *HTC Corp v Nokia Corporation* [2013] EWHC 3778 (Pat).

90 *Evalve Inc v Edwards Lifesciences Limited* [2020] EWHC 513 (Pat).

91 That aspect handed down in [2020] EWHC 514 (Pat).

92 *Evalve Inc v Edwards Lifesciences Limited* (n 90) [46]–[47].

Organon Teknika.[93] Where 'various public interests are engaged and pull in different directions, one should have in mind that the legislator is better equipped than the courts to examine these issues and draw the appropriate broad balance.'[94] On the facts, the public interest in freedom of clinical decision-making did not rise to the level that an injunction would be refused.[95] But drawing from the analysis of Birss J, one can imagine some compelling arguments that, during a pandemic, the public interest in education is such that access to learning materials must be maintained, and that an injunction should not be granted.

Of course, the refusal to grant an injunction does not mean that the educational establishment faces no consequences, as there is still the question of damages in lieu. In *Jaggard v Sawyer*, it was held that such damages should be calculated by reference to the price that would be accepted by a 'reasonable seller' rather than a 'ransom price'.[96] This raises the question of how the position of the reasonable seller is determined. This sort of evidentiary question is an issue for damages generally. For instance, it was said in *General Tire v Firestone* that, when quantifying damages by reference to a licence fee, the principles in the nineteenth-century case of *Penn v Jack* still apply, such that the rightsholder cannot 'ascribe any fancy sum which he says he might have charged'.[97] Instead, all that may be claimed is the 'going rate'.[98] This principle was applied in the successful strike-out application *Lilley v DMG Events Limited*, in which the litigant-in-person's copyright infringement claim amounted to, he alleged, £798,728,820.[99] Applying *Firestone*, the court found the claimant mistaken to assume 'the infringer had to take the [claimant] as he found him and, specifically, had to accept whatever rate of royalty which the [claimant] says he would have charged for a licence covering all the infringing acts'.[100]

But even if the claimant cannot pluck sums from thin air, to what extent, if at all, can the defendant push back against prices that it believes are excessive (as has been argued repeatedly in relation to the rates charged for licences for e-books and subscription databases)? And can defendants point to COVID to suggest that usual licence fees may need to be adjusted downwards? *Firestone* suggests that 'the circumstances in which the going rate was paid' are relevant.[101] Even if the publisher can produce evidence of a market at particular prices, it is obliged to show that the circumstances of those transactions is 'the same as or at least comparable with those in which the [rightsholder]

93 Discussed at n 85 above.

94 *Evalve Inc v Edwards Lifesciences Limited* (n 90) [73].

95 The reasoning here was that such a lack of choice was inherent in the patent system. This is not to say that there may not be circumstances where that choice needed to be maintained through the refusal to grant an injunction, but they would be limited.

96 *Jaggard v Sawyer* [1995] 1 WLR 269, 282.

97 *General Tire & Rubber Co v Firestone Tyre & Rubber Co* [1975] 1 WLR 819, 825, citing *Penn v Jack* (1867) LR 5 Eq 81, 113–114.

98 Ibid 825.

99 *Lilley v DMG Events Limited* [2014] EWHC 610 (IPEC).

100 Ibid [52]. The court concluded the proper figure was the more modest sum of *circa* £83: [60]. This story has a fascinating sequel: Mr Lilley sought to have this decision set aside on the grounds of 'treason, fraud and perverting the course of justice': *Lilley v Euromoney Institutional Investor plc* [2014] EWHC 2364 (Ch), [3]. In subsequent, related litigation against three further publishers (on the same grounds), he accused the sitting judge, Birss J, of apparent bias and asked that he recuse himself. That application was denied, and his claim for £593m against the defendants dismissed. Despite being issued with an extended civil restraint order and being made bankrupt as a result of this litigation, he issued further proceedings in January 2017 against different defendants, this time for the lesser sum of £335m: *Lilley v FT Lmited* [2017] EWHC 1916 (Ch). He lost.

101 *Firestone* (n 97) 825.

and the infringer are assumed to strike their bargain'.[102] This might suggest that the existence of COVID could limit the relevance of pre-pandemic prices. That said, there are also limits to this analysis. For instance, it has been said that the *Firestone* assessment cannot amount to what the defendant '*could have afforded* to pay'.[103] In addition, *Firestone* should not be understood as a judicial discretion to award what is 'just and fair' in the circumstances. It is not an equitable measure but an opportunity for the parties to introduce extrinsic evidence of what the market will bear, should that amount be less than the publisher's expectation.

In sum, it is possible that public interest arguments could have some bearing on the outcome of any copyright litigation arising out of the pandemic. However, we believe that such arguments would be relevant for remedies – and, perhaps, the availability of a defence under fair dealing or another statutory exception – rather than crystallising as a standalone public interest defence.

4 Other options

Thus far, we have described the licensing arrangements and exceptions that are most relevant to education, and concluded that the public interest defence – if it still exists in copyright law – does not map onto the particular issues raised by COVID. We have also observed that, while there are latent flexibilities in our existing statutory exceptions, there are ultimately limits to their reach, especially in relation to copying of lengthy extracts and entire works. In this final section, we consider measures that might be particularly relevant for this latter problem: compulsory licensing and the incentivisation of voluntary negotiation through amendment of section 36 of the CDPA.

In its letter to the UK government, Research Libraries UK identified compulsory licensing as a possible solution to challenges caused by COVID.[104] In its response, the government rejected this suggestion, stating that it would 'remove exclusive rights from right holders' and would likely be contrary to international copyright law.[105] Although the government did not spell out its reasoning, this statement would seem to reflect the proposition that compulsory licences are only possible under international copyright law where expressly countenanced in an international instrument.[106] Relevantly for this article, these instances are rare[107] and do not include education, except for developing countries.[108] This view of compulsory licensing also assumes that the greater does not include the lesser: that is, that permission for member states to introduce a free exception

102 Ibid.

103 *Irvine v Talksport Limited* [2003] EWCA Civ 423, [106] (emphasis in original).

104 RLUK letter (n 11).

105 Solloway letter (n 12).

106 See eg Bently et al (n 13) 315 (one reason there are few non-voluntary licences in the UK is that 'the international standards to which the United Kingdom has committed itself are generally incompatible with compulsory licensing'); see also N Caddick, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (17th edn, Sweet & Maxwell online resource 2016–) [28–06].

107 Eg Berne Convention, Articles 11*bis*(2) (rebroadcasting), 13 (mechanical recording of musical works); Rome Convention, Article 12 (secondary uses of phonograms).

108 Appendix to the Berne Convention. For discussion, see N Ndiaye, 'The Berne Convention and developing countries' (1986) 11 Columbia-VLA Journal of Law and the Arts 47.

(under which copyright owners receive nothing) does not implicitly enable them to instead enact an exception that is subject to the payment of remuneration.[109]

A number of counter-arguments can be made. First, even if we accept the latter argument, such that compulsory licensing for education cannot be justified by reference to Article 10(2) of Berne (as no mention is made of remuneration),[110] the UK could instead point to the three-step test in Article 9(2).[111] Sam Ricketson and Jane Ginsburg seem to treat this as given in *International Copyright and Neighbouring Rights*. They state, in relation to course packs, that '[s]uch usages are well developed forms of exploitation in many countries, subject to voluntary licensing arrangements or even compulsory licensing schemes that meet the requirements of article 9(2)'.[112] Second, many countries have compulsory licensing regimes outside the express examples in Berne and other international instruments, including for education.[113] With no objection having been made to these regimes, for instance under World Trade Organization dispute resolution processes, this state practice could be said to reflect consensus that compulsory licensing is compliant with international copyright law.[114] Finally, the position said to exist at the international level can be contrasted with EU copyright law, where a number of the permitted exceptions in Article 5 of the ISD are subject to the payment of fair compensation,[115] and the CJEU has pointed to remuneration in considering whether domestic exceptions are compliant with the three-step test as incorporated in Article 5(5).[116] As such, the UK government may be unduly cautious in suggesting that compulsory licensing for education would conflict with international copyright law.

109 The Rome Convention provides what is arguably the strongest evidence of a demarcation between free and remunerated exceptions. In Article 15(2), Rome permits contracting states to enact 'the same kinds of limitations' for performances, phonograms and broadcasts as it does for copyright in literary and artistic works, but that 'compulsory licences' may only be granted 'to the extent to which they are compatible with this Convention'. Only one provision – Article 12 – refers expressly to the payment of equitable remuneration. Rome also countenances certain 'exceptions' in Article 15(1).

110 Article 10(2) allows member states 'to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice'. See P Goldstein and B Hugenholtz, *International Copyright: Principles, Law, and Practice* (3rd edn, Oxford University Press 2013) §11.1 (describing Article 10(2) as an 'uncompensated limitation').

111 Article 9(2) states: 'It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'

112 Ricketson and Ginsburg (n 1) [13.45]. In their discussion of the legislative history of Article 9(2), Ricketson and Ginsburg argue at [13.25] that the provision was 'envisaged' to cover free exceptions and compulsory licences and that this makes sense given its purpose and language; that Article 9(2) was intended to apply in a range of 'certain special cases'; and that states were not precluded from tying reliance on an exception to the payment of remuneration.

113 Eg Australian Copyright Act 1968 (Cth), Part IVA, Division 4; Singapore Copyright Act (chapter 63, revised edition 2006), section 52.

114 See Vienna Convention on the Law of Treaties, Article 31(3)(b) (subsequent practice can be used as an aid in treaty interpretation).

115 ISD, Articles 5(2)(a), (b) and (e). An entitlement to receive fair compensation is also found in the EU orphaned works exception: Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, Article 6(5). In the UK, this amount is to be agreed between the parties or, if no such agreement can be reached, set by the Copyright Tribunal: CDPA, Schedule ZA1, paragraph 7(4). The mandatory exception for uses for the 'sole purpose of illustration for teaching' in the DSM Directive may be implemented as a remunerated exception: Article 5(4).

116 Eg *Technische Universitat Darmstadt v Eugen Ulmer KG* (n 60) [48].

There may nevertheless be philosophical and practical objections to compulsory licensing. The philosophical objection is that compulsory licences are antithetical to private property rights as they remove from individual copyright owners the ability to decide whether to licence rights and for how much.[117] This might be seen as problematic for a number of reasons: first, because it erodes the decision-making autonomy of owners; and second, because it is likely to lead to inefficient outcomes, on the basis that the state is poorly placed to set prices.[118] This latter concern will be particularly acute for those who favour neoliberal economic models, the central tenet of which is the supremacy of the market and limiting state interventions. One answer might be that, even if we normally prefer to leave the exploitation of copyright works to voluntary negotiation, a pandemic creates conditions where the usual reasons for market failure – holdout, fragmentation of rights, transaction costs, etc – are magnified and of far greater consequence. In universities, for example, access to physical library collections is likely to be limited for some time, making staff and students incredibly reliant on online and digitised content. Even if we ordinarily have an aversion to compulsory licensing, a pandemic may create an environment in which we cannot trust the market to support the required expansion of online collections, making state intervention essential.

But even if those arguments are compelling, there remains the question of whether it is realistic to expect the UK government to have the legislative bandwidth to develop a compulsory licensing regime from scratch, and whether the relevant copyright collectives would be able to implement that scheme in a timely manner. On the plus side, there are already workflows for reporting what has been copied and for the payment and distribution of fees. But before these could be adapted to any new scheme, the government would need to consider many important questions about the terms of the licence. One option might be for the government to develop a broad framework for the licence, on the basis that the precise details in relation to quantitative limits, pricing, reporting, and so forth would be agreed by the relevant parties or, if agreement could not be reached, set by the Copyright Tribunal. If it was attracted to this model, the government could use as a guide the simplified educational copying licence introduced in Australia to replace the schemes in Parts VA and VB.[119] But while this may speed up the legislative process at the government's end, it would risk generating a protracted commercial negotiation which in all likelihood would end up at the Tribunal.[120] To avoid such an outcome, the government could finalise many of the details itself, including how remuneration is calculated. But this would only magnify the concern, noted above, that

117 To use the economic language, this changes the copyright owner's entitlement from a property right to a liability rule: see G Calabresi and A Melamed, 'Property rules, liability rules, and inalienability: one view of the cathedral' (1972) 85 Harvard Law Review 1089. Similar objections have been made to the granting of damages in lieu of an injunction, as discussed above in Section 3.2.

118 Concerns about the deficiencies of state decision-making may be even stronger when the royalty is prescribed by statute (statutory licensing) rather than fixed by a tribunal, if a tribunal is better equipped than a legislative drafting team to respond to the views and evidence of relevant stakeholders.

119 Introduced by the Copyright Amendment (Disability Access and Other Measures) Act 2017. For instance, section 113P(1) sets out the circumstances in which the copying or communicating of a work is non-infringing. These include that a 'remuneration notice' applies and is in force; the act is solely for the educational purposes of that or another educational institution; and that 'the amount of the work copied or communicated does not unreasonably prejudice the legitimate interests of the owner of the copyright'.

120 In Australia, the Copyright Agency Limited and Universities Australia were unable to reach agreement on the methodology for ascertaining the amount of equitable remuneration under a new licence covering the period 1 January 2019 to 31 December 2024. In late 2018, the Copyright Agency made an application to the Copyright Tribunal to determine this point. Interim orders were made by Perram J in May 2019: *Copyright Agency Limited v University of Adelaide (Interim Orders)* [2019] ACopyT 2. The matter continues.

states are not good at setting prices. That is, if the government will do a bad job at a compulsory licence at the best of times, it can hardly be expected to improve on its usual performance during pandemic conditions. Even for those whose views on state intervention are more charitable, one can imagine the concern that a hastily assembled scheme might be either useless to universities *or* damage the markets and income streams of authors and publishers.

We wonder, though, whether there is a government intervention that would incentivise rather than replace voluntary negotiation: reform of section 36 of the CDPA, perhaps for a limited period, so that it expressly allows educational establishments to copy lengthier extracts or even entire works (perhaps under CDL terms) *but not where licences are available that authorise those acts*.[121] To understand this suggestion, it is necessary to step back a moment to understand the structure and goals of section 36. That provision allows educational establishments to copy and communicate, for the purposes of instruction, not more than 5 per cent of a work (not being a broadcast or artistic work). However, section 36 does not apply to the extent that a licence is available and the establishment is aware or ought to have been aware of that fact.[122] The idea is to simultaneously strengthen the hand of educational establishments at the negotiating table (as they know that they can copy certain amounts for free) and encourage copyright owners to offer licences that go beyond that which is covered by section 36.[123] Similar thinking underpinned the recommendation of the Whitford Committee in the 1970s in relation to photocopying by libraries, educational establishments, and so forth.[124] That committee saw blanket licensing as the best mechanism to deal with reprographic reproduction and recommended the removal of exceptions in the Copyright Act 1956. However, it also observed that users should not be asked to give up these exceptions 'without a guarantee that their needs will be met by blanket licensing schemes'.[125] The answer of the committee was that a time be set for such negotiations, after which, if licences were not in place, there would be a 'free-for-all' in which copies could be made without payment.[126] The Whitford Committee saw a number of benefits of this approach, including that the collectives administering the licences would have the flexibility to make different arrangements with different users.[127]

There are many different ways this general idea – of using an exception to incentivise licensing – could be operationalised, and articulation of a detailed plan is beyond the scope of this article. But, to provide a brief example, let us say that the aim is to encourage the expansion of collective licences for published print material so that lengthier extracts and entire works may be copied and made available to staff and students. We might start from the premise that, when it comes to facilitating digitisation,

121 See generally R Merges, 'Contracting into liability rules' (1996) 84 California Law Review 1293, arguing against the widespread use of compulsory licences, noting the efficiency of collective forms of administration and considering various ways to encourage such 'private liability rules' to emerge. For Merges, one way to encourage the latter is to 'modify property rule entitlements so as to increase slightly the risk that the [defendant] can escape entirely from the [claimant's] property right': at 1316.

122 CDPA, section 36(6). It is important to bear in mind that the Copyright Tribunal has ultimate oversight of this process through its supervision of licensing schemes and bodies: see CDPA, chapter VII.

123 It has been questioned whether section 36 achieved this, at least in earlier iterations: R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press 2005) 128–129.

124 Whitford Report (n 1).

125 Ibid [279].

126 Ibid.

127 Ibid [280].

voluntary licensing – perhaps including a scheme for *licensed* digital lending – is the gold standard. There are a number of reasons for this. A licensing scheme can permit levels of access beyond those possible under CDL and could conceivably apply to a broader range of works. It avoids some of the uncertainties that are inherent in relying on exceptions, for instance in relation to the right to digitise and the legality of providing access to students located overseas. Depending on how the scheme was set up, universities may be able to access born-digital content or scans produced by other establishments (including, potentially, the British Library), rather than having to digitise everything themselves. Such digital content could include functionality to make it more user-friendly than a pdf of a book and could be accompanied by less aggressive digital rights management (DRM) overlays, to the extent licensed digital lending was permitted. Finally, there could be different approaches to pricing, ranging from transactional fees (whether based on pages, chapters or works) to a subscription-based 'all you can eat' model.

If the government agreed that such an expansion of collective licensing were desirable, it could consider a Whitford-esque approach in which it extends section 36 to cover a greater range of acts. At this point the government would need to think carefully about the details of this reform, as the goal would be to encourage a negotiated solution and not provide educational establishments with such an attractive exception that licensing becomes redundant.[128] But we can imagine that its response might comprise or include an exception that explicitly allowed educational establishments to adopt CDL. That exception would need to follow the key features of CDL, for instance in relation to the owned-to-loaned ratio and the inclusion of DRM to limit re-use by the borrower. It would permit educational establishments to copy entire works, although we can envisage a key area of debate being whether *any* published work held in physical form could be copied in full, or whether there would be different rules for titles that are also available commercially in digital form. Allowing such books to be digitised in full would raise complaints about market substitution. On the other hand, one might ask why universities should be asked to pay over and over again for the same content. If a university acquires, lawfully, a physical book and wishes to digitise that book and lend a soft copy under strict CDL terms, why should we protect the e-book market?

In suggesting the expansion of section 36, we do not mean to imply that this would be a straightforward or easy option for the UK government to operationalise. But we believe that the sort of consultation and review required for an exception would be of a much lower magnitude than that required for a fully fledged compulsory licensing system. Being unremunerated, there would be no need to set a price. The general idea would be to give universities greater comfort in embracing CDL than can be achieved from section 32 and 36A alone, but in the context where a collective licence and/or licensed digital lending scheme would be even better.

5 Conclusion

As stated in the introduction, the COVID-19 pandemic has not generated entirely new problems for educational institutions in relation to copyright but has magnified the effects of longstanding tensions and issues. We have made a number of suggestions for how universities may make better use of exceptions and have suggested that, if the government is minded to intervene, the best approach may be to encourage voluntary licensing. But, for universities and their representatives at the negotiating table right now,

128 Indeed, such an exception may be inconsistent with the three-step test as found in Article 5(5) of the ISD and various international treaties.

what can they do to ensure the economic realities of teaching during a pandemic figure in their discussions with rightsholders? As a matter of law, it is very important to hold the line in relation to exceptions, and we have also discussed whether public interest arguments might be relevant to remedies. But, beyond that, we see the negotiation as largely commercial in nature. Even before the pandemic, there were ongoing complaints that publishers were insisting on high, unrealistic prices for digital content. We would suggest that, before publishers get too strident in their insistence that everything should be left to private ordering and that this is just the way of things, they may want to reflect on one form of private ordering that universities might, following COVID, be even more minded to embrace. This crisis illustrates both the fragility of the university's position and their dependence upon the goodwill of publishers. It only heightens the urgency of considering new publishing models, given the preponderance of materials hawked about by publishers that emanate from the efforts of employees in the university sector. Is it not, then, time for the university sector to move even more aggressively towards open access and other in-house publishing models, so that we have greater control over our own destiny and can reap the benefits ourselves?

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'A leap forward'? Critiquing the criminalisation of domestic abuse in Northern Ireland

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Abstract

Following in the footsteps of other jurisdictions across the UK and Republic of Ireland, Northern Ireland is currently taking steps to criminalise 'domestic abuse'. The proposed offence is strongly influenced by research into 'coercive control', a framing popularised by Evan Stark that captures both physical and non-physical forms of abuse. In this article, I introduce the Northern Ireland Domestic Abuse and Family Proceedings Bill, before analysing its likely impacts on victim-survivors. To do so, I draw from three key critiques of criminalisation that have emerged from both reformist and anti-carceral feminist scholarship: first, that implementation will pose practical challenges; second, that criminalisation will result in a range of unintended harms; and, third, that criminalisation alone is an ineffective response to domestic abuse. In light of these critiques, I argue for a more holistic response, which considers the underlying social structures and dynamics that contextualise the phenomenon of domestic abuse.

Keywords: domestic abuse; coercive control; criminalisation; restorative justice; transformative justice.

Introduction

Domestic abuse[1] is increasingly recognised globally as an issue of public concern and human rights implications which causes a wide range of serious physical and psychological effects for victim-survivors[2] and their children.[3] With COVID-19-related economic stress, restricted movement, social distancing and self-isolation exacerbating the

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1 Domestic abuse is one term used to describe patterns of threatening, controlling, coercive behaviour, violence or abuse (financial, physical, psychological/emotional, sexual) used by adults or adolescents against their current or former partners or family members. Other terms include domestic violence and partner violence or intimate partner violence in the context of intimate relationships.

2 This article refers to those who have suffered domestic abuse as 'victim-survivors' to acknowledge their victimisation while recognising that some prefer 'survivor' as a more empowering term.

3 Jane E M Callaghan et al, 'Beyond "witnessing": children's experiences of coercive control in domestic violence and abuse' (2018) 33 Journal of Interpersonal Violence 1551.

vulnerability of those for whom the home is unsafe,[4] debates about how to meaningfully respond to and prevent domestic abuse have never been more urgent. Across the world, criminal justice policies and legislative frameworks have dominated responses to domestic abuse for several decades.[5] However, these frameworks have been critiqued for failing to deliver justice to victim-survivors or reduce the prevalence of domestic abuse.[6] One critique that has gained particular traction amongst policy makers and legislatures in recent years has been that criminal law's focus on 'violent incident models'[7] has prevented appropriate recognition of the long-term patterns of physical and non-physical behaviours that can categorise domestic abuse.[8] Research has consistently shown that not only 'long-standing physical and sexual abuse' but patterns of 'threats, stalking, isolation, and numerous instances of control' create the context for many victims of domestic abuse,[9] with non-physical harms often having longer and greater negative impacts.[10]

Across the UK and the Republic of Ireland, sustained campaigns have spurred moves to criminalise non-physical abuse. Legislation prohibiting 'controlling or coercive behaviour' was introduced in England and Wales in 2015,[11] a criminal offence of 'coercive control' was introduced in the Republic of Ireland in 2018,[12] and 'partner abuse' was criminalised in Scotland the same year.[13] Following in these footsteps, a Domestic Abuse and Family Proceedings Bill (the Northern Ireland Bill) is now being debated in Northern Ireland. If passed, this Bill would create a new criminal offence, prohibiting patterns of psychological, emotional and physical abuse perpetrated against partners, ex-partners and family members. Although distinct in their formulations, each of these pieces of legislation have drawn to some extent on the concept of 'coercive control', a framing of abuse publicised by Evan Stark (and others) as a means of emphasising the importance of power and control in abusive relationships.[14] The concept highlights how 'minor' acts of violence and other non-physical forms of control, which might by themselves not appear to justify an intervention, become significant when viewed as part of a broader pattern of behaviour.[15] Stark has strongly argued that 'violent incident

4 'UN chief calls for domestic violence "ceasefire" amid "horrifying global surge"' (*UN News*, 5 April 2020) <https://news.un.org/en/story/2020/04/1061052>; Maria Luísa Moreira, 'The invisible pandemic: domestic violence within EU borders' (*LSE Blogs,* 11 June 2020) <https://blogs.lse.ac.uk/wps/2020/06/11/the-invisible-pandemic-domestic-violence-within-eu-borders>.

5 Aparna Polavarapu, 'Global carceral feminism and domestic violence: what the west can learn from reconciliation in Uganda' (2019) 42(1) Harvard Journal of Law and Gender 123.

6 See e.g. Cheryl Hanna, 'The paradox of progress: translating Evan Stark's coercive control into legal doctrine for abused women' (2009) 15(12) Violence Against Women 1458; Mandy Burton, *Legal Responses to Domestic Violence* (Routledge 2008); Susan Edwards, *Policing Domestic Violence: Women, the Law and the State* (Sage 1989).

7 Richard Gelles, *Intimate Violence in Families* (Sage 1997).

8 Evan Stark, 'Looking beyond domestic violence: policing coercive control' (2012) 12 Journal of Police Crisis Negotiations 199.

9 Evan Stark and Marianne Hester, 'Coercive control: update and review' (2019) 25(1) Violence Against Women 81.

10 Torna Pitman, 'Living with Coercive Control' (2017) 47(1) British Journal of Social Work 143.

11 Serious Crime Act 2015, section 76.

12 Domestic Violence Act 2018, section 39.

13 Domestic Abuse (Scotland) Act 2018.

14 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007); Evan Stark, 'Rethinking coercive control' (2009) 15(12) Violence Against Women 1509. See also Susan Schechter, *Women and Male Violence* (South End Press 1982); For other similar formulations, see e.g. Michael Johnson, *A Typology of Domestic Violence* (Northeastern University Press 2008); Richard Tolman 'The development of a measure of psychological maltreatment of women by their male partners' (1989) 4 Violence and Victims 159.

15 Stark (2012) (n 8) 204–205.

models' are failing victim-survivors, as 'the characteristic pattern of violence in coercive control involves frequent, even routine, low-level assaults that either fall below the radar of police screens or else result in few or no sanctions. Meanwhile, the forms of intimidation, isolation, degradation and control that comprise the infrastructure of coercive control remain largely invisible to law and criminal justice.'[16]

Although neither theoretically nor empirically uncontested,[17] Stark's concept of coercive control has had a significant influence on legal, policy and advocacy strategies around domestic abuse.[18] However, as observed by Walklate and Fitz-Gibbon, 'the mere introduction and "travelling" nature of such policies should not be misinterpreted as evidence of their effectiveness in practice'.[19] At the Second Stage of the Northern Ireland Bill debate in April 2020, Northern Irish Minister of Justice Naomi Long stated that '[w]hile the Bill is not a panacea, it is not just a positive step in the right direction but perhaps a leap forward in the fight against domestic abuse in Northern Ireland'.[20] In this article, I interrogate the assumption that the Bill will constitute 'a leap forward' in combatting domestic abuse. To do so, I engage with three key critiques that have emerged from the literature: first, that criminalisation will be challenging to implement in practice; second, that criminalisation will have unintended negative consequences; and, third, that criminalisation alone will be ineffective at addressing domestic abuse. Throughout, I situate these critiques in the particular context of Northern Ireland, a conservative patriarchy where religious, social and gendered norms have intersected with a history of political violence and continued economic strain, contributing to an environment where gendered violence has been both prevalent and hidden.[21] In doing so, I aim to contribute to the task of 'drawing out and differentiating that which is unique to the fabric of the criminal justice system in Northern Ireland', as well as those aspects that are shared with the rest of the UK.[22]

The three critiques outlined above are drawn from two schools of feminist anti-violence thought. The first is 'reformist' scholarship, which frames criminalisation as an important, if imperfect, avenue for addressing domestic abuse.[23] This prioritisation of criminalisation as an anti-violence tactic emerged from the liberal political roots of the women's movement in the USA and UK[24] and the desire to correct the 'legacy of judicial

16 Ibid 212.

17 Sylvia Walby and Jude Towers, 'Untangling the concept of coercive control' (2018) 18 Criminology and Criminal Justice 7.

18 Michele Burman and Oona Brooks-Hay, 'Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control' (2018) 18(1) Criminology and Criminal Justice 67.

19 Sandra Walklate and Kate Fitz-Gibbon, 'The criminalisation of coercive control' (2019) 8(4) International Journal for Crime, Justice and Social Democracy 94.

20 Transcript available at <www.theyworkforyou.com/ni/?id=2020-04-28.2.28&p=24994>.

21 See e.g. Jessica Leigh Doyle and Monica McWilliams, *Intimate Partner Violence in Conflict and Post-Conflict Societies: Insights and Lessons from Northern Ireland* (Political Settlements Research Programme 2018) 66–68; Alice McIntyre, *Women in Belfast: How Violence Shapes Identity* (Praeger 2004); Fidelma Ashe, *Gender, Nationalism and Conflict Transformation* (Routledge 2019).

22 Anne-Marie McAlinden and Clare Dwyer, '"Doing" criminal justice in Northern Ireland: "policy transfer", transitional justice and governing through the past' in Anne-Marie McAlinden and Clare Dwyer, *Criminal Justice in Transition: The Northern Ireland Context* (Bloomsbury Publishing 2015) 365.

23 See e.g. Lise Gotell, 'Reassessing the place of criminal law reform in the struggle against sexual violence' in Anastasia Powell, Nicola Henry and Asher Flynn (eds), *Rape Justice* (Palgrave Macmillan 2015).

24 While this movement emerged originally as a response to violence against women in the context of heterosexual intimate relationships, we now know that domestic abuse can impact people of all genders and sexual orientations. In this article, I will use inclusive language wherever possible to recognise this reality. This is not intended to minimise the serious nature or continued prevalence of male violence against women.

indifference to violence in the private matters of the home'.[25] As observed by Simon, 'domestic violence has emerged over the last three decades as one of the clearest cases where a civil rights movement has turned to criminalization as a primary tool of social justice'.[26] Dubbed 'carceral feminism'[27] by its critics,[28] this school of thought often centres around perceived gaps or limitations in legal frameworks, or the failure of law enforcement practitioners to adequately police or prosecute domestic abuse.[29] As such, it explores ways of making legal frameworks more effective and 'victim-centric'.

The second school of thought, known as 'anti-carceral feminism' or 'feminist abolitionism',[30] looks beyond interpersonal violence to consider the structural oppressions and inequalities that facilitate and enable violence in homes and families.[31] Drawn from the Black feminist movement in the USA,[32] this approach refutes the ability of criminal interventions to deliver justice,[33] condemns the violence perpetrated by the criminal justice system,[34] critiques its ability to respond to the socio-economic needs of victim-survivors,[35] and advocates for alternative community-led restorative and transformative justice approaches.[36] Rather than definitively placing this article in either school of thought, I engage in what Matsuda has termed the 'dance with the devil',[37] accepting the presence of criminal justice as part of a response to domestic abuse, while retaining an awareness of the inherent limitations and risks of such a response. As a result, I argue for a more holistic response to domestic abuse, one which may continue to encompass criminal sanctions, but which also looks beyond criminalisation to consider a broader range of preventative and responsive measures.

The article proceeds as follows. It first provides context to this discussion by outlining the background to the Northern Ireland Bill and its main provisions. It then engages with the first of the three critiques outlined above, arguing that there will be significant

25 Deborah M Weissman, 'The community politics of domestic violence' (2016) 82 Brooklyn Law Review 1479.

26 Jonathon Simon, *Governing through Crime* (Oxford University Press 2007) 180.

27 Elizabeth Bernstein, 'The sexual politics of the "new abolitionism" differences' (2007) 18(3) Journal of Feminist Cultural Studies 128.

28 '… to my knowledge no feminist scholar has explicitly embraced this label': Chloe Taylor, 'Anti-carceral feminism and sexual assault – a defense' (2018) Social Philosophy Today 1543.

29 See e.g. Heather Douglas and Lee C Godden, 'The decriminalisation of domestic violence' (2003) 27 Criminal Law Journal 32.

30 Patricia O'Brien et al, 'Introduction to special topic on anticarceral feminisms' (2020) 35(1) Affilia: Journal of Women and Social Work 5.

31 Gillian McNaull, 'Contextualising violence: an anti-carceral feminist approach' in Rachel Killean, Eithne Dowds and Anne-Marie McAlinden (eds), *Sexual Violence on Trial* (Routledge 2021).

32 Beth E Richie, 'Reimagining the movement to end gender violence: anti-racism, prison abolition, women of color feminisms, and other radical visions of justice' (2015) 5 University of Miami Race and Social Justice Law Review 257, 268.

33 Leigh Goodmark, *A Troubled Marriage* (New York University Press 2011).

34 Beth E Richie, *Arrested Justice* (New York University Press 2012).

35 See e.g. Deborah M Weissman, 'The personal is political—and economic: rethinking domestic violence' (2007) Brigham Young University Law Review 387.

36 See e.g. Emily Thuma, *All our Trials* (University of Illinois Press 2019); Ejeris Dixon and Leah Piepzna-Samarasinha, *Beyond Survival* (AK Press 2020); Mimi E Kim, 'From carceral feminism to transformative justice: women-of-color feminism and alternatives to incarceration' (2018) 27(3) Journal of Ethnic and Cultural Diversity in Social Work 219.

37 'For now feminists must dance with the devil – demanding that the existing criminal justice system protect women from violence even as we criticize and work toward the abolishment of that system': Mari Matsuda, *Where is Your Body? And Other Essays on Race, Gender and the Law* (Beacon Press 1996).

challenges associated with implementing the proposed Bill. To do so, it focuses on the difficulties criminal justice practitioners may face in identifying, investigating and evidencing the new offence. It then turns to the second critique, arguing that criminalisation will result in secondary victimisation for victim-survivors, both as a result of their engagement with the criminal justice system and as a result of the outcomes that follow that engagement. Turning to the third critique, the article argues that prioritising a criminal justice response will be an ineffective means of reducing domestic abuse perpetration. As a result of this analysis, the article's final section explores how we might look beyond criminalisation to consider a more holistic response, one which places domestic abuse in its broader structural and societal context and which encompasses a range of preventative and responsive measures.

1 Criminalising domestic abuse in Northern Ireland

While underreporting can make it difficult to determine the full extent of domestic abuse in Northern Ireland,[38] available statistics nonetheless demonstrate that it is a substantial problem. The Police Service of Northern Ireland (PSNI) recorded 31,682 domestic abuse incidents in 2018/2019, the highest level recorded since the data series began in 2004/2005,[39] with an average of five domestic homicides taking place each year.[40] It is estimated that about one in every five to six women[41] and about one in every 10 to 12 men experience domestic abuse,[42] with domestic homicides accounting for a quarter of all homicides in Northern Ireland.[43] Indeed, Northern Ireland has been reported as having one of the highest rates of domestic homicide in Europe.[44] The recent COVID-19 lockdown has tragically highlighted the prevalence of this phenomenon, with 2000 domestic abuse calls made to the PSNI in the first three weeks of April 2020 and three deaths attributed to domestic abuse between March and April.[45]

Recognising the need to address this pervasive harm, the Northern Ireland Department of Health, Social Services and Public Safety (DoHSSPS) and the Department of Justice (DoJ) in Northern Ireland published a seven-year Strategy, 'Stopping Domestic and Sexual Violence and Abuse in Northern Ireland' in 2016.[46]

38 The Northern Ireland Crime Survey 2010/2011 found that the PSNI was only alerted to approximately one-third of the 'worst' cases of domestic abuse, cited in DoHSSPS and DoJ, *Stopping Domestic and Sexual Violence and Abuse in Northern Ireland: A Seven Year Strategy* (March 2016) <www.health-ni.gov.uk/publications/stopping-domestic-and-sexual-violence-and-abuse-northern-ireland-strategy>.

39 PSNI, 'Trends in domestic abuse incidents and crimes recorded by the police in Northern Ireland' 2004/05–2018/19 (*Annual Bulletin*, 8 November 2019).

40 DoHSSPS and DoJ, *Developing a Workplace Policy on Domestic and Sexual Violence and Abuse: Guidance for Employers* (November 2018) <www.nibusinessinfo.co.uk/sites/default/files/Developing-a-Workplace-Policy-on-Domestic-and-Sexual-Violence.pdf>.

41 Women's Aid Annual Survey 2015 <www.womensaid.org.uk/womens-aid-releases-annual-survey-2015-statistics>.

42 DoHSSPS and DoJ (n 38) 22.

43 PSNI, 'Trends in domestic abuse incidents and crimes recorded by the police in Northern Ireland' 2004/05–2014/15 (*Annual Bulletin*, 6 August 2015).

44 Eurostat, 'Intentional homicide victims by victim-offender relationship and sex: number and rate for the relevant sex group' http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=crim_hom_vrel&lang=en.

45 Jayne McCormack, 'Coronavirus: three domestic killings since lockdown began' (*BBC News*, 28 April 2020) <www.bbc.co.uk/news/uk-northern-ireland-52440662>. See also Ronagh McQuigg, 'Domestic violence – the "shadow pandemic"' (Queen's Policy Engagement, 28 October 2020) <http://qpol.qub.ac.uk/domestic-violence-the-shadow-pandemic/>.

46 DoHSSPS and DoJ (n 38).

Reflecting the influence of Stark's coercive control model, the Strategy produced a new definition of domestic abuse, encompassing:

> ... threatening, controlling, coercive behaviour, violence or abuse (psychological, virtual, physical, verbal, sexual, financial or emotional) inflicted on anyone (irrespective of age, ethnicity, religion, gender, gender identity, sexual orientation or any form of disability) by a current or former intimate partner or family member.[47]

This framing of abuse is not reflected in Northern Ireland's criminal law. Existing criminal offences capture some behaviours associated with domestic abuse, including common assault,[48] assault occasioning actual bodily harm,[49] wounding with intent to cause grievous bodily harm,[50] sexual assault and rape,[51] and harassment and 'putting people in fear of violence'.[52] This is reflective of the 'violent incident model' and has been criticised both for its failure to recognise patterns of abuse and for making non-physical abuse almost impossible to prosecute.[53] Statistics highlight the challenges of prosecuting perpetrators under the existing legal framework: data from the Criminal Justice Inspection (Northern Ireland) (CJINI) indicates that a third of domestic violence and abuse cases do not meet the required standards to proceed to a prosecution, with under a third resulting in a conviction.[54]

Moves to introduce a new criminal offence recognising patterns of coercive and controlling behaviour began with a consultation in February 2016.[55] Although respondents were generally favourable of such a move, progress was slowed by the collapse of the Northern Ireland Assembly in January 2017. However, a subsequent consultation was held in 2019 to explore options for legislation prohibiting victims of domestic abuse from being cross-examined by perpetrators in person in family proceedings.[56] This also garnered positive responses, and, following the re-establishment of the Assembly in January 2020, the Minister of Justice introduced the Domestic Abuse and Family Proceedings Bill to the Northern Ireland Assembly on 31 March 2020.[57]

The Bill aims to 'improve the operation of the justice system by creating an offence that recognises the experience of victims, the repetitive nature of the abusive behaviour and the potential cumulative effect of domestic abuse'.[58] To do so, it introduces a new

47 Ibid 18.

48 Offences Against the Person Act 1861, section 42.

49 Ibid section 47.

50 Ibid section 18.

51 Sexual Offences (Northern Ireland) Order 2008, Articles 7 and 14.

52 Protection from Harassment (Northern Ireland) Order 1997.

53 Julia Tolmie, 'Coercive control: to criminalize or not to criminalize' (2018) 18(1) Criminology and Criminal Justice 50.

54 CJINI, *No Excuse: A Thematic Inspection of the Handling of Domestic Violence and Abuse Cases by the Criminal Justice System in Northern Ireland* (June 2019). See also PSNI (n 39).

55 Details available at <www.justice-ni.gov.uk/consultations/domestic-abuse-offence-and-domestic-violence-disclosure-scheme/>.

56 Details available at <https://www.justice-ni.gov.uk/consultations/consultation-prohibition-cross-examination-family-proceedings>.

57 Details available at <www.niassembly.gov.uk/assembly-business/legislation/2017-2022-mandate/primary-legislation---bills-2017---2022-mandate/domestic-abuse-bill/>

58 Explanatory and Financial Memorandum, NIA Bill 03/17-22 EFM, paragraph 17.

offence of domestic abuse;[59] an aggravation of domestic abuse which can be applied to other offences;[60] and two child aggravators associated with the domestic abuse offence.[61] It also makes a number of associated changes to procedures in criminal and family proceedings.[62] Although the new offence does not specifically criminalise 'coercive control' by name, the influence of this framing is evidenced by the offence's focus on courses of behaviour (defined as at least two incidents of behaviour) including psychological, emotional and physical abuse.[63] The offence is broader than Stark's conceptualisation of coercive control as violence perpetrated by men against their female intimate partners. In keeping with the definition used in the 2016 Strategy outlined above, it is, instead, gender neutral and extends to abuse perpetrated by partners, ex-partners and family members (defined as 'personally connected' persons).[64]

Further reflecting the influence of coercive control, the Bill explicitly acknowledges relevant effects that could indicate that behaviour is abusive. This includes behaviour that causes victims to become dependent on or subordinate to the abuser, that isolates the victim, that involves the controlling, regulating or monitoring of the victims' activities, that restricts freedom of action, or makes the victim feel frightened, humiliated, degraded, punished or intimidated.[65] In recognising dependency, subordination, control and isolation, the proposed offence moves beyond the 'violent incident model', criminalising the 'underlying architecture' of domestic abuse.[66] Importantly, rather than requiring proof that a victim felt those specific effects, an offence is committed when a 'reasonable person' would consider that the course of behaviour would be likely to cause physical or psychological harm, including fear, alarm and distress, and when the accused either intended to cause harm, or was reckless as to whether it did or not.[67] In removing the requirement of a specific effect (required in England and Wales), the Northern Ireland Bill mirrors the approach taken in Scotland, praised as the 'gold standard' of coercive control legislation.[68]

If passed, the Bill is likely to please those who consider the criminal law a positive tool in changing people's lives.[69] Certainly, the offence delivers on its aim of better recognising the 'experience of victims, the repetitive nature of the abusive behaviour and the potential cumulative effect of domestic abuse'.[70] This, it has been argued, has symbolic power. As reasoned by Tadros, criminal law should reflect domestic abuse's 'moral distinctiveness' as a specific form of violence.[71] This recognition may in turn send a message about the state's condemnation of such behaviour, facilitating a change in

59 Domestic Abuse and Family Proceedings Bill, as introduced in the Northern Ireland Assembly on 31 March 2020 (Bill 03/17-22) (the NI Bill), section 1.

60 Ibid, section 15.

61 Ibid sections 8–9.

62 Ibid sections 21–26.

63 Ibid section 2.

64 Ibid section 5.

65 Ibid section 2(3).

66 Tolmie (n 53) 52.

67 NI Bill (n 59) section 1(2).

68 Burman and Brooks-Hay (n 18) 78.

69 Charlotte Barlow et al, 'Putting coercive control into practice: problems and possibilities' (2020) 60 British Journal of Criminology 160.

70 Explanatory and Financial Memorandum (n 58) 17.

71 Victor Tadros, 'The distinctiveness of domestic abuse: a freedom based account' (2005) 65(3) Louisiana Law Review 989.

societal norms about the acceptability of such behaviour.[72] Similarly, it has been argued that criminalising non-physical abuse could have a broader educative function, enabling victim-survivors to put a name to their experience and reducing the stigma associated with staying in an abusive, violent situation.[73] However, while potentially symbolically important, the ability of increased criminalisation to meaningfully address domestic abuse and improve the lives of victim-survivors remains unclear. In the following section, I turn to the first of the three critiques outlined in my introduction, namely that there will be significant challenges associated with implementing a new domestic abuse offence.

2 The challenges of implementation

Law does not exist in a vacuum, and the Bill's implementation will inevitably be shaped by how criminal justice practitioners exercise their discretion when responding to reports of a domestic abuse incident.[74] Stark has argued that, by requiring police officers to place incidents of violence in their historical context through 'enhanced' questions and investigations, they will be encouraged to pursue a 'proactive response', applying sanctions designed to curtail the course of conduct.[75] Moves to criminalise coercive control in other jurisdictions have been praised for encouraging criminal justice professionals to view abuse as a process rather than an isolated incident,[76] and for enabling police interventions in instances where they might not previously have been able.[77] By facilitating earlier interventions, there is the hope that victim-survivors will be given time and space to implement safety plans,[78] potentially preventing future escalations to acts of physical violence and victim fatalities.[79] However, much will depend on the extent to which criminal justice practitioners are given the tools and knowledge required to correctly identify domestic abuse.[80] Police officer decisions taken at the scene, such as whether or not to carry out arrests or take other further action, will be formed by their ability to identify behaviour falling within the parameters of the new offence, conduct an accurate assessment of the risk posed, elicit relevant evidence from the victim-survivor and other sources, and correctly assess that evidence for the purposes of laying charges.[81] Following investigations, decisions as to whether to prosecute will be similarly influenced by prosecutors' understanding of the new offence and the evidence required to initiate and succeed in a prosecution.[82]

72 Leigh Goodmark, 'Should domestic violence be decriminalised' (2017) 40 Harvard Journal of Law and Gender 53, 66–67.

73 Stark (2012) (n 8) 215.

74 Iain R Brennan et al, 'Service provider difficulties in operationalizing coercive control' (2016) 25(6) Violence Against Women 635.

75 Stark (2012) (n 8).

76 Barlow et al (n 69).

77 Vanessa Bettinson, 'Criminalising coercive control in domestic violence cases: should Scotland follow the path of England and Wales?' (2016) Criminal Law Review 165.

78 Margret E Bell et al, 'Battered women's perceptions of civil and criminal court helpfulness' (2011) 17 Violence Against Women 71.

79 Andy Myhill, 'Measuring coercive control: what can we learn from national population surveys?' (2015) 21(3) Violence Against Women 355; Connie J A Beck and Chitra Raghavan, 'Intimate partner abuse screening in custody mediation: the importance of assessing coercive control' (2010) 48 Family Court Review 555; R Emerson Dobash and Russell P Dobash, *When Men Murder Women* (Oxford University Press 2015).

80 Barlow et al (n 69) 174.

81 Andy Myhill and Kelly Johnson, 'Police use of discretion in response to domestic violence' (2015) 16 Criminology and Criminal Justice 3.

82 Andy Myhill and Katrin Hohl, 'The "golden thread": coercive control and risk assessment for domestic violence' (2016) 34(21) Journal of Interpersonal Violence 4477.

This is likely to raise challenges in practice, as criminal justice practitioners will be required to adjust how they understand domestic abuse in two significant ways. First, the offence's focus on a 'course of behaviour' will require a shift in approach from 'responding and taking stock of crime "incidents" as isolated events towards looking to a series of interrelated events'.[83] Second, the criminalisation of non-violent behaviours will require nuanced understandings of when behaviour has become criminal.[84] These two requirements are interlinked; often, the 'full scope of coercive control as a form of abuse only becomes apparent when these behaviours are interwoven into a pattern over time and when obeying an abuser's demands is largely based on fear'.[85] This is particularly the case when the abuser's demands correspond with traditional gender roles.[86] As noted by Bishop, 'compliance with demands about dressing, shopping or cooking in a particular way to avoid repercussions may seem voluntary to an outsider with little or no understanding of the dynamics in the relationship'.[87] While gender roles may play a part in shaping the forms of abuse, perpetrators have been shown to adapt tactics 'through trial and error based on their relative benefits and costs and the perceived vulnerabilities of their partner', meaning the specific tactics may differ substantially from case to case.[88] Additional barriers to the identification of abuse may arise in the case of same-sex intimate relationships, where heterosexist assumptions about the egalitarian nature of such relationships may obscure other power dynamics and abusive behaviours.[89] Criminal justice practitioners will be required to navigate these complexities when engaging with victim-survivors' and perpetrators' narratives. Research suggests that perpetrators construct narratives which focus on individual isolated incidents,[90] while victim-survivors may have normalised their experiences of abuse to the extent that they do not consider it as justifying a criminal intervention.[91] Indeed, the complexities of family and relationship dynamics and the centrality of 'normalisation' to long-term patterns of abuse may make identifying and naming the abuse very difficult.

There will be work to be done here; a qualitative study conducted in Northern Ireland in 2016 revealed that while police responses to domestic abuse had improved significantly over the past two decades, officers were 'dismissive of incidents involving psychological violence'.[92] Studies in jurisdictions where coercive control is criminalised have shown that practitioners continue to prioritise isolated incidents of violence or property

83 Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, 'Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories' (2015) 18(1) Criminology and Criminal Justice 115.

84 Tolmie (n 53) 56.

85 Stark (2012) (n 8) 203.

86 Ibid.

87 Charlotte Bishop, 'Why it's so hard to prosecute cases of coercive or controlling behaviour' (*The Conversation*, 31 October 2016) <https://theconversation.com/why-its-so-hard-to-prosecute-cases-of-coercive-or-controlling-behaviour-66108>.

88 Stark (2012) (n 8) 207. See also Marianne Hester, 'The three planet model: towards an understanding of contradictions in approaches to women and children's safety in contexts of domestic abuse' (2011) 41(5) British Journal of Social Work 837.

89 Carrie Brown, 'Gender-role implications on same-sex intimate partner abuse' (2008) 23 Journal of Family Violence 457.

90 Liz Kelly and Nicole Westmarland, 'Naming and defining "domestic violence": lessons from research with violent men (2016) 112(1) Feminist Review 113.

91 Amanda L Robinson, Andy Myhill and Julia Wire, 'Practitioner (mis)understandings of coercive control in England and Wales' (2018) 18(1) Criminology and Criminal Justice 29.

92 Doyle and McWilliams (n 21) 91.

destruction.[93] While police might identify coercive control practices when they appear alongside other forms of physical violence, they have a tendency to dismiss non-physical coercive control alone as 'weak' or 'unverifiable' evidence,[94] 'arguments between partners'[95] or simply 'horseshit'.[96] Studies have also suggested that police officers can grow frustrated when repeatedly called to the same address, demonstrating ignorance about the power dynamics of coercive control[97] and its eroding impact on the options available to victim-survivors.[98] Such mindsets have implications for both the way risk is assessed, and the follow-up and support that is offered to victim-survivors in light of that assessment.[99]

Reaching the required evidential threshold for a prosecution may also prove particularly difficult in cases of non-physical abuse, reducing the likelihood of prosecutions being taken forward, and increasing the barriers to a successful prosecution in cases that make it to trial.[100] As noted above, the Northern Ireland Bill focuses on the actions of the perpetrator and removes the requirement to prove that the victim-survivor experienced specific harm.[101] However, Burman and Brooks-Hay opine that it is unlikely to have that effect in practice, with the likelihood being that evidence of some harm will be required.[102] Indeed, given its private, subtle and individualised nature, it is difficult to imagine many situations in which a prosecution would not involve victim-survivor testimony.[103] This will raise challenges: victim-survivors may become uncooperative, hostile or simply unreliable witnesses. This can arise for many different reasons, from fear of reprisal to a desire for reconciliation and resistance to criminal sanctions (discussed below).[104] Indeed, victim-survivors may not have a clear idea of their own narrative; in some cases this is only possible once they have accessed safety and skilled support.[105]

On the other hand, it is worth acknowledging a distinct risk that can arise from the complex nature of domestic abuse – that of over-criminalisation. This might manifest in two ways. The first is in relation to the identification of a 'course of behaviour' constituting domestic abuse. As Burman and Brooks-Hay noted in the Scottish context, without a specification of what time period might be reasonable to constitute the offence, two incidents over a period of years might theoretically allow for a prosecution.[106] Second, the offence's broad inclusion of non-physical behaviours potentially increases the

93 E.g. Andy Myhill, 'Renegotiating domestic violence: police attitudes and decisions concerning arrest' (2019) Policing and Society 52; Amanda L Robinson, Gillian M Pinchevsky and Jennifer A Guthrie, 'A small constellation: risk factors informing police perceptions of domestic abuse' (2018) 28(2) Policing and Society 189; Nicole Westmarland and Liz Kelly, 'Why extending measurements of success in domestic violence perpetrator programmes matters for social work' (2012) 43 British Journal of Social Work 1.

94 Barlow et al (n 69) 170.

95 Ibid 171.

96 Robinson et al (n 91) 38.

97 Ibid 37.

98 Tolmie (n 53) 57.

99 Robinson et al (n 91) 41.

100 Bishop (n 87).

101 NI Bill (n 59) section 3(1).

102 Burman and Brooks-Hay (n 18) 74.

103 Emma E Gorbes, 'The Domestic Abuse (Scotland) Act 2018: the whole story' (2018) 22 Edinburgh Law Review 406.

104 Cheryl Hanna, 'No right to choose: mandated victim participation in domestic violence prosecutions' (1996) 109 Harvard Law Review 1849.

105 Tolmie (n 53).

106 Burman and Brooks-Hay (n 18) 77.

likelihood of 'mutualisation', either through dual arrests of both parties or through resistance to a pattern of abuse being interpreted as abuse in its own right.[107] Victim-survivors of abuse may find themselves criminalised for, for example, seeking to deny their violent partner parental access to their shared children,[108] or using force in an attempt to stop or escape from violence.[109] Evidence from other jurisdictions suggests this false mutualisation has negatively impacted women in particular, with the number of arrests increasing at a rate unjustified by the extent of perpetration by women.[110] Such findings can be linked to gendered expectations, with women who are perceived to be stepping out of the passive norm facing harsher treatment. This has potential implications for Northern Ireland, where, as noted above, traditional gender roles remain prevalent.[111]

As a result of these challenges, scholars have stressed the need for additional guidance in conducting domestic abuse investigations, as well as extra funding to facilitate the implementation of new coercive control offences.[112] As Burman and Brooks-Hay note, improving responses through 'education, training and embedding best practice and domestic abuse expertise – is likely to be more effective than the creation of new offences alone'.[113] However, while training may assist, an awareness of an issue does not necessarily mean front-line professionals are adequately equipped to deal with them.[114] The subtlety and individualised nature of domestic abuse means its identification will require a complexity of analysis that it may not be realistic or fair to expect from first-responding police officers 'who are required to respond to and have a level of competence in dealing with a wide range of situations'.[115] Though knowledge and understanding may improve, it is likely implementation will pose a considerable challenge in practice. Such a finding arguably invites reflections on whether additional and/or alternative measures might increase the possibilities of meaningfully responding to domestic abuse perpetration. These reflections become all the more important in light of the following section, which turns from the practical challenges of implementation to consider the impacts that a focus on criminalisation can have on victim-survivors of abuse.

3 Secondary victimisation and the harms of criminalisation

The introduction of a Domestic Abuse and Family Proceedings Bill forms part of the 'Protection and Justice' strand of the 2016 Strategy for 'Stopping Domestic and Sexual Violence and Abuse in Northern Ireland'.[116] This strand was identified as reflecting 'the need to protect the most vulnerable in society from violence and abuse, to protect and

107 Tolmie (n 53) 61.

108 For calls to have 'parental alienation syndrome' included in definitions of domestic abuse, see 'The ManKind Initiative, submission to the Home Affairs Committee Inquiry into Domestic Abuse' (4 July 2018).

109 Susan L Miller and Michelle Meloy, 'Women's use of force: voices of women arrested for domestic violence' (2006) 12 Violence Against Women 89.

110 Alesha Durfee, 'Situational ambiguity and gendered patterns of arrest for intimate partner violence' (2012) 18 Violence Against Women 64.

111 See e.g. Angela Browne, *When Battered Women Kill* (Free Press 1987).

112 Brennan et al (n 74).

113 Burman and Brooks-Hay (n 18) 78.

114 Sue Peckover, 'Domestic abuse, safeguarding children and public health' (2014) 44 British Journal of Social Work 1770.

115 The PSNI does have domestic abuse officers, but these may not necessarily be the first point of contact.

116 DoHSSPS and DoJ (n 38).

seek justice for victims, address harmful behaviour, hold perpetrators to account and support victims and witnesses through their engagement with the justice system'.[117] In the following sub-sections, I query the extent to which the introduction of the Bill can respond to those needs. I first consider the secondary victimisation[118] and other harms that can result from a criminal justice response to domestic abuse. These can emerge in the context of the victim-survivors' engagement with the criminal justice system and in the context of the outcomes that flow from that engagement. I then turn to whether a focus on criminalisation (and as a result incarceration) can constitute an effective response to domestic abuse.

Harms of engagement

The risk of secondary victimisation begins from the moment a victim-survivor or third party contacts the police.[119] In addition to risking an escalation of abuse,[120] legal interventions can expose victim-survivors as well as perpetrators to the oppressive force of law enforcement practitioners.[121] In Northern Ireland, many communities' relations with the PSNI have improved significantly over the last two decades.[122] However, marginalised individuals may have justified concerns about bringing the police into their homes and communities;[123] racism, homophobia, transphobia, classism, sectarianism and other forms of discrimination may taint police responses.[124] Police intervention also brings risks of social service intervention; parents who are being abused may therefore resist calling for help due to fears that they might lose access to their children.[125] Once their abuse has become subject to a criminal investigation, victim-survivors find themselves with little to no agency over how the case proceeds.[126] Depending on their ability to access support services, they may receive only limited information and support and may be faced with a lengthy wait before their abuser faces trial.[127]

If a case makes it to trial, a victim-survivor may face the prospect of testifying as a complainant witness. In addition to the evidential issues raised above, this raises diverse

117 Ibid 34.

118 Defined as negative social or societal reactions in consequence of the primary victimisation, see e.g. Leo Montada, 'Injustice in harm and loss' (1994) 7 Social Justice Research 5.

119 Many indicators of domestic abuse, including exposure to violence and trauma, substance abuse and toxic masculinities are also 'conspicuously present' in police culture, and for some there may therefore be particularly personal risks associated with contacting the police. See e.g. Philip Stinson Sr and John Liederbach, 'Fox in the henhouse: a study of police officers arrested for crimes associated with domestic and/or family violence' (2012) 24(5) Criminal Justice Policy Review 601.

120 Richard Felson et al, 'Reasons for reporting and not reporting domestic violence to the police' (2002) 40(3) Criminology 617.

121 Meda Chesney-Lind, 'Criminalizing victimization: the unintended consequences of pro-arrest policies for girls and women' (2002) 2(1) Criminology and Public Policy 81.

122 Jessica Leigh Doyle and Monica McWilliams, 'What difference does peace make? Intimate partner violence and violent conflict in Northern Ireland' (2020) 26(2) Violence Against Women 139.

123 Taylor (n 28).

124 See e.g. Heike Goudriaan, Karin Wittebrood and Paul Nieuwbeerta, 'Neighbourhood characteristics and reporting crime' (2006) 46(4) British Journal of Criminology 719; Michele Decker et al, 'You do not think of me as a human being' (2019) Journal of Urban Health 772; Leigh Goodmark, 'Transgender people, intimate partner abuse, and the legal system' (2013) 48 Harvard Civil Rights – Civil Liberties Law Review 51.

125 Donna Coker et al, *Responses from the Field: Sexual Assault, Domestic Violence and Policing* (American Civil Liberties Union 2015).

126 Gillian Hunter, Jessica Jacobson and Amy Kirby, *Out of the Shadows: Victims' and Witnesses' Experiences of Attending the Crown Court London* (Victim Support 2013).

127 Ibid.

challenges for victim-survivors, ranging from increased risks of reprisal, to unwanted intrusions into their personal lives and relationships.[128] It is uncontroversial to observe that protecting the dignity of complainant witnesses while maintaining the rights of the defence is an ongoing challenge for adversarial criminal justice systems.[129] In Northern Ireland, the recent Gillen Review on the law and procedures in serious sexual offences highlighted a range of challenges associated with participating as a complainant witness, including being exposed to the public in court, testifying in front of the defendant and being subjected to humiliating cross-examination.[130] While concerned with a different category of offence, similarities around the intimate and interpersonal nature of the offending mean these further risks of secondary victimisation likely face complainants in domestic abuse cases too.[131]

In this context, it is notable that the Bill contains several changes to law and procedure that seek to mitigate some of these challenges. These include a prohibition on the accused cross-examining victim-survivors in person, a move designed to 'reduce the possibility of an accused person using the processes of the justice system to further exert control and influence over their partner/connected person and will help to minimise the trauma for them while ensuring the proper administration of justice is achieved'.[132] The Bill also extends the presumption of eligibility for special measures on grounds of fear or distress to complainants in cases involving domestic abuse.[133] This entitles them to the use of live links or screens at court, unless they have informed the court that they do not wish to be eligible for such assistance.[134] A special measures direction may also provide for the exclusion of persons from court (excepting the accused, their legal representative and interpreters) when the complainants are giving evidence.[135] These proposed reforms mirror steps that have previously been taken to improve the experience of other vulnerable witnesses such as sexual complainants and child witnesses. However, while special measures can be appreciated by recipients, research suggests that they often fail to improve complainants' overall experiences of the criminal justice system.[136]

One reason for this failure is that the introduction of special measures cannot protect complainants from the tactics employed by defence lawyers, who in pursuit of defending their client may reject the victim-survivor's version of events, challenge their credibility and imply that the victim-survivor agreed to or welcomed the behaviour.[137] As argued by Burton et al, the adversarial trial's focus on 'winning' the case encourages traumatic

128 Hanna (n 104).

129 See e.g. Uli Orth, 'Secondary victimization of crime victims by criminal proceedings' (2002) 15(4) Social Justice Research 313; Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice* (Hart Publishing 2008).

130 Sir John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (DoJ 2019) <www.justice-ni.gov.uk/publications/gillen-review-report-law-and-procedures-serious-sexual-offences-ni>.

131 On the parallels between the issues arising around the criminalisation of coercive control and criminal justice responses to sexual violence, see Tolmie (n 53) 58–59.

132 Explanatory and Financial Memorandum (n 58) 5.

133 NI Bill (n 59) section 22.

134 See Criminal Evidence (Northern Ireland) Order 1999, part II.

135 NI Bill (n 59) section 22(3).

136 See e.g. Olivia Smith, 'The practicalities of English and Welsh rape trials: observations and avenues for improvement' (2017) Criminology and Criminal Justice 1; Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press 2001); Rabiya Majeed-Ariss et al, '"Could do better": report on the use of special measures in sexual offences cases' (2019) Criminology and Criminal Justice.

137 Hanna (n 6).

questioning regardless of the existence or not of special measures.[138] Tuerkheimer has argued that the criminalisation of domestic abuse will encourage victim-survivors to recount the 'full range of their experiences', making the experience of giving testimony validating of their lived experience.[139] The new offence may also enable the broader context of the relationship between the perpetrator and victim-survivor to become evidentially relevant during trials, meaning judges and juries will receive a fuller account of the perpetrators' behaviour. Yet, an associated consequence may be that victim-survivors find the 'full range of their experiences' subjected to cross-examination,[140] a potentially deeply humiliating experience.[141]

Harms of outcome and the ineffectiveness of incarceration

Following the conclusion of what may have been a traumatising experience, victim-survivors face the possibility of a harmful outcome. This is a risk regardless of the victim-survivors' attitude towards the criminal justice process. On the one hand, those who seek a conviction may see their abuser acquitted; Northern Irish statistics indicate that the outcome rate for domestic abuse crimes has been falling, from 46.6 per cent in 2010/2011 to 26.7 per cent in 2018/2019.[142] A prosecutor may also accept a plea bargain, potentially invalidating a victim-survivor's understanding of their own experience.[143] On the other hand, some victim-survivors may see the conviction and incarceration of their abuser as an intrusion rather than a welcome intervention.[144] Their preference may be for the abuse to stop but for the perpetrator to remain in their lives, for a variety of personal, social, practical and/or economic reasons.[145]

The Bill allows for a maximum 12 months' imprisonment on summary conviction, and up to 14 years' imprisonment when tried on indictment. The Explanatory and Financial Memorandum states that the nature of the penalties is intended to reflect the cumulative nature of the offence over time, that it may cover both physical and psychological abuse and also the intimate and trusting nature of the relationships involved.[146] It has been argued that, in addition to providing more time and space to implement safety measures, extended periods of incarceration will satisfy those victim-survivors who desire retributive justice.[147] Research has suggested that some victim-survivors can feel let down by responses that focus on individual incidents; convictions for broader patterns of coercive control may address this dissatisfaction.[148] It has also been argued that attaching severe sentences to coercive control will send a message to the

138 Mandy Burton, Roger Evans and Andrew Sanders, 'Vulnerable and intimidated witnesses and the adversarial process in England and Wales' (2007) 11(1) International Journal of Evidence and Proof 1.

139 Deborah Tuerkheimer, 'Recognising and remedying the harm of battering: a call to criminalise domestic violence' (2004) 94(4) Journal of Criminal Law and Criminology 959.

140 Hanna (n 6).

141 Ellison (n 136).

142 PSNI (n 39).

143 Tolmie (n 53) 4.

144 M Joan McDermott and James Garofalo, 'When advocacy for domestic violence victims backfires' (2004) 10 Violence Against Women 1245; Edna Erez and Joanne Belknap, 'In their own words: battered women's assessment of the criminal processing system's responses' (1998) 13 Violence and Victims 251.

145 Goodmark (n 72) 85–86.

146 Explanatory and Financial Memorandum (n 58) 11.

147 Leigh Goodmark, '"Law and justice are not always the same": creating community-based justice forums for people subjected to intimate partner abuse' (2015) 42 Florida State University Law Review 707.

148 Beth E Richie, 'Who benefits and who loses in the criminalization of IPV'?, draft discussion paper prepared for the National Science Foundation/National Institute of Justice Workshop on Developing Effective Primary, Secondary and Tertiary Interventions, 14–16 May 2014, Arlington VA.

perpetrator that they must change their whole behaviour, rather than avoid crossing 'a line into criminality' through acts or threats of violence.[149]

While the Bill undoubtedly enables a clear message of condemnation to be delivered through the imposition of substantial sentences, it is worth noting that in practice prison in general consistently fails to either deter or rehabilitate offenders.[150] Created as a means of inflicting punitive harm through social isolation, austere conditions and in some incidences physical violence,[151] prison sentences do little to encourage community reintegration.[152] Rather, they have long been critiqued for reducing the future prospects for ex-prisoners, inflicting and triggering experiences of trauma, and creating the conditions for more violence and offending following release.[153] As such, the new offence, aggravating factors and harsh sentences are unlikely to succeed in delivering justice to victim-survivors or making communities safer. Indeed, it is notable that overall levels of domestic abuse rarely decrease following the introduction of criminal justice interventions.[154] As argued by Davis, criminalising domestic abuse will not put an end to domestic abuse any more than imprisonment has put an end to crime in general.[155] Some have argued that this may have more to do with implementation than a deeper failing of criminalisation.[156] However, the findings correspond with more general research about the ineffectiveness of criminal sanctions as a means of deterring harmful behaviour.[157]

One of the reasons for this may be that, while criminalisation can make politicians feel like they have done something to address the issue,[158] it cannot address the underlying intractable social, cultural and institutional problems.[159] Of course, it may not be intended to – as acknowledged by Naomi Long in the Northern Irish context, the proposed Bill is 'not a panacea'. Nonetheless, criminalisation can become problematic when it emerges as a dominant response, as this 'carceral creep'[160] may divert energy and resources from policies and initiatives that seek to address those underlying societal problems.[161] In the final section, I consider what considerations might inform a broader, more holistic response to domestic abuse, one that does not entirely reject criminal law, but which also looks beyond the courtroom for solutions.

149 Goodmark (n 72) 66–67.

150 J M Moore and Rebecca Roberts, 'What lies beyond criminal justice? Developing transformative solutions' (2016) Justice, Power and Resistance 115; Paul H Robinson and John M Darley, 'Does criminal law deter? A behavioural science investigation' (2004) 24 Oxford Journal of Legal Studies 173.

151 Phil Scraton and Jude McCulloch (eds), *The Violence of Incarceration* (Routledge 2008); Phil Scraton, 'Prisons and imprisonment in Northern Ireland' in Anne-Marie and McAlinden, *Criminal Justice in Transition: The* Northern Ireland Context (Bloomsbury Publishing 2015) 185.

152 Anne-Marie McAlinden, *The Shaming of Sexual Offenders* (Bloomsbury Publishing 2008).

153 Michele Foucault, *Discipline and Punish* (Penguin Books 1975); David Garland, *Punishment and Modern Society* (Oxford University Press 1990); William R Kelly, *Criminal Justice at the Crossroads* (Colombia University Press 2015).

154 Stark (2007) (n 14).

155 Angela Davis, 'Opening keynote address: "The color of violence against women": Color of Violence Against Women Conference' (2000) 3(3) Colorlines.

156 Eve Buzawa, *Response to Domestic Violence in a Pro-Active Court Setting*, Final Report (US Department of Justice 1999).

157 Robinson and Darley (n 150).

158 Leigh Goodmark, 'Reframing domestic violence law and policy: an anti-essentialist proposal' (2009) 31 Washington University Journal of Law and Policy 55.

159 Burman and Brooks-Hay (n 18) 77.

160 Mimi E Kim, 'The carceral creep: gender-based violence, race and the expansion of the punitive state, 1973–1983' (2019) 67 Social Problems 251.

161 Goodmark (n 72) 69, 86.

4 A more holistic response? Looking beyond criminalisation

The challenges associated with implementation and risks to victim-survivors who engage with the criminal justice system raise the question of whether increasing the breadth of criminalisation is likely to be an effective response to domestic abuse in practice. As Harris has asked: 'if reliance on the criminal justice system to address violence against women and sexual minorities has reached the end of its usefulness, to where should advocates turn next?'[162] We might turn to the work of anti-carceral feminists, who have increasingly sought to explore alternative means through which to pursue perpetrator accountability, victim support and safety, and preventative work.[163] Indeed, a growing awareness of the harms of incarceration and the value of anti-carceral perspectives has emerged in Northern Ireland's feminist movements, prompted in part by international awareness of police brutality and the resulting Black Lives Matter movement in the USA.[164] This has been evidenced by the creation of a Northern Ireland chapter of the Abolitionist Futures collective, which brings together pro-choice, feminist and union activists and has previously hosted events exploring feminist abolition and the harms of criminalisation.[165]

A turn to anti-carceral approaches would prioritise community-led responses to violence, empowering neighbourhoods, workplaces, religious groups, friends and families to develop values and practices that resist violence and encourage safety, support and accountability. While offering alternatives to criminal sanctions, such approaches are certainly not without accountability. However, rather than pursuing retribution, an anti-carceral approach instead explores the possibilities of a transformative justice. Grounded in the values of collective and self-determined community strategies for justice, transformative justice responds to interpersonal violence in a way that prioritises the needs of the victim, while also providing restorative justice possibilities for perpetrators and communities.[166]

Restorative justice practices are well known in Northern Ireland, where they have flourished at both a community and state level.[167] The presence of community-based projects is particularly notable; developed as an alternative to paramilitary interventions (discussed below) these have become embedded approaches to conflict resolution in Northern Ireland. Designed to promote inclusive dialogue; direct participation; acceptance of responsibility; reparation; rebuilding of relationships among victims, offenders and communities; reintegration; and empowerment,[168] their particular benefits in Northern Ireland's post-conflict context have been explored elsewhere. However, their applicability to domestic abuse and other gendered harms has been contested by

162 Angela P Harris, 'Heteropatriarchy kills: challenging gender violence in a prison nation' (2011) 38 Washington University Journal of Law and Policy 13.

163 INCITE! Women of Color against Violence and Critical Resistance, 'Statement on gender violence and the prison industrial complex' (2001) <https://incite-national.org/incite-critical-resistance-statement/>.

164 Women's Policy Group NI, *COVID-19 Feminist Recovery Plan* (July 2020) 90–91.

165 McNaull (n 31).

166 See e.g. Mimi Kim, 'Anti-carceral feminism: the contradictions of progress and the possibilities of counter-hegemonic struggle' (2019) Affilia: Journal of Women and Social Work (advance online publication) <https://journals.sagepub.com/doi/10.1177/0886109919878276>.

167 Anna Eriksson, 'Restorative justice in the Northern Ireland transition' in Anne-Marie McAlinden and Clare Dwyer, *Criminal Justice in Transition: The Northern Ireland Context* (Bloomsbury 2015); Kieran McEvoy and Anna Eriksson, 'Restorative justice in transition: ownership, leadership and "bottom-up" human rights' in Dennis Sullivan and Larry Tifft (eds), *The Handbook of Restorative Justice: Global Perspectives* (Routledge 2005).

168 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989).

Northern Ireland feminist groups, who have expressed concerns over the power disparities that exist between participants, and the risks that victim-survivors will be pressured by their abusers to undergo restorative justice practices.[169]

Such fears are not new or unusual. The appropriateness of restorative justice in the context of domestic abuse has been a topic of extensive debate; scholars have highlighted both the possibilities of greater victim agency, validation and vindication, and the risks of manipulation, pressure and empty symbolic implications.[170] Nevertheless, it is worth noting the tentative steps that have been taken towards extending a range of restorative justice responses to domestic and sexual violence in diverse jurisdictions, including in the UK.[171] While empirical evidence into their effectiveness and practice is limited, recent studies have suggested that they can lead to reduced recidivism,[172] offer a more victim-centric process, and in some cases even push normative change.[173] This emerging evidence supports arguments that alternative accountability measures might have a role to play in moving away from retributive responses to domestic abuse.[174] However, such measures would require careful consideration and planning to ensure that sufficient safeguards and victim-support services are in place.[175]

Thus, it is arguably all the more important that a holistic response to domestic abuse includes both appropriate *responses* to instances of violence and *preventative* work which seeks to tackle misogyny, racism, homophobia and other cultures of violence.[176] Anti-carceral feminists have long argued that interpersonal forms of violence are not separable from the multiple structural forms of violence and oppression that characterise society.[177] A sole focus on criminalisation obscures this reality, decontextualising individual acts of violence from the power structures and socio-economic challenges that shape a society.[178] Anti-violence activists and scholars can sometimes be critical of those who analyse perpetration through frameworks other than the premise of individual choice, decrying such attempts as some form of 'justification'.[179] Yet, to do so arguably shuts down and restricts the possibility of effective responses to domestic abuse beyond

169 See e.g. Women's Policy Group (n 164) 90–91.

170 Kathleen Daly and Julie Stubbs, 'Feminist engagement with restorative justice' (2006) 10(1) Theoretical Criminology 9; Heather Strang and John Braithwaite, *Restorative Justice and Family Violence* (Cambridge University Press 2002).

171 Nicole Westmarland, Kelly Johnson and Clare McGlynn, 'Under the radar: the widespread use of "out of court resolutions" in policing domestic violence and abuse in the United Kingdom' (2018) 58 British Journal of Criminology 1; Kim (n 36).

172 Linda G Mills et al, 'A randomized controlled trial of restorative justice-informed treatment for domestic violence crimes' (2019) 3 Nature Human Behaviour 1284.

173 Polavarapu (n 5).

174 Roni A Elias, 'Restorative justice in domestic violence cases' (2015) 9 DePaul Journal for Social Justice 67.

175 On the need for evidence-based refinement of restorative justice, see e.g. Jonathan Doak, 'Honing the stone: refining restorative justice as a vehicle for emotional redress' (2011) 14(4) Contemporary Justice Review 439; Julie Stubbs, 'Beyond apology? Domestic violence and critical questions for restorative justice' (2007) 7 Criminology and Criminal Justice 169; Donna Coker, 'Restorative justice, Navajo peacemaking and domestic violence' (2006) 10(1) Theoretical Criminology 67.

176 Dixon and Piepzna-Samarasinha (n 36).

177 Critical Resistance and INCITE!, 'Critical resistance–INCITE! statement on gender violence and the prison-industrial complex' (2003) 30 Social Justice 141.

178 Donna Coker, 'Transformative justice: anti-subordination processes in cases of domestic violence' in Strang and Braithwaite (n 170).

179 See e.g. Ruth Jones, 'Guardianship for coercively controlled battered women: breaking the control of the abuser' (2000) 88 Georgetown Law Journal 634.

punishment.[180] What, then, might it mean to construct a holistic response which contextualises domestic abuse in Northern Ireland? Arguably, there are three main intersecting contexts to consider: social norms and their role in creating stigma and oppression; a history of violence and trauma; and economic challenges. These are each discussed in turn.

Contextualising domestic abuse

First, domestic abuse must be situated within conservative religious and social norms which frame domestic abuse as a private, family issue and stigmatise divorce and single parenthood.[181] Northern Ireland continues to be characterised by the 'twin engines of Protestant and Catholic conservative Christian patriarchy', which create 'normative models of sexuality and gender' based around 'ideals of motherhood, domesticity and chastity'.[182] These patriarchal norms have intersected with a history of colonial, sectarian and ethnonational violence, contributing to an environment in which gender inequalities and toxic hegemonic masculinities have flourished,[183] and gendered and sexual violence has been both prevalent and hidden.[184] These realities are reflective of other cross-cultural empirical studies which suggest a connection between rigid social norms and higher levels of domestic abuse.[185] Nor are they exclusive to the majority Christian population. A study by the Northern Ireland Council for Ethnic Minorities (NICEM) in 2013 drew attention to diverse religious and cultural beliefs that viewed domestic violence as permissible, as well as community pressure on victim-survivors to remain in the family home.[186] These cultural sensitivities are not always understood in Northern Ireland. Indeed, as observed by NICEM, the prevalence of institutional and structural racism within public bodies and other relevant organisations has led to victims being treated without adequate care and cultural sensitivity when they do reach out for help, discouraging other victims from doing so.[187]

In addition to fostering shame and stigma around gender-based violence, the dominance of conservative Christian patriarchy has also contributed to pervasive homophobia and transphobia in Northern Ireland.[188] Members of the gay and lesbian community have drawn links between cultural homophobia in Northern Ireland,

180 Weissman (n 25) 1500.

181 Doyle and McWilliams (n 21) 66–68.

182 Fidelma Ashe, 'The pedagogical challenges of teaching sexual politics in the context of ethnic division' (2009) 2(2) Enhancing Learning in the Social Sciences 1. See also Graham Ellison, 'Criminalizing the payment for sex in Northern Ireland: sketching the contours of a moral panic' (2017) 57(1) British Journal of Criminology 194.

183 Ken Harland and Sam McCready, 'Rough justice: considerations on the role of violence, masculinity and the alienation of young men in communities and peacebuilding processes in Northern Ireland' (2014) 14(3) Youth Justice 269.

184 McIntyre (n 21); Ashe (n 21).

185 Rachael Jewkes, 'Intimate partner violence: causes and prevention' (2002) The Lancet 1423.

186 Monica McWilliams and Priyamvada Nellum Rose Yarnell, 'The protection and rights of black and minority ethnic women experiencing domestic violence in Northern Ireland' prepared for submission to CEDAW (NICEM Report June 2013) 8–10.

187 Ibid 3–16.

188 Bernadette Hayes and John Nagle, 'Ethnonationalism and attitudes towards gay and lesbian rights in Northern Ireland' (2016) 22(1) Nations and Nationalism 20; Marian Duggan, 'Heteronormativity and the inverted relationship between socio-political and legislative approaches to lesbian, gay and bisexual hate crime' in Jennifer Schweppe, Amanda Haynes and Seamus Taylor (eds), *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan 2017).

internalised shame, and the perpetration of domestic abuse in intimate relationships.[189] Some have attributed their partner's violence to their discomfort with their own sexual identity, while others have expressed a belief that they were deserving of violence due to their sexual orientation.[190] Homophobia and transphobia have also been highlighted as barriers to accessing support.[191] Distrust of the police, fear of 'coming out' and an unwillingness to approach organisations designed with heterosexual victim-survivors in mind can all create the sense of being trapped in an abusive relationship.[192] Limited resources are available in comparison to those available for heterosexual victim-survivors,[193] and some members of the community have expressed a belief that LGBTQ+ support organisations either viewed domestic abuse as a specifically patriarchal heterosexual issue, or were reluctant to address violence perpetrated within the community in case it detracted from a 'united front against heterosexism and sexual identity prejudice'.[194]

Contextualising domestic abuse within these social dynamics highlights the stigma, lack of family/community understanding and limited appropriate support that face victim-survivors who wish to leave abusive situations, particularly when they experience intersecting forms of oppression.[195] Given that many victim-survivors will not contact the police, and some may not frame their experience as criminal abuse, it is arguable that holistic responses which emphasise whole-system support are needed.[196] A positive step might therefore be to ensure adequate resources are available to enable specialist organisations to offer that support. As was observed in the Bill's second debate: 'specialists … very often, are left to scratch around annually for charitable donations and the crumbs off the Executive's table'. Years of austerity have impacted vital support services, yet the adequate funding of specialist organisations could do much to help victim-survivors navigate their way to safety and support. Further support could be offered through the establishment of an Independent Domestic Violence Advisors (IDVA) programme. IDVAs have existed in England and Wales for some time and were recommended in Northern Ireland nearly a decade ago.[197] Their introduction could provide an important primary point of contact for victim-survivors seeking to discuss

189 Marian Duggan, *Queering Conflict: Examining Lesbian and Gay Experiences of Homophobia in Northern Ireland* (Ashgate 2012) 120–121.

190 Ibid 121. This reflects findings in studies conducted elsewhere e.g. Tamar Goldenberg et al, '"Struggling to be the alpha": sources of tension and intimate partner violence in same-sex relationships between men' (2016) 18(8) Culture, Health and Sexuality 875; Kimberly Balsam and Dawn Szymanski, 'Relationship quality and domestic violence in women's same-sex relationships: the role of minority stress' (2005) 29(3) Psychology of Women Quarterly 258.

191 While there is limited specific research on domestic abuse amongst trans individuals in Northern Ireland, the Institute for Conflict Research found a general reluctance to approach statutory agencies, including the police, in its study *'The Luck of the Draw': A Report on the Experiences of Trans Individuals Reporting Hate Incidents in Northern Ireland* (May 2010). For a more general discussion of trans experiences, see Goodmark (n 124).

192 Duggan (n 189) 121. See also Catherine Finneran and Rob Stephenson, 'Gay and bisexual men's perception of police helpfulness in response to male-male intimate partner violence' (2013) 14(4) Western Journal of Emergency Medicine 354.

193 Although see the important work done by the Rainbow Project and Cara Friend NI.

194 Duggan (n 189) 121.

195 On the impact of intersecting identities on vulnerability to harm, see Kimberley Crenshaw, 'Mapping the margins: intersectionality, identity politics, and violence against women of colour' (1991) 43(6) Stanford Law Review 1241.

196 Barlow et al (n 69) 176.

197 CJINI (n 54).

suitable options and safety plans.[198] I noted above the role that appropriate training would play in the implementation of the new offence. It is worth noting the potential for training to also help service providers (outside the criminal justice framework) identify the dynamics of domestic abuse and to connect these dynamics to the broader structural inequalities of sexism, homophobia and racism. As argued by Brennan et al, a deeper understanding of the role power plays in abusive relationships could form a grounding for developing more nuanced strategies amongst service providers that seek to empower victim-survivors and increase their capacity and agency.[199]

While stigmatising social norms in Northern Ireland have been shaped in part by conservative religious beliefs, it is important to acknowledge the role that faith organisations can play in countering interpersonal violence.[200] Research has shown that giving religious leaders appropriate training can facilitate immediate and long-term positive change, including through the expanding of religious leaders' activities to encompass measures that positively address domestic abuse in their congregations.[201] Educators (and other youth leaders where appropriate) can also play an important role in combatting harmful norms. For example, they might be trained to deliver specific domestic abuse prevention[202] and age-appropriate sexual health and sexuality education at all levels of education,[203] and to bring an intersectional gender equality lens to education more broadly.[204] Such measures move beyond direct assistance to victim-survivors to consider the possibilities of transformative justice and a less violent future.

Second, the political violence in Northern Ireland's recent history has also impacted on domestic abuse.[205] Despite the cessation of hostilities, a 'culture of violence' has lingered.[206] Paramilitaries continue to create harmful power dynamics within homes and communities, allowing perpetrators to exert influence and avoid accountability.[207] In this regard, the Northern Ireland Executive's work to tackle paramilitarism, criminality and organised crime has potential knock-on benefits, highlighting the 'important influence' Northern Ireland's history and particular context continues to have 'on contemporary criminal justice and the current legal order'.[208] However, to be fully effective, the other side of a paramilitary presence, i.e. as an alternative form of policing, will require ongoing

198 Northern Ireland Policing Board, *Domestic Abuse Review* (December 2019) 14.

199 Brennan et al (n 74) 643.

200 John Michael McAllister and Amelia Roberts-Lewis, 'Social worker's role in helping the church address intimate partner violence' (2010) 37(2) Social Work and Christianity 161.

201 Rene Drumm et al, 'Clergy training for effective response to intimate partner violence disclosure: immediate and long-term benefits' (2018) 37(1) Journal of Religion and Spirituality in Social Work: Social Thought 77.

202 For examples, see e.g. Claire Fox et al, 'Evaluating the effectiveness of domestic abuse prevention education' (2016) 21 Legal and Criminological Psychology 212.

203 For models, see e.g. Joanna Heart et al, 'The Revised International Technical Guidance on Sexuality Education – a powerful tool at an important crossroads for sexuality education' (2018) 15 Reproductive Health 185.

204 Maria Esteves, 'Gender equality in education: a challenge for policy makers' (2018) 4(2) PEOPLE: International Journal of Social Sciences 893.

205 Monica McWilliams and Joan McKiernan, *Bringing it out into the Open: Domestic Violence in Northern Ireland* (HMSO 1993).

206 Chrissie Steenkamp, 'The legacy of war: conceptualising a "culture of violence" to explain violence after peace accords' (2005) 94 Round Table 253.

207 Doyle and McWilliams (n 122).

208 McAlinden and Dwyer (n 22) 369.

attention.[209] While restorative justice mechanisms have been implemented to supplant these forms of policing, more work will be needed to ensure legitimate forms of 'justice' fully do so. As Eriksson argues, steps will be required to reduce 'social, cultural, historical and political distance' within communities, between communities, and between communities and mechanisms of the state,[210] supporting the need for holistic responses to violence.

While most people who suffer trauma do not perpetrate violence,[211] the cessation of public violence has also been hypothesised as resulting in a rise in violence in the home due to 'hyper-masculinized and traumatised' males seeking new outlets for aggression.[212] Research in Northern Ireland has shown disproportionately high rates of trauma exposure and post-traumatic stress disorder in both the general public and offender samples, demonstrating another enduring legacy of a history of conflict.[213] Recent studies have revealed connections between conflict-related trauma exposure and increased odds of general and violent reoffending in a sample of offenders.[214] Domestic abuse offenders have a higher prevalence of trauma than the general population, with exposure to conflict-related trauma appearing particularly high.[215] Relatedly, substance abuse has been found to significantly increase the odds of violent perpetration and the use of a weapon,[216] possibly accounting for part of the pathway from trauma to domestic violence.[217] This has been reflected in other case studies outside Northern Ireland, which have noted the connections between alcohol abuse and increased severity of perpetration in the context of domestic abuse.[218] The connections between trauma, substance abuse and violence suggest that the development of trauma-informed elements to rehabilitative interventions, used in conjunction with treatment for substance abuse, may play an important role in combatting domestic violence. The connections between domestic violence and childhood trauma, and the exacerbating role conflict-related trauma can have on individuals who have experienced childhood trauma, also highlights the potential long-term benefits of adopting trauma-informed interventions into family-malfunctioning.[219]

209 Anne-Marie McAlinden, 'Public and official responses to sexual and violent crime in Northern Ireland' in Anne-Marie McAlinden and Clare Dwyer, *Criminal Justice in Transition: The Northern Ireland Context* (Bloomsbury 2015).

210 Eriksson (n 167).

211 See e.g. Andrea Roberts et al, 'Witness of intimate partner violence in childhood and perpetration of intimate partner violence in adulthood' (2010) 21(6) Epidemiology 809.

212 Samantha Bradley, 'Domestic and family violence in post-conflict communities: international human rights law and the state's obligation to protect women and children' (2018) 20(2) Health and Human Rights 123.

213 Madeleine Dalsklev et al, 'Childhood trauma as a predictor of reoffending in a Northern Irish probation sample' (2019) Child Abuse and Neglect 97; Brendan Bunting et al, 'Trauma associated with civil conflict and posttraumatic stress disorder: evidence from the Northern Ireland study of health and stress' (2013) 26(1) Journal of Traumatic Stress 134.

214 Dalskley et al (n 213).

215 Aine Travers et al, 'Trauma exposure and domestic violence offending severity in a probation sample from post-conflict Northern Ireland' (2020) Journal of Interpersonal Violence 1.

216 Ibid.

217 See also Jocelyn Kelly et al, 'From the battlefield to the bedroom: a multilevel analysis of the links between political conflict and intimate partner violence in Liberia' (2018) 3(2) British Medical Journal Global Health, Article e000668.

218 See e.g. William Fals-Stewart, James Golden and Julie Schumacher, 'Intimate partner violence and substance use: a longitudinal day-to-day examination' (2003) 28(9) Addictive Behaviors 1555; Heather Foran and K Daniel O'Leary, 'Alcohol and intimate partner violence: a meta-analytic review' (2008) 28(7) Clinical Psychology Review 1222.

219 Travers et al (n 215) 17.

Third, these Northern Irish particularities intersect with and are exacerbated by broader socio-economic inequalities that have only grown more pronounced in the wake of the UK's policies of austerity. A strong relationship has been identified between economic strain and domestic abuse, particularly against women by their male partners.[220] For those being subjected to abuse in their home, a lack of access to safe and affordable housing, funding cuts to support agencies and inadequate health and social services all contribute to a situation in which remaining at home may be the lesser evil.[221] NICEM's research has also drawn attention to the UK's 'no recourse to public funds'[222] rule and the deep-rooted dysfunctions of the social security system, both of which place minority women in particular in a position of economic dependency and enhanced vulnerability.[223] A holistic response to domestic abuse would require engagement with the ongoing impacts of austerity and welfare reform on communities, particularly those with intersecting vulnerabilities. Resources that are being directed into the criminal legal system might better be spent providing economic and housing support for victim-survivors. On a smaller and more immediate scale, policies that enable emergency housing or secure tenancies for victims of domestic abuse might be explored. Similarly, while a small step, the introduction of an employment rights provision, enabling victim-survivors to take 10 days' domestic abuse paid leave, might facilitate some in seeking safety and support. There are examples of such a provision to be found elsewhere, including New Zealand,[224] the Philippines,[225] and at a provincial level in Manitoba[226] and Ontario[227] in Canada.

This section has sought to highlight some of the intersecting forms of oppression, stigma, violence and trauma that form the backdrop to interpersonal violence in Northern Ireland. If these interconnections are accepted, then it follows that a more meaningful and holistic response to violence within families and relationships would also consider these structural harms. This would include the prioritisation of what have been termed 'primary prevention-strategies' which address underlying causes of violence, for example by centring education, health and addiction care, employment assistance, welfare reform, housing, post-conflict demilitarisation of former paramilitary groups and other measures that could stabilise communities.[228] It would also centre 'secondary approaches' that focus on intervening with groups identified at risk, such as through increased funding for specialist services and victim support. 'Tertiary approaches' involving legal and community-led interventions in instances of abuse would also be part of this picture, but a more holistic response would move away from a 'waste management' strategy that

220 Greer Litton Fox and Michael L Benson, 'Household and neighborhood contexts of intimate partner violence' (2006) 121 Public Health Reports 419; Donna Coker and Ahjané Macquoid, 'Why opposing hyper-incarceration should be central to the work of the anti-domestic violence movement' (2015) 5 University of Miami Race and Social Justice Law Review 585.

221 McNaull (n 31); Sian Norris, 'Women fleeing abuse are being "re-traumatised" by the housing system' (*New Statesman*, 9 September 2019).

222 Certain types of UK visa have the condition 'no recourse to public funds' attached, meaning holders cannot claim most forms of state benefits.

223 McWilliams and Yarnell (n 186).

224 Domestic Violence – Victims' Protection Act 2019, section 72C.

225 Anti-Violence Against Women and their Children Act of 2004, Republic Act 9262, section 43.

226 Employment Standards Code Amendment Act 2016 (Leave for Victims of Domestic Violence, Leave for Serious Injury or Illness and Extension of Compassionate Care Leave), section 59.11.

227 Employment Standards Act 2000, section 49.7.

228 On primary, secondary and tertiary strategies for gender-based violence, see e.g. D Richard Laws, 'Sexual offending as a public health problem' (2000) 5(1) Journal of Sexual Aggression 30; Wendy Larcombe, 'Limits of the criminal law for preventing sexual violence' in Nicola Henry and Anastasia Powell, *Preventing Sexual Violence* (Palgrave Macmillan 2014).

prioritises the punishment of offenders.[229] While the intersecting challenges outlined above can seem daunting in their intractability, small steps in the spaces available might do much to prevent abuse and support victim-survivors.

Conclusion

Domestic abuse is a significant issue facing Northern Irish society. The proposed Bill may have some positive impacts on this issue, by recognising the 'moral distinctiveness' of domestic abuse as a form of violence,[230] facilitating greater accountability for perpetrators of coercive control, enabling earlier and more appropriate police interventions, and sending a message to victim-survivors and society that non-physical behaviour can constitute criminal abuse. However, as this article has argued, three critiques have emerged in reformist and anti-carceral feminist scholarship which are directly relevant to an analysis of the Bill's ability to meaningfully address domestic abuse. First, the legislation is likely to pose significant challenges in implementation, relating to the difficulties associated with identifying, investigating and evidencing abuse. Second, the Bill may have unintended negative consequences for victim-survivors, due to the risk of harms often associated with engagement with the criminal justice system. Third, evidence suggests that increased criminalisation and harsher sentences are unlikely to lead to less perpetration or safer communities. As a result, it is questionable whether criminalisation constitutes the 'leap forward' in addressing domestic abuse that has been claimed.

Indeed, while criminalisation may play a role in combatting abuse, and while legislative reform may be politically popular, its prioritisation risks directing energy and resources that might be put towards other preventative or supportive measures. One does not have to commit to an abolitionist perspective to see the value in considering how a more holistic response might be developed to address domestic abuse. As explored in this article, such a response might continue to incorporate forms of criminal accountability. However, it would also encompass a broader array of preventative and responsive measures, ranging from increasing funding for specialist support services to considering how educators and religious leaders might combat social stigma and shame.

Such a response would see domestic abuse as a contextualised phenomenon, rather than a decontextualised act by a single perpetrator. Interpersonal violence within families and relationships cannot and should not be separated from structural forms of oppression. In the Northern Irish context, the phenomenon of domestic abuse must be understood in light of the influences of conservative Christian patriarchy, the impact of a history of sectarian violence and trauma, and the continued prevalence of institutional racism and homophobia. Unfortunately, the pervasiveness of conservative social norms within the Northern Ireland Assembly itself means it can be difficult to imagine top-down measures being implemented to address these broader structural and societal challenges. While this article has highlighted potential avenues for a more holistic range of responses to address domestic abuse, it may well be that the community-level transformative strategies proposed by anti-carceral feminists present the best opportunity for working towards a less violent future in Northern Ireland.

229 Goodmark (n 72) 86.
230 Tadros (n 71).

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Navigating complexity and uncertainty after the *Belfast–Good Friday Agreement*: the role of societal trauma?

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Abstract

A central challenge of the Belfast–Good Friday Agreement *is the radical contingency or uncertainty that underpins the current democratic legal order in Northern Ireland. It is a dimension of the* Agreement *that will come to the fore with growing demands for preparations and planning ahead of any referendum on the constitutional future of the region. Using a combination of perspectives from the literature on societal trauma and agonism, this article asks if we need to pay more attention to this affective dimension of the* Belfast–Good Friday Agreement *and the journey from outright antagonism to an agonism that envisages a society capable of addressing conflict while respecting the 'other's' entitlement to hold a radically different position.*

Keywords: agonism; hegemony; the *Belfast–Good Friday Agreement*; contingency; complexity; 'culture of feeling'; *politics and the political.*

> *Suffering subsists on the underside of agency, mastery, wholeness, joy and comfort. It is, therefore, ubiquitous.*[1]

Introduction

The 100-year anniversary of the foundation of Northern Ireland in 2021 will be a testing time for the institutions of the *Belfast–Good Friday Agreement*[2] as Ireland marks a 'Decade of Centenaries'. Approaches to the anniversary itself – *sublime celebrations* versus *tragic commemoration* – promise to be deeply contested, mirroring the polity's uncertain constitutional status.

Since the 2016 United Kingdom Referendum on leaving the European Union there has been a new conversation[3] around the question of the pace and nature of political evolution in Northern Ireland, as fresh momentum in public deliberations about its

1 William Connolly, 'Suffering, justice and the politics of becoming' in David Campbell and Michael J Shapiro (eds), *Moral Spaces: Rethinking Ethics and World Politics* (University of Minnesota Press 1999) 125.

2 *The Belfast Agreement – Agreement Reached in Multiparty Negotiations* (Belfast 10 April 1998).

3 BBC News Online, 'PSNI chief warning over post-Brexit threat' (9 September 2018) <www.bbc.co.uk/news/uk-northern-ireland-45461120>. The former Chief Constable of the Police Service of Northern Ireland, George Hamilton, accused some Westminster politicians of failing to understand the dangers of terrorism in Northern Ireland following the United Kingdom's departure from the European Union.

contested constitutional status has been spurred by the unintended consequences[4] of the referendum, alongside other constitutional uncertainties, including the timing and likely outcome of another referendum on Scotland's independence.[5] Brexit and the United Kingdom–European Union negotiations that have flowed from the historic decision have dramatised the (geo)political entanglements that the *Agreement* sought to capture, codify and process with a view to bringing political violence to an end and creating the enabling conditions for a restoration of complex agency to political actors and citizens, above all, *within* Northern Ireland.

Using a combination of perspectives from the literature on the implications of societal trauma for post-conflict societies and the agonistics writings of Chantal Mouffe[6] and Bill Connolly,[7] this article posits that the *contingent* nature of the constitutional configuration – represented by the *Agreement* – demands more attention to the affective challenge posed by the societal experience of trauma in the wake of violent conflict. A recognition of the importance of trauma as an affective dimension that can mediate political progress is part of a larger and growing appreciation of emotions in politics and law. Little and Rogers[8] note that the shift to a concern with the emotions in politics is a recognition that how people feel in and after violence constitutes more than a sideshow that detracts attention from rigorous analysis of policy initiatives or institutional reform. The emotive dimension must be included in political analysis in recognition of the capacity of people – both individually and collectively – to reinforce or undermine institutions and policies.

Noting that the experience of trauma is closely linked to the role of language and narrative in the constitution and stabilisation of identity, Little and Rogers describe trauma as the experience of an excess resulting from the impossibility of assimilating a loss or suffering into one's narrative. The victim or survivor is the one who struggles to tell the story that cannot be captured in thought, memory or speech.[9] In conditions of conflict, the political symptomology rooted in the trauma of a society that has experienced violence – a desperate effort to *fix* one's own categories, while refusing those of others – can clash with the imperatives of engaging with the complexity of a conflict and is both prolonged and reproduced by the experience of contingency and uncertainty. Traumatic symptomology clashes with the demands for a new kind of citizenship in

4 Peter Robinson, 'Professorial Speech from Right Honourable Peter Robinson' (8 June 2018) <qpol.qub.ac.uk/professorial-speech-rt-hon-peter-robinson>. In his professorial lecture at Queen's University, Belfast, the former leader of the Democratic Unionist Party, Right Hon Peter Robinson, became an unlikely proponent for the examination of and reflection on the issue of the border poll instrument, as set out in the *Belfast–Good Friday Agreement*. It should be added that his comments were couched in a statement of his own confidence that such a poll will result in the status quo. Nevertheless, noting the chaotic experience that has followed in the wake of the United Kingdom's Brexit referendum, he called for early consideration and agreement on a process of negotiations, timescales and the identification of who would be involved in negotiations on an Irish border poll and its outcome, to avoid the kind of chaos and disruption that has followed the 2016 Brexit debacle.

5 Politico, 'Support for Scottish independence at highest ever level: poll' (14 October 2020). A series of polls in 2020 point to a consistent majority in favour of Scotland leaving the United Kingdom.

6 Chantal Mouffe, *Agonistics – Thinking the World Politically* (Verso Books 2013) 306.

7 Connolly (n 1).

8 Adrian Little and Juliet Brough Rogers, 'The politics of "whataboutery": the problem of trauma trumping the political in conflictural societies' (2017) 19(1) British Journal of Politics and International Relations 172, 173.

9 Dori Laub, 'An event without a witness: truth, testimony and survival' in Shoshana Felman and Dori Laub (eds), *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History* (Routledge 1992) 75, cited in Little and Rogers (n 8).

Northern Ireland, one that is less grounded in certainty and more at ease with the fluidity and virtuosity of pluralisation, with horizons that extend to ever new constellations of identity/difference.

The parties and their constituencies *within* Northern Ireland have never been the definitive authors of their fateful constitutional narratives (whether nationalist or unionist), and – as the structures and logics of the *Agreement* attest – they could never become the sole authors of the definitive resolution to an essentially (geo)political dilemma bestowed by the failures of the United Kingdom and the Republic of Ireland to win lasting legitimacy for their now qualified claims on the territory. Sectarianism has always been the shadow play of an underlying crisis of agency, based on a misrecognition of the complex locus of effective intervention: a combination of local and non-local factors. Harvey has noted that it was never envisaged that an 'internal' Northern Ireland solution could or would work.[10] This explains, for example, the design of the Strand One institutions to operate within overarching confederal and federalising arrangements or possibilities guaranteed by the 'patron' states.[11] Crucially, O'Leary observes that these over-arching arrangements, with their prospects of shared authority, have been largely downplayed during the life of the *Agreement*.

The British–Irish *Agreement*'s recognition of the legitimacy of whatever choice is freely exercised by a majority in Northern Ireland with regard to its status, whether they prefer to continue to support the union with Great Britain or a sovereign united Ireland, underwrites the radically contingent nature of Northern Ireland's status in recognising that the most fundamental constitutional question remains open-ended. By institutionalising uncertainty in the terms of the *Agreement*, the two governments bestowed a far-reaching challenge on parties and communities emerging from a traumatic generational experience of violent conflict and societal instability.

In promising rigorous impartiality in their protection of rights and institutions the two governments also, indirectly and implicitly, assumed responsibilities to ensure that the politics of Northern Ireland could never again be allowed to lapse into a sectarian stand-off on the old 'narrow ground'.[12] Any failure by the two governments to remain fully engaged and impartial has always risked – by default – licensing if not encouraging an element of recidivism in the internal politics of the region (Strand One), given that the terms of the extraterritorial dimensions of the *Agreement* have met with some resistance from parties operating within Northern Ireland.[13] This has been borne out by a constant need for Irish and British governmental interventions to assist the Northern Ireland parties during periods of crisis and suspension.[14] The guardianship commitment by the two governments – the outworking of improved British–Irish relations during the 1990s – was a formative factor in enabling the *Agreement* and will have to be translated into a sustained process of deep engagement with political and civic society in Northern Ireland if the dominant ethno-nationalist parties working in the Strand One institutions are to be encouraged to embrace a more complex and nuanced form of identity politics at the

10 Colin Harvey, 'Leaving the union: Brexit and complex constitutionalism in Northern Ireland' (2018) 11–12 Irish Yearbook of International Law.

11 Brendan O'Leary, 'The twilight of the United Kingdom and Tiochfaidh ár lá: twenty years after the Good Friday Agreement' (2018) 17(3) Ethnopolitics 3.

12 A T Q Stewart, *The Narrow Ground: Aspects of Ulster, 1609–1969* (Blackstaff Press 1997).

13 The Democratic Unionist Party not only opposed the signing of the *Belfast–Good Friday Agreement* but have continued to resist wholehearted participation in the cross-border institutions. Unionists have occasionally exercised vetoes to contain any expansion in competences.

14 O'Leary (n 11) 5.

scales and levels of political activity where formative shifts in power and influence are registered with a sobering clarity. Brexit, for example, has helped to accelerate an emergent renegotiation of patterns in political relationships both within the United Kingdom (the 'Empire State'),[15] driven by a re-emergence of a newly assertive English identity, and a repositioning of the United Kingdom – outside the European Union – in international relations.

Participation in a complex interdependency of scales and boundaries is written into the *Agreement*, namely the three Strands that must be understood as dynamic and open-ended entanglements and relationships in which identities and meanings continue to unfold and evolve as functions of power shifts. This original transversal logic of the *Agreement* is an admission that the political theatre or space of Northern Ireland, as constituted before 1998, was unable to 'safeguard the space in which antagonistic social forces have failed to subdue one another'.[16] The *Agreement* recast the constitutional[17] space as a series of institutionalised North-South-East-West Anglo-Irish relationships in ways intended to enable the conflicting parties *within* Strand One to cultivate conditions for agonistic respect,[18] while navigating contingency as a way of political life. The *Agreement* reintroduced an explicit recognition of the (geo)political as the decisive theatre for staging the non-violent resolution of outstanding differences. Agonistic respect is complex, all the more so when radical contingency – in terms of contested constitutional outcomes – is part of the *Agreement*'s DNA. It demands more than institutional layers of deliberation. It also demands the cultivation of what Williams[19] once described as a 'culture of feeling', that inner dynamic at work by means of which new formations of thought emerge to replace dominant or once hegemonic ways of thinking. Nancy[20] cautions that shared structures of feeling must not be automatically identified with those that are experienced in common or as a structure *through which* the same feelings are derived. Instead, Nancy insists that a truly shared structure of feeling is one in which actors have a distinctive, contributory stake – a structure that incorporates and enables the activation and further articulation of differences. In the context of the conflict in Northern Ireland these shifts in hegemonic influences that have borne down on the territory since its foundation (and on the island of Ireland for much longer) are only fully understood and fully experienced across all three theatres or Strands of the *Agreement*. There has never been a realistic prospect that constituencies or parties might be swept up indistinguishably into a compelling shared narrative – the experience of essentially being *the same*. The *Agreement*'s affective challenge is a demand for the cultivation of a shared structure of feeling in which the parties retain a distinctive, contributory stake, incorporating and enabling the activation of difference in a spirit of respect.

Williams was all too aware of the apparent contradictions in bringing together the words 'structure', with its associations with fixity and objectivity, and 'feelings', denoting affect, fluidity and subjectivity. His conceptual work on 'structure of feeling' was an attempt to draw attention to emergent relational dynamics, to that structuring process that is synonymous with a quality of historically distinct social experiences and relationships-in-solution. Understood as such, as a structuring process, the *Agreement* brings the affective and the cognitive dimensions of consciousness and relationality into

15 Anthony Barnett, *The Lure of Greatness: England's Brexit and America's Trump* (Penguin Books 201).

16 William Connolly, *Ethos of Pluralization* (University of Minnesota Press 1995) 115.

17 *Robinson v Secretary of State for Northern Ireland and Others* [2002] UKHL 32.

18 Andrew Schaap, *Law and Agonistic Politics* (Ashgate Press 2009).

19 Raymond Williams, *Marxism and Literature* (Oxford University Press 1977).

20 Jean Luc Nancy, *The Inoperative Community,* Simona Sawhney (trans) (Minneapolis University Press 1991).

dialogue, in bringing elements of impulse, restraint, tone and tension into an abiding and continually changing constellation. The discernment process that must accompany the *Agreement* – entailing a culture of feeling – is not about an encounter with an already established set of fixed institutions or societal templates but, in Williams' words 'social experiences in solution, as distinct from other social semantic formations which have been precipitated'.[21] In a contemporary reading of Williams, Hershock[22] describes the possibility of a politics of diversity that can be understood as a still-emerging structure of feeling at once resulting from and resulting in ongoing amplifications of differences as the basis of mutual contribution – a structure of feeling that is non-dualistic but essentially relational, and dynamically aligned with an appreciation of strengths for relating freely. Far from implying or implicating constituencies in a *fixed* institutional framework the politics of diversity demanded by the *Agreement* also invites a coalescence of differentially realised patterns of ever-strengthening readiness for shared, value-generating relational improvisation.

Human or social systems contain both designed (Strands One, Two and Three) and emergent (informal networks, civil society) structures. The designed structures include legal and institutional forms of routinisation and predictability, while the key emergent structures – where novelty and innovation is more likely to emerge – are created by informal networks and communities of practice (in law, business, peace activism, therapeutic practitioners). The emergent dimension is akin to a living system and is key to innovation, creativity and flexibility. The emergent dimension is also the realm of the affective, the domain where emotion encounters and comes into conversation with what has been routinised and what is now possible. This is also a domain that is associated with non-linear change, involving multiple feedback loops across scales of organisation and resistance to pre-determination.

1 Origins of the question

The question raised in this article was first articulated at a Northern Ireland Roundtable on Wellbeing, a high-level stakeholder process that met over the course of two years (2014–2015) to consider recommendations for the design of an outcomes-based performance framework for the Northern Ireland Executive's draft *Programme for Government*[23] (2016–2021). The Roundtable was convened by the author[24] together with the Carnegie United Kingdom Trust. One of the first discussions taken up by the stakeholders – drawn from two of the main political parties, the senior civil service, academia and civil society – was the mental health impact of the conflict on the population. The Roundtable[25] addressed wellbeing in a post-conflict context, noting that it is linked to enhanced levels of political agency, capabilities, autonomy and embedding a culture of democratic deliberation. At the first meeting of the Roundtable, considerable attention was given over to the collective traumatic impact of the conflict and the consequences for levels of mental health and addiction. Participants linked contemporary experiences of trauma, addiction, self-harm and suicide and our collective incapacity to complete the journey out of enmity.

21 Williams (n 19) 132–133.

22 Peter Hershock, *Valuing Diversity: Buddhist Reflections on Realizing a More Equitable Global Future* (Suny Press 2012) 251.

23 Northern Ireland Executive, *Draft Programme for Government 2016–21* (Northern Ireland Executive 2016) 7 <www.northernireland.gov.uk/topics/work-executive/programme-government>.

24 Together with John Woods.

25 Peter Doran, John Woods and Jennifer Wallace, *Towards a Wellbeing Framework for Northern Ireland: A Technical Report* (Carnegie United Kingdom Trust 2015) 29–32.

The Belfast writer and campaigner, Adam McGibbon, has noted[26] that Northern Ireland has recorded the highest rates of post-traumatic stress disorder in the world, with 40 per cent of the population having experienced a conflict-related trauma event. He attributes this to the 'scars of the Troubles, our decades-long conflict, and the unsolved problems left in its wake'. One of the key indicators of ongoing and widespread psychological fallout is Northern Ireland's prescription rates for antidepressant medicines. Research[27] conducted in 2014 for the data-based journalism project, *The Detail*, reinforced earlier findings about the consumption of prescription medication.

Research conducted by Professor Mike Tomlinson at Queen's University Belfast has also linked the increase in suicide in Northern Ireland to the legacy of 'the Troubles', with a key finding that the cohort of children and young people who grew up in the worst years of violence, during the 1970s, recorded the highest and most rapidly increasing suicide rates and account for a steep upward trend in suicide following the *Agreement*.[28] Tomlinson's findings are reinforced in a survey by the University of Ulster. The survey results state:

> The highest odds ratios for all suicidal behaviours were for people with any mental disorder. However, the odds of seriously considering suicide were significantly higher for people with conflict and non-conflict-related traumatic events compared with people who had not experienced a traumatic event.[29]

In 2020, the Northern Ireland Executive took a number of steps to address a perception that mental health and its impact on wellbeing remain priority concerns, including suicide prevention. The Executive established a special working group on mental wellbeing, with Deputy First Minister Michelle O'Neill noting that these complex issues should be addressed by a number of departments beyond the Department of Health.[30] In June 2020, the Health Minister went further and announced the appointment of an interim mental health champion, Professor Siobhan O'Neill, of Ulster University.[31]

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26 Adam McGibbon, 'Coronavirus could bring Northern Ireland's mental health crisis to boiling point (*www.inews.co.uk*, 17 August 2020) <www.inews.co.uk/opinion/coronavirus-northern-ireland-mental-health-ptsd-boiling-point-579467>.

27 Jon McClure, 'New data shows Northern Ireland is a world leader in prescription drug use' (*The Detail* 17 November 2014) <www.thedetail.tv/articles/new-data-shows-northern-ireland-is-a-world-leader-in-prescription-drug-use>. *The Detail* reported, *inter alia*: 'Antidepressant prescription rates in Northern Ireland far exceeded those of England and Wales, and were also higher than levels found in 23 countries featured in a global study; Northern Ireland's prescription levels are higher than other United Kingdom regions with a similar economic profile, or with similar or higher rates of depression; Doctors interviewed for the *Script Repor*t pointed to a rising problem among age groups that are too young to have directly experienced the Troubles.'

28 Mike Tomlinson and G P Kelly, 'Is everybody happy? The politics and measurement of national wellbeing' (2013) 41(2) Policy and Politics 139.

29 Paul Nolan, *The Northern Ireland Peace Monitoring Report 3* (Northern Ireland Community Relations Council 2014) <www.community-relations.org.uk/wp-content/uploads/2013/11/Introduction1.pdf>.

30 The Northern Ireland Executive Committee, 'Executive will work together to improve mental health – Ministers' (Northern Ireland Executive Committee 22 January 2020) <www.executiveoffice-ni.gov.uk/news/executive-will-work-together-improve-mental-health-ministers>.

31 Northern Ireland Executive Committee, 'Appointment of interim mental health champion' (Northern Ireland Executive Office 24 June 2020) <www.health-ni.gov.uk/news/swann-announces-appointment-interim-mental-health-champion>. In a press release issued by the Northern Ireland Executive Committee the Health Minister set out the responsibilities of the interim mental health champion, including: participation in the public debate around mental resilience, suicide, mental health and recovery; building consensus to integrate mental health and wellbeing across government and its integration into public policy making; and to advise senior stakeholders, support research and provide a voice for those who otherwise would not be heard.

While the steps being taken by the Northern Ireland Executive are clearly an advance in recognising and acting on the psychic fallout of the political conflict and the resulting sequelae, the wider political implications of a traumatic interruption of a society's already contested narrative(s) is a key concern here. An important figure for understanding these implications is Paul Ricoeur, for whom humanity's collective existence itself is constituted by narrative. In a post-conflict setting it is the relationship between the *personal* and the *political* or *shared* narrative that is of particular interest if we are to understand the significance of post-conflict trauma. Ricoeur has influenced the thinking of the President of Ireland, Michael D Higgins, in his invocation of 'narrative hospitality',[32] a taking of responsibility in imagination and in sympathy for the story of the other, through the life narratives which concern the other.

Trauma cannot be reduced to an individualised symptom of conflict but is implicated, as Jenny Edkins and others have shown, in our very understanding of sovereign political power and *the political*. The Northern Ireland Executive's tentative steps to address mental health barely begin to identify this larger picture where trauma poses an affective interruption of the possibilities for politics *per se* given its role in mediating memory and the constitution of sovereign political communities. Of particular relevance for a transversal territory like Northern Ireland is Edkins' examination of the under-analysed 'traumatic intersection between peace and war, inside and outside' – the existential realm between the internal working of the state and international politics – with its concern for external conflict and war, and the implications for the production of the self and the state. These observations have a special importance for the region because the contingent and radically uncertain conditions that have suffused politics since the *Agreement* are – in a fundamental sense – *a politics of suspension*, a suspension between war and peace, a suspension between the linear norms associated with the internal workings of a state (*politics*) and the discontinuous (ab)normality of the sphere of (geo)politics or 'anarchy' (*the political*).[33] It is this state of suspense – and contingency – that complicates the experience of trauma, conflict and politics in Northern Ireland.

The nature and role of trauma in post-conflict politics

Trauma is perceived to inhabit post-conflict societies.[34] For Little and Rogers,[35] conflictual societies attempting to deal with troubled histories through legal and political reform often have to confront the residues of trauma that accompany protracted violence and bloodshed. In conflicts located in long histories of political difference, a focus on the traumas acquired through the violence of the past is crucial.

Theorists of trauma[36] note the paradox that the most direct seeing or witnessing of a violent event may be experienced as an absolute inability to know it. The immediacy sparks a belatedness and, since traumatic experience enters the psyche differently than normal experience and creates an abnormal memory that resists narrative representation, the unique process of this remembering results in an approximate recall but never determinate knowledge. Traumatic memory gives rise to an inherently unstable and indeterminate set

32 Paul Ricoeur, 'Reflections on a new ethos for Europe' in Richard Kearney (ed), *Paul Ricoeur: The Hermeneutics of Action* (Sage 1996) 107–118.

33 Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press 2012).

34 Vanessa Pupavac, 'War on the couch: the emotionology of the new international security paradigm' (2004) 7(2) European Journal of Social Theory 149.

35 Little and Rogers (n 8).

36 Cathy Caruth, *Unclaimed Experience: Trauma, Narrative, and History* (Johns Hopkins University Press 1992).

of memories. For Caruth,[37] traumatic memory operates similarly for both individuals and cultural groups with regard to collective or cultural traumatic experience, for 'history, like trauma, is never simply one's own, that history is precisely the way we were implicated in each other's trauma'. This implies that the traumatic event can evoke a shared response across time, giving rise to a transhistorical or intergenerational effect.

For theorists such as Kirmayer,[38] the interplay between individual and collective experience takes on a new significance. He has argued that the recollection of traumatic events is governed by social contexts and cultural models (possibilities) for memories, narratives and life stories.[39]

Theories of trauma and the political provide a means of revisiting the *Agreement* in ways that foreground the importance of the affective turn, including an acknowledgment that issues of memory, legacy, responsibility and victimhood – insofar as they are mined by political parties to re-engage in the conflict by proxy – feed a cycle that can only be broken and interrupted by taking the affective dimension seriously. This is more than a therapeutic or individual concern. It is deeply political.

The tragic cycle of collective post-conflict trauma

In the normal course of post-conflict politics, an authoritative/hegemonic state-sanctioned narrative succeeds in laying down a new social order, using strategies that include acts of forgetting and memorialisation. As a result, the realms of the *political* and contingency, trauma and war are projected by the new political order onto the 'outside' or the 'other', while sovereignty and order are restored 'inside'. There has been no such resolution in Northern Ireland after 1998.

The genius of the *Agreement* and the 'peace process' is also its outstanding challenge: namely, the management of the open wound of radical contingency, the risk of continued exposure to a series of contested foundational narratives of traumatic violence (and a repetition of attempts at their vindication, in a clear sign that the conflict is still alive). Below the surface of what passes for the day-to-day performance of a linear narrative of 'normal' politics in progress within the Northern Ireland Executive and Assembly is the unfinished business of conflict and interpretative contestation over preferred constitutional futures. The sovereign state, far from enjoying a hegemonic moment of imposing a new narrative order, is itself deeply engaged in managing its own among multiple competing narratives about the nature of the conflict and the legitimacy/illegitimacy of its use of force and political violence. Legacy and memory are mere currency in this ongoing transactional politics that sit somewhere between ongoing antagonism and agonism.

The profound role of trauma in this complex scenario has been explored by Jenny Edkins[40] in her work on the constitutive role of trauma in the *political*. She notes that our existence relies not only on our personal survival as individual beings but also on the continuance of the social order that gives our existence meaning and dignity: family, friends, political community, beliefs. If our social order betrays us, the meaning of our existence changes.[41] Traumatic events are overwhelming, she writes, but they are also a

37 Ibid 15.

38 Laurence Kirmayer, 'Landscapes of memory: trauma, narrative, and dissociation' in Paul Antze and Michael Lambek (eds), *In Tense Past: Cultural Essays in Trauma and Memory* (Routledge 1996) 173.

39 Ibid 191.

40 Jenny Edkins, *Trauma and the Memory of Politics* (Cambridge University Press 2003).

41 Ibid 4.

revelation. They can strip away commonly accepted meanings by which we lead our lives in our various communities. They reveal the contingency of the social order and, in some cases, how it conceals its own impossibility: 'They question our settled assumptions about who we might be as humans and what we might be capable of.'[42]

In a counterintuitive move, Edkins argues that the re-inscription of trauma and traumatic events into linear history generally depoliticises and gentrifies this experience. She argues:

> Memory and forgetting are crucial, *both in contesting the depoliticization that goes under the name of politics, and in keeping open a space for a genuine political challenge by encircling the trauma rather than attempting to gentrify it.*[43]

Edkins' excavation of the connection between trauma and acts of sovereign constitution is at once deeply provocative and essential for examining the current politics of Northern Ireland. Edkins poses the question of how contemporary forms of political community, such as the modern state, have an 'ironic connection' with traumatic events. She demonstrates this by exploring the connections between violence, the effects of trauma, and forms of political community, drawing on her interests in the formation of sovereign power and western subjectivity or personhood. With debts to Michel Foucault and Jacques Lacan, Edkins conceives power as, above all, a relationship and is interested in the intersection of state power and the experience of trauma:

> Forms of statehood in contemporary society, as forms of political community, are themselves produced and reproduced through social practices, including practices of trauma and memory.[44]

Critically, the *political* is understood here as that which enjoins us not to forget the traumatic real but rather to acknowledge the constituted and provisional nature of what we call social reality. *Politics*, on the other hand, refers to the institutions and practices that belong to our imagined 'social reality'. The *political* is that which takes place at moments of major upheaval and discontinuity – hegemonic transitions – that precede the replacement of new social and legal orders.[45]

2 The journey from antagonism to agonism

One of the criticisms of the liberal approach to peace processes is an inclination towards depoliticisation or denial of the continuing salience of power. In stark contrast, the work of Chantal Mouffe on agonism foregrounds the continuous processes of hegemonic ascendance and decline and the ever-present factor of conflict in all politics.

The *agōn* in agonism means struggle and is associated with the writings of Friedrich Nietzsche, Hannah Arendt and contemporary political theorists including Bill Connolly and Chantal Mouffe, who have introduced the discussion on agonism to conceptualise the conditions and possibilities of freedom that must be constantly negotiated, navigated and reconstructed as social orders rise and fall on tides of hegemonic constellations of power.

Hegemony is a deeply relational concept of power, referring to the capacity and mechanisms, including law, ideology and culture, used by a dominant group in society to exert influence over a subjugated group.[46] Each moment of sovereign enactment of power

42 Ibid 5.

43 Ibid 16.

44 Ibid 11.

45 Ibid 12–13.

46 Terry Eagleton, *Ideology: An Introduction* (Verso 1991).

and identity is implicated in a perpetual negotiation with contingency (traversing the realms of the *political* and *politics*)[47] followed by narrations of security, social order and identity. For agonists, identities – no matter how ancient, how powerful – are always in translation, always holding out, but never fully secured by totalising impulses in the face of social conflict and pluralisation (identity/difference). Democracy is, above all, the creation of conditions for conflict to find its expression in agonistic terms rather than the inevitable creation of a reconciled society.[48] This is precisely the nuanced positioning that was invoked by the *Agreement* but, for reasons that we have explored, has been under-analysed.[49]

For Mouffe and others writing in this radical tradition, the key is to embrace a point of view that acknowledges conflict as integral to social life and always amenable to transformation from destructive to constructive approaches. In her reading of societal order, we have to relinquish the idea of a society beyond division and power and come to terms with the lack of a final ground; undecidability. For Mouffe, a radical negativity impedes the full totalisation of society because each order can only achieve a passing hegemonic grip in the face of the ever-present possibility of antagonism. Mouffe understands the *political* as the ontological realm where antagonism plays a constitutive role in forming human societies. In contrast, the realm of *politics* refers to that ensemble of practices and institutions upon which a specific hegemonic order is constructed. Recognising each social order as such means that society must be envisaged as the product of a series of practices aimed at establishing order in a context of contingency, a context of ever-shifting accretions of power.

3 Discussion

In Northern Ireland, the demands of the democratic journey from antagonism to agonism are exceptional insofar as the *Agreement* marks a threshold moment in the over-arching relationships between Dublin, London and Belfast. O'Leary[50] goes so far as to venture that the 1998 *Agreement* appeared to end British political colonialism in Ireland, adding that the informed Irish nationalist understanding was that Northern Ireland's current status as part of the United Kingdom was now a function of Irish choices, not merely the outcome of past British conquest or imposition. It seemed that the new arrangements, with their proto-federal-like structures, provided for mutually interconnected institutions protected by the two sovereign governments. However, expectations that *both* governments would continue to act impartially, and in good faith, as co-guarantors of the principles and institutions at the heart of the *Agreement* have been strained by unilateral positions adopted by the United Kingdom government, including those proposed in the course of its negotiations with the European Union on the terms of its withdrawal. Indeed, Harvey[51] has observed 'a staggering degree of constitutional irresponsibility' on the part of the United Kingdom government in the wake of the 2016 referendum on exiting the European Union. While acknowledging that leaving the European Union is a distinct issue, he recalls that respect for the principle of consent is supposed to be central to the new constitutionalism of Northern Ireland.

47 Mouffe (n 6).

48 Chantal Mouffe, in Nico Carpentier and Bart Cammarerts, 'Hegemony, democracy, agonism and journalism: an interview with Chantal Mouffe' (2006) 7(6) Journalism Studies 964 <eprints.lse.ac.uk>.

49 Ibid 9.

50 O'Leary (n 11) 308–309.

51 Colin Harvey, 'Complex constitutionalism in a pluralist UK' (*Constitutional Law Blog* 2 July 2016) <https://ukconstitutionallaw.org/>.

Uncertainties around the United Kingdom government's commitments to the *Agreement* have amplified and radicalised the uncertainties built into the *Agreement* itself, reinforcing fractures between the dominant unionist and nationalist parties in Northern Ireland. Suspended between a politics of antagonism and agonism, the dominant ethno-nationalist parties of Northern Ireland have not put their most fundamental constitutional differences behind them but pursue their preferences – directly and indirectly – in a series of proxy policy arenas, from Brexit to the COVID-19 pandemic.

Today, it seems that two political scenarios hover, spectre-like, over the public square in Northern Ireland, as initial plans for the 100-year anniversary are debated just as calls for referendums and conversations about the shape of a new 'shared island'[52] proliferate. These are:

- the prevailing status quo marked by dominant and often antagonistic unionist/nationalist/republican party discourses of constitutional contestation predicated on a tacit acknowledgment of political uncertainty (unionists tend to regard contingency and uncertainty through the lens of lost hegemony, 'insecurity' and extreme caution given their deep ontic investment in the status quo; while nationalists/republicans openly seek to test the limits of contingency); and
- divergent responses to the contingent nature of the *Agreement* map on to responses to the prospect of a high-stakes test of preferred constitutional preferences in 'border polls'.[53] Whereas political unionism has, for the most part, sided with the British government in resisting or deferring proposals to set an early date for a referendum on the future status of Northern Ireland (given their comfort with the status quo), nationalists/republicans have begun to actively prepare and press for such a poll in each jurisdiction (Northern Ireland and the Republic of Ireland),[54] one in Northern Ireland as early as 22 May 2023 (the 25th anniversary of the ratification of the *Agreement*).[55] Some have even criticised the Irish government's Shared Island Unit and the proposal of the Taoiseach, Michael Martin, to delay calling for a border poll for at least five years.[56]

This article posits a third, emergent, scenario. One that does not rule out the prospect of polls (sooner or later) but which seeks to draw attention to the unfinished work of addressing the full implications of the radical contingency that is implicit in the

52 Following the General Election of 2019 in the Republic of Ireland, the Taoiseach's Office established a 'shared island' unit to consider the Irish government's role in facilitating peaceful change in line with the *Belfast–Good Friday Agreement*.

53 The *Belfast Agreement*, Schedule 1 (Polls for the Purpose of Section 1), outlines United Kingdom legislative provision for the Northern Ireland Secretary of State to direct the holding of a poll. The *Agreement* states that Northern Ireland shall not cease to be part of the United Kingdom without the consent of a majority of the people in Northern Ireland voting in a poll. Referendums would take place in both Northern Ireland and, later, in the Republic of Ireland if ratification of a Northern Ireland poll outcome with constitutional implications for the Republic is required.

54 Oireachtas Joint Committee of the Implementation of the Good Friday Agreement, *Brexit and the Future of Ireland: Uniting Ireland and its People in Peace and Prosperity* (Seanad Éireann Report 2017).

55 'Queen's professor Colin Harvey proposes date for Irish unity polls' *Belfast Telegraph* (Belfast 29 November 2020) <www.belfasttelegraph.co.uk/news/northern-ireland/queens-professor-colin-harvey-proposes-date-for-irish-unity-polls-38738151.html>.

56 James Ward, 'Irish border poll not on agenda for next five years, says Micheál Martin' *Irish Times* (Dublin 23 October 2020).

architecture of the *Agreement*. This third scenario posits the possibility of working towards conditions where:

- the *Agreement* is understood as a structuring process – bringing the affective and the cognitive dimensions of consciousness and relationality into dialogue – and bearing forth the conditions of possibility for the emergence of an as-yet-unimagined/nor fully articulated constitutional destination for the island that – while respecting the binary ('either/or') nature of referendums – valorises first and foremost a will to novelty and improvisation, and mutual constitutional co-authorship enabled by a politics of agonism. This scenario will require not only political and institutional forms but an affective turn, notably that which addresses and recognises the formative role of societal trauma and its implication in contested narrativity on the threshold of state formation.

The full power of the *Agreement* escapes us, in the absence of a complex understanding that an *affective* dimension must accompany our attempts to understand communities' experience of traumatic conflict and the role of trauma in mediating attempts to navigate contested narratives-as-histories in conditions of contingency. The recovery of complex agency is wagered on this belated engagement with the psychic fallout and suffering that has resulted from a prolonged political conflict. The conflict has tragically touched the lives and families of citizens and leading political representatives across the spectrum.

Insofar as the *Agreement* straddles what Mouffe has described as the *political* and *politics*, part of the outstanding challenge of implementation is the role of acknowledging and understanding the formative role of collective post-conflict trauma and how it is associated with histories of political violence at the boundaries of (geo)politics ('the political') and the internal workings of a state ('politics'). Where the democratic ethos of a society emerging from conflict is ill-prepared to navigate between the realm of the *political* and *politics*, in conditions of radical contingency, there is an ongoing risk that experience of violence, recrimination and accusations will continue to be instrumentalised (even weaponised in a rhetorical sense) as parties to the conflict seek out ways to conduct conflict by proxy, even using opportunities afforded by notionally democratic arrangements (power sharing). These practices, characterised by antagonism, give rise to the cyclical and repetitive behaviours and responses closely associated with 'trauma time',[57] in the absence of the emergence of an agreed or authoritative political narrative of a new social order. In the interim, the challenge is to agree conditions for what the President of Ireland, Michael D Higgins, has described as an ethics of remembering and narrative hospitality; a radical challenge in the face of uncertainty. Drawing on the works of Hannah Arendt, Paul Ricoeur and Richard Kearney, the President has addressed the challenges of this 'Decade of Centenaries' in terms of different narratives of violence recalled and the absolutisms that drove those impulses to violence together with the careless assumptions of 'the Other'. Urging citizens to understand that we are concerned with a very tentative horizon of completion, of a critical historical knowledge aware of its limitations, and built on such a reconciliation of narratives that avoids binary opposites, he recalls Paul Ricoeur's observation that between history's project of truth and memory's aim of faithfulness is a small miracle of

57 Rebecca Graff-McRae, *Remembering and Forgetting 1916: Commemoration and Conflict in Post-peace Process Ireland* (Irish Academic Press 2010).

recognition that has no equivalent in history. That which must come to be shared lies beyond history or memory.[58]

Edkins[59] describes the role of the state in mediating foundational violence and drawing a narrative veil over its role in securing a new social order. The contingent nature of the *Agreement* interrupts the state's ability to pursue a conventional pattern of authoritative state-sponsored forgetting/narrativity as part of an attempt to reinscribe a convincing linear narration of social order and politics *per se*. This interruption results in an ongoing cyclical pattern of contested and antagonistic narrativity associated with the political, including attempts to instrumentalise issues of contested history, memory, legacy processes and memorialisation. The contingent nature of the *Agreement* – with the open-ended prospect of fundamental constitutional change – continues to interrupt any prospect of drawing a veil over contested foundational narrative histories; memory, legacy and memorialisation have, instead, become absorbed into and have been instrumentalised in unresolved antagonism. Indeed, the prospect of a referendum itself has become one of the subjects of an antagonistic dispute over the meaning of the *Agreement*, with some challenging the legitimacy of calls for a poll on grounds that it may provoke a violent response or undermine a thin reconciliation. The debate on the timing of a referendum clearly evokes discursive invocations of the *political* and a discursive tactical preparedness to leverage influence by invoking this realm of the traumatic. Calls for preparation of a border poll are met, for the moment, by some responses that are characteristic of a deep residual antagonism associated with a denial of the rights of those who wish to advocate for such preparations.

Conclusion

With a growing appreciation for the importance of emotions in politics and law, this article has drawn attention to the particular role of societal trauma in a polity where the most fundamental questions of constitutional decisions remain radically contingent and open, due to the nature of the *Belfast–Good Friday Agreement*. The role of trauma is a central mediator of the connection that individuals make with collective or societal narratives, and this experience, in turn, is heavily influenced by the available cultural and political contexts. In conditions of complexity and radical contingency, the individual experience of trauma clashes with the requirement for critical responsiveness and a dialogical orientation required to complete the journey from antagonism to constructive, democratic agonism. Personal and collective trauma is associated with a tendency to retreat to and fix categories, and with a refusal to accommodate the political positions adopted by 'others'. Far from an openness to narrative hospitality and improvisation, trauma can drive a will-to-control and fix that which appears already present and objective.

Considering the question of the multiple Strands or scales involved in the *Agreement*, we have noted a tension within Strand One (within Northern Ireland) where a counterfactual liberal tendency to anticipate a consensus-based teleology that might one day produce reconciliation has encouraged a virtuous but misleading expectation that normal ('bread and butter') devolution-style politics can be achieved. We have concluded that the continuing – and likely increasing re-engagement – of the United Kingdom and

58 Michael D Higgins, President, 'Of centenaries and the hospitality necessary in reflecting on memory, history and forgiveness' (Speech on Centenary Commemorations, 4 December 2020) <https://president.ie/en/media-library/speeches/of-centenaries-and-the-hospitality-necessary-in-reflecting-on-memory-history-and-forgiveness>.

59 Edkins (n 40).

Republic of Ireland governments in managing the uncertainties embedded in the *Agreement* will remain vital for the evolution of politics within Northern Ireland if a recidivist tendency to lapse back into sectarianism is to be avoided. The roles of the two governments will be paramount in managing and mediating the political conditions for the Strand One actors, as calls mount for a referendum on the future constitutional status of Northern Ireland. The *Agreement*, more than anything, took its present form because the political theatre of Northern Ireland – prior to 1998 – was unable to safeguard the space in which antagonistic social forces have failed to subdue one another. In such conditions it was always unlikely that the journey from antagonism to respectful agonistic politics could be achieved, due to an incomplete experience of agency in the context of a conflict that has origins and continuing salience for players and conditions that lie beyond the region's territory. Brexit has turned out to be an exemplary case study in a geopolitical transition, rooted in England's long post-imperial decline and subsequent failure to fully integrate into the European Union project, which has begun to trigger far-reaching ramifications for the constitutional 'settlement' with the devolved nations of the United Kingdom. Brexit has demonstrated that the *Agreement* – perhaps best understood as a complex legal order – acts as a catalyst and agentic supplement for parties normally limited in their field of influence within Northern Ireland. The *Agreement* bestows complex and empowered agency on political players by institutionalising, albeit in an agonistic fashion, hard and soft power obligations by a complex network of actors, from Dublin to London, and from, Brussels to Washington, mediating designed and emergent structures to articulate a new balance of interests between parties within Northern Ireland in ways that reflect the ongoing shifts in hegemonic power at the level of geopolitics. The most effective players from Northern Ireland will embrace the structuring possibilities of the *Agreement* as an invitation to cultivate and embrace a distinct 'culture of feeling' or felt understanding for the navigation of the meaning of such hegemonic shifts, by working across all three Strands of the *Agreement*.

We have drawn, primarily, from the work of Edkins for a far-reaching insight into the formative role of trauma in the constitution of sovereign political power and the dimension of the political or the realm of 'war and peace'. Using her framework, we can closely observe the predicament of Northern Ireland, which currently occupies a position of suspension between war and peace: a suspension between the realm of the radically contingent where narrativity is exposed as undecidable, *and* where expectations of a normal linear social order are continually confounded. The outstanding challenge for parties to the *Agreement* remains the management of the open wound of radical contingency, the risk of continued exposure to a series of contested foundational narratives of traumatic violence and their capture/utilisation by political entrepreneurs seeking to win vindication for a new bid for a hegemonic social order. This activity involves both non-state and state actors. Where these actors continue to engage as ethnic entrepreneurs, there is a continuing risk that profound matters such as the management of conflict legacy and support for a generous and plural respect for conflict memories are drawn into a transactional vortex, resulting in their translation into a currency for a new round of conflict.

If Edkins is correct in her basic thesis, that forms of statehood in contemporary society, as forms of political community, are produced and reproduced through social practices, including practices of trauma and memory, we may need to revisit the implications for Northern Ireland, given its suspended status somewhere between the *political* and *politics*, somewhere between war and peace. The test, it seems, will be to cultivate an affective politics – looking beyond the liberal expectation of consensus – to

a more post- or metamodern form of political practice that embraces radical contingency and uncertainty and can live more at ease with the constituted and provisional nature of social reality. This would entail a significant shift in the tone and quality of political discourse within Northern Ireland, and one that is probably only viable within the political imaginary sustained by the complex field of political identity/difference held by the *Agreement*. It will mean a radical cultivation of institutional and affective conditions for a tolerance of uncertainty and contingency, and a respectful agonism that extends to an easy contemplation of far-reaching constitutional possibilities. It will mean an explicit public understanding and recognition that each sovereign enactment of power and identity is always implicated in a perpetual negotiation with contingency from which narratives of social order, security and identity are never more than moments of disambiguation.

Identities are always in translation, notably those dimensions of identity that found themselves on temporary hegemonic moments in the sun. An acknowledgment that conflict is always with us, that accretions of power have no final resting place, can be embraced as liberating – given the appropriate affective orientation – in a spirit of critical responsiveness, with a radical commitment that goes beyond mere pluralism/tolerance and extends to practices of pluralisation. This is a societal investment in extending the horizons for the emergence of new identities and new conditions of possibility that liberates everyone in a politics of becoming where the promise is a coming-into-freedom.

The unfolding and uncertain ramifications of Brexit for the United Kingdom's continuing obligations to the *Agreement* present a real challenge to our third scenario that envisages the *Agreement* as a structuring possibility – bearing forth the conditions of possibility for the emergence of an as-yet-unimagined constitutional destination, informed by a will to novelty in a spirit of improvisation. This uncertainty is balanced by the interventions sponsored by the Republic of Ireland's government in the form of the Shared Island dialogues and €500 million investment in connecting infrastructure and people across the island. One innovative and deliberative possibility for a significant civic society contribution is an all-island Citizens' Assembly, a variation on a model that has been instrumental in facilitating far-reaching policy shifts[60] within the Republic of Ireland, including decisions with constitutional implications.[61]

Significant interventions have also been led by the President, Michael D Higgins, who has made calls for ethical remembering and narrative hospitality a cornerstone of his mandate. The President has recently outlined some of the thinking that lies behind the 'Shared Island' initiative that is part of the current *Programme for Government* (2020). He invites citizens to revisit their conceptions of what constitutes a real republic – a republic that would have solidarity, community and the public world at its heart; a republic fit for a shared island of diverse tradition, hopes and loyalties and one that would acknowledge the state not only as benign, but as active, as a shared responsibility for the common welfare of all.

These conversations, including the affective responses they engender, will be important in setting the tone and conditions for any challenging initiative, such as a

60 Mandated by the Irish Parliament – Dáil Éireann – the Citizens' Assembly convened between 2016 and 2018 forwarded recommendations to the Dáil on the equal right to life of a pregnant woman and her baby (Eighth Amendment to the Constitution), ageing, fixed-term parliaments, the conduct of referenda and climate change. The Citizens' Assembly website is available here <www.citizensassembly.ie/en/>.

61 A Citizens' Assembly is one of the recommendations for consideration set out in *Interim Report of the Working Group on Unification Referendums on the Island of Ireland* (The Constitution Unit, University College London, November 2020).

referendum on Northern Ireland's constitutional future. A test for all those advocating such a referendum will be the avoidance of a conflation of the binary nature of the referendum process with an expectation that any outcome should follow a binary logic. Our third scenario offers the possibility of a more compelling vision of constitutional change as a threshold in time for the creation of a space for multiple belongings.

Drawing from the inspiration of James Joyce, Kearney adds that a philosophy of 'twinsome minds' – the way of thinking that informed the *Belfast–Good Friday Agreement* of 1998 – suggests that the key to the way forward is to regard the Agreement as a promissory note that may only deliver by holding a *working through*, holding a space for the complex, crossed identities and lost aspirations of those who have grown up 'in between', whose stories risk being eclipsed by 'monumental history'.[62] In a commentary on the importance of 'good commemoration', the authors look to a way beyond 'pathological polarities of either/or towards an open culture of *both/and*'.

Agonism as an achievement of living in the deep present must also move forward as a set of embodied practices – *as a mutually affective orientation* – and inform a non-violent emergence (*qua* co-authorship) of open-ended and unprecedented constitutional futures-in-solution – not as a conflict over *pre-scribed* templates ('a United Ireland' versus 'the United Kingdom') but as an emergence of hybrid arrangements, perhaps without precedent, that carry forward the intentions, practices, transformed narratives and complex multi-layered identities and affiliations that seek accommodation in an, as yet, unimagined constitutional framework.

This is work with multiple dimensions, in the realms of identity *and affect* alongside their retrospective codification in new forms of institutions, *as yet unimagined*. Legal orders re-imagined in all their affective and complex dimensions offer the possibility for re-imagining liberty that is much less invested in control and closure and committed to improvisation and adaptation. Transforming the *quality* of conversation in a system means transforming the quality of relationship and thought – and it is this transformed quality that travels with us into the emerging future.

62 Edkins (n 40) 15.

NILQ 71(4): 635–650

Irish rights of residence: the anatomy of a phantom

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Abstract

The present law on rights of residence relies heavily on a licence-based analysis resting in large part on the seminal work of Professor Harvey. However, since the 1970s, the law of licences, and in particular their proprietary effect, has been in retreat. This has left the licence approach exposed and rights of residence in need of a reappraisal.

Keywords: real property; rights of residence; licences.

Introduction

When rights of residence are granted, the intention of the grantor, the draftsperson and the grantee of the right, in the overwhelming number of cases, is that the grantee will have the occupation and use of the property for their lifetime but nothing more.

In a seminal article on the subject, 'Irish rights of residence – the anatomy of an hermaphrodite',[1] Professor Brian Harvey conducted a survey of the various methods of conceptualising rights of residence and settled on the licence as the most appropriate. By reason of developments in the law of licences since Professor Harvey's article, the licence analysis is now attended by considerable difficulty.

In what will be, in effect, a recapitulation of Professor Harvey's work, this article will examine some of the possible methods of conceptualisation, aside from the licence, that he considered and rejected. The article will then move to explain the difficulties with the licence analysis and how, as a consequence, rights of residence cannot be understood as licences. The article then looks at some further possible alternative analyses before concluding that a right of residence as it is generally understood is, in fact, a creature entirely unknown to the common law.

* MA (Oxon). The author gave a very confusing talk to the members of the South Derry Solicitors Association on this subject on which this article is hopefully an improvement. Thanks are due to the anonymous reviewers for their helpful comments.

1 (1970) Northern Ireland Legal Quarterly 389. As comprehensive a treatment of the subject as one could wish to find.

1 The problem

> Farmers' wills often contain a provision to the effect that the testator's widow is to have a right during her life to reside in the testator's farmhouse …[2]

The idea is simple (and popular):[3] A wants to give his house to B but wants C to be able to live there for the rest of her life. However, the only constraint that A wants to place on B's enjoyment is C's lifetime residence. An unschooled observer might conclude that it is both natural and perfectly reasonable for a person holding a dwelling to be able to specify who should be permitted to reside in the dwelling after his death. Even a property lawyer might intuitively say that if A has the fullest dominion over the dwelling recognised by the law, A should be able to carve up that interest in whatever way A pleases, including by specifying that C shall have the right to reside for her life in the property. The problem is that stating C has a right of residence only raises the question about what that label really means for all the various parties who may have an interest in the property; particularly the grantee of the right of residence and the devisee of the freehold, but also purchasers from either of them. In our law of property, certain property concepts and labels have become so well developed that the rights of the competing interest-holders have become sufficiently clear.[4] The difficulty with the right of residence is that this is not the case. But a yet more fundamental problem is that, when we attempt to fashion a concept which performs all the functions we demand of it, we find that the existing materials are insufficient for the task. Starkly put, not only is a right of residence vague, but it is also incompatible with the rest of the law of property.

2 The essential elements of a right of residence

Before we can examine how we can (or cannot) legally accommodate the elements of the right of residence we have to ask what those elements are. In other words: what do we expect of a right of residence? Statute is an obvious place to begin since that source allows us to see how the polity acting through the legislature has viewed rights of residence.

In registered land, the position is governed by section 47 of the Land Registration Act (Northern Ireland) 1970:

> Where:
>
> (a) a right of residence in or on any registered land, whether a general right of residence in or on that land or an exclusive right of residence in or on part of that land; or
>
> (b) a right to use a specified part of that land in conjunction with a right of residence referred to in paragraph (a);
>
> is granted by deed or by will, such right shall be deemed to be personal to the person beneficially entitled thereto and the grant made by such deed or will shall not operate to confer any right of ownership in relation to the land upon such person, but registration of any such right as a Schedule 6 burden shall make it binding upon the registered owner of the land and his successors in title.

In its relatively recent consultation paper, the Northern Ireland Law Commission (NILC) acknowledged the unsatisfactory state of the law, in particular with regard to rights of

2 *Report of the Committee on the Registration of Title to Land* (Cm 512, 1967); Harvey (n 1) 389. Of course, the desire to avail of this arrangement is not limited to farmers and their widows

3 10 per cent of all wills in Northern Ireland contain a right of residence: *Re JS (deceased)* [2018] NICh 20 at [1].

4 For example, the life interest, which we will encounter below as a concept containing some of the features of a right of residence, has ancient case law and whole statutes devoted to its comprehension.

residence in unregistered land, and recommended that the law in registered and unregistered land be harmonised.[5] In its proposed draft Bill, the Law Commission's report proposed that a right of residence should be binding on the successors in title of the grantor provided the right were registered in the Registry of Deeds:

> Notwithstanding the personal nature of … a person's right of residence, it is enforceable against the owner of, or holder of any interest in, the land and, subject to [registration in the Registry of Deeds], that owner's or holder's successors in title.[6]

Both statute and the Law Commission therefore recognise that a right of residence should: (i) bind the creator and his successors but (ii) be personal to the grantee. The latter condition can only mean that the right cannot be enjoyed by an assignee or alienee from the grantee.

At first glance it seems surprising to suggest that existing property law materials could not be arranged in such a way as to accommodate the result we desire. However, the right that we seek has two particular facets that coexist uneasily in any property concept presently known to the law: the holder of the right must be able to specifically enforce the right against the whole world and must, at the same time, hold a right that cannot be passed in any shape or form to another person.

The impetus to present a fully developed concept of the right of residence is arguably not so pressing in the case of registered land where statute can be relied upon. However, even in the case of registered land, there is still something of a problem: if we cannot conceptualise the right using existing materials, we are bound to accept that the right in registered land is *sui generis*. As with most aspects of the subject, Professor Harvey first identified this problem. His view was that even with the enactment of section 47, 'we are still unenlightened as to what the right is in law'. In a perhaps generous appraisal of section 47, Professor Harvey mused on whether 'luggage-labels' on concepts were altogether necessary.[7] The problem with eschewing existing labels and innovating is that one is obliged to be extremely detailed about the new right being fabricated. Section 47 is clear about the two particular facets that we have mentioned above, but it is otherwise silent as to how the right might fit in with, or draw from, recognised property law ideas.

Having sketched the problems, we now turn to the concepts which Professor Harvey explored as possible solutions.

3 The possibilities: lien

The first is a lien.[8] This presents a practical problem for the court, namely in valuing the right of residence.[9] But a more fundamental problem with the lien analysis was recognised in Northern Ireland by Lord Lowry's Committee on the Registration of Title to Land in 1967. As noted by Harvey, the committee's report was very doubtful about the ability to buy out the right of residence:

5 NILC, *Land Law Consultation Paper* (NILC 2, 2009) at 4.19.

6 NILC, *Report on Land Law* (NILC 8, 2010) at 157 (draft Bill, cl 18(2)).

7 Harvey (n 1) 406.

8 Using language lifted directly from *Kelaghan v Daly* [1913] 2 IR 328 at 330 (Boyd J), in the Republic of Ireland, statute has laid down that in registered land a right of residence is 'a right in the nature of a lien for money's worth in or over the land': Registration of Title Act 1964, section 81.

9 See Professor Wylie's discussion of Lavan J's decision in *Johnston v Horace* [1993] ILRM 91: J C W Wylie, *Irish Land Law* (4th edn, Bloomsbury 2010) 20.21.

> We do not think that a farmer-testator would normally intend to give his son the right to put his (the testator's) widow out of the farmhouse on payment to her of a sum of money, even if fixed by a court of law as fair and reasonable.[10]

This is a recognition of the first of the incompatible facets we noted above: the ability of the grantee to specifically enjoy the right against the devisee (and, by extension, any successor of his; in other words, against all the world). A right of buy-out is therefore not consistent with the essential elements of the right of residence, as we have described them above. Moreover, the lien is a variant of security, and security is held to ensure the performance of some other, primary, obligation due to the holder: a lien is a safeguard against default on the primary obligation.[11] In the case of the right of residence, the right, if viewed as a lien, would be held to ensure performance of the payment of the value of the right. This obviously makes very little sense when we have identified the right to reside as the primary duty to be upheld. A further problem with the lien analysis is that a lien only arises where the owner of the lien holds the subject property prior to the creation of the primary obligation. In many cases the grantee of the right will have residence prior to the time of the coming into force of the right (most usually after the death of the grantor); but, equally, they may never have set foot on the land at any time.

While there are instances of apparent liens which do not depend on prior possession, Professor Ben McFarlane has persuasively argued that these are not liens in the true sense. The primary instance where prior possession is not a condition is the lien held by the purchaser over the subject land for the return of his purchase money. In the course of considering the possibility of such a lien, Professor Wylie perceptively observes that this 'lien': (i) arises by virtue of the operation of equity rather than by virtue of the transaction between the parties and (ii) takes effect as a charge.[12] For McFarlane, the logical conclusion of these observations is that the result is an equitable charge and that the terminology of lien is misplaced.[13] Harvey expressively said that calling a right of residence a right in the nature of a lien was like calling a cat 'an animal in the nature of a dog'.[14] Harvey also considered whether the right was an annuity or money charge and discounted both possibilities largely on the same bases that the lien was found wanting: (i) difficulty in valuing the charge for redemption purposes and (ii) a fundamental inconsistency between, on the one hand, what the law generally envisages by security and, on the other, the essential elements of the right of residence.[15]

4 The possibilities: life interest

The second distinct possibility is a life interest, but as Lord Denning MR pointed out in *Binions v Evans*,[16] such a characterisation would give the holder of the right the wide powers (most obviously, that of sale) of a life tenant under the Settled Land Acts. Girvan J adopted the same reasoning in *Jones v Jones*:

> Even if a person is given an exclusive right to reside in specified premises as opposed to a general right to reside in circumstances where others may also reside in the premises this in my view falls short of creating a life interest for the

10 Harvey (n 1) 405.

11 Ben McFarlane, *The Structure of Property Law* (Hart 2008) 591.

12 Wylie (n 9) 12.16.

13 McFarlane(n 11) 622.

14 Harvey (n 1) 411

15 Ibid.

16 [1972] Ch 359

> purposes of the Settled Land Acts 1882–1890 since the beneficiary of the right has a limited right to be on the premises and the right has none of the other incidents of a life interest capable of creating a life interest for the purposes of the Settled Land Acts.[17]

This is an instance of the other incompatible facet of the right: it cannot be transferred in any way. In *Jones*, the risk identified was the ability of the grantee of the right being permitted to sell the fee simple as a life tenant pursuant to the statutory power of sale; but even the transfer of the barest right to reside, if recognised, could impose a complete stranger upon the devisee of the fee simple and would undoubtedly be at odds with the intentions of the testator.

5 The possibilities: trust

The third option is to rely on a trust. Harvey was of the view that a trust could not be relied on for four main reasons:[18] (i) the trust was too vague to enforce;[19] (ii) in cases of non-exclusive rights of residence, equity would not assist the grantee;[20] (iii) the 1970 Act had expressly withheld any form of property interest from the grantee;[21] and (iv) any situation where the devisee is trustee for the grantee for the latter's life is very difficult to distinguish from a life interest and that conceptualisation has just been rejected.

Only the last two of these objections are submitted to be fatal to the possibility of a right of residence taking effect under a trust. The vagueness principle has its classic expression in *Morice v Bishop of Durham* in which a bequest in trust for 'such objects of benevolence and liberality as the trustee in his own discretion shall most approve' failed for want of certainty.[22] The deficiency there related to the objects of the legacy and that cannot be a bar to enforcement where the grantee of the right of residence is named. In reality, objections (i) and (ii) are expressions of the same concern, namely that there is a predisposition against specifically enforcing interests that depend on the court's constant supervision. This objection gained some support from Lord Hoffmann in *Co-operative Insurance v Argyll Stores Ltd* where his Lordship's foremost concern was the:

> … possibility of the court having to give an indefinite series of such rulings in order to ensure the execution of the order …[23]

This is not a rule of law, however, and, for example in *Brownfield Restoration Ireland Ltd v Wicklow CC*, Humphreys J rejected the advance of the *Argyll Stores* case by a polluter anxious to avoid specific relief:

> … this is something of a polluter's argument. Do not require us to remove the waste as it will involve the court having to supervise.[24]

With respect to the concern raised in *Argyll Stores,* it is submitted that courts, perhaps especially in Ireland, are vastly experienced at (arguably, weary of) regulating land usage by persons proximate to one another in space. The particular problem presented by rights of residence is whether that supervisory jurisdiction can extend to requiring people to

17 [2001] NI 244, 254.

18 Harvey (n 1) 412–413.

19 *Morice v Bishop of Durham* (1805) 10 Ves Jr 522; 32 ER 947.

20 *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch 233, 250 (Megarry J).

21 At section 47: 'shall not operate to confer any right of ownership'. The Registration of Title Act 1964 makes similar provision at section 81: 'shall not operate to create any equitable estate in the land'.

22 (1805) 10 Ves Jun 522; 32 ER 947. See Harvey (n 1) 412.

23 [1998] AC 1 at 12. The facts of *Argyll Stores* concern the specific performance of an ongoing covenant in a lease.

24 [2017] IEHC 456.

'live peaceably under the same roof'[25] in the case of a non-exclusive grant. If this is a valid objection, though, it would effectively undermine the efficacy of all non-exclusive grants where the property does not lend itself to some form of physical partition. The 1970 Act, though, is explicit that 'general' (i.e. non-exclusive) grants are enforceable in the registered system and the objection is difficult to maintain in the face of this enactment. Furthermore, developments in family law mean that the courts are familiar with those situations where two parties have occupation rights under the same roof. The courts in Northern Ireland have power under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 to 'regulate the occupation of the dwelling-house by either or both parties'.[26]

In fact, if rights of residence were recognised as taking effect under a trust, the occupation order scheme contained in the 1998 Order would, in most cases, govern rights of residence. By Article 11, an occupation order can be sought by any person entitled to occupy a dwelling-house by virtue of a beneficial estate provided: (a) the dwelling is or has been the home of that person and the person from whom occupancy is claimed and (b) those two persons are related.[27]

Objections (iii) and (iv) both address the same, significant concern, already noted: that the grantee of the right cannot effect its transfer. In *Bank of Ireland v O'Donnell*,[28] the defendant bankrupts argued that their alleged right of residence in property (part registered, part unregistered)[29] did not vest in the Official Assignee as 'property' within the terms of section 44 of the Bankruptcy Act 1988. Similarly to section 47 of the 1970 Act, section 81 of the Registration of Title Act 1964 provided that a right of residence 'shall not operate to create any equitable estate in the land'. Costello J rejected the bankrupts' argument in strident terms:

> It is absolutely incontestable that a right of residence, such as is asserted by the defendants in their defence and counterclaim in these proceedings, is an interest in property.[30]

However, while the durability of the statutory right against the devisee and her successors begins to make the right look as if it is proprietary, true proprietary status is ultimately

25 From Goddard LJ (as he then was) in *Thompson v Park* [1944] KB 408 at 409. Chancery lawyers may place greater faith in Megarry J's endorsement of this statement in *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch 233, 250.

26 Article 11(3)(d). See, for instance, *E v E* [1995] 1 FLR 224, where the English Court of Appeal (applying the ouster jurisdiction under the Domestic Violence and Matrimonial Proceedings Act 1976) permitted a husband to continue residing with his wife even in spite of her allegations of attempted rape.

27 This might, inadvertently, be a useful development in providing a statutory scheme which would be particularly helpful in the regulation of non-exclusive grants. It might be the case that the legislation hoped for by this article would have to provide for a custom-made scheme to regulate non-exclusive grants.

28 [2015] IEHC 640.

29 See another instalment of the saga: [2014] IESC 77, [9].

30 [2015] IEHC 640, [34]. Insolvency decisions are not always the most reliable sources of general determinations on the law of property. As an example, the proprietary effect of the chattel lease derived from *Bristol Airport plc v Powdrill* [1990] Ch 744 has been called into question: William Swadling, 'The proprietary effect of a hire of goods in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (Lloyd's of London Press 1998).

denied in the statutory prohibition on any transfer[31] which prohibition, as we have argued above, must be an essential feature of the right in unregistered as well as registered land.

The prohibition on transfer is also incompatible with rights under a life interest since, as we noted above, a life tenant has statutory powers of sale under the Settled Land Acts. It is also difficult to conceive of other entitlements under a trust which would not attract the provisions of the Settled Land Acts. One possible option might be for the court to construe the interest of the grantee of a right of residence as an interest under a protective trust. Protective trusts are exceptions to the rule against inalienability and permit a settlor to give property to A for life but upon purported alienation by A to pass to B.[32] This aligns exactly with our view of the right of residence, and we might thus conceptualise a right of residence as a gift to the devisee on protective trust for the grantee of the right with remainder to the devisee and a limitation over to the devisee in the event of an attempted alienation. While the protective trust comes within a whisker of providing us with the framework of an inalienable life interest, ultimately the type of trust we wish to construct would fall within the terms of section 2(1) of the Settled Land Act 1882, which provides:

> Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

As Wylie explains, a protective trust falls outside the definition of a settlement if the interest of the person entitled upon alienation is merely the possibility of a reverter (and thus not an estate or interest in land).[33] But if the right of residence is to function as we want it to, the person entitled on alienation is also entitled upon the death of the

31 An anonymous reviewer helpfully pointed out the assertive nature of this statement. Is the power of transfer, then, an essential facet of property? In the case of the fee, the right of alienation has been fundamental since Quia Emptores. But this does not really assist us in answering the more general question. For that, we begin by observing that 'our property is nothing but those goods, whose constant possession is establish'd by the laws of society': David Hume, *A Treatise of Human Nature*, L A Selby-Bigge and P H Nidditch (eds) (Clarendon Press 1978[1739]) 491. McFarlane (n 11), at 139, notes a function of this: property is an arbitrary concept, and we cannot work out whether something is property from first principles. In James Penner's thesis, *The Idea of Property in Law* (Oxford 1997), property is intrinsically bound up with rights of use and exclusion (70). The right of alienation is a necessary element of property because (90) parting with it by gift to persons one cares about is part of one's own use. Selling, however, does not engage this use interest because one's own use is deemed to be exhausted upon receipt of the consideration. At 102, Penner takes the view that certain restrictions on alienability are consistent with property. The matter is one of degree, and the motivation behind the restriction is important. Topically, he suggests that a temporary ban on the transfer of land to quell an infectious disease would not alter the status of the land as property. However, 'very general restrictions on the scope of property use' would begin the call into question the very status of the relevant thing. In making this point, though, Penner seems to concede that property status owes something to the versatility of the thing in question. If that is the case, we might be persuaded that property status diminishes in line with the freedom to convert an item of property into something else that might be of greater use or value to the alienor. Turning back to rights of residence there is, in fact, only one possible purchaser of a right of residence, as we generally understand it, and that is the holder of the fee simple who might wish to buy it out. Meanwhile, any effort to alienate a right of residence to any other person is completely impossible: the right simply evaporates upon the attempt.

32 D J Hayton et al (eds), *Underhill and Hayton: Law of Trusts and Trustees* (19th edn, LexisNexis 2017) 11.68. In technical terms, A has a determinable life estate: Wylie (n 9) 9.87.

33 Wylie (n 9) 8.22.

beneficial owner (the grantee of the right of residence) and a settlement, with all it involves, necessarily follows by reason of the breadth of section 2(1) of the 1882 Act.

Having rejected the trust, Harvey settled upon the licence as the answer, and this approach has received weighty judicial endorsement in Northern Ireland (see below). We are therefore going to subject the licence-based theory to closer analysis than has been the case for the other possible solutions. This will involve a detailed look at what precisely is happening when a right of residence is granted.

6 The licence-based theory

In *Jones v Jones*,[34] by agreement made in 1983 and registered in 1985, a father made an *inter vivos* transfer of his holdings to his son, the first defendant, and in return reserved a right of residence in the family dwelling house for himself and his wife, the plaintiff, for their respective lives. From the time of the agreement until 1998, the plaintiff enjoyed exclusive occupation in the dwelling. In 1998, the plaintiff was admitted to hospital and eventually to a residential care home. Once in residential care, the plaintiff found that she was experiencing difficulty in obtaining readmittance to the dwelling, her son withholding the keys. Initially, to counter the alleged interference of his siblings, the son argued that the plaintiff had an exclusive right of residence. However, the son later changed tack completely when he admitted his own son and daughter-in-law, the second and third defendants, as occupants of the dwelling. All defendants now argued that the plaintiff only had such rights of residence as were consistent with the rights of the new occupants. The plaintiff sought declaratory relief that she was entitled to a right of residence during her lifetime and that the defendants should be restrained from obstructing her access to the premises. The defendants argued that a right of residence was an established legal term with a precise meaning; in the absence of words of exclusivity, this right was to be interpreted as a general rather than an exclusive right; a general right of residence did not entitle the plaintiff to exclusive occupation. Girvan J rejected these submissions:

> In fact the term 'right of residence' is not a legal term with a clear and precise meaning (as is demonstrable from an analysis of the authorities). An analysis of the Irish case law shows a considerable variation in the way in which the parties express a right of residence which is being conferred or reserved.[35]

Drawing on Professor Harvey's article, his Lordship concluded that rights of residence were a species of licence:

> The right of residence in favour of the deceased and the plaintiff reserved by the agreement can fairly be viewed as a form of contractual licence reserved by and granted back to the plaintiff and her husband. In reality it was an integral part of the agreement for the transfer of land to William by the deceased. During the lifetime of the deceased and the plaintiff it was an irrevocable contractual licence to reside in the premises which the court would protect by injunction or specific performance if appropriate.[36]

The conclusion that the right of residence is best conceptualised as a licence seems now to have ossified. In *Re JS (deceased)*, McBride J recently held:

> In line with *Jones* and the views expressed by Professor Harvey I am satisfied that a right of residence is upon a proper analysis a contractual licence.[37]

34 [2001] NI 244.

35 Ibid 256.

36 Ibid.

37 [2018] NICh 20, [55]. It is difficult to criticise this conclusion in view of the fact that it was supported by previous authority and academic writing.

In order to assess this conclusion, we are obliged to look at difficulties in the licence-based theory as it applies between the grantor (and his successors in title) and grantee. We will encounter further difficulties when we assess the relationship of grantee and a purchaser of the fee simple.

7 Licences: grantor and grantee

In *Jones*, the right of residence lay in a contract between the father and son.[38] The wife and mother was able to benefit from the consideration passing from her husband to her son by virtue of section 5 of the Law Reform (Husband and Wife) Act (Northern Ireland) 1964.[39] On the facts of that case, the identification of the relationship between the son and mother as contractual licensor and licensee respectively was accurate.[40] But, more generally, as we will now attempt to show, we cannot say that all rights of residence can be so categorised. A right granted by will, for example, is very likely to be gratuitous and by that analysis, if a licence, revocable. We need to break this reasoning down somewhat by examining the gratuitous and revocable nature of the right granted.

As Girvan J said in *Jones*, licences come in several different forms, but for the moment we need to compare the contractual and bare varieties. As his Lordship stated:

> A contractual licence which derives its force from some contract express or implied differs from a bare licence in that it is not granted voluntarily but is founded on valuable consideration moving from the licensee.[41]

A beneficiary under a will gives no consideration for the gift to him. This does not normally present any issues since donees under a will are able to compel the personal representatives to effect a transfer of the gift to them.[42] But the status of the right of residence is thrown into stark relief when we consider that property passed by will is subject to all the usual incidences of that property. As an obvious example, the interest under the bequest of a term of years will determine on the expiry of the term.[43] The devisee of an estate *per autre vie* takes a right which is, factually, potentially less secure yet.

A gratuitous licence arising *inter vivos* is liable to be determined at will. In *Binions v Evans*,[44] Lord Denning MR commented on the case of *Buck v Howarth*:

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38 The right was also contractual in another important judgment of Girvan J's on this subject, *Re Walker's Application* [1999] NI 84.

39 See now the Contracts (Rights of Third Parties) Act 1999.

40 As was the conclusion that, since the right had been registered as a Schedule 6 burden as contemplated by section 47 of the 1970 Act, the second and third defendants were also bound by it. However, absent this specific provision, the 1970 Act does not make licences binding. A licence cannot assume a proprietary nature as the right of a person in actual occupation under paragraph 15 of Schedule 5 to the Act because that paragraph is directed at rights which are proprietary at common law (and would thus bind a purchaser of unregistered land) but which would not otherwise bind a registered purchaser under the registered scheme: see the discussion of Schedule 3 to the Land Registration Act 2002 in E Cooke, S Bridge and M Dixon, *Megarry & Wade: The Law of Real Property* (9th edn, Sweet & Maxwell 2019) 6-097.

41 *Jones* (n 17) 255

42 The particular rights of the beneficiaries is an area of dispute in itself. Following *Commissioner of Stamp Duties v Livingston* [1965] AC 694, beneficiaries have, at the very least, a chose in action to compel the proper administration of the estate. In fact, devisees in both jurisdictions in Ireland have the benefit of a trust which was expressly disapproved of in *Livingston*: Succession Act 1965, section 10(3); Administration of Estates Act (Northern Ireland) 1955, section 2(3).

43 And, as pointed out in *Williams on Wills* (10th edn, LexisNexis 2018) 8.1, may be liable to determine sooner on the operation of an option or power of re-entry.

44 [1972] Ch 359 at 366.

> … where a man, for no consideration, gave another permission to stay in a cottage until he died, it was held to be no lease but only a tenancy at will. Today it would be considered a bare licence, with no contractual right at all to stay there.[45]

Megarry & Wade: Law of Real Property says the following:

> A bare licence is a licence which is not supported by any contract, and includes a gratuitous permission to enter a house or cross a field … A bare licence can be revoked at any time … Even a licence granted by deed may be revocable, provided there is no covenant not to revoke it … A revocable licence is automatically determined by the death of the licensor or the assignment of the land.[46]

A testamentary right of residence does not fit neatly into this framework of the licence. We have asserted that an essential element of a right of residence is that a grant of the right from a testator (T)[47] to a grantee (A) confers on A the right to reside in the subject property for her life, and testators and draftspeople work on that assumption. But if T's grant of an *inter vivos* licence to A would cease on T's death, it is not clear how we explain a licence from T to A which only *commences* on T's death and apparently endures for A's *lifetime*. If T could have terminated the licence at any time during his own lifetime, it is not apparent by what licence-based means A can require T's estate to recognise a lifetime licence in favour of A.

It might be tempting to say that the right obtains its durability by way of a transfer under seal combined with a covenant not to revoke (implied, if necessary). However, a will is not a deed. A deed is a document of title,[48] but a will is only the document of title of the executors. For the beneficiaries, the will gives an ultimate (contingent) right to title, but it is not title itself: *Commissioner of Stamp Duties v Livingston*.[49] The devisee of a legal estate requires an assent in writing;[50] the legatee of personalty obtains the assent of the executors in their acquiescence in the legatee's enjoyment of the property.[51] Therefore, it would be difficult to argue that the durable right of residence comes to the legatee by way of construing the will itself as a deed granting a right of residence together with an implied covenant against revocation.

We are now going to bypass, for a moment, consideration of the relationship between the grantee of the right and the devisee of the fee simple. Rather, we are going to assess the durability of the licence as against a purchaser of the fee simple. This will also allow us to draw some conclusions about the relationship between the grantee and the devisee.

8 Licences: grantee and purchaser

We commence this study by observing two comments from academics. This is Professor Martin Dixon:

> Something is either a licence, or it is not. If it is a licence, it may be irrevocable by reason of equitable remedies, but it can bind no-one but the licensor.[52]

45 [1947] 1 All ER 342.

46 Cooke et al (n 40) 33-003.

47 But it could equally be an i*nter vivos* grant.

48 Real Property Act 1845.

49 [1965] AC 694. Even the trusts imposed by section 10(3) of the Succession Act 1965 and section 2(3) of the Administration of Estates (Northern Ireland) Act 1955 only exist for the persons 'by law entitled thereto' and those persons could, but *need not*, be the legatees under the will.

50 Administration of Estates (Northern Ireland) Act 1955, section 34(4).

51 R Kerridge, *Parry & Kerridge: The Law of Succession* (13th edn, Sweet & Maxwell 2016) 23–36.

52 Martin Dixon, 'Developments in estoppel and trusts of land' [2015] Conveyancer and Property Lawyer 469, 473.

And this is Professor Ben McFarlane:

> Indeed, relying on two House of Lords authorities, *Ashburn Anstalt* plainly contradicts [the] contention that such a licence is a property right and hence *prima facie* binding on a transferee of the land. This clear refusal to confer proprietary status on licences of land has been consistently confirmed in subsequent cases …[53]

At one point, there was a judicial move towards recognising that a licence would bind a transferee of the grantor unless the transferee were a purchaser for value without notice. The most famous examples of these cases tend to involve Lord Denning MR, but there is actually a reasonably weighty line of authority going back to cases such as *De Mattos v Gibson*[54] and the decision of the Privy Council in *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd*.[55] In these cases there is a contractual right to use an object (in the two given cases, a ship); the owner then sells the object to a new owner (sometimes expressly subject to the right of the user) and the holder of the contractual right asserts his right of use against the new owner. The new owner argues that he is not bound by his predecessor's personal obligations. In both *De Mattos* and *Lord Strathcona*, the arguments of the user (charterers) were successful, Lord Shaw in the latter case stating that:

> Equity would grant an injunction to compel one who obtains a grant *sub conditione* from violating the condition of his purchase to the prejudice of the original contractor.[56]

Such were the older cases. In *Errington v Errington*, a son and daughter-in-law went into possession of a house and were promised by the father that if they paid the mortgage, he would convey the house to them. Denning LJ (as then) concluded that the couple were licensees with a contractual right to remain.

> As such they have no right at law to remain, but only in equity, and equitable rights now prevail … This infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of the contract. Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice.[57]

In *Binions v Evans*,[58] the owners of a cottage made the following compact with the occupant:

> The landlords, in order to provide a temporary home for the tenant … hereby agree to permit the tenant to reside in and occupy all that cottage and garden … as tenant at will of them free of rent for the remainder of her life or until determined as hereinafter provided …

In the English Court of Appeal, Lord Denning analysed this right and rejected the notion of a tenancy at will since the interest granted was to last for the life of the grantee. A life estate was also rejected on the grounds (noted above) that no one intended that the grantee should have the wide powers of a life tenant under the Settled Land Acts. Lord Denning concluded that the grantee had a contractual right to reside which was probably an equitable interest *ab initio* but certainly became one when the owners of the cottage sold the superior interest and the purchasers, who had taken the property expressly

53 Ben Macfarlane, 'A reply to Mr Watt' [2003] Conveyancer and Property Lawyer 473.

54 (1849) 4 DeG & J 276.

55 [1926] AC 108.

56 [1926] AC 108, 120.

57 [1952] 1 KB 290 (CA), 298–299.

58 [1972] Ch 359.

subject to the rights of the grantee and had paid a reduced price accordingly, attempted to evict her. His Lordship's conclusion was:

> When the landlords sold the cottage to a purchaser 'subject to' her rights under the agreement, the purchaser took the cottage on a constructive trust to permit the defendant to reside there during her life, or as long as she might desire. The courts will not allow the purchaser to go back on that trust.

In *Ashburn Anstalt v Arnold*,[59] however, the English Court of Appeal reined in this expansive doctrine, adopting the dissenting reasoning of Russell LJ in *National Provincial Bank Ltd v Hastings Car Mart Ltd*:[60]

> … on *Errington v Errington* … I find it not easy to see, on authority, how that which has a purely contractual basis between A and B is, though on all hands it is agreed that it is not to be regarded as conferring any estate or interest in property on B, nevertheless to be treated as producing the equivalent result against a purchaser C, simply because an injunction would be granted to restrain A from breaking his contract while he is still in a position to carry it out.

It is that reasoning which is endorsed in the two academic opinions already noted.

In *Ashburn Anstalt*, the Court of Appeal left open the possibility that the contractual licence could be enforced through a constructive trust. That would only arise, though, where the conscience of the holder of the fee simple was affected. The overriding concern was for the certainty of title to land, expressed in the statement that it was not 'desirable that constructive trusts of land should be imposed in reliance on inferences from slender materials'.[61] The decision in *Binions v Evans* was not expressly disapproved of but, as explained, what was felt to be of importance was not that the purchaser had notice of the licence, but that he had paid a reduced amount. That latter conduct made it unconscionable to attempt to ignore the licence.

All the cases we have referred to involve the clash between a *contractual* licensee and a transferee for value from the grantor of the licence. The present state of judicial and academic opinion is that a contractual licence is not enforceable against any person other than the grantor. That does not auger well for the grantee of a gratuitous right of residence since, if her right is merely classified as a licence, it cannot prevail against a purchaser, even one with notice of the right,[62] unless (following *Binions*) some further unconscionable conduct can be found.

9 Licences: grantee and devisee

We can now offer some conclusions about the right of the grantee against the devisee of the fee simple. The devisee may be the grantor's successor in title to the fee simple and, on one view, no better placed than his predecessor. However, the devisee is still a person other than the grantor, and, on the basis of the current law of licences, he is not bound by the licence.

If it is the case, as has been argued above, that T's estate is not bound to recognise a bare licence in favour of the grantee, it is difficult to see by what purely licence-based theory the devisee could be bound. Even at the high-water mark of judicial support for

59 [1989] Ch 1.

60 [1964] Ch 665, 698. Lord Denning MR was in the majority whose decision was overturned by the House of Lords.

61 [1989] Ch 1, 25–26.

62 'But notice is not enough to impose on somebody an obligation to give effect to a contract into which he did not enter': [1989] Ch 1, 26.

the licence holder, there was no suggestion that a bare licence was anything other than revocable at will.[63]

10 Licence by estoppel

When we consider the licence by estoppel, the matter is much more nuanced. A licence by estoppel arises where a person acts to his detriment in response to a representation from the holder of the superior interest that a licence will be granted.[64] Instances where a testator assures someone, usually a close relative, that they will be provided for in the aftermath of the testator's death are legion. The court could choose to order that the testator's estate is bound by the representations and give the representee the licence they expected to receive.

We might attempt to construct an argument that every testamentary right of residence raises an estoppel, but if we did so we would have to expand innovatively on how estoppels are presently understood. Admittedly, there will be considerable factual overlap between rights of residence and estoppel licences in many cases. But, equally, there will be cases where the legatee of the right of residence has received no assurances at all during the testator's lifetime. If a testator bequeaths a right of residence to, say, a relative living in England with whom she has had no contact for years, that right is presently understood to be as good a right of residence as any other. However, in that case the strength of the right of residence cannot depend on the unconscionability of the testator since, firstly, there is no representation; secondly, there is unlikely to be any detrimental reliance on the part of the legatee; and, thirdly, if the right of residence is frustrated, that is likely to be at the behest of the devisee of the fee simple and not the testator's estate.

Similarly, if we shift the focus to the actions of the devisee of the fee simple, the *Binions v Evans* constructive trust cannot bind him without further legal innovation. It will be recalled that in *Binions* the purchasers of the freehold were bound by the licence because they had given less than the market rate in return for an undertaking to respect the licence. The vendors had, in effect, paid the purchasers to respect the licence. The imposition of the constructive trust was really the court's response to the inability of the resident to enforce the agreement made for her benefit.[65] The devisee of the fee simple subject to a right of residence is guilty of no such unconscionability since he has at no stage given any undertaking or assurance that he will respect the right of residence.

A yet further problem is that, *assuming* an estoppel licence comes into existence, its durability against persons other than the grantor is not at all certain. This is because asking whether estoppel licences bind third parties is a category mistake. Ben McFarlane puts it like this:

> Asking if a type of right is capable of binding third parties, i.e. if it is proprietary, is a sensible and significant enquiry. However, asking the same of a means of acquiring rights is mistaken and misleading … The answer depends of course on whether the particular means of acquiring rights has led in a particular case to the acquisition of a proprietary right. If so, it is that proprietary right which is capable of binding a third party. Yet, largely due to the confusion between licences and rights arising through estoppel, the question 'do estoppels bind third parties?' is often put.[66]

63 See for example, Hodson LJ's short concurring judgment in *Errington* (n 57) 301, where he confronts the ineffectiveness of a bare licence (revocable) and goes on to find the existence of a contractual licence.

64 Other representations could lead to the award of a licence.

65 For which there were two reasons: the licensee was not in privity and the vendors' agreement with the purchasers lacked formality.

66 Ben McFarlane, 'Proprietary estoppel and third parties after the Land Registration Act 2002' [2003] 62 Cambridge Law Journal 661, 679

For McFarlane, any durability which flows from the estoppel depends on the recognition that the right-holder has a proprietary interest; a class from which licences, by definition, are excluded.[67]

In *Inwards v Baker*,[68] a son was encouraged to build on his father's land in the expectation that he would be permitted to live there as long as he wished. He did so and lived in the resulting dwelling until the father died. The father did nothing else to safeguard the son's interests, and upon the father's death his will provided for the land to pass to persons other than the son. In the English Court of Appeal, Lord Denning MR said:

> It is quite plain from those authorities that if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity.[69]

His Lordship concluded his short judgment by saying:

> I am quite clear in this case it can be satisfied by holding that the defendant can remain there as long as he desires to use it as his home.[70]

McFarlane denies that there is anything particularly significant, or binding, about the conjunction of the licence with the 'equity'. Rather, the significant feature is the proprietary interest which the court settles upon as satisfying the equity that has arisen. It is that property right which is the true source of the right of the estoppel licensee. In the *Inwards* case, McFarlane's view (the court did not express a view on the precise category of the remedy) is that the son actually took an equitable lease.[71]

If this analysis is accurate, then it is fatal to the existence of a stand-alone proprietary licence.

11 Licences: conclusions

Of all the resolutions to the problem posed by the right of residence, the licence theory was the most auspicious, and Harvey's reliance on it was understandable. That theory, however, has been exposed as the proprietary theory of licences has retreated from its furthest advances in Lord Denning's day.

12 Further possibilities: election

Williams on Wills describes the application of the testamentary doctrine of approbation and reprobation in this way:

> Thus, if the testator gives to A property which in fact belongs to B and by the same will makes a gift to B, then B will not be allowed to take such gift unless he undertakes to give effect to the gift to A or, in the usual phrase, he is prepared to carry into effect the whole of the testator's dispositions.[72]

It was explained by Lord Cairns LC in *Codrington v Codrington* as meaning that a person named in a will:

67 'However, it is not the licence which binds the third party, as the licence is simply a personal permission from A': ibid 676.

68 [1965] 1 All ER 446.

69 Ibid 448.

70 Ibid 449.

71 McFarlane (n 11) 515.

72 *Williams on Wills* (n 43) 42.1.

> … cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them.[73]

Approbate and reprobate are Scottish terms identical to the doctrine of election more familiar in England and Ireland,[74] and that latter term will be used for the remainder of this article. Maitland addresses the objection that the doctrine should only apply where T is mistaken about his ownership of A's property which he has given to B. But the doctrine is not so refined, and the blanket application is to avoid a difficult enquiry into T's state of mind.[75] Anyhow, as Maitland says, 'such is the principle'.[76]

Applied to the present problem, it is much less unjust then in the standard case where A has to give up property (or compensate B) which may never have belonged to T at all in order to obtain her own benefit under the will.

In the case of the right of residence, put simply, we oblige the devisee of the fee simple (A) to recognise the right of B as a condition of taking the devise. We could regard this as a type of estoppel, but of a particular kind. The only conduct of A's to which the doctrine responds is her refusal to adhere to T's intentions.

This solution is not a new one and was, in fact, proposed by Professor Harvey. He concluded that the principle that one could not approbate and reprobate 'could equally well be expressed as "he who approbates is *estopped* from reprobating"'.[77]

Election provides an explanation as to why the devisee is bound to respect the right of residence. The problem is that the recognition of an estoppel under the doctrine of election is not a solution of itself because, as we discussed above, an estoppel requires fulfilment in some remedy known to the law, ranging from a mere monetary award to the grant of a fee simple. We are in the process of showing that no such right, interest or concept performs all the functions we would wish for a right of residence. For example, an estoppel licence poses rather than answers questions of durability. If the right of residence which putatively binds the devisee of the fee simple is a bare licence, why must the devisee (still less a purchaser from him) put up with it? The answer provided by election is that it is the condition attached to his gift. But the devisee's retort will be, 'yes, it is a condition but that condition takes the form of a bare licence which, by definition, I am not bound by'.

13 Further possibilities: lease

Finally (more accurately, as an afterthought), we turn to the lease, but we find almost immediately that it will not serve. While covenants prohibiting assignment (therefore fulfilling the requirement that the right be personal to the grantee) are known to the law, a lease for the life of a tenant is no longer capable of being created.[78] Furthermore, the hallmark of a lease is exclusive possession, and this is, obviously, incompatible with non-exclusive rights of residence where the right is to reside along with, rather than instead of, the devisee. Further still, by section 3 of the Landlord and Tenant Law Amendment

73 (1875) LR 7 HL 854, 861–862.

74 F W Maitland, *Equity* (1st edn, Cambridge University Press 1909) chapter XVIII.

75 Ibid 227.

76 Ibid 225–227.

77 Harvey (n 1) 419 (original emphasis).

78 Property (Northern Ireland) Order 1997, Article 37(1). Under the Settled Land Act 1882, a tenant for years determinable on life, 'holding merely under a lease at a rent', was expressly disqualified from exercising the powers of the tenant for life: see section 58(1)(iv).

(Ireland) Act 1860, an Irish lease requires rent, whereas a right of residence must be capable of being enjoyed gratuitously.[79] We cannot therefore manufacture the right of residence we seek from the raw materials of the lease.

Conclusion

If the analysis provided above is correct, then the results of the foregoing enquiry are disquieting and perhaps surprising: outside statute, rights of residence cannot be accommodated within the current framework of the law of real property. There are two major consequences. Firstly, the statutory right in registered land is *sui generis*.[80] Secondly, in unregistered land, we are entirely dependent upon statutory intervention to close a significant lacuna. A court might presently be able to use the licence to fulfil the election-based estoppel we noted above that would oblige a grantee of the fee simple to observe the right of residence. To that extent, the licence could act as a stop-gap mechanism by which to conceptualise the relationship between those two persons. However, as we have attempted to show, if that licence also binds the transferee of the fee simple, it ceases to be any type of licence currently recognised by the law.

79 The right of residence need not be gratuitous, but if we seek a general conceptualisation of the right it must be capable of encompassing gratuitous rights and a lease will not serve.

80 A conclusion reached with some reluctance since it means that, whether the draftsperson intended so or not, section 47 virtually codifies the right.

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Skype kids and the price elasticity of demand: constructing the common law constitution

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Abstract

In 2017, the Supreme Court held that it was unlawful to charge a British citizen earning £15,000 a year approximately £160 to bring a claim to an employment tribunal, but lawful to prevent their partner from living with them in the UK. This article analyses these two decisions in relation to the Common Law Constitution (CLC). It shows that there was a profound discrepancy in the judicial approach, with structurally different tests employed at sharply different intensities, despite the two cases raising similar legal issues and both plausibly involving interests which have been protected at common law. It is argued that the CLC is being used as guise to promote a distinctive ideology, focused on a set of court-centred norms. This article questions the constitutional legitimacy of this development, which privileges certain norms whilst marginalising others, especially those conducive to the interests of the poor and equal citizenship.

Keywords: public law; common law constitutional rights; protection of fundamental rights; family life; judicial partiality.

Introduction

In a much-celebrated judgment, described by one leading public lawyer as 'a tour de force that ought to be compulsory reading for every Minister and parliamentarian', the Supreme Court in *R (UNISON) v Lord Chancellor*[1] struck down the employment tribunal fees regime.[2] This was a welcome outcome, especially for those on low and modest incomes with some savings who, under the means-tested system, had to pay up to £1200 to bring a tribunal claim. Three months earlier, low-income families had fared less well in the Supreme Court. The legality of the minimum income requirement (MIR), which means that only British citizens earning at least £18,600 can live in the UK with their partner, was upheld in *R (MM (Lebanon)) v Secretary of State for the Home Department*.[3] This article argues that this discrepancy in treatment, which holds that it is lawful to prevent a British citizen earning £15,000 a year from living in the UK with their family, yet unlawful to expect them to pay (after means-testing) approximately £160 to take a case

1 [2017] UKSC 51.

2 M Elliott, 'The rule of law and access to justice: some home truths' (2018) 77 Cambridge Law Journal 5. Some of the other praise, but only a sample, is collected in the first paragraph of M Ford, 'Employment tribunal fees and the rule of law: *R (UNISON) v Lord Chancellor* in the Supreme Court' (2018) 47 Industrial Law Journal 1.

3 [2017] UKSC 10.

to an employment tribunal, is not based on any sound legal principle, but is indicative of the ideological partiality of the highest courts. In particular, the flexibility provided by the turn to the Common Law Constitution (CLC) is being used to promote a narrow court-centred set of rights, principles, interests and values, whilst other norms – far more morally compelling – conducive to the interests of the poor and equal citizenship are ignored. This article argues as such that the central problems of the law of judicial review are not confined to 'deference' or 'overreach' or even 'palm tree justice' but must also include ideological partiality.

By the CLC this article means the set of norms – rights, interests, principles and values – that the courts robustly protect and promote in public law cases when such protection has not been expressly authorised by statute (e.g. by the Human Rights Act 1998 (HRA) or EU law). Three mechanisms of robust protection are identified: treating the issue as one for the court to determine itself on the merits, proportionality and radical interpretation of statute. It is argued that describing norms according to which the courts have at times developed private law or that have attracted an 'anxious scrutiny' test as 'constitutional' obscures understanding of public law and, in particular, the hierarchy of norms constructed by the courts. Although this article is primarily concerned with Common Law Constitutional Rights (CLCR), which were at issue in *MM* and *UNISON*, to understand the nature of such rights it is important that they are placed in the wider context of the CLC. Part of the argument of this article is that, once seen in this context, it will be recognised that 'CLCR' and the 'CLC' are misnomers. What actually exists is a narrow court-centred constitution and associated rights.

Current discussion of the CLC and CLCR has been prompted by a series of recent decisions, starting with *Guardian News*,[4] in which the courts have stressed the continuing importance of the common law as a source of rights, principles and values. This set of cases has received considerable attention from judges, practitioners and academics, often focused on the relationship between CLCR and the rights contained in the European Convention on Human Rights, especially the capacity of the common law to 'step in' if the HRA were to be repealed.[5] This article takes a different approach squarely focusing on the identification of the norms that the CLC has been used to protect, promote and marginalise, the techniques of such protection, the rationalisations provided and the subsequent legitimacy of this development.

This article proceeds as follows. In the first section, background on the two cases is provided and the judgments analysed. In the second section, the different structure and far more intensive approach to review in *UNISON* is highlighted. In the third section, it is argued that this discrepancy cannot be explained by the principles that it is typically claimed should guide the judicial approach to substantive review – indeed, the usual principles favour a more stringent standard in *MM*. In the fourth section, the argument that this discrepancy stems from the nature of the common law, which recognises access to a court as a common law norm unlike family life or citizenship, is rejected. In the final section, the discussion is widened to consider other CLC cases. It is argued that the 'CLC' is used as a guise to promote a narrow set of court-centred norms, with the courts failing to engage in a principled way with the nature or history of the common law.

4 *Guardian News and Media Ltd v City of Westminster Magistrates' Court* [2012] EWCA Civ 420.

5 The literature includes: M Elliott, 'Beyond the European Convention: human rights and the common law' (2015) 68 Current Legal Problems 85; R Clayton, 'The empire strikes back: common law rights and the Human Rights Act' [2015] Public Law 3; E Bjorge, 'Common law rights: balancing domestic and international exigencies' (2016) 75 Cambridge Law Journal 220; C Lienen, 'Common law constitutional rights: public law at a crossroads?' [2018] Public Law 649.

1 Background to the two cases and analysis of the judgments

Background to *UNISON*

The details of *UNISON* have been discussed elsewhere.[6] In brief, fees were introduced by the Employment Appeal Tribunal Fees Order 2013 under section 42 of the Tribunals, Courts and Enforcement Act 2007 which provides that the 'Lord Chancellor may by order prescribe fees payable in respect of' the Employment Tribunal and the Employment Appeal Tribunal. No fees were previously charged. Under the new system, single type A claims, such as unpaid wages, cost £390 (£160 issue fee, £230 hearing fee) and type B, including unfair dismissal, cost £1200 (£250, £950). Under the means-testing scheme, if a claimant had savings above £3000 at each stage, then the fee was to be paid in full. If not, a 'specified amount' was allocated depending on whether the claimant was single (£1085) or in a couple (£1245), with this amount increased by £245 for each child. If their gross monthly earnings were less than their specified amount, no fee was charged. Above this, for every £10 of additional income, £5 must be paid towards the fee. An order would normally be made by the tribunal for the respondent to reimburse the fee if the claimant was successful.

The Supreme Court quashed the fees. Lord Reed's judgment, with which all the other justices agreed, proceeded in three-stages, expressly following the distinctive methodological approach – a common law proportionality test – employed in a set of cases decided prior to the introduction of the HRA: *Leech*, *Witham*, *Pierson*, *Simms* and *Daly*.[7] At the first-stage, Lord Reed claimed that the fees interfered with the 'constitutional right of access to the courts'.[8] The correct test for establishing such interference, according to Lord Reed, was whether there was a 'real risk' that the right was interfered with – 'conclusive evidence'[9] that there are specific individuals for whom the fees made it not 'simply unattractive but in practice impossible to pursue a claim', as held by the Court of Appeal, was not required.[10] For Lord Reed, the court must consider the 'impact of the fees on behaviour in the real world', with two pieces of evidence sufficient to show that the real risk test was met: first, the substantial fall in the number of claimants bringing cases after the introduction of the fees; and, second, that the level of fee although means-tested still required some claimants to forego 'reasonable expenditure' based on the Joseph Rowntree Foundation's minimum income standards.[11] Nor was this interference ameliorated by the existence of the Lord Chancellor's discretionary power of fee remission, which was too restrictive, since it would only be used 'where the Lord Chancellor is satisfied that there are exceptional circumstances which justify doing so'. The problem with the fees was 'not confined to exceptional circumstances: they are systemic'.[12]

The second stage concerned whether this interference could be justified. Lord Reed accepted that the government's aims in introducing the fees – namely, reducing the cost to taxpayers and the number of weak and vexatious claims – were legitimate. However,

6 In addition to texts cited above (n 2), A Bogg, 'The Common law constitution at work' (2018) 81 Modern Law Review 509.

7 *R v SSHD, ex p Leech* [1994] QB 198; *R v Lord Chancellor, ex p Witham* [1998] QB 575; *R v SSHD, ex p Pierson* [1998] AC 539; *R v SSHD, ex p Simms* [1999] QB 349; *R (Daly) v SSHD* [2001] UKHL 26.

8 *UNISON* (n 1) [66].

9 Ibid [87], [93].

10 *R (UNISON v The Lord Chancellor)* [2015] EWCA Civ 935, [67] (Underhill LJ).

11 *UNISON* (n 1) [93].

12 Ibid [95].

for the fees to be lawful, it had to be shown that these aims could not have been achieved through less intrusive means – that they were necessary. According to Lord Reed, this test was not met, since the government had assumed that the higher the price charged the more effective it would be in transferring costs to users. This assumption was false since 'the price elasticity of demand was greatly underestimated'. Hence, it was not shown that a less onerous fee 'would have been any less effective in meeting the objective of transferring the cost burden to users'.[13]

It should be noted that Lord Reed's claim that it is 'elementary economics, and plain common sense' that 'the fees were not set at the optimal price' itself seems false.[14] If, as the Impact Assessment makes clear, the average cost of a tribunal is considerably less than the fee charged, how could charging lower fees reduce the cost burden to the government if it makes a loss on each tribunal provided?[15] Even if, in the short run, fixed and sunk costs may mean that losses are minimised by maximising revenues, this is hardly likely to be the case over the medium to long term when, again as the Impact Assessment makes clear, a large proportion of the costs – approximately half – derive from judicial salaries and associated fees.[16] Given this, maximising revenues by lowering the price will almost certainly increase and not reduce the cost burden to the government. Lord Reed's argument only appears plausible because he subtly shifts the government's aims from transferring 'some of the cost burden to users',[17] which likely would be achieved (depending on fixed and sunk costs) by higher fees to 'obtain[ing] the maximum revenue' which was not the government's aim.[18]

At the third-stage, Lord Reed claimed that such unnecessary interference with the right of access to a court caused by the fees would only be lawful if it was expressly authorised by primary legislation. However, since 'section 42 of the 2007 Act contains no words authorising the prevention of access to the relevant tribunals' then it follows the fees regime was ultra vires.[19]

Background to *MM*

Changes in 2012 to the Immigration Rules introduced a minimum income requirement (MIR) that any British citizen, person with settled status, refugee or person with humanitarian protection in the UK, who wishes to sponsor a partner (i.e. spouse or civil partner or somebody living in an equivalent relationship) must have a gross annual income of at least £18,600.[20] Those who do not meet the threshold can rely on savings, but the rules are very strict: they must control savings above £16,000 for at least six months, which are at least two-and-a-half times any shortfall between annual income and the threshold. Hence, a sponsor with no income requires savings of at least £62,500 (£18,600*2.5 + £16,000). The MIR was based on a report by the Migration Advisory Committee (MAC) which identified the £18,600 threshold as 'the point at which the [childless] family is not entitled to receive any income related benefits (including Tax

13 Ibid [100].

14 Ibid.

15 Average cost: type A: £760; type B: £2890 or £3380. Ministry of Justice, *Impact Assessment: Introducing a Fee Charging Regime into Employment Tribunals and the Employment Appeal Tribunal* (IA: TS007 2012) paragraph 1.28.

16 Ibid paragraph1.27.

17 Also, ibid 1: 'Government intervention is needed because taxpayers are currently subject to an excessive financial burden as this free service has become increasingly utilised.'

18 *UNISON* (n 1) [100].

19 Ibid [87].

20 The MIR and other financial requirements are contained in the Immigration Rules: Appendix FM.

Credits)'.[21] In addition, the government claimed as a secondary aim that the MIR would promote integration, although no supporting evidence was provided and this aim barely featured in the judicial review litigation.[22]

A review of the MIR brought by a group of affected British citizens and refugees on both human rights and common law grounds was successful at the High Court.[23] Blake J accepted that the MIR was rationally connected to a legitimate aim but held that the MIR was neither necessary nor struck a fair balance. Blake's reasoning was based on the conflict of the MIR with both Article 8 of the HRA and British citizens' 'constitutional right' of abode at common law and under the Immigration Act 1971. Blake held that a lower threshold at the level of the annual income of a full-time job at the minimum wage would be compatible with Article 8 and British citizens' constitutional rights. Although Blake declined to declare the MIR unlawful, he held effectively that it would be when applied in individual cases to all British citizen and refugee sponsors earning the annual minimum wage or above.[24]

However, Blake's approach was rejected by the Court of Appeal and the Supreme Court, which both unanimously upheld the legality of the MIR. In the sole judgment, Lady Hale and Lord Carnwath emphasised that the challenge was to the Immigration Rules as such or in principle, rather than their application in an individual case. This led the court to adopt an 'incapable' test, according to which the MIR would only be unlawful under Article 8 if 'couched in a form which made non-compliance in individual cases practically inevitable'.[25] Given the nature of this test, the Supreme Court reasoned that, since there was provision within the rules for consideration of 'exceptional circumstances', as well as an appeal to a tribunal on human rights grounds, then the rules were not incapable of being applied consistently with Article 8. As such, since the MIR was lawful under the HRA, it followed that the case must 'stand or fall under common law principles'.[26]

The court characterised the common law challenge as whether the MIR is 'based on a misinterpretation of the 1971 [Immigration] Act, inconsistent with its purposes, or otherwise irrational'.[27] In two brief paragraphs, the court's answer was that the challenge on such grounds fails because the MIR has 'entirely legitimate' aims – 'to ensure, so far as practicable, that the couple do not have recourse to welfare benefits and have sufficient resources to be able to play a full part in British life' – and that there is a 'rational connection' between the aims and the income threshold chosen, since the 'work of the Migration Advisory Committee is a model of economic rationality … it arrived at an income figure above which the couple would not have any recourse to welfare benefits'. Given this, the court held that 'it is also not possible to say that a lesser threshold, and thus a less intrusive measure, should have been adopted'.[28] Hence, the MIR was lawful at common law.

21 Migration Advisory Committee, *Review of the Minimum Income Requirement for Sponsorship under the Family Migration Route November* (2011) 72.

22 Home Office, *Impact Assessment: Changes to Family Migration Rules* (IA: HO0065 2012) 9. As noted by H Wray, 'The MM case and the public interest: how did the government make its case?' (2017) 31(3) Journal of Immigration, Asylum and Nationality Law 227, 235.

23 *R (MM (Lebanon) v SSHD)* [2013] EWHC 1900 (Admin).

24 Ibid [142]–[144].

25 *MM* (n 3) [67].

26 Ibid [60].

27 Ibid.

28 Ibid [82]–[83].

2 Contrasting structures and intensity of review

The legal issues in dispute in the two cases share important similarities. Both cases involved the commodification or marketisation of rights, to family reunification and access to justice, in order, the government claimed, to save public money in a political context of austerity. Both cases were heard in 2017, by which time the government and the media no longer regarded the size of the deficit 'as the most important issue of all'.[29] Both were reviews of the legality of a general rule, rather than its application to a specific case. The Home Secretary and the Lord Chancellor both retained a discretion to waive the rule in 'exceptional circumstances', which was little used: 26 grants of leave from 30,000 refusals from 2012 to 2014; 51 fee remissions between July 2015 and December 2016.[30] Both cases were arguable on human rights and common law grounds and both disproportionately affected women and ethnic minorities raising a discrimination claim.[31] In respect of Convention rights, it is strongly arguable that both the MIR and the fees would be regarded by the ECtHR as within a state's margin of appreciation. Both cases were heard by seven member panels, reflecting the important issues at stake. Finally, few would argue that fees or a MIR could never be lawful (or equally could never be unlawful unless expressly authorised by Parliament), with the key legal question being whether the level set in each case unlawfully interfered with the relevant right.

Nonetheless, despite these similarities, the Supreme Court's approach was radically different in the two cases. The most striking difference is the use of different common law tests – in *MM* a two-pronged structure, with no 'reasonably necessary' or proportionality stage as with *UNISON*. It was sufficient for the MIR's lawfulness at common law that it was rationally connected to a legitimate aim. If this test had been employed in *UNISON*, then the fees almost certainly would have been lawful, since there was 'no dispute that the purposes which underlay the making of the Fees Order are legitimate'.[32] Why essentially a *Wednesbury* rationality test was appropriate in *MM* which would seem to involve 'fundamental' rights is never explained by the court. This relates to another important difference; whilst *UNISON* cites a number of authorities and follows the same approach adopted in the *Leech* set of cases, no authorities at all are cited for the common law approach adopted in *MM*, despite the standard of review at common law, especially when involving fundamental rights, being a live issue amongst judges and academics.[33]

A related difference is the contrasting intensity with which the two tests are employed. In *UNISON*, although the government would only recover less than half of the estimated unit cost of a tribunal from the fee, along with the inevitable uncertainty in predicting how potential tribunal users would react to the fees (which is flagged in the Impact Assessment),[34] Lord Reed employs a stringent conception of necessity: since the government's aim (which Lord Reed incorrectly treats as maximising revenue) could have

29 Jon Snow in a 2014 TV interview with Ed Miliband: 'Is Ed Miliband ready to become Prime Minister?' (*Channel 4 News*, 24 September 2014) <www.channel4.com/news/ed-miliband-labour-politics-jon-snow-interview>.

30 *UNISON* (n 1) [44]; MM (n 3) [25].

31 The discrimination claim was successful in *UNISON* and unsuccessful in *MM*. The Supreme Court did not address the issue in *MM* (n 3) [78], agreeing with the reasoning of the lower courts that no separate issue arose.

32 *UNISON* (n 1) [86].

33 *Kennedy v Information Commissioner* [2014] UKSC 20; *Pham v SSHD* [2015] UKSC 19; *Keyu v SSFCA* [2015] UKSC 69.

34 'Price elasticity of demand for ET and for EAT is unknown, so two scenarios have been used to capture a plausible range of demand responsiveness among employees and employers.' Ministry of Justice (n 15) 2.

been achieved with less interference, the fees were unlawful. In contrast, in *MM* the justification for the MIR was not probed at all, with the MAC report described as a 'model of economic rationality'.

The irony is that the MAC, a body comprised of academic economists, was essentially answering a question of social security law; as the court put it, what is the 'income figure above which the couple would not have any recourse to welfare benefits'? Answering this question does not involve anything resembling economic reasoning and perhaps unsurprisingly, given the complexities of social security law, the MAC made an extremely important error – it overlooked that when a British citizen forms a couple with a partner subject to immigration control their benefit entitlement cannot increase (whilst, as the MAC recognised, individuals subject to immigration control have no independent entitlement).[35] Hence, it is strongly arguable that the MIR is not rationally connected to a legitimate aim, since granting leave to a partner at the 'leave to enter' or 'further leave to remain' stages cannot increase social security entitlement. Yet, because the evidence was not probed or scrutinised at all, this central aspect of the case was completely missed by the court. Hence, remarkably, in one case the court mischaracterised the government's aims and then second-guessed an economic question – what price will maximise revenues – and in the other case it deferred on a question of law – the social security entitlement of couples where one partner is subject to immigration control – incorrectly answered by economists.

3 Potential justifications

It is of course no surprise that significant differences exist in the standard of review the courts employ, with many judges and academics expressly supporting a 'variable intensity' or 'contextual' approach to substantive review. However, this section argues that the principles which it is most commonly claimed guide, or at least ought to guide, the standard of review cannot explain the discrepancy in structure and intensity in *UNISON* and *MM*.

Unrepresented minorities

A common justification for judicial review is that it provides a safeguard for minorities who may be unrepresented in or lack influence on Parliament. Such a view was expressed by Lord Bingham in *Huang v Secretary of State for the Home Department* who rejected the claim that the executive should be accorded the same level of deference in challenges to the Immigration Rules on Article 8 grounds as is provided to such challenges to housing policies.[36] Echoing Hart Ely's influential process-based theory of judicial review in which measures that burden groups marginalised or excluded from the political process are constitutionally suspect,[37] Lord Bingham held:

> The analogy is unpersuasive. Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented ... The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate

35 Child Poverty Action Group, *Welfare Benefits and Tax Credits Handbook 2019/20* (CPAG 2018) 1026–1050. For discussion, see: C Rowe, 'Family reunification, the minimum income requirements and the welfare myth' (2020) 34(1) Journal of Immigration, Asylum and Nationality Law 30.

36 [2007] UKHL 11.

37 J Hart Ely, *Democracy and Distrust – A Theory of Judicial Review* (Harvard University Press 1981).

> in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented.[38]

Although Lord Bingham's claim that tenants' interests have been 'fully represented' in Parliament is doubtful, his approach appears apposite for the issue of tribunal fees. The case itself was brought by UNISON, the UK's largest trade union, with the links between unions and the Labour party manifold, which strongly opposed the fees in Parliament. A vote, held under the affirmative resolution procedure, led to a clear split on party lines.[39] This is not surprising: not only did the fees affect powerful interest groups – employers, trade unions, lawyers and the legal system – but the issue maps onto the left–right political divide over flexible labour markets, the 'managerial prerogative' and the general commodification and marketisation of public services. Prior to the hearing, the Modern Law Review published an article criticising the fees,[40] which were also condemned in a letter signed by over 400 barristers.[41] This coalition of interests opposing the fees looks much more like the (perhaps temporary) loser in an ongoing political struggle than an unprotected minority. Curiously, Lord Reed was alert to the concern of political conflicts being relitigated in the courts in the context of the benefits cap but seemingly not in respect of tribunal fees.[42]

In contrast, the opposition to the MIR could not have been more different. Its most effective opponent has been a grassroots campaign conducted through a blog and social media by a couple new to any form of political activism, with opposition also from the migrant-friendly non-governmental organisations.[43] Unlike with tribunal fees, there was no party division over the MIR, which was part of a wider set of changes to the Immigration Rules. The government unusually held a House of Commons debate prior to the introduction of the new rules, which were almost unanimously supported. Like the then Shadow Home Secretary, Yvette Cooper, who did not mention the MIR, most MPs focused on expressing support for the government's attempts to strengthen the deportation rules for 'foreign criminals'. A few backbenchers – Jeremy Corbyn, John McDonnell and Pete Wishart – did criticise the changes including the MIR, although no one 'prayed' against them and so there was no vote.[44] Within legal academia the MIR has been of little interest outside the specialist Journal of Immigration, Asylum and Nationality Law, with no articles published prior to the Supreme Court hearing, which could have influenced the decision (even if only to flag to the court that important issues – direct discrimination against the poor, two-tier citizenship – were at stake). Clearly, therefore a difference in representation or influence cannot explain the contrasting treatment of the two cases – in fact, far more scrutiny would have been expected of the MIR if the court were to take Lord Bingham's *Huang* approach seriously.

38 *Huang* (n 36) [17].

39 The order was approved by 272 votes to 209, HC Deb 12 June 2013, vol 564, col 465.

40 A Adams and J Prassl, 'Vexatious claims: challenging the case for employment tribunal fees' (2017) 80 Modern Law Review 412.

41 Employment Law Bar Association, 'Open letter to Chris Grayling' <http://elba.org.uk/wp-content/uploads/2015/03/ELBA-Fees-Letter.pdf>.

42 *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [92]–[96].

43 BritCits 'was formed in 2012 in direct response to the attack on British citizens and residents with non-EEA family members' <http://britcits.blogspot.com/p/about-us.html>.

44 HC Deb 19 June 2012, vol 547, cols 760–824.

Importance of the norm

There is widespread agreement amongst judges on the common-sense proposition that the standard of any review, at common law or under the HRA, should be in part at least determined by the importance of the norm at stake. As Lady Hale put it, account has to be taken of 'the comparative importance of the right infringed in the scale of rights protected'.[45] Although different scales suggest themselves, such as the importance of a norm for democracy, perhaps the most intuitive standard is according to a norm's significance for well-being: the greater the harm any interference causes a group or individual, *ceteris paribus* the more intensive should be the standard of review. This is reflected in the focus in *UNISON* on showing that the fees were not 'reasonably affordable'. On Lord Reed's account, the right would not have been interfered with if the fees – as is almost always the case with any price system – simply altered the choices made by potential litigants, with some now choosing not to bring a claim. It was necessary to go further and show that the fees harmed some people by forcing them to forego reasonable expenditure. However, it is difficult to see how relative harm can make sense of the contrasting approaches in the two cases. The fees were one of innumerable public spending cuts, but unusually were reasonably protective of the poorest who were largely exempt due to means-testing. As shown by the UN Special Rapporteur on Extreme Poverty in his UK visit, this was far from typical: 'great misery has ... been inflicted unnecessarily'[46] by policies, including those held to be lawful by the Supreme Court such as the bedroom tax[47] and the benefits cap,[48] that directly cut the living standards of the poorest – people whose incomes even before the cuts were below the Joseph Rowntree minimum standards. It is noteworthy that the review itself was brought by UNISON rather than in the name of an affected individual – one possibility is that nobody was identified who felt both strongly about the fees and was in a financial position which evoked sufficient hardship. There is also a certain irony about the fee 'victory'. Trade unions paid the fees of their members and few developments would be of greater benefit to workers collectively than a significant increase in union membership.

For poor families, however, there is no collective organisation they can join – let alone for a modest monthly fee conferring a host of other benefits – which will take them to the MIR threshold. As the Supreme Court acknowledged in *MM*, the 'MIR may constitute a permanent impediment to many couples, because the sponsor will never be able to earn above the threshold'.[49] Similarly, whilst there may be some doubts about the level of hardship the tribunal fees have caused, as the court held '[t]here can be no doubt that the MIR has caused, and will continue to cause, significant hardship to many thousands of couples who have good reasons for wanting to make their lives together in this country, and to their children'.[50] For many British citizens the MIR means a choice between relocating to one of the poorest countries in the world with a life of great hardship and poverty or remaining in the UK without their family. Many earning less than £18,600 in the UK will do the types of low-skilled jobs which are extremely poorly paid in developing

45 *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [124]. This point has been made innumerable times – in relation to the CLC, Lord Mance in *Kennedy* (n 33) [54]: 'In the context of fundamental rights, it is a truism that the scrutiny is likely to be more intense than where other interests are involved.'

46 P Alston, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights on his visit to the United Kingdom of Great Britain and Northern Ireland' (Human Rights Council 2019) paragraph 11.

47 *R (Carmichael) v SSWP* [2016] UKSC 58.

48 *SG* (n 42), *R (DA) v SSWP* [2019] UKSC 21.

49 *MM* (n 3) [81].

50 Ibid [80].

countries, if such work is even available to British citizens. The strain of the MIR, combined with the very high visa fees and the bureaucratic hurdles, has led one affected person to speak publicly about how refusal led to a suicide attempt,[51] while the rules have also been linked to several suicides.[52] Many more speak about feeling like second-class citizens, discriminated against because they are low paid. As such, as bad as tribunal fees might be, there is no comparison between the harm caused by being prevented from living with one's family and being unable, without a one-off means-tested financial sacrifice – which could have been avoided by joining a union – to take a claim to an employment tribunal. It is difficult to imagine anybody thinking otherwise – even lawyers.

Deference

Both *MM* and *UNISON* engage a set of interrelated and much-discussed public law concepts which it is often claimed should guide the intensity of any review. If a case is polycentric (i.e. affects unrepresented third parties) or engages expertise (e.g. requires the court to assess complex evidence or question the views of 'experts') or involves the allocation of resources, then the court, it is claimed, should defer or assign weight or provide a greater area of discretionary judgement to the decision-maker. However, these concepts cannot make sense of the differing approaches in the two cases. *UNISON* directly involved resource allocation, since, by quashing the fees, the income foregone (and higher future costs due to an increase in demand from the abolition of the fees) has to be found from elsewhere in the Ministry of Justice budget. Yet, although the decision to quash the fees was clearly polycentric in a policy area which has seen some of the largest budget cuts,[53] no weight or deference at all appears to have been assigned to the decision of the policy-makers or 'experts' in the ministry as to how to most effectively allocate their very scarce resources.

In contrast, the consequences for resource allocation of declaring the MIR unlawful would have been far more limited. If the decision of the High Court was left to stand, with the £18,600 threshold replaced with one at the minimum wage, then only one subset of partners who would receive leave to enter or remain – those at the 'indefinite leave to remain' (ILR) stage – could have increased welfare payments. This limited impact could have been avoided entirely if the MIR was only quashed in relation to couples at the stages prior to ILR. In any case, a uniform threshold at the level of the minimum wage, a European norm,[54] would not have caused any immediate budget shortfall that would require, as with *UNISON*, resources to be allocated from elsewhere. In the long-term, any savings from the MIR are highly speculative and contested – most of the forecast savings in the Impact Assessment resulted from reductions to child benefit and tax credit

51 'Families torn apart as visa misery hits foreign spouses' (*The Guardian*, 18 August 2018) <www.theguardian.com/uk-news/2018/aug/18/visa-britons-foreign-spouses-families-split-hostile-environment>.

52 An immigration solicitor describes some tragic cases: S Pasha and N Kandiah, 'The real-life cost of the minimum income requirement for spouse visas' (*Electronic Immigration Network*, 30 January 2020) <www.ein.org.uk/blog/real-life-cost-minimum-income-requirement-spouse-visas>. Also: J Penrose, 'Donna Oettinger Purley rail deaths: mum had tried to commit suicide just months ago' (*Daily Mirror*, 2 April 2015) <www.mirror.co.uk/news/uk-news/donna-oettinger-purley-rail-deaths-1781828>.

53 In 2017, the year *UNISON* was heard, the Institute for Fiscal Studies calculated that in the decade following 2010, the Ministry of Justice's budget would be cut by around 40 per cent. House of Commons Library, *The Spending of the Ministry of Justice* (1 October 2019) 2.

54 H Wray et al, 'A family resemblance? The regulation of marriage migration in Europe' (2014) 16 European Journal of Migration and Law 209.

payments for British citizen children who are no longer being brought up in the UK. A briefing paper which criticised these assumptions was not mentioned by the court.[55]

Moreover, as pointed out above, the MIR was based on a question of social security law – the threshold at which an individual and families cease to be eligible for in-work benefits – and so there could have been no 'expertise'-based objection to the court at least carefully scrutinising the MIR. Immigration is of course a 'polycentric' issue, but then few legal issues are not.[56] As Lord Reed points out in *UNISON*, cases such as *Donoghue v Stevenson* have 'implications well beyond the particular claimants'.[57] Declaring the MIR unlawful may have had similar positive implications, such as diminishing the unfairness in treatment between not only low-income British citizens and their more affluent counterparts, but low-income European Economic Area nationals resident in the UK, who were not subject to the MIR – an apparent injustice which led some to vote leave in the EU referendum.[58]

4 The nature of the common law

The obvious explanation for the different treatment of the two cases, it might be thought, lies not in general legal principles, but in the common law itself. The common law developed over centuries in an inegalitarian and class-divided society, and so it is hardly surprising that it protects certain norms over others even if they might be considered morally less compelling. Accordingly, almost all of the recent CLC cases involve in some way court-related or quasi-judicial norms: open justice within (*Al Rawi*, *Guardian News*, *A v BBC*, *Cape Intermediate Holdings*) and outside the courts (*Kennedy*); access to a court (*Ahmed*, *DSD*) and a right to an oral hearing (*Osborn*).[59] The court-centric focus of the CLC is equally plain in the precedents most commonly cited in support of these decisions, which originated the proportionality at common law test: *Leech* (prisoner communication with a solicitor), *Pierson* (prison sentence retrospectively increased), *Simms* (prisoner communication with a journalist), *Daly* (confidentiality of a prisoner's legal correspondence) and *Witham* (access to a court for someone on benefits).[60] Similarly, in recent cases where the Supreme Court has adopted an especially strained interpretation of statute, this has been to protect court-related principles – the importance of the court retaining jurisdiction (*Privacy International*) and the supremacy of court or tribunal judgments (*Evans*).[61] Hence, although there may be questions about the legitimacy of this turn to the CLC – how can the fact norms were posited (assuming they were and are not simply being invented today) by judges in a undemocratic, unjust society justify their current use as constitutional or fundamental norms when these norms were not chosen by democratically accountable representatives or based on their moral or political significance? – the nature of the common law can at least explain the discrepancy in

55 H Wray and E Kofman, 'The fiscal implications of the minimum income requirement: what does the evidence tell us?' (Middlesex University Briefing, June 2013).

56 J King, 'The pervasiveness of polycentricity' [2008] Public Law 101.

57 *UNISON* (n 1) [69].

58 Interviews with MIR-affected families found some 'palpably angry at the apparent discrepancy' and who stated 'they would vote to leave in the upcoming referendum'. M Griffiths, '"My passport is just my way out of here"…' (2019) Identities 1, 12.

59 *Al Rawi v The Security Service* [2011] UKSC 34; *Guardian News* (n 4); *A v BBC* [2014] UKSC 25; *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38; *Kennedy* (n 33); *HM Treasury v Mohammed Jaber Ahmed* [2010] UKSC 2; R *(DSD) v Parole Board* [2018] EWHC 694 (Admin); R *(Osborn) v The Parole Board* [2013] UKSC 61.

60 *Leech*, *Pierson*, *Simms*, *Daly* and *Witham* (n 7).

61 R *(Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; R *(Evans) v Attorney General* [2015] UKSC 21.

treatment between *UNISON* and *MM*: one interest, access to a court, is recognised and protected by the common law, whilst equal citizenship and family life are not.

This argument may have some plausibility as an explanation of certain areas of recent senior courts' jurisprudence. It is striking, for instance, that the recent set of cases around social security and austerity – benefits cap,[62] two-child cap,[63] bedroom tax[64] – have all been decided entirely independently of any notion of CLCR. Although Van Bueren has forcefully argued that 'socio-economic rights are a part of the English legal heritage', she acknowledges that socio-economic rights case law is 'scarce', which would seem to be a serious impediment to any recognition of a CLCR to a minimum standard of living or the like.[65] This though may be to set the bar too high: the German Constitutional Court, for instance, has recently robustly protected basic socio-economic rights in part through its interpretation of the 'dignity' clause of the German Constitution, holding that benefit sanctions are subject to a 'strict proportionality' test, with mandatory sanctions and those exceeding 30 per cent of entitlement unconstitutional.[66] Lord Reed has also claimed that 'dignity' is a core value of the common law,[67] which suggests that if the Supreme Court had really wanted, like its German counterpart, to place some limits on at least the harshest austerity measures – the human consequences of which were powerfully captured by the UN Special Rapporteur on his UK visit – then it would not have been too difficult to identify resources within the common law that could trigger a proportionality test or, if the interference is contained in primary legislation, a strained interpretation of the statute. Of course, the fact that, when considering the Convention compatibility of such measures, the Supreme Court has adopted the most deferential proportionality test available, the manifestly without reasonable foundation standard, which is even laxer than the test it employed to protect the property rights of firms from legislation compensating the NHS for costs arising from asbestos-related disease, suggests that the priorities of the UK's highest court are quite different from its German counterpart.[68]

However, none of the familiar worries which caution against the judicial recognition of socio-economic rights apply to family life and citizenship: case law is not scarce, both are protected in civil and political international human rights instruments,[69] and both will often, as discussed above in respect to *MM* and *UNISON*, raise concerns around resource allocation and expertise less acutely than for court-centred norms. Indeed, the significance of family life and marriage has at times been recognised by the common law for ill, with the supposed impossibility of marital rape the most egregious case.[70] The common law rule of spousal privilege is another well-known example. Section 10 of the British Nationality and Status of Aliens Act 1914, which stated that 'the wife of a British

62 *SG* (n 42); *DA* (n 48).

63 *R (SC) v SSWP* [2019] EWCA Civ 615.

64 *Carmichael* (n 47).

65 G Van Bueren, 'Socio-economic rights and a Bill of Rights – an Overlooked British tradition' [2013] Public Law 821, 837.

66 BVerfG, 1 BvL 7/16 of 5 November 2019 *Sanktionen im Sozialrecht*.

67 *Osborn* (n 59) [68].

68 *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3, [52]. For discussion of this contrast, see M Cousins, 'Social security, discrimination and justification under the European Convention on Human Rights' [2016] 23(1) Journal of Social Security Law 20.

69 The International Covenant on Civil and Political Rights, Article 17 (right to family life) and Article 24 (right to nationality).

70 The impossibility of marital rape under English common law was declared by M Hale's *History of the Pleas of the Crown* (1736), vol 1, 629. Likewise, the first edition of J Archbold's *Pleading and Evidence in Criminal Cases* (1822) 259.

subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien', is a legislative instance of the common law principle of 'conjugal unity'. As Baty put it:

> When we consider the enormous power with which a husband is invested over his wife by the Common Law, it seems monstrous that she could ever conceivably be thought to be subject to a competing control exercised by an alien power … [it is] flatly incompatible with the unity of person which is the essential basis of the common law view of marriage.[71]

The idea that the common law does not recognise the importance of marriage or family life as such is not credible. Similarly, the right to abode was recognised by Blackstone[72] and in a number of recent cases.[73] Moreover, as mentioned above, at the High Court Blake J explicitly grounds his decision in part on the 'constitutional right' of abode of British citizens. Yet this 'constitutional right' was not even mentioned by the Supreme Court in *MM*, although the appeal was on both common law and human rights grounds.

Blake's reasoning explicitly followed Sedley LJ's judgment in *Quila v Secretary of State for the Home Department*.[74] The case concerned an immigration rule which prevented the granting of a spouse visa, again absent exceptional circumstances, if either partner was under the age of 22. In a judgment notable for the clarity with which CLCR are approached, Sedley begins, under a section heading 'Proportionality at Common Law':

> In … *Daly*… the House of Lords, on the eve of the coming into force of the Human Rights Act 1998, took the opportunity to make it clear that proportionality was already required by the common law where an executive measure would interfere with a fundamental individual right.[75]

Sedley then points out that the 'critical initial question is therefore what right, if any, either appellant can rely on in order to found a case on proportionality' – indeed, this is the critical question, expanded to include other norms but rarely, if ever, directly engaged with by other judges when approaching the CLC. For Sedley:

> Two such rights are founded upon here: the right of a citizen of the United Kingdom to live here, and the right of an adult to marry. The first is an indefeasible and unconditional right, for the British state has no power of exile. The second is a right which is governed and qualified by statute, but it is in the eyes of the common law a fundamental right with which the state may interfere only within measured limits – for example, in relation to age, consent, formality and so forth.[76]

As with the MIR, Sedley points out that the rule does not 'prevent anybody from marrying', and 'it does nothing to prevent cohabitation elsewhere in the world'. Hence, a

71 T Baty, 'The nationality of a married woman at common law' [1936] Law Quarterly Review 52, 247. See also: H Wray, *Regulating Marriage Migration into the UK: A Stranger in the Home* (Routledge 2016) 27–40.

72 But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal.' W Blackstone, *Commentaries on the Laws of England* 15th edn (1809) vol 1, 137.

73 *Bancoult v SSFCA* [2001] QB 1067, [39], Laws LJ: 'I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen.' *DPP v Bhagwan* [1972] AC 60, [77], Lord Diplock referred to 'the common law rights of British subjects … to enter the United Kingdom when and where they please and on arrival to go wherever they like within the realm'. See also: *Bancoult v SSFCA (No 2)* [2008] UKHL 61, [70] (Lord Bingham); *Lukaszewski v The District Court in Torun, Poland* [2012] UKSC 20, [31] (Lord Mance).

74 [2010] EWCA Civ 1482.

75 Ibid [34].

76 Ibid [37].

British citizen 'is still free … to enjoy family life with his or her spouse even while both are under 22'.[77] However, for Sedley:

> In the eyes of the common law it is not simply the right to marry and not simply the right to respect for family life but their combined effect which constitutes the material right: that is to say a right not merely to go through a ceremony of marriage but to make a reality of it by living together. For the state to make exile for one of the spouses the price of exercising the right to marry and embark on family life requires powerful justification.[78]

For Sedley, as for Blake, that powerful justification was not forthcoming and so the rule was disproportionate.

In response to Blake, Aikens LJ at the Court of Appeal claimed that '[t]here is nothing in the 1971 Act or the common law that grants a "constitutional right" of British citizens to live in the UK with non-EEA partners',[79] but provided no further elaboration even though he was bound by Sedley's judgment in *Quila*, and so arguably the decision was *per incuriam*. The closest the Supreme Court has come to addressing the issue of CLCR in the immigration context is *Agyarko v Secretary of State for the Home Department*, where Lord Reed very briefly addresses the claim under the 1971 Act. According to Lord Reed it 'does not advance the argument', since the Act does not entitle a British citizen to 'insist that his or her non-national partner should also be entitled to live in the UK'.[80] Whatever the force of this response in respect to a claim made under the Act, it is hopeless as a counterargument to the CLCR position advanced by Blake and Sedley. Their point was not that CLCR are absolute, allowing citizens to 'insist' on the right to live with their family members in the UK, but – precisely like Lord Reed's argument in *UNISON* – that any interference must be proportionate.

In these circumstances, it is very difficult to regard the Supreme Court as a 'forum of principle' or as a body which takes social justice seriously. The MIR is a measure which, it acknowledges, causes great hardship, conflicts with equal citizenship and directly discriminates against the poor, whilst the court has frequently emphasised the importance of common law norms, that 'litigants … should look first to the common law to protect their fundamental rights' and so on.[81] Yet in *MM* it failed to mention CLCR despite forming part of the *ratio* at first instance, based on the judgment of one of the most eminent public lawyers of his generation, Sir Stephen Sedley. This is not the courts developing the common law incrementally but choosing, consciously or not, to marginalise certain norms and prioritise others – to the detriment of the disadvantaged who are not even considered to be owed an explanation as to why their interests are not deemed 'constitutional' or 'fundamental'.

77 Ibid [39].

78 Ibid [48].

79 *R (MM (Lebanon)) v SSHD* [2014] EWCA Civ 985, [138].

80 [2017] UKSC 11, [68].

81 Lady Hale, 'UK constitutionalism on the march?' (speech to ALBA, 12 July 2014) 15. See also *Kennedy* (n 33) [46], Lord Mance: 'the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene' and [133] Lord Toulson observing 'a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.'

5 The CLC as a set of court-centred norms

A HOOK TO HANG IT ON

One explanation for why the Supreme Court did not regard *MM* as raising any issues of CLCR can be found in an extra-judicial speech of Lord Carnwath, who gave the joint judgment in *MM*. For Lord Carnwath:

> In 19 years as a judge of administrative law cases I cannot remember ever deciding a case by simply asking myself whether an administrative decision was 'beyond the range of reasonable responses' .... My approach I suspect has been much closer to the characteristically pragmatic approach suggested by Lord Donaldson … 'the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take'. If the answer appears to be yes, then one looks for a legal hook to hang it on. And if there is none suitable, one may need to adapt one.[82]

It may be that the state, imposing a choice on low-income British citizens of 'exile' or family life and 'skype kids' growing up without a parent is not seen by Lord Carnwath and colleagues as the type of matter on which something has 'gone wrong'. This is perhaps unsurprising – Lord Carnwath likely knows few people on a low income and rather more who earn the MIR figure or more in a week. Lord Sumption, for instance, is taken to remark that he left academia so that he could afford his 'grocery bills', while the fees at his and Lord Carnwath's old school is more than twice the MIR threshold.[83] It has been plausibly argued that 'empathy gulfs' emerge in very unequal societies such as the UK, which 'harden attitudes above', with the most privileged unable to identify with the lives of the poor.[84] It would be no surprise if the most successful barristers and judges thought £18,600, or less, was no figure on which to support a family or, equally, as professional lawyers, that a sharp fall in the number of employment tribunal cases was very concerning. The CLC, as such, may be a convenient hook on which judges can hang what they think has 'gone wrong'.

Elliott has criticised the pragmatism of Lord Carnwath's remarks for failing to 'to grapple with the underlying need for a normative ordering of the values that warrant judicial protection' calling for 'a greater sense of the underlying principles and the theoretical framework in which they sit'.[85] Similarly, Lienen has argued, specifically in relation to CLCR, that 'it is very difficult to devise a model of [CLCR] because the jurisprudential approach lacks coherence' and 'consistency',[86] whilst almost everybody who has written on CLCR has concurred with Lady Hale's observation that 'that no two lists … would be the same'.[87]

Nonetheless, whatever the psychological process underlining the decision-making of Lord Carnwath and colleagues, the normative ordering, and as a result the constitutional

82 Lord Carnwath, 'From judicial outrage to sliding scales – where next for Wednesbury?' (ALBA Annual Lecture, 12 November 2013) 18.

83 An anecdote that has stood the test of time for Lord Sumption. Repeated in 'The historian as judge' (Speech at training session for tribunal judges, 6 October 2016) 1; and 'Lawyer of the week' *The Times* (London, 6 November 2001).

84 I Shapiro, *The State of Democratic Theory* (Princeton University Press 2003) 135.

85 M Elliott, 'Where next for the Wednesbury principle?' (UK Constitutional Law Association, 20 November 2013) <https://ukconstitutionallaw.org/>.

86 Lienen (n 5) 649 and 667.

87 Lady Hale (n 81) 15.

ordering, constructed by the Supreme Court in respect to the CLC is clear enough, including the 'underlying principles', 'jurisprudential approach' and, indeed, the rights, principles, values and interests that the CLC will protect and promote. If a measure interferes with or engages a court-centred norm, involving access to a (quasi) court, (quasi) court processes, the supremacy of (quasi) court decisions or a court's jurisdiction, then a stringent form of review will be applied, with robust protection provided by the court for the relevant norm in one of three ways. If the court treats the decision under review as a 'hard edged issue of law',[88] then the court can (re)take the decision itself on the merits – this is the approach when the issue involves court processes, such as the disclosure of information in court proceedings.[89] Alternatively, a proportionality test will be employed, usually when a non-judicial decision-maker (e.g. a prison governor or a minister) takes a decision which interferes with a court-centred norm – this could be charging court fees or restricting a prisoner's legal correspondence. If the interference with the norm, however, stems directly from the authorising statute, say, by restricting the court's jurisdiction, then the court may take the third option of a strained or radical interpretation which, in effect, rewrites the statute to protect the relevant norm. In court-centred norm cases limited, if any, weight will be assigned to the views of the original decision-maker (if there is one). Indeed, it is likely the court will be eager to show that the norm at stake can be protected by the common law and that there is no need to rely on the HRA, with the protection provided by the common law just as strong as that provided in other jurisdictions.[90]

If a measure interferes, however, with the rights of low-income citizens to live in this country with their families or maintain a basic standard of living, then a very lax standard of review will be applied both at common law and under the HRA. Indeed, the common law may not be seen as relevant and nor will the court be concerned whether the protection provided by the common law is weaker than that provided by other legal systems. Both the Supreme Court and the Court of Appeal in *MM* were indifferent that EU law, as flagged by the High Court, provides much stronger protection for the family reunification rights of EU citizens, with the Court of Justice of the EU, striking down a MIR in excess of the minimum wage.[91] Nor were they concerned that a comparative study of immigration policies in 38 developed countries found that British '[s]eparated families now face the least "family-friendly" immigration policy in the developed world'.[92]

The crucial point is not that the common law cannot be very plausibly interpreted to protect other important norms – interests at the very centre of human well-being, such as family life, or at the centre of democracy, such as equal citizenship – but the Supreme Court in particular has chosen not to do this. It has chosen to focus almost exclusively on protecting and promoting a set of court-centred norms. But these were not choices, conscious or not, determined by the nature or history of the common law, but choices made by today's judges reflecting their own distinctive ideology.

88 Clayton (n 5), 10.

89 *Guardian News* (n 4) [132], (Lord Toulson).

90 *Witham* (n 7) [23], Laws J: 'As regards the ECHR jurisprudence I will say only that, as it seems to me, the common law provides no lesser protection of the right of access to the Queen's courts than might be vindicated in Strasbourg.' *Maftah v SSFCA* [2011] EWCA Civ 350, [32] (Lord Judge).

91 *MM* (Hight Court) (n 23) [34], referring to Case C-578/08 *Chakroun v Minister van Buitenlandse Zaken* [2010] ECR 1-1839. The case concerned the Family Reunification Directive, 2003/86/EC to which the UK opted out. The family reunification rights of EU citizens who have exercised their freedom of movement rights (unlike Chakroun) have been strongly defended by the Court of Justice of the EU in cases such as Case C-60/00 *Carpenter* [2002] ECR I-6279.

92 T Huddleston, *Migrant Integration Policy Index 2015* (CIDOB, Migration Policy Group 2015) 213.

Property rights and other norms

This argument conflicts with an important strand in the contemporary literature on the CLC, which, whilst usually recognising the importance of court-centred norms, claims that other norms are also recognised. However, on closer inspection these arguments are not convincing. Bjorge, for instance, lists the rights of freedom of expression, not to be tortured, to life and not to be discriminated against as, at least, potential CLCR, whilst focusing on property rights.[93] He takes the view that:

> The common law will protect fundamental rights through the operation of the four stage test set out by Lord Sumption in *Bank Mellat*, a test which matches even the least intrusive means test crystallised by the ECtHR. On this approach, even the area of the law which traditionally was accorded the weakest protection – ordinary property rights – now enjoys strong protection.[94]

Leaving aside the surprising claim that 'traditionally' property rights have been accorded the weakest protection by the common law, *Bank Mellat v HM Treasury (No 2)* did not posit a four-fold proportionality test to protect property rights at common law.[95] Although Lord Sumption's judgment is somewhat vague as to the source of the proportionality test he is discussing, Lord Reed's dissent is explicit that the relevant challenge is under statute and the HRA.[96] The four-stage test is also different from how the proportionality test is presented at common law (i.e. the three-stage test outlined above), and the case has not been understood elsewhere as propounding a common law test.[97]

Property rights were nonetheless engaged in *Youssef v Secretary of State for Foreign and Commonwealth Affairs*,[98] one of the two recent Supreme Court CLC cases which did not directly concern court-centred norms, but in neither case was a proportionality test (or other robust protection) actually employed. In *Pham*, which involved the stripping of citizenship, proportionality was only discussed by some justices as the possible correct test,[99] whilst in *Youssef* Lord Carnwath held that, 'even applying a proportionality test', it would yield the same result as the *Wednesbury* test applied by the lower courts – he was not positing proportionality as the correct test for interference with property rights.[100] It would be, to say the least, strange if a more stringent test was imposed for means-tested employment tribunal fees than stripping somebody of their citizenship, but what test the courts will actually impose remains undecided,[101] whilst normatively unintuitive and unattractive decision-making, as per *MM*, is not uncharacteristic of the CLC.

Indeed, it is striking that, although prior to the HRA it was not uncommon for judges to make expansive claims, such as 'you have to look long and hard before you can detect any difference between the English common law and the principles set out in the

93 Bjorge (n 5), 222.

94 Ibid 229.

95 [2013] UKSC 39.

96 Ibid [67].

97 P Daly, for instance, describes the case as 'not exactly ground-breaking as a matter of law, and is certainly the poor relation of *Bank Mellat (No. 1)*' – an unlikely assessment if the leading judgment was positing a four-stage proportionality test for property rights at common law. 'First Principles: Substantive and Procedural Review on the UKSC' (*Administrative Law Matters*, 6 November 2020) <https://www.administrativelawmatters.com/>.

98 [2016] UKSC 3.

99 *Pham* (n 33) [120] (Lord Reed); [98] (Lord Mance).

100 *Youssef* (n 98) [59].

101 See *Pham* [2018] EWCA Civ 2064, [49]–[63].

Convention',[102] the only cases where a proportionality test was actually employed all concerned court-centred norms in the *Leech* set of cases. When it came to other norms, such as equal treatment in *Smith*,[103] or freedom of expression in *Brind*,[104] or the right to life in *Bugdaycay*,[105] the test was heightened or anxious scrutiny and not proportionality. In *B*, which involved the right to life – a child's access to expensive medical treatment – Laws J applied an especially intensive standard of review, employing a balancing test akin to proportionality with the health authority required to show a 'substantial objective justification' for the decision to decline treatment; i.e. that the 'financial constraints and other deserving cases are more pressing than at present appears', although this was 'hard ... to imagine'.[106] However, Lord Bingham, then Master of the Rolls, rejected Laws' stringent approach in favour of a conventional *Wednesbury* test (as per *Smith* albeit heightened in which he also gave the lead judgment).[107] Revealingly, Lord Bingham would though endorse a common law proportionality test for a court-centred norm in *Daly*. Little has changed in recent decisions, with the courts failing to recognise the right to life as a CLCR in *Zagorski*,[108] *Sandiford*[109] and *El Gizouli*,[110] whilst the CLCR of access to a court is sufficiently stringent (as per the *Worboys* case) that the barrier presented by the rule requiring the secrecy of parole board hearings to 'victims' legally challenging a decision of the board was such that the rule was ultra vires even though it had not prevented the victims in the case bringing a judicial review.[111]

It is not necessary to argue that it follows from the above that the right to life or to family life are not recognised as values by the common law because the courts do not employ a robust methodology – merits, proportionality or radical interpretation – to protect those norms. As Elliott has observed, the common law can exhibit 'normative sympathy for values that underpin some – perhaps many – Convention rights' even though it 'has not always delivered tangible protection'.[112] The common law can recognise those values in other areas – the law of defamation, for instance, has developed in some ways to recognise the value of freedom of expression,[113] whilst by employing an anxious scrutiny test the common law recognises that, say, the state firing somebody because of their sexuality is more normatively significant than a cinema's opening hours.[114] What does follow, however, is that it is deeply misleading to regard such norms as 'constitutional'. At the least 'constitutional' denotes norms which are in some real sense basic or fundamental, but this is not a meaningful description of norms which attract an anxious scrutiny test or according to which areas of private law are developed; the floodgates principle is presumably not a constitutional norm, regardless of how central it is to tort law. If we are to provide an accurate description of the nature of public or

102 *Brind v SSHD* [1990] 2 WLR 787, [797] (Lord Donaldson MR). Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] Public Law 397, 408: 'for most practical purposes the common law would provide protection to the individual at least equal to that provided by the E.C.H.R.'.

103 *R v Ministry of Defence, ex p Smith* [1996] QB 517.

104 *R v SSHD, ex p Brind* [1991] 1 AC 696.

105 *R v SSHD, ex p Bugdaycay* [1987] AC 514.

106 *R v Cambridge Health Authority, ex p B* [1995] 25 BMLR 5 (QB), [17].

107 *R v Cambridge DHA, ex p B* [1995] 1 WLR 898, [906].

108 *Zagorski v SSBIS* [2010] EWHC 3110 (Admin).

109 *Sandiford v SSFCA* [2014] UKSC 44.

110 *El Gizouli v SSHD* [2019] EWHC 60 (Admin).

111 *DSD* (n 59).

112 Elliott (n 5).

113 *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

114 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

constitutional law in the UK, and in particular the hierarchy of norms constructed by the senior courts, then the affix 'constitutional' or 'fundamental' should only be used for those norms which are robustly protected by the courts – at present, outside the HRA and EU law, only court-centred norms consistently attract such protection.

The lawyers' constitution

Of course, there has been no 'constitutional moment' when the British people or their elected representatives decided that court-centred norms or perhaps the 'rule of law' required some special protection which rights to a basic standard of living or to family life or even to vote[115] did not. The CLC cases considered in isolation have a progressive cast, and from this perspective they appear a positive development – it is the cases, such as *MM*, where any CLC aspect is ignored and the hierarchy of norms this creates that is problematic, rather than decisions in *UNISON* or the other CLC cases being in and of themselves objectionable. Many of the cases have been of benefit to prisoners, and it is especially noteworthy that the courts, led by Lord Steyn, started to provide such robust protection at a period in the mid-1990s when the Home Secretary courted political popularity through attacks on prisoners' rights. This is not the common law that has troubled the British left for much of the twentieth century, albeit the mooting of a proportionality test for property rights in *Youssef* and especially Bjorge's suggestion that the CLC's openness to customary international law means that the CLC can provide greater protection for property rights than the ECHR does indicate potential for conflict given Labour's most recent manifestos.[116] If the courts were to take this approach – say if Labour were to nationalise, as was indicated, the utilities for less than their market value (albeit improbable under its new leadership) – they would likely have most of the elite, including the media, cheering them on. The range of values that the CLC promotes has been construed narrowly so far, but this can easily change, with *Youssef* suggesting the courts may be inclined to perceive the CLC as more relevant to property rights than to the family life or standard of living of the poor.

A progressive slant to the cases decided positively in accordance with the CLC is not, however, the only striking feature. This does not appear to be a constitutional order which is to be adhered to, or perhaps even known by the public – it is not a constitutional order, in a country which surely needs one, with an 'integrative function'.[117] More fundamentally, it seems highly unlikely that this is an order that many British people would want to subscribe to – modern constitutions contain commitments far more extensive, including to social rights, than to the court-centred norms protected and promoted by the Supreme Court. A constitutional order vaguely Hayekian in the nature and austerity of its commitments seems, to say the least, an unlikely choice in a country where a socialised healthcare system is its most popular institution.

Gearty, a forceful critic of the 'common law partisans', has also claimed that 'almost unnoticed, human rights have crept into the same position as a binding agent whose adhesive qualities (it is no exaggeration to say) help to preserve in place the whole national project'.[118] While there may be some truth in this at an elite level and perhaps more generally in Northern Ireland, when the heat was actually on for the national project, with the 'yes' vote ahead in the Scottish independence referendum polls and Gordon Brown

115 *Moohan v Lord Advocate* [2014] UKSC 67, [34] (Lord Hodge).

116 Bjorge (n 5) 242.

117 D Grimm, 'Integration by Constitution' (2005) 3 International Journal of Constitutional Law 193.

118 C Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (Oxford University Press 2016) 22, 180.

called on to give his 'speech that saved the union',[119] he did not once mention human rights or court-centred norms or the rule of law, but focused on the NHS and the welfare state.[120] These might not be the priorities for elites, judicial or otherwise, but these are surely the binding agents – along with, as Moran has argued, 'the cult of military remembrance'[121] – if there are any left in a fractured and divided country. But whilst the welfare state has been under siege, with life expectancy in decline,[122] austerity linked with an estimated 120,000[123] to 130,000[124] excess deaths and the human consequences made plain to the world by the UN Special Rapporteur, Ken Loach,[125] and others,[126] the judges have been preoccupied elsewhere, supposedly protecting 'fundamental' and 'constitutional' rights.

One further point is worth mentioning. Bogg has responded creatively to *UNISON* by attempting to leverage the access to a court principle as an instrument to influence the interpretation of the employment status of gig-economy workers, since if they are not classed as 'workers', Bogg argues, their access to a court will be limited and so, given the importance of this right, the courts should adopt an approach as 'inclusive' to employment status as possible.[127] Adler similarly has written on how the benefit-sanctioning regime conflicts with the rule of law.[128] Good lawyers will always try to utilise the concepts and concerns of the courts to promote the interests of their clients, or, in their cases, social justice. But the peculiarity of this development should not be missed. The UK does not have a codified written 'constitution', difficult to amend, which as a result encourages creative interpretation of a fixed text. Why then does the UK now have a constitutional order in which to argue that the courts should promote and protect equal citizenship, family life or the interests of the most disadvantaged it is necessary to appeal to court-centred norms or the rule of law? The short answer is that this constitutional order was constructed by the courts – primarily a small group of men: Lord Steyn, the innovator of the common law proportionality test, and Lord Justice Laws, Lord Toulson and Lord Reed, who have done most to further develop it – and reflects their ideological choices about what is important. The rest of us have to fit our constitutional arguments to these choices. But constitutions are not the property of judges and lawyers – they belong to every citizen and should reflect the core values of the political community as a whole. Rather than it being 'now time for workers to reclaim the common law as their own', as Bogg suggests,

119 'A reborn Gordon Brown could be the man who saved the Union' (*Financial Times*, 17 September 2014) <www.ft.com/content/34866df6-3e85-11e4-adef-00144feabdc0>.

120 Full speech available at: <https://gordonandsarahbrown.com/2014/09/gordon-browns-speech-at-the-love-scotland-vote-no-rally-in-glasgow/>.

121 M Moran describes remembrance as 'the most successful civic ritual created by the British state in the last century', in *The End of British Politics?* (Palgrave Macmillan 2017) 63 and 65.

122 P Collinson, 'Life expectancy falls by six months in biggest drop in UK forecasts' (*The Guardian*, 7 March 2019) <www.theguardian.com/society/2019/mar/07/life-expectancy-slumps-by-five-months>.

123 J Watkins et al, 'Effects of health and social care spending constraints on mortality in England: a time trend analysis' (2017) 7 British Medical Journal Open.

124 D Hochlaf et al, 'Ending the blame game: the case for a new approach to public health and prevention' (Institute for Public Policy Research 2019) 6.

125 K Loach, *I, Daniel Blake* (BBC Films, 2016).

126 P Goodman, 'In Britain, austerity is changing everything' (*New York Times*, 28 March 2018) <https://www.nytimes.com/2018/05/28/world/europe/uk-austerity-poverty.html>.

127 Bogg (n 6) 518.

128 M Adler, 'Benefit sanctions and the rule of law' (UK Constitutional Law Association, 23 October 2015) <https://ukconstitutionallaw.org/>.

which will only provide victories to citizens when incidental to the protection of court-centred norms, it is past time the constitution itself was claimed.[129]

Conclusion

When Sir Martin Moore-Bick was selected to lead the Grenfell Tower inquiry, many affected residents were resistant. Understandably, they wondered how anybody with his life experiences could appreciate their situation, albeit by not attending an elite public school they were perhaps less narrow than the 'quad-to-quad' life-course of most of his judicial brethren. In response, many in the legal community very reasonably pointed to his skills as a judge, a 'fact-finder … trained to root out the truth'.[130]

What though is 'the truth' or the facts or the law to get right in respect of the CLC? The judges are not attempting – with the odd exception, especially Sedley in both *Quila* and his extra-judicial publications[131] – to engage in any meaningful sense with the actual history of the common law in order to identify the norms it has recognised or thereafter develop principled criteria to determine which of the identified norms, if any, should be given a special protection or status today. Rather, they have simply identified a set of court-centred norms, which no doubt have some connection with the common law, whilst ignoring other norms which have an equally plausible connection.

This has created a legitimacy problem for the senior courts. *MM* raised issues of the highest importance for a liberal democracy – equal citizenship, direct discrimination against the poor – and yet, despite CLCR forming part of the *ratio* of the judgment at first instance, the issue was entirely ignored by the Supreme Court. British citizens prevented from living with their families on the basis that they are too poor deserve far better than this from the senior judiciary – at the very least, they are owed an explanation as to why their rights and interests do not merit the same standard of protection as others.

If, perhaps as a result of the Brexit imbroglio, the UK (or likely what was left of it) adopts a conventional codified constitution, the suggestion that it should be written by a collection of predominantly male multi-millionaires from the most socially exclusive schools and universities would be met with incredulity – however 'terrifyingly bright'[132] or effective as judges or advocates they may be, it would surely be pointed out that they are in no special position to identify the basic norms to not only constitute social and political life in the UK, but to express the type of society that the UK is and claims to be. But this is precisely the situation that has arisen with the CLC. Of course, any written codified constitution must be interpreted, but there is a fundamental difference between interpretation and the actual positing of the norms and their hierarchy. In the meantime, until a conventional constitution is adopted, if this set of judges cannot provide principled reasons why it is unlawful (that is, unconstitutional) for somebody earning £15,000 a year to be charged £160 a year to use an employment tribunal, but it is lawful to prevent them from living with their partner in the UK, then perhaps it is time a wider range of people with different skills, backgrounds and experiences were selected who can provide the UK with a constitutional order justifiable to all its citizens.

129 Bogg (n 6) 526.

130 The Secret Barrister, 'Grenfell Inquiry: critics of Martin Moore-Bick are dabbling in fearmongering' (*New Statesman*, 11 July 2017).

131 S Sedley, *Lions under the Throne: Essays on the History of English Public Law* (Cambridge University Press 2015).

132 The Secret Barrister (n 130).

NOTES AND COMMENTARIES

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The electoral commission, disinformation and freedom of expression

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Abstract

This commentary examines how the prospective electoral commission could play a role in combatting disinformation in the run-up to Irish elections. While legislative debates have pointed to the potential role of the commission in protecting elections from anti-democratic actors who disseminate false electoral claims, no clear mandate has detailed how this could manifest. This ambiguity is exacerbated by Ireland's electoral statutory framework, which has struggled to adapt to the challenging digital realities of contemporary electoral engagement. While the emergence of disinformation and related digital exigencies represents a potential for regulatory scrutiny, this must be considered alongside Article 10 of the European Convention on Human Rights (ECHR) and Article 40.6.1 of the Irish Constitution, both of which protect the right to freedom of expression. In positing how the new commission could counter electoral disinformation, a natural starting point is to probe how such functions are shaped and limited by this fundamental right. Moreover, the reluctance of the Irish judiciary and the European Court of Human Rights (ECtHR) to accept regulatory interference with political expression means that restrictions on the dissemination of information in the run-up to elections must be treated with delicacy when shaping the commission's potential functions in this critical area.

Keywords: electoral commission; disinformation; human rights; freedom of expression.

Introduction

In the Programme for Government (PfG) published in June 2020, the newly formed Irish government signed off on a commitment to finally establish a permanent electoral commission. This comes over a decade since a report by the Geary Institute from University College Dublin (UCD) recommended its establishment as a statutory body.[1] As of now, the mandate of the new commission is to 'provide independent oversight of elections and referendums, to inform the public about elections and referendums, to update and maintain the electoral register and to conduct elections'.[2] Broadly speaking, this consolidation of electoral oversight is long overdue and is a potential gateway to necessary electoral reform in Ireland. Specific areas of accountability in existing bodies are increasingly fractured. For example, the Referendum Commission's role is limited to

1 Richard Sinnott et al, *Preliminary Study on the Establishment of an Electoral Commission in Ireland* (UCD Geary Institute 2008).

2 Programme for Government – Our Shared Future <https://static.rasset.ie/documents/news/2020/06/draft-programme-for-govt.pdf>.

oversight of referendums, while the Standards in Public Office Commission is not accountable for local elections. Accordingly, 'there is no one actor responsible for devising and pioneering a reform agenda in the sensitive area of electoral policy,' leading to a 'piecemeal approach' that has hampered substantive reform.[3] This fragmentation of accountability has contributed what Reidy condemns as a 'moribund' system that has failed to progress 'into the 21st century', and one that requires consolidation through a new statutory body. As Kavanagh notes, attempts to 'modernise' the Irish electoral legislative framework have proven extremely difficult, in particular, in light of the 'costly failure' of attempts to introduce electronic voting in Ireland.[4] In view of electoral dangers associated with the rise of technology in Irish democracy, new legal, constitutional and technical challenges have emerged, which call into question the functional scope of the long-proposed commission in protecting the right to vote under Article 16(1)(2) of Bunreacht na hÉireann and Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR) from emergent threats in an increasingly digital electoral environment.

1 Technology, veracity, and electoral uncertainty

A critical aspect of the commission's function remains unclear and in desperate need of clarification. That is, what role will the commission play in meeting the contemporary challenge of electoral disinformation online? This unanswered question is highly prescient, in particular light of the potential scope for the commission to 'regulate online political advertising in the public interest' and harmonise a new legislative regime for 'political advertising across all media'.[5] This would represent a long overdue designated regulatory framework for political advertising online, the absence of which is currently recognised as a 'lacuna' that exacerbates the harms of digitally spawned false and misleading information in the run-up to elections.[6] Existing instruments, such as the Electoral Act 1997, restrict anonymous and excessive donations.[7] However, these legislative provisions fail to address digital political adverts and electoral campaigning, nor do they scrutinise the veracity and accuracy of claims that surface in the course of electoral advertising online. This presents legal loopholes within 'electoral laws' and 'electoral procedures' that Kavanagh highlights as the core of 'electoral integrity'.[8] While COVID-19 has justifiably amplified concerns surrounding the public harms of false and misleading claims online,[9] disinformation had been recognised as an electoral threat long before the pandemic. In 2018, the Irish government produced the *First Report of the Interdepartmental Group on the Security of Ireland's Electoral Process and Disinformation*. While the report found a generally high level of public trust and technical security in the electoral

3 Report of the Joint Committee on the Consultation on the Proposed Electoral Commission (Houses of the Oireachtas 2016) 7 <https://webarchive.oireachtas.ie/parliament/media/committees/archivedcommittees/environmentculturea ndthegaeltacht/report-on-electoral-commission-final-20160113.pdf>.

4 Jennifer Kavanagh, 'Electoral law in Ireland: sustaining electoral integrity from process, procedures, and precedent?' (2015) 30(4) Irish Political Studies 510–530.

5 Ibid.

6 'Proposal to Regulate Transparency of Online Political Advertising' (*MerrionStreet*, 5 November 2019) <https://merrionstreet.ie/en/News-Room/News/Proposal_to_Regulate_Transparency_of_Online_Political_Advertising.html>.

7 Electoral Act 1997, section 23.

8 Kavanagh (n 4).

9 Jack Horgan Jones, 'No plans to combat sharing of coronavirus misinformation on WhatsApp' *Irish Times* (Dublin, 16 March 2020).

process, online threats were identified as unique sources[10] of electoral dangers.[11] Specifically, 'cyber attacks' and 'the spread of disinformation online' were identified as 'substantial risks' to Ireland's electoral process.[12] These concerns prompted recommendations for the legislature to 'expedite the establishment' of a permanent commission. Disinformation has already had damaging effects on the Irish electorate, whose democratic engagement is increasingly characterised by the use of digital platforms and consternation surrounding the authenticity of information online.[13] In the aftermath of the abortion referendum in 2018, Murphy et al exposed 3140 participants to six news stories (two false and four verified). Almost half of respondents reported a memory for at least one of the false stories. Those who reported memories about false stories were 'more likely to remember falsehoods about the opposing side' of the abortion referendum and many did not revise their memory after being exposed to its falsity.[14] These developments leave the contemporary Irish legal framework in a precarious situation with regard to how maladaptive legislation has struggled to respond to these threats and the inability of voters to tell fact from fiction in the increasingly digitised electoral environment. Codes from the Advertising Standards Authority of Ireland (ASAI) *do* address *online* advertising[15] and stipulate that advertisements must be 'honest and truthful'.[16] However, such codes are non-binding and are chiefly directed at commercial marketing communications, not political content. These exist within broader soft law attempts to control digital disinformation, such as the European Commission's Codes of Practice, non-binding guidelines aimed at curbing disinformation through voluntary compliance by technological signatories. Recent attempts have been made to modernise Ireland's electoral regulatory framework, but have not yet come to fruition. The Social Media Online Advertising Transparency Bill 2017, proposed by Deputy James Lawless TD, was one such attempt.[17] This Bill proposed statutory requirements for online political advertisements to include 'transparency notices', which are required to 'display in a clear and conspicuous manner' funding details and target audiences.[18] The proposed legislation also attempted to introduce an imposition of statutory fines for failure to display transparency notices[19] and the use of automated, or 'bot', accounts 'to cause multiple online presences directed towards a political end to present as an individual account or profile on an online platform'.[20] While the 2017 Bill entailed encouraging

10 Department of An Taoiseach, *First Report of The Interdepartmental Group on Security of Ireland's Electoral Process and Disinformation* (Government of Ireland 2018).

11 Niamh Kirk et al, *Digital News Report Ireland* (Reuters 2019) <https://www.bai.ie/en/increase-in-number-of-irish-media-consumers-concerned-about-fake-news-on-the-internet-reuters-digital-news-report-2019-ireland/> Last accessed 7 August 2020.

12 Department of An Taoiseach, *Overview: Regulation of Transparency of Online Political Advertising in Ireland* (BAI, 14 February 2019) <https://www.gov.ie/en/policy-information/7a3a7b-overview-regulation-of-transparency-of-online-political-advertising-/>.

13 Broadcasting Authority of Ireland, 'Over half of Irish consumers (52%) now get their news via social media sites' (15 June 2016) <https://www.bai.ie/en/over-half-of-irish-consumers-52-now-get-their-news-via-social-media-sites/>; Charlie Taylor, 'Some 90% of Irish people aged between 19 and 24 use social networks', *Irish Times* (Dublin, 4 July 2019) <https://www.irishtimes.com/business/technology/some-90-of-irish-people-aged-between-19-and-24-use-social-networks-1.3944424>.

14 Gillian Murphy et al, 'Fake news can lead to false memories' (2019) *Science Daily* <https://www.sciencedaily.com/releases/2019/08/190821082228.htm>.

15 ASAI Codes <https://www.asai.ie/code/>.

16 Ibid.

17 Online Advertising and Social Media (Transparency) Bill 2017 Part 1, 2.

18 Ibid.

19 Ibid.

20 Ibid.

attempts to enshrine transparency into political advertising, it was defeated before the committee stage in the Dáil. In addition, the Bill entailed problematic aspects, including the imposition of criminal penalties for offences. One legislator, Ruth Coppinger TD, contested the Bill on the basis that it underestimated social media's empowering role in galvanising anti-water charge protests in Ireland.[21]

2 Constitutional and fundamental rights concerns

This objection to the 2017 Bill is inextricably linked to a necessary question that must be scrutinised when addressing the scope of the new electoral commission in its ability to combat the democratic harms associated with electoral disinformation online. That is, how can the problem be curbed while simultaneously preserving fundamental rights to freedom of expression? Under Article 40(6)(1) of the Constitution, and Article 10 of the ECHR, freedom of expression is protected. In other common law jurisdiction such as the United States, the freedom of speech clause of the first amendment has been used by the judiciary to strike down provisions of federal electoral legislation in the 2002 Bipartisan Campaign Reform Act which imposed restrictions on independent corporate expenditures from corporations, as demonstrated in *Citizens United v Federal Election Commission*.[22] However, neither the Irish Constitution nor the ECHR are absolute in protecting expression. Interferences are subject to limitations and must be proportionate. Like the ECHR, the Irish Constitution 'has developed organically to reflect and accommodate a changing society since 1937' to allow for 'contemporary conceptions of human rights'.[23] Increasingly, tension arises between traditional concepts of freedom of expression and modern forms of electoral interference that yield unprecedented challenges, thereby threatening historically rigid paradigms. Barendt argues that, under one of four theoretical arguments for 'freedom of speech', public opinion can only be meaningfully achieved through 'sustaining individual access to uninhibited public debate on political issues'.[24] Habermas posits the formation of 'public opinion' as a core function of the 'public sphere' in democracy.[25] However, these concepts are challenged in an era where public opinion itself is the target of sophisticated and technologically driven anti-democratic actors. As John contends, this has led to a revisiting of 'traditional conceptions of freedom of expression' in light of the 'global character of Internet speech'[26] and social media's growing mantle in democracy.[27] Not all forms of disinformation are equal, and this is highly prescient from the perspective of freedom of expression. Various types of disinformation, depending on the level of foreseeable harm and abusive content, are subject to different legal scrutiny. Satire and parody, for example, often described as forms of 'fake news',[28] are robustly protected under Article 10.[29]

21 Marie O'Halloran, 'Government defeated on Online Advertising and Social Media Bill', *Irish Times* (Dublin, 14 December 2017).

22 *Citizens United v Federal Election Commission* [2010] 558 US 3.

23 Gerard Hogan and Gerry Whyte, *Kelly: The Irish Constitution* (3rd edn, Butterworths 1994).

24 Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005).

25 Jürgen Habermas et al, 'The public sphere: an encyclopedia article' (1974) 3 New German Critique 49–55.

26 Richard R John, 'Freedom of expression in the digital age: a historian's perspective' (2019) 4(1) Church, Communication and Culture 25–38.

27 Ibid.

28 Edson C Tandoc Jr, Zheng Wei Lim and Richard Ling, 'Defining fake news' (2018) 6(2) Digital Journalism 137–153.

29 *Ziembinsky v Poland (No 2)*, App no 1799/07 (ECHR 5 July 2016).

3 The precarious case of political expression

One legal principle congruent with both traditional views on freedom of expression and the contemporary information age is, as Barendt highlights, the reluctance of the judiciary 'to countenance abridgements of political and social discussion'. This is highly germane when addressing how the incoming electoral commission must delicately mediate its necessary role in combatting disinformation while maintaining consistency with protections to freedom of expression under Article 40 of the Irish constitution and under Article 10 of the ECHR. As demonstrated by relevant jurisprudence from both the Irish judiciary and the European Court of Human Rights (ECtHR), a key challenge that emerges for the new commission is that extreme caution must be exercised in potential incursions on political forms of expression, and care must be exercised in maintaining impartiality when imparting information to the Irish electorate. Under Article 40(6)(1) of Bunreacht na hÉireann, the right of citizens to 'express freely their convictions and opinions' is protected. This includes 'criticism of Government policy' but excludes 'the publication or utterance of seditious or indecent matter'.[30] Furthermore, this right is subject to conditions that secure public order and morality. When considering the scope for the electoral commission in tackling electoral disinformation online, it is critical that, as an organ of the state, it does not overstep boundaries that have been delineated when protecting political forms of expression and open debate in the run-up to elections. In particular, the commission must maintain its impartiality in the period immediately before elections and referendums. In *McKenna v An Taoiseach*,[31] it was pointed out that the organs of the government must take care to ensure impartiality and equality when issuing advice and information to the public with respect to electoral campaigns specifically if the 'public purse' is implicated in such advocacy.[32] As clarified in the subsequent High Court case of *McCrystal v Minister for Children*,[33] limitations on state interference through disseminating information to voters vis-á-vis the *McKenna* judgment exist in the interests of 'fully informing the electorate in advance' of elections, reiterated by Kearns P as 'vital in any democracy'.[34] This is reflective of the rationale used by the ECtHR of ensuring a level playing field for political advertisers and 'preserving the impartiality of broadcasting on public interest matters and, thereby, of protecting the democratic process' as a legitimate aim accepted in *Animal Defenders International v UK*.[35] Following Denham CJ in the Supreme Court appeal of the *McCrystal* case, information disseminated with respect to informing the electorate must, at a minimum, be conveyed in a manner that is 'fair, equal, and impartial'.[36] Accordingly, the commission's functions must be framed in a manner that is cognisant of well-established limitations surrounding impartiality and political expression. However, this must be considered alongside the role of the commission in fostering pluralistic debate and imparting reliable information to the electorate in good faith. This was considered by Hogan J, who directly addressed the functional scope of the referendum commission in *Doherty v Referendum Commission*,[37]

30 The Constitution provides in Article 40.6.1. for the right of citizens to express freely their convictions and opinions.

31 *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

32 Niall F Buckley, 'Developments in constitutional law' (The Bar Council, 15 July 2013).

33 *McCrystal v Minister of Youth Affairs and Others* [2012] IESC 53.

34 Ibid.

35 *Animal Defenders International v UK*, App no 48876/08 (ECHR, 22 April 2013).

36 *McCrystal* (n 33).

37 *Doherty v Referendum Commission* [2012] IEHC 211.

where it was stated that the proliferation of 'extreme, far-fetched and fanciful' claims 'were believed to have had the effect of distorting genuine political debate'. This, as Hogan pointed out, comprised part of 'the background to the establishment of the Commission'. The referendum commission, a body that the new commission will subsume, had been constructed as 'a specialist body' that would 'seek impartially to ascertain the true facts (insofar as they could be ascertained) and to communicate general information to the public'.[38]

This underlines an important informative function that must continue, and potentially expand, under the prospective new electoral commission. However, in particular when considering if and how the new commission could restrict political forms of expression, the ECtHR has clarified its reluctance to uphold legal proceedings by contracting states that are deemed to present incursions into the freedom of political debate that the court considers intrinsically important in electoral democracy. In *Bowman v UK*,[39] it was highlighted that freedom of political debate should be strenuously protected in order for citizens to effectively express their choice in the legislature, and that 'it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely'.[40] In *Kita v Poland*,[41] the ECtHR reiterated 'the right to impart, in good faith, information on matters of public interest, even where this involved damaging statements about private individuals'.[42] Forms of political expression that involve criticism of elected officials require the most scrutiny. In *Feldek v Slovakia*,[43] the court stressed that 'limits of acceptable criticism are still wider where the target is a politician'. Moreover, in *Brzeziński v Poland*,[44] the ECtHR noted that the statements were made in the run-up to elections and were of public and political interest, leaving 'little room' for Article 10 interferences. In addition, the court emphasised a wider scope of permissible criticism towards elected officials, further limiting the margin of appreciation for interferences by contracting states, in light of a wider scope of 'admissible exaggeration and provocation' within 'political debate at local level'.[45] In *Salov v Ukraine*,[46] the punishment of a five-year sentence along with a fine and licence revocation for the applicant's publication of false information in the run-up to an election was deemed excessive and disproportionate.[47] These robust protections by the ECtHR must be understood and further probed when fleshing out the role of the new commission if it is mandated to sanction the dissemination of false information in the run up to elections and referendums as an electoral offence under accompanying legislation.

While the commission, as an organ of the state, must take care not to frustrate rights to freedom of expression under Article 40 of the Constitution and Article 10 of the ECHR, the Irish government, and the legislators tasked with finalising the commission, must remain aware that contracting states to the Convention can also have positive obligations in order to secure optimal conditions for freedom of expression. This was highlighted by the ECtHR in *Dink v Turkey*, where it was stated that:

38 Ibid.

39 *Bowman v UK*, 141/1996/760/961 (ECHR 19 February 1998).

40 Ibid.

41 *Kita v Poland*, App no 57659/00 (ECHR 8 July 2008).

42 Ibid.

43 *Feldek v Slovakia*, App no 29032/95 (ECHR 12 July 2001).

44 *Brzeziński v Poland*, App no 47542/07 (ECHR 25 July 2019).

45 Ibid.

46 *Salov v Ukraine*, App no 65518/01 (ECHR 6 September 2005).

47 Ibid.

> States had positive obligations in relation to freedom of expression: they must not just refrain from any interference but must sometimes take protective measures even in the sphere of the relations of individuals between themselves. They were also required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear.[48]

Moreover, in *Özgür Gündem v Turkey*,[49] it was clarified that the 'genuine, effective exercise of' freedom of expression under Article 10 is not limited 'the State's duty not to interfere, but may require positive measures of protection'.[50] Accordingly, it is imperative that, if the electoral commission attempts to interfere with freedom of expression when combatting electoral disinformation, the scope of the state's positive obligations, as well as limitations, under both the ECHR and the Constitution, are sufficiently probed. This is a crucial balance that legislators need to address when the formal construction of the commission finally begins, in particular when mediating freedom of expression protections with countervailing public interests and 'pressing social' needs.[51] While it is urgently necessary, it is far from clear if the commission will ultimately have clear responsibilities for combatting electoral disinformation beyond generic information campaigns. If the commission's functions do in fact go further, the connected regulatory framework must be conscious of constitutional and fundamental rights protections, while not using the reluctance of the judiciary in permitting interferences with political expression as a crutch to shirk responsibility in this critical area of Irish electoral reform.

Conclusion

It is without question that the right to freedom of expression creates limitations that shape the electoral commission's role in combatting disinformation online. As outlined in both an Irish and European legal context, freedom of expression in the run-up to elections often comes under the privileged purview of political expression. This means that, if the prospective commission is to be tasked with countering disinformation, regulatory scrutiny must avoid being restrictive in nature where possible. This caveat, while important to acknowledge, should not preclude scrutiny of disinformation in the run-up to elections. Regulatory constraints posed by freedom of expression protections do not impede the commission from informing the electorate, providing clarity on pertinent electoral information, and correcting pervasive false claims that could lead to a distortion of the facts. Arbitrary and restrictive measures that abridge the freedom to express opinions must be treated with legal suspicion. As a body entrusted with electoral oversight, the commission must limit its scrutiny to false claims that could affect the outcome of electoral events by distorting and polluting the information needed for voters to make informed choices. Going forward, the development of the commission must further probe how more proactive and robust mechanisms to counter false claims can be established, in a manner that complements other areas of urgently required reform in the area of digital political advertising. At a minimum, the commission needs to be capable of delivering reliable and data-driven information to voters, in a capacity that can dispel and debunk claims that arise and gain traction on foot of pervasive disinformation campaigns in the run-up to Irish elections. The manner and form in which this occurs must be of primary concern when the commission finally comes to fruition in the coming months.

48 *Dink v Turkey*, App no 2668/07 (ECHR 14 September 2010).

49 *Özgür Gündem v Turkey*, App no 23144/93 (ECHR 16 March 2000).

50 Ibid.

51 *Sunday Times v UK*, App no 6538/74 (ECHR 26 April 1979).

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Medical negligence and diagnosis: further inroads into *Bolam*?

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Abstract

The Bolam *test allows medical professionals to set the standard of care in medical negligence litigation. There is growing recognition that the medical professional's duty to the patient is complex and multifaceted and that* Bolam *may not be appropriate with respect to some aspects of the duty. Significantly, it has been rejected with respect to the duty to inform. Recent cases involving diagnosis and cancer screening raise questions about its application to these aspects of the medical professional's duty. It is timely to consider further inroads into* Bolam *by curtailing its application to diagnosis and rejecting its application to screenings tests.*

Key words: *Bolam*; diagnosis; duty; negligence; screening; standard.

Introduction

The approach to the standard of care in medical negligence was set out by McNair J in *Bolam v Friern Hospital Management Committee*[1] when he directed the jury that, as long as a doctor acted in accordance with a practice accepted as proper by a responsible body of medical opinion, that doctor may not be found negligent even though there is another body of opinion expressing a contrary view.[2] Lord Scarman subsequently declared in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*, 'the law imposes the duty of care: but the standard of care is a matter of medical judgment'.[3] In the same case, Lord Diplock observed that the doctor's duty is a comprehensive one that is 'not subject to dissection into a number of component parts to which different criteria of what satisfy the duty of care apply, such as diagnosis, treatment, advice'.[4]

However, the dissection of the doctor's duty had already begun in North America and soon swept across the common law world.[5] The UK Supreme Court recognised this in *Montgomery v Lanarkshire Health Board*,[6] when it rejected the application of *Bolam* to

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1 [1957] 1 WLR 583.

2 The House of Lords affirmed this in *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634.

3 *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] 1 AC 871, 881.

4 Ibid 893.

5 *Canterbury v Spence* 464 F 2d 772 (1972); *Reibl v Hughes* (1981) 114 DLR 1; *Rogers v Whitaker* (1992) 174 CLR 479; *Foo Fio Na v Dr Soo Fook Mun* [2007] 1 MLJ 593.

6 [2015] UK 11; [2015] AC 1430.

determine the standard of care with respect to the duty to inform. Instead of relying on the medical expert's view of what constitutes a material risk, *Montgomery* replaces that with the patient's perspective – whether a risk is material is based on whether a reasonable patient would consider it so.[7] *Montgomery* explicitly recognises that the duty to inform is different from the duty to diagnose, treat and care and, for that reason, need not be subject to *Bolam*. Rightly so. The reality is that the doctor's duty is multifaceted; it includes the duty to diagnose, treat, care, inform, advise, warn, disclose, refer and follow-up. There is no reason why *Bolam* must apply – or apply in the same way – to every aspect.[8]

Bolam is apposite in the realms of treatment and care which are based on a range of factors, including: the expertise of the doctor; the needs and temperament of the patient; the dynamics of the patient's medical condition; the overriding need to respect patient autonomy and preserve the doctor–patient relationship; the available resources; and institutional protocols. Legitimate differences of opinion and a range of options are in play. One can sensibly speak of accepted practices in the context of treatment and care – depending on the circumstances, different professionals will favour different practices, each being reasonable. Not always with diagnosis. While it is true that, in many cases, diagnosis cannot be isolated from treatment and care as each informs and affects the other, nonetheless there are some aspects of diagnosis that can be isolated and treated differently, especially those involving interpretation of pathological tests or radiological scans. Here, the issue is whether the doctor could have got the diagnosis right and, in some of these cases, it would be farcical to defend as acceptable practice that which is patently wrong.

A series of recent decisions involving negligent misdiagnoses based on misinterpretation of scans or biopsies as well as negligent screenings for cancer have applied an 'absolute confidence' test as part of or as an alternative to *Bolam*.[9] If *Montgomery* could recognise a 'material risk' test for the duty to inform, why not an 'absolute confidence' test for the duty to diagnose? This article considers this question by exploring recent jurisprudence from England, Australia, Singapore and Ireland demonstrating a pattern where courts have explicitly or implicitly questioned the application of *Bolam* to diagnosis. It sets out the *Bolam* test and the impact on it of two crucial English decisions[10] and examines cases involving cancer diagnosis or screenings where courts have applied or referred to the 'absolute confidence' test to determine negligence. The article concludes with two modest arguments: one, the *Bolitho* addendum should be applied more liberally

7 For accuracy, the *Montgomery* test is set out: 'The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it' (*Montgomery* at [87]). The rejection of *Bolam* is now almost uniform across the common law world: *Canterbury v Spence* (n 5); *Reibl v Hughes* (n 5) (Canada); *Rogers v Whitaker* (n 5) (Australia); *Foo Fio Na v Dr Soo Fook Mun* (n 5); reaffirmed and clarified in *Dr Hari Krishnan & Another v Megat Noor Ishak Megat Ibrahim & Another* [2018] 1 MLRA 535 (Malaysia); *Hii Chii Kok v Ong Peng Jin London Lucien and Another* [2017] SGCA 38; [2017] 2 SLR 492 (Singapore).

8 A leading medico-legal practitioner, Simon Fox, making a similar argument, is developing a menu of standards for different aspects of the doctor's duty. See, S Fox, 'The latest on *Bolam* is dead' 6 July 2019, <www.simonfoxqc.com>.

9 *Muller v King's College Hospital NHS Foundation Trust* [2017] EWHC 128; [2017] QB 987; *XXX v King's College NHS Foundation Trust* [2018] EWHC 646; *Morrissey & Another v Health Service Executive & Others* [2019] IEHC 268; *Armstrong, Carol Ann v Quest Laboratories Pte Ltd* [2019] SGCA 75; [2020] 1 SLR 133.

10 *Bolitho v City & Hackney Health Authority* [1997] UKHL 46; [1998] AC 232; P*enney & Others v East Kent Health Authority* [1999] EWCA Civ 3005; [2000] PNLR 323.

by judges to constrain *Bolam* with respect to the duty to diagnose;[11] two, diagnosis and screening should not be conflated, and *Bolam* should be confined to the former.

1 *Bolam/Bolitho* and medical negligence

Bolam has been criticised for enshrining medical paternalism and inhibiting judges from carrying out their judicial function in adjudicating disputes and setting legal standards.[12] It is seen as a test that is not a neutral but one that is 'so firmly against the plaintiff in a medical negligence action that it is almost not worth going to court in the first place'.[13] This is unsurprising considering the history of the *Bolam* test and its underlying judicial philosophy that was pro-doctor.[14] In an article on liability for spinal anaesthesia, the authors (all anaesthetists) candidly explain how Lord Denning and McNair J acted as the principal architects of a medical negligence regime that protected doctors and the National Health Service from liability.[15]

Responding to some of these criticisms, English judges have whittled down *Bolam* at the margins over the last two decades. Significantly, the House of Lords in *Bolitho v City & Hackney Health Authority*[16] cautioned that judges should scrutinise expert opinion and be satisfied that the opinion is logically defensible as well as reasonable, respectable and responsible before accepting it. Following this decision, Brazier and Miola published an article predicting the demise of *Bolam* in a 'velvet revolution' that would advance the interests of doctors and patients.[17] However, courts continued to give *Bolitho* a narrow reading and restricted themselves to scrutinising whether the defendant's expert opinion was logically defensible rather than focusing on whether the opinion was respectable, reasonable and responsible.[18] In a detailed analysis of *Bolitho*,[19] Rachel Mulheron referred to the Singaporean interpretation of *Bolitho* in *Khoo James v Gunapathy d/o Muniandy*,[20] in which Yong Pung How CJ observed as follows:

> Interpreted liberally, *Bolitho* could unwittingly herald invasive inquiry into the merits of medical opinion. For if 'defensible' were to be given a meaning akin to 'reasonable', the *Bolam* test would only be honoured in lip service. A doctor would then be liable when his view, as represented by the defence experts, was found by the court to be unreasonable. We do not think this was the intention of the House of Lords in *Bolitho*.[21]

This conservative approach validates the criticisms that *Bolitho* has not modified *Bolam* and that the law continues to treat negligence as a sociological rather than an ethical

11 *Bolitho City & Hackney Health Authority* (n 10). See below at text to notes 16–26 for an explanation of *Bolitho*.

12 Lord Woolf, 'Are Courts Excessively Deferential to the Medical Profession?' (2001) 9 Medical Law Review 1, 15.

13 M A Fordham, 'The *Bolam* test lives on' [1998] Singapore Journal of Legal Studies 140, 148.

14 See, H Teff, *Reasonable Care: Legal Perspectives on the Doctor Patient Relationship* (Clarendon Press 1994) 30; J Mason, 'Master of the balancers; non-voluntary therapy under the mantle of Lord Donaldson' [1993] Juridical Review 115.

15 J Maltby, C D D Hutter and K C Clayton, 'The Woolley and Roe case' (2000) 84(1) British Journal of Anaesthesia 121. Lord Denning made no secret of the fact that he deliberately reshaped the law in order to 'relieve the anxieties of the medical men'. Lord Denning, *The Discipline of Law* (Butterworths 1979) 241.

16 *Bolitho City & Hackney Health Authority* (n 10).

17 M Brazier and J Miola, 'Bye-bye *Bolam*: a medical litigation revolution?' [2000] Medical Law Review 85, 86.

18 See, the analysis of post-*Bolitho* cases in A Maclean, 'Beyond *Bolam* and *Bolitho*' (2002) 5 Medical Law International 205.

19 R Mulheron, 'Trumping *Bolam*: a critical legal analysis of *Bolitho*'s gloss' [2010] Cambridge Law Journal 609.

20 [2002] SGCA 25; [2002] 1 SLR(R) 1024.

21 Ibid at [64]–[65].

concept.[22] Thus, a defendant who is supported by an expert whose opinion is logically defensible cannot be found negligent by the court; in effect, the medical profession sets its own standards.[23] However, recent decisions may herald a bolder vision for *Bolitho*. Once apparently confined to rare and exceptional cases,[24] courts no longer impose such restrictions, treating *Bolitho* as generally applicable.[25] The authoritative exposition on the contours and application of the 'Bolitho addendum' is found in *C v North Cumbria University Hospitals NHS Trust (Rev 1)*,[26] in which Green J set out detailed guidance on how to deal with expert evidence. Significantly, Green J disaggregated logical defensibility from the adjectival triumvirate of 'reasonable, respectable and responsible', stressing that judges had to evaluate the expert opinion holistically and test it against the evidence to determine the weight that should be accorded to it.

This approach to the *Bolitho* addendum gives it more teeth, moving it slightly away from the sociological to the ethical approach. It allows judges to prevent medical experts from setting the standard if the judge does not find the expert opinion 'reasonable, respectable and responsible'. Even in Singapore, the tide is shifting. In a judgment handed down 15 years after the *Bolitho*-neutering judgment of *Gunapathy*, the Singapore Court of Appeal breathed new life into *Bolitho*, highlighting that 'the *Bolam* test is a *proxy* or a *heuristic* for determining what a reasonable and competent doctor would do'.[27]

Interpreting *Bolam* as a proxy or heuristic is profound, as it clarifies that *Bolam* is a means to an end, a distinction that was lost in the *Bolam*isation of medical negligence over several decades. The High Court of Australia, in a series of decisions in the last decade of the twentieth century,[28] set out an unimpeachable approach to the standard of care in medical negligence in *Rosenberg v Percival*:

> As the above passage, which was quoted with approval in *Rogers v Whitaker*, makes clear, the *relevance* of professional practice and opinion was not denied; what was denied was its *conclusiveness*. In many cases, professional practice and opinion will be the primary, and in some cases it may be the only, basis upon which a court may reasonably act. But, in an action brought by a patient, the responsibility for deciding the content of the doctor's duty of care rests with the court, not with his or her professional colleagues.[29]

Rosenberg strikes the right balance between recognising that expert medical opinion is crucial to understanding what constitutes acceptable medical practice while ensuring that, ultimately, courts have the responsibility and power to determine whether the doctor had acted negligently in the circumstances. What is objectionable about *Bolam* as understood by English courts is the assumption that judges must always defer to medical opinion unless it is illogical. This extreme position prevents a judge who fully understands both the issues and the expert medical opinion from exercising independent judgement. Unfortunately, the elegant solution provided in *Rosenberg* was swept away by legislative reforms which were aimed at reinstating the *Bolam* test in Australia.

22 J L Montrose, 'Is negligence an ethical or a sociological concept?' (1958) Modern Law Review 259.

23 Maclean (n 18) 207.

24 Mulheron (n 19) 618.

25 That *Bolitho* will no longer be treated as a rare exception was affirmed in *Lane v Worcestershire Acute Hospitals NHS Trust & Another* [2017] EWHC 1900, [16].

26 [2014] EWHC 61 ('*North Cumbria*'), [25].

27 *Hii Chii Kok v Ong Peng Jin London Lucien* (n 7) [104], [111].

28 *Rogers v Whitaker* (1992) 175 CLR 479; *Breen v Williams* (1996) 186 CLR 71; *Naxakis v Western General Hospital* (1999) 197 CLR 269.

29 (2001) 205 CLR 434 per Gleeson CJ at [7] (emphasis in original).

The legislative test adopted across the Australian states (with minor variations) is based on the standard proposed by the panel of experts appointed by the Australian government to propose reforms to the law of negligence:[30]

> A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational.

Instead of referring to widely held medical opinion, the various statutes refer to widely accepted practice.[31] This has raised fresh questions about what constitutes a practice, when it is to be regarded as widely accepted, and when a professional practice may be disregarded as irrational.[32] The tension between the courts and the medical profession as to who determines the standard of care is most clearly seen in the Victorian case of *Boxell v Peninsula Health*.[33]

The plaintiffs in *Boxell* were the widow and children of the deceased, a man who died following an acute aortic dissection (AD). The deceased had presented himself at the emergency department of a hospital managed by the defendant, which discharged him without diagnosing AD. The defendant conceded that, had a CT aortogram (CTA) been performed, it was likely that the AD would have been diagnosed and life-saving surgery ordered. However, the defendants argued that there was no clinical basis for performing a CTA and that, as it had 'acted in a manner widely accepted as competent professional practice', it therefore could not be held negligent.

The court noted that it was not enough for the defendant to point to an existing practice accepted by peers, but it must establish the existence of a practice *widely* accepted in Australia as competent practice. Nine experts were called in *Boxell*, four for the plaintiff and five for the defendant. Despite all five defendant's experts testifying that not performing a CTA was acceptable, the court did not accept that their views constituted widely accepted practice, holding that the practice defended by the defendant's expert was not 'consistent with that practised in the hospitals represented by [the plaintiff's experts]'.[34]

The court highlighted the difference between 'a standard being commonly practised, and it being widely accepted as competent professional practice by a significant number of respected practitioners in the field'.[35] This is a departure from the *Bolam/Bolitho* approach because the court rejected the defendant's experts' views not on the narrow grounds of logical indefensibility but on the court's own assessment that the defendant's experts' practice did not comport with 'widely accepted practice'. The court went on to hold the defendant negligent on the facts, the evidence and the expert opinion. The

30 Following a health insurance crisis in 2001, the Australian government established a panel of experts chaired by Ipp J to propose reforms to tort law. One of the recommendations of the panel was to reintroduce *Bolam* in modified form: *Review of the Law of Negligence Final Report* (September 2002), Recommendation 3.

31 See, Civil Liability Act (NSW), section 5O; Wrongs Act 1958 (Vic), section 59; Civil Liability Act 2002 (WA), section 5PB.

32 Recent decisions from three different states have not arrived at a uniform approach. See *Boxell v Peninsula Health* [2019] VSC 830; *Coffey v Murrumbidgee Local Health District formerly known as Greater Murray Health Service* [2019] NSWSC 1265; *Child and Adolescent Health Service v Sunday John Mabior by Next Friend Mary Kelei* [2019] WASCA 151.

33 *Boxell v Peninsula Health* (n 32).

34 Ibid [293].

35 Ibid.

defendant's failure to consider AD and perform a CTA constituted negligent misdiagnosis.

One aspect of *Bolam* that is often overlooked in the literature and judgments is McNair J's rider that it would be negligent of a doctor to hold on to a particular 'technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion'.[36] This is especially relevant to diagnosis, as scientific advancement has led to rapid developments in diagnostic techniques, particularly with the pervasive use of technology and now artificial intelligence.[37] Courts and the medical profession will have to confront the reality that diagnosis – unlike treatment and care – is more of a science than an art. In many cases, judges will be able to rely on scientific evidence, medical literature and competing expert testimony to evaluate whether a doctor was negligent in diagnosis, as exemplified in *Boxell*.

2 *Bolam*, diagnosis and screening

A recent study showed that diagnostic errors in three areas (vascular disease, infections and cancer) account for almost 75 per cent of cases which result in serious harm or death to the patient.[38] The study also found that the overwhelming cause of diagnostic errors is poor clinical judgement. Recognising this, medical experts have called for the development of better protocols and systems to reduce diagnostic errors, including greater reliance on computer-based tools, diagnostic performance feedback, clinical teamwork and diagnostic education.[39] It is striking that, while the medical profession has acknowledged that the leading cause of diagnostic errors resulting in harm to patients is poor clinical judgement, courts continue to apply the *Bolam* test to negligent diagnosis cases; the irony – if it needs to be spelt out – lies in the fact that the *Bolam* test defers to clinical judgement.

Having said this, there is an emerging body of cases involving cancer screening or diagnosis that raises questions about the application of *Bolam*. The starting point is *Penney & Others v East Kent Health Authority*,[40] which involved three claimants whose cervical smears taken for cancer screening were negligently reported as negative. The slides showed some abnormalities, but the experts differed as to what a reasonable cytoscreener should have seen and reported. All the experts agreed that, unless the screener had absolute confidence that the smears were not cancerous, they should not report them as negative. The trial judge, Peppitt QC, held that, as there were abnormalities in each smear, the screeners had failed the absolute confidence test and were negligent in reporting the smears as negative. In explaining his decision, Peppitt QC stated:

> All the experts agree that the cytoscreener was wrong. No question of acceptable practice was involved. The issue here to which the experts' evidence was directed was whether the cytoscreeners conduct though wrong, was excusable. This seems to me to fall outside the Bolam Principle.[41]

36 *Bolam v Friern Hospital Management Committee* (n 1) 587.

37 See, S M McKinney et al, 'International evaluation of an AI system for breast cancer screening' (2020) 577 Nature 89; E Neri et al, 'What the radiologist should know about artificial intelligence – an ESR white paper' (2019) 10 Insights Imaging 44.

38 D E Newman-Toker et al, 'Serious misdiagnosis-related harms in malpractice claims: the 'big three' – vascular events, infections, and cancers' (2019) 6(3) Diagnosis 227.

39 Ibid 236; A Olson et al, 'Competencies for improving diagnosis: an interprofessional framework for education and training in health care' (2019) 6(4) Diagnosis 335, 340.

40 *Penney v East Kent Health Authority* (n 10).

41 Ibid [36] (emphasis in original).

On appeal, the appellants argued that Peppitt QC had failed to apply the *Bolam* test and had substituted his opinion for the experts. In addressing this argument, Lord Woolf MR distinguished between factual findings and diagnosis based on the factual findings, observing that the *Bolam* test 'has no application where what the judge is required to do is to make findings of fact. This is so, even where those findings of fact are the subject of conflicting expert evidence.'[42] Lord Woolf set out three questions that had to be answered, the first being the purely factual question to which *Bolam* did not apply:[43]

> What was to be seen in the slides?
>
> At the relevant time could a screener exercising reasonable care fail to see what was on the slide?
>
> Could a reasonably competent screener, aware of what a screener exercising reasonable care would observe on the slide, treat the slide as negative?

Penney was closely analysed by Kerr J in *Muller v King's College Hospital NHS Foundation Trust*,[44] who argued that Lord Woolf had included some elements of professional interpretation within 'findings of fact' to which the *Bolam* test would not apply. The relevant paragraph from *Muller* is reproduced:

> Lord Woolf was clearly treating question (i) as one of fact. Yet, by 'what was to be seen in the slides', he must have meant not merely what images the screener would physically see (a question of fact in the ordinary sense of the word), but also what *interpretation* should be placed on what was to be seen on the slides, i.e. whether, objectively, there was any indication of possible cancer. His reference to expert evidence being required to determine question (i) otherwise does not make sense. He held that the court had to decide this question without reference to the *Bolam* test.[45]

It must be emphasised that Lord Woolf affirmed that the *Bolam* test applied to diagnosis and that Kerr J accepted that he was bound by *Penney*. Nonetheless, Kerr J expressed support for the view that *Bolam* should be restricted to treatment and care and should not be applicable to pure diagnosis, 'which was either right or wrong and, if wrong, either negligently so or not'.[46] Kerr J's dictum may be read in two ways. The more radical is to take Kerr J's words literally. *Bolam* should not apply to diagnosis and should be restricted to treatment and care as only the latter requires nuanced judgements where legitimate differences of opinion may exist. As Kerr J pithily noted, diagnosis is either right or wrong.

A more nuanced reading would be to recognise that there is a gradient from purely factual findings to interpretation to opinion in the realm of diagnosis. *Bolam* applies at the opinion end of the spectrum but fades away as it approaches the factual finding end. This is a grey area that will continue to pose challenges for courts and uncertainty for medico-legal practitioners. For example, Penney was applied in *XXX v King's College NHS Foundation Trust*,[47] in which the defendant sonographer failed to detect a cardiac abnormality. The issue was whether the sonographer was negligent either in the manner in which he conducted the foetal scan or in mistaking a mimicking structure for a ventricular outlet. The defence expert testified that a reasonable sonographer could have been deceived by a mimic while conducting a scan and would not necessarily be in breach

42 Ibid [27].

43 Ibid.

44 *Muller v King's College Hospital* (n 9).

45 Ibid [65].

46 Ibid [46].

47 *XXX v King's College NHS Foundation Trust* (n 9).

of duty.[48] However, the judge preferred the view expressed by the plaintiff's experts that, had the scan been properly administered, the error should not have occurred. The error occurred, ergo the court concluded that the sonographer must have negligently performed the scan.

On the other hand, the court in *Shaw v South Tees Hospitals NHS Foundation Trust*[49] applied Bolam to find the obstetrician defendant not negligent for reporting a foetal scan as normal when, in fact, the structure connecting the two hemispheres of the brain was wholly or partially absent in the developing foetus. The court noted that reading such a scan 'is not an easy task and it is a matter of judgment and subjectivity'.[50] A Court of Appeal decision that has not received as much attention as it should is *Lillywhite v University College London Hospitals' NHS Trust*.[51] The facts are similar to those in *Shaw*. There was a failure to detect an anomaly in the foetal scans which would have revealed that the two hemispheres of the brain had failed to divide into two. As a result, a proper diagnosis of holoprosencephaly was not made. The Court of Appeal, by a 2:1 majority, allowed the appeal, finding the respondent negligent.

The appellant underwent a routine scan for abnormalities during the early stages of her pregnancy. The radiographer, who was unable to detect the cavum septum pellucidum on the ultrasound scans referred the appellant to the respondent, a leading specialist in foetal medicine. The respondent carried out a scan and reported it as normal. So did two other sonographers who carried out scans on the appellant. In her claim, the appellant alleged that the respondent had failed to exercise reasonable care and skill in evaluating and reporting the scan as normal. The respondent argued that because three tertiary sonographers had failed to detect the abnormality and because the respondent's experts had testified that holoprosencephaly was undetected in 40–60 per cent of cases, it was not negligent of the respondent to have failed to diagnose correctly.

The trial judge held that the defendant had performed the ultrasound procedure carefully and agreed with the defendant's experts that it was not negligent to fail to diagnose holoprosencephaly. Allowing the appeal, Latham LJ highlighted that the issue was not whether the respondent had simply conformed to a proper practice but whether 'a reasonable sonologist, given the information provided by the ultra-sound, could with reasonable care and skill have come to the conclusion that he did'.[52] Here, the sonologist clearly had got it wrong by being deceived by mimic echoes. The appellant's experts highlighted that these echoes were well recognised in the literature, and a reasonable sonographer should not have been misled.[53]

Buxton LJ, agreeing with Latham LJ, further observed that 'the requisite level of skill and judgment simply could not have been exercised, given that the results produced were so disastrously wrong'.[54] The majority's approach provides some support for *Muller*'s dictum on pure diagnosis: it is 'either right or wrong and, if wrong, either negligently so

48 Ibid [93].

49 [2019] EWHC 2280.

50 Ibid [52].

51 [2005] EWCA Civ 1466.

52 Ibid at [33].

53 Buxton LJ made a point to highlight this, quoting the expert who had said: 'We have it here in black and white in the literature that is being presented to us that this is a well recognised pitfall. This is not something that should be a surprise to any expert who is carrying out a scan. This is in black and white, written in 1990.' Ibid [104].

54 Ibid [86].

or not'.[55] Deferring to expert opinion per *Bolam* shifts the focus from actionable negligence to excusability.[56] The law would fail if a doctor who made an elementary mistake in diagnosis was not held to account simply because other medical practitioners sanctioned it. Indeed, Arden LJ who dissented in *Lillywhite*, paradoxically conceded this in applying *Bolam* to exonerate the respondent:

> The *Bolam* principle mattered because the appellant's case was that [the three sonologists] all fell below the standard of care to be expect [sic] of a reasonably competent tertiary sonologist, and *had all made elementary mistakes*. They visualized and measured echoes which they ought to have realized were not echoes of the actual structures they needed to find.[57]

The *Muller* dictum on *Bolam* and diagnosis made its way to Singapore where it was first argued before the Singapore Court of Appeal in *Noor Azlin Bte Abdul Rahman v Changi General Hospital Pte Ltd*.[58] Phang JA, while rightly concluding that *Muller* had not changed the law, referred with approval to the distinction in *Penney* between factual findings and diagnosis. Shortly after *Noor Azlin*, the court delivered its judgment in *Armstrong, Carol Ann v Quest Laboratories Pte Ltd*.[59] Like *Noor Azlin*, *Armstrong* also concerned misdiagnosis of cancer. The respondents had negligently reported a biopsy as benign, when in fact it was a malignant melanoma that resulted in the patient's death four years later.

The trial judge found for the appellant (the surviving spouse of the deceased), noting in colourful language that negligence was obvious on 'plain, old, common sense' and that 'no clever twisting and turning around *Bolam* and *Bolitho* is of any use'.[60] This prompted the respondent to argue on appeal that the judge had erred by failing to apply Bolam/Bolitho in assessing negligence. Phang JA rejected the respondent's argument, highlighting that all the experts agreed that the 2009 slides had indicated malignant melanoma or, at the very least, that the slides did not unequivocally indicate benignity. In reaching his decision, Phang JA emphasised the importance of accurate diagnosis by pathologists, implicitly approving the 'absolute confidence' test applied in *Penney*.[61]

Penney has gained notoriety for its exclusion of *Bolam*/*Bolitho* from factual findings, but, in some ways, it may be more significant for its application of the 'absolute confidence' test to determine negligence in screening cases. The purpose of screening programmes is to exclude the possibility of cancer as a prevention strategy;[62] this purpose would be thwarted if the pathologist is permitted to exercise his or her professional judgement to exercise discretion in reporting screening results as negative when he or she is not absolutely certain of the result. Although *Penney* arose in the context of a general screening exercise, the absolute confidence test has been applied to pathological tests to

55 *Muller v King's College Hospital NHS Foundation Trust* [2017] EWHC 128; [2017] QB 987, [49].

56 A point implicit in Peppitt QC's judgment in *Penney*. See above, text at note 42.

57 *Lillywhite v University College London Hospitals' NHS Trust* [55] (emphasis added).

58 [2019] SGCA 13; [2019] SLR 834.

59 *Armstrong, Carol Ann v Quest Laboratories Pte Ltd* (n 10).

60 *Armstrong, Carol Ann v Quest Laboratories Pte Ltd* [2018] SGHC 66; [2020] 3 SLR 211 at [8].

61 Phang JA emphasised that 'lives depend upon accurate diagnoses by pathologists, and diagnoses had therefore to be undertaken with due diligence. This does not mean that pathologists are expected to get it right all the time, but, *at a minimum* … if a pathologist could not rule out the worst-case scenario, they should have stated so in their report.' Ibid [67].

62 A B Miller, *Cervical Cancer Screening Programmes: Managerial Guidelines* (World Health Organization 1992) 1.

diagnose cancer.[63] It is argued that a distinction should be drawn between diagnosis and screening with *Bolam* excluded only in the latter cases.[64]

Penney and *Muller* featured prominently in the Irish case of *Morrissey & Another v Health Service Executive & Others*.[65] Mrs Morrissey underwent two cervical screenings under the National Cervical Screening Programme run by the government of Ireland. Both results were reported as negative. A few years later, Mrs Morrissey was diagnosed with cancer. Audits of the screening showed that her test results had been wrongly reported as negative. Mrs Morrissey and her husband sued the Health Service Executive which ran the programme and the two laboratories that carried out the screening. Applying the 'absolute confidence' test, the High Court of Ireland gave judgment in her favour. Referring to *Penney*, Cross J noted that the first question in Lord Woolf's trilogy was purely factual and did not engage *Bolam*/*Bolitho*.[66] The second and third questions were to be resolved on the absolute confidence test, not *Bolam*. Expert opinion would be relevant only to assist the court to determine whether a reasonable screener could have had absolute confidence on the facts.

This judgment gave rise to concern that the court had substituted the *Bolam* approach with a separate 'absolute confidence' test.[67] The Supreme Court of Ireland gave leave for a leapfrog appeal to determine, amongst other things, whether the *Bolam* approach continued to apply or whether it had been displaced in cancer screening cases.[68] The court reaffirmed the status quo – *Bolam* applies to diagnosis.[69] The judgment, while defensible and perhaps even inevitable, illuminates two problems – the abdication of the standard of care to the medical profession and the conflation of diagnosis and screening in cancer cases.

Clarke CJ was unequivocal, stating that the court had no role in setting the standard of care, which was to be determined by the profession itself.[70] Clarke CJ rationalised the absolute confidence test as compatible with *Bolam* on the ground that it was the test agreed to by all the experts called in *Penney* and in *Morrissey*. This does not seem right. Surely, the standard is set by the law; it cannot be that, in a subsequent case, if there are experts who disagree that absolute confidence is required in screening cases, the court will not apply the absolute confidence test for screening. Unlike diagnosis, where the doctor may have several options to choose from and expert evidence on accepted practice may be relevant to set the standard, screening involves a binary choice and is based on a single standard – absolute confidence. Experts have a role to assist the court to determine whether the absolute confidence test is met, but they do not set the standard in these

63 *Manning (Executor of the Estate of Jane Louise Manning Deceased) v King's College Hospital NHS Trust* [2008] EWHC 1838. The court held that, unless the confidence level was at least 90 per cent, a pathologist should not report it as negative; to do so would be negligent under *Bolitho* even if another pathologist would also report the result as negative (*Manning* [189]). The decision was upheld on appeal: *Manning & Another v Kings College Hospital NHS Trust* [2009] EWCA Civ 832; (2009) 110 BMLR 175.

64 See, for example, *Morrissey & Another v Health Service Executive & Others* [2020] IESC 6, 3.4, in which the Irish Supreme Court highlighted the distinction between diagnostic tests and screening tests. See generally, N Wald and H Cuckle, 'Reporting the assessment of screening and diagnostic tests' (1989) 96 British Journal of Obstetrics and Gynaecology 389.

65 *Morrissey v Health Service Executive* (n 9).

66 See above, text at note 44.

67 The Irish equivalent of Bolam is *Dunne (an infant) v National Maternity Hospital* [1989] IR 91, but for convenience *Bolam* is used as a generic reference for the approach to medical negligence.

68 *Morrissey v Health Service Executive* (n 64).

69 Ibid at 6.11.

70 Ibid 6.14, 6.15, 6.30.

cases. Clarke CJ recognised this dual role of experts,[71] but by conflating diagnosis and screening was unable to accept absolute confidence as a test for screening cases.

Conclusion

When it comes to treatment and care, doctors often act with imperfect knowledge, are required to make judgement calls and may be constrained by available resources and individual patients' choices. So long as the doctor acts in accordance with a practice accepted as proper, he or she should not be found liable in negligence for an adverse outcome unless there are exceptional reasons to do so. *Bolam* is apt. However, the doctor's duty is not a monolithic whole; it is complex and multifaceted. *Bolam* should not apply to all aspects of the doctor's duty in the same way. Recognising that the duty to inform is a distinct aspect of the doctor's duty, courts have rejected *Bolam* in favour of a different test to determine negligence, namely the *Montgomery* material risk test.

This article has considered whether the time has come to reconsider the application of *Bolam* to diagnosis and screening. In many cases, diagnosis is distinguishable from treatment and care for several reasons. It involves interpretation of objective test results; there are many diagnostic tools to aid doctors; and further investigations are readily available. As medical knowledge progresses and new diagnostic tools become available, the law has a role to hold doctors to contemporary standards. It is argued that, while *Bolam* should continue to set the standard for the duty to diagnosis, the *Bolitho* logical defensibility bar should be relaxed. A judge should be entitled to prefer one expert's opinion over another, so long as the judge is satisfied that the expert's opinion is responsible, reasonable and respectable.

Screening tests and diagnostic tests should not be conflated. Screenings are designed to exclude the possibility of disease, and the absolute confidence test should set the standard. Although Bolam should not apply, medical expert evidence will remain relevant to assist the court to determine whether the standard is met in each case. The arguments advanced in this article should not result in medical professionals readily being found negligent in misdiagnosis cases. However, they will enable courts to play a crucial role in ensuring that doctors and screeners maintain reasonable standards in a world where diagnosis is becoming more of a science than an art, and screenings are conducted as a matter of routine by various service providers.

71 Ibid at 6.37.

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Medical Decision-Making on Behalf of Young Children edited by Imogen Goold, Cressida Auckland and Jonathan Herring

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The recent cases of Charlie Gard, Alfie Evans and Tafida Raqeeb and their prominence in the mainstream media have promoted international debate about the role of parents in decisions pertaining to the provision or non-provision of life-sustaining treatment by healthcare professionals. This involves situations where everyone believed that what *they* wanted was in the child's *best interests*. Everybody had an opinion on these cases – from the Pope, to the next-door neighbour, from the medical professional working in the hospital in question to the medical lawyer charged with arguing for or against a particular position. These opinions spanned all extremities of thought and included chastisement of parents for daring to act against medical advice and repudiation of the same healthcare teams for advocating action against the parents' wishes. The final arbitrator in these cases was not public opinion or medical judgement or parental desire. The final decision-maker was the court. English law proclaims that, in these disputes between parents and doctors, courts have the authority to make the ultimate decision, based on their perception of what is in the child's best interests. That is the backdrop to this edited collection. Cases such as these are not easy to resolve. It is, I believe, fair to say that the best interests standard can never be wholly objective. At the end of the day, these decisions have a profound impact upon the lives of real human beings, and I am convinced that any decision-maker who reads this book will be in a better place to make a balanced and truly informed decision.

Imogen Goold, Cressida Auckland and Jonathan Herring have succeeded in producing a book that maps the approaches taken to decision-making on behalf of young children in diverse and differing jurisdictions. The book considers the following contexts: Belgium, Scotland, Switzerland, Hong Kong, China, Mexico, the United States, Israel, England and Wales, Singapore, Malaysia, Chile, Sweden, Ireland, Canada, France, South Africa, Botswana, Spain, Peru, Argentina, Norway, Australia, Thailand and Greece. This is no small task! A number of issues are teased out, including community responsibility, individual rights and cultural competence, as well as the role of the decision-maker and normative debate in relation to the standard of best interests.

In the 'Introduction' to this book, Goold et al state that the volume has two aims: (1) 'it seeks to examine the legal position of other jurisdictions and to explore whether

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situations have arisen elsewhere and how the courts in other countries have responded to them'; and (2) it critically appraises the current law.[1] They claim that '[i]t is hoped that the experiences of other countries will provide a lens through which to evaluate the approach of the English courts, and to inform the UK's approach to navigating the issue'.[2] They recognise that considerable debate exists in relation to how the interests and rights of the child are balanced with the 'responsibilities and authority of the parents; the role of medical professionals in such disputes; and the extent to which it is legitimate for the courts to intervene in private, familial decisions'.[3] Goold et al argue that the book offers a 'framework' for assessing how English law should respond to these disagreements. It seeks to act as an informative aid for readers in order to enhance their perspectives on the interjurisdictional approaches taken.

The book paints a picture of best interests that is not a linear, one-dimensional one. Rather, different authors show that best interests can be interpreted in different ways, often in line with cultural knowledge and practice. For example, Ben Gray argues that 'there is no such thing as the objective best interests of the child' and, instead of applying a best interests test, the notion of 'cultural competence' ought to be applied.[4] He argues that different interpretations of best interests highlight 'the absence of a common morality', and, if we accept that no such commonality exists, then the views of doctors, bioethicists and judges are actually just 'the assessment of experienced and wise people of what they think the right thing to do is'.[5] He says that this does not mean that their view does not count, but that their opinion is based on their 'cultural background' – a form of 'unconscious bias'.[6] The book brings an informed energy to debates about the best interests of children that have captured the human imagination. Having read the book, we know more about the authority of parents and their ability to arbitrate for the child; we understand that there are cultural limitations to this authority; we have learned much about medical interventions in clinically different contexts; and we understand that harm can befall a child, not only through illness and the protection from illness, but also through over-intervention when there is little hope that that intervention can sustain a quality of life that is in the best interests of the child.

Discussion in the book pertaining to medical decision-making on behalf of young children is grounded in bioethics. Rosalind McDougall develops bioethical debate relating to best interests and discusses whether a different principle (the 'harm threshold') should replace the best interests test. Much of the literature in bioethics concerns this clash between best interests and the harm threshold. However, McDougall argues that an inadequate focus has been placed on the role of the decision-maker.[7] In her view, there is a failure to consider the relationship between *who* ('who is the appropriate decision-maker when there is an entrenched disagreement between doctors and parents about a child's medical treatment?') and *how* ('how should decisions be made?').[8] Thus, she argues that there is a need to move beyond the 'best interests' versus 'harm threshold' arguments. She says that further clarity is required in relation to these issues and that '[i]f we are clear

1 Imogen Goold, Cressida Auckland and Jonathan Herring (eds), *Medical Decision-Making on Behalf of Young Children* (Hart 2020) 3–4.

2 Ibid 4.

3 Ibid 4.

4 Ibid 325.

5 Ibid 329.

6 Ibid 329, 331–333.

7 Ibid 6.

8 Ibid 7.

about the role of the decision-maker and the nature of the question that the decision-maker is answering, we can more deftly employ the most appropriate conceptual tool or tools'.[9] She also argues that conceptual creativity is required.[10] This bioethical discussion provides an ethical lens by which and through which many of the subjects discussed in subsequent chapters relating to the specific jurisdictions can be viewed.

A review such as this could not possibly summarise all of the approaches taken in the countries explored: there are, however, a number of themes that emerge throughout the book, including rights as they apply to parents and children and the role of legal systems in responding to ethical dilemmas surrounding the application of such rights. Cultural competence is identified as a motif within some jurisdictions. The book lays bare the legal and cultural differences that apply to medical decision-making across a number of jurisdictions. The key question of 'Who decides?' finds voice within this book in a range of challenging medical contexts, including end-of-life care and the context of critically ill children.

The book weaves together the complexities that apply when there is contention about parental authority, as it applies in culturally diverse contexts. Goold and Auckland conclude that resolution to contention lies in bringing together all the voices within all the contentious debates in 'a manner aimed at informed and culturally sensitive consensus building'.[11] They contend that the journey towards resolution includes recognising the differences within communities, within cultures, within the way in which the best interests of the child can mean different things in different situations. This argument is well made in the book and is founded on a rich vein of authority and an insightful analysis of contentious contexts in a range of jurisdictions.

Paradoxically, a primary strength of the book may also be perceived to be a weakness: each of the contributors keeps very clearly to the assigned remit. There is great certainty in each chapter in terms of its depiction of a particular aspect of decision-making on behalf of children. This adds clarity to the book, and those who wish to be immersed in this very interesting topic will find depth of research and richness of debate therein. However, the reader who likes to meander in and out of a key topic and to be swayed by tangential arguments and pathways that intersect key messages, and sometimes detract attention from them, will not, perhaps, be entranced by the almost clinical attention afforded by all contributors to the key debates. To be honest, there is a certain tedium, occasionally, attached to the faultless rigour that applies to reading similar material within different contexts from, of course, differing and interesting perspectives. That is a small flaw, if, indeed, a flaw it is because, in my view, the aims of the book are well met, the objectives are achieved and conclusions made are fascinating and purposeful and, if applied, have the potential to amend contentious practice.

I urge anyone who is interested in medical law and ethics to read this book. The way in which the law is presented and analysed through different jurisdictional vistas is a *tour de force*. You will not be disappointed. You will walk away from this book feeling that you have learned something important about the application of law at an interjurisdictional level. You will jump from the connection between parental decision-making and the manifestation of religious belief in Switzerland to the role of Confucian ethics in Hong Kong. You will be intrigued by the fact that 'the courts implicitly deem children to be

9 Ibid 16.

10 Ibid 16.

11 Ibid 359.

property that parents co-own' in China.[12] You will learn about the relevance of sanctity of human life in Israel and the Latin American context in Chile. You will read about constitutional restraints in Canada and preserving family relationships in Botswana. All the other intriguing issues that are found in the paragraphs and pages of this wonderful book will be a source of interest and knowledge to the astute reader.

It is hard to conceive of a more onerous responsibility than that of making medical decisions on behalf of young children. Think of the anguish of parents confronted with medical opinion that asserts that the best step for their beloved child is removal of life-sustaining treatment. These parents have lived through every joyful, painful and often sickness-filled moment of their precious child's life. In the main, they want and need to sustain that life for even a few moments longer, no matter, sometimes, at what cost. Think of the medical consultant, the oncologist who has approved and supervised the most invasive and painful medical procedures that were initially aimed at improving and extending life, but now that consultant comes to the sad realisation that these treatments have little medical benefit and, in fact, will cause pain and suffering to the child. Think of the judge in the court of law who has to bring wisdom to bear upon these competing stances and hold fast to the idea that the child and the best interests of the child are what is paramount. This book has provided us with a window seat to the evolving medico-legal and familial drama that applies to these sad and emotionally challenging multijurisdictional cases.

12 Ibid 71.