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NORTHERN IRELAND LEGAL QUARTERLY

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Beyond trade: implementing the Ireland/ Northern Ireland Protocol's human rights and equalities provisions

C R G Murray and Clare A G Rice*

Newcastle University

Correspondence email: colin.murray@newcastle.ac.uk

ABSTRACT

The protections for rights and equality might be placed at the forefront of the EU/UK Withdrawal Agreement's Protocol on Ireland/Northern Ireland, but they have been overshadowed by debates over the Protocol's trade provisions. This marginalisation of these elements of the Protocol is problematic. Rights and equalities protections have long been a contested aspect of Northern Ireland's constitutional arrangements, and there is thus every possibility that the limits of these new arrangements will be tested upon their entry into force. Moreover, unlike the aspects of the Protocol relating to trade, which can ultimately be terminated by the Northern Ireland Assembly, the rights and equalities aspects of the Protocol will continue in force independent of such a vote. As such, these provisions could even be said to provide the kernel of an (uncodified) Northern Ireland Bill of Rights.

Keywords: human rights; Brexit; oversight mechanisms; Northern Ireland Bill of Rights.

INTRODUCTION

Cross-border trade concerns have often dominated Northern Ireland's place in Brexit debates, to the virtual exclusion of the European Union (EU)/United Kingdom (UK) Withdrawal Agreement's protections for rights and equalities. These commitments are nonetheless significant. Article 2 of the Agreement's Protocol on Ireland/Northern Ireland (PINI) asserts that Brexit will result in 'no diminution of rights, safeguards or equality of opportunity' and obliges

* Reader in Public Law, Newcastle University, and Research Associate, Newcastle University. Our thanks to Sylvia de Mars (Newcastle University), Aoife O'Donoghue (Durham University), Ben Warwick (Birmingham University) and Htaik Win (Northern Ireland Human Rights Commission) for their advice and encouragement regarding this article. This research is supported by the ESRC through Grant ES/S006214/1. Paper updated and hyperlinks last accessed on 29 June 2021.

the UK to fulfil this obligation through ‘dedicated mechanisms’.¹ These protections were thus agreed with explicit regard to the Belfast/Good Friday Agreement’s provisions on ‘rights, safeguards and equality of opportunity’.² Indeed, from the early phases of the withdrawal negotiations, the UK Government had accepted that the Belfast/Good Friday Agreement committed it to ‘ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law’.³ Given how sensitive rights and equality issues remain within Northern Ireland’s political discourse, article 2 also provided an important platform upon which Northern Ireland’s politicians could agree to re-engage with power sharing in January 2020 and even to once again debate the prospect of a Northern Ireland Bill of Rights. Article 2 is nonetheless open to different political interpretations, and, although this might have contributed to making it less immediately contentious than trade aspects of the Protocol, it does not insulate it from disagreements once it comes to be relied upon in legal disputes.

This article addresses how the Withdrawal Agreement and its implementing legislation engage with and in important regards reshape some of the arrangements established under the Belfast/Good Friday Agreement. In doing so, we build upon a large body of work examining the 1998 Agreement’s rights and equality commitments⁴ and, more specifically, on the prospect of a Northern Ireland Bill of

1 *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (30 January 2020), PINI, art 2(1).

2 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (1998) 2114 UNTS 473, Multi-Party Agreement, Rights, Safeguards and Equality of Opportunity, para 1.

3 *Joint Report from the Negotiators of the European Union and the United Kingdom Government on progress during phase 1 of Negotiations under article 50 TEU on the United Kingdom’s orderly Withdrawal from the European Union*, TF50 (2017) 19 (8 December 2017) para 53.

4 See, for example, C Harvey, ‘Building bridges – protecting human rights in Northern Ireland’ (2001) 1 *Human Rights Law Review* 243; C Bell, C Campbell and F Ní Aoláin, ‘Justice discourses in transition’ (2004) 13 *Social and Legal Studies* 305; L Mallinder, ‘Metaconflict and international human rights law in dealing with Northern Ireland’s past’ (2019) 8 *Cambridge International Law Journal* 5; C Murray, A O’Donoghue and B Warwick, ‘The implications of the Good Friday Agreement for UK human rights reform’ (2016–2017) 11–12 *Irish Yearbook of International Law* 71.

Rights.⁵ We detail how the Protocol and its implementing legislation impact upon the roles of the Northern Ireland Assembly, the UK Government and Westminster Parliament, especially in light of how fraught the implementation of other aspects of the Protocol became after the announcement of the UK Internal Market Bill in September 2020. We thereafter consider the enforcement of these terms and the transformation of the roles of the Equality Commission for Northern Ireland (ECNI) and Northern Ireland Human Rights Commission (NIHRC) under the terms of the Protocol. In light of this extensive overhaul of human rights and equality protections applicable to Northern Ireland, we conclude by considering whether, despite a Bill of Rights still appearing a distant prospect, the Protocol means that Northern Ireland will in practice operate an increasingly distinct human rights and equality regime to elsewhere in the UK.

THE PROTOCOL'S HUMAN RIGHTS AND EQUALITY CONSTRAINTS UPON LEGISLATIVE AND EXECUTIVE ACTION

Before Brexit: devolved competences and EU law

The complex and novel nature of power sharing envisaged by the 1998 Agreement is reflected in the manner in which competences for areas of law making were devolved to the Assembly under the Northern Ireland Act 1998. This framework was unique to Northern Ireland. In contrast to Senedd Cymru (which did not gain comparable powers until the enactment of the Wales Act 2017), the Northern Ireland Assembly enjoyed a range of primary law-making powers from the outset of devolution. By comparison to the Scottish Parliament, however, fewer areas of competence were transferred to Stormont under the 1998 legislation, and Scotland's powers and competences (for example, over income tax and the electoral system) have only increased in subsequent

5 Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (10 December 2008). For commentary, see P Munce, 'Unionists as "court sceptics": exploring elite-level Unionist discourses about a Northern Ireland Bill of Rights' (2013) 15 *British Journal of Politics and International Relations* 647; A Smith and L Green, 'The processes of the "unfinished businesses" of the Good Friday/Belfast Agreement: an all-island Charter of Rights and the Northern Ireland Bill of Rights' (2016–2017) 11(2) *Irish Yearbook of International Law* 23; A Schwartz and C Harvey, 'Judicial empowerment in divided societies: the Northern Ireland Bill of Rights process in comparative perspective' in C Harvey and A Schwartz (eds), *Rights in Divided Societies* (Hart 2012) 148.

rounds of devolution.⁶ The Northern Ireland Act 1998 details two sets of competences that the Northern Ireland Assembly cannot exercise: those relating to excepted and reserved matters. Under this schema, all areas of competence which were not expressly reserved or excepted amounted to transferred competences.⁷

Excepted matters, listed in schedule 2 of the Northern Ireland Act 1998, amount to issues of national importance to the UK as a country. As with the arrangements for Scotland and Wales, it is not envisaged that such issues (including the Crown, defence and national security, honours, nationality law and currency) will ever fall within the remit of devolved institutions. Schedule 3's reserved matters, by contrast, provide an intermediate category comprised of those areas of competence which could potentially be devolved but for sensitivities over the Northern Ireland context. Under the 1998 scheme, it was envisaged that these competences (including consumer protection, telecommunications and broadcasting, and civil aviation) would continue to be managed by Westminster until Northern Ireland's power-sharing institutions had shown themselves to be effective.⁸

The movement of areas of competence was therefore clearly envisaged in the 1998 devolution scheme. The 2007 restoration of power sharing paved the way for new powers to be transferred to the Assembly which had hitherto been reserved to Westminster. The Northern Ireland Assembly passed legislation establishing a Department of Justice, and in April 2010 powers over policing, prisons and criminal law were transferred to the competence of the Assembly.⁹ Legislation in 2014 reclassified the composition of the Assembly from an excepted to a reserved matter (allowing for the subsequent reduction in the number of Assembly seats).¹⁰ The Corporation Tax (Northern Ireland) Act 2015 also made provision, not yet in force, for the transfer of powers over Northern Ireland's corporation tax rate to Stormont.

6 The powers and competences provided under the Scotland Act 1998 were extended under the Scotland Act 2012 and, to give effect to the promises of 'Devo Max' made during the 2014 independence referendum campaign, in the Scotland Act 2016. See N McEwen, 'A constitution in flux: the dynamics of constitutional change after the referendum' in A McHarg, T Mullen, A Page and N Walker (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford University Press 2016) 225.

7 B Dickson, *Law in Northern Ireland* 3rd edn (Hart 2018) 32–34.

8 For example, the 1998 Agreement foreshadowed the eventual devolution of justice and policing to Northern Ireland, 'as appropriate'; Belfast/Good Friday Agreement 1998 (n 2 above) Multi-Party Agreement, Policing and Justice, para 7.

9 Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010 (SI 2010/977). See G Anthony, 'The devolution of policing and criminal justice' (2011) 17 *European Public Law* 197.

10 Northern Ireland (Miscellaneous Provisions) Act 2014, s 6.

EU law affected many aspects of competences transferred to Northern Ireland's institutions, on issues from the environment to agriculture, to rights and equality. For as long as the UK was part of the EU, devolution required that Stormont carry into effect EU law which required transposition, such as EU directives, insofar as they fell within areas of devolved competence. These arrangements meant that there could be four different sets of measures implementing EU law within the UK, providing for a high degree of regulatory diversity.¹¹ Through this embrace of diversity, the EU order started 'catching up with the realities of the rise of devolution and decentralisation taking place across many parts of Europe'.¹²

Even when devolution has been misfiring in Northern Ireland, rights and equality obligations, including those derived from EU law, have never been far from leading the agenda. Where the Northern Ireland Assembly has failed to legislate to provide for rights and equality protections as required by EU law, the UK Government has stepped in to fulfil its obligations even when the Assembly was functioning.¹³ In periods when the Assembly has been suspended, moreover, Westminster has granted the Northern Ireland Secretary specific competences to legislate for same-sex marriage and reproductive rights.¹⁴

Before Brexit, the Northern Ireland Assembly had no competence to make law that was incompatible with EU law.¹⁵ Ministers of the Northern Ireland Executive are also bound by EU law in the exercise of their functions.¹⁶ The European Union (Withdrawal) Act 2018 altered these strictures, changing the restriction on the Assembly's law-making powers to the extent that 'EU law' would only cover retained laws (measures translated into domestic law by Westminster) once Brexit took effect. This enactment, however, was very much a holding statement; it could not account for how Northern Ireland's institutions would have to continue to engage with EU law because negotiations remained ongoing over the special arrangements which would apply to Northern Ireland upon Brexit.

11 See Case C-428/07 R (*Horvath*) v *Secretary of State for the Environment, Food and Rural Affairs* (2009) ECLI:EU:C:2009:458.

12 J Hunt, 'Devolution and differentiation: regional variation in EU law' (2010) 30 *Legal Studies* 421, 423.

13 The Sex Discrimination (Amendment of Legislation) Regulations 2008, SI 2008/963. See A Smith, M McWilliams and P Yarnell, 'Does every cloud have a silver lining?: Brexit, repeal of the Human Rights Act and the Northern Ireland Bill of Rights' (2016) 40 *Fordham International Law Journal* 79, 126.

14 Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, s 4.

15 Northern Ireland Act 1998, s 6(2)(d).

16 *Ibid* s 24(1).

At this point, devolution existed in a half-life, following the Assembly's suspension in January 2017. The Northern Ireland Executive's departments continued to function without ministerial direction. Notwithstanding the additional powers provided to the Northern Ireland Secretary and civil servants under legislation passed in 2018¹⁷ and 2019,¹⁸ the UK Government remained concerned that there was not the capacity for civil servants to take the 'proactive decisions that are needed on public services or the economy'.¹⁹ The extraordinary decision-making capacity which was being vested in civil servants had made little impact in practice, not least because of their concerns over the probity of taking decisions without ministerial authorisation.²⁰

The grant of further powers to civil servants was therefore unlikely to bridge Northern Ireland's yawning governance shortfall, making formal direct rule all but inevitable in a no-deal situation. Once Boris Johnson's Withdrawal Agreement was concluded in October 2019, the supporting legislation was thus drafted both to allow the UK Government to manage all aspects of its implementation and with one eye towards the Assembly's possible restoration. When the outcome of the December 2019 general election cost the Democratic Unionist Party (DUP) its pedestal to speak for Northern Ireland's interests provided by its confidence-and-supply arrangement with the Conservative Party, the pieces quickly fell in place for the Assembly to be restored.²¹

The miracle on the Wirral and *New Decade*, New Approach

For all the hyperbole that surrounded Boris Johnson's new deal, first sketched out in private meetings at a Wirral hotel between the UK Prime Minister and Ireland's Taoiseach, the main body of the Withdrawal Agreement remained unchanged from Theresa May's deal. Even within the Protocol on Ireland/Northern Ireland, the human rights and equality elements of May's deal were untouched; what was article 4 of the 2018 version of the Protocol became, word-for-word,

17 Northern Ireland (Executive Formation and Exercise of Functions) Act 2018.

18 Northern Ireland (Executive Formation etc) Act 2019.

19 HC Deb 5 September 2019, vol 664, col 363.

20 Constitution Committee, Northern Ireland (Executive Formation and Exercise of Functions) Bill (2018) HL 211, para 24. These legislative developments followed the outcome of the *Arc21* case (*Application by Colin Buick for judicial review* [2018] NICA 26) in which the Northern Ireland Court of Appeal found civil servants approving decisions which would ordinarily require ministerial approval unlawful.

21 See J Tonge and J Evans, 'Northern Ireland: From the Centre to the Margins' (2020) 73 *Parliamentary Affairs* 172, 180–184.

article 2 of the 2019 version.²² Article 2(1) obliges the UK to ensure that there is no diminution of rights and equality standards envisaged by the Belfast/Good Friday Agreement in Northern Ireland because of Brexit.²³ This ensures that the rights and equality protections in Northern Ireland's law should not fall below the base line of those protections which were operating at the time of Brexit as a result of the UK's withdrawal from the EU.

Brexit cannot be used to create an opportunity to reduce these protections. Six of EU law's directives on equality and non-discrimination are explicitly preserved in effect in Northern Ireland's law through this provision,²⁴ but article 2(1) also reaches beyond these measures, by 'including' them alongside other EU law relevant to the Belfast/Good Friday Agreement's provisions on rights, safeguards and equality of opportunity.²⁵ These six directives do not, of themselves, provide the entire picture of the EU equality *acquis*.

Despite the prominent concerns that after Brexit the EU Charter of Fundamental Rights 'is very unlikely to have any effect in the domestic law of any part of the UK',²⁶ article 2(1) opens up the possibility of the EU's rights architecture continuing to apply with regard to any EU law which remains in effect in Northern Ireland. The UK Government has maintained throughout the Brexit process that the Charter does not create standalone rights separate from other rules and principles of EU

22 See C Murray and B Warwick, 'The strange case of Northern Ireland's disappearing rights in the EU–UK withdrawal negotiations' (2019) 19 *European Yearbook on Human Rights* 35, 56–58.

23 Belfast/Good Friday Agreement 1998 (n 2 above).

24 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

25 See S de Mars, C Murray, A O'Donoghue and B Warwick, *Rights, Opportunities and Benefits' in Northern Ireland after Brexit* (NIHRC and Irish Human Rights and Equality Commission 2020) 41.

26 Dickson (n 7 above) 125.

law,²⁷ but the case law of the Court of Justice of the European Union (CJEU) is increasingly placing weight upon the Charter as a source of enforceable rights.²⁸ This means that the terms of non-diminution under article 2(1) of the Protocol could thus be subject to expansive readings which encompass aspects of the Charter that can be linked to the 1998 Agreement's rights and equality provisions.²⁹ But the extent of inherent alignment (rather than alignment with new EU rights and equality mechanisms through Joint Committee processes, as discussed below) will depend upon how these interests are protected, particularly by the Protocol's 'dedicated mechanisms'.³⁰ Article 2(2) explicitly connects oversight of these protections to the workings of the NIHRC, the ECNI and the Joint Committee of the Human Rights Commissions of Northern Ireland and Ireland.

Article 18 of the Protocol was, by contrast, a significant change introduced as a result of Boris Johnson's renegotiation of the Protocol. Under this provision, the Assembly will be permitted to vote once every four years, starting in 2024, on the continuation of provisions relating to trade as outlined in articles 5 to 10 of the Protocol. The Northern Ireland Assembly is not simply a bystander in the Protocol, but is an active actor within it, and the provisions within the Protocol are pegged to the idea of a functioning Assembly. The Protocol's default position is that the arrangements governing Northern Ireland's relationship with the EU Single Market for goods and EU Customs Union will persist unless the Assembly opts to terminate them.³¹ The requirement that these special arrangements for Northern Ireland must receive

27 See HM Government, *Legislating for the United Kingdom's Withdrawal from the European Union* (Cm 9446 2017) para 2.23, and Department for Exiting the European Union, *Charter of Fundamental Rights of the EU: Right by Right Analysis* (5 December 2017) 4.

28 See, for example, C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer* ECLI:EU:C:2018:871, concerning the horizontal application of art 31 of the Charter on working conditions; E Frantziou, '(Most of) the Charter of Fundamental Rights is horizontally applicable: ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, Bauer et al' (2019) 15 *European Constitutional Law Review* 306.

29 This was acknowledged by the UK Government in August 2020; Northern Ireland Office, 'UK Government commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: what does it mean and how will it be implemented?' (2020) para 15.

30 There remains the possibility that art 2's arrangements might be little more than a 'snapshot' of the protections existing at the point of Brexit, given its explicit focus on the equality directives, but narrow readings would raise concerns regarding the terms of the Belfast/Good Friday Agreement 1998 (n 2 above); Murray and Warwick (n 22 above) 59–60.

31 See C Murray and C Rice, 'Into the unknown: implementing the Protocol on Ireland/Northern Ireland' (2020) 15 *Journal of Cross Border Studies in Ireland* 17, 25.

the Assembly's periodic approval will, moreover, only operate if the Assembly is functional. With Northern Ireland's two largest parties, Sinn Féin and the DUP, maintaining very different perspectives over Brexit and the implementation of the Protocol, there is every possibility of a further period of institutional stalemate in the future.

The Assembly's three-year suspension demonstrated that rights and equalities remain intensely contested elements of Northern Ireland's politics. This has been seen in division on matters ranging from language rights³² to citizenship (particularly in the context of the *DeSouza* case),³³ while Sinn Féin's promotion of what it has framed as its 'equality agenda' was met with DUP opposition.³⁴ The Brexit negotiations had placed an emphasis on the fractured nature of the relevant legal protections, and Westminster's action on reproductive rights and same-sex marriage had illustrated the limits to devolution. January 2020, however, marked a turning point in the political travails of Northern Ireland with the conclusion of the *New Decade, New Approach*³⁵ agreement and a return to the Northern Ireland Assembly. This agreement provided a new agenda of ambitions to be addressed within Northern Ireland's institutions, while also reconstituting the basis of a working relationship between its two largest parties, Sinn Féin and the DUP.

Although *New Decade, New Approach* was reached in full knowledge of the content of the revised Withdrawal Agreement and its Protocol on Ireland/Northern Ireland, references within it to Brexit were limited. The deal specifically committed the UK Government to introducing primary legislation on the linkages between Northern Ireland and the remainder of the UK internal market, and not simply effecting changes through the powers contained in the European

32 The debate over language rights, particularly regarding an Irish Language Act, was not confined to the political sphere. Civil society and activist bodies were central in this debate and helped to shape political approaches on the issue through their engagement with parties and the processes which eventually led to the signing of the *New Decade, New Approach* deal; see D Mac Síthigh, 'Official status of languages in the United Kingdom and Ireland' (2018) 47 *Common Law World Review* 77.

33 *Secretary of State for the Home Department v DeSouza* (2019) EA/06667/2016 (UKUT). See also A Harvey, *A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998* (NIHRC and Irish Human Rights and Equality Commission 2020).

34 This has been delicately described as a 'differential affinity to rights'; R Whitaker, 'Debating rights in the new Northern Ireland' (2010) 25 *Irish Political Studies* 23, 27.

35 *New Decade, New Approach* (8 January 2020). For an overview, see also S Haughey, 'Back to Stormont: the New Decade, New Approach agreement and what it means for Northern Ireland' (2020) 91 *Political Quarterly* 134.

Union (Withdrawal Agreement) Bill then before Parliament.³⁶ Other elements addressed the role of Northern Ireland's institutions in the post-Brexit arrangements. These included a (short-lived) Executive Sub-committee on Brexit,³⁷ Brexit-specific commitments of support from the UK and Irish Governments,³⁸ and measures to increase the resilience of the institutions to, in part, withstand the challenges that Brexit would present between parties with different perspectives on the matter.³⁹ The Protocol was therefore already being built upon as a fixed point in Northern Ireland's constitutional arrangements. *New Decade, New Approach* also provided for the establishment of an Ad Hoc Committee on a Bill of Rights, reflecting the Protocol's special arrangements and the prominence of rights and equality debates in Northern Ireland's political discourse.⁴⁰

Despite this, one of the restored Assembly's first actions was to unanimously pass a motion rejecting the revised Withdrawal Agreement.⁴¹ In contrast to the divergent perspectives on Brexit within the Assembly, there was a united sense of purpose that the new Withdrawal Agreement and Protocol were bad for Northern Ireland and, for different reasons, that it should not be legislated for. In addition, similar positions were also adopted in Scotland⁴² and Wales.⁴³ This showed that none of the devolved administrations approved of the Withdrawal Agreement, and further, enshrining it in UK law demonstrated an alteration to the devolution legislation, including the Northern Ireland Act 1998.⁴⁴ Such a measure would ordinarily require the devolved legislatures to approve its terms through Legislative Consent Motions, under the terms of the Sewel Convention. Secure in its advice that such an authorisation was not a legal requirement, the UK Government brushed aside refusals of consent from all three devolved legislatures, a course softened only by Michael Gove's platitudes that this was 'a significant decision and it is one that we have not taken lightly'.⁴⁵

36 Ibid annex A, paras 8–12.

37 Ibid para 3.5.

38 Ibid annexes A and B.

39 Ibid pt 2, paras 14–18.

40 Ibid pt 2, para 28.

41 Official Report of the Northern Ireland Assembly, vol 125(3), 2–27 (20 January 2020).

42 Official Report of the Scottish Parliament, cols 46–93 (8 January 2020).

43 Official Report of the Welsh Parliament, paras 159–323 (21 January 2020).

44 See, in particular, the European Union (Withdrawal Agreement) Act 2020, sch 6.

45 See M Gove, 'Update on the EU (Withdrawal Agreement) Bill' (23 January 2020) HCWS60.

The European Union (Withdrawal Agreement) Act 2020

The UK Government and rights/equality safeguards

The European Union (Withdrawal Agreement) Act 2020 provided no detailed exposition of how the Withdrawal Agreement was to be given effect, but instead provided the UK Government with sweeping powers to implement the Protocol's provisions by adding a new section 8C into the European Union (Withdrawal) Act 2018. Under this provision a UK Government Minister 'may by regulations make such provision as the Minister considers appropriate ... to implement the Protocol on Ireland/Northern Ireland in the withdrawal agreement'.⁴⁶ This enabling legislation is framed in a manner which is exceptionally broad, permitting Westminster to manage the Protocol should the Assembly collapse or should Northern Ireland departments neglect to advance or implement necessary measures. As long as such activity is appropriate to the purpose of implementing the Protocol, it permits UK Government ministers to make any new law or amend any existing law, including statutes (and even this parent statute),⁴⁷ by means of secondary legislation.

Much of the explicit content of section 8C covers the making of secondary legislation with regard to the Withdrawal Agreement's arrangements for Northern Ireland as a territory which would continue to apply the rules of the EU single market for goods after Brexit. Nonetheless, a catch-all provision applies these powers to all aspects of the Protocol and the EU law measures referenced therein, meaning that they apply equally to the Protocol's rights and equality protections.⁴⁸ The limitations on these new powers must therefore be understood if the Belfast/Good Friday Agreement's principle of non-diminution of rights protections is to be upheld. The first important factor is procedural; applications of these powers which seek to amend existing primary legislation or retained EU law require an affirmative vote in the House of Commons.⁴⁹ This protection is, however, of limited practical effect when the UK Government enjoys the support of a substantial majority of MPs. An affirmative vote, moreover, does not transform legislation which would breach the UK's international human rights and equality commitments into compliant legislation.

It is significant that these powers have been parachuted into the European Union (Withdrawal Agreement) Act 2020. As such, they must

46 European Union (Withdrawal) Act 2018, section 8C(1)(a).

47 Ibid s 8C(2).

48 Ibid s 8C(7).

49 See Constitution Committee, *European Union (Withdrawal Agreement) Bill: Interim Report* (2019) HL 21, para 81.

be considered in light of the legal limitations within that statute upon the operation of ministerial powers to make statutory instruments to address statute book deficiencies arising from the UK's withdrawal from the EU for two years after the end of Brexit's transition/implementation period, meaning until 31 December 2022.⁵⁰ The most important of those restrictions, in the Northern Ireland context, is the Patten Amendment, a concession made by Theresa May's Government to parliamentary pressure during the passing of the original 2018 Act.

This amendment was contained in section 10 of the 2018 Act. For Morgan LCJ, who had cause to consider it during the *McCord* challenge to the legality of the UK leaving the EU without a Withdrawal Agreement, section 10 provided 'some protection for the existing arrangements under the Agreement to function'.⁵¹ In general terms, this protection requires ministers to use their powers under the Act in 'a way that is compatible with the terms of the Northern Ireland Act 1998'⁵² and to have 'due regard' for the UK's commitments under the 2017 UK/EU Joint Report.⁵³ It also, more specifically, excludes the use of section 8 powers to 'diminish any form of North–South cooperation'⁵⁴ or to 'create or facilitate [new] border arrangements between Northern Ireland and the Republic of Ireland'.⁵⁵ These specific protections, however, only apply to the original section 8 powers, not the additional section 8C powers regarding the Protocol. Section 10, moreover, does not extend to other legislation which was essential in the UK's implementation of its Belfast/Good Friday Agreement commitments, notably the Human Rights Act 1998.

It might nonetheless be possible to use the section 10 restrictions to protect against any ministerial action, including moving statutory instruments, which diminishes human rights or equality protections relevant to Northern Ireland, on the basis that ministers must have 'due regard' for the UK's Joint Report commitments.⁵⁶ Given that the commitments on rights and equality were subsequently given legal expression in article 2 of the Withdrawal Agreement's Protocol, it would be difficult for UK Government ministers to argue that any use of this power to diminish rights and equality protections applicable to Northern Ireland is acting with 'due regard' to these commitments. Having 'due regard', however, is not an outright bar on ministerial

50 European Union (Withdrawal) Act 2018, s 8(8).

51 *In re McCord* [2019] NICA 49, [118] (Morgan LCJ).

52 European Union (Withdrawal) Act 2018, s 10(1)(a).

53 *Ibid* s 10(1)(b).

54 *Ibid* s 10(2)(a).

55 *Ibid* s 10(2)(b).

56 EU–UK Phase 1 *Joint Report* (n 3 above) paras 52–53.

action, and much therefore depends on the approach of the courts to any such challenge. The UK Government, moreover, could always seek to circumvent these strictures using primary legislation (explored in more depth below).

The Northern Ireland Assembly and rights/equality safeguards

That the provisions regarding the Northern Ireland Assembly's powers to implement the Protocol overlap with the powers of the UK Government is unsurprising given that there was no clear indication that the Assembly would be functional to undertake any of the implementation when the Withdrawal Agreement Bill was first drafted. Even so, the legislation was particularly light on detail with regard to Stormont's role, to the extent that it provided no initial domestic law basis for the operation of the Protocol's 'Stormont lock'.⁵⁷ The approval mechanism, however, relates only to articles 5 to 10 of the Protocol. Stormont's rejection of these arrangements at one of the periodic approval points beginning in 2024 would therefore not affect the operation of the rights and equalities protections provided under article 2.⁵⁸

Section 22 of the Withdrawal Agreement Act 2020 gave the Assembly, within its areas of competence, comparable powers to alter existing law as required to implement the Protocol as those granted to UK Government ministers. These powers became part 1C of schedule 2 of the European Union (Withdrawal) Act 2018. As with the UK Government's powers, these powers must be used for the purpose of implementing or dealing with matters arising out of the Protocol. These powers are restricted by the limitations to competences of the devolved institutions, to which schedule 2 of the 2018 Act are subject.⁵⁹ Under the new part 1C, provision is made for the Assembly and the UK Government acting jointly, which might be particularly important on issues at the boundaries of the Assembly's competences. The Patten Amendment's general obligations to act in a manner compatible with the Northern Ireland Act 1998 and have 'due regard' for the pledges made in the 2017 UK/EU Joint Report apply to devolved institutions as they do to UK Government ministers.⁶⁰ The overlap between the

57 A Statutory Instrument was passed in December 2020 to address this in the form of the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020, SI 2020/1500, which inserts a new s 56A and sch 6A into the Northern Ireland Act 1998.

58 See K Hayward, D Phinnemore and M Komarova, *Anticipating and Meeting New Multilevel Governance Challenges in Northern Ireland after Brexit* (UK in a Changing Europe May 2020) 18.

59 European Union (Withdrawal) Act 2018, s 11.

60 *Ibid* s 10(1).

UK Government's powers and those of the Assembly thus speaks to a pervasive uncertainty over the continued operation of power sharing in Northern Ireland, and to the UK Government seeking to immediately have the powers at its disposal to manage Northern Ireland-related aspects of Brexit should an untimely collapse occur.

Further specific limitations relevant to the UK's commitments under article 2 of the Ireland/Northern Ireland Protocol are imposed under schedule 3 of the Withdrawal Agreement Act. The Assembly will have no competence to make law which is incompatible with article 2,⁶¹ and Ministers of the Northern Ireland Executive are to be restricted from exercising their functions in a manner which is incompatible with this Protocol provision.⁶² The scope of these restrictions is potentially broad. Article 2's commitment to non-diminution of rights and equality protections extends beyond the non-discrimination directives that the UK is specifically required to retain as part of Northern Ireland's law; the UK's obligation 'include[s]' these protections, but it does not stop at them. These new provisions could therefore provide the basis of judicial review challenges against any laws passed by the Assembly or exercises of powers by Ministers of the Northern Ireland Executive which arguably undermine rights and equalities protections.

In general, these human rights and equality aspects of the Withdrawal Agreement and the Protocol have hitherto remained relatively uncontroversial within Northern Ireland politics. Long-standing disputes over rights and equalities have manifested in proxy struggles, particularly around the *DeSouza* case, as opposed to extensive debate on the substantive content and implications of article 2.⁶³ Particularisation, it would appear, matters. Heated political disputes over rights have proven difficult to sustain in the abstract. For all that trade issues have to date been pushed to the fore, once article 2 takes effect and starts to impact upon particular cases, political dispute over its terms is sure to follow.

The UK Internal Market Act 2020

Article 2 of the Protocol and the commitment to non-diminution of rights in Northern Ireland might be the antithesis of the prominent agenda for a clean-cut exit from the EU, but these arrangements have

61 Northern Ireland Act 1998, s 6(2)(ca).

62 Ibid s 24(1)(aa).

63 The nationalist SDLP and Sinn Féin parties supported the case, while unionist parties broadly remained opposed to the premise of the case. One notable exception was the UUP's former leader Mike Nesbitt, who publicly spoke in support of the case and was widely criticised by his party for doing so. For a summary of key political perspectives on the case, see E DeSouza, 'The DeSouza case: an explainer' (13 November 2019).

hitherto generated little of the opposition which has been focused upon the Protocol's measures relating to Northern Ireland's place in the EU Single Market for goods. But, before addressing the enforcement of the Protocol's rights and equalities protections, we must address the destabilising effect of part 5 of the United Kingdom Internal Market Bill, introduced in September 2020, and the Northern Ireland Secretary's incendiary admission that the Bill's provisions would allow the UK Government to breach its commitments under the Protocol in 'a very specific and limited way'.⁶⁴

Clauses 42 and 43 of the Bill, as introduced,⁶⁵ sought to give the UK Government the power to take steps with regard to customs declarations and state aid which, by Brandon Lewis's own admission, would be contrary to the UK's obligations to give effect in domestic law to the provisions of the Ireland/Northern Ireland Protocol relating to customs declarations and state aid.⁶⁶ Clause 45, moreover, sought to permit ministers to take such action 'notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent', effectively curtailing any possibility for legal challenge against this breach in the domestic courts.

Although these provisions related specifically to state aid and barriers to trade, rights and equality protections were soon drawn into the narrative around the legislation in Northern Ireland Assembly debates:

The dreams of future generations cannot be crushed by the imposition of a Tory nightmare vision of the internal market. The provisions of the internal market [Bill] risk undermining the human rights and equality protections in the Irish protocol, which states that there should be no diminution of rights.⁶⁷

That the Internal Market Bill's provisions did not relate to article 2 might be thought to mark such claims as game playing, but they are difficult to dismiss offhand. The curtailing of the ordinary workings of judicial oversight, even with the amendment of clause 45 to deny any power to interfere with incorporated provisions of the European Convention on Human Rights (ECHR), itself imperilled the right of access to the

64 Brandon Lewis MP, HC Deb 8 September 2020, vol 679, col 509.

65 All references herein are to the Bill as introduced to the House of Commons in September 2020.

66 Withdrawal Agreement (n 1 above) art 4.

67 M Anderson MLA, Official Report of the Northern Ireland Assembly, vol 130(7), 54 (22 September 2020).

courts and drew prompt criticism from the NIHRC and ECNI.⁶⁸ In more emotive terms, Lord Neuberger presented this measure as being on a ‘very slippery slope’ towards ‘dictatorship’ or ‘tyranny’.⁶⁹

The introduction of legislation which sought to circumvent obligations assumed not 12 months previously, moreover, called into question the UK Government’s attitude towards upholding other Withdrawal Agreement commitments. At the time the Internal Market Bill was introduced, the NIHRC and ECNI’s putative special oversight and enforcement powers with regard to the Protocol, which will be explored in the next section, remained subject to commencement regulations which had yet to be tabled.⁷⁰ The shock which accompanied the Internal Market Bill and the UK Government’s delay in confirming that the Commissions’ new powers would commence at the end of the transition/implementation period contributed to an atmosphere in which the Protocol’s rights and equalities protections suddenly appeared less secure.⁷¹ It undermined the trust necessary between the Northern Ireland parties, the UK Government and the EU to make the Protocol function and became a red-line issue for the EU in negotiations over a future relationship agreement.

The Bill faced extensive challenge in Parliament. Bouncing several times between the House of Commons and the House of Lords, it became an Act on 17 December 2020, providing the UK with a default fallback position should an overarching future relationship deal with the EU not be reached. The Bill’s most controversial clauses were, however, removed once agreement had been reached over the implementation of the Ireland/Northern Ireland Protocol.⁷² This in turn cleared the way for the UK and EU to conclude the Trade and Cooperation Agreement (TCA) on 24 December 2020.⁷³ The manner in which the Internal Market

68 NIHRC and ECNI, [Briefing on the Internal Market Bill](#) (2020) para 1.12.

69 O Bowcott, ‘Brexit strategy risks UK “dictatorship”, says ex-president of Supreme Court’ *The Guardian* (7 October 2020).

70 European Union (Withdrawal Agreement) Act 2020, s 42(7).

71 Parts of sch 3 of the European Union (Withdrawal Agreement) Act 2020 took effect in May 2020 (European Union (Withdrawal Agreement) Act 2020 (Commencement No 3) Regulations 2020, SI 2020/518), but no legislation provided for the commencement of the dedicated mechanism arrangements at the end of the transition window until 21 December 2020 (SI 2020/1622); The European Union (Withdrawal) Act 2018 and European Union (Withdrawal Agreement) Act 2020 (Commencement, Transitional and Savings Provisions) Regulations 2020, Regulation 5(i).

72 For details on the outcomes of these committee processes, see M Gove, *The Northern Ireland Protocol* (December 2020) CP346.

73 [Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part](#) (24 December 2020).

Bill was introduced nonetheless remains significant, illustrating the ongoing likelihood of the special arrangements applicable to Northern Ireland becoming the subject of negotiation brinkmanship between the UK Government and the EU.

OVERSIGHT AND ENFORCEMENT OF THE PROTOCOL'S HUMAN RIGHTS AND EQUALITY PROTECTIONS

The human rights and equality Commissions' mandates and EU law

The NIHRC's mandate under the Northern Ireland Act 1998, as enacted, covered the oversight of 'the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights'.⁷⁴ This clearly raised issues of EU law, and, in the context of Brexit, the Commission was drawn into debates over whether the arrangements for the UK's withdrawal from the EU would involve a diminution of human rights protections and a consequent breach of the UK's Belfast/Good Friday Agreement commitments. As noted above, the outcome of these debates was article 2(1) of the Withdrawal Agreement's Ireland/Northern Ireland Protocol, which includes an open-ended obligation upon the UK Government to secure non-diminution of rights in Northern Ireland notwithstanding the UK's withdrawal from the EU. The Withdrawal Agreement also obliges the UK to 'facilitate' the work of the NIHRC and ECNI.⁷⁵ Together, these obligations are intended to copper-fasten the UK's existing rights-and-equality commitments under the Belfast/Good Friday Agreement insofar as they might be affected by Brexit. In order to assess the effectiveness of these arrangements, however, the new roles of the NIHRC and ECNI must be understood in the context of the oversight and enforcement arrangements of the Withdrawal Agreement as a whole.

The Withdrawal Agreement

The CJEU is the final arbiter on the application of EU law and retained this role during the Withdrawal Agreement's transition/implementation period which operated between February and December 2020.⁷⁶ Thereafter, other than potential violations which occurred before the end of the transition/implementation period, its general jurisdiction with regard to the UK will generally end. Special rules, however, cover aspects of the settlement, including aspects of

74 Northern Ireland Act 1998, s 69(1).

75 Withdrawal Agreement (n 1 above) PINI, art 2(2).

76 Ibid art 131.

the Protocol on Ireland/Northern Ireland and the rights of EU citizens in the UK and UK citizens in the EU post-Brexit. Setting aside the latter issues for present purposes, under these provisions the CJEU's ongoing jurisdiction with regard to Northern Ireland will only apply to the rules of the EU single market in goods and related level-playing field obligations, such as state aid rules.⁷⁷ Its jurisdiction does not extend over the operation of the Protocol's rights and equality obligations.⁷⁸

The Withdrawal Agreement makes extensive provisions for implementation and dispute settlement and obliges the parties to make recourse to these where disputes arise. At the apex of this system is the Joint Committee, which is made up of representatives appointed by the UK and EU.⁷⁹ It will meet at least once a year and its decisions have 'the same legal effect as this Agreement'.⁸⁰ Although its decisions are therefore binding over the UK and EU, the balance of representatives means that they will be issued by a process of mutual consent. Under the Protocol's rights and equalities provision, however, its implementation function can extend indefinitely. If new EU law addresses issues which fall within the scope of the Belfast/Good Friday Agreement's 'rights, safeguards and equality of opportunity' provisions, then the Joint Committee must decide whether these new measures, which will be applicable in Ireland, should also apply in Northern Ireland.⁸¹ In light of the 1998 settlement's cross-border linkage of rights protections,⁸² such a dynamic application of article 2's obligation might prove difficult for the UK Government to resist (even though it has disputed the impact of these linkages throughout the Brexit process).

Specialised Committees staffed by subject experts have also been established under the Withdrawal Agreement to 'assist the Joint Committee in the performance of its tasks'.⁸³ This means that they will be able to address issues within their remit before passing them to the Joint Committee for decision or recommendation. Under the procedures set out in Annex VIII of the Withdrawal Agreement, both the Specialised Committees and the Joint Committees will operate on a 'closed door' basis; '[t]he relevant rules suggest that meetings would be confidential, decisions might not be published, and even summary

77 Ibid PINI, art 5 and art 7 to 10.

78 Ibid PINI, art 12(4).

79 Ibid art 164.

80 Ibid art 166.

81 Ibid PINI, art 13(4).

82 Belfast/Good Friday Agreement 1998 (n 2 above) Multi-Party Agreement, Rights, Safeguards and Equality of Opportunity, para 9.

83 Withdrawal Agreement (n 1 above) art 164(5)(b).

minutes might not be made publicly available'.⁸⁴ The work of one of these Specialised Committees is devoted to the implementation of the Protocol on Ireland/Northern Ireland. This system has important implications for the NIHRC, together with the Joint Committee and the ECNI. Under article 14(c) of the Protocol, the Ireland/Northern Ireland Specialised Committee is specifically tasked with considering any matters relating to article 2 of the Protocol which are brought to its attention by these bodies.

For all of its sophistication, this committee system will struggle to replicate the oversight currently provided by the CJEU where fundamental rights and equality protections are at issue. Northern Ireland residents affected by the implementation of the Withdrawal Agreement could have limited opportunity to engage with the Specialist Committee, unless the statutory NIHRC or ECNI takes up their cause. Even if an issue is heard, the internal processes of the committee system are opaque and could result in no meaningful outcome (if there is no agreement between UK and EU representatives) and no reasoned decision made publicly available.⁸⁵

The Withdrawal Agreement Act 2020

As introduced under section 23 of the 2020 Act, schedule 3 made important modifications to the provisions of the Northern Ireland Act 1998 which detail the NIHRC's functions.⁸⁶ These reforms are the culmination of a prolonged struggle over the NIHRC's litigation competences. At its creation, the NIHRC was conceived as a 'visible and accessible body' which would work to restore the trust in the state's commitment to human rights which had been undermined by the decades of conflict in Northern Ireland.⁸⁷ Many judges, however, have long given the distinct impression that they regarded the Commission as an unnecessary interloper.

Its competence to intervene in cases was the subject of protracted litigation.⁸⁸ Even after this role was grudgingly accepted by the

84 EU Committee, *Brexit: The Withdrawal Agreement and Political Declaration* (2018) HL 245, para 37.

85 See EU Committee, *The Protocol on Ireland/Northern Ireland* (2020) HL 66, para 310.

86 Northern Ireland Act 1998, ss 69 and 71.

87 S Livingstone, 'The Northern Ireland Human Rights Commission' (2000) 15 *Irish Political Studies* 163, 170.

88 *In re Northern Ireland Human Rights Commission* [2002] UKHL 25. See A Smith, 'Access to intervene: the Northern Ireland Human Rights Commission and the Northern Ireland Act 1998' [2003] *European Human Rights Law Review* 423.

House of Lords, judicial sniping continued. In the *Holy Cross* case,⁸⁹ touchstone litigation for the place of human rights in Northern Ireland after the 1998 settlement, Lord Hoffmann saw no benefit to the Commission's role and bluntly asserted that its intervention had 'only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant'.⁹⁰ All of which set the scene for the UK Supreme Court's 4:3 decision in 2018 that the NIHRC was not granted standing under the Northern Ireland Act 1998 to pursue a judicial review of Northern Ireland's abortion law.⁹¹ It did so over Lord Kerr's powerful dissent that such standing was very much the point of section 69(5) of the 1998 Act when read in light of the Belfast/Good Friday Agreement provisions it was enacted to implement.⁹²

In response to this sorry state of affairs, schedule 3 modifies section 71 of the 1998 Act to explicitly provide for the Commission's standing to institute legal proceedings under the Human Rights Act 1998. Even though this reform is thus tangential to Brexit, in providing a secure legal basis for the Commission's litigation activity, it makes the institution a much more potent instrument for exercising the new powers granted to it with regard to Brexit. Put simply, this reform frees the Commission from persistent worries about its standing which have long left it looking over its shoulder. This enables the NIHRC (and the ECNI) to flex its new powers inserted as sections 78A to 78E of the Northern Ireland Act 1998, relating to Brexit and human rights. Three of these powers will be outlined below, and the fourth, a litigation function, will be explored in the next section.

The first of these are oversight powers; tasking the Commission with monitoring and reporting to the UK Government and Northern Ireland Executive on the implementation of article 2(1),⁹³ requiring reply to their recommendations,⁹⁴ and enabling them to issue formal advice to the Assembly on compatibility of legislative proposals with article 2(1).⁹⁵ This pre-legislative oversight role corresponds, to an extent, with existing duties to advise the Assembly upon its law making.⁹⁶ The extension of these powers to cover the law making of the Secretary of

89 *In Re E (a child)* [2008] UKHL 66.

90 *Ibid* [3].

91 *In re Northern Ireland Human Rights Commission* [2018] UKSC 27; [2018] NI 228.

92 *Ibid* [168]–[169]. See J Rooney, 'Standing and the Northern Ireland Human Rights Commission' (2019) 82 *Modern Law Review* 525, 534.

93 Northern Ireland Act 1998, ss 8A(1)–(2) and 78B(1)–(2).

94 *Ibid* ss 78A(3) and 78B(3).

95 *Ibid* ss 78A(5)–(6) and 78B(5)–(6).

96 *Ibid* ss 69(4) and 73(3).

State with regard to Northern Ireland is potentially a more complex task, with the Commissions not being embedded in Westminster, but arguably a necessary one in light of the unstable nature of power sharing in Northern Ireland and the UK Government's broad powers under the 2020 Act with regard to the Protocol's implementation.

The second element imposes a duty upon the Commission to educate and inform the general public in Northern Ireland about the operation of article 2.⁹⁷ The duty to educate and inform the public regarding article 2 again closely correlates to their existing functions with regard to fostering awareness of human rights and equality in Northern Ireland.⁹⁸ It, moreover, responds to the Commission's recommendations that more must be done by public bodies to educate and inform on the rights impacts in Northern Ireland of Brexit.⁹⁹ If additional resources are not provided to facilitate this duty, however, following a decade of budget cuts the Commissions risk not being able to perform their task adequately, whilst other public bodies might step back from this task in light of the Commission's new mandate.¹⁰⁰

The third element of these provisions brings into domestic law the Withdrawal Agreement's provisions regarding the formal role of the Commission in feeding concerns over article 2's implementation into the treaty's Committee system (as discussed above).¹⁰¹ This new power, however, could appear more impressive on paper than in practice. The nature of the Withdrawal Agreement's committee system, and particularly the lack of openness and transparency in its decision making, makes it an uncertain avenue for rights protection.

The Commission's fourth new function, bringing or intervening in judicial review proceedings related to potential breaches of article 2(1), therefore requires specific attention.

Direct effect, supremacy and article 2(1) Protocol on Ireland/Northern Ireland

Potentially the most important of the new powers vested in the Commissions is their ability to bring or intervene in legal proceedings relevant to article 2(1) of the Protocol¹⁰² and to assist others engaged in

97 Ibid ss 78A(7) and 78B(7).

98 Ibid ss 69(6) and 73(3).

99 NIHRC, *The 2018 Annual Statement: Human Rights in Northern Ireland* (2018) 192.

100 The adequacy of the NIHRC's budget has been questioned since its inception; B O'Leary, *A Treatise on Northern Ireland: Volume 3 – Consociation and Confederation* (Oxford University Press 2019) 200.

101 Northern Ireland Act 1998, ss 78A(9) and 78B(9).

102 Ibid s 78C(1).

litigation drawing upon article 2(1).¹⁰³ To understand the significance of this power, this Protocol provision must be understood in the context of the Withdrawal Agreement as a whole. The Withdrawal Agreement might not be an EU law treaty, but article 4 nonetheless vests its provisions with the EU law concepts of direct effect and supremacy, provided that they meet the requirements for direct effect.¹⁰⁴ This means that such provisions will continue to be enforceable within the UK's domestic courts after Brexit. With regard to article 2 of the Protocol, the EU directives relating to equality listed in annex 1 of the Protocol have all long operated on the basis that they are directly effective within domestic law.¹⁰⁵ The broader commitment to non-diminution of rights is, by its nature, more vague, and this want of clarity puts the direct effect of this commitment in doubt.¹⁰⁶

This difficulty is not necessarily resolved by the UK's implementation legislation. It is not ordinarily possible for parties to a judicial review action to ground that action upon unincorporated treaty provisions.¹⁰⁷ Article 2 of the Protocol is not explicitly incorporated into domestic law in the legislation. Instead, the legislation states that such 'rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement ... are without further enactment to be given legal effect or used in the United Kingdom'.¹⁰⁸ Which again leaves open to question whether or not the UK's legal obligations under article 2 cover only the listed EU directives or extend to the general commitment to the non-diminution of rights and equality protections.

A narrow reading of these provisions does not account for the NIHRC and ECNI being granted the explicit power to use judicial review to uphold the UK's article 2 commitment.¹⁰⁹ This power could change the dynamic of protecting against a diminution of rights after

103 Ibid s 78D(1).

104 As classically formulated in *Van Gend*, EU Law provisions enjoy direct effect within the domestic legal orders of member states when they are clear, provide for negative obligations, unconditional, make no reservation for member states and are not dependent for their effect on member state implementation measures; Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.

105 See U Belavusau and K Henrard, 'A bird's eye view on EU anti-discrimination law: the impact of the 2000 equality directives' (2019) 20 *German Law Journal* 614, 618–619; and P Craig, 'The legal effect of directives: policy, rules and exceptions' (2009) 34 *European Law Review* 349.

106 de Mars et al (n 25 above) 43.

107 See, for example, *Secretary of State for the Home Department v DeSouza* (n 33 above).

108 European Union (Withdrawal) Act 2018, s 7A(1).

109 Northern Ireland Act 1998, s 78C(1).

Brexit. If the general commitment against diminution can be litigated in this way, then public bodies could potentially be held to account for breaches of any aspect of this commitment, not simply those explicitly set out in the retained EU directives. The legislation, however, denies that this provision creates any new cause of action.¹¹⁰

This thoroughly ambiguous statutory jumble might therefore have appeared set for litigation once the implementation/transition period elapsed, had the UK Government not issued a belated clarification, through a Written Answer in the House of Lords, that it ‘considers that article 2(1) of the Protocol is capable of direct effect and that individuals will therefore be able to rely directly on this article before the domestic courts’.¹¹¹ This might appear to be a slender hook on which to hang the broad range of rights protections which could operate under article 2, especially in light of the reassertion of parliamentary sovereignty in the 2020 Act¹¹² and the UK Government’s willingness to breach other Protocol provisions. This hook, however, does not simply sustain the NIHRC and ECNI’s pre-Brexit powers with regard to EU law, but yokes them into redefining the protection of human rights and equality in Northern Ireland after Brexit.

TOWARDS A BILL OF RIGHTS FOR NORTHERN IRELAND?

New momentum: New Decade, New Approach

New Decade, New Approach brought the issue of establishing a Bill of Rights back onto the table, announcing an Ad Hoc Northern Ireland Assembly Committee on a Bill of Rights, which was established in February 2020.¹¹³ In an attempt to prevent this body from becoming a talking shop, or succumbing to some of the intractable differences in opinion between Members of the Legislative Assembly (MLAs) on many of the issues within its remit, it was determined that it would be supported by a panel of five experts, appointed by the First and deputy First Ministers.¹¹⁴ It was not immediately clear who these experts would be, or who would constitute an ‘expert’ on the matter. Neither were the roles of the experts, the terms of reference for their positions,

110 Ibid s 78C(2).

111 Lord Duncan of Springbank, House of Lords Written Answer 404 (28 January 2020).

112 European Union (Withdrawal Agreement) Act 2020, s 38.

113 See also C Rice, ‘Briefing on the New Decade New Approach deal in Northern Ireland – governance and identity’ (24 January 2020).

114 *New Decade, New Approach* (n 35 above) paras 5.27–5.28.

or practicalities such as term of office or payment outlined within *New Decade, New Approach*. It was not until June 2020 that these practical details were clarified by Executive Office officials.¹¹⁵

In light of this guidance, the Committee expressed concern that it could not justify the financial cost of calling upon the panel to offer advice, at up to £2500 per meeting, nor were members clear over what would be required of the panel.¹¹⁶ Some members were also unsure why five experts had been deemed an appropriate number and questioned whether a panel was needed at all in light of experts from a range of backgrounds having been forthcoming to provide evidence at no cost.¹¹⁷ While Mike Nesbitt (Ulster Unionist Party (UUP)), Paula Bradshaw (Alliance Party) and the Michelle McIlveen (DUP) opted to seek clarification from the Executive Office on these particulars, two Sinn Féin members voted against doing so, primarily on the basis that it could lead to delays in the appointment of the panel. This division might indicate that the expert panel was a Sinn Féin-sponsored element within *New Decade, New Approach*.

The dispute furthermore illustrates that the divergences between the Northern Ireland political parties on rights and equalities have not abated. However, the strong emphasis that has to date been placed on expert evidence and public input has mitigated the opportunity for these differences to prevail in Committee hearings. The real test will come when the Committee attempts to process this information. It is perhaps at this point also that an independent expert panel could prove most valuable. Given that other aspects of *New Decade, New Approach* have been quietly abandoned, notably the Executive Subcommittee on Brexit,¹¹⁸ and the difficulties in getting the First Minister and deputy First Minister to agree on high-profile appointments since the Assembly reconvened,¹¹⁹ it remains to be seen whether this panel will ever be appointed.

The Committee's remit is to 'consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement in that it contains rights supplementary to those contained in the European Convention on Human Rights'.¹²⁰ In light of the NIHRC having been the body assigned the task of laying the groundwork for a Bill of Rights

115 As of April 2021, a panel remained to be appointed.

116 *Minutes of Proceedings*, 4 June 2020.

117 *Minutes of Proceedings*, 18 June 2020.

118 *New Decade, New Approach* (n 35 above) pt 2, para 16.

119 Most notably, a replacement head of the Northern Ireland Civil Service remains to be appointed despite the completion of shortlisting and interview processes for potential candidates. In March 2021, it was decided to split the duties of the post across two positions.

120 *New Decade, New Approach* (n 35) pt 2, para 28.

in the Belfast/Good Friday Agreement,¹²¹ this raises a question as to why the Commission has not been afforded a defined role in these fresh deliberations, and what is to be gained by appointing a panel of experts which might be thought of as acting in its stead. It could be that, having submitted its final advice on a Bill of Rights over a decade ago, the Commission itself regards its role as fulfilled. The Committee's work, moreover, could generate more political acceptance for Bill of Rights proposals than the Commission was able to achieve. The stalled appointments process for the panel of experts nonetheless suggests that some parties regard the Committee as a convenient way to either further undermine the concept of a Bill of Rights for Northern Ireland or, at least, to delay any possible reform.¹²²

A de facto Northern Ireland Bill of Rights?

The Committee's prominence within *New Decade, New Approach* is nonetheless reflective of wider domestic, national and international political developments which contributed to the collapse of the Assembly and Executive in 2017 and snowballed in the intervening years. The January 2020 deal was reached in full knowledge of the Protocol's terms, and of the UK Government's antipathy towards its ECHR commitments and its reluctance to confirm those commitments as part of the EU–UK Future Relationship negotiations.¹²³ Vocal elements within the Conservative Party have long trumpeted modifying or repealing the Human Rights Act 1998 as way of asserting the UK's sovereignty post-Brexit, notwithstanding the consequences of such upheaval for Northern Ireland.¹²⁴

The UK Government thus also potentially benefits from the Ad Hoc Committee's quest for a politically acceptable Bill of Rights. Given its expressed desire to preserve the protections for Northern Ireland necessary to maintain compliance with its Belfast/Good Friday Agreement obligations, and its corresponding eagerness to prevent those obligations from working against its political ambitions to unpick parts of the Human Rights Act, it cannot be assumed that the 1998 Agreement's explicit references to the ECHR will provide sufficient

121 Belfast/Good Friday Agreement 1998 (n 2) Multi-Party Agreement, Rights, Safeguards and Equality of Opportunity, para 4.

122 This strategy mirrors the efforts of the UK Coalition Government between 2010 and 2015 to bury their differences over human rights in an extended consultation process; M Elliott, 'A damp squib in the long grass: the report of the Commission on a Bill of Rights' [2013] *European Human Rights Law Review* 137.

123 O Boycott, 'UK Government plans to remove key human rights protections' *The Guardian* (13 September 2020).

124 See C Harvey, 'Mutual respect? Interrogating human rights in a fractured union' (2018) 29 *King's Law Journal* 216, 231–234.

enough basis to ensure the Human Rights Act's retention in its current form. Nor does the inclusion of UK commitments to the ECHR within the TCA mean that the practical operation of human rights in the other parts of the UK cannot be subject to change. A distinct Bill of Rights for Northern Ireland might therefore become a necessary element of this project.¹²⁵

The Ad Hoc Committee has given fresh momentum to the debate over a Bill of Rights for Northern Ireland, but it remains unclear how this momentum will be translated into practical outcomes.¹²⁶ *New Decade, New Approach* simply states that the Committee should 'consider' the creation of a Bill of Rights.¹²⁷ It could therefore offer advice on the codification of the existing legal framework for rights and equality protections in Northern Ireland into a single document, lead moves within the Assembly to advance this proposition, or make proposals for enhancing the system for rights and equality protections. Indeed, some combination of all three is a possibility. As Harvey and Russell once warned, a 'bill of rights that is not properly grounded will have an insecure future and risks irrelevance'.¹²⁸ Article 2 therefore provides a useful anchor point for the Committee's work, given that it has proven, at least prior to its implementation and resultant litigation, to be an uncontroversial element of the Protocol. But focusing on this measure, and upon maintaining the ECHR's incorporation, could well come at the expense of the Committee's work providing any form of novel departure.

Even if the work of the Committee comes to nothing,¹²⁹ article 2 of the Protocol will continue to provide Northern Ireland with a distinct set of protections for rights and equalities. In terms of substantive protections, article 2 reaches beyond the specific EU directives protecting against discrimination.¹³⁰ Even though the specific

125 See S de Mars, C Murray, A O'Donoghue and B Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press 2018) 84–85.

126 See C Harvey and A Smith, 'Designing Bills of Rights in contested contexts: reflections on the Northern Ireland Experience' (2020) 44 *Fordham International Law Journal* 357, 392–394.

127 *New Decade, New Approach* (n 35 above) pt 2, para 28.

128 C Harvey and D Russell, 'A new beginning for human rights protection in Northern Ireland?' [2009] *European Human Rights Law Review* 748, 753.

129 At the time of writing, the pressure on the Human Rights Act is apparently diminishing as a result of the progress of the EU–UK Future Relationship negotiations; D Boffey, 'Boris Johnson set for compromise on Human Rights Act – EU sources' *The Guardian* (7 October 2020).

130 See n 25 above.

directives began 2021 as retained EU law throughout the UK,¹³¹ there is immediate scope for their application in other parts of the UK to diverge and also the likelihood, discussed above, that the application of these measures within Northern Ireland's legal order will keep pace with new developments in EU law.¹³² The extensive range of oversight mechanisms applicable to article 2, moreover, will extend to Northern Ireland, and not to other parts of the UK, from the end of the transition/implementation period.

The combination of article 2 of the Protocol's potentially far-reaching terms, its enforceability in domestic courts and its exclusion from the workings of the Stormont lock pose one further question about the future of Northern Ireland's legal order. If Northern Ireland's human rights and equality protections are now so distinct from those in operation in the remainder of the UK,¹³³ does Northern Ireland already have its own *de facto* Bill of Rights? Article 2 takes a place alongside the distinct protections for the ECHR's application in Northern Ireland under the Belfast/Good Friday Agreement¹³⁴ and Northern Ireland law's protections against discrimination on grounds of political opinion.¹³⁵ Rights and equality provisions in Northern Ireland will thus take on a unique character, divergent from the remainder of the UK and the EU. Taken as a whole, these distinctive measures already amount to an uncodified Northern Ireland Bill of Rights. Oxymoron though that might be, it is perhaps in keeping with the compromises inherent in Northern Ireland's post-1998 governance order.

CONCLUSION

The Withdrawal Agreement fundamentally changes how rights derived from EU law are to be protected in the context of Northern Ireland post-Brexit. The non-diminution guarantee, derived from the Belfast/Good Friday Agreement, is prominently placed within the revised Agreement. But, if this commitment is to be meaningful, the work of

131 European Union (Withdrawal) Act 2018, s 4(1). See J Grogan, 'Rights and remedies at risk: implications of the Brexit process on the future of rights in the UK' [2019] Public Law 683.

132 Seen 82 above.

133 See ECNI, 'Gaps in equality law between Great Britain and Northern Ireland' (March 2014).

134 Belfast/Good Friday Agreement 1998 (n 2 above) Multi-Party Agreement, Rights, Safeguards and Equality of Opportunity, para 2.

135 Northern Ireland Act 1998, s 75(1) and Fair Employment and Treatment (Northern Ireland) Order 1998, SI 1998/3162. See *Lee v Ashers Baking Company Ltd* [2018] UKSC 49; [2019] NI 96.

Northern Ireland's statutory human rights and equality bodies will have to change to match their new-found gatekeeper status where article 2 of the Protocol is at issue.

The UK's obligation to 'facilitate' their work might well ring hollow if their expanded roles are not accompanied by a reversal of a decade of funding cuts.¹³⁶ Scarce resources that are expended in supporting litigation before the Northern Ireland Courts will not be available to prepare memoranda for the attention of the Specialised Committee, engaging in pre-legislative scrutiny or public education. In addition, they might have to make choices over whether to focus on the continuing implementation of EU law's non-discrimination directives or the potentially broader implications of article 2.

In time, article 2's arrangements could provide a framework for rights and equality protections in Northern Ireland which operates very differently from the remainder of the UK and, perhaps, even circumvent the need for Northern Ireland's politicians to reach an agreement over a Northern Ireland Bill of Rights. This would also have the virtue of contributing to the degree of cross-border rights alignment envisaged by the Belfast/Good Friday Agreement. Such a solution to the intractable debates over a Northern Ireland Bill of Rights would, however, make for a rather minimalist project and one of preservation, rather than advancement, of rights and equality within Northern Ireland's distinct constitutional order.

136 Withdrawal Agreement (n 1 above) PINI, art 2(2). For UK Government commitments in this regard, see Northern Ireland Office (n 29 above) para 30.



The ‘associative’ discrimination fiction: part 1

Michael Connolly

Portsmouth University

Correspondence email: michael.connolly@port.ac.uk

ABSTRACT

Associative discrimination is a consequence of the open formulas used in the UK (and EU) equality legislation to define direct discrimination. The treatment needs only to be ‘because of a protected characteristic’ (such as race, sexual orientation, etc) rather than because of *his* (or *her*) protected characteristic. Hence, a white worker dismissed for marrying a black person could sue for direct (racial) discrimination. The open formula is not limited to such cases and, so, treating associative discrimination as a term of art is a mistake, as this could unnecessarily restrict the reach of the deliberately open legislative formula. This article identifies the Supreme Court judgment in *Lee v Ashers* as an example of this mistake. It further asserts that any compromise for conflicting rights is found in the Human Rights Act 1998 (HRA 1998), and not by distorting the definition of discrimination.

Keywords: associative discrimination; *Lee v Ashers*; equality.

INTRODUCTION

A white worker is dismissed from her job because she married a black man,¹ or a bar denies service to a white woman because she is accompanied by a black man.² No one is likely to have to think too long over the policy and technical issues raised in these two scenarios. Any lawyer, let alone a layperson, would consider that the white person should win a claim of racial discrimination. Although atypical, these are ‘simple’ examples of what has become known as associative discrimination. The white person can sue for discrimination because the treatment was based on her association with a black person. The principle is not confined to race; it applies to the Equality Act 2010 (EA 2010) protected characteristics (or ‘suspect classes’) of age, disability, gender reassignment, religion or belief, sex, and sexual orientation.

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- 1 See eg Lord Simon, *obiter*, *Race Relations Board v Applin* [1975] 2 AC 259 (HL) 289–290 (on the premise that foster parents discriminated against a local authority for refusing to foster children of colour).
 - 2 See the suggestion by James Comyn QC, approved by Lord Denning MR: *Applin v Race Relations Board* [1973] QB 815 (CA) 828, and 831 (Stephenson LJ), affirmed [1975] 2 AC 259 (HL).

Now consider this, more complex, scenario.

A bakery refused to ice a cake with the slogan 'Support Gay Marriage'; it was requested by a customer whose sexual orientation was unknown and intended for a gay rights group and its celebration of anti-homophobia week.

This occurred, of course, in *Lee v Ashers Bakery*.³ It may surprise some that the Supreme Court, reversing all below, utilised the 'associative' theory to *limit* the reach of the United Kingdom's (UK) discrimination law, which underpinned the decision that the bakery had *not* discriminated because of sexual orientation.

The principal thesis of this article is that any notion of associative discrimination as a term of art is a fiction. An analysis of this case shows that recourse to the legislative provisions would produce much simpler questions to be asked, which were whether there was less favourable treatment because of sexual orientation, and if so, did such a finding violate the bakery's human rights. It seems instead that the court's reasoning was (mis)led by the associative theory into a convoluted and overly restrictive definition of discrimination. The core error was treating the notion of associative discrimination as a term of art, when it has no more utility than providing our vocabulary with a convenient description of a certain factual scenario. Accordingly, in arguing that associative discrimination is not a term of art, this article highlights the likely missteps when treated as such. It does so using this more complex scenario and the reasoning deployed by the Supreme Court to decide the matter.

Ahead is a brief theoretical overview of the notion of associative discrimination followed by an appreciation of the governing statutory regimes and general principles of discrimination. Both inform the subsequent missteps. The substance of the discussion centres on the reasoning deployed in *Lee v Ashers*. The court's associative theory as set out is examined in detail, followed by the other discernible bases of the decision. These comprise the 'message case' exemption and a refusal 'applying to all'.

A THEORETICAL BASIS FOR ASSOCIATIVE DISCRIMINATION?

It is surprising, perhaps, that the notion of associative discrimination has attracted little scholarly attention. Most is from the United States (US), where the literature tends towards textual analyses⁴ with a

3 *Lee v Ashers Bakery* [2018] UKSC 49.

4 See eg Mark W II Honeycutt and Van D Jr Turner, 'Third-party associative discrimination under title VII' (2001) 68 *Tennessee Law Review* 913. See also below n 5.

predominant purpose of utilising associative discrimination as a vehicle to overcome the omission from the Civil Rights Act 1964 of sexual orientation as a protected class.⁵ By exception, Victoria Schwartz draws upon the moral philosophy that Western rights are rooted in personal autonomy. Building upon this is the notion that 'individuals do not develop their notions of self in an abstract vacuum'.⁶ Hence, development of the self involves association with others:⁷

Therefore, in the employment discrimination context, the relational discrimination interpretation expands the definition of an individual's characteristics to encompass not only her own protected characteristic when viewed in isolation, but also a complete protection of the individual's rights including consideration of the individual in relationship to others.⁸

In preference to the term 'associative', Schwartz favours the label 'relationship discrimination'.⁹ The 'relationship' element is key. It is *via the relationship* that the treatment of the targeted victim damages the third party's autonomy. Victims are targeted because of their

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- 5 Civil Rights Act 1964, title VII (employment, 42 USC § 2000e-2), see n 11 below. The basic argument being that a woman attracted to a woman is treated less favourably than a man attracted to a woman and so can amount to sex discrimination. See eg V Schwartz, 'Title VII: a shift from sex to relationships' (2012) 35 *Harvard Journal of Law and Gender* 209; M Clark, 'Stating a title VII claim for sexual orientation discrimination in the workplace: the legal theories available after *Rene v MGM Grand Hotel*' (2003) 51 *UCLA Law Review* 313; A Reed, 'Associative discrimination theory and sexual orientation-based employment bias' (2018) 20 *University of Pennsylvania Journal of Business Law* 731. Similar arguments were made in the UK before sexual orientation became a protected characteristic: see eg R Wintemute, 'Recognising new kinds of direct sex discrimination: transsexualism, sexual orientation and dress codes' (1997) 60 *Modern Law Review* 334, 347–348. The argument was rejected in *Smith v Gardner Merchant* [1999] ICR 134 (CA) 148–150, paras 6–7, on the basis that the comparator would be a person of the opposite sex but homosexual also, this being a sex discrimination claim. However, liability *can* arise where a homosexual man is treated less favourably than a homosexual woman is, or would be, treated (*ibid*). The goal of these theories has been overwhelmingly satisfied by the recent US Supreme Court decision that there is liability under the Civil Rights Act 1964 where sex is a factor when discriminating against homosexuals: *Bostock v Clayton County Georgia* (2020) 140 S Ct 1731.
- 6 See Schwartz (n 5 above) 233, citing Holning Lau, 'Transcending the individualist paradigm in sexual orientation antidiscrimination law' (2006) 94 *California Law Review* 1271, 1281.
- 7 *Ibid*, citing P Jones, 'Group rights and group oppression' (1999) 7 *Journal of Political Philosophy* 353, 353.
- 8 *Ibid* 234.
- 9 This also distinguishes this notion from freedom of association, citing *Ripp v Dobbs Housing* 366 F Supp 205 (ND Ala 1973) as a case confusing the two notions. See Schwartz (n 5 above), respective accompanying texts to fns 25 and 47 within.

relationship with persons from a protected class. The white woman dismissed because she married a black man was so treated because *she* is white.¹⁰ This is discrimination because of the worker's (white) race. Hence, it remains essential that the treatment (in part at least) is because of the protected characteristic of the targeted victim. This limited theory aligns with a literal reading of the US Civil Rights Act's prohibition of employment discrimination, requiring the victim to belong to a relevant protected class.¹¹

In Europe, a theoretical basis was offered in Advocate General (AG) Maduro's Opinion for the case of *Coleman v Attridge Law* (where a worker suffered discrimination because of her disabled child).¹² AG Maduro began at much the same place as Professor Schwartz, assuming that equality law was rooted in dignity¹³ and personal autonomy.¹⁴ Hence, for AG Maduro, discrimination denies the intrinsic importance of every human life and the autonomy of persons to choose 'valuable options', such as employment.¹⁵ Moreover, targeting workers because of their association with a person belonging to a 'suspect class' can have the same negative effects. Thus, 'A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they, too, affect the persons belonging to suspect classifications.'¹⁶

Although not expressed as such, this relies on a relationship between the targeted victim and the third party. Putting aside any doubts over dignity as a basis of equality law,¹⁷ the notable feature here is that for the claimant to succeed, the third-party 'associate' must have suffered

10 See eg *Tetro v Elliot Popham Pontiac* 173 F 3d 988, 994 (6th Cir 1999) (white worker dismissed because his child was mixed race).

11 Civil Rights Act 1964, title VII, s 706 (42 USC § 2000e-2): 'It shall be an unlawful employment practice for an employer ... to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin ...'.

12 Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27.

13 Ibid paras AG8–9, citing, R Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton University Press 2006) ch 1; J Raz, *The Morality of Freedom* (Oxford University Press 1986).

14 See eg Immanuel Kant, *The Moral Law: Groundwork of the Metaphysics of Morals* (Hutchinson 1948 [1785]) 434–440, especially 436.

15 Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27 opinion of AG Maduro, paras AG10–11.

16 Ibid para AG12.

17 See R O'Connell, 'The role of dignity in equality law: lessons from Canada and South Africa' (2008) 6(2) *International Journal of Constitutional Law* 267–286. In *R v Kapp* [2008] 2 SCR 483 (SCC) [19]–[24], the Canadian Supreme Court abandoned dignity as a mainstay of applying its Charter of Rights, because it was, 'an abstract and subjective notion that [can be] confusing and difficult to apply ... [and] an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.' (Emphasis supplied.)

some harm (a loss of dignity and/or autonomy, it is presumed) as a result of the treatment. The rather odd consequence of this view would transpire when *claimants* seek (and are awarded) a remedy for *their own* (not the third party's) loss. Although it is necessary that third parties suffer harm, the theory does not necessitate that they have a remedy. It is also notable that AG Maduro (whose task lies much closer to litigation than an academic paper) neither lamented the absence of a remedy for this person nor proposed any solutions. A theory dependant on harm to a person without a remedy is somewhat incomplete to support a cause of action.¹⁸

The theory also falls short when considered in the broader context of other extended forms of discrimination structurally similar to associative discrimination. First, the 'harm' requirement would undermine the established principle of 'third-party' discrimination. In *Showboat Entertainment Centre v Owens*,¹⁹ a white manager of an amusement centre was dismissed for refusing to obey an instruction to ban black youths. The Employment Appeal Tribunal (EAT) held that this employer was liable to the manager for racial discrimination. In coming to the decision, Browne-Wilkinson J concluded that, 'the words "on racial grounds" are perfectly capable in their ordinary sense of covering any reason for an action based on race, whether it be the race of the person *affected by the action* or *of others*'.²⁰ Whether the employer's act caused harm to the black youths was irrelevant to liability.²¹ If the EAT were bound to align its reasoning with notions of loss of dignity or autonomy, it would have demanded evidence of a

18 A procedural solution (*locus standi*, or standing) is suggested in the US case, *Trafficante v Metropolitan Life Insurance* 409 US 205 (1972, US Sup Ct) 208.

19 [1984] ICR 65 (EAT).

20 *Ibid* 70 (emphasis supplied). The phrase 'racial grounds' was superseded in the EA 2010 with 'because of'; this was not intended to change the meaning; Explanatory Note (61) to the EA 2010, s 13. *Showboat* is commonly regarded as a 'third-party' discrimination case. See eg *Weathersfield v Sergeant* [1999] ICR 425 (CA) 429 (Pill LJ), 434 (Swinton-Thomas LJ); *English v Sanderson Blinds* [2009] ICR 543 (CA) [30] Laws LJ, [68] (Collins LJ).

21 In any case, on these particular facts, any black person refused admission would have a right to sue, the refusal falling under the provision of services. See now EA 2010, s 29. In many cases, including *Coleman*, and where the white worker is dismissed because her husband is black, it is not certain that AG Maduro's third party would have standing to sue.

black youth somehow harmed, which would seem most unlikely given the manager's refusal to carry out the instruction.²²

Second, the requirement even for the existence of a third party belonging to a protected class undermines the notion of perceived discrimination, where the defendant acts upon a mistaken belief that the victim possesses a protected characteristic. Here, there is no person with a protected characteristic.²³

A common feature to these three forms of extended discrimination ('associative', 'third-party', 'perceived') is that there is discriminatory conduct harming a person *without* a relevant protected characteristic, suggesting that these are the only two elements required for liability. More is required than merely uttering bigotries in an empty room; there must be a targeted victim. Nonetheless, for the sake of ease of terminology, these three forms of discrimination could fall under a common label of 'discriminatory conduct *per se*'.

Indeed, later in his Opinion, AG Maduro appeared to depart from his theoretical requirement of harm to the third-party associate, writing,

The distinguishing feature of direct discrimination and harassment is that they bear a necessary relationship to a particular suspect classification. The discriminator relies on a suspect classification in order to act in a certain way. ... An employer's reliance on those suspect grounds is seen by the Community legal order as an evil which must be eradicated. Therefore, the Directive prohibits the use of those classifications as grounds upon which an employer's reasoning may be based.²⁴

The judgment of the European Court of Justice (ECJ) appeared to agree: 'The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference

22 Much the same can be said for the notion of third-party victimisation recently established in the US Supreme Court (*Thompson v North American Stainless* (2011) 562 US 170). An act of retaliation against a friend, relative, or loved-one of a person who, say, had made a complaint of discrimination, is actionable, irrespective of whether the retaliation harmed the principal complainant. See, generally, (2010) 35 *European Law Review* 822.

23 Where say, a shopkeeper bans a Sikh, believing him to be a Muslim. See eg *English v Sanderson Blinds* [2009] ICR 543 (CA) [38] (Sedley LJ); *Chief Constable of Norfolk v Coffey* [2018] ICR 812 (EAT). The matter is not settled in the US. According to its enforcement commission, it is actionable: see US Equal Employment Opportunity Commission, 'Employment discrimination based on religion, ethnicity, or country of origin'. For an argument that *EEOC v Abercrombie & Fitch* 135 S Ct 2028 (2015, US Sup Ct) endorsed 'perception theory', see D F Flake, 'Religious discrimination based on employer misperception' [2016] *Wisconsin Law Review* 87, 126–129.

24 Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27 para AG19.

to the grounds mentioned in Art. 1.²⁵ This characterisation of direct discrimination shifts the focus away from the protected status of the victim (or anyone) towards the conduct of the defendant (in this example, an employer). In doing so, it departs from the dignity theory. The 'evil which must be eradicated' is conduct informed by a protected characteristic (race, sex, disability, etc) rather than any harm caused to the third-party associate. This aligns with the 'discriminatory conduct *per se*' label.

That said, the notions of dignity and 'conduct *per se*' were explored in the English Court of Appeal in *English v Sanderson Blinds*,²⁶ on facts where there was no relevant person with a protected characteristic (real or perceived). In this employment case, Mr English was harassed by colleagues using homophobic sexual innuendo, suggesting he was homosexual. However, Mr English was heterosexual, *and* his tormentors neither assumed nor perceived Mr English to be gay. Further, Mr English was aware throughout that his tormentors never mistook him for being homosexual. If you like, *he knew that they knew* he was heterosexual. A majority (2:1) found that this conduct could amount to unlawful *harassment* (on the ground of sexual orientation).²⁷ The statutory definition is more open and elaborate than that for direct discrimination. It requires unwanted conduct 'related to' a protected characteristic (or of a sexual nature) with the purpose or effect of 'violating a person's dignity' or creating 'an intimidating, hostile, degrading, humiliating or offensive environment'.²⁸ As well as the expressed reference to 'a person's dignity', any of these effects could be supported by notions of dignity.

Apart from a textual reading of the legislation (which was open enough for such a finding), Sedley LJ underpinned the decision with a policy concern, which was the prospect of a victim having to declare his sexual orientation before being able to complain.²⁹ At the root of this is respect for persons keeping their sexual orientation a private matter. An alternative finding would mean that persons suffering harassment

25 Ibid para 38 (and 50). The 'grounds' alluded to were sexual orientation, religion or belief, disability, and age ('Framework' Directive 2000/78/EC, art 1). The principle was applied to the Race Directive 2000/43/EC in Case C-83/14 *CHEZ* [2016] CMLR 14, para 56.

26 [2009] ICR 543 (CA).

27 On facts, the case failed: *English v Sanderson Blinds (No 2)* [2011] Eq LR 688 (EAT) [41]. The EAT upheld a finding that, as he joined in the banter and remained genuine friends with his tormentors, the claimant did not perceive a violation of dignity nor a hostile environment.

28 The claim in *English v Sanderson Blinds* was made under the since repealed Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1660, reg 5. See now EA 2010, s 26; Framework Directive 2000/78/EC, art 2(3).

29 [2009] ICR 543 (CA) [39] (Sedley LJ).

would have the options of 'coming out' or suffering in silence, either being an affront to the person's dignity. By the same principle, respect for privacy should apply with other protected characteristics. For instance, a worker being abused with mental-health epithets should be able to complain without disclosing any disability of his or her own. Others may prefer to keep private matters of religion, race, gender, or age, for example. Thus, driven by the 'privacy' concern, Sedley LJ threw a 'dignity' blanket over all cases of harassment *per se*, to include instances where the only person suffering harm did *not* belong to the relevant suspect class. The point is, unlike the theories of Schwartz or AG Maduro, the matter of dignity in anti-discrimination law need not be confined to that of those belonging to a relevant suspect class. Bearing in mind that neither the claimant nor anyone else possessed the relevant protected characteristic, the *decision* in *Sanderson* endorses the notion of *harassment per se* and, by implication, recognises another variety of discrimination *per se*.³⁰

It is not the purpose of this article to provide a theoretical basis for associative discrimination. Indeed, its main thrust is to debunk it as a term of art in need of an exclusive theoretical underpinning. The suggestion merely is that any theoretical support for associative (or 'relational') discrimination is incomplete. It is confined to the dignity of the third-party associate (with the relevant protected characteristic), yet provides no remedy for this person. It also falls short in the context of other extended notions of discrimination ('third-party' and 'perceived') that require no harm to a third party, or indeed, no third party at all ('perceived', '*Sanderson*'). The only distinguishing feature of these associative theories is that the third party should suffer harm because of the association with the targeted victim, which, without a remedial basis, renders the distinction a rather hollow one. Any distinction is in fact reliant on a creative textual interpretation of the American statutory provision insisting that the targeted victim possesses the relevant protected characteristic.³¹ It has the flavour of devising a theory to support the text.

30 Sedley LJ found that the distance between this case and perceived *discrimination* was 'barely perceptible'. In both instances, the 'imaginary' sexual orientation was the ground of the conduct. Collins LJ aligned the statutory formula with the *conduct*, rather than the victim's protected characteristic, and assumed that the same logic applied to discrimination. See [2009] ICR 543 (CA), respectively [38], [46]. Note, although no opinion was offered, the decision in *Lee v Ashers* [2018] UKSC 49 suggests that *Sanderson* does not apply to discrimination. See M Connolly, 'Lee v Ashers Baking and its ramifications for employment law' (2019) 48(2) *Industrial Law Journal* 240.

31 As in the US Civil Rights Act 1964. See n 11 above and accompanying text; for some exceptional restrictions in the UK, see n 37 below and accompanying text.

Where the statutory formula has no such restriction (as in the European Union (EU) and the UK), no such distinction is required. In this more open legislative context, associative discrimination has more in common with other extended forms of discrimination, whose recognition seems to be a policy commitment to outlawing the 'evil' of discriminatory conduct *per se*. Nonetheless, there are strong doctrinal reasons not to treat 'associative' discrimination as a term of art. These are explained next with a textual analysis of the legislative framework and its reach.

ASSOCIATIVE DIRECT DISCRIMINATION – THE LEGISLATIVE FRAMEWORK

For Northern Ireland (where *Lee v Ashers* originated), direct discrimination is defined thus, 'a person (A) discriminates against another person (B) if— (a) on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons'.³² The EA 2010, section 13(1), provides, 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'

The formulas are substantially the same. The obvious difference here is that the phrase 'on grounds of' appears as 'because of' in the EA 2010. However, in the British legislation, 'because of' was expressed to have the same meaning as 'on grounds of'.³³ The definition does *not* state 'because of *his* (or *her*) protected characteristic'. The omission of a possessive adjective is key here. Rather than identifying the targeted victim with a protected characteristic, the conduct need only be because of *a* protected characteristic, a somewhat more abstract term. EU equality directives are similarly formulated. For example,

[D]irect discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin ...³⁴

As indicated above, this is in contrast to the US Civil Rights Act 1964, whose employment discrimination provisions express that the protected characteristic belongs to the victim-claimant.³⁵

The requirements under section 13's formula are (1) a comparison of how a person in the same circumstances (save for the protected

32 Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, SR 2006/439 (SORs), reg 3(1). Fair Employment and Treatment (Northern Ireland) Order (FETO), SR 1998/3162, art 3, is substantially the same.

33 Explanatory Notes to the EA 2010, para 61.

34 Race Directive (n 25 above) art 2(2)(a).

35 Civil Rights Act 1964, title VII, s 706 (42 USC § 2000e-2): see n 11 above.

characteristic element) would have been treated. In the 'simple' examples,³⁶ for instance, the husband, or companion at the bar, would be white. But the comparator can be hypothetical. (2) Treatment 'because of' (3) the protected characteristic in question. In the simple examples, the conduct was because of the race of the third party, or perhaps, the interracial relationship.

Thus, the key to the statutory formulas encompassing associative discrimination is the absence of any requirement that the victim-claimant holds the relevant protected characteristic. This goes much further than necessary for the 'simple' examples of associative discrimination outlined above, which could be explained by the targeted victim's own race, or perhaps the interracial relationship. This broader legislative intent is confirmed by the inclusion of expressed exceptions that require the targeted victim to hold the relevant protected characteristic.³⁷

Having considered and provided exceptions, Parliament must be presumed to expect that the definitions of discrimination should not be read down out of sympathy towards any particular reason other than those it expressed.³⁸ As Lord Simon once opined on the same formula in the Race Relations Act 1968, it would be 'impermissible' to read it as if it referred to *his* (or *her*) race, as 'this would involve reading into the subsection a word which is not there'.³⁹ As noted above, the ECJ has stated much the same thing: that the equality legislation is to combat discrimination by reference to a particular protected characteristic rather than 'a particular category of person'.⁴⁰ The open formula

36 See Introduction, at 29–30 above.

37 Eg pregnancy and maternity (EA 2010, ss 17, 18), being married or in a civil partnership (s 13(4)). Religious organisations can discriminate because of the victim-claimant's sexual orientation or religion, in the fields of services, public functions, associations, and premises (sch 23, para 2). For the extensive employment exceptions, see sch 9, and for services, sch 3.

38 See *Bull v Hall* [2013] UKSC 73 [38] (Lady Hale), on the predecessor to EA 2010, sch 23 (ibid): 'Parliament was very well aware that there were deeply held religious objections to what was being proposed and careful consideration had been given to how best to accommodate these within the overall purpose ... Parliament did not insert a conscientious objection clause for the protection of individuals who held such beliefs. Instead, it provided ... a carefully tailored exemption for religious organisations and ministers of religion from the prohibition of both direct and indirect discrimination on grounds of sexual orientation.'

39 *Race Relations Board v Applin* [1975] 2 AC 259 (HL) 289–290, commenting on s 13's predecessor, the Race Relations Act 1968, s 1(1), which similarly omitted a possessive adjective.

40 On the Race Directive (n 25 above), Case C-83/14 *CHEZ* [2016] CMLR 14 para 56; on the Framework Directive (n 28 above) (sexual orientation, age, disability, and religion or belief), Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27 para 38 (also para 50).

gives considerable scope for case law to mark the boundaries of direct discrimination law.

Accordingly, in arguing that associative discrimination is not a term of art, the starting point is that the statutory text does nothing to encourage it. A good reason for this is the risk of missteps. Yet, in *Lee v Ashers*, the Supreme Court seemed transfixed by the 'associative' notion to the exclusion of all other thinking.

THE CASE OF *LEE V ASHERS BAKERY*

In *Lee v Ashers Bakery*,⁴¹ a customer, whose sexual orientation was found to be irrelevant, ordered a cake to be iced with the slogan 'Support Gay Marriage' and the logo 'QueerSpace' (a gay rights group for which the cake was intended). This occurred in Northern Ireland, at a time when same-sex marriage was not legally recognised.⁴² The bakers refused to supply the slogan because same-sex marriage was against their religious belief. The Supreme Court rejected the claim of sexual orientation discrimination. The initial misstep in this case came when, giving judgment for the unanimous court, Lady Hale wrote, 'This was a case of associative discrimination or it was nothing.'⁴³ Given this premise, the reasoning was not entirely clear, but three bases can be detected from the judgment: (1) any association was not 'close enough'; (2) 'message cases' were exceptional; (3) the refusal 'applied to all', and so could not be because of sexual orientation. Each related to a notion of associative discrimination, although the first was at the heart of it, while the second and third bases were supplementary with broader implications.

The 'close-enough' rubric

On the facts, the Supreme Court held that the connection with sexual orientation had to be 'closer': treatment that 'has something to do with the sexual orientation of some people' was 'very far from' the association required. Lady Hale observed that in addition to gay and bisexual people, the 'message',

could also accrue to the benefit of the children, the parents, the families and friends of gay people who wished to show their commitment to one another in marriage, as well as to the wider community who recognise the social benefits which such commitment can bring.⁴⁴

41 *Lee v Ashers* [2018] UKSC 49.

42 See now Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019/1514, in force 13 January 2020.

43 *Lee v Ashers* [2018] UKSC 49.

44 *Ibid* [33].

In other words, as the slogan could be associated with such a wide range of persons, many of whom were heterosexual, any association with sexual orientation was not close enough. This has a ring of authenticity about it. The label 'associative' implies a degree of closeness, or proximity. It also appears more liberal than Schwartz's 'relationship' theory, suggesting a looser connection than a relationship is sufficient, and not requiring the targeted victim to hold any protected characteristic. Of course, the accompanying problem is the imprecision. The judgment expressly declined to define the degree of closeness required, considering this 'unwise'.⁴⁵ This suggests that it is not confined to an exhaustive list of 'close personal relationships', including, say, a spouse, a cousin, a second cousin, a great uncle, and so on. Instead, it could be something more generic, such as *any* 'close personal relationship', each case depending on a factual enquiry into the actual proximity and cogency of the relationship. It could include old school friends and exclude, perhaps, distant family members who have never met, or even close family members who have not spoken for years. However, the explanation given implies something broader than that. The observation that the 'benefit' could accrue to a 'diluted' group of persons (by sexual orientation) implies that if the only persons in support of the cause (of gay marriage) were homosexual, then the association would have been close enough. Thus, a 'close personal relationship' is not a prerequisite. This renders a close-enough rubric not just vague in terms of proximity, but also terms of the protected characteristic of those with whom the association could be.

The vagueness is just one problem that comes with treating associative discrimination as a term of art. The resultant missteps become apparent upon revisiting Lady Hale's analysis of the 'association'. It turns as much on her choice of 'associates' as it does on the close-enough rubric. Rather like making comparisons in claims for equal pay,⁴⁶ or direct⁴⁷ and indirect discrimination,⁴⁸ there are likely to be many possibilities, with the choice being critical to the outcome. A risk with deploying the associative concept, especially when implemented with a close-enough rubric, is that in any one case, the possibilities are many and multifarious. The irony is that the whole exercise serves

45 Ibid [34].

46 See eg *Pickstone v Freemans* [1988] ICR 697 (HL).

47 See eg *Showboat Entertainment Centre v Owens* [1984] ICR 65 (EAT), discussed, text to n 19 above and n 66 below.

48 See eg *Orphanos v QMC* [1985] AC 761, 771 (Lord Fraser); I Leigh, 'Of racial groups and non-groups' (1986) 49(2) *Modern Law Review* 235; M Connolly, *The Judiciary, Discrimination Law and Statutory Interpretation: Easy Cases Making Bad Law* (Routledge 2018) ch 8, 174–182. For equal pay, see eg *Pickstone v Freemans* [1988] ICR 697 (HL).

only to limit the law's reach. Some possibilities are explored below, if only to demonstrate the folly of going down the associative blind alley. The possibilities considered here are associations with diluted classes and specific identifiable persons. First though, some consideration is required of the relationship between these possibilities and the targeted victim.

Association between whom (or what)?

While the focus rests on the identity of any 'associate', it is largely overlooked that there are two sides to any 'association'. On 'this' side of the equation is the targeted victim or 'subject'. Schwartz's relationship model requires the targeted victim to be in a relationship with the person bearing the relevant protected characteristic. Here, identifying both parties is straightforward. *Lee v Ashers* demonstrated that the notion of associative discrimination, when taken out of the context of Schwartz's rigid model, becomes erratic, even for this seemingly straightforward task. This alone should be enough to undermine the utility of associative discrimination as a vehicle to identify liability. At all three levels of the litigation, there was no analysis of this point, just some assumptions. The county court found an association between the *customer* and sexual orientation (via gay marriage).⁴⁹ The Court of Appeal was less specific, indicating, if anything, that it was between the *slogan* and the Northern Ireland gay community.⁵⁰ In reversing these decisions, the Supreme Court seemed to be looking for an association between the *customer* and sexual orientation⁵¹ (which, unlike the county court, it did not find). But the finding that the 'benefit' of the slogan could accrue to a wide diluted group, artfully shifted the focus

49 *Lee v Ashers Bakery* [2015] NI CtY 2 [39], [60]. See also R Wintemute, 'Lesbian and gay inequality 2000: the potential of the Human Rights Act 1998 and the need for an Equality Act 2002' (2000) 6 *European Human Rights Law Review* 603 (arguing for legal protection on the basis that homosexuality is better aligned to religion as a mutable characteristic).

50 *Lee v Ashers Bakery* [2016] NICA 39 (Morgan LCJ, for the court) [58]: 'There was an exact correspondence between those of the particular sexual orientation and those in respect of whom the message supported the right to marry. This was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community.' Although this seems to confuse associative and indissociable theories, the conclusion points to associative.

51 *Lee v Ashers* [2018] UKSC 49 [32], citing the Explanatory Notes to the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, para 7.3: 'when a person treats another person less favourably on the grounds of his/her sexual orientation ... or the sexual orientation/perceived sexual orientation of another person with whom they associate' (emphasis supplied). See also *Gill v Northern Ireland Council for Ethnic Minorities* [2002] IRLR 74 (NICA) [33] (Carswell LCJ).

from the *customer's* association with sexual orientation to that of the *slogan* and its apparent broader, diluted, reach. Indeed, later in her speech, Lady Hale insisted that, 'The less favourable treatment was afforded to the message not to the man',⁵² implying that to succeed, the 'subject' had to be the victim-claimant (the customer), and not the slogan (or 'message'), or anything else. This was not expressed in concrete terms, and neither was any reasoning provided underpinning such a requirement. It is arguable, at least, that the targeted 'subject' could have been, say, the request, or the refusal. Either of which would be more closely associated with sexual orientation. Similarly, the *customer*, by ordering the cake to be decorated with the slogan alongside the QueerSpace logo, must have been associated by the bakery with QueerSpace – a gay rights group – and thus associated with sexual orientation.⁵³ Upon this, it could be argued that the Supreme Court found the answer it wanted by picking the two remotest contenders for its own 'closeness' test (the message and the diluted group). Assuming, as we must, that this was not the case, the irregularity demonstrates the susceptibility to manipulation if associative discrimination is treated as a term of art.

The potential associates

The next step is to explore the potential 'associates'. These have been sub-divided thus: (i) a 'diluted' class of persons, and (ii) specifically identifiable persons.

(i) The 'diluted' class of persons

A feature of the 'associative' decision in *Lee v Ashers* was the choice of persons by which the close-enough rubric was tested. It was noted above that the group 'benefitting' from the slogan included 'the children, the parents, the families and friends of gay people'.⁵⁴ This was the widest possible group of persons who could be associated with the slogan. It meant that, in terms of the relevant protected characteristic (sexual orientation), it was somewhat diluted, including as it did, homosexual and heterosexual persons. As we know, this association was not 'close enough' for Lady Hale. The criticism here is that it would have been more realistic to consider some subcategories, such as those attending the event for which the cake was intended, or just those persons wishing to have a same-sex marriage. The court's analysis turned a blind eye to the cake's intended purpose, which was QueerSpace's celebration of the end of 'Northern Ireland Anti-homophobic Week' and to mark

52 *Lee v Ashers* [2018] UKSC 49 [47].

53 See below, text to n 57.

54 *Lee v Ashers* [2018] UKSC 49 [33].

the momentum towards legalising same-sex marriage. It was a *private* event⁵⁵ for this 'small volunteer group'.⁵⁶ Bear in mind the group's logo – dominated by the word 'QueerSpace'⁵⁷ – was also to be iced on the cake. It you were to associate the slogan with 'beneficiaries' at all, it would have been more straightforward to associate it with the QueerSpace group or its members, who were the obvious 'beneficiaries'. It is reasonable to presume that the cake was intended to be eaten, and so not even the slogan would have survived beyond this event to 'benefit' per chance a heterosexual non-member. No enquiry was made as to the composition of the QueerSpace group, whose membership, on the face of it, was unlikely to comprise any heterosexuals. When the cake was intended for a temporary purpose for an exclusive group at a private function, it was unrealistic to associate the slogan with *anyone* who supported same-sex marriage.

An alternative association could be drawn from the refusal. The basic reason for the *refusal* was, 'I do not agree that homosexuals should be able to register a same-sex marriage.' Upon this, an association could be with just those wanting, but prevented from registering, a same-sex marriage, a narrower and certainly more exclusive class, comprising a subcategory of homosexual persons in Northern Ireland.

Thus, in this case there existed associated groups that were far more realistic. It would have been reasonable to presume that less favourable treatment because of either of these classes of persons was close enough to be treatment because of sexual orientation.

(ii) *Association with specific identified persons*

Another feature of Lady Hale's 'associative' judgment was the citation of the ECJ decision *Coleman v Attridge Law*.⁵⁸ It will be recalled that the court held that it was directly discriminatory to treat a mother less favourably because of her child's disability. Lady Hale noted pertinently, 'In that case, there was a specific identified person whose disability, the protected characteristic, was the reason for the less favourable treatment.'⁵⁹ This suggests that, for the Supreme Court, associative discrimination does not go beyond the protected characteristic of a real identifiable (third-party) person. There are four particular talking points here.

55 Ibid [10]. See also *Lee v Ashers* [2015] NI Cty 2 [6]; [2016] NICA 39 [5] (emphasis supplied).

56 *Lee v Ashers* [2015] NI Cty 2 [60].

57 See LGBT Northern Ireland – Queerspace <http://lgbtni.org/portfolio/queer-space>.

58 Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27.

59 [2018] UKSC 49 [29].

First, as demonstrated above, the members of QueerSpace could have been a group of 'specifically identifiable' persons, yet no inquiry was made into this. Second, the implication of Lady Hale's observation that the 'benefit' could accrue to a 'diluted' group of persons (including heterosexuals and 'the children, the parents, the families and friends of gay people')⁶⁰ is that if the only persons 'benefitting' were homosexual, the association could have been 'close enough'. For Lady Hale then, the claimant's associative argument failed because not all of this group were homosexual and wanting to register a gay marriage. However, sharing the same protected characteristic does not make these persons necessarily 'specific identified persons'. It is quite likely, for example, that those in Northern Ireland wanting a same-sex marriage are not all known to the customer, or the bakery, or indeed, to each other. It is almost certain that they could not be identified for the court. This suggests a contradiction in the judgment. It implies the association could be close enough with persons unknown while demanding an association with specific identified persons.

Third, it bears repeating that the legislative provision does not restrict direct discrimination to any (known or unknown) particular person's protected characteristic.⁶¹ Therefore, to restrict its scope to an association with a 'specific identified person', a court would have to read words into the statute, something ordinarily impermissible.⁶² Of course, conflicting EU law would be a valid reason to depart from the rule. Lady Hale deployed *Coleman*, but *Coleman* in no way limited the scope of the domestic definition of direct discrimination. Quite the opposite. It actually extended the UK's definition of direct disability discrimination, which at the time was limited to claimants with a disability, and thus excluded associative discrimination.⁶³ The ECJ did this under a principle of discrimination *per se*, rather than against 'a particular category of person'.⁶⁴ This certainly rules out restricting associative discrimination to a connection with just one particular identifiable person. If anything, the rationale of *Coleman* undermines the seemingly restrictive finding in *Lee v Ashers*.

60 *Lee v Ashers* [2018] UKSC 49 [33].

61 See above, p 37, under 'Associative Direct Discrimination – The Legislative Framework'.

62 Bear in mind here Lord Simon's edict against doing this to exclude associative discrimination from the legislation: *Race Relations Board v Applin* [1975] 2 AC 259 (HL) 289–290; see text to n 39 above.

63 Disability Discrimination Act 1995, s 3A(5): 'A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably ...'.

64 Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27 para 38 (also para 50).

Fourth, case law *not* cited in *Lee v Ashers* demonstrates the limitation of confining an analysis to the associative notion, which is to neglect the broader reach of direct discrimination. Consider again the case of *Showboat Entertainment Centre v Owens*,⁶⁵ where a white manager of an amusement centre was dismissed for refusing to obey an instruction to ban black youths. In a well-received decision, the EAT held that the definition of direct discrimination, not being qualified with a possessive adjective (*his* or *her* race), was broad enough to cover the manager's claim of direct racial discrimination. Thus, there can be liability where the treatment was rooted in the race of a third party (the black youths). This did not depend on any relationship, or association, with the black youths, other than at some time in the future, these yet-to-be identified persons would attempt to enter the amusement centre. At the time of the dismissal, they were purely hypothetical. Again, it did not matter whether or not the employer or the manager knew any of the black youths. As such, *Showboat* appears to offer a much more fluid approach to the closeness required in associative cases.

It is *Showboat*, perhaps, that offers a key to unlocking the problem under the UK regime. The decision did not even rely on the existence of the third parties. Browne-Wilkinson J reasoned, 'The only question in each case is whether the unfavourable treatment afforded to the claimant was caused by racial considerations.'⁶⁶ Thus, for the 'less favourable' element, Browne-Wilkinson J deployed as the (hypothetical) comparator, a white manager who *would have* obeyed the instruction and so would not have been dismissed. Had there been no black youths in the vicinity, and the instruction was uttered solely out of bigotry, the manager's claim would stand if, say, he had objected and was dismissed as a result, or just resigned out of disgust.⁶⁷ The point is that there need not be *any* persons with a protected characteristic in the scenario. This chimes with the 'discrimination *per se*' edict from *Coleman*.

Once the reasoning goes down the associative route, it becomes blinkered to all other possibilities offered by the broader definition of direct discrimination, which, as amplified in *Showboat*, is not confined by notions of 'close enough', 'associative', the protected characteristic of 'specific identifiable persons', or that of *any* person. Indeed, during the passage of the Equality Bill, the Government rejected an amendment

65 [1984] ICR 65 (EAT).

66 Ibid 71. He repeated the point at 73.

67 He may have objected because, say, he was new to the area and/or the job, and assumed that there would be black customers; or he was simply disgusted by the employer's bigotry. Note that in *Weathersfield v Sergeant* [1999] ICR 425 (CA), the Court of Appeal held that *Showboat* applied to constructive dismissal, where a similarly instructed worker merely resigned without defying the instruction.

to specify 'associative' discrimination, for fear of unduly narrowing the scope of direct discrimination:

Here is the core of why we do not think that we should accept the amendment. The 'because of' turn of phrase in clause 13 is broad enough and is intended to be broad enough to cover much more than just cases in which the less favourable treatment is due to the victim's association with someone who has the characteristic or because the victim is wrongly thought to have that characteristic.⁶⁸

Lady Hale's reasoning demonstrated much that could go wrong when associative discrimination is treated as a term of art, instead of resorting to the section 13 formula as Parliament had intended. It led to needless speculation as to the identity of those who could be associated with the 'message' or the customer (this was not clear), and then, to retain some control over the outcome, required the devising of a vague and subjective close-enough rubric. This facilitates a unilateral choice of associates, allowing a court to pick the remotest, or closest, depending on the desired outcome. Here, Lady Hale's selection of the diluted class was the remotest, with the inevitable result. This was done with little fidelity to the statutory formula, without reference to *Showboat v Owens*, and with a selective citation of *Coleman*.

Should 'message cases' be immune from discrimination law?

If the close-enough rubric was too vague to explain the rejection of the associative claim in *Lee v Ashers*, other reasons are apparent in the judgment. As noted above, the refusal was about the slogan, or 'message', as it became characterised in this case. The judgment made a feature of this, seemingly suggesting that 'message cases' were immune from discrimination claims. As noted above, in removing the customer from the associative equation, Lady Hale insisted that the refusal was to 'the message not to the man'.⁶⁹ And later,

The bakery could not refuse to provide a cake – or any other of their products – to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different – obliging them to supply a cake iced with a message with which they profoundly disagreed.⁷⁰

In furtherance of this point, the judgment drew upon a recent case from the US Supreme Court, *Masterpiece Cakeshop Ltd v Colorado*

68 Hansard HC 'Equality Bill' Solicitor-General, HC 17 June 2009, col 254.

69 *Lee v Ashers* [2018] UKSC 49 [47].

70 *Ibid* [55].

Civil Rights Commission.⁷¹ For Lady Hale, the 'important message' (no pun was apparent) from *Masterpiece* was a 'clear distinction between refusing to produce a cake conveying a particular message ... and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics'.⁷² In other words, refusing to supply a wedding cake for a same-sex marriage is quite distinguishable from refusing to supply a message.

The policy implications of this distinction are discussed below. Before then, it is important to identify a number of countervailing legal principles that were not referenced when making the distinction. First of all, the default legal position is that withholding one service, while providing other services, is no defence to a discrimination claim. Without a clear distinction, a willingness to provide the customer with a different slogan or other patisserie ought not to make a difference,⁷³ just as a hotel refusing a double room to a same-sex couple cannot escape liability by offering single rooms.⁷⁴

The effect of this message distinction was not only to undermine the 'associative' claim, but to immunise 'message cases' entirely from discrimination law. One might expect that such a wholesale exemption would be marked with a clear-cut, legally sound and durable boundary. A caution from Lord Nicholls is appropriate here. He advised that 'in the application of this [discrimination] legislation ... legalistic phrases, as well as subtle distinctions, are better avoided so far as possible'.⁷⁵ Moreover, the distinction was made without reference to the *Coleman* edict (noted above) that equality law is to combat discrimination by reference to a particular protected characteristic and 'not to a particular category of person'.⁷⁶ It was also made without an opinion on the seemingly germane *Sanderson* decision that homophobic abuse without reference to any particular person's sexual orientation amounted to unlawful harassment.⁷⁷

71 (2018) 138 S Ct 1719.

72 *Lee v Ashers* [2018] UKSC 49 [62].

73 In *Gill v El Vino* [1983] QB 425 (CA) a wine bar's practice of providing women with tables while excluding them from the bar area amounted to direct sex discrimination.

74 See *Bull v Hall* [2013] UKSC 73. See also, Wintemute (n 5 above) 354–255, noting, 'For the woman who wants badminton at the same price as a man, free swimming is no consolation.'

75 *Nagarajan v LRT* [2001] AC 501 (HL) 513.

76 Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27 para 38 (also para 50); see above, text to n 58. See also Case C-83/14 *CHEZ* [2016] CMLR 14 para 56.

77 *English v Sanderson Blinds* [2009] ICR 543 (CA) (discussed above, text to n 26). Extracts from the majority and dissenting judgments were cited, but no opinion was given: *Lee v Ashers* [2018] UKSC 49 [30]–[31].

Equality law mandates that businesses must provide their services without discrimination. Yet, it seems, someone in the business of providing slogans is exempt, unless a refusal is about the customer or someone 'closely associated'. A bakery was in business *inter alia* to provide slogans on its cakes. It refused to supply one favouring same-sex marriage when it would have provided one for opposite-sex marriage. Distinguishing between the service and the customer (or 'the message and the man') could not only seem overly subtle, but a touch flippant. This is not a case of a business refusing to provide certain services beyond its speciality or abilities, such as a hairdresser specialising in Afro-Caribbean hair refusing to cut European hair, or *vice versa*. As it happens, such an exception is provided by the EA 2010,⁷⁸ and so a *statutory* boundary already exists, the need for which demonstrates that cases falling inside of it would otherwise amount to discrimination. Instead of devising another boundary, Lady Hale could have drawn on this.⁷⁹ If a dividing line were required, this is it, and a service in the business of providing messages dictated by the customer does not fall within it.

Not only is the message distinction a statutory outlier, it is full of uncertainty, evoking the question of when words, or images, become a 'message'. This could see courts descending into such debates with refusals to provide cakes iced with, say, a Union Jack, or the words, 'It's Christmas', 'Bar Mitzvah', or 'Jesus' (which could be merely honouring a family member with his not uncommon Hispanic name).⁸⁰ Given the existing legal markers and the subtleties and uncertainties inherent in the distinction, one would expect clear and cogent reasons for this statutory outlier.

Instead, the judgment merely muddied the waters further with reasoning that actually undermined the message distinction. First, the distinction became even finer with Lady Hale finding that the refusal to supply the message *did* amount to direct discrimination on the ground of political opinion (specific to Northern Ireland).⁸¹ This was because (in contrast to the sexual orientation claim) 'there is here a much closer

78 See EA 2010, sch 3, pt 7, para 30; Explanatory Notes, para 745.

79 The case was heard under the Sexual Orientation Regulations (n 32 above), which do not provide this exception. But the Supreme Court was not creating an exception just for Northern Ireland.

80 A case here could be assembled around the protected characteristic of Latino, or Spanish, for example. The matter could become more complex if the refusal is wrongly based on religious grounds, generating an argument for perceived direct discrimination, instead of indirect discrimination.

81 FETO 1998 (n 32 above) art 3. The finding of discrimination was outweighed by the baker's human rights of freedom of speech and religion (European Convention on Human Rights (ECHR), arts 9 and 10): *Lee v Ashers* [2018] UKSC 49 [56].

association between the political opinions of the man and the message that he wishes to promote, such that it could be argued that they are “indissociable”.⁸² And so, the *same* customer, requesting the *same* service with the slogans *QueerSpace* and *Support Gay Marriage* could be associated with a political opinion but *not* with sexual orientation. While the context may render the question a fact-sensitive one, it remains a distinction difficult to comprehend and, as Lord Nicholls once advised, better avoided.

Second, the US case (*Masterpiece*), cited in support, in fact decided (6:2) that the state had unlawfully interfered with a baker’s constitutional freedom of religion in bringing an action for refusing to supply a cake (apparently without a slogan) intended for a same-sex wedding.⁸³ The principal reason was that during the initial hearings the state had expressed undue hostility towards the baker’s religious beliefs, which was a breach of the baker’s constitutional rights under the First Amendment.⁸⁴ Some *obiter dicta* by two of the majority (plus the two minority justices) was that the state had good reason not to have taken similar action against another three bakers for refusing to supply a cake iced with *anti-gay* messages. Such refusals were distinguishable because *these* bakers would have refused *anyone* such a cake.⁸⁵ The two minority justices added that these were distinguishable as ‘message cases’.⁸⁶ Against this, three of the majority expressly rejected the message distinction,⁸⁷ with Justice Gorsuch finding it ‘irrational’ because no one could ‘reasonably doubt that a wedding cake without words conveys a message ... it celebrates a wedding’.⁸⁸ (The remainder offered no opinion.) It would seem then, that citing *Masterpiece* as an authority for the message distinction is perhaps placing undue weight upon the case where a majority (3:2) of those who were concerned enough to cast an opinion were against it. Just two from a court of eight favoured it.

In fact, the ‘important message’ that the *Lee v Ashers* reasoning could draw from *Masterpiece* is apparent from the court’s judgment given by Justice Kennedy, who wrote:

82 *Lee v Ashers* [2018] UKSC 49 [48].

83 The Colorado Anti-Discrimination Act outlaws sexual orientation discrimination in the provision of services.

84 (2018) 138 S Ct 1719, 1732 (Justice Kennedy, giving the Court’s judgment).

85 *Ibid*, respectively, 1733–1734 (Justices Kagan and Breyer); 1750–1751 (Justices Ginsburg and Sotomayor).

86 *Ibid* 1750–1751 (Justices Ginsburg and Sotomayor).

87 *Ibid* 1735 (Justices Gorsuch and Alito); 1743–1745 (Justice Thomas).

88 *Ibid* 1738 (with whom Justice Alito concurred).

[T]he delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the state itself would not be a factor ...⁸⁹

This shows that there are two competing bodies of law: the Colorado Anti-Discrimination Act and the US Bill of Rights, here the First Amendment guaranteeing freedoms of speech and religion.⁹⁰ If anything, the lesson to be taken from this is that apparently discriminatory refusals to provide a service for reasons of religion or free speech should be adjudged under the HRA 1998. Isolating claims as 'message cases' should not insulate them from discrimination law; if the defendant's human rights are sufficiently violated, the discrimination law in question should be read down to comply, or declared incompatible.⁹¹

Thus, the existing legal markers – of withholding one service, subtle distinctions, the *Coleman* edict, the *Sanderson* principle, the existing statutory boundary – combined with a more appropriate avenue to assess the merits of the refusal, the finding of political opinion discrimination on the same facts, and the unhelpful opinion from American case law, all indicate that the message distinction is technically troublesome and has no utility. As such, these cases should not be immune from discrimination law. In *Lee v Ashers*, the associative analysis led the court to distinguish between the customer and the service requested. This was another misstep, with more than just technical consequences, as the following policy considerations demonstrate.

Policy considerations

Even without these reasons against the homogenisation of 'message cases', it is possible to cast the distinction in a somewhat darker light on policy grounds. Lady Hale supported her 'message' analysis by deploying this simile: 'It is more akin to a Christian printing business being required to print leaflets promoting an atheist slogan.'⁹² The simile remains in the field of services, and smacks of the old common law approach to commerce once characterised by Lord Diplock.

89 (2018) 138 S Ct 1719, 1724. This was in fact cited in the *Lee v Ashers* judgment: [2018] UKSC 49 [60].

90 The first 10 amendments (ratified in 1789) to the US Constitution are known as the Bill of Rights. See eg M J Douma, 'How the first ten amendments became the Bill of Rights' (2017) 15 *Georgetown Journal of Law and Public Policy* 593. See also T M Massaro and E T Sullivan, 'Due process exceptionalism' (2011) 46 *Irish Jurist* 117.

91 HRA 1998, s 3 and s 4, respectively. Indeed, that was the approach taken with the political opinion claim: *Lee v Ashers* [2018] UKSC 49 [56].

92 *Lee v Ashers* [2018] UKSC 49 [47].

Commenting on the relatively unambitious Race Relations Act 1968, he lamented,

This is a statute which, however admirable its motives, restricts the liberty which the citizen has previously enjoyed at common law to differentiate between one person and another in entering or declining to enter into transactions with them.⁹³

However lamentable some judges may find the erosion of the Englishman's liberty to discriminate, modern societies have recognised in law that some of these liberties are objectionable, if not thoroughly poisonous. As Lord Kerr more recently observed in the context of a religious-based refusal with race-based consequences,

[W]hen the answer to that religious question has consequences in the civil law sphere, its legality falls to be examined. If the decision has consequences that are not permitted under the law, the fact that it was taken for a religious purpose will not save it from the condition of illegality.⁹⁴

This is a reminder that any business providing services to the public has entered the 'civil law sphere'. Consequently, the starting point must be that anyone in the business of supplying slogans is obliged to provide them without discrimination because of certain specified protected characteristics. Bear in mind also that a generally accepted purpose of discrimination law, at least when concerning minorities, is to address social exclusion.⁹⁵

Christian printers should be obliged to supply atheist⁹⁶ slogans, just as a Muslim printer should be obliged to provide Christian slogans. It is no different from a Christian hotelier being obliged to supply double rooms to same-sex couples.

Obliging businesses to provide personally disagreeable slogans is better supported by considering the potential harm caused by this apparent liberty to refuse. It may have been assumed that Mr Lee easily would have found another bakery willing to supply his slogan. But what if no one in town would supply the slogan, and thus treat gay persons as

93 *Dockers Labour Club and Institute Ltd v Race Relations Board* [1976] AC 285 (HL) 295–296. See also *Taiwo v Olaigbe* [2016] UKSC 31, [21] (Lady Hale).

94 *R (E) v Governing Body of JFS* [2009] UKSC 15 [119]. A school giving priority to Orthodox Jews, thus discriminating against all other racial groups (as well as non-Orthodox Jews). Faith schools enjoy some exemptions from religious, but not racial, discrimination.

95 See eg H Collins, 'Discrimination, equality and social inclusion' (2003) 66(1) *Modern Law Review* 16; S Bunbury, 'Unconscious bias and the medical model: how the social model may hold the key to transformative thinking about disability discrimination' (2019) 19(1) *International Journal of Discrimination and the Law* 26.

96 Atheism is a 'belief' under the EA 2010, s 10; see Explanatory Notes, para 53.

social outcasts, depriving them of the equality that discrimination law is assumed to protect? Now the matter seems more sinister. Suppose all the bakers or printers in an English town, somewhat resentful of recent eastern European immigration, refused to produce a slogan, 'Support the Polish Veterans', celebrating Second World War Polish servicemen (who in fact had settled in the town after the war). Some of these suppliers may have felt intimidated by the local resentment, and with no legal imperative to resist (because of *Lee v Ashers*), played their part in alienating people defined by their national origin, marginalising both war heroes and recent immigrants as social outcasts. One could imagine any number of pernicious embargoes on causes or slogans associated with a protected characteristic. Take a scenario from an era that informs us of the need for equality law: in anticipation of the Nazis taking power, every baker in a German town refused to ice a cake, 'Support the Synagogue', or for that matter, 'Support Gay Marriage'. Few, if any, would argue here that the bakeries' liberty to trade with whom they choose should prevail over the poisonous harm caused by the embargo. These apparently extreme examples show the potential of *Lee v Ashers*. Minorities, notably Roma and Travellers, still face populist *and* institutional persecution throughout Europe, including blanket bans and segregation.⁹⁷ The point is twofold. Neither such blanket bans, nor the harm they can cause, are unrealistic suppositions.

Yet, in principle, each refusal is the same as the one in *Lee v Ashers*. The only difference is the extent of harm caused, a consideration not within the Supreme Court's principled reasoning. Bear in mind also, that, in these 'slogan' cases, the customer's protected characteristic is irrelevant, as anyone would be refused. Therefore, if the customers were

97 The accounts are numerous. See eg *any* volume of the European Roma Rights Journal, or the Roma Rights Quarterly; for example, Panayote Dimitras, 'Greece's non-implementation of international (quasi-)judicial decisions on Roma issues' [2010] (1) Roma Rights Quarterly 29 (charting racist police violence, inadequate housing and evictions and exclusion or segregation in education, ignored by Greek authorities). For Ireland see eg 'Nimbyism is the national sport of south Dublin' *Irish Times* (19 October 2015) (residents blockading attempts to provide emergency accommodation for surviving Travellers now without homes following tragic fire); 'Publicans to defy law with blanket ban on Travellers' *Irish Independent* (2 August 2002). For the UK, see *Bromley LBC v Persons Unknown* [2020] EWCA Civ 12 (council's blanket ban on camping on open spaces ruled unlawful); 'Gypsy and Traveller families "hounded out" of areas in act of "social cleansing" as councils impose sweeping bans' *The Independent* (18 November 2018). For human or social rights violations, see eg *European Roma Rights Centre (ERRC) v Bulgaria* (2019) 69 EHRR SE (systemic discriminatory practices targeting Romany women); *R (ERRC) v Immigration Officer at Prague Airport* [2005] 2 AC 1 (HL) (Roma targeted by immigration authorities); on inadequate housing and eviction rights, see *ERRC v Ireland* (2016) 63 EHRR SE9, *ERRC v Portugal* (2016) 62 EHRR SE6, *ERRC v France* (2010) 51 EHRR SE1.

all Polish, Jewish, Roma, or homosexual, as the case may be, a blanket embargo would remain lawful, or at least untested as long as there were some with a different protected characteristic who reasonably could be imagined to agree with the message in question.

Against this, there is the risk of abuse. Lady Hale's 'atheist' simile evokes more offensive slogan requests, such as a pro-Nazi slogan to a Jewish business, or images of Mohammed to a (Sunni) Muslim printer. On the basis that these requests (and subsequent refusals) relate to the protected characteristics of race or religion, as the case may be, it could be deduced that *Lee v Ashers* saves such refusals from being discriminatory and removes any obligation on the businesses to supply. However, this need not be so, for two reasons.

First, such 'anti-protected characteristic' requests at the least fall foul of any policy considerations and can be marginalised. Anti-discrimination law is not in place to protect racism or any other prejudice covered by the legislation. The issue arose in *Redfearn v Serco*,⁹⁸ where the claimant used the logic of discrimination law to claim that his dismissal for belonging to a racist political party was in fact discriminatory. The Court of Appeal rejected the claim, albeit on rather unsatisfactory reasoning.⁹⁹ However, it is well within the traditions of statutory interpretation to reject such claims simply because using the legislation in this way would create an absurdity or anomaly not envisaged by the drafter.¹⁰⁰ It certainly would be absurd if anti-discrimination law came to the aid of someone *because* he was a racist (or homophobe, xenophobe, Islamophobe, misogynist, and so on). Likewise, the ECJ has the means to reject any such dissonant claims under its teleological approach to interpretation.¹⁰¹ Thus, it is possible to hold that the refusal of abusive requests is not discriminatory at all.

98 *Redfearn v Serco (t/a West Yorkshire Transport Service)* [2006] EWCA 659. See also, *Wheeler v Leicester CC* [1985] AC 1054 (CA and HL).

99 See eg M Connolly, 'The multiple definitions of harassment and direct discrimination: a "Pandora's attic"' (2009) 10 *International Journal of Discrimination and the Law* 101, 102–104 and 106–107.

100 Commonly labelled the Golden Rule. See eg *Stock v Frank Jones (Tipton)* [1978] 1 WLR 231 (HL) 237 (Lord Simon), 238–239 (Lord Scarman); O Jones, *Bennion on Statutory Interpretation* 6th edn (LexisNexis 2013) Div 5, 'Introduction' to pt XXI, and pt XXI, s 312. Note that Redfearn won a human rights claim based on political opinion under ECHR, art 11 (freedom of association): *Redfearn v UK* [2013] IRLR 51 (ECtHR).

101 See the explanation given in *R v Henn and Darby* [1981] 1 AC 850 (HL) 904–905 (Lord Diplock). In the US case, *Bellamy v Mason's Stores* 508 F 2d 504, at 505 (4th Cir 1974) affirming 368 F Supp 1025, at 1026 (ED Va 1973), it was held that the Ku Klux Klan was not a religion under the Civil Rights Act 1964: '[T]he proclaimed racist and anti-Semitic ideology ... takes on a ... narrow, temporal and political character inconsistent with the meaning of "religion".'

Of course, *Lee v Ashers* evokes the question of 'anti-gay' message requests. What if a baker (perhaps gay) is asked to ice a cake with the slogan, 'Ulster says no to same-sex marriage' or perhaps 'Protect the traditional family'? The first refusal is explicit enough to be 'on grounds of' (heterosexual) sexual orientation, or at least indissociable¹⁰² from it. The second would depend on context. If it were the case (as encouraged under the Thatcher Government in the 1980s) that the 'traditional family' mantra was common currency for demeaning gay relationships,¹⁰³ then of course, this 'convenient shorthand'¹⁰⁴ could be indissociable from sexual orientation, suggesting that a refusal was on that ground. At a time when same-sex marriage was not lawful, but same-sex relationships were, a court may entertain an argument that the first message is *relatively* benign, as it is distinguishable from gay relationships and restates the *status quo* (but see the baker's human rights, below). As such, it would have held that the message was not anti-protected characteristic. Once same-sex marriage is legal, the argument would fail, of course. The request, demeaning to gay marriage and gay persons, would be 'anti-protected characteristic'. Assuming the second 'traditional family' message carried an anti-gay sentiment, it would be also anti-protected characteristic. As such, a refusal here would not amount to unlawful discrimination.

Second, even if this anti-protected characteristic policy did not apply, and any refusal were found to be discriminatory, the next consideration is the provider's freedoms of speech and religion under the separate human rights regime. (Bear in mind that free speech includes a refusal to express something.)¹⁰⁵ As noted above, during the *Masterpiece* discussion,¹⁰⁶ this is the proper forum to weigh the defendant's human rights against the policy considerations favouring anti-discrimination law, such as those previously outlined. Further examples could include mischievous or malicious requests for slogans, deliberately to

102 *Bull v Hall* [2013] UKSC 73, holding that marriage and sexual orientation were indissociable.

103 'Children who need to be taught to respect traditional moral values are being taught that they have an inalienable right to be gay. And children who need encouragement – and children do so much need encouragement – so many children – they are being taught that our society offers them no future. All of those children are being cheated of a sound start in life – yes cheated.' Prime Minister Thatcher, *Conservative Party Conference, Blackpool*, 9 October 1987; also reported in *The Times* (10 October 1987).

104 *James v Eastleigh BC* [1990] 2 AC 751, 764 (Lord Bridge) equating 'pensionable age' with sex as, at the time, men and women had different state retirement ages.

105 See eg *Lee v Ashers* [2018] UKSC 49, citing *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38 [42].

106 Text et al to n 83 above.

antagonise, humiliate, or even bankrupt the business,¹⁰⁷ knowing that it would find them offensive. An example of this justification exercise was given in the Canadian case *Brockie v Ontario*,

If any particular printing project ordered ... contained material that conveyed a message proselytizing and promoting the gay and lesbian lifestyle or ridiculed his religious beliefs, such material might reasonably be held to be in direct conflict with the core elements of [the supplier's] religious beliefs. On the other hand, if the particular printing object contained a directory of goods and services that might be of interest to the gay and lesbian community, that material might reasonably be held not to be in direct conflict with the core elements of [the supplier's] religious beliefs.¹⁰⁸

Using this approach, (European) human rights jurisprudence provides enough discretion with its margin of appreciation,¹⁰⁹ justification (including proportionality),¹¹⁰ and 'Living Instrument'¹¹¹ doctrines to decide each case on its merits. What a court should not be doing is winking out an overly subtle exception in an attempt to hold that there was no discrimination in the first place. This can be applied just as readily to any 'anti-gay' requests. A message 'proselytizing and promoting' the heterosexual lifestyle and demeaning same-sex relationships may directly conflict with the baker's religious or free speech rights.

Suppliers of messages, therefore, should have no reason to fear abusive or demeaning requests, as a refusal need not be discriminatory, and, in any case, it would be protected by their overriding human rights of freedoms of speech or religion. The human rights consideration could apply even where the request was inadvertently offensive to the supplier, as appeared to be the case in *Lee v Ashers*. The advantage of this approach is that, even if a supplier is entitled to refuse, it

107 If a business is obliged to supply a service with which it profoundly disagrees, it might feel necessary to cease trading for fear of litigation. See eg *Bull v Hall* [2012] EWCA 83 [3].

108 *Brockie v Ontario (Human Rights Commission)* (2002) 222 DLR (4th) 174 (Ontario Superior Court of Justice) [56].

109 On the limited margin afforded in domestic cases, see *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173 [118] (Lady Hale); *Steinfeld v Secretary of State for Education* [2018] UKSC 32.

110 See eg *Karner v Austria* (2003) FLR 623 (ECtHR).

111 *Őcalan v Turkey* (App no 46221/99) (2005) 41 EHRR 45 [163]: 'The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.' See also *Zaunegger v Germany* (2010) 50 EHRR 38, para 60.

does so only because of its own particular genuine and cogent legally recognised beliefs. This means that the likelihood of social exclusion is minimalised, as suppliers more generally are less likely to have such a defence (as in the anti-Polish refusals, above).

Treatment 'applying to all'

In *Lee v Ashers*, Lady Hale's characterisation of the refusal as affecting 'People of all sexual orientations'¹¹² was an observation deployed to hold that this could *not* be direct discrimination, associative or otherwise. As well as drawing on *dicta* from *Masterpiece*,¹¹³ Lady Hale cited a well-known rubric, 'It cannot constitute direct discrimination to treat all employees in precisely the same way.'¹¹⁴ The citation is from the Court of Appeal in *Islington LBC v Ladele*.¹¹⁵ Here, a registrar was subjected to disciplinary proceedings for refusing to conduct (same-sex) civil partnerships, for reasons of her religious beliefs. After rejecting the registrar's direct discrimination claim because all disobedient registrars would be treated in the same way, the Court of Appeal went on to analyse the case as indirect discrimination.

There are two observations to be made here. First, while the refusal in *Lee v Ashers* would have been made to all *customers*, it concerned a service specific to a protected characteristic. This is akin to an employer refusing to hire all *applicants* who were married to a black man. Both refusals apply to all, but each is specific to a protected characteristic, and expressed to be so, or in the jargon, the treatment was 'facially discriminatory'. By contrast, the discipline in *Ladele* applied to all acts of disobedience and was *not* specific to any protected characteristic. It was not facially discriminatory.

Second, assuming for the moment that the characterisation was correct, and the refusal was not specific to any protected characteristic, the next step for any discrimination lawyer would be a consideration of indirect discrimination. Yet, Lady Hale refused to consider this, and without providing reasons.¹¹⁶ If she had done so, the analysis might have run as follows.

112 *Lee v Ashers* [2018] UKSC 49 [25].

113 *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* (2018) 138 S Ct 1719. See above, text et al to n 83.

114 *Islington LBC v Ladele* [2007] ICR 387 (EAT) [53] (Elias J), adopted by [2010] 1 WLR 955 (CA) [29] (Lord Neuberger), cited by Lady Hale, and in *Lee v Ashers* [2018] UKSC 49 [23].

115 *Ibid.*

116 *Lee v Ashers* [2018] UKSC 49 [21]. Contrast *Onu v Akwìwu, Taiwo v Olaigbe* [2016] UKSC 31 [31]–[33], where, despite the claimant's concession that there was no indirect discrimination, Lady Hale discussed the matter.

The elements of indirect discrimination require an unjustified practice applied to all that puts a protected group, as well as the claimant, at a particular disadvantage.¹¹⁷ Thus, the refusal to supply the message, which applied to all, was intrinsically liable¹¹⁸ to have particularly disadvantaged the predominantly homosexual members of QueerSpace (for whom the cake was intended), as well as Mr Lee (who, being gay, suffered the same disadvantage). The outcome would have then turned on objective justification, which could appreciate the bakery's human rights of freedom of speech and religion. Note here, although the claimant must share the same protected characteristic as the group, it is irrelevant that the bakery might not have known, or perceived, that Mr Lee was homosexual.

This 'refuse-all' analysis was as flawed as the message distinction. It attempts to disguise the element of sexual orientation within the treatment. Thus, even if the direct discrimination analysis was watertight, the matter should have defaulted to a consideration of indirect discrimination.

The missteps in *Lee v Ashers*

The discussion on *Lee v Ashers* argues that the three possible reasons underpinning the decision are deceptive devices, unable to disguise the discriminatory element in the bakery's refusal. The close-enough rubric, the message distinction, and the refuse-all theory were missteps that do not stand scrutiny. The vague and subjective close-enough rubric led to unconvincing speculation as to the identity of the associates and is susceptible to manipulation in favour of a desired result. It was made with little fidelity to the statutory formula, and without reference to obvious sources of authority, such as *Applin*,¹¹⁹ *Showboat v Owens*, and the broader bases of *Coleman* and *English v Sanderson*.

There is no support in the equality legislation for the message distinction. This statutory outlier was also contrary to a number of legal principles and even the judgment's own reasoning on the political opinion claim. In addition, there are strong policy reasons why 'message cases' should not be immunised from discrimination law, with abuse, and freedoms of speech and religion, being addressed under the separate respective interpretive and human rights regimes. These have the benefit of minimalising any consequent social exclusion.

117 Sexual Orientation Regulations (n 32 above) reg 3(1)(b); EA 2010, s 19.

118 See Case-C237/94 *O'Flynn v Chief Adjudication Officer* [1996] ECR I-2617; and on the EA 2010, *Homer v Chief Constable of West Yorkshire* [2012] ICR 704 (SC) [14] (Lady Hale).

119 *Applin v Race Relations Board* [1975] 2 AC 259 (HL) 828; and [1975] 2 AC 259 (HL). See text to nn 1, 2 and 39 above.

Additional missteps were the reliance on the unavailing *Masterpiece* case and 'atheist' simile.

The final misstep was the deployment of *Ladele*. While the case was used to close down the direct discrimination claim, its partial citing facilitated an unexplained avoidance of the usual consequence of an indirect discrimination analysis.

It may appear that much of the criticism in this article, notably the speculation as to potential associates, is following *Lee v Ashers* down the associative blind alley. The purpose in doing this was to highlight the unnecessary complications that can arise if associative discrimination is treated as a term of art under a statutory regime that dictates no such notion, and certainly no such bespoke restrictions. Almost to the exclusion of any other thinking, this notion supplanted the basic questions posed by the statutory formulas of direct and indirect discrimination. This was surprising, not least because a 'simple' example of associative discrimination recognised by the House of Lords as early as 1974 was done so on the straightforward interpretation of the open statutory formula and the 'mischief' of the Act.¹²⁰ This was another relevant authority that went uncited in *Lee v Ashers*. A simple resort to the statutory text and its mischief, or purpose (notably the message policy considerations), would have resolved the case without these missteps.

The correct approach?

It is not the purpose of this article to provide a detailed alternative judgment for this case. Rather, it is to highlight that the Supreme Court asked the wrong questions and in doing so endorsed principles that have no place in the statutory regime, thus reducing the potential for some meritorious claims. What can be said is that, for direct discrimination, the question should have centred on whether less favourable treatment because of same-sex marriage was less favourable treatment because of sexual orientation. Current jurisprudence suggests that the matter would turn on whether a court considered that gay marriage was indissociable from sexual orientation. Precedent suggests that it is,¹²¹ and on this basis there would be liability (subject to the defendant's human rights). Should it be found that this was not direct discrimination, then the question is whether the refusal amounted to (*prima facie*) indirect discrimination. As noted above, it is suggested that this would be the case, with the matter turning on the justification defence, including again the defendant's human rights.¹²²

120 *Applin* Ibid.

121 *Bull v Hall* [2013] UKSC 73, holding that marriage and sexual orientation were indissociable.

122 See text to n 117 above.

CONCLUSION

Associative discrimination has two origins in modern discrimination law. One, from the US, is a narrow but manageable theory dependent upon a *relationship* between the targeted victim and a third party. The *claimant's* protected characteristic must be a factor motivating the treatment. Its limited reach is down to the 'closed' (US federal) legislative formula. The other, stemming from the more open UK formula, has no such limitation. Hence, as early as 1973, the Court of Appeal and, subsequently, the House of Lords recognised that associative scenarios fell within the UK open formula and its mischief, or purpose.¹²³ Its open formula meant that the claimant's protected characteristic need not be a factor.

The *Lee v Ashers* judgment appeared to have no knowledge of either origin. It did little more than serve to expose that under UK (and EU) legislation, the notion of associative discrimination as a term of art is a fiction. It has no complete theoretical basis and no utility other than providing our vocabulary with a convenient description of a certain factual scenario. The most obvious evidence of the haphazard reasoning is the conclusion on direct discrimination. The Supreme Court's indulgence in the 'associative' notion blinkered it to the broader potential of the direct discrimination formula. Seemingly unaware of the existing statutory exception for specialist services, and in what must surely be an affront to the statutory purpose, the 'message case' doctrine ring-fences a significant sector of commerce from its obligation to provide services without discrimination. An anti-abuse and alternative human rights approach would have minimalised this to just those instances of countervailing rights, such as free speech. Meanwhile, the judgment's refusal to go further after holding that the practice 'applied to all' leaves unclear meaning of indirect discrimination in the UK's equality legislation.

The recommendations for either the Supreme Court, or Parliament, are as follows. First, either must clarify that associative discrimination is not a term of art and, in any case, must not be used to the exclusion of the broader principles of discrimination legislation. Until such a time, litigants in anything beyond a 'simple' associative scenario would be prudent to avoid pleading it as such, instead couching a case in terms of the broader statutory formulas, and relying on, if anything, a fluid but sound comparison (demonstrated in *Showboat v Owens*).

Second, the lawmakers must express that 'message cases' should be analysed only under an anti-abuse interpretation and human rights freedoms of speech and religion, and not under the definitions

123 *Applin v Race Relations Board* [1973] QB 815 (CA) 828 and [1975] 2 AC 259 (HL). See text to nn 1, 2 and 39 above.

of discrimination.¹²⁴ Third, although there seems little can done on the 'apply to all' aspect of *Lee v Ashers* (Parliament can do no more than repeat the existing statutory formula), tribunals and courts could ignore it on the basis that no reasoning (and so no *ratio decidendi*) was apparent.

The use of associative discrimination as a term of art is one open to so much manipulation that discrimination law should steer well clear of it as a legal benchmark.

124 Mr Lee's claim may be heard in the Strasbourg Court. If it distinguishes discrimination from objective justification, it may force a change in the law.



Reasonable accommodation in Irish constitutional law: two steps forward and one step back – or simply out of step?

Shivaun Quinlivan and Lucy-Ann Buckley*

National University of Ireland, Galway
Correspondence email: shivaun.quinlivan@nuigalway.ie

ABSTRACT

By ratifying the United Nations Convention on the Rights of Persons with Disabilities (CRPD), Ireland has committed to implementing the principle of reasonable accommodation in multiple contexts. To date, however, it has failed to expand existing legislative measures. This article analyses the potential of the Irish Constitution to encompass a reasonable accommodation duty and meet Ireland's CRPD obligations. It examines the constitutional model of equality, as well as judicial conceptualisations of disability, and argues that the Constitution is capable of accommodating a more robust legislative standard for reasonable accommodation than often thought, which is compatible with the CRPD. It also contends that recent decisions offer potential for the development of a constitutional reasonable accommodation duty. However, these apparent gains are fragile and the current constitutional capacity to accommodate CRPD requirements is undermined by continuing judicial contestation. The Constitution should therefore be amended so that Ireland can meet its international human rights obligations.

Keywords: reasonable accommodation; disability; UN Convention on the Rights of Persons with Disabilities; CRPD; article 40.1; equality; Irish Constitution.

INTRODUCTION

Barrington J famously opined that the 'concept of equality before the law is probably the most difficult and elusive concept contained in the Constitution'.¹ This is amply demonstrated by the jurisprudence of the Irish courts. Convoluted and inconsistent interpretations indicate profound gaps in judicial approaches to equality. Nowhere is this more evident than in the case law addressing the capacity of the Constitution to encompass the principle of reasonable accommodation. Reasonable

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1 *Brennan v Attorney General* [1983] ILRM 449 (HC) 479.

accommodation, though not always judicially referred to as such, involves adapting systems and processes in response to individual needs and is essential for ensuring equality in practice for persons with disabilities. However, its position in Irish constitutional law remains deeply contested.

The capacity of the Constitution to encompass a reasonable accommodation principle matters because, to date, the two main drivers for the development of an Irish duty of reasonable accommodation – the Framework Employment Directive² and the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD)³ – are international and limited in effect. The Framework Employment Directive overrides national law but applies only in the employment context; it is therefore of no assistance in the many other contexts where reasonable accommodation may be required. The CRPD (ratified by Ireland in 2018) applies the duty of reasonable accommodation in multiple contexts. However, it has no domestic effect in Ireland without legislative implementation. As yet, this has been sadly lacking, and Ireland's only statutory duties in relation to reasonable accommodation long pre-date its ratification of the CRPD.⁴

The Constitution represents a third driver in the Irish context, which (paradoxically) may serve both to expand and curtail the scope of reasonable accommodation, and which directly impacts on Ireland's ability to meet its international obligations. The potential for expansion lies in the constitutional equality guarantee, though the exact scope of this remains contested and legal development has been hampered by restrictive doctrines and limited judicial engagement with equality concerns. However, there are indications of a more positive approach in some recent decisions which suggest not only that the equality guarantee mandates the provision of reasonable accommodation in some circumstances, but that the duty may extend to contexts not yet addressed by legislation. The potential for curtailment lies primarily in competing constitutional provisions, most notably the right to private property, which has been interpreted as restricting legislative ability to

2 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Employment Directive).

3 UN General Assembly, Convention on the Rights of Persons with Disabilities A/RES/61/06.

4 The sole attempt to update current equality law in light of the CRPD lapsed with the dissolution of the Dáil (Parliament) in early 2020. For a detailed analysis of the Employment Equality Acts 1998–2015 and implementation of the CRPD in Ireland, see Lucy-Ann Buckley and Shivaun Quinlivan, 'Reasonable accommodation in Irish equality law: an incomplete transformation' (2021) 41(1) *Legal Studies* 19.

implement the reasonable accommodation duty. In a curious tension, therefore, constitutional law has been used to develop a principle of reasonable accommodation in some contexts, while simultaneously limiting it in others.

Given Ireland's international obligations in respect of reasonable accommodation and the inadequacy of legislative implementation to date, this article asks if the constitutional equality guarantee is capable of accommodating Ireland's CRPD obligations. To this end, it focuses on two key sub-questions. First, how far does the Constitution permit or limit a statutory reasonable accommodation duty? Second, how far does the Constitution *impose* a reasonable accommodation duty, independent of legislation?

The article begins by outlining the nature of reasonable accommodation in the CRPD and how it fits with particular models of equality and disability. It then examines the model of equality enshrined in the Irish Constitution, as well as judicial conceptualisations of disability, to evaluate the potential scope for reasonable accommodation in constitutional law. In terms of *permitting* reasonable accommodation, the article argues that the limiting effects of the private property guarantee have been overstated and that the Constitution is capable of accommodating a more robust legislative standard than often thought, which is compatible with the CRPD. However, the legislature has been reluctant to put this to the test. In terms of *requiring* reasonable accommodation, the article contends that recent decisions represent two steps forward from previous restrictive interpretations of both equality and disability and offer greater potential for the development of a constitutional duty. However, these apparent gains are fragile and are undermined by an unresolved tension between the Supreme Court and lower courts. The article concludes that the capacity of the current equality guarantee to accommodate CRPD requirements is uncertain and is undermined by continuing judicial contestation. It should therefore be amended so that Ireland can meet its international human rights obligations.

THE CONCEPT OF REASONABLE ACCOMMODATION

The legal concept of reasonable accommodation has become intrinsically associated with disability discrimination but originates in American religious discrimination law.⁵ Indeed, it could be argued that the Irish Supreme Court decision in *Quinn's Supermarket Ltd*

5 Code of Federal Regulations: 29 CFR § 1605.2: reasonable accommodation of an employee's religious practices is required by the Civil Rights Act 1964, title VII, s 701(j) unless it would amount to 'undue hardship'.

*v Attorney General*⁶ represents an early acknowledgment of the principle of reasonable accommodation on the grounds of religion. The Americans with Disabilities Act 1990 (ADA) included the first application of the concept of reasonable accommodation as a tool to address disability discrimination. The influence of the ADA cannot be overestimated and is arguably even more extensive externally than internally. So suited is the concept of reasonable accommodation to disability equality that the principle pioneered in the ADA has migrated into legislative enactments worldwide,⁷ culminating in the principle of reasonable accommodation being enshrined as a fundamental building block underpinning the CRPD.

The CRPD was the fastest negotiated human rights treaty in history. At the time of writing, it has been ratified by 181 countries, including every member state of the European Union (EU), as well as the EU itself. As Buckley and Quinlivan have noted,⁸ the CRPD's influence is extensive, and it has been cited and relied on in the jurisprudence of the Court of Justice of the European Union,⁹ the European Court of Human Rights¹⁰ and the European Social Charter (Revised)¹¹ as well as by the Irish Supreme Court.¹² This paper therefore contends that the CRPD represents a broad consensus at European level and that the concepts enshrined therein should guide our understanding of relevant principles and concepts, such as reasonable accommodation. Indeed, Ireland's ratification of the CRPD requires internal implementation in order to comply with the Convention.

6 *Quinn's Supermarket Ltd v Attorney General* [1972] IR 1 (SC). Here the Supreme Court accepted the necessity to adapt the system in response to the needs of a particular group. This differs somewhat from the CRPD understanding of reasonable accommodation, which is a tool for the individual rather than the group.

7 Jerome Bickenbach, 'The ADA v the Canadian Charter of Rights: disability rights and the social model of disability' in Leslie Pickering Francis and Anita Silvers (eds), *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institution* (Routledge 2005) 342.

8 Buckley and Quinlivan (n 4 above) 1.

9 See eg Joined Cases C-335/11 and C-337/11 *Ring and Skouboe Werge*; C-406/15 *Milkova*; C-395/15 *Daouidi*; C-363/12 *Z v A Government Department*.

10 See eg *Glor v Switzerland* (2009) App no 13444/04; *Kiyutin v Russia* (2011) App no 2700/10; *Alajos Kiss v Hungary* (2010) App no 38832/06; *Guberina v Croatia* (2016) App no 23682/13.

11 See eg *European Action of the Disabled (AEH) v France* Complaint No 81/2012 Decision on the Merits, 11 September 2013; *Mental Disability Advocacy Center (MDAC) v Bulgaria*, Complaint No 41/207; *Mental Disability Advocacy Center (MDAC) v Belgium*, Complaint No 109/2014.

12 *Nano Nagle School v Daly* [2019] IESC 63.

The CRPD is fundamentally a human rights instrument with ‘an explicit, social development dimension’.¹³ Significantly, it views persons with disabilities as right-holders, consistent with what is often described as the move from charity to rights.¹⁴ It adopts innovative and effective modes of implementation, including the expansion of implementation duties beyond the state to the private sector.¹⁵

Discrimination is broadly conceived under the CRPD, which requires that ‘all forms of discrimination, including denial of reasonable accommodation’ be prohibited.¹⁶ The CRPD further defines reasonable accommodation at article 2 as:

Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

In a detailed analysis of reasonable accommodation in the CRPD, Buckley and Quinlivan have highlighted that the duty to accommodate has two constituent elements.¹⁷ The first element is the duty to provide a modification or adjustment deemed necessary and appropriate in a particular case to ensure that a person with a disability is able to enjoy or exercise a right on an equal basis with others. This is a responsive duty, which addresses the barriers specific to the individual in question. Importantly, in determining what accommodations are necessary and appropriate, the duty-bearer should engage in dialogue with the person requiring the accommodation. This positions the person with a disability as a ‘stakeholder whose voice must be heard’.¹⁸ The second element of the duty is that an accommodation should not impose a disproportionate or undue burden on the duty-bearer; this is also an individualised assessment. Buckley and Quinlivan emphasise that the determination of whether an accommodation gives rise to a disproportionate or undue burden should involve more than mere financial assessment and highlight other relevant factors, such as potential benefits to third parties and the disruption likely to be caused by the proposed accommodation.¹⁹

13 UN Department of Economic and Social Affairs, CRPD.

14 Michael Ashley Stein, ‘The paradigm shift from welfare to rights’ (11 January 2010).

15 Frédéric Mégret and Dianah Msipa, ‘Global reasonable accommodation: how the Convention on the Rights of Persons with Disabilities changes the way we think about equality’ (2014) 30 *South African Journal on Human Rights* 252.

16 CRPD, art 2.

17 Buckley and Quinlivan (n 4 above) 5.

18 Ibid 9.

19 Ibid 7.

Article 5 of the CRPD requires states parties to ensure that there is ‘effective legal protection against discrimination’.²⁰ This is a requirement on all 181 states parties ‘to ensure that reasonable accommodation provisions are enshrined in law as an immediately enforceable right in all areas of law and policy’.²¹ However, as will be discussed later in this article, Ireland’s ability to legislate in this area has been restricted in practice by the Irish Constitution. The reasons for this largely stem from the constitutional model of equality and the limited judicial engagement with more widely accepted concepts of both equality and disability.

THE SIGNIFICANCE OF EQUALITY AND DISABILITY MODELS

The ability of the Constitution to encompass a reasonable accommodation duty compliant with the CRPD depends on the model of equality it adopts. Formal equality demands similar treatment for people in similar situations; applying an Aristotelian approach, those who are differently situated may be treated differently, though the disparity of treatment should be proportionate to the degree of difference. Under formal equality, people should not be treated differently on the basis of factors which are deemed irrelevant, such as gender, race or disability. Legally, this is manifested in the concept of direct discrimination, where the primary focus is on parity of treatment and the purity of the decision-making process, rather than the fairness of the outcome. In practice, formal equality is effectively blind to structural power imbalances, and the language of equality masks an insistence on particular social norms (for example, expectations regarding hours of work or methods of accessing information).²² Formal equality has no minimum standards – any treatment is acceptable, so long as it is the same for everyone. ‘Different’ treatment of those who are regarded as ‘similar’ is perceived as contrary to equality, leaving little space for reasonable accommodation. While the Aristotelian model offers some room for differential treatment, too often a finding of ‘difference’ results in exclusion or disadvantage.²³

20 CRPD, art 5(2).

21 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Germany* (13 May 2015) CRPD/C/DEU/CO/1 [14(b)].

22 For a detailed critique of the formal equality model, see Sandra Fredman, *Discrimination Law* 2nd edn (Oxford University Press 2011) 8.

23 Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press 1990).

Substantive equality also assumes a general principle of similar treatment; however, this may be ameliorated by special treatment in particular cases in the interests of fairness. Unlike formal equality, substantive equality focuses on the effects of a particular rule or practice, rather than processes and motivations. Legally, this is manifested in the concept of indirect discrimination, which focuses on disparate impact. Substantive equality also recognises that different treatment may be needed where there are genuine differences in situation, such as disability. In this understanding, reasonable accommodation is not only permitted, but required, to compensate for the disadvantages experienced by some groups and ensure full equality in practice. However, substantive equality does not challenge existing norms or practices, but rather seeks to enable those who are disadvantaged to satisfy them. It may therefore be criticised for its limited ability to tackle entrenched structural inequalities.

As Buckley and Quinlivan note, the principles of substantive equality permeate the CRPD.²⁴ The CRPD's stated purpose is 'to promote, protect and ensure the full and equal enjoyment of all human rights ... by all persons with disabilities',²⁵ and equality and non-discrimination are cross-cutting principles that apply to all other articles.²⁶ All substantive rights are stated to apply 'on an equal basis with others', and the Convention explicitly requires proactive measures by states to achieve this.²⁷ Uniquely in international human rights treaties, the CRPD expressly defines discrimination as including the denial of reasonable accommodation,²⁸ so the right to reasonable accommodation therefore also applies to the exercise of all other rights under the Convention. Buckley and Quinlivan contend that this strong vision of equality is essential to address the historic and continuing exclusion and marginalisation of persons with disabilities.²⁹ They note that the CRPD Committee has recently argued that the Convention is based on a new equality model, known as transformative or inclusive equality, incorporating a range of dimensions based on principles of fair distribution, recognition, participation and the accommodation

24 Buckley and Quinlivan (n 4 above) 2.

25 CRPD, art 1.

26 Committee on the Rights of Persons with Disabilities, *General Comment No 6 (2018) on Equality and Non-Discrimination*, CRPD/C/GC/6 (General Comment No 6) 12.

27 See eg Committee on the Rights of Persons with Disabilities (n 21 above); *Concluding Observations on the Initial Report of Greece* (24 September 2019) CRPD/C/GRC/CO/1; and *Concluding Observations on the Initial Report of India* (24 September 2019) CRPD/C/IND/CO/1.

28 CRPD, art 2.

29 Buckley and Quinlivan (n 4 above) 3.

of difference.³⁰ Unlike formal and substantive equality, which are essentially corrective in nature, transformative equality seeks to tackle exclusionary practices that may well be considered unobjectionable under prevailing norms.³¹ Exclusion and disadvantage are to be addressed by rethinking rules and expectations and using positive measures to overcome inequality, rather than allowing for exceptional treatment. The objective is thus both normative and systemic change. However, Degener has emphasised that there is still a role for both formal and substantive equality in addressing particular kinds of discrimination.³²

The CRPD's emphasis on substantive equality is supported by its model of disability. Rejecting a medical disability model – where difficulties experienced by persons with disabilities are attributed to their impairments and require medical solutions – the CRPD is said to have adopted a social understanding of disability.³³ In this view, barriers derive not from an impairment, but from exclusionary social structures and practices, which have a disabling effect.³⁴ This is most evident in article 1 of the CRPD, which states that: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments *which in interaction with various barriers* may hinder their full and effective participation in society on an equal basis with others'. However, the CRPD itself notes that 'disability is an evolving concept',³⁵ and the conceptualisation has been further refined in recent years by the development of a human rights model of disability, which has been adopted by the CRPD Committee.³⁶

The relationship between the human rights model of disability and the social model of disability is somewhat contested. Some commentators contend that the human rights model goes beyond the social model by acknowledging the human dignity of persons with disabilities as the basis of their equal human rights in multiple contexts and recognising

30 General Comment No 6 (n 26 above) 8. For a further discussion of the proposed equality dimensions, see Fredman (n 22 above) 25.

31 Hester Lessard, 'Book review: Inclusive Equality: Relational Dimensions of Systemic Discrimination in Canada, by Colleen Sheppard' (2011) 49(1) *Osgoode Hall Law Journal* 159.

32 Theresia Degener, 'Disability in a human rights context' (2016) 5(3) *Laws* 35.

33 *Ibid.*

34 For a discussion of the social model, see Rannveig Traustadóttir, 'Disability studies, the social model and legal development' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities* (Martinus Nijhoff 2009) 3–4.

35 CRPD, Preamble, para (e).

36 Degener (n 32 above).

the impact of impairment as well as socially constructed barriers.³⁷ Hence, Degener contends that the human rights model is a progression rather than a replacement of the social model, which ‘offers a roadmap for change’, not merely an explanation of disadvantage.³⁸ By contrast, Lawson and Beckett argue strongly against the perception that the human rights model builds on the social model, contending that it is complementary and supportive of the social model. They propose a complementarity thesis, whereby ‘the relationship between the two models is one in which neither can be viewed as an improvement on the other because each has distinctive roles to play’.³⁹ Whatever, the position adopted, commentators apparently concur that both the social model and the human rights model ‘are valuable tools’⁴⁰ for those striving to achieve equality.

The existence of a reasonable accommodation duty is contingent on the model of disability, as it interacts with the model of equality. The medical model essentially attributes any difficulties experienced by a person with disabilities to personal limitations; the impact of social barriers therefore remains invisible, and the presumption of neutrality is beyond contestation. This speaks directly to a formal equality model, which likewise assumes social neutrality, ignores the impact of context and structural conditions, and locates problems in the individual. Both models therefore effectively serve to legitimate existing norms. As Rioux comments: ‘When the source of the inequality is located in the individual in this way, there is a ready rationale for social inequality and for limiting social entitlement.’⁴¹ By contrast, the social model of disability focuses on the impact of social context, relationships and environment, and the need to eliminate socially constructed barriers.⁴² Like substantive equality, therefore, it emphasises the need to remove obstacles and ensure the ability to participate equally. Impairment is thus seen as a difference that must be accommodated, to ensure real equality in practice. This approach is strengthened further by the human rights model of disability and a transformative approach to

37 Ibid; see also Sarah Arduin, ‘Article 3: general principles’ in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press 2018).

38 Degener (n 32 above).

39 Anna Lawson and Angharad E Beckett, ‘The social and human rights models of disability: towards a complementarity thesis’ (2020) *International Journal of Human Rights* 1.

40 Ibid.

41 Marcia Rioux, ‘Towards a concept of equality of well-being: overcoming the social and legal construction of inequality’ (1994) 7(1) *Canadian Journal of Law and Jurisprudence* 127, 131.

42 Traustadottir (n 34 above) 9.

equality, where structural transformation, including the removal of barriers, is essential to ensure equal participation and the vindication of human rights.

While transformative equality and the human rights model of disability best describe our present understanding of the CRPD, they are not essential for the recognition of a constitutional reasonable accommodation duty that is compliant with the Convention. However, the foregoing discussion highlights that any scope for such a constitutional duty requires, at a minimum, a substantive approach to equality and a social understanding of disability. The following sections will discuss the extent to which these preconditions are satisfied in Irish constitutional jurisprudence.

EQUALITY IN IRISH CONSTITUTIONAL LAW

Article 40.1 of the Irish Constitution provides that:

All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

In international terms, Irish Constitutional jurisprudence is ‘remarkably underdeveloped’,⁴³ with a somewhat stagnant view of equality. Commentators have highlighted its static understanding of equality, noting that the ‘debate about differing conceptions of equality has, to a large extent passed Article 40.1’.⁴⁴ The Constitution Review Group noted that the ‘narrow wording’ of the equality guarantee and its restrictive judicial interpretation ‘have been widely observed and criticised’.⁴⁵ For this reason it recommended significant changes to article 40.1, though these have not been progressed.⁴⁶

A key focus of criticism was the introduction of the so-called ‘human personality doctrine’, which limited the protection of article 40.1 to ‘human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow’.⁴⁷ Thus, it was said, article 40.1 ‘relates to their essential

43 Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* 5th edn (Bloomsbury 2018) 1562. See also Oran Doyle, *Constitutional Equality Law* (Thomson Roundhall 2004) 74.

44 Ibid.

45 Constitution Review Group, *Report of the Constitution Review Group* (Stationery Office 1996) 195.

46 Ibid 204.

47 *Quinn’s Supermarket Ltd* (n 6 above) 13–14.

attributes as persons, those features which make them human beings. It has ... nothing to do with their trading activities or with the conditions on which they are employed.⁴⁸ This is described as the context approach⁴⁹ and as having ‘virtually emasculated the guarantee of equality’.⁵⁰ A constitutional right of action could not arise unless a potentially offending enactment related to some facet of the human personality, as opposed to a person’s interactions with society – an almost impossible standard to meet in practice. This has reasonably been described as ‘an exceedingly narrow view of the equality guarantee – almost suggesting that human personality could exist in a void’.⁵¹ Invariably, it is a person’s interactions with society that give rise to discriminatory situations, such as a denial of education, employment opportunities, or access to goods and services. By conceptualising the person as entirely atomistic and prohibiting only those activities that impacted on the essence of being human, the human personality doctrine placed an insuperable barrier in the path of any claim to reasonable accommodation.

More recent cases suggest that the focus has shifted from the context of discrimination to the ‘basis of discrimination’.⁵² In *Brennan v Attorney General*, Barrington J emphasised that: ‘Article 40.1 is not dealing with human beings in the abstract but with human beings in society’,⁵³ a view echoed by the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996*.⁵⁴ In theory, this should offer greater scope for reasonable accommodation. However, as discussed below, the decision in *Re Employment Equality Bill 1996* placed other constitutional obstacles in the path of reasonable accommodation.

Apart from applying the ‘human personality’ doctrine, the courts have traditionally held that article 40.1 does not contain a substantive right to equality, but simply prohibits arbitrary and invidious discrimination in state actions. This is evidenced most starkly in *Murphy v Attorney General*,⁵⁵ where the plaintiffs, a married couple, were treated less favourably than an unmarried couple for tax purposes. Although they ultimately succeeded on other grounds, the Supreme Court held that there was no breach of article 40.1. The court stated

48 *Murtagh Properties v Cleary* [1972] IR 330 (HC) 335.

49 Hogan et al (n 43 above) 1582; Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008); Doyle (n 43 above) 74.

50 Hogan et al (n 43 above) 1582.

51 J M Kelly, ‘Equality before the law in three European jurisdictions’ (1983) 18 *Irish Jurist* 259, 265.

52 Hogan et al (n 43 above) 1586; Doyle (n 49 above) 103.

53 *Brennan* (n 1).

54 *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 (SC).

55 *Murphy v Attorney General* [1982] 1 IR 241 (SC).

that a legislative inequality is not itself repugnant to the Constitution 'if *any* state of facts exists which may reasonably justify it'.⁵⁶ In *Murphy*, the unequal treatment meted out by the tax code could be balanced against the 'many favourable discriminations made by the law in favour of married couples'.⁵⁷ This position is surely untenable; by this rationale most discrimination could be balanced against some other 'favourable discriminations' made by law. The court's absolute deference to the legislature in relation to potential justifications for inequality has led *Murphy* to be described as the 'low-water mark of the equality guarantee'.⁵⁸

The doctrinal limitations outlined above reflect a judicial reluctance to engage with equality principles, and in practice the courts have generally been reluctant to invoke the equality guarantee, even in relatively straightforward cases. Thus, in *Murtagh Properties v Cleary*,⁵⁹ the court preferred to find an implicit constitutional right to earn a livelihood than to rely on the explicit equality clause to deal with an obvious case of direct gender discrimination. More commonly, the reluctance to invoke the equality guarantee is demonstrated by a judicial willingness to rely on other substantive constitutional norms to uphold discriminatory legislation.⁶⁰ The Supreme Court has also emphasised that the legislature must be given 'considerable latitude' when addressing financial matters, and that the burden of demonstrating that a law is unconstitutional is 'formidable'.⁶¹

Notwithstanding this reluctance to engage, there is some judicial recognition of suspect classifications. In *Re Article 26 and the Employment Equality Bill 1996*,⁶² it was held that all legislative classifications should attract some scrutiny by the courts, but that some 'suspect' classifications (such as sex, race, language, or religious or political opinions) should attract stricter scrutiny.⁶³ However, this has not been consistently applied. In *MD v Ireland*,⁶⁴ the Supreme Court upheld legislation which provided for the criminalisation of boys but not girls for underage sexual intercourse. The court justified the discrimination by reference to potential harmful effects on girls of

56 Ibid 284 (emphasis added).

57 Ibid.

58 James Casey, *Constitutional Law in Ireland* 3rd edn (Sweet & Maxwell 2000) 456.

59 *Murtagh Properties* (n 48 above).

60 See eg *Lowth v Minister for Social Welfare* [1993] IR 339 (HC), [1998] 4 IR 321 (SC).

61 Ibid.

62 *Re Employment Equality Bill 1996* (n 54 above).

63 Ibid 347.

64 *MD v Ireland* [2012] IESC 10; [2012] 2 ILRM 305.

unwanted pregnancies. It did not engage with the ‘suspect classification’ but stated that the legislature was entitled to additional latitude in respect of legislation dealing with matters of social controversy.⁶⁵ As Mitchell highlights, ‘deference is entirely inappropriate for suspect classifications because by their very nature, it was thought that the Constitution held that such classifications can very rarely be valid.’⁶⁶ The ‘suspect classification’ position was subsequently reaffirmed in *Fleming v Ireland*,⁶⁷ where the Supreme Court noted the existence of ‘categories, where as a matter of history, it is possible to detect the operation of conscious or unconscious prejudice’.⁶⁸ Clearly, these categories could include disability; however, the Supreme Court stated that ‘classification by reference to age or disability may be suspect or may be easily explained. Benefits granted by reference to age or disability may be easy to justify.’⁶⁹ It therefore appears that disability may attract less strict scrutiny than characteristics such as race or gender. While potentially disadvantageous (if a denial of benefits could also be easily justified), this approach might also offer greater scope for reasonable accommodation and positive equality measures (discussed further below).

It has long been established that article 40.1, in keeping with a formal equality model, prohibits direct discrimination, but the position with regard to indirect discrimination is less clear. For this reason, the Constitution Review Group recommended amending article 40.1 to capture expressly both direct and indirect discrimination.⁷⁰ The principal barrier to clarity has been judicial unwillingness to adopt a substantive approach to equality. The issue was recently addressed by the Supreme Court in *Fleming*,⁷¹ which addressed the constitutionality of the Criminal Law Suicide Act 1993. The plaintiff in *Fleming* suffered from multiple sclerosis, an incurable and progressive condition that left her severely physically incapacitated. She wished to be allowed to die at a time of her choosing but needed assistance to end her life. While suicide is not a criminal offence under the 1993 Act, assisting another person to commit suicide constitutes a criminal offence, punishable by up to 14 years’ imprisonment. The plaintiff alleged that the Act disadvantaged people with significant physical disabilities, such as herself, in comparison with persons who were in a position

65 Ibid [50].

66 Ben Mitchell, ‘Constitutional equality law after *Fleming v Ireland*’ (2014) 37(1) *Dublin University Law Journal* 252, 263.

67 *Fleming v Ireland* [2013] IESC 19.

68 Ibid [130].

69 Ibid.

70 Constitution Review Group (n 45 above) 204.

71 *Fleming* (n 67 above).

to commit suicide without assistance. She therefore contended that it was incompatible with the equality guarantee. *Fleming* thus offered a classic indirect discrimination argument: while facially neutral, the Act in practice disadvantaged persons with disabilities.

The Supreme Court judgment appeared to blend direct and indirect discrimination. Direct discrimination normally consists of differential treatment based on a protected characteristic. Referencing direct discrimination, however, Denham CJ stated:

Discrimination may be shown if the class of persons or of activity chosen is formulated unfairly to include or exclude. If the classification is motivated by a discriminatory intent or reveals a prejudice then a classification, though apparently neutral, may be impermissible. Few examples, if any, of this are to be found in modern legislation.⁷²

This suggests that direct discrimination may also occur where an ostensibly neutral rule has an impermissible motivation, such as a hidden motivation to exclude. This is not quite indirect discrimination, which normally focuses on impact rather than motivation; instead, it appears to represent a hybrid of direct and indirect discrimination.

In relation to indirect discrimination, Denham CJ continued:

It is often the case that neutral laws will affect individuals in different ways: in the absence of impact on a fundamental right that does not normally give rise to any unconstitutionality.⁷³

She concluded:

The Court does not consider that the constitutional principle of equal treatment before the law ... extends to categorise as unequal the differential indirect effects on a person of an objectively neutral law addressed to persons other than that person.⁷⁴

From this, it appears that the Supreme Court did not completely reject a constitutional application of indirect discrimination, though it did not uphold the claim on the facts. The court essentially construed the criminal liability provision in the 1993 Act as directed only at the plaintiff's partner, as the person who would have to assist her to commit suicide. The consequences of the provision for the plaintiff herself could therefore be ignored and did not count as indirect discrimination. Whether an indirect discrimination claim might be upheld in other circumstances remained undecided.

Following *Fleming*, it is still unclear whether indirect discrimination is captured by article 40.1. All that can be said with certainty is that facially neutral categorisations based on a discriminatory intent

72 Ibid [131].

73 Ibid [132].

74 Ibid [136].

are discriminatory, and that an indirect impact on a fundamental constitutional right might be discriminatory. Neither requirement was satisfied in *Fleming*. Indirect discrimination is notoriously difficult to apply in practice,⁷⁵ but the Supreme Court in *Fleming* effectively made it almost impossible for an action to succeed. While the (partial) recognition of indirect discrimination could have represented a step towards a more substantive equality model, the Supreme Court's restrictive conceptualisation and application represents a step backwards.

The doctrinal constraints and limited engagement with equality identified above suggest little scope in article 40.1 for reasonable accommodation. However, a final feature of article 40.1, known as 'the proviso', is that the state may 'have due regard to differences of capacity, physical and moral, and of social function'. In *MD v Ireland*, Denham J considered that the two statements in article 40.1 'should not be treated as if they were in separate compartments ... The second is concerned with what the first sentence means.'⁷⁶ It is therefore clear that article 40.1 does permit legislative distinctions between people. As Walsh J famously stated in *De Búrca and Anderson v Attorney General*:

... Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances but it forbids arbitrary discrimination. It imports the Aristotelian concept that justice demands that we treat equals equally and unequals unequally.⁷⁷

Nevertheless, the courts have struggled with the application of equality principles to differing circumstances, as the proviso's scope for legislative distinctions based on 'differences' and 'social function' has proved problematic.⁷⁸ Two separate issues arise here: the extent to which differential treatment may be permitted under the proviso, and the extent to which it may be required. In terms of *permitting* differential treatment, it has generally been emphasised that a distinction may be justified 'if it is not arbitrary, capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved of supporting the selection or classification complained of.'⁷⁹ This approach again prioritises state discretion, once it has any perceived reasonable basis. Direct discrimination may therefore be justified in Irish constitutional law, though the standard is not the same

75 Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Hart 2007) 323.

76 *MD* (n 64 above) 44.

77 *De Búrca and Anderson v Attorney General* [1976] IR 38 (SC) 68.

78 Constitution Review Group (n 45 above) 202.

79 *Dillane v Ireland* [1980] ILRM 167 (SC) 169.

as the statutory defence of objective justification in equality legislation (discussed below). However, it appears that the courts may be moving towards a test that aligns more closely with the statutory test. In *Dokie v DPP*,⁸⁰ the plaintiff, a non-national, challenged the constitutionality of an immigration law provision that required non-nationals to produce on demand a valid form of identification, and in some cases an immigration registration certificate also. Failure to comply without good reason would result in criminal liability. The plaintiff alleged that this provision amounted to a disproportionate interference with her right to equality with Irish citizens under article 40.1. Finding for the plaintiff, the court held that 'legislative infringement on rights contained in article 40.1 must satisfy the proportionality test'.⁸¹ Kearns P cited with approval the view of Costello J in *Heaney v Ireland* that any restriction on the exercise of a right must be proportionate.⁸² In *Heaney*, Costello J stated:

The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (b) impair the right as little as possible, and
- (c) be such that their effects on rights are proportional to the objective.⁸³

These principles bear a close resemblance to the established criteria for objective justification in equality legislation, where a measure must be based on a legitimate aim, and the means of achieving that aim must be appropriate and necessary (essentially, a proportionality test).⁸⁴ It is to be hoped that this more balanced approach prevails over the previous 'capriciousness' test, as a vital safeguard against unfair disadvantage.

In terms of *requiring* differential treatment, the situation is more complex. The early signs were not propitious, due to the decision in *Draper v Attorney General*.⁸⁵ The plaintiff had multiple sclerosis and was unable to go to a polling station to cast her vote, as this would have caused her severe physical discomfort and could potentially have been life threatening. She contended that the electoral laws that authorised a postal vote or special assistance for certain classes of voters, but which excluded her, constituted a breach of the equality guarantee.

80 *Dokie v DPP* [2010] IEHC 110.

81 *Ibid.*

82 *Heaney v Ireland* [1994] 3 IR 593 (HC).

83 *Ibid.* 607.

84 See eg Employment Equality Acts 1998–2015, s 22(1)(b).

85 *Draper v Attorney General* [1984] IR 277 (SC).

She sought declarations that facilities be made available to enable her to exercise her franchise. Effectively, she sought a reasonable accommodation – different treatment that would enable her to vote, as others could. Dismissing her action, O’Higgins CJ stated:

The case made by the plaintiff in this action rests entirely on the failure of the State to provide special facilities for her and for those similarly situated. In the opinion of the Court, such failure does not amount to an interference by the State in the exercise of the right to vote ... Nor is it, in the opinion of the Court, a breach by the State of the provisions of s. 1 of Article 40. While under this Article the State could, because of the plaintiff’s incapacity, have made particular provisions for the exercise by her of her voting rights, the fact that it did not do so does not mean that the provisions actually made are necessarily unreasonable, unjust or arbitrary. For the reasons already stated, the Court could not so find.⁸⁶

This approach has been described as ‘Aristotle-lite’,⁸⁷ as the Supreme Court failed to grasp the concept of treating unequals unequally. Due to her disability, the plaintiff was not equally situated to the majority of voters and required different treatment. However, the court stated that the state’s failure to make different provision for her did not violate the equality guarantee. *Draper* clearly indicates that the proviso, while permissive, is not mandatory, and that differential treatment of those who are differently situated is not considered an essential aspect of equality.

However, a different approach was taken subsequently in *DX v Judge Buttimer*.⁸⁸ This involved a judicial review of the refusal of a judge to permit the plaintiff to be accompanied and assisted by a Ms S during his family law proceedings. The plaintiff had undergone a laryngectomy, which made his speech difficult to understand and depleted his energy. The plaintiff depended on Ms S for support, but more particularly she was familiar with his speech and could have assisted him in the initial hearing. Hogan J, in the High Court, noted that article 40.1 obliges the courts to ensure that all persons are ‘held equal before the law’. He stated:

In practical terms, this means that the courts must see to it that, where this is practical and feasible in the circumstances, litigants suffering a physical disability... are not placed at a disadvantage as compared with their able bodied opponents by reason of that disability, so that all litigants are truly held equal before the law in the real sense which the Constitution enjoins.⁸⁹

86 Ibid 290–291.

87 Doyle (n 43 above) 73.

88 *DX v Judge Buttimer* [2012] IEHC 175.

89 Ibid [14].

The decision is significant as it envisages a meaningful role for the equality guarantee in ensuring that litigants are not disadvantaged. It suggests that disparity of treatment may be required in some circumstances to prevent inequality; effectively, this is a move from formal to substantive equality, more compatible with the CRPD.

The issue of providing different treatment to persons with disabilities was again considered in *Fleming*. As discussed above, *Fleming* also provided some (faint) indications of a move towards a more substantive model of equality. The High Court cited *DX* with approval, stating that, in respect of ‘persons with disabilities within appropriate limits of feasibility and practicality, Article 40.1 will ... permit ... separate and distinct legislative treatment of persons with disabilities so that all “are truly held equal before the law ...”’.⁹⁰ This indicates that, at the least, reasonable accommodation measures are permissible under article 40.1. It appears that the High Court viewed reasonable accommodation as a potential ‘cure’ for an indirectly discriminatory act, stating:

The Court is prepared to allow that inasmuch as the 1993 Act failed to make separate provision for persons in the plaintiff’s position by creating no exception to take account of the physical disability which prevents the plaintiff taking the steps which the able bodied could take, the precept of equality in Article 40.1 is here engaged. But, again, for all the reasons which we have set out with regard to the Article 40.3.2, we consider that this differential treatment is amply justified by the range of factors bearing on the necessity to safeguard the lives of others ...⁹¹

The first sentence suggests that a failure to make separate provision for persons with disabilities might amount to a breach of article 40.1, indicating that reasonable accommodation might be mandatory under the equality guarantee. However, the second sentence suggests that, because the impugned provision was justifiable on public policy grounds, there was no unlawful discrimination, and so no need for reasonable accommodation. This indicates that reasonable accommodation *might* be mandatory where it could remedy unlawful discrimination.

In a marked step back from this position, the Supreme Court adopted a largely formal approach to equality, concluding:

While it may be open to the Oireachtas to consider making some distinction between persons, it cannot be said that any such distinction is required in this case by the Article 40.1 rights of the appellant.⁹²

This suggests that reasonable accommodation measures may be constitutionally permissible but are not mandatory. However, although the rejection of a duty of reasonable accommodation appears

90 *Fleming v Ireland* [2013] IEHC 2 [121].

91 *Ibid.*

92 *Fleming* (n 67) [136].

to be conclusive, the same paragraph also emphasises the context of the decision, specifically the ‘important objective’⁹³ of the impugned section in protecting the equal right to life of all persons under article 40.3. It must also be recalled that the Supreme Court had also (apparently) limited the application of indirect discrimination to the context of protecting constitutional rights, and that it had already determined that no such right was at stake in the plaintiff’s case. As Mitchell notes, the ‘accommodation of difference and protections against indirect discrimination ... are simply two versions of the same phenomenon; both are protections against inequalities that arise from the effects of facially neutral laws’.⁹⁴ It follows that, if the court were unwilling to find indirect discrimination where constitutional rights were not at stake, it would also be unwilling to uphold a principle of reasonable accommodation: the one is the mirror of the other. By inference, if the court were willing to apply indirect discrimination in the context of constitutional rights, it might also infer a reasonable accommodation duty.

Overall, it is clear that the model of equality enshrined in article 40.1 is far from dynamic. Formal in nature, the scope it offers for differential treatment where persons are differently situated has not traditionally been interpreted as mandating such differential treatment. Instead, the scope of the equality guarantee has been circumscribed by restrictive judicial doctrines and arguably excessive deference to the legislature. The historic development of the article therefore does not inspire confidence in the development of a constitutional duty of reasonable accommodation compatible with the CRPD, though it suggests scope for legislative intervention, particularly given the degree of deference offered by the judiciary to the legislature to date.

DISABILITY IN IRISH CONSTITUTIONAL LAW

The ‘paradigm shift’ in the legal conceptualisation of disability from the medical to the social and human rights models is not yet matched in Irish constitutional jurisprudence. The Irish courts originally considered persons with disabilities solely through the prism of the medical model. In *Re Philip Clarke*,⁹⁵ the applicant was involuntarily detained as a person suspected to be of unsound mind, supposedly for his own safety. Under the relevant legislation, he could be detained without review for an indefinite period. He brought an action for *habeas corpus*, unsuccessfully challenging the

93 Ibid.

94 Mitchell (n 66 above) 256.

95 *Re Philip Clarke* [1950] IR 235 (SC).

constitutionality of his detention and the governing legislation. The Supreme Court held:

That, though all citizens, as human beings, are to be held equal before the law, the State may, nevertheless, in its enactments have due regard to differences of capacity, physical and moral, and of social function. We do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity to remain at large to the possible danger of themselves or others. (at 247–248)

The medical model is equally evident in the significantly more recent decision in *Draper*. Speaking for the Supreme Court, O’Higgins CJ noted that the plaintiff was unable to vote at a polling station because of her disability.⁹⁶ Locating the plaintiff’s inability to vote in her failure to comply with the Electoral Acts, he failed entirely to grasp the different dynamics of disability discrimination and the nature of social barriers.

There is some evidence of a recent shift in judicial thinking. In *DX*,⁹⁷ Hogan J held that refusing to permit Ms S to assist the plaintiff had placed him at an unacceptable disadvantage, amounting to a breach of article 40.1. While not referencing the duty of reasonable accommodation in terms commonly understood from the CRPD, Hogan J stated that, where it is ‘practical and feasible’, litigants with a physical disability should not be placed at a disadvantage. Thus, it may be inferred that, where there is an achievable or attainable accommodation that could ensure a person with a disability is not disadvantaged, the courts should consider such an accommodation. The decision of Hogan J is directly linked to a social model of disability. He situates the ‘problem’ in society (the application of particular rules), rather than in the plaintiff’s impairment. Hence, the court must respond to the particularities of the person’s disability by allowing an exception to the rule, to overcome the disadvantage.

This apparent shift towards a social model of disability was not followed in *Fleming*. The Supreme Court there applied a medical model of disability, stating:

Assuming for present purposes that such a complaint may give rise to a claim under Art 40.1, this effect does not, of course, result from the provisions of the law, which applies equally to everybody wishing to commit suicide. ... What prevents the appellant from committing suicide is, on her own evidence, the fact of her disability.⁹⁸

96 *Draper* (n 85 above) 286.

97 *DX* (n 88 above).

98 *Fleming* (n 67 above) [133].

In the view of the Supreme Court, it was not the criminalisation of assisting someone to commit suicide that impacted on the plaintiff, but merely her own disability. This clearly situates the ‘problem’ of disability in the individual and places the onus on them to adapt to a society not attuned to their physical, mental or sensory requirements. Inability to adapt is due to a lack of personal capacity, rather than social rules or requirements. From this perspective, the Supreme Court’s rejection of a duty of reasonable accommodation in *Fleming* is unsurprising. Reasonable accommodation requires society to respond to the disability of an individual, by adapting rules and procedures to allow them to participate equally with others. This is the antithesis of the Supreme Court’s analysis.

It is therefore surprising that a radically different approach was adopted only a few years later by the Court of Appeal, in *DPP v Harrison*.⁹⁹ The respondent had suffered significant head injuries and the case centred on his fitness to stand trial. The court commented at length on what the right to a fair trial might mean for a person with a disability, emphasising that the right to a fair trial must include a right to reasonable accommodation, where necessary. Speaking for the court, Edwards J gave multiple examples of accommodations that might be appropriate in particular circumstances. These included sign language interpreters or induction loop facilities, accessible documentation or assistive technologies, shorter sittings, and more frequent breaks or adjournments.¹⁰⁰ Simplified explanations of complex or technical matters, additional time to assimilate information or respond to questions, or the provision of daily transcripts to facilitate this might also be appropriate.¹⁰¹ The court clearly viewed reasonable accommodation as a responsive duty, which must be tailored to the individual’s needs. Edwards J noted that the individual’s requirements would need to be identified, ideally by detailed exploration pre-trial, and that expert evidence might be adduced to evaluate what would be required.¹⁰² The trial judge should then give pre-emptive directions, as far as possible, while recognising that unanticipated issues might still arise.¹⁰³ The court concluded that, where there is a demonstrated need for reasonable accommodation in the trial process, the trial judge should make ‘rigorous and meaningful’ enquiries as to what was appropriate, and that every effort should be made to accommodate

99 *DPP v Harrison* [2016] IECA 212.

100 *Ibid* [54].

101 *Ibid* [57].

102 *Ibid* [57].

103 *Ibid* [59].

both the public interest in a prosecution and a defendant's right a fair trial.¹⁰⁴

What is most striking about *Harrison* is that the court clearly locates the barriers to a fair trial in the structures and procedures of the court, rather than the individual. The court must therefore adapt its procedures, to vindicate the rights of the person with the disability: it cannot simply leave it to the legislature to enact a remedy. *Harrison* therefore represents a strong step towards both a social model of disability and a substantive model of equality, compatible with the CRPD.

A CONSTITUTIONAL DUTY OF REASONABLE ACCOMMODATION?

It is clear from the case law that, notwithstanding the adoption of a formal equality model, there is a (limited) place for reasonable accommodation in Irish constitutional law. This is not limited to the equality guarantee, as is evident from *Quinn's Supermarket Ltd v Attorney General*,¹⁰⁵ where a ministerial order restricting the opening hours for meat shops exempted kosher butchers. The Supreme Court held that this amounted to religious discrimination under article 44.2.3, but that that article had to be read in light of article 44.2.1 which guaranteed the free practice of religion. Without an exemption for kosher shops, the freedom of members of the Jewish community to practise their religion would have been affected. Although article 40.1 was not at issue, the decision clearly reflects principles of substantive equality and acknowledges that facially neutral laws may have a discriminatory effect – a principle not yet clearly established in the more obvious context of the equality guarantee.

However, the constitutional scope for reasonable accommodation in *Quinn's Supermarket* was essentially permissive, insofar as the Supreme Court conceded that a legislative distinction could be valid in the interests of substantive equality; it did not hold that such an accommodation was mandatory. In *Draper*, on the other hand, the Supreme Court made it clear that there was no constitutional obligation to provide such an accommodation under the equality guarantee. The court held that the state was merely obliged to act reasonably, and that prohibiting a postal vote was not unreasonable, in light of the potential for abuse. More recently, in *Fleming*, the Supreme Court similarly suggested that it was open to the legislature to provide an exception for persons in the plaintiff's situation, though it did not find the impugned legislation unconstitutional. All this suggests that, while reasonable

104 Ibid [60].

105 *Quinn's Supermarket Ltd* (n 6 above).

accommodation may be permitted under the equality guarantee, it is not required by it.

The permissive capacity of the Constitution is not that straightforward, however, as demonstrated in *Re Employment Equality Bill 1996*.¹⁰⁶ The 1996 Bill required employers to provide reasonable accommodation to employees with disabilities, unless this would amount to ‘undue hardship’. The Bill then listed some factors to be considered in determining whether undue hardship existed in a particular case, including the financial circumstances of the employer. The Supreme Court held that this amounted to an impermissible interference with the constitutional right to private property in article 43. A similar right to reasonable accommodation in relation to goods and services was likewise rejected in *Re Equal Status Bill 1997*.¹⁰⁷

The decision in *Re Employment Equality Bill 1996* had deeply significant repercussions on the shape of equality legislation in Ireland. The legislature abandoned the original statutory test for reasonable accommodation, based on ‘undue hardship’, and instead reasonable accommodation was required only where it did not give rise to more than ‘nominal’ costs.¹⁰⁸ Although this was subsequently amended in the employment context, due to the Framework Employment Directive, the nominal costs standard continues to apply in relation to goods and services. This represents a direct breach of the CRPD, which Ireland has now ratified. Although a range of legislative amendments were proposed in advance of ratification, the proposed changes to the nominal cost standard applied only to selected categories of service providers, mostly in the public sector,¹⁰⁹ and in any event, have now lapsed. The legislature therefore appears to assume that further interference with private property is not permissible.

In fact, this is not necessarily the case. Writing in the family property context, Buckley has argued that ‘the key question appears to be whether the limitation or restriction of the transferor’s property rights is justifiable as meeting a pressing social objective’,¹¹⁰ and that ‘In determining whether delimitations of private property rights are justifiable, there is considerable deference for legislative views on social policy.’¹¹¹ In essence, the question is one of proportionality,¹¹²

106 *Re Employment Equality Bill 1996* (n 54 above).

107 *Re Equal Status Bill 1997* [1997] 2 IR 387 (SC).

108 Employment Equality Act 1998, s 16 (as enacted); Equal Status Acts 2000–2018, s 4.

109 Disability (Miscellaneous Provisions) Bill 2016, s 4.

110 Lucy-Ann Buckley, ‘Financial provision on relationship breakdown in Ireland: a constitutional lacuna? (2013) 36(1) Dublin University Law Journal 59, 73.

111 *Ibid.*

and it appears that, in addition to state expropriations, ‘property reallocations between individuals may be upheld, at least as part of a larger redistributive scheme’.¹¹³ A similar proportionality test was applied in other constitutional contexts in *Heaney* and *Dokie*, discussed above. It seems highly likely that providing reasonable accommodation to enable persons with disabilities to access services and employment could be characterised as a ‘pressing social need’;¹¹⁴ indeed, the Supreme Court effectively conceded this point in *Re Employment Equality Bill 1996*.¹¹⁵

The issue in that case essentially related to the proportionality of the intervention, as the ‘undue hardship’ test could be viewed as allocating social costs to private citizens in all but the most extreme cases. However, it does not follow that only ‘nominal’ costs can be reallocated for social purposes; indeed, a long line of cases in other contexts clearly indicates otherwise. For instance, in *Re Part V of the Planning and Development Bill 1999*,¹¹⁶ the Supreme Court held that a scheme that expropriated development land for social housing, at less than the market rate in compensation, was not a disproportionate interference with the right to private property.

From this perspective, the ‘disproportionate burden’ test for reasonable accommodation, mandated by the CRPD, appears to fit squarely within existing Irish constitutional principles. The Supreme Court itself arguably left the way open for more nuanced intervention as Hamilton CJ highlighted a number of considerations in rejecting the ‘undue hardship’ standard:

There is no provision to exempt small firms or firms with a limited number of employees, from the provisions of the Bill. The wide definition of the term ‘disability’ in the Bill means that it is impossible to estimate in advance what the likely cost to an employer would be. The Bill does provide that one of the matters to be taken into consideration in estimating whether employing the disabled person would cause undue hardship to the employer is ‘the financial circumstances of the employer’ but this in turn implies that the employer would have to disclose his financial circumstances and the problems of his business to an outside party.¹¹⁷

112 Ibid 71.

113 Ibid.

114 *Clinton v An Bord Pleanála and Others* [2005] IEHC 84 (Finnegan P), citing Budd J in *An Blascaod Mór v Commissioners of Public Works (No 3)* [1999] IESC 4; [2000] 1 IR 6.

115 *Re Employment Equality Bill 1996* (n 54 above).

116 *Re Part V of the Planning and Development Bill 1999* [2000] IESC 20; [2000] 2 IR 321.

117 *Re Employment Equality Bill 1996* (n 54 above) 368.

Because the disproportionate burden test is responsive to the situation of the duty-bearer, it automatically considers the financial or other capacity of a business to provide a particular accommodation. It is also capable of addressing situations where the disclosure of commercially sensitive information might disadvantage the duty-bearer, though the application of means tests in multiple other contexts suggests that the disclosure of financial information in general should not be an issue. The breadth of the definition of disability does not seem relevant; one might equally argue that, because everyone has a race, a gender and an age, employers are potentially open to multiple discrimination claims that are not quantifiable in advance. All this suggests that the scope for legislative intervention may be broader than previously thought, and that the Constitution might be capable of accommodating legislative implementation of the CRPD duty.

Recent case law also suggests that the Constitution may also impose a mandatory reasonable accommodation duty in some circumstances. This is particularly seen in the High Court decision in *DX*¹¹⁸ and the decision of the Court of Appeal in *Harrison*.¹¹⁹ The decision in *Harrison* is particularly important, coming as it does only a few years after the Supreme Court decision in *Fleming*. In stark contrast with *Fleming*, *Harrison* adopted both a social model of disability and a substantive approach to equality. This suggests that the approach in *Fleming* is not necessarily set in stone, and that different approaches may be adopted in different contexts, by differently constituted courts, or in light of changing social or legal norms.

Harrison fits particularly well with the CRPD. Edwards J noted that the only limitation that should be put on proposals for accommodations 'is that they should be reasonably practical; they should be confined to what is strictly necessary, and they should not confer such an unfair advantage on the beneficiary as to render an unfairness to the other side, in this instance the prosecution'.¹²⁰ He also commented that 'the fact that accommodations might prolong a trial, perhaps significantly, should not be a reason in itself to discount their suitability or practicality'.¹²¹ Effectively, this is a proportionality approach, which connects closely with the CRPD: reasonable accommodation is a necessary and appropriate measure, which does not impose a disproportionate burden on the duty bearer. The emphasis Edwards J placed on the need for 'rigorous and meaningful' enquiries as to what measures would be appropriate also fits well with the duty to consult the right-holder under the CRPD.

118 *DX* (n 88 above).

119 *Harrison* (n 99 above).

120 *Ibid* [56].

121 *Ibid*.

The decisions in *DX* and *Harrison* may perhaps be explained by the fact that substantive constitutional rights – access to justice and the right to a fair trial – were at stake, while the decision in *Quinn’s Supermarket* related to the constitutional guarantee of freedom from religious discrimination. By contrast, the Supreme Court in *Fleming* held that there was no substantive constitutional right to die, and in *Draper* it held that the constitutional right to vote was contingent on compliance with statutory criteria and was not conferred solely by citizenship.¹²² However, this is not an entirely satisfactory explanation. The equality guarantee in article 40.1 is not expressly limited to other constitutional rights (unlike its so-called ‘parasitic’ equivalent in the ECHR).¹²³ Clearly, therefore, if such a limitation were to be applied in practice, this would constitute an ‘impermissible judicial gloss’¹²⁴ on the text of the Constitution.

It is possible to view *Draper* as an outlier, pre-dating more modern views of disability and equality. The more recent case law is arguably broadly indicative of a constitutional right to reasonable accommodation, at least in some circumstances. However, the problem of *Fleming* remains and puts the Supreme Court out of step with both the High Court and the Court of Appeal, as well as Ireland’s international obligations. There have been some indications of a more social model of disability being adopted in recent Supreme Court decisions in other contexts, most notably following ratification of the CRPD. The leading decision here is undoubtedly *Nano Nagle School v Daly*, where the Supreme Court emphasised the importance of interpreting the Employment Equality Act 1998 through the prism of the Framework Employment Directive, which in turn must be interpreted in light of the CRPD.¹²⁵ It is possible that the CRPD may also influence the Supreme Court’s understanding of equality, though this seems unlikely given that Ireland is a dualist state; nor has Ireland’s previous ratification of other international treaties, such as the ECHR, in itself had such an effect.

122 *Draper* (n 85 above) 287.

123 ECHR, art 14. While Protocol 12 to the ECHR provides for a general prohibition on discrimination, not linked to other rights in the Convention, Ireland has not ratified this.

124 *Radmacher (formerly Granatino) (Respondent) v Granatino (Appellant)* [2010] UKSC 42 [166] (Lady Hale).

125 *Nano Nagle* (n 12 above) [13]–[34]. See also Shivaun Quinlivan and Charles O’Mahony, ‘The Irish Supreme Court judgment in *Nano Nagle School v Marie Daly*: a saga of litigation’ 70(4) Northern Ireland Legal Quarterly 505.

CONCLUSION

Where does this leave the constitutional scope for reasonable accommodation? Can the equality guarantee accommodate Ireland's CRPD obligations? It seems clear that there has been some movement in relation to reasonable accommodation in recent years, and that the overall approach has moved beyond the permissive to the mandatory, in at least some contexts, most notably where other constitutional rights are held to be at stake. It also appears that there may be more scope for interference with private property rights than is commonly thought, if proportionality criteria are applied. If so, this would greatly strengthen the scope for statutory intervention and increase the potential for CRPD compliance. However, the potential for recognising a general constitutional duty of reasonable accommodation is contingent on a greater and more dynamic understanding of equality and a more social model of disability. On the evidence of *Fleming*, the only recent Supreme Court decision on this point, these elements still appear to be lacking in the constitutional context.

The constitutional scope for reasonable accommodation matters because the impact of *Re Employment Equality Bill 1996* is still being felt in the framing of the reasonable accommodation duty in the Equal Status Acts 2000–2018. The Framework Employment Directive, which led to the amendment of the reasonable accommodation duty in relation to employment, does not apply to goods and services, and as yet there is no other EU law measure in this area. Access to goods and services remains a matter for national law, where property rights are still seen as limiting the scope for a statutory reasonable accommodation duty. To date, the State has not indicated any willingness to revisit this outside of particular contexts (largely public sector) and appears to take the limitation as a given, notwithstanding its ratification of the CRPD. This is amply demonstrated by its very limited reframing of the reasonable accommodation duty in the now lapsed Disability (Miscellaneous Provisions) Bill 2016.¹²⁶ This reluctance to engage means that the right of persons with disabilities to access goods and services on an equal basis with others will never be properly vindicated without constitutional reform or the development of a constitutional avenue of redress. Similar constraints are likely to apply to any new legislative measures to introduce a reasonable accommodation duty to the multiple other areas covered by the CRPD – if any such measures are taken. Indeed, the dearth of such measures to date also indicates the need for a constitutional duty.

126 For a detailed analysis of the 2016 Bill, see Buckley and Quinlivan (n 4 above) 11.

There are undoubted steps forward represented in decisions like *DX* and *Harrison*, but these positive steps are countered by the step backward in *Fleming*. The apparent subordination of the equality guarantee to other constitutional norms, such as the right to private property, appears to have had a chilling effect on the legislature. This, coupled with the widespread critique of the equality guarantee and its interpretation,¹²⁷ and the glacial pace of change, suggests the need for more substantial reform. The amendments proposed by the Constitution Review Group nearly 25 years ago,¹²⁸ prohibiting unfair direct and indirect discrimination on grounds including disability, might indicate a suitable way forward. Ideally, this should be supplemented by an express recognition of the duty of reasonable accommodation, rather than mere permission for the State to have regard to relevant differences. It is time to amend the equality guarantee to implement a more substantive understanding of equality that is more in line with our international obligations and less out of step with comparative and international jurisprudence.

127 See eg Constitution Review Group (n 45 above), Hogan et al (n 43 above), Doyle (n 49 above); Doyle (n 43 above); Mitchell (n 66 above); Casey (n 58 above).

128 Constitution Review Group (n 45 above) 204. The Citizens' Assembly has also recently called for the amendment of Article 40.1, recommending that it should refer explicitly to gender equality and non-discrimination. See 'Recommendations of the Citizens' Assembly on Gender Equality'.



Reading narratives of privilege and paternalism: the limited utility of human rights law on the journey to reform Northern Irish abortion law

Lynsey Mitchell*

Abertay University

Correspondence email: l.mitchell@abertay.ac.uk

ABSTRACT

This article argues that a gendered conceptualisation of rights means that an invisible barrier had to be surmounted when attempting to frame denial of access to abortion in Northern Ireland as a human rights violation. It considers the Supreme Court decisions of *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)*¹ and *R (on the application of A and B) v Secretary of State for Health*;² examines what they reveal about the potentiality of human rights law to advance women's rights; and analyses the limited success of human rights litigation in securing reproductive rights for Northern Irish women. It posits that the reason for this is the continued framing of abortion in the United Kingdom as a paternalistic privilege permitted to women only in limited scenarios and locations. It demonstrates how courts implicitly endorse this framing and consequently exclude women's victimhood from the human rights framework.

Keywords: abortion; women's rights; European Convention on Human Rights; international human rights law; Northern Ireland; CEDAW; devolution; legal paternalism.

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1 *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27 (hereafter *NIHRC*).

2 *R (on the application of A and B) v Secretary of State for Health* [2017] UKSC 41 (hereafter *A and B*).

INTRODUCTION

Despite the achievements of rights-based jurisprudence, scholars have critiqued the inability of law to properly redress gender inequality due to its promulgation of gender and class hierarchies.³ This is especially true when it comes to reproductive rights, and there is a vast critique of the (in)ability of law to advance these specifically.⁴ Even when human rights are embedded in cultural and legal consciousness, the prevailing discourse of human rights focuses on public rights that privilege a prioritised legal (male) subject.⁵ Thus, reproductive rights are especially contentious and difficult to deliver, even in rights-oriented jurisdictions, because of the supposed threat that women's human rights pose to the hegemonic discourse of liberalism, which still prioritises and elevates the classical formulation of civil and political rights.⁶

This article argues that the courts are unable to situate reproductive rights claims within the traditional liberal understanding of human rights. This is because abortion in the United Kingdom (UK) has

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- 3 M A Fineman, 'Feminist legal theory' (2005) 13 *Journal of Gender, Social Policy and the Law* 19; Carol Smart, *Regulating Womanhood* (Routledge 1992); Karen Knop (ed), *Gender and Human Rights* (Oxford University Press 2004); M J Frug, 'A postmodern feminist legal manifesto (an unfinished draft)' (1992) 105 *Harvard Law Review* 1045; Ratna Kapur, *Gender Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar 2018).
 - 4 Joanna N Erdman and Rebecca J Cook, 'Decriminalization of abortion – a human rights imperative' (2020) 62 *Best Practice and Research Clinical Obstetrics and Gynecology* 11; Sally Sheldon, 'Who is the mother to make the judgment? The constructions of women in English abortion law' 1993 1 *Feminist Legal Studies* 3; Eileen V Fegan, 'Subjects of regulation/resistance? Postmodern feminism and agency in abortion–decision-making' 1999 7 *Feminist Legal Studies* 241.
 - 5 Ngaire Naffine and other feminist legal scholars have long argued that the law is centred around an idealised legal subject that is male. She argues that this is because law reflects liberalism's distinction between the public and private spheres and assigns to women the role of 'holding the two worlds [public and private] together': Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin 1990) 149. Similarly, Carol Pateman's famous feminist critique of the social contract holds that the social contract theory, as espoused by Hobbes, Locke and Rousseau, not only assumes but is dependent upon women's subordination and relegation to the private sphere. Carol Pateman, *The Sexual Contract* (Polity Press 1988). Hannah Arendt conceived of citizenship as the 'existence of a right to have rights'. Such conception allows women's rights to be ignored through denying women personhood and the right to their own bodies. See Hannah Arendt, *The Origins of Totalitarianism* (Meridian 1958) 269.
 - 6 Siobhán Mullally and Claire Murray, 'Regulating abortion: dissensus and the politics of rights' (2016) 25 (6) *Social and Legal Studies* 645; Kathryn McNeilly, 'From the right to life to the right to livability: radically reapproaching "life" in human rights politics' (2015) 41 *Australian Feminist Law Journal* 1

traditionally been understood as a privileged exception from criminalisation and such framing is exceptionally difficult to dislodge. While international and European human rights law has long been promoted as a vehicle for reforming the restrictive abortion regime in Northern Ireland (NI), this rights-based approach has been slow to penetrate the traditional liberal construction of human rights that consequently excludes women's trauma from being understood as a core rights issue. When it comes to litigating harm caused by lack of access to abortion, this article argues that this gendered construction can be seen in the fact that dominant paternalistic narratives around abortion in the UK situate abortion as a privilege and not a right. These narratives are deeply problematic and yet have been implicitly endorsed by the NI and UK courts over the last two decades. This deprioritisation of women's rights-based claims allows the denial of access to abortion to be downplayed as inconsequential and situated outside the mainstream human rights framework. This article examines the two recent Supreme Court decisions on the human rights compatibility of the NI abortion regime and argues that, despite overt demonstrations of sympathy with the appellants' plight, the same implicit gender biases and inherent framing of abortion as a privilege and not a right, which prevented previous legal actions from succeeding, is present in these judgments.

The first section narrates the decades-long fight for reproductive rights in NI and describes how, despite opening new avenues, the adoption of the Human Rights Act 1998 (HRA) did not act as a panacea in redressing lack of access to abortion. It explores how abortion discourse in the UK is rooted in narratives of paternalism rather than women's autonomy, meaning that activists needed to adopt a multi-jurisdictional and multi-arena approach to making rights claims, rather than simply relying on UK courts to determine that this was a human rights violation.

The next section analyses the decisions of *NIHRC* and *A and B* to demonstrate how, despite European Convention on Human Rights (ECHR) jurisprudence and international consensus that lack of abortion in certain circumstances is a human rights violation, in neither case did the appellants convince the court to declare that the NI regime was incompatible with the ECHR. The judgments endorse the aforementioned paternalistic framework of privilege enshrined in the British abortion regime and held the NI regime as human rights compatible because it did not explicitly prevent women from travelling

to Britain to obtain abortions, in contrast to some jurisdictions.⁷ This, coupled with the fact that the British regime permits access to abortion for Northern Irish women, means that the overall regime was not viewed as a core human rights violation and thus allowed the courts to uphold the *status quo*, which appears to be that, so long as Northern Irish women were not explicitly prohibited from seeking an abortion in Britain then there was no problem.

Section 4 argues that despite the UK courts' willingness to progressively interpret the ECHR when adjudicating human rights challenges in other contexts, when faced with claims emanating from the restrictive abortion regime in NI, they have been unwilling to situate reproductive rights as core human rights violations. This section highlights how the Supreme Court could have adjudicated the cases in a way that situated the women's experience at the heart of their reasoning. It sets out the lack of discussion in *NIHRC* and *A and B* of why the women's pain and suffering was not enough to be conceived as a human rights violation and interrogates the court's reluctance to engage with the progressive international jurisprudence and the gendered reality of unwanted pregnancy.

This article concludes that there is an indeterminacy to women's rights because, even when the tools of domestic and international human rights regimes are being utilised to enforce them, such claims based on reproductive autonomy, dignity, privacy and respect do not invite the full protection of the law because they do not fit the paradigmatic rights violation narrative. It posits that the dominant discourse in the UK has successfully framed abortion as an indeterminate privilege restricted to mainland Britain, rather than an unfettered legal right. Thus, the UK deprioritises women's rights by categorising abortion as a privilege only to be bestowed when the cultural and political hegemony allows, and this framing has proven impervious to human rights challenges because the courts have been unable or unwilling to situate women's experience of abortion prohibition as a core human rights violation. This fits within a wider narrative exposed by feminist and critical legal scholars, whereby women's rights, which generally encompass private rather than public issues, can be deprioritised when they come into conflict with wider public rights.⁸

7 The ECtHR has considered cases from Poland where women were explicitly prohibited from obtaining an abortion abroad, whereas it distinguished the prohibition in Ireland because it did not prevent women obtaining abortions abroad. See *A, B and C v Ireland* App no 25579/05 (ECHR, 16 December 2010); *P & S v Poland* App no 57375/08 (ECHR, 30 October 2012); *RR v Poland* App no 27617/04 (ECHR, 26 May 2011); *Tysiac v Poland* App no 5410/03 (ECHR, 20 March 2007).

8 Celina Romany, 'Women as aliens: a feminist critique of the public/private distinction in international human rights law' (1993) 6 *Harvard Human Rights Journal* 87.

THE HISTORICAL NARRATIVISATION OF ABORTION AS PRIVILEGE

The UK's two-tier abortion regime and background to reform in NI

The failure to extend the Abortion Act 1967 (the Act) to NI created a two-tier system of reproductive healthcare in the UK. Women in Britain were free to seek terminations (subject to the provisions of the Act),⁹ yet women in NI could effectively only do so outside NI.¹⁰ Abortion in NI was until recently governed by the Offences Against the Person Act 1861¹¹ (OAPA) and section 25 of the Criminal Justice Act (NI) 1945. The OAPA was a criticised archaic framework, with no exception for rape, or saving a woman's life.¹² Instead in *R v Bourne*¹³ the English High Court carved out a defence for any doctor performing an abortion 'in good faith' that continuation of the pregnancy 'creates a grave risk that the woman will become a mental or physical wreck'.¹⁴ Thus, in NI, *Bourne* remained the definitive interpretation on the circumstances under which a lawful¹⁵ abortion could be performed until a series of cases in the 1990s sought clarification.¹⁶ Even with the clarification,

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- 9 The 1967 Act does not grant rights to women seeking to terminate pregnancy. It instead confers a privilege upon doctors.
- 10 An amendment to the Northern Ireland (Executive Formation etc) Bill was inserted providing that should there be no functional NI Executive by midnight on 21 October 2019 then s 58 and s 59 of the OAPA would be repealed in NI. See s 9 and s 13(4) Northern Ireland (Executive Formation etc) Act 2019. New regulations came into force in 2020 to provide for access to abortion in NI. See the Abortion (Northern Ireland) Regulations 2020, SI 2020/345 discussed further below.
- 11 Ss 58 and 59.
- 12 Sally Sheldon, 'The decriminalisation of abortion: an argument for modernisation' (2016) 36 *Oxford Journal of Legal Studies* 334, 335; Fiona Bloomer and Eileen Fegan, 'Critiquing recent abortion law and policy in Northern Ireland' (2013) 34 *Critical Social Policy* 109.
- 13 [1939] 1 KB 687.
- 14 *Ibid* [694].
- 15 Since the OAPA criminalised 'unlawful' abortion, *Bourne* confirmed that there were circumstances in which abortion would be lawful. See Sheldon (n 12 above) 341.
- 16 *Northern Health and Social Services Board v F and G* [1993] NILR 268; *Northern Health and Social Services Board v A and Others* [1994] NIJB 1; *Western Health and Social Services Board v CMB* (Unreported), High Court (Family Division), 29 September 1995; *Down Lisburn Health and Social Services Board v CH and LAH* (Unreported), High Court (Family Division), 18 October 1995.

increasingly few legal abortions occurred,¹⁷ in part because there was confusion as to when medical professionals might perform one, underscored by a vocal anti-choice climate perpetuated by many in the political establishment.¹⁸ This uncertainty meant that some women who met the criteria for a legal abortion in NI could not access one.¹⁹ It also meant that most women in NI, even those pregnant as a result of sexual crime or diagnosed with fatal foetal abnormality (FFA) or serious malformation of the foetus (SMF), could not access an abortion in NI, leaving them to either continue the pregnancy or fund travel to Britain to secure an abortion there.

Despite decades of campaigning by reproductive rights organisations in NI, successive UK Governments failed to consider equivalising access to abortion in NI with Britain, ostensibly because NI was considered to be ‘different’.²⁰ Refusal to extend the Act to NI was continually justified on the basis that legislating for controversial morality issues would be a threat to the fabric of society²¹ and the peace process,²² thus foreclosing any discussion of reform.²³ While British politicians were sensible to be mindful of such claims, the politicisation of abortion and the presentation of it as a ‘redline’ enabled successive Governments to use the threat of extending the Act to NI as leverage to ensure parliamentary votes and support from NI Members of Parliament (MPs).²⁴ This was described as an example of ‘women’s needs traded

17 Between 2017–2018, 12 abortions were carried out. Department of Health, ‘Northern Ireland Termination of Pregnancy Statistics’ (Hospital Information Branch 2019).

18 Standing Advisory Committee on Human Rights, *Abortion Law in Northern Ireland: The Twilight Zone* (SACHR 1993); T McGleenan, ‘Bourne again? Abortion law in Northern Ireland after Re K and Re A’ (1994) 45 Northern Ireland Legal Quarterly 389.

19 Bloomer and Fegan (n 12 above) 111.

20 Jennifer Thomson, ‘Explaining gender equality difference in a devolved system: the case of abortion law in Northern Ireland’ (2016) 11 British Politics 371, 379.

21 Catherine O’Rourke, ‘Advocating abortion rights in Northern Ireland: local and global tensions’ (2016) 25(6) Social and Legal Studies 716, 718.

22 Claire Pierson and Fiona Bloomer, ‘Macro and micro-political vernacularizations of rights: human rights and abortion discourses in Northern Ireland’ (2017) 19(1) (June) Health and Human Rights Journal 179.

23 Feminist scholarship notes how the common claims as to culture, and the belief that there is cross-community support for maintaining the ban on abortion in NI, were not in fact endorsed by evidence. See L Smyth, ‘The cultural politics of sexuality and reproduction in Northern Ireland’ (2006) Sociology 40 (4) 663 and O’Rourke (n 21 above).

24 In 2008, there was speculation that the Democratic Unionist Party (DUP) had received assurances from the then Labour Government that if it voted in favour of anti-terror legislation then there would be no attempt by the Government to extend the Act to NI. See Sally Sheldon, ‘A missed opportunity to reform an outdated law’ (guest editorial) (2009) 4 Clinical Ethics 3, 4; Thomson (n 20 above) 383.

on the pretext of maintaining the “peace process” in which women have become increasingly marginalised’.²⁵

This elevation of constitutional settlement serves to perpetuate narratives whereby claims for rights that reflect women’s gendered lives are viewed as less compelling than the traditional civil and political rights claims that pertain to male lives. The result is that substantive issues around lack of access to abortion and the suffering this caused were rarely considered, rendering women’s rights claims inferior to traditional conceptions of rights that reify male experiences and community cohesion.²⁶

Yet, the last two decades have seen a shift in both public and parliamentary attitudes towards reproductive rights.²⁷ Much of this was due to the sustained efforts of grass roots activism in NI,²⁸ which was determined to force the issue either with NI politicians or those in Westminster.²⁹ Activists hoped that the passing of the Human

25 Margaret Ward, ‘From negotiation of the peace to implementation of the peace agreement: a gender analysis of the Northern Ireland experience’ Address at the Roundtable on Gender and Security, 4.

26 There is a growing body of literature that critiques the gendered nature of conflict and post-conflict situations and argues that all too often women’s rights and concerns are deprioritised in favour of settlements that support those who were involved in the violence. Some of this literature has traced parallels between the peace agreement and the deprioritisation of women’s rights in Northern Ireland. See Fionnuala Ní Aoláin, ‘Women, security, and the patriarchy of international transitional justice’ (2009) 31(4) *Human Rights Quarterly* 1055–1085; Catherine O’Rourke, *Gender Politics in Transitional Justice* (Routledge 2001); Aisling Swaine, *Conflict-related Violence against Women* (Cambridge University Press 2018); Elish Rooney, ‘Women’s equality in Northern Ireland’s transition: intersectionality in theory and place’ (2006) 14(3) *Feminist Legal Studies* 353–375.

27 Sally Sheldon et al, “‘Too much, too indigestible, too fast’? The decades of struggle for abortion law reform in Northern Ireland’ (2020) 83(4) *Modern Law Review* 761, 774.

28 Alliance for Choice provides direct support to individual women in need of or considering an abortion. It is also a campaigning organisation and works with other advocacy groups, such as Amnesty International, the London Irish Abortion Rights Campaign and the NIHRC and was directly involved in campaigning for a ‘Yes’ vote in the Republic’s referendum on repeal of the 8th Amendment. See Mairead Enright, Kathryn McNeilly and Fiona de Londras, ‘Abortion activism, legal change, and taking feminist law work seriously’ (2020) 71(3) *Northern Ireland Legal Quarterly* 359–385.

29 Enright and others describe how flexibility is a key tool in the arsenal of feminist activists and how pro-reform groups learned to navigate and traverse multiple jurisdictions and forums agitating for change in both the Republic of Ireland and Northern Ireland by means of lobbying, harnessing international human rights mechanisms and the domestic legal system in both Northern Ireland and Britain. See Enright et al (n 28 above).

Fertilisation and Embryology Act (HFEA) in 2008 would finally extend the Act to NI as this was generally seen as the last chance for reform before criminalisation of abortion was devolved to the NI Assembly.

The path to reform gains momentum: leveraging international human rights law

Despite disappointment that there was ultimately no amendment to the HFEA to extend the Act to NI, activists continued their campaign and sought instead to utilise international legal mechanisms as well as domestic ones to push for reform. Aware that there was little prospect of securing reform at Stormont, activists worked hard to resituate NI abortion reform as an issue of international human rights compliance, in order to remind the UK Government of its obligation to comply. This strategy allowed them to circumnavigate the hurdle of devolution. In this way ‘international human rights law emerged as indispensable to the process for change in NI and a key location for feminist law work’.³⁰

Activists were optimistic that international human rights law could compel reform because recent years had seen a trend toward interpreting international human rights treaties as providing for access to abortion in situations of sexual crimes and FFA.³¹ Additionally, the Committee on Economic, Social and Cultural Rights (CESCR) calls on states party to the International Convention on Economic Social and Cultural Rights to ‘liberalize restrictive abortion laws; to guarantee women and girls access to safe abortion services and quality post-abortion care’.³² Regarding the NI regime, in 2016 the CESCR recommended that the UK should ‘amend the legislation on termination of pregnancy in Northern Ireland to make it compatible with other fundamental rights, such as women’s rights to health, life and dignity’.³³ Various international human rights committees have also called on states to decriminalise abortion and remove punitive sanctions on women. The Committee on the Rights of the Child (CRC) has advocated that abortion

30 Ibid 23.

31 See eg HRC, *Amanda Mellet v Ireland* (9 June 2016 CCPR/C/116/D/2324/2013); HRC, *KL v Peru* (22 November 2005 CCPR/C/85/D/1153/2003); CEDAW Committee, *LC v Peru* (4 November 2011 CEDAW/C/50/D/22/2009); HRC, *LMR v Argentina* (28 April 2011 CCPR/C/101/D/1608/2007).

32 CESCR, General Comment No 22, The Right to Sexual and Reproductive Health, (2016) UN Doc E/C.12/GC/22 (2016) para 10. See also para 34.

33 CESCR, Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, UN Doc E/C.12/GBR/CO/6 (2016) para 62.

be decriminalised and called on the UK to ‘review its legislation’.³⁴ The Committee of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has repeatedly challenged the NI regime in its UK reports.³⁵ In response to criminal prosecutions of women in NI,³⁶ the Human Rights Committee (HRC) in 2015 stated: ‘The UK should, as a matter of priority, amend its legislation on abortion in NI.’³⁷

In the wake of the continuing refusal of both the UK Government and the NI Executive³⁸ to legislate for appropriate abortion provision in NI, the Family Planning Association Northern Ireland (FPANI), the Northern Ireland Women’s European Platform and Alliance for Choice³⁹ had requested in 2010 that the CEDAW Committee conduct an inquiry into access to abortion in NI under its Optional Protocol.⁴⁰ The submission set out how the regime violated articles

34 CRC, Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, UN Doc CRC/C/GBR/CO/5 (2016) para 65(c).

35 CEDAW, Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland, UN Doc CEDAW/C/GBR/CO/7 (2013) para 51, and Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, UN Doc CEDAW/C/UK/CO/6 (2008) para 289.

36 In 2016, a student who miscarried after taking pills purchased online was found guilty and sentenced to three month’s imprisonment (suspended). The facts are narrated in *NIHRC* (n 1 above) [89]. In 2017, a mother was charged with procuring pills for her 15-year-old daughter. She was only acquitted after the trial judge ordered the jury to acquit her in light of the repeal of the OAPA on 22 October 2019.

37 HRC, Concluding Observations on the United Kingdom, UN Doc CCPR/C/GBR/CO/7 [Auths/193] (2015).

38 The competency of abortion was transferred to the NI Assembly in the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010.

39 The strategy of appealing to the international human rights regime was spearheaded by Northern Irish reproductive rights activists. See FPANI, Northern Ireland Women’s European Platform, Alliance for Choice, *Submission of Evidence to the CEDAW Committee Optional Protocol: Inquiry Procedure* Research Paper No 15-01 (Transitional Justice Institute 11 February 2015) 60–61; Catherine O’Rourke, ‘Bridging the enforcement gap – evaluating the Inquiry Procedure of the CEDAW Optional Protocol’ (2018) 27 *American University Journal of Gender Social Policy and the Law* 1.

40 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 1999, United Nations Treaty Series, vol 2131. Reproductive rights organisations in Northern Ireland had realised they could use the Optional Protocol mechanism to force an investigation into the treatment of Northern Irish women due to lack of abortion access. Although this invited the CEDAW Committee to investigate the UK Government’s compliance with women’s rights, this was a wholly NI initiative organised and instigated by the coalition of NI organisations.

2, 5, 10, 12, 14 and 16 of CEDAW.⁴¹ By utilising international human rights mechanisms, these organisations were able to take advantage of these aspirational international human rights documents which positioned abortion as a human right in the aforementioned limited circumstances. This jurisdictional shift was crucial as it allowed the activists to overcome criticism that abortion in NI was a devolved issue and not for the UK Government to remedy. By framing it as a human rights compliance issue, they were able to conceptually shift the responsibility back to the UK Government and, thus, hoped that the ‘international scrutiny might embarrass the UK government into taking action’.⁴² In 2018, the CEDAW Committee reported its findings,⁴³ stating that: ‘de facto limitations render access to abortion [in NI] virtually impossible’.⁴⁴ It recommended that the UK ‘repeal sections 58 and 59 of the OAPA 1861 so that no criminal charges can be brought against women and girls who undergo abortion or against qualified healthcare professionals and all others who provide and assist in the abortion’.⁴⁵ It further recommended that legislation be adopted to permit abortion on wider grounds and that criminal prosecutions be halted.⁴⁶ While the UK Government’s response was to continue to hold that abortion was an issue for the NI administration, publication of the report brought further spotlight to the NI abortion regime. It also made clear that the Committee did not consider that devolution absolved the UK Government from its human rights commitments,⁴⁷ which added further momentum to the campaign for reform.⁴⁸

In the midst of this, the UK Supreme Court handed down its two judgments relating to abortion in NI and human rights. While these judgments did not favour the pro-reform lobby, activists were able to capitalise on the publicity around them and so leverage further pressure on the UK Government. Following extensive lobbying by NI activists, in 2019, the House of Commons Women and Equalities Committee published its report on abortion law in Northern Ireland.⁴⁹ The report

41 FPANI et al (n 39 above).

42 O’Rourke (n 21 above) 724.

43 CEDAW Committee, Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Report of the Committee, 6 March 2018, UN Doc CEDAW/C/OP.8/GBR/1.

44 Ibid para 20.

45 Ibid para 85.

46 Ibid.

47 Ibid para 53.

48 For discussion of the multi-pronged approach taken by pro-reform activists in order to leverage international human rights law, see Enright et al (n 28 above) 24.

49 House of Commons Women and Equality Committee, Abortion Law in Northern Ireland (Eighth Report of Session 2017–2019 HC 1584 (2019)).

made various recommendations, ultimately calling on the Government to produce guidance clarifying the legal position and to legislate for abortion in situations of FFA.⁵⁰

These high-profile engagements with NI abortion law all took place against the wider background of the referendum on repeal of the Eighth Amendment in the Republic of Ireland.⁵¹ This generated huge press coverage throughout the UK and indirectly raised public awareness of the lack of abortion provision in NI.⁵² Westminster politicians were all too aware that the regime in NI was undefendable.⁵³ However, while there was finally a coalition of MPs willing to vote in favour of abortion reform for NI, the Government continued to voice objections to the UK Parliament interfering in an area of transferred competency.⁵⁴ It was proposed (in line with the CEDAW Recommendations as suggested by the pro-reform organisations) that rather than extending the Act to NI, the Government should repeal sections 58 and 59 OAPA,⁵⁵ effectively decriminalising abortion⁵⁶ in England, Wales and NI. This was seen as an effective compromise between respecting devolution and giving effect to the recommendations of the CEDAW enquiry. Yet, still the UK Government rejected this proposal and maintained that the matter was for the NI Assembly to deal with.⁵⁷

50 Ibid ch 10.

51 See [Abortion Rights Campaign](#).

52 Jon Henley, 'Irish abortion referendum: yes wins with 66.4% – as it happened' *The Guardian* (26 May 2018).

53 'Joint letter in the Sunday Times to the UK and Irish Governments calling on them to respect women's rights by reforming abortion law in Northern Ireland' *The Times* (22 July 2018); see also Tom Frost, 'Abortion in Northern Ireland: has the Rubicon been crossed?' (2018) 39 *Liverpool Law Review* 175; Ruth Fletcher, '#RepealedThe8th: translating travesty, global conversation, and the Irish abortion referendum' (2018) 26 *Feminist Legal Studies* 233.

54 Karen Bradley, Secretary of State for Northern Ireland, HC Deb 5 June 2018, vol 642, col 220.

55 Stella Creasy MP convened an emergency debate in the House of Commons making clear that, in the absence of a working assembly in Northern Ireland, such action would not usurp the powers of the NI Assembly: HC Deb 5 June 2018, vol 642, col 208.

56 This was supported by the CEDAW Committee in its inquiry findings and also the Family Planning Association, British Pregnancy Advisory Service (PBAS) and other reproductive rights organisations and is indeed their long-term goal. See 'Campaign groups unite in calling for repeal of sections 58 & 59 of the Offences Against The Persons Act 1861' Press Release (London Irish Abortion Rights Campaign 5 June 2018).

57 See UK Response to CEDAW, Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Observations of the UK, March 2018, UN Doc CEDAW/C/OP.8/GBR/2, para 5.

The reality was that the devolved assembly had ceased to function in 2016 and there was no effective governance in NI. Maintaining the position that abortion in NI was an issue for the devolved assembly was increasingly seen as untenable. This political vacuum provided the perfect opportunity for pro-reform activists to leverage further pressure on the UK Government. Not only could they frame abortion as an international human rights issue, but the stalemate meant they could credibly place responsibility for reform with the UK Government, since there was no viable alternative.⁵⁸ They were able to successfully argue that the absence of devolved governance obligated the UK Parliament to legislate on the issue.⁵⁹

Ultimately, Stella Creasy MP aided by parliamentary researcher Cara Sanquest, a co-founder of the London Irish Abortion Rights Campaign,⁶⁰ took up the mantle of legislative reform. After successfully embarrassing the Government into agreeing to fund National Health Service (NHS) abortions for Northern Irish women,⁶¹ Creasy tabled a series of amendments to technical Bills that dealt with matters arising due to the absence of the devolved assembly.⁶² With the support of a group of cross-party MPs, she eventually pushed through an ambitious amendment that required the UK Government to implement the recommendations of the CEDAW report should the NI Assembly not resume sitting by 21 October 2019.⁶³ In this way, Creasy and other MPs at the behest of NI activists ‘successfully and strategically deployed international human rights law in laying the groundwork for the decriminalisation of abortion’.⁶⁴ Despite last-minute attempts to reconvene the NI Assembly and thus block the repeal, sections 58 and 59 of the OAPA were repealed for NI, decriminalising abortion there. And, finally, in March 2020, regulations providing for abortion in NI came into effect.⁶⁵

58 Enright et al (n 28 above) 24.

59 Ibid 25.

60 [London Irish Abortion Rights Campaign](#).

61 Creasy proposed an amendment to the Queen’s speech: HC OP 2 (26 June 2017) part 1, 5–6. There was speculation that the amendment would pass, embarrassing the Conservative/DUP alliance. Rt Hon Justine Greening MP, Minister for Women and Equalities, [Letter to the Members of the House of Commons](#), 29 June 2017.

62 For full discussion of the work of the London Irish Abortion Rights Campaign and Stella Creasy in achieving legislative reform, see Sheldon et al (n 27 above).

63 S 9 of the Northern Ireland (Executive Formation etc) Act 2019 put an obligation on the Secretary of State to implement the recommendations of the CEDAW Committee by 31 March 2020.

64 Enright et al (n 28 above) 25.

65 The Abortion (Northern Ireland) Regulations 2020, SI 2020/345. The regulations allow for abortion on request in the first 12 weeks of pregnancy. After 12 weeks, abortion is permitted on grounds similar to those in the rest of the UK. See Sheldon et al (n 27 above) 793.

Reading privilege and paternalism in the NI abortion regime

The provision of abortion services in NI is a momentous victory for reformers and represents the culmination of decades of NI activism. While such a success is a celebratory moment, it is necessary to examine why such tireless activism was necessary and why the initial turn to human rights law to gain reproductive rights was not more successful in the UK courts.⁶⁶

Despite the UK Government's position that abortion was an issue for the devolved NI Assembly, it promotes access to abortion as part of its development programme and considers abortion a key right in advancing gender equality.⁶⁷ It also acknowledges that safe abortion services for victims of rape during war are protected under international humanitarian law.⁶⁸ Thus, 'the British Government's endorsement of abortion rights for women in developing countries contrasts greatly with its refusal to intervene to endure such rights for its own citizens living in a devolved region of the UK'.⁶⁹

Despite such curious cognitive dissonance by the Government, its reluctance to interrogate the NI regime can be understood. The fact that NI had such restrictive abortion provision appears to have allowed the UK Government to narrativise the position in Britain as comparatively liberal.⁷⁰ Abortion remains a paternalistic ritual in Britain which requires the (male) legal and political establishment to first acquiesce, and then requires individual women to seek

66 While aware that the shift towards human rights framing has been an overall success for the pro-reform lobby and ultimately achieved reform of the law, this article confines itself to an examination of the power of human rights law in the courts. It seeks to question why human rights arguments did not have more traction with the courts. While it also acknowledges that successful feminist activism takes place across a variety of platforms and forums, and that many feminists have low expectations of the power of law to achieve change, for legal scholars it is important to interrogate the power of human rights arguments to advance women's rights and expose entrenched dynamics that inhibit this.

67 Department for International Development, 'DFID's Policy on Safe and Unsafe Abortion' (Department for International Development 2009); Department for International Development, 'Developing a Human Rights-based Approach to Addressing Maternal Mortality' (Department for International Development 2005).

68 UN Security Council, Resolution 2106, UN Doc S/RES/2106 (2013) and UN Security Council, Resolution 2122, UN Doc S/RES/2106 (2013).

69 Goretti Horgan and Julia O'Connor, 'Abortion rights in a devolved region of the UK' (2014) 13 *Social Policy and Society* 39, 40.

70 Rosamund Scott, 'Risks, reasons, and rights: the European Convention on Human Rights and English abortion law' (2015) 24 *Medical Law Review* 1, 2.

permission from the medical establishment.⁷¹ The discourse around abortion conceptualises the regime in Britain as a privilege rather than facilitating universal health rights for women, meaning that women can be discouraged from pressing for further reform, as to do so invites the suggestion that the privilege may be rescinded entirely.⁷² Despite the supposedly liberal nature of British abortion law, the paternalism cemented in the Act and endorsed in positivistic interpretation by the courts 'highlight[s] the potential for the criminal nature of abortion regulation to bear heavily on practice'.⁷³ This paternalistic framing underpins much of the conceptualisation of the NI regime, as it prevented the two regimes being viewed in isolation. The reality is that the British and NI regimes have a symbiotic relationship. The existence of the restrictive NI regime allowed the British regime to be narrativised as liberal and feminist, while the existence of the British regime and its availability to Northern Irish women allowed the NI regime to continue without being found to violate human rights, as both the Government and the courts afforded weight to the fact that Northern Irish women could ultimately undergo abortions in Britain thereby absolving themselves of the view that women were forced to continue unwanted pregnancies. This failure to situate the restrictive NI regime as a violation of women's rights is telling. While the two-tier system was justified as a sensible legal compromise on a highly politicised issue, such narrativisation only endorses the wider feminist critique that law has proven impervious to calls to reinterpret in a way that includes women's lived experiences.

This narrative of privilege reifies a paternalistic approach to women's bodily autonomy that inhibits activists' attempts to enforce universal rights. Focusing on the formalistic restrictions of the NI regime meant that the British regime was conceptualised as liberal in comparison, belying the truth that abortion in Britain remains highly legalised and

71 Scott cites the list of reasons why the requirement for two doctors was enshrined. One is that it requires the woman to demonstrate a 'seriousness to terminate'. See also Sheldon (n 12 above) 345; Jonathan Brown, 'Scotland and the Abortion Act 1967: historic flaws, contemporary problems' 2015 *Juridical Review* 29, 29.

72 That s 1(1)(a) of the Abortion Act 1967 requires women to gain the permission of two doctors even in the first trimester can be read as an obstacle. Scott (n 70 above). See also Mary Neal, 'Devolving abortion law' (2016) 20 *Edinburgh Law Review* 399, 399; Stephanie Palmer, 'Abortion and human rights' (2014) *European Human Rights Law Review* 596, 3.

73 Scott (n 70 above) 18.

regulated by criminal sanctions.⁷⁴ The continued criminalisation of abortion in Britain also leaves the UK far behind the coalescing legal standards advocated by international human rights bodies and suggests that it is inhibiting the UK human rights framework from effectively protecting women and situating denial of abortion as a human rights violation in the way that international human rights commentators may expect it to. Thus, the NI regime served as a helpful scapegoat and detractor from the actuality of the British regime and shielded the Government from any claims that the British regime was in need of reform.

CHALLENGING PRIVILEGE AND PATERNALISM: THE UTILITY OF HUMAN RIGHTS LAW IN SECURING REPRODUCTIVE RIGHTS

Utilisation of human rights arguments to compel clarification of the NI abortion regime was first tried after the passing of the HRA. Activists had initially hoped this would provide a legalistic lexicon for challenging the lack of abortion provision for Northern Irish women. There was a notable effort to position reproductive rights claims within a distinctly legal vernacular and capitalise on human rights arguments.⁷⁵ Yet, situating the hardship and discrimination of Northern Irish women within such discourse did not produce the sought-after remedies, and law did not provide the much hoped for panacea as the NI courts were reluctant to label these restrictions as human rights violations.⁷⁶

74 The 1967 Act does not decriminalise abortion, and those carried out outwith the terms set out in the Act would be criminal. It provides that: 'a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner' and meets certain requirements set out in s 1(a)(b)(c)(d). Such abortions would be criminalised in England and Wales under the OAPA and under the common law in Scotland. Although, there is debate over whether Scots law has ever criminalised abortion given that pre-1967 jurisprudence allowed for a more liberal regime than in England. See Brown (n 71 above) and Kenneth McK Norrie, 'Abortion in Great Britain: one Act two laws' [1985] *Criminal Law Review* 475.

75 Enright et al (n 28 above) 9.

76 Ruth Fletcher, 'Abortion needs or abortion rights? Claiming state accountability for women's reproductive welfare' (2005) 13 *Feminist Legal Studies* 123; Barbara Hewson, 'The law of abortion in Northern Ireland' (2004) (Summer) *Public Law* 234; Eileen V Fegan and Rachel Rebouche, 'Northern Ireland's abortion law: the morality of silence and the censure of agency' 2003 11 *Feminist Legal Studies* 221; Kathryn McNeilly, Claire Pierson and Fiona Bloomer, 'Moving forward from judicial review on abortion in situations of fatal foetal abnormality and sexual crime: the experience of health professionals' (Queen's University Belfast 2016).

This section revisits this series of challenges and explores why these judgments were conservative at best and openly hostile at worst. It argues that the reason for this was the NI courts' discomfort over adjudicating reproductive rights (which they understood to be contentious and political) and so remained impervious to such claims. It highlights not only the effort needed to achieve small victories for NI reproductive rights in the courts, but how, even where human rights litigation did achieve results, this did not translate to improvements on the ground, and did not force the UK Government or the NI Assembly to act. This demonstrates the liminal nature of human rights and their limited utility in exposing the harm of the abortion regime in NI. Even where challenges were successful, the discourse of human rights did not trump existing narrative framings that drew on morality, culture, religion and NI exceptionalism.⁷⁷ This section then traces these themes of paternalism and privilege from these early challenges through to the recent Supreme Court cases. While there has been a shift in judicial discourse towards greater willingness to frame the suffering of Northern Irish women as objectionable and a potential human rights violation, there is still reticence towards affording unequivocal legal remedies. This is rooted in the implicit acceptance that dualistic abortion provision in the UK was permissible so long as Northern Irish women were not explicitly prohibited from travelling to Britain and obtaining abortions there, which ultimately endorses a paternalistic permissive regime; abortion provided to women not as a right but as a privilege only accessible under certain conditions – thus privileging traditional liberal constructions of human rights which serve to exclude women's needs and suffering from the scope of human rights protection.

Early human rights challenges in the NI courts

In 2003, the FPANI sought a declaration that the NI Minister for Health had acted unlawfully in failing to provide guidance on the availability and provision of services for the termination of pregnancy.⁷⁸ The first instance case was unsuccessful and Bloomer and Fegan note that Kerr J 'showed little understanding of the experience of medics or women when he claimed that this law was clear, although admittedly "difficult to apply"'.⁷⁹ Hewson noted that: 'It is arguable that Kerr J's restrictive interpretation of domestic law shows insufficient respect for women's right to physical or moral integrity under Article 8.'⁸⁰ While

77 O'Rourke (n 21 above) 717.

78 *Family Planning Association of Northern Ireland, Re an Application for Judicial Review* [2003] NIQB 48 (hereafter *FPANI 2003*).

79 Bloomer and Fegan (n 12 above) 112.

80 Hewson (n 76 above) 245.

the case was an attempt to clarify the law and was thus described as 'morally neutral in substance',⁸¹ it was not perceived this way and was characterised as seeking to change the law 'by the backdoor'.⁸² Kerr J appeared to allow his unease that the FPANI was on record as attempting to liberalise abortion law to influence his rejection of their case.⁸³ Fegan and Rebouche noted with concern the court's willingness to allow anti-choice groups access to the litigation on the grounds of morality.⁸⁴ The failure of the court to recognise the very real suffering endured by women, or to situate the lack of guidance as a human rights violation was disappointing, especially as the importance of judicial review to achieving women's equality has been noted by feminist legal scholars.⁸⁵

While the FPANI won on appeal⁸⁶ and draft guidance was issued in 2009,⁸⁷ this represented another missed opportunity for the courts to consider the issue of women's autonomy as a human right and to disentangle the patriarchal narratives woven into NI abortion regulation.⁸⁸ In reading in restrictions that did not ostensibly exist, the guidance 'arguably interpreted the existing law more restrictively',⁸⁹ thus demonstrating how a judgment in the pro-reformers' favour was also one that further entrenched paternalistic notions over how women should access abortion. Thus, although the turn to the law and invocation of human rights had been useful in compelling the NI administration to act and provide guidance, the guidance itself was so opaque that it did not help facilitate abortion access for women

81 Fegan and Rebouche (n 76 above) 230.

82 Ibid 231.

83 *FPANI 2003* (n 78 above) [21]. For commentary, see Sara Ramshaw, 'Commentary on Family Planning Association of Northern Ireland v The Minister for Health, Social Service and Public Safety' in Aoife O'Donoghue, Julie McCandless and Mairead Enright (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart 2017) ch 21, 439.

84 Fegan and Rebouche (n 76 above) 223.

85 Ibid.

86 *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety and others* [2004] NICA 37 (hereafter *FPANI 2004*).

87 Department of Health, Social Services and Public Safety NI, 'Guidance on the termination of pregnancy: the law and clinical practice in Northern Ireland' (2010).

88 *FPANI 2004* (n 86 above) [84]. Nicholson LJ's judgment largely ignored the rights of pregnant women, especially when he asserted that it would be wrong to circulate the guidance to pregnant women unless they specifically asked for it. John Kennedy, 'Commentary on Society for the Protection of Unborn Children's Application for judicial review' in O'Donoghue et al (n 83 above) ch 22, 459.

89 Bloomer and Fegan (n 12 above) 112.

entitled to it because of the chilling undercurrent implicit within it.⁹⁰ This meant that, while law had granted a remedy, it was not effective, demonstrating what many feminist scholars have long articulated that law, and even judicial remedy, rarely translates to changing actual women's lives.⁹¹ As McNeilly notes, it is not enough for judges to state the law but then to abrogate responsibility for its wider application.⁹²

Kennedy⁹³ describes the paternalism explicit in this case where Nicholson LJ expresses hope that the guidance would encourage those considering an abortion to change their minds, positioning abortion as the ultimate tragedy, and women who seek them as needing to be persuaded otherwise.⁹⁴ It was clear that the judges did not think that the guidance should be encouraging abortion. Thus, the deeply problematic aura of paternalism over abortion and the failure to see women as rational actors rather than pitiful creatures at risk of being exploited by abortion providers is woven into this judgment. The judges did not situate the lack of clarity, which was causing confusion over when to permit abortions and so perpetuating suffering, as a human rights violation. Again, it is suggested that this is because, conceptually, forced pregnancy is not conceived as a core human rights violation. It is further suggested that the judges were aware that women who did not want, or were unable, to continue their pregnancies, could in theory arrange an abortion in Britain, leaving the judges free to provide a decision guided solely by procedural public law principles rather than human rights.

Similarly, when the 2009 guidance was challenged by the Society for the Protection of Unborn Children on the grounds that it was unlawful,⁹⁵ Girvan LJ ruled that it was 'misleading' and ultimately made his own ideological position clear.⁹⁶ He disregarded the jurisprudence of the European Court of Human Rights (ECtHR) that provision of information on abortion must be allowed, even in jurisdictions where

90 Horgan questioned whether the purpose of the guidance was to scare doctors from performing abortions. Goretta Horgan, 'Foreword' in A Rossiter, *Ireland's Hidden Diaspora: The Abortion Trail and the Making of a London-Irish Underground, 1980–2000* (IASC 2009).

91 The NI activists' frustration with the parameters of law is narrated in Enright et al (n 28 above) 11–14.

92 Kathryn McNeilly, 'Family Planning Association of Northern Ireland v The Minister for Health, Social Service and Public Safety' in O'Donoghue et al (n 83) ch 21, 15.

93 Kennedy (n 88 above) 458.

94 *FPANI 2004* (n 86 above) [17].

95 *Society for the Protection of Unborn Children, Re Judicial Review* [2009] NIQB 92.

96 Bloomer and Fegan (n 12 above) 114.

abortion was prohibited,⁹⁷ and claimed that the guidance was unclear on conscientious objection.⁹⁸ Here again, the denial of reproductive rights to women in NI was interpreted as unproblematic in itself, and, as a result of this case, the guidance was withdrawn in 2010, returning legal uncertainty over when legal abortions could occur.⁹⁹

The denial of reproductive rights to women in NI that the continuing legal uncertainty (and apathy of the Department of Health to meet its obligations) caused was adjudicated as unproblematic in itself, and, despite an expectation that such cases be judged solely on legal standards, the subject matter meant that the judge scaffolded morality considerations onto his decision making.¹⁰⁰ The narrativisation of abortion as a privilege and not a core healthcare right, far less a bodily autonomy or privacy right is implicit throughout this judgment, especially when the judge appears to balance clarifying access to abortion in NI against moral convictions of anti-choice organisations.¹⁰¹ Again, this case can be considered morally neutral as it was not about liberalisation, but merely sanctioning the guidance clarifying the existing law to reassure women and healthcare workers and thus facilitate effective access for those legally entitled to an abortion. Yet, the perception was that simply providing the guidance was relaxing the regime and, thus, encouraging abortion. It is clear that the judge was uncomfortable with this and, as such, the hardship that the lack of guidance caused to women became lost in the effort to reify the concerns of religious and anti-choice organisations, again approaching women's rights to access abortion through the lens of privilege and paternalism, rather than as a core right to be upheld by the court.

These early reviews of Government and NI administration policy choices were deliberately limited in their scope and did not seek or envision repeal of the criminal prohibitions on abortion or extending the Act to NI. Instead, they were very carefully targeted actions that sought to clarify the law. The inability of the early cases to convince

97 *Society for the Protection of Unborn Children, Re Judicial Review* (n 95 above) [37]. See *Open Door and Dublin Well Women v Ireland* App no 14234/88 (A/246-A), App nos 14235/88 and 14235/88 (1993) 15 EHRR 244, 29 October 1992: the court held that Ireland's ban on counselling services providing information on abortion provisions overseas violated Article 10 ECHR.

98 *Society for the Protection of Unborn Children, Re Judicial Review* (n 95 above) [45].

99 A final version was issued in 2016 making clear that abortion is only lawful in very limited circumstances: Department of Health, Social Services and Public Safety, [Guidance for Health and Social Care Professionals on Termination of Pregnancy in Northern Ireland](#).

100 *Society for the Protection of Unborn Children, Re Judicial Review* [2009] NIQB 92 (n 95 above) [3].

101 *Ibid* [40].

the courts to situate these challenges as solely core human rights violations is problematic and demonstrates just how ineffective law is at protecting and advancing the rights of women.¹⁰²

NIHRC: The elusive declaration of incompatibility

Due to the ever more hostile environment foisted on women in need of an abortion and their medical practitioners in NI and a disturbing trend where a number of women were prosecuted for procuring medication and inducing their own abortions, in 2014 the Northern Ireland Human Rights Commission (NIHRC), having been persuaded by pro-reform groups to take up the mantle of abortion access in NI, eventually brought judicial review proceedings under sections 4 and 6 of the HRA.¹⁰³ Despite minimal success via human rights vernacularisation previously, the willingness of the UK courts in the intervening years to progressively interpret ECHR jurisprudence,¹⁰⁴ combined with judgments from the ECtHR that held that denial of access to abortion in certain circumstances was a violation of convention rights, suggested that the NIHRC might finally succeed in forcing the UK Government and NI administration to accept that the NI regime violated human rights and thus compel reform. The NIHRC argued that the effective prohibition on abortion in NI created by sections 58 and 59 of the OAPA and the Criminal Justice (Northern Ireland) Act 1945 violated articles 3, 8 and 14 of the ECHR, as it made no provision for victims of sexual crimes (rape or incest), or in cases where there was a diagnosis of FFA or SMF.¹⁰⁵

In the High Court, Horner J found in favour of the NIHRC regarding article 8 in situations of sexual crime and FFA¹⁰⁶ and issued a

102 Enright and others describe how activists became experts in shifting locations and learned to capitalise on ‘failed’ cases in other contexts. See Enright et al (n 28 above) 22.

103 *In the Matter of an Application for Judicial Review by the Northern Ireland Human Rights Commission in the Matter of the Law on Termination of Pregnancy in Northern Ireland* [2015] NIQB 96 (hereafter *NIHRC 2015*). While the intervention of the Human Rights Commission was welcomed by the pro-reform campaign, some highlighted that previous attempts to convince the Commission to challenge the abortion regime had been ignored. The shift by mainstream rights organisations such as the Commission and Amnesty International to positioning the lack of availability of abortion in NI as a human rights issue was due to the huge effort undertaken by pro-reform activists to situate it as such. See further Enright et al (n 28 above).

104 For an overview of the Supreme Court’s progressive and inventive interpretation of human rights law, see Bryce Dickson, *Human Rights and the UK Supreme Court* (Oxford University Press 2003).

105 *NIHRC 2015* (n 103 above) [2].

106 *Ibid* [173].

declaration of incompatibility.¹⁰⁷ This was heralded as an incredible success and the first time there was overt judicial agreement that the abortion regime in NI violated women's rights.¹⁰⁸ The decision was momentous because it actually went much further than the Strasbourg jurisprudence, finding substantive rather than procedural breaches of article 8. However, the decision was appealed by a vocally anti-choice Attorney General.¹⁰⁹ The Court of Appeal reversed the declaration of incompatibility on the basis that the devolved assembly had refused to legislate for the issue in 2016 and therefore held that a declaration of incompatibility would challenge Stormont's democratic mandate.¹¹⁰ The case was heard by the Supreme Court, which found that the NIHRC did not have standing¹¹¹ to bring a case in the abstract.¹¹²

By a majority of four to three (Lord Mance, Lord Reed, Lord Lloyd-Jones and Lady Black, with Lady Hale, Lord Kerr and Lord Wilson in the minority), the Supreme Court endorsed a formalistic reading of the Northern Ireland Act 1998 (NIA), rendering the NIHRC powerless to bring such cases, even though this was clearly one of the purposes of its creation.¹¹³ Despite section 71(2B)(a) of the NIA stating that the 'Commission need not be a victim or potential victim of the unlawful act', the court interpreted this to mean that the NIHRC could only bring its own challenge where there has been 'an unlawful act' and not when it was challenging primary legislation. The majority held that such cases could only be brought by, or on behalf of, an identified victim.¹¹⁴ Here, the court held that NIHRC was challenging primary legislation, but it had not identified, nor was it acting on behalf of, a potential victim and therefore did not have standing.¹¹⁵

This restrictive interpretation was disappointing because, as Lady Hale (in her minority opinion on standing) noted, the issue of standing

107 Ibid [5].

108 'Supreme Court finds NI abortion law is in breach of international human rights law' (PBAS 7 June 2018); and 'NI abortion law "breaches human rights"' (*BBC News*, 30 November 2015).

109 'NI abortion law: Attorney general lodges appeal over high court ruling' (*BBC News*, 25 January 2016); and 'Attorney General questions Sarah Ewart's right to challenge abortion laws in High Court' *Irish News* (31 January 2019).

110 *Attorney General for Northern Ireland v Northern Ireland Human Rights Commission* [2017] NICA 42 [74]–[75] per Morgan LCJ.

111 See Jane M Rooney, 'Standing and the Northern Ireland Human Rights Commission' (2019) 82(3) *Modern Law Review* 525; and Shona Wilson Stark, 'Northern Ireland's abortion legislation: procedural and substantive confusion over declarations of incompatibility' (2003) 7 *Cambridge Law Journal* 448.

112 *NIHRC* (n 1 above). For commentary see Frost (n 53 above).

113 *NIHRC* (n 1 above) [62].

114 Ibid [56]–[60].

115 Ibid [73].

was ‘an arid’¹¹⁶ one as there was ‘no doubt that the NIHRC could readily have found women who either are or would be victims’.¹¹⁷ Indeed, it did identify several women, but brought the case in its own stead. It did so because:

there is, if not an express, an implied provision that it is the role of the NIHRC to bring this litigation. The NIHRC was best placed to represent the victims because of the resources at its disposal, the expertise it could draw on, its role as a quasi-governmental body that engages with the executive and legislature to ensure that legislation is human rights compliant, its desire for a declaration of incompatibility, and to lessen the burden of the victims.¹¹⁸

Thus, in denying the NIHRC standing, the majority denied one of the core purposes of the NIHRC. While this interpretation might be explained through a literal reading of both the NIA and HRA, a purposive reading ‘indicates that the NIHRC should have had standing’.¹¹⁹ It is telling that a court that has previously been willing to engage in purposive interpretation to radically interpret legislation in accordance with human rights norms decided to revert to judicial conservatism in this instance. Lord Mance appeared to be aware of how controversial and unwelcome his interpretation on standing was as he acknowledged that his conclusion was ‘inconvenient’,¹²⁰ which, as Stark notes, is quite the understatement.¹²¹

As Rooney highlights, the result of Lord Mance’s opinion is to set the bar exceedingly high for any woman to establish victimhood and be granted admissibility.¹²² Not only does the majority opinion state that the NIHRC lacked standing to bring the case, it appears to suggest that a Northern Irish woman who was denied an abortion on the grounds of either FFA or sexual crime could only challenge the particular grounds that directly affected her.¹²³ In his dissenting opinion, Lord Kerr highlights the absurdity that such an interpretation would render, noting that women in such situations ‘do not have the luxury of time with which to seek vindication of their rights’.¹²⁴ Indeed, this very issue

116 Ibid [11].

117 Ibid.

118 Rooney (n 111 above) 538.

119 Ibid 525.

120 *NIHRC* (n 1 above) [70].

121 Stark (n 111 above) 450.

122 Rooney (n 111 above) 541.

123 The High Court appeared to confirm that, as a result of Lord Mance’s ruling, a woman who is a victim of FFA could challenge the human rights compatibility of that ground but not the other grounds: *In the Matter of an Application by Sarah Jane Ewart for Judicial Review* [2018] NIQB 85 at [2].

124 *NIHRC* (n 1 above) [197].

appeared to influence Horner J's first instance conclusion that the law could not intend for only an individual pregnant women to litigate the matter as that would 'be to do a further injustice to them'.¹²⁵ Therefore, while cloaked in the vagaries of statutory interpretation, the majority opinion on standing is disappointing and, taken at face value, appears to place further onerous barriers in the path of women challenging the abortion regime.

However, while unable to issue a declaration of incompatibility, the Supreme Court delivered an unusual *obiter* judgment which effectively stated that, had the case been brought by a named victim, the court would have issued such a declaration.¹²⁶ On the merits, a majority (Lord Mance, Lord Kerr, Lord Wilson and Lady Hale) found that the law in relation to rape, incest and FFA was incompatible with article 8. Lady Black found incompatibility with article 8 only in relation to FFA. Lords Reed and Lloyd-Jones found no incompatibility with either article 8 or article 3, while Lords Kerr and Wilson found incompatibility with both article 8 and article 3.¹²⁷ This was a highly complex case that caused division between the judges, yet the majority finding that article 8 had been violated merely follows ECtHR jurisprudence, which has held that denial of abortion in cases of FFA can constitute a breach of the ECHR and should not have been especially controversial.¹²⁸ The judges did not feel the need to explore the article 14 claims due to the fact there was a majority finding that article 8 was infringed.

Article 8

Lady Hale acknowledged that there was 'common ground' that the law interfered with women's article 8 right to respect for privacy.¹²⁹ The question was whether such interference was justified under article 8(2).¹³⁰ In adjudicating whether the article 8 interference was necessary, and whether it struck a fair balance between the rights of

125 *NIHRC 2015* (n 103 above) [88]–[89].

126 Following the judgment, Sarah Ewart, who had already provided extensive evidence in the *NIHRC* case, raised an application as a named victim. *In the Matter of an Application by Sarah Jane Ewart for Judicial Review* [2019] NIQB 88. The judge referred to the reasoning in *NIHRC* (n 1 above) and determined that the abortion regime had violated Ms Ewart's human rights.

127 *NIHRC* (n 1 above) [2].

128 *P & S v Poland*; *RR v Poland*; *Tysiac v Poland*; *A, B and C v Ireland* (n 7 above)

129 *NIHRC* (n 1 above) [19].

130 Article 8(2) states: 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

the women and the interests of the foetus, the court considered each of the situations. On SMF there was agreement that interference with article 8 rights was not disproportionate and struck a fair balance.¹³¹ On FFA a majority found that there was no community interest in requiring a woman to carry such a pregnancy to term, with Lord Mance noting that: 'It is difficult to see what can be said to justify inflicting on the woman the appalling prospect of having to carry a fatally doomed foetus to term.'¹³² On sexual crimes (rape and incest) the court was more divided. The majority found that the interference with article 8 rights could not be justified. The rights of the pregnant woman should take precedence over community interests of protecting the foetus.¹³³ Again Lord Mance was clear that continuing a pregnancy in such circumstances was undesirable:

The agony of having to carry a child to birth, and to have a potential responsibility for, and lifelong relationship with, the child thereafter, against the mother's will, cannot be justified.¹³⁴

The minority did not think article 8 rights were violated by not allowing for abortion provision in circumstances of sexual crimes. They applied the ECtHR's reasoning in *A B and C v Ireland*, which found that since Irish women could access abortion abroad then the infringement of their article 8 rights was justified. Here, Lord Reed and Lord Lloyd-Jones highlighted that the circumstances were much the same, in that Northern Irish women also had the option to travel to Britain for an abortion.¹³⁵

Article 3

Only two judges found there to be a violation of article 3. Lord Kerr (the only NI judge) and Lord Wilson found that the law as applied to women in situations of sexual crime and FFA violated article 3 because 'it is plainly humiliating to require a girl or woman to continue a pregnancy when she knows that the foetus she carries will die or where she finds that pregnancy abhorrent because it is the consequence of rape or incest'.¹³⁶ He found that the resultant psychological trauma suffered by some women who were denied an abortion in those circumstances would meet the threshold to merit a violation of article 3.¹³⁷ Lady Hale did not feel it necessary to adjudicate on the article 3 claim since she

131 *NIHRC* (n 1 above) [133] Lord Mance.

132 *Ibid* [123].

133 *Ibid* [27] Lady Hale.

134 *Ibid* [132] Lord Mance.

135 *Ibid* [357] Lord Reed

136 *Ibid* [237] Lord Kerr.

137 *Ibid* [235] Lord Kerr.

had found a violation of article 8. The majority (Lord Mance, Lord Reed, Lord Lloyd-Jones and Lady Black) all found there to be no article 3 violation. Lord Mance, also influenced by *A B and C v Ireland*, noted that Northern Irish women could travel to Britain for an abortion.¹³⁸

The judgment can be read as a compromise which created space for Parliament to legislate, while asserting that failure would result in a declaration of incompatibility if a challenge was brought by a named victim.¹³⁹ While the court's caution on a highly contentious issue is understandable, it is problematic as it unquestioningly accepts the political framing of abortion in NI as a contentious morality issue, which is a constructed framing and not a given. The court appears to have been unduly deferential to this constructed political framing.

While many found cause for celebration in the court's strident assessment that the legislative provision was in clear violation of human rights, the lack of judicial remedy highlights the limited power of both women's lived experiences and the utility of pursuing reproductive rights in the UK courts.¹⁴⁰ This decision represents another example of the tokenistic approach to women's rights. There was much sympathy accorded to individual testimony¹⁴¹ and a clear message that such treatment was a violation of human rights.¹⁴² Yet, ultimately, the court placed a remedy just out of reach by essentially demanding that individual women litigate the same case in their own name.¹⁴³ This was a missed opportunity for the court to deliver a powerful judgment determining that harms suffered by Northern Irish women who could not access abortion were violations of the ECHR. Instead, the court appeared influenced by the fact that Northern Irish women were not prevented from seeking abortions in Britain, reducing the pressing need to determine that the NIHRC had standing and issue a declaration of incompatibility and provide the women with a useful remedy.

Framing abortion as a privilege for 'worthy' cases

This judgment further demonstrates the paternalism at the heart of UK legal reasoning on reproductive rights, which allowed the judges to offer

138 Ibid [100] Lord Mance.

139 Ibid [135]. See Reproductive Health Law and Policy Advisory Group, 'The UK Supreme Court Decision on Human Rights and Abortion in Northern Ireland – What Now?'

140 In her feminist judgment, McNeilly notes the failure of the courts in the *FPANI* cases to situate the applications within human rights law. McNeilly (n 92 above).

141 *NIHRC* (n 1 above) [85]–[91].

142 Ibid [2].

143 Ibid [61].

sympathy to the women whose stories were told in court.¹⁴⁴ While this showed that the judges were moved by the women's plight, they did not allow this sympathy to influence interpretation of the legislation to enable them to deliver a declaration of incompatibility, nor a majority finding that there was a violation of article 3. The judgment is carefully crafted to demonstrate empathy and understanding of the hardship and trauma, while making clear that this cannot be redressed by the courts. Instead, the judgment continues law's narrativisation of women as unfortunate victims of circumstance rather than as individual actors seeking redress under the law. It would appear that such women are to be pitied, but not afforded rights or remedy.

The NIHRC was well aware that there is a lack of consensus that there is a general right to abortion.¹⁴⁵ As such, it deliberately narrowed the scope of the litigation to encompass only the most extreme cases of abortion prohibition (rape, incest, FFA and SMF) in order to take advantage of ECHR jurisprudence and general comments and country recommendations of international human rights committees, thus firmly positioning its argument within demonstrable legal precedent. While this was a strategic position designed to ensure that denial of abortion in the most serious situations be redressed, such a strategy inevitably constructs categories of worthy and unworthy claimants which, inadvertently positions abortion as a 'privilege' awarded only to those women deemed to be most tragic or most deserving, thus continuing the theme of paternalism. Distinguishing categories of women who need an abortion on the basis of harrowing circumstances positions such women as unfortunate creatures, thereby allowing their plight to serve as an exemption to the overall prohibition. While the court's endorsement of a right to abortion on grounds of rape or FFA via a declaration of incompatibility would have been a huge improvement for women in those circumstances, it would do little to shift the dominant narrative framing of abortion as unfortunate and tragic. Instead, it would merely position certain women as so unfortunate that an abortion must be permitted, thereby privileging the most 'worthy' of tragic circumstances. This framing goes to the heart of the court's reasoning. Only where women can be constructed as tragic and pitiable might those women's interests prevail over community interests. In

144 Brid Ní Ghráinne and Aisling McMahon, 'Abortion in Northern Ireland and the European Convention on Human Rights: reflections from the UK Supreme Court' 2019 *International and Comparative Law Quarterly* 490.

145 There is a general acceptance that international human rights law recognises prohibition of abortion in cases of FFA and rape as a violation of human rights, but there is no consensus on a general right to abortion. It was thus expedient of the NIHRC to litigate only those examples of women denied an abortion in situations of rape, incest, FFA and SFM.

regimes which permit abortion for these reasons, women need to make sure they fit the characterisation of victimised and desperate in order to invoke law's paternalistic permission. Lord Mance noted that in situations of sexual crime the law should 'protect the abused woman',¹⁴⁶ which is reminiscent of the language of *Bourne* where the judge conceptualised women as being 'wrecks'. It was disappointing that such a morally neutral and conservative claim that endorsed law's inherent paternalism toward women did not find more traction with the judges. While this was a sensible strategy designed to mount the best case, it allows the court to solidify problematic abortion narratives that position abortion as tragic but necessary for particular worthy groups of women who can be portrayed as unfortunate victims and demonstrates just how conservative activists have had to be in positioning abortion as a human right.

While the case demonstrates the utility and, indeed, the partial success of pro-choice advocates in situating abortion rights within article 8 jurisprudence, drawing on the successful framing of abortion as both an access to healthcare issue but also as a bodily autonomy issue, it shows how low expectations needed to be and just how conservative the NIHRC's arguments were. Overt claims for reproductive rights premised solely on bodily autonomy arguments that engage article 8 were unlikely to have been endorsed by the courts. This forces activists and lawyers to package arguments for reproductive rights around tragic narratives that rely on women reliving trauma. This further demonstrates the paternalism of law in failing to take women's bodily autonomy seriously and again privileges the traditional liberal understanding of human rights jurisprudence, which excludes women.

Fegan and Rebouche argue that, while healthcare access is a more neutral framing than rights claims based on women's autonomy, a move toward the more overt human rights language of bodily autonomy, privacy, discrimination¹⁴⁷ and inhuman treatment is necessary to fully utilise human rights jurisprudence.¹⁴⁸ It is clear from *NIHRC* that the NIHRC attempted to take up this challenge. Its strategy mirroring the global approach that initially framed abortion rights primarily within the sphere of access to healthcare, then incrementally emphasising bodily autonomy as a core human right within the scope of right to freedom from interference in private life.

146 *NIHRC* (n 1 above) [127] Lord Mance.

147 In *Mellet v Ireland* (n 31 above) and *Whelan v Ireland*, Communication No 2425/2014, the HRC adopted a sex discrimination approach that involved contrasting the treatment of the claimants, not with a man in a similar position, but with other women. See Joanna N Erdman, 'The gender injustice of abortion laws' 2019 27 *Sexual and Reproductive Health Matters* 1.

148 Fegan and Rebouche (n 76 above) 233.

This judgment endorses the conceptualisation of abortion as a privilege that not all women are automatically entitled to, by situating it outside traditional liberal understandings of human rights violations. It may be that the judges were reassured that women could still obtain abortions in Britain and so did not conceptualise the suffering and trauma as seriously as they might had the suffering better aligned with traditional jurisprudential understandings of rights violations that violate bodily autonomy, the right to private life or the right to life itself.

Thus, while the NIHRC's approach can be positioned at the forefront of global reproductive rights advocacy, it is disappointing that such an approach packaged within the 'normatively neutral' narrative of access to healthcare¹⁴⁹ did not appear to insulate the litigation from moralistic overtures and the resultant judicial handwringing; especially since international human rights bodies are moving toward highlighting that in some cases abortion denial can constitute torture or cruel, inhuman or degrading treatment.¹⁵⁰

A and B: the invisibility of gendered arguments on abortion funding and access

In *A and B*, where the appellants¹⁵¹ challenged the now redundant policy¹⁵² of not funding NHS abortions for Northern Irish women who travelled to Britain, the question was whether the Health Secretary's decision not to fund A's abortion was unlawful as a matter of public law and a breach of the ECHR. By a majority of three to two (Lord Wilson, Lord Reed and Lord Hughes, with Lady Hale and Lord Kerr dissenting) the court did not find in favour of the appellants, holding that the Health Secretary was justified in his decision not to fund abortion and that, while there was a violation of A and B's convention rights, such violation could be justified.

The public law arguments advanced were that the Health Secretary had erred in his decision not to provide funded abortions to Northern

149 Daniel Fenwick, "'Abortion jurisprudence" at Strasbourg: deferential, avoidant and neutral?' (2014) 34 *Legal Studies* 214, 215.

150 Isabella Moore, 'Indignity in unwanted pregnancy: denial of abortion as cruel, inhuman and degrading treatment' (2019) 23 *International Journal of Human Rights* 1010, 1010; Ronli Sifris, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (Routledge 2013).

151 The appellants lodged an application with the European Court of Human Rights. However, the court refused to hear the case on the grounds that a 'friendly settlement' had been reached: *A and B v UK* No 80046/17 (ECHR 20 December 2019).

152 On 29 June 2017, the UK Government announced that NHS coverage would extend to Northern Irish women accessing abortion in England. See Greening (n 61 above).

Irish women and hinged on the statutory interpretation of whom was owed a duty. The majority held that the Health Secretary had not failed in his duty by choosing not to extend abortion funding to Northern Irish women on the basis that section 1(1) of the National Health Service Act 2006 stated that this duty extended to the ‘people of England’.¹⁵³ Taking a formalistic approach to interpretation, the majority concluded that Northern Irish women seeking abortions in England could not be considered ‘people of England’ because NHS regulations specifically prevented people from one devolved nation temporarily registering with a GP elsewhere to avail themselves of better treatment.¹⁵⁴ The majority were persuaded that: ‘Parliament’s scheme is that separate authorities in each of the four countries united within the kingdom should provide free health services to those usually resident there.’¹⁵⁵ Thus, Northern Irish women were excluded from any duty that compelled the Health Secretary to fund abortions for people in England, even if they happened to be in England to receive an abortion.

The human rights arguments advanced that abortion services came within the ambit of article 8 and so engaged article 14 (anti-discrimination) as to how those services were provided. The appellants accepted that there was no explicit convention right to an abortion, nor for abortions to be provided free of charge, but argued that where a state did provide abortion services, it must do so in a non-discriminatory fashion. Both the court and the Health Secretary agreed that abortion provision engaged article 8 and thus article 14. The question for the court was, therefore, whether the appellants were discriminated against on the basis of their residency, and, if there was discrimination, whether it could be justified.

Article 14

Article 14 provides that convention rights shall be secured without discrimination ‘on any ground such as sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status’. Thus, the appellants had to demonstrate that their place of residence (NI) amounted to ‘status’ under article 14, and as such they should not be discriminated against on this basis. The appellants’ argument was not that the NI legislation prohibiting abortion was discriminatory or treated women differently than the English provision, but that denying NHS-funded abortions in England to women normally resident in NI was discriminatory on the basis that such women were afforded

153 *A and B* (n 2 above) [9]–[16].

154 *Ibid* [15].

155 *Ibid* [20].

different treatment solely based on their residency in NI.¹⁵⁶ In *Carson*, the ECtHR found that place of residence did constitute an aspect of personal status under article 14.¹⁵⁷ The court therefore was satisfied that a law which treats residents of a place differently to non-residents differentiates on the basis of personal status within the meaning of article 14.¹⁵⁸

Having satisfied the court that the law preventing Northern Irish women from accessing NHS-funded abortions in England was discriminatory, and thus interfered with the appellants' Article 8 rights, they then had to establish that such discrimination could not be justified. It was on this point that the judges disagreed. The majority found that the discrimination was justified and as such there was no violation of the appellants' Convention rights. Their reasoning was that the Health Secretary was correct to uphold the scheme for separate health provision in the devolved regions of the UK.¹⁵⁹ Consequently, it was lawful to prevent people from one nation contracting better healthcare services in another and to impose a duty on the Health Secretary to fund abortions for Northern Irish women would 'precipitate both a substantial level of health tourism into England from within the UK and from abroad and a near collapse of the edifice of devolved health services'.¹⁶⁰

Despite taking as its starting point the importance of the devolved nature of health provision throughout the UK, and the need to afford a high degree of respect to the sanctity of devolution, the majority judgment was not explicit on the reason for this, nor why in this instance devolution should trump the protection of individual rights.¹⁶¹ Here again, paternalism and privilege are at play, where notions of constitutional rights and maintaining the devolution settlements are privileged over women's right to healthcare and bodily autonomy. While the judgment is not explicit that permitting abortion would be a threat to the peace process, there is an implicit suggestion.¹⁶² The reference to 'respect' for the sanctity of devolution is not fully explained, yet it conjures similar images to politicians speaking of the need to deny women's rights in order to further constitutional settlements. In suggesting this, the court implicitly reifies the gendered hierarchy at play in law whereby women's human rights are deemed lesser than

156 *Ibid* [91].

157 *Carson v UK* 51 EHRR 13 [70].

158 *A and B* (n 2 above) [47].

159 *Ibid* [35].

160 *Ibid* [36].

161 Leanne Cochrane, 'Devolution and discrimination between citizens under article 14 ECHR: preserving local provision' (2017) 76 *Cambridge Law Journal* 472, 474.

162 *A and B* (n 2 above) [20].

traditional constitutional rights, which are coded as male and more worthy of protecting.¹⁶³ There is no explanation as to how the court assessed these competing issues and thus decided that the Health Secretary was correct to weigh the balance in favour of respecting devolution. Indeed, so entrenched is this gendered hierarchy of rights that the court saw no inherent problem in its privileging of devolution over the women's human rights, hence its failure to fully explain its rationale.

The fact that the court termed the authority of international human rights bodies as 'slight' meant that it determined that progressive jurisprudence that held that *de facto* obstruction of access to abortion was a human rights violation did not have sufficient weight to counter the Health Secretary's legitimate aim in restricting abortion funding.¹⁶⁴ It is disappointing that there was no consideration of the international jurisprudence and curious that the majority was so eager to dismiss such authority. While it is correct that treaties such as the CEDAW, the Convention Against Torture and the International Covenant on Civil and Political Rights (ICCPR) are not directly incorporated into UK law, the interpretation of such treaties by other courts and the United Nations (UN) committees offered convincing evidence of the international trend in situating obstructions in abortion access as a human rights violation. While the majority of the court acknowledged such a trend, they stated that it merely added 'background colour'.¹⁶⁵

It is disappointing that the Supreme Court did not frame the legal question to situate the appellant's claim within the wider discourse on access to abortion. Instead, it followed the depressing stance of the Strasbourg court, described as 'deferential, avoidant, and neutral',¹⁶⁶ in focusing on procedural issues only and placed the maintenance of the devolved Assembly's right to make its own healthcare provisions above the rights of women seeking healthcare. The judges appear to have been swayed by the Health Secretary's declaration that the motivation behind this policy was not financial or regional fairness, but to demonstrate respect to the NI Assembly's decision to continue to criminalise abortion in NI by refusing to fund such services for those women should they come to England.¹⁶⁷ It was not made clear why the

163 See Mullally and Murray (n 6 above) who highlight that the human rights framework is not capable of protecting women's reproductive autonomy. See also Vanesa Sauls Avolio, 'Rewriting reproductive rights: applying feminist methodology to the European Court of Human Rights' Abortion Jurisprudence' (2017) 6(2) *Feminists@law*.

164 *A and B* (n 2 above) [35].

165 *Ibid*.

166 Fenwick (n 149 above).

167 *A and B* (n 2 above) [20].

court considered this to be the case, although the reasoning appears to suggest that so long as Northern Irish women are not prohibited from leaving NI to secure an abortion there is no violation of their human rights, even if refusing them funded treatment puts a huge obstacle in the way of accessing such abortions in Britain.¹⁶⁸ This again serves as another instance of law being unable to conceptualise the actual lived realities of women, since denying funding was in effect denying access to abortion.

Lack of gender awareness

Both Lord Kerr and Lady Hale offered strong dissenting judgments that the discrimination could not be justified. While Lord Kerr concurred that the democratic decisions of the NI Assembly must be respected, he questioned why funding abortions for Northern Irish women in England was necessarily understood to be disrespectful.¹⁶⁹ His Lordship noted that, despite NHS funding in England being for the benefit of the people of England', should a woman from NI visit England and require an appendectomy, such treatment would be funded by the NHS.¹⁷⁰ Lord Kerr suggested that there was a presumption that the appendectomy would be an emergency procedure, whilst an abortion is elective.¹⁷¹ He correctly noted that the conceptualisation of an abortion as an elective procedure, especially when there is no option to have an abortion in NI, is a false one.¹⁷² Yet, the majority did not appear to agree with or endorse this reasoning, stating that it is 'easy to think of other people suffering a grave medical condition who could mount an equally convincing special case'.¹⁷³ While the majority demonstrated sympathy with A's position, it is difficult not to read their judgment as endorsing the view that accessing abortion services in England was no different to someone from NI attempting to gain better treatment in England than that offered by their local NHS trust. This is buttressed by the fact that there is very little consideration in the majority judgment that, in not affording abortion funding to Northern Irish women who come to England, the policy effectively means that many women would be unable to access an abortion at all. This approach belies the fact that, since there is virtually no abortion provision in NI, any Northern Irish woman who wanted an abortion would by necessity *have to travel to England*. As Lord Kerr notes: 'This is not an instance of her seeking

168 This framing suggests that the state has only negative obligations to comply with in ensuring women are not denied access to abortion.

169 *A and B* (n 2 above) [76]–[77].

170 *Ibid* [52].

171 *Ibid* [51].

172 *Ibid*.

173 *Ibid* [36].

what she regarded as a better level of service in England. It was a case of her being obliged to come to the only medical service of which she could avail.¹⁷⁴

As Lady Hale (the only female judge) correctly asserts in her dissenting judgment: ‘The NHS there could not provide abortion on a wider basis there even if it wanted to do so.’¹⁷⁵ The failure of the majority to consider that abortion was an entirely different case to any other healthcare concern is problematic and highly gendered. The majority did not appear to consider the fact that abortion was a ‘special case’ in that it was a healthcare provision only utilised by pregnant women.¹⁷⁶ Yet, accepting that pregnancy was a special criteria might have negated Lord Wilson’s fear that allowing persons from NI to access free NHS services in England would bring about ‘the near collapse of the edifice of devolved health services’.¹⁷⁷ It is suggested that, not only should the court have distinguished abortion provision from routine healthcare provision, it should have afforded weight to the fact that decisions on abortion funding were inherently gendered due to the fact that denial of access to NHS abortions in many cases means denial of access to any abortion, consequently forcing a woman to either carry an unwanted pregnancy to term or obtain abortion pills illegally in NI. This gendered consequence was highlighted in the *Mellet* communication, which characterised prohibitive restrictions on abortion as ‘a disproportionate, abnormal and unjust existential burden on women, by virtue of being women’.¹⁷⁸

Lady Hale correctly begins from the perspective that this case cannot be approached as though it were any other healthcare funding decision or that respecting the funding decisions of other devolved regions was an aim that could be balanced against women’s human rights to bodily autonomy. It is disappointing that this gendered reality was not given more attention by the majority and the dispute framed within the human rights jurisprudence on access to abortion rather than seeking funded treatment in a different devolved nation. Much

174 Ibid [70]

175 Ibid [97].

176 Ibid [96].

177 Ibid [36].

178 *Whelan v Ireland* (n 147 above) Annex I: Individual opinion of Committee Member Yadh Ben Achour (concurring) para 5.

like the ECtHR's well-criticised judgment *A, B and C v Ireland*,¹⁷⁹ the majority appeared satisfied that since there was no legal prohibition on Northern Irish women leaving NI to obtain abortions elsewhere then there was no violation. This is a misreading of the fact that no funding means that the state is effectively prohibiting women from obtaining abortions elsewhere and is out of step with international jurisprudence.¹⁸⁰ It serves to perpetuate reification of the abortion regime in Britain as a privilege not a right, but paradoxically something that Northern Irish women can easily avail themselves of should they wish. This saves the court from needing to criticise the NI regime as it can satisfy itself that the appellants were able to obtain abortions in Britain. However, this framing is incorrect, it endorses the implicit paternalism around abortion in the UK by reifying the obstructive regulation as acceptable and approaches the issue as whether Northern Irish women are prevented from obtaining abortions elsewhere, rather than addressing the fact that the need to obtain one outwith NI is what causes the violation of human rights or that denying funding is akin to denying them an abortion in Britain.¹⁸¹ While the reasoning here mirrors the ECtHR in *A, B and C*, the ECtHR's judgments are 'designed to provide a floor and not a ceiling of protection'.¹⁸² It is well within the purview of individual states to aim for a higher standard. Thus, while Ireland's argument that women were free to obtain abortions abroad was accepted by the ECtHR as striking a fair balance, such reasoning does not translate well to the Supreme Court given the UK Government's endorsement of abortion generally. It is disappointing that the testimony of individual women who demonstrated why being unable to access abortion provision in their home nation is so traumatising was not actually processed by the courts nor adjudicated as the primary issue.

179 Sheelagh McGuinness, 'A, B and C leads to D (for delegation)' (2011) 19 (Summer) *Medical Law Review* 476; Katherine Side, 'A B and C versus Ireland' (2011) 13(3) *International Feminist Journal of Politics* 390; Joanna N Erdman, 'Procedural abortion rights: Ireland and the European Court of Human Rights' (2014) 22(44) (November) *Reproductive Health Matters* 22; Brynn Weinstein, 'Reproductive choice in the hands of the state: the right to abortion under the European Convention on Human Rights in light of A, B & C v Ireland' (2012) 27 *American University International Law Review* 391.

180 In *Mellet v Ireland* (n 31 above) the HRC stated that the costs incurred from travelling were themselves an arbitrary interference with the author's right to privacy: para 7.8.

181 Commentators have long criticised the Irish abortion regime for similarly exporting vulnerable women to other jurisdictions, yet this is not the solution because there are categories of women who cannot travel. See Ruth Fletcher, 'Contesting the cruel treatment of abortion seeking women' (2014) 22 *Reproductive Health Matters* 10, 21.

182 Palmer (n 72 above) 6.

THE DE-PRIORITISATION OF WOMEN'S RIGHTS AND THE FAILED UTILITY OF HUMAN RIGHTS

In both *NIHRC* and *A and B*, the court demonstrated sympathy with women's experiences, but this did not translate to a remedy. The decisions demonstrate the inability of the UK courts to situate the actual hardship and trauma facing Northern Irish women as human rights violations. Instead, these decisions can be read as a continuation of the conceptualisation of abortion as a 'privilege' in both Britain and NI whereby, so long as Northern Irish women are not explicitly prohibited from accessing an abortion in Britain, there was less impetus on the courts to make a finding of discrimination or a violation of human rights. This conceptualisation allowed the regime to continue to perpetrate hardship, suffering and discrimination of women in NI because narrativising abortion as a 'privilege' rather than a right reifies the discourse of NI exceptionalism and the devolution settlement as impenetrable. The result is that the *status quo* was maintained through allowing fundamental rights claims to be transformed into claims for 'elective' health care,¹⁸³ devaluing such claims to the extent that they could not penetrate the dominant narrative and so fail to gain traction. This explains the Government's reluctance to submit the UK's dualistic abortion regimes to international scrutiny, as such conception is at odds with the trend toward recognition of reproductive rights in international jurisprudence and activism that frames abortion squarely as a rights issue about dignity and bodily autonomy.

The inability of the Supreme Court in both *A and B* and *NIHRC* to position reproductive rights claims solidly within the human rights framework is disappointing, and it is notable that arguments based on violations of article 3 did not gain more discussion as a finding that a state has violated article 3 carries a strong message.¹⁸⁴ While the majority in *NIHRC* agreed *obiter* that there had been a violation of the convention, they were unconvinced that article 3 could be invoked because they held that not every woman in the circumstances before the court would suffer a violation of article 3 on being denied an abortion.¹⁸⁵ As Ní Ghráinne and McMahon argue, this is a perplexing and somewhat controversial statement by the court.¹⁸⁶ Although the judges referred to the extensive evidence of the ongoing mental and physical anguish and trauma suffered by women who had been unable

183 *A and B* (n 2 above) [36].

184 See Ní Ghráinne and McMahon (n 144 above). However, the fact that there remains a stigma where states are found to violate art 3 may contribute to the perception that there is an exceptionally high threshold to clear in order to gain a finding that there has been a violation of art 3 in any circumstance.

185 *NIHRC* (n 1 above) [100].

186 Ní Ghráinne and McMahon (n 144 above).

to obtain abortions in NI, for the majority, article 3 was not engaged as the severity of treatment threshold was not reached.¹⁸⁷ Yet, there was no sustained discussion or explanation as to why they considered this to be the case. Instead, the court was at pains to distinguish *NIHRC* from the HRC's decisions in *Mellet v Ireland* and *Whelan v Ireland* on the basis that the ECHR necessitated a minimum level of severity of treatment to engage article 3 while article 7 of the ICCPR did not.

This restricted discussion and dismissal of authority is disappointing and appears a missed opportunity for the court to acknowledge that the article 3 jurisprudence has 'broadened in recent years'¹⁸⁸ and for it to refer to 'the ECtHR's well-established position that psychological distress and denial of medical treatment can lead to a violation of article 3'.¹⁸⁹ Thus, despite the tenuous celebrations of the court's *obiter* findings that the NI regime infringed article 8 in respect of sexual crimes and FFA, the court's cursory reasoning is unhelpful. The judges were keen to acknowledge the suffering and indignity experienced by those women who gave evidence, but, with very little discussion, this was clearly held to not amount to either torture or inhuman or degrading treatment. Lord Mance distinguished the case from *P&S v Poland* and concluded that the case could only be decided on the assessment of the actual circumstances of the conduct relied on and not a risk that a state *may* breach article 3.¹⁹⁰ Yet, in their minority judgment, Lords Kerr and Wilson were clear that the minimum level of severity did not mean that every woman who became pregnant as a result of rape, incest, or with FFA needed to suffer the same in order to engage article 3.¹⁹¹ It appears a tautology to suggest that, despite evidence that the regime perpetrated inhuman and degrading treatment, the court should not find it to be a violation of article 3 because some women may not find such treatment degrading.

Several judges referred to the women's suffering in their findings that there had been a violation of article 8. Lord Mance referred to the substantial 'trauma',¹⁹² 'anguish'¹⁹³ and 'stress'¹⁹⁴ suffered by the women in determining an article 8 violation. The majority acknowledged and appeared to consider the psychological impacts of denying abortions to women who had been raped, were victims of incest, or where there was a diagnosis of FFA or SMF, but it still did not

187 *NIHRC* (n 1 above) [103].

188 Ní Ghráinne and McMahon (n 144 above).

189 *Ibid.*

190 *NIHRC* (n 1 above) [100]–[103].

191 *Ibid* [230]–[262].

192 *Ibid* [126].

193 *Ibid* [127].

194 *Ibid* [126].

think this enough to engage article 3.¹⁹⁵ Lady Hale noted that there is a difference in the standard required to determine a violation of article 3 compared with article 8,¹⁹⁶ but that itself does not explain why the judgments engage in such a cursory analysis of article 3 when they were clearly willing to endorse that the women had in fact suffered. Such conceptualisation appears to misread progressive interpretations of article 3 which acknowledge that the pain and suffering experienced by women who were denied an abortion having experienced rape or being diagnosed with FFA would meet the severity of treatment threshold and could be considered a violation of article 3.¹⁹⁷

Ultimately, it is disappointing that, in both *A and B* and *NIHRC*, the court appeared to be influenced by the idea that, so long as women were not prevented from accessing abortion elsewhere, there was a less pressing need to find a violation of their human rights. While the court correctly identified that in *A, B and C v Ireland* the ECtHR had accorded a margin of appreciation on abortion to individual states, this was done so on the basis that there was no European consensus on the issue.¹⁹⁸ While Ireland was found to have violated the applicants' article 8 rights in failing to provide access to abortion, this could be balanced against the Irish Government's aim of protecting foetal life¹⁹⁹ alongside the fact that women could travel to obtain an abortion.²⁰⁰ As Fenwick notes, 'the stress and hardship suffered by the women was seen as a necessary concomitant of that choice'.²⁰¹ Yet, such reasoning trivialises the mental and physical suffering of individual women, the invasion of their private lives and the hardship that having to travel to England for a private abortion caused. In *NIHRC*, the majority held that there was no breach of article 3 because women could still avail themselves of an abortion in Britain. However, Lady Hale argued (in respect of article 8) that 'relying on the possibility that [she] may be able to summon up the resources, mental and financial, to travel to Great Britain for an abortion if anything makes matters worse rather than better'.²⁰² In *A and B*, the majority appeared to occlude the fact that it was *because* there was no access to abortion in NI that women were forced to access the provision in England, and thus the

195 Ibid [91], [100].

196 Sifris concludes that in most circumstances the denial of abortion would surpass the minimum threshold to engage art 3. Sifris (n 150 above) 260, See also Moore (n 150 above).

197 Sifris (n 150 above); Ní Ghráinne and McMahan (n 144 above).

198 *A, B and C v Ireland* (n 7 above) [22].

199 Ibid [237].

200 Ibid [241].

201 *Fenwick* (n 149 above) 221.

202 *NIHRC* (n 1 above) [27].

suffering was very much a consequence of the restrictive regime in NI. The judges acknowledged that the physical reality of having to travel away from friends and family to receive an abortion, as well as the additional burden of having to privately fund this, represented a strain.²⁰³ Yet, the underpinning issue, the lack of abortion in NI, which precipitated this need, was not linked to the end results, which was denial of access to NHS-funded abortion services and the fact this caused real suffering. As Gerards notes, the finding that there was a margin of appreciation on the issue of abortion does not mean that domestic courts, especially in jurisdictions that *do* allow for abortion, cannot find that overly restrictive abortion regimes or the treatment they perpetrate violate convention rights.²⁰⁴ This appears a missed opportunity as the UK Government (unlike Ireland) could not claim any great ideological basis for restricting access to abortion, so the margin of appreciation offers little guidance when adjudicating the NI regime considering the UK's overall position, and therefore the court could have been much more progressive. In *NIHRC*, it appears to be a case of selective reasoning, where the court was at pains to sympathise with the hardship and suffering facing women in its determining a breach of article 8 and highlighting the stress and humiliation that being unable to access abortion in NI caused, yet it is unclear why none of this reality impressed a need for the majority to consider it in relation to article 3.²⁰⁵

As Zureick notes, this reflects the fact that incidences of torture or cruel or inhuman treatment tend to be conceptualised as 'largely constructed on the basis of a male paradigm ... ignoring the contexts in which women experience comparable pain or suffering'.²⁰⁶ This is an example of law's tendency to reflect male experiences and suffering and privilege a particular legal subject.²⁰⁷ Yet, as Edwards demonstrates, by engaging in a subjective reading of individual circumstances, international courts and tribunals have managed to read international

203 *A and B* (n 2 above) [7].

204 J H Gerards, 'The European Court of Human Rights and the national courts: giving shape to the notion of "shared responsibility"' in J H Gerards and J W A Fluren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law: A Comparative Analysis* (Intersentia 2014) 31.

205 Ní Ghráinne and McMahon (n 144 above) 490.

206 Alyson Zureick, '(En)gendering suffering: denial of abortion as a form of cruel, inhuman, or degrading treatment' (2015) 38 *Fordham International Law Journal* 99.

207 Hilary Charlesworth, Christine Chinkin and Shelly Wright, 'Feminist approaches to international law' (1991) 95 *American Journal of International Law* 613; Hilary Charlesworth and Christine Chinkin, 'The gender of jus cogens' (1993) 15 *Human Rights Quarterly* 63.

prohibitions of torture and inhumane and degrading treatment as applying to a variety of situations that predominately affected women.²⁰⁸ It is disappointing that the Supreme Court did not frame the women's evidenced suffering within article 3.²⁰⁹

Thus, a trend of minimisation of women's lived reality can be seen clearly in these judgments. Despite much heralding of the potentiality of human rights litigation to force legal reform, this article argues that, while there has been demonstrable effort by the courts to empathise and sympathise with the victims, there was a failure to situate the women's pain, trauma, stress and humiliation within core human rights discourse, particularly around article 3 and its inability to afford any remedy. While this follows a trend highlighted by feminist scholars that article 3 jurisprudence has been slow to recognise women's trauma as reaching the minimum level of severity and so be accordingly labelled as torture, inhumane or degrading treatment, it is disappointing that the women's objective reality was not given more consideration by the Supreme Court in either *NIHRC* or *A and B*. Despite the court being much more willing in both cases to acknowledge a potential infringement of the women's article 8 rights, the *obiter* nature of the finding in *NIHRC* and the determination that this could be balanced against the Government's aims of restricting healthcare funding in *A and B* meant that, despite the sympathy and sensitivity accorded to the women, their claims were not endorsed by the courts and as such in neither case were the claimants afforded an effective judicial remedy.

Ignoring international human rights law?

In addition to utilising ECHR jurisprudence, the appellants in *NIHRC* and *A and B* pointed to progressive international human rights law to evidence general acceptance by UN human rights bodies that denial of abortion in situations of sexual crime and FFA is a human rights violation.²¹⁰ It is disappointing that the courts did not engage more with the international treaty provisions or jurisprudence of the

208 Edwards notes how cases of rape, sexual violence, forced sterilisation, genital mutilation and unsafe abortion could fall within the ambit of torture, inhuman, cruel or degrading treatment. Alice Edwards, 'The feminizing of torture under international human rights law' (2006) 19 *Leiden Journal of International Law* 349.

209 It is acknowledged that, despite some movement, the ECtHR maintains its high threshold for determining violations of art 3 generally, and so the inability to harness art 3 is not limited to lack of abortion provision. See, for example, Lourdes Peroni, 'The protection of women asylum seekers under the European Convention on Human Rights: unearthing the gendered roots of harm' (2018) 18(2) *Human Rights Law Review* 347.

210 Christina Zampas and Jaime M Gher, 'Abortion as a human right – international and regional standards' (2008) 8 *Human Rights Law Review* 249, 284.

UN committees that consistently calls on states to provide access to abortion in the aforementioned situations and evidences a clear shift in situating abortion denial in the such circumstances as a human rights violation, particularly as several international treaty bodies have gone further and called on states to decriminalise and ensure access to safe abortion.²¹¹

States have been encouraged to adopt clear guidelines stating the circumstances in which abortion is legal²¹² and to provide financial support for women who might otherwise struggle to afford the service.²¹³ Where women have procured illegal abortions, they are not to be refused medical care, nor is the medical care to be conditioned upon prosecution.²¹⁴ The Committee Against Torture held that doing so may constitute cruel, inhuman and degrading treatment.²¹⁵ The HRC has also found denial of abortion access to be cruel, inhuman and degrading treatment.²¹⁶ Regional human rights organisations have continued the trend toward encouraging decriminalisation of abortion. Furthermore, the Parliamentary Assembly of the Council of Europe adopted a report calling on member states to decriminalise abortion and guarantee access to safe and legal abortion for women.²¹⁷

As Fine et al conclude, ‘an important shift is underway as human rights norms progress beyond the recognition of procedural guarantees in connection with abortion to the establishment of access to abortion

211 UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No 24: Article 12 of the Convention (Women and Health)* 1999, A/54/38/Rev1; UN Human Rights Committee (HRC), *CCPR General Comment No 28: Article 3 (The Equality of Rights between Men and Women)* 29 March 2000, CCPR/C/21/Rev.1/Add.10.

212 CESCR, Concluding Observations on Peru, UN Doc E/C.12/PER/CO/2-4 (2012) para 21; CESCR (n 32 above) para 17; CEDAW Committee, Concluding Observations on Costa Rica, UN Doc CEDAW/C/CRI/CO/5-6 (2011) paras 32–33(c); CEDAW Committee, Concluding Observations on Kuwait, UN Doc CEDAW/C/KWT/CO3-4 (2011) para 43(b).

213 CEDAW Committee, Concluding Observations on Austria, UN Doc CEDAW/C/AUT/CO/7-8 (2013) paras 38–39.

214 CESCR (n 32 above) para 28. CEDAW Committee, Concluding Observations on Chile, UN Doc CEDAW/C/CHI/CO/4 (2006) para 20.

215 Committee Against Torture, Concluding Observations on Chile, UN Doc CAT/C/CR/32/5 (2004) para 7(m).

216 *Mellet v Ireland* (n 31 above) para 7.6 (2016) and *Whelan v Ireland* (n 147 above) para 7.6. See also, Human Rights Committee, General Comment No 20, para 3, General Comment No 31, para 6, General Comment No 34, para 21; CAT, General Comment No 2, para 6.

217 Council of Europe Parliamentary Assembly, Resolution 1607 on access to safe and legal abortion in Europe, 15th Sitting, 16 April 2008.

services as a substantive human rights obligation'.²¹⁸ They argue that, slowly, states are removing prohibitions against abortion, and those states that maintain *de facto* denial of abortion services have received negative attention from the UN human rights treaty bodies and the international media.²¹⁹

In *NIHRC*, while Lady Hale and Lord Kerr made reference to interpreting the ECHR in light of international treaties²²⁰ in accordance with the well-established rule of international law on treaty interpretation,²²¹ Ní Ghráinne and McMahon note that very little reference was made to international law in the case.²²² Lord Kerr stated that he would not engage with the HRC's views because 'the status of those decisions and their relevance in domestic proceedings ... are far from straightforward subjects'.²²³ Lord Mance declared that the HRC's views were 'not authorities as to the position under the ECHR'.²²⁴ Ní Ghráinne and McMahon argue that the court erred and that 'the views of the HRC are persuasive (albeit non-binding) because the HRC has been mandated to provide "authoritative" and "determinative" interpretations of the ICCPR'.²²⁵ The Supreme Court should have taken the HRC's views into account, given that it is such an authority and it had previously given an authoritative decision on abortion in situations of FFA.²²⁶

CONCLUSION

This article has argued that the reason the courts have been so reluctant to situate denial of abortion access as a human rights violation and offer clear remedies is that there is a pervasive aura of paternalism inherent in the UK's abortion regime. For so long, this has underpinned the unequal dualistic regime and allowed the discrimination and suffering of Northern Irish women to be ignored or balanced against the fact that they can ultimately seek an abortion in Britain, thereby

218 Johanna B Fine, Katherine Mayall, and Lilian Sepúlveda, 'The role of international human rights norms in the liberalisation of abortion laws globally' (2017) 19 *Health and Human Rights Journal* 69, 76.

219 *Ibid*; Zampas and Gher (n 210 above) 294.

220 *NIHRC* (n 1 above) [328].

221 Art 31(3)(c), Vienna Convention on the Law of Treaties 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980).

222 Ní Ghráinne and McMahon (n 144 above).

223 *NIHRC* (n 1 above) [330].

224 *Ibid* [102].

225 Ní Ghráinne and McMahon (n 144 above), 492.

226 See *Mellet v Ireland* (n 31 above) and *Whelan v Ireland* (n 147) and Ní Ghráinne and McMahon (n 144 above) 493.

maintaining a compromise. While it is unfortunate that this narrative has been endorsed by the UK Government, it is deeply problematic to see it endorsed by the courts. Much like the earlier abortion challenges, which are resplendent with moralistic overtures, the Supreme Court appears to have started from the position that abortions ought not to be achieved lightly and that women should experience some hardship,²²⁷ which is narrativised as inconvenience in having to travel and fund abortions in Britain, rather than as suffering or inhuman or degrading treatment.²²⁸

Yet, such a negative framing of a rights issue belies an inherent misconception of what reproductive freedom actually entails and allows the UK to frame the situation in NI as acceptable in contrast to cases in Poland (where the ECtHR ruled that the state had violated human rights by effectively preventing women from obtaining abortions) because the NI regime was not *explicitly* designed to force women to remain pregnant and give birth.²²⁹ This demonstrates the power of the prevailing narrative framing of abortion in the UK, which is that it is a privilege rather than a right. This framing has allowed the Government to endorse its own image of the UK as a champion of women's rights by 'permitting' Northern Irish women to access abortion in Britain while concurrently upholding the regressive prohibition in NI, reifying moralistic discourse rooted in NI exceptionalism.²³⁰ The problem is that this framing meant that women's needs and experiences were silenced because the moralistic and paternalistic narratives make it challenging to present abortion as a matter of access to healthcare, far less bodily autonomy. Despite harnessing the human rights framework, it is difficult for human rights activists to dislodge this dominant framing as the 'option' of undergoing an abortion outwith NI is continually presented as evidence that the regime did not violate human rights. Thus, while the international human rights regime has moved toward increasing recognition of reproductive rights and provided a useful nomenclature for activists, it has only had incremental success in the UK and particularly limited traction in swaying the courts.

227 In *A, B and C v Ireland*, the ECtHR was accused of endorsing an Irish model premised on the basis that women were free to travel to obtain abortions and part and parcel of that was that the hardship should be necessary: *A, B and C v Ireland* (n 7 above) [240]–[241]. See Fenwick (n 149 above) 221.

228 In *A and B*, the majority referred to the real dangers of 'health tourism': *A and B* (n 2 above) [36]. It also acknowledged 'respect for the ethical "pro-life" convictions which inform the law'. While it also mentioned the counter position, it is odd that the court felt the need to display such deference to the 'ethical' position that was described as being at the root of the restrictive NI regime: *ibid* [6].

229 *RR v Poland; P & S v Poland; Tysiac v Poland* (n 7 above).

230 Thomson (n 20 above) 380.

While the judgment in *NIHRC* put the UK Government on notice that the regime was unsustainable, the fact that further litigation by victims was necessitated demonstrates that the bar set for women's rights claims to gain traction is exceptionally high. It suggests that, while violations of women's rights attract judicial sympathy, the continual framing of them as subordinate to traditional liberal conceptions of rights means that they can be denied if there are any counter-narratives at work. Ultimately, while the decriminalisation of abortion in NI is a moment of celebration for activists, it is problematic that the Supreme Court was so unwilling to condemn the regime on the basis that it was a clear violation of women's rights. Similarly, while the Government reversed its position of not funding NHS abortions for Northern Irish women, leading Cragg to suggest that the appellants in that case had 'lost the battle but won the war',²³¹ such funding remains at the discretion of the state and not because the Government has accepted that it has a duty to do so. As Cragg has cautioned, this means that such funding could potentially become (further) politicised and withdrawn.²³² Moreover, the fact that the Supreme Court did not mandate this provision as a human rights requirement is disappointing. While it was hoped that the progression of *A v B* to Strasbourg may have offered helpful clarification and the position of international authorities might have played a greater role,²³³ it is once again problematic that individuals are forced to resort to such lengths to enforce their rights. Thus, while the last five years have seen significant movement in the NI abortion regime, with various victories resulting from these hard-fought grassroots campaigns, the fact that human rights litigation has not proven particularly helpful in bringing about these changes suggests a continuing problem in enforcing women's rights as human rights through the courts.

231 Stephen Cragg, 'Abortion, Northern Ireland and the NHS in England: can respect for devolved governments be a justification for discrimination?' (2017) 4(2) *Journal of International and Comparative Law* 377, 387.

232 *Ibid.*

233 *Ibid.* See *A and B v UK* (n 151 above).



Restrictive covenants, use of land and the restraint of trade doctrine

David Capper

Queen's University Belfast
Correspondence email: d.capper@qub.ac.uk

ABSTRACT

The common law doctrine of restraint of trade has a well-established presence in relation to contracts of employment and contracts for the sale of a business. Beyond those specific areas it reared its head from time to time, but the legal test for its applicability was not a model of clarity. Where the covenantor ceded a pre-existing freedom to engage in commercial activity, the decision of the House of Lords in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 brought it within the doctrine, but the recent decision of the Supreme Court in *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36, on appeal from the Northern Ireland Court of Appeal [2018] NICA 7, has discarded that test in favour of one based on the structure of a trading society. *Peninsula Securities* was a case concerned with the applicability of the restraint of trade doctrine to covenants affecting the ability of a landowner and its successors in title to use the land in a way that potentially competed with the business of an adjoining occupier. The decision that the restraint of trade doctrine was not engaged in these circumstances was set against the power of the Lands Tribunal to modify or extinguish covenants affecting land under article 5 of the Property (NI) Order 1978.

Keywords: restraint of trade; pre-existing freedom; structure of trading society; use of land.

INTRODUCTION

*Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd*¹ was a case first heard in the High Court in Northern Ireland and eventually decided by the Supreme Court of the United Kingdom in August 2020. In its decision, the Supreme Court invoked the 1966 Practice Direction of the House of Lords² to overrule the 1967 decision of the House of Lords in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*³ on a point of law concerned with the common law doctrine of restraint of trade. With the exception of the *Ashers Bakery* case,⁴ there has been

1 [2020] UKSC 36, [2020] 3 WLR 521.

2 [1966] 1 WLR 1234.

3 [1968] AC 269.

4 [2018] UKSC 49, [2020] AC 413.

no other purely private law case from Northern Ireland determined by the Supreme Court since its opening in late 2009, and *Ashers* might not fit everyone's definition of a private law case in any event. Comment on this decision in this journal is clearly called for.

FACTS

In 1979, Patrick Shortall, a developer, purchased 5.5 acres of land in Springtown, Londonderry, with a view to developing it as a retail shopping unit. In February 1981, Mr Shortall leased 1.05 acres of this land to Dunnes Stores as the anchor tenant of this development. The shopping centre when built contained a Dunnes supermarket and a number of smaller retail units along a mall leading to the entrance of the Dunnes store. Dunnes paid for the construction of the supermarket and contributed to the cost of the car park. The lease contained a covenant on the part of Mr Shortall that no development on his remaining land would contain a unit in size measuring 3,000 sq ft or more for the purpose of trading in textiles, provisions or groceries. Dunnes paid a premium of £50,000 and a nominal yearly rent of £100 for the lease. Dunnes insisted on the covenant being included in the lease because it wanted to insulate itself against competition from other retailers. The evidence was clear that without this covenant Dunnes would not have agreed to open any retail unit on this site. Without its participation the shopping centre in this part of Northern Ireland, described by Mr Shortall as an economic and political wasteland at that time, would not have been viable.

In 1983, Mr Shortall transferred his interest in the lands subject to the restrictive covenant and the land leased to Dunnes to Peninsula Securities Ltd, a property holding company in which he owns 99 of the 100 shares, the other being owned by his wife. This company was the plaintiff in the case that proceeded to the Supreme Court, with Dunnes Stores being the defendant.

In 2002 the plaintiff obtained planning permission to build a new shopping centre on the land subject to the restrictive covenant. That shopping centre was completed in 2006 and included one or more units exceeding 3,000 sq ft which the plaintiff wished to lease for the purpose of trading in textiles, provisions or groceries. There proved to be considerable difficulty attracting tenants to this development, according to Mr Shortall because of the restrictive covenant. At the time of the proceedings in this case it was largely vacant.

CASE HISTORY – NORTHERN IRELAND COURTS

The plaintiff made a reference to the Lands Tribunal under article 4 of the Property (NI) Order 1978 seeking a declaration that the covenant represented an impediment to the enjoyment of its land and an order pursuant to article 5 of the 1978 Order that the covenant be modified or extinguished.⁵ The plaintiff also challenged the covenant as being in unreasonable restraint of trade at common law but, accepting that the Lands Tribunal had no jurisdiction to adjudicate that claim, instituted proceedings in the High Court for a declaration that the covenant was unenforceable on that ground. A further claim that the covenant was void under section 2 of the Competition Act 1998 was initially added but subsequently withdrawn on receipt of the defendants' evidence on that issue. The High Court proceedings continued as a challenge to the covenant as being in unreasonable restraint of trade at common law, with the Property Order proceedings kept in reserve should this challenge fail.

At each stage of the proceedings in the courts the outcome turned on the effect given to the decision of the House of Lords in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*.⁶ That case concerned a petrol filling station solus agreement where the owner or tenant of a filling station essentially covenanted only to purchase petrol from one specific supplier of petroleum products, the other party to the solus agreement. The House of Lords held that because the purchaser of petroleum products gave up a pre-existing freedom to purchase petroleum products from other suppliers the covenant was subject to the restraint of trade doctrine. The covenant's enforceability depended on whether it was reasonable between the parties and not contrary to the public interest. There were two covenants in that case, one lasting for five years and the other for 21 years. The first of these was held to be reasonable as between the parties and not contrary to the public interest, but the second was declared unenforceable as in unreasonable restraint of trade. Lord Wilberforce, although concurring in the result of the case, took a different approach to the question of whether the restraint of trade doctrine was engaged. He held that this did not depend on whether the party restrained gave up a pre-existing freedom but on whether the covenant was of a kind that had gained sufficient acceptance to become part of the structure of a trading society.⁷ Lord

5 A similar procedure, involving now a reference to the Upper Tribunal, exists in England and Wales under s 84 of the Law of Property Act 1925.

6 [1968] AC 269.

7 He held that it had not become part of the structure of a trading society because solus agreements had not been in use long enough, even though evidence revealed that about 35,000 of the 36,000 filling stations in Britain were subject to solus agreements.

Wilberforce's approach was the preferred approach of the Supreme Court as will be discussed below.

At the outset of her consideration of the issues in this case, McBride J held that the *Esso* case was of general application to all instances where a party to a contract alleged to be in restraint of trade gave up a pre-existing freedom.⁸ She rejected a submission from counsel for Dunnes Stores that it was confined to solus agreements, and it is submitted that the judge's ruling on this point was good law.⁹ McBride J distilled three principles relating to the extent and application of the restraint of trade doctrine to covenants affecting the use of land.

First, it applies to all persons who give up a pre-existing freedom when they enter into a restrictive covenant.

Second, the doctrine does not apply to lessees or purchasers of land who accept a restrictive covenant governing what use they may make of the land. These persons give up no pre-existing freedom. On the contrary they acquire ownership or possession of land subject to whatever terms are agreed between the parties.

Finally, the doctrine does not extend to successors in title either to the original covenantor or covenantee as they give up no pre-existing freedom of land use.¹⁰

At first instance, the decision turned on the third principle above. Mr Shortall had transferred his interest in the lands subject to the restrictive covenant to the plaintiff company more than two years after demising land to Dunnes Stores. The plaintiff company was thus a successor in title to Mr Shortall, and in accordance with the third principle above the restraint of trade doctrine offered no escape from the obligation not to allow a retail outlet rival to Dunnes Stores to open on the adjoining land. The case was different from *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*¹¹ where the solus and lease and lease-back agreements were all part of the one transaction. It had not been suggested that the case was appropriate for 'piercing the corporate veil'.¹² In the judge's view to allow a successor in title to challenge a restrictive covenant as an unreasonable restraint of trade from the time of the original conveyance of land would cause havoc in the conveyancing world.¹³ The covenant could be challenged but only under the Property (NI) Order 1978.¹⁴

8 [2017] NIQB 59, [50].

9 Ibid. The Court of Appeal also rejected this argument at [2018] NICA 7 at [42].

10 Ibid [52].

11 [1985] 1 WLR 173 (CA).

12 On this see the recent Supreme Court decisions in *Vedanta Resources plc v Lungowe* [2019] UKSC 20 and *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3.

13 [2017] NIQB 59 [67]–[68].

14 Ibid.

The Court of Appeal allowed an appeal from McBride J's judgment, holding that the interests of the public protected by the restraint of trade doctrine did not change after the transfer of Mr Shortall's interest in the lands in question to the plaintiff.¹⁵ The restraint of trade doctrine was engaged, and the case was remitted to the High Court to consider the reasonableness of the restraint as between the parties to the covenant and in the wider public interest.

THE SUPREME COURT

The Supreme Court allowed an appeal from the Court of Appeal but on grounds very different from those of McBride J. The Supreme Court rejected the *Esso Petroleum Co Ltd v Harpers Garage* test of giving up a pre-existing freedom and accepted Lord Wilberforce's structure of a trading society test. Applying this approach the covenant here satisfied the trading society test and the restraint of trade doctrine was not engaged. It was therefore unnecessary to express a view on the question of whether the doctrine applied to successors in title of the covenantor. The continued applicability of the covenant would depend upon the decision of the Lands Tribunal.

Lord Wilson (with whom Lord Lloyd-Jones, Lady Arden and Lord Kitchin agreed) gave the principal judgment of the Supreme Court. The pre-existing freedom test was found to be most unsatisfactory. It did not explain how petrol filling station solus agreements fell within restraint of trade restrictions but tied public houses did not.¹⁶ In terms of public policy, it did not explain what was objectionable about restraints involving pre-existing freedoms when other restraints did not engage the doctrine.¹⁷ The test had been discarded in Canada and Australia.¹⁸ The trading society test was much better, and applying it produced the conclusion that this covenant was sufficiently integrated into the structure of a trading society that it survived restraint of trade challenge.¹⁹ Lord Wilson was aware that this covenant could potentially affect this land for a very long time but was fortified in his conclusion that the common law did not apply by the existence of the Property Order procedure.²⁰

Lord Carnwath drew attention to the capricious results produced by the pre-existing freedom test applying to the grantor of an interest

15 [2018] NICA 7 [45] (Stephens LJ).

16 [2020] UKSC 36 [29].

17 Ibid [44].

18 Ibid [49]–[50].

19 Ibid [51].

20 Ibid [54]–[57].

in land but not the grantee.²¹ He pointed out how restraint of trade conflicted with freedom of contract and the need for clear articulation of the public policy reasons for not giving effect to a freely entered into bargain.²² This particular transaction was not in essence an agreement between traders, more a transaction in land, and would only affect trade to the extent that it interfered with the right of future occupiers to trade in textiles, provisions or groceries.²³ The ability of Dunnes Stores to offer contract terms to Mr Shortall that included restrictions on competition certainly facilitated trade in that without those terms Dunnes would have walked away from any participation in the development.²⁴ Lord Carnwath was clearly also of the view that the Property Order procedure was a better way of regulating the use of this covenant because it could better consider how circumstances change over time.

COMMENT²⁵

The common law restraint of trade doctrine requires the court to address the following questions.

First, is the restraint upon the freedom of a contracting party to engage in trade one which itself engages the restraint of trade doctrine? Every contract restricts trade to a degree because, if A contracts to sell certain property to B, A is restrained from selling the same property to C or D. If X is working for Y, then X is likely to be restrained from simultaneously working for Z. If the doctrine is not engaged, ie this is not a restraint that comes within the doctrine at all, questions 2 and 3 do not arise.

Second, if the doctrine is engaged, then the party seeking to restrain the other party's freedom to trade must have a legitimate interest that it is trying to protect otherwise the restrictive covenant will be unenforceable.

Third, the restraint imposed pursuant to that legitimate interest must be no more than is reasonably necessary for the protection of that interest.

21 Ibid [59]. This drew heavily upon Robert Megarry QC's submissions to the House of Lords in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 289–290.

22 Ibid [61].

23 Ibid [63].

24 Ibid [65].

25 The outline of the basic framework of the common law doctrine of restraint of trade below draws heavily upon and acknowledges the immense assistance derived from Professor Stephen Smith's essay on the subject. See Stephen A Smith, 'Reconstructing restraint of trade' (1995) 15 *Oxford Journal of Legal Studies* 565.

The doctrine is not about the fairness of the bargain between the parties. The offer of a sum of money the size of a lottery jackpot in consideration of the covenantor never working in competition with the covenantee may well be substantively fair between the parties because it relieves the party restrained from the need ever to work again. But it would be in restraint of trade because it deprives the community at large of the benefit of the restrained party's talents and skills. What the covenantee provides by way of consideration for the covenantor's restraint may inform the court's answer to questions 2 and 3 above. Smith provides the example of the petrol filling station solus agreement where the filling station proprietor agrees not to sell any other supplier's petrol during the currency of the agreement. Smith points out that in return for the restrictive covenant the petroleum supplier will likely be providing loans to the proprietor, guaranteed petrol, reduced prices, help in setting up the station and other things.²⁶ What the covenantee provides describes the investment it is making and trying to protect. This goes towards identifying the legitimate interest and the reasonableness of the measures adopted to protect it. Indeed, it has been observed that the questions whether the restraint of trade doctrine is engaged and the legitimacy of any restraint imposed involve considerable overlap.²⁷

As Lord Carnwath pointed out in *Peninsula*,²⁸ restraint of trade is an interference with the parties' freedom of contract. It requires justification in any particular case. By far the most common case type where the doctrine is invoked is the contract of employment (or a contract similar to employment) which contains a covenant restricting a departing employee's right to work for a competitor for a period of time and over a geographical area. It is established law that protecting the employer from competition by its former employee is not a legitimate interest capable of justifying restraint.²⁹ A case type often contrasted with employment restraints is the sale of a business. The purchaser will probably require as a condition of the sale that the seller undertakes not to continue to trade with the business's existing customers because of the likelihood that this would make the purchaser's business a failure from the outset. This restraint on competition is legitimate because it facilitates the sale as few purchasers would agree to the sale without it.³⁰ Lord Macnaghten explained this approach in terms of 'The homely

26 Ibid 589.

27 *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444, [2012] FSR 16 [59] (Arden LJ) and [156] (Gross LJ).

28 [2020] UKSC 36 [61].

29 *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 (HL); *Herbert Morris Ltd v Saxelby* [1916] AC 688 (HL).

30 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 (HL).

proverb current in [this] part of the country which says you may not “sell the cow and sup the milk”.³¹ It is not entirely clear whether this means restraint of trade is not engaged or that the restraint is very likely to be reasonable.³²

Covenants to which the restraint of trade doctrine applies are not confined to the above two case categories. Those that do not fall into those categories would engage the doctrine if they fell foul of the structure of a trading society test. Examples of this kind of potentially unenforceable covenant include *McEllistrim v Ballymacelligott Co-Operative Agricultural and Dairy Society Ltd*,³³ *Dickson v Pharmaceutical Society of Great Britain*,³⁴ *A Schroeder Music Publishing Co Ltd v Macaulay*³⁵ and *Proactive Sports Management Ltd v Rooney*.³⁶ However, it may be wise, as the Court of Appeal has recently cautioned, not to think of trading society as the only test to be applied for engagement of the restraint of trade doctrine.³⁷ A novel agreement would not be one that easily found acceptance within the structure of a trading society, so something more like a broad and flexible rule of reason might be preferable.³⁸ The inevitable lack of precision in this test gives to the courts considerable discretion in regulating market transactions. One could perhaps question the constitutional legitimacy of the courts’ role in this area. But the bottom line is that the statutory test of unlawful competition under section 2 of the Competition Act 1998 grounding both a Competition and Markets Authority investigation and a civil action on the part of a party affected by the agreement is also broad and malleable. The same may also be said of the Sherman Anti-trust Act 1890 in the USA. Legislatures have not been able to construct detailed and specific criteria for regulating these contracts, and courts have been making these heavily policy-based

31 Ibid 572.

32 *Bridge v Deacons* [1984] AC 705 (PC) 713–714 (Lord Fraser).

33 [1919] AC 548 (HL). The case concerned restrictions on a member of an agricultural cooperative society selling his milk to a creamery outside the society. See David Foxton, ‘McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd: in retrospect’ (2019) 62 *Irish Jurist* 150.

34 [1970] AC 403 (HL). In this case an ultimately unsuccessful attempt was made to change the rules of the Pharmaceutical Society to prevent pharmacists from selling non-pharmaceutical goods.

35 [1974] 1 WLR 1308 (HL). This case was about an agency contract between a young musician and a publishing company that did not permit the musician to terminate the contract and try selling his compositions elsewhere.

36 [2011] EWCA Civ 1444, [2012] FSR 16. This case was about an image rights representation agreement that secured quite handsome benefits for both parties but was considered to be too long (eight years).

37 *Quantum Actuarial LLP v Quantum Advisory Ltd* [2021] EWCA Civ 227.

38 Ibid [73]–[75] (Carr LJ).

judgments for a very long time, so the argument from constitutional legitimacy is unlikely to gain much traction. Mary Catherine Lucey has even defended the common law doctrine on the basis that its ability to develop case by case enables it to reach anti-competitive arrangements that the less flexible statutory regime may miss.³⁹

None of the above means that the presence of a statutory regime is immaterial to the courts' decision whether or not to subject a restrictive covenant to scrutiny under the common law restraint of trade doctrine. In *Peninsula* the restrictive covenant undoubtedly 'sealed the deal' between Mr Shortall and Dunnes Stores at the inception of the shopping-centre development in this case. Whether it was past its 'sell by' date 40 years on might be quite a difficult question. But the prospect that it might remain binding on the land adjacent to the land leased to Dunnes Stores for 999 years is pretty mind-boggling.⁴⁰ This took the case beyond the sale of business category to which it shared some similarities. However, the restriction on the use of land for centuries beyond the passing of all the parties involved in this case was the true issue and was much better left to the Lands Tribunal to resolve. The question for it will be not whether the covenant was in restraint of trade in 1980 or 2020, but whether the covenant unreasonably impedes the enjoyment of the land going forward.

39 Mary Catherine Lucey, 'Restraint of trade doctrine: a traditional tool fit for the modern economy?' in Robert Merkin and James Devenney (eds), *Essays in Memory of Professor Jill Poole* (Routledge 2019) 164.

40 Aidan Robertson QC, 'The common law doctrine of restraint of trade – will it rise up again unshackled by Brexit and reformed by the Supreme Court?' (2021) 42(2) *European Competition Law Review* 62.



Villiers v Villiers: the end of the line? Case study of the Supreme Court decision reported at [2020] UKSC 30

Mrs Justice Keegan

Senior Family Judge of the High Court of Northern Ireland

INTRODUCTION

This divorce case has attracted much attention not least due to the fact that it has been before the Supreme Court after numerous interlocutory hearings before the courts of England and Wales. The split decision given by the Supreme Court has engendered much commentary about the potential for divorce tourism, particularly in relation to maintenance. The core characteristic of the case was that one party wished to litigate for maintenance in England and one in Scotland. Although close geographically, each of these intra United Kingdom (UK) jurisdictions applies different legal principles when it comes to maintenance. The English courts have traditionally taken a more liberal approach to maintenance, whereas in Scotland maintenance is usually capped for a period of time. Hence, the suggestion of divorce/maintenance tourism.

This case relates to a part of the Matrimonial Causes Act 1973 which is not widely used, namely section 27. The corollary in Northern Irish legislation is article 29 of the Matrimonial Causes (Northern Ireland) Order 1978. Both provisions are similar and allow for financial provision in cases of neglect by a party to a marriage to maintain the other party or child of the family. Article 29(1) reads:

- 29.—(1) Either party to a marriage may apply to the court for an order under this Article on the ground that the other party to the marriage ('the respondent')—
- (a) has failed to provide reasonable maintenance for the applicant, or
 - (b) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family.

I do not know of any reported cases in Northern Ireland in relation to article 29. Whilst there have been a few applications over the years, they have ultimately settled and not involved protracted litigation. Notwithstanding the limited use of this provision, the Supreme Court case brought into focus issues of jurisdiction of considerable interest in relation to disputes in divorce intra UK and the application of European Union law in this area.

That is because the case was essentially about the interpretation and effect of schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 and the interpretation and effect of Council Regulation EC No 4 2009 (the Maintenance Regulation) on jurisdiction, applicable law, recognition and enforcement of decisions in co-operation in matters relating to maintenance obligations. Of course, with the Withdrawal Act 2020 following Brexit the issue of the applicability of the Maintenance Regulation fades away. So, the initial flurry about this case has passed, and in real terms it is likely to have limited application going forward.

THE BACKGROUND

The case involved parties who were married in 1994 in England but who lived in Scotland between 1995 and 2012. They separated in 2012. The wife returned to England in 2012 and has lived there since. On 13 January 2015 she issued her application under section 27 in England for an order requiring the husband to make maintenance payments. The wife had issued a divorce petition in England in July 2013 which included a prayer for financial orders. The husband issued a writ for divorce in Scotland in October 2014 which included relief in the form of an order to dissolve the marriage but no prayer in relation to financial matters.

As the Supreme Court pointed out, the effect of the relevant statutory provision (schedule 1, paragraph 8, Domicile and Matrimonial Proceedings Act 1973) was that the application for divorce had to be assigned to the court in Scotland, since the parties had last lived there together. The wife accepted this, and on 13 January 2015 she consented to an order dismissing her petition in England, which order was made on 16 January 2015. Therefore, the husband's divorce could proceed in Scotland.

A section 27 application is not tied to the grant of divorce, and it can be sought in separate proceedings. Therefore, the wife, notwithstanding the withdrawal of the divorce petition, issued the application for maintenance on the same day that she withdrew her petition. The issue was whether or not, given the Scottish petition, the application should be either stayed or dismissed.

THE PROGRESS OF COURT PROCEEDINGS

The application was heard before Mrs Justice Parker in the High Court. In her decision, which is reported at [2016] EWHC 668, Parker J rejected the challenge to the jurisdiction of the English court and made an order for interim maintenance. This was an order in favour of the

wife for interim maintenance in the sum of £2500 per month backdated to the date of the issue of the application, namely 15 January 2015, payable monthly in advance, with arrears to be paid within six weeks.

The husband appealed to the Court of Appeal. His appeal was dismissed by the court in a judgment reported as [2018] EWCA Civ 1120. Thereafter, the Supreme Court granted leave to appeal and essentially found in favour, again, of allowing the section 27 application to be heard in England and Wales.

THE OPINIONS IN THE SUPREME COURT

The Supreme Court was split in this case, with the majority opinion given by Lord Sales with whom Lord Kerr agreed and Lady Black, who gave a separate concurring judgment. In the minority were Lord Wilson with whom Lady Hale agreed.

The majority held that, first, schedule 6 of the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 imported in modified form the jurisdiction and other legal rules in the Maintenance Regulation to intra UK jurisdictional disputes.

Second, there was no scope for the operation of a *forum non conveniens* discretion in the context of the legislative scheme of schedule 6; it was not preserved by section 49 of the Civil Jurisdiction and Judgments Act 1982. Therefore, the English courts had no discretion to stay the section 27 application on the ground of *forum non conveniens*.

And, finally, the wife's application could not be stayed under article 13 of the Maintenance Regulation (as imported by schedule 6) as a related action. The fundamental object of the mandatory rule of jurisdiction in article 3 of the Maintenance Regulation was to afford special protection for a maintenance creditor by giving her the right to choose the jurisdiction in which to bring a claim for maintenance. Interpreting article 13 of the Maintenance Regulation in the light of that object, related actions in article 13 referred primarily to maintenance claims of the kind to which the Maintenance Regulation applied, and any extension of the concept of related actions beyond this was confined to cases where there was a risk of irreconcilable judgments. In the present case there was no relevant connection between the wife's English maintenance claim under section 27 of the Matrimonial Causes Act 1973 and the husband's Scottish proceedings concerning marital status, and thus no risk of irreconcilable judgments. Therefore, the two sets of proceedings were not related actions for the purposes of article 13 of the Maintenance Regulation, as applied by schedule 6 and,

accordingly, the court had no jurisdiction to stay the wife's application for maintenance.

The concurring judgment of Lady Black agrees with the majority. However, Lady Black clearly had some struggles with the outworking of the majority decision given that she describes the related action point as 'extremely difficult'. Interestingly, Lady Black says this:

The natural response of a family lawyer might be to say that *obviously* one court should resolve all the financial issues that arise upon the ending of a marriage. Indeed, an initial response might be to go further and say that one court should resolve all the issues, of whatever sort, arising upon the ending of a marriage. Further thought would remind the family lawyer that that sort of consolidation is by no means universal, however. Two examples will demonstrate the point. First, jurisdiction in relation to parental responsibility issues is often dictated by the habitual residence of the child (see domestic law and the Brussels II Revised Regulation (Council Regulation (EC) No 2201/2003)). Secondly, financial relief can be available in the courts of England and Wales, following the granting of an overseas divorce, under the Matrimonial and Family Proceedings Act 1984, including in situations where there has already been an order elsewhere for a payment, or transfer of property, to be made in favour of the applicant or a child of the family. Nevertheless, the idea of two courts within the United Kingdom both making orders which will regulate the finances of the parties to a marriage following divorce is not very palatable. And yet that is what the position might be if, as the Court of Appeal decided in a very clearly reasoned judgment, article 13 does not permit the court to intervene. [79]

It is Lord Wilson, with whom Lady Hale agreed, who provides a robust dissent. In this Lord Wilson has a clear eye on result. In particular, having analysed the interplay between domestic law and European law, he says this:

The Maintenance Regulation did not change the rules which required or permitted the court of a member state to stay proceedings in respect of which jurisdiction had been conferred on it in favour of the court of another member state. For articles 27 and 28 of the Judgments Regulation were repeated, word for word, in articles 12 and 13 of the Maintenance Regulation. Article 12, entitled '*Lis pendens*', provides:

'1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.' [116]

Lord Wilson highlights that the Article 13 provision entitled ‘related actions’ is of central importance to the resolution of this appeal.

In looking at article 13 of the Maintenance Regulation, Lord Wilson maintains that it must be construed in its context, adjacent to article 12. He also refers to article 13(3) which defines the circumstances in which actions are deemed to be related and says:

It is probably intended to provide an exclusive definition of such circumstances. These are that the actions ‘are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.’ But actions in different member states, as also in different parts of a member state, cannot be heard and determined together. Paragraph (3) must mean that it is expedient to hear and determine together the *issues raised* in the two actions. [150] (original emphasis)

Lord Wilson asks:

Did the majority check its construction of article 13 in the light of its adverse consequences?

His answer is this:

When lawyers conclude that the construction of an instrument is clear, they will not shrink from their conclusion by reference to its adverse consequences. If, however, their provisional conclusion has adverse consequences, they will check it before making it their concluded view. There will be two adverse consequences of today’s decision, one expressly noticed only by Lord Sales, and the other only by Lady Black. The first will be the untrammelled licence given to a wife to go forum-shopping, in other words to put her husband at an initial disadvantage unrelated to the merits of her case. Having observed that in the *N* case the judge considered that the wife had engaged in illegitimate forum-shopping, Lord Sales comments in para 56 above that she had been entitled to choose the forum for her claim by reference to tactical reasons and that, under the Maintenance Regulation, there had been nothing illegitimate in her doing so. The second will be the inability of a court in one part of the UK to decline to determine a wife’s maintenance claim even when a court in another part alone has power to determine a claim by one spouse or the other for transfer of property or for some other adjustment (such as would, for example, disentangle them from joint ownership of property) or for a pension sharing order. As Lady Black says in para 79 above, the prospect is ‘not very palatable.’ So the final question can be refined: did the adverse consequences of today’s decision oblige the majority to undertake a rigorous examination of its provisional conclusion about the meaning of article 13 and, if so and in the light of all the questions posed above, can its provisional conclusion have received rigorous examination? [180]

THE NEXT CHAPTER

This case returned to the Family Division of the High Court to consider the section 27 application on its merits, jurisdiction having been established by virtue of the Supreme Court decision. Mr Justice Mostyn decided the case, which is reported at [2021] EWFC 23. In this ruling Mostyn J examines the history of the case before he turns to the progress of the maintenance application. Quite starkly, he makes the point that under the interim maintenance order made by Parker J not one penny has been paid.

Mostyn J also refers to the law in relation to section 27 (our article 29) as the ‘condition precedent’ in section 1A. He points out that the court has to be satisfied as a condition precedent to make an award of maintenance that the other party to the marriage has failed to provide reasonable maintenance for the applicant. In this context Mostyn J says:

Plainly, the requirement to make this preliminary factual determination must be interpreted purposely and not literally. Plainly, the condition precedent would not be satisfied, say, on proof of the failure to have provided reasonable maintenance for a short period 10 years earlier. It must mean in the period immediately prior to the application the respondent has failed to provide reasonable maintenance for the applicant. That period might be quite long, and the failure may be intermittent, but it must proximate to the application. [128]

Mostyn J also refers to the fact that there is no authority on the point although it is referenced at *Jackson’s Matrimonial Finance*.¹ Therefore, he reached the conclusion on the facts that the condition precedent was not satisfied in the case, and he maintained that the logic of this must mean that the order made should be discharged. In the alternative he said that, if he was wrong in his assessment of the condition precedent, the only question is whether the husband, in circumstances where he is now receiving about £28,000 a year in net income from his two funds by way of discretionary trust, should be maintaining the wife. In this hypothetical scenario, the judge said that the husband ought to pay £10,000 per annum in maintenance to the wife. Also, in finalising this case, the judge said that once the parties are divorced the court in Scotland should deal with all financial questions between the husband and the wife which would include exercising powers not available to the English court including pension sharing. Therefore, the duration of any maintenance order, if there were one, would only be until the Divorce Court in Scotland dealt with the matter.

1 10th edn (Lexis Nexis 2019) at para 11(2).

The judge's final comments are these:

Finally, I cannot forebear from observing that had the husband not chosen to challenge the jurisdiction of this court to hear the wife's Section 27 application of 13 January 2015 then it would have been heard on its merits in 2015. I am certain that the same result would have been reached as I have reached in this judgment and that the application would have been dismissed. That would have saved the parties the better part of 6 years of stressful, contentious, ruinously expensive and psychologically damaging litigation warfare. There would have been a divorce long ago in Scotland. Years ago the Sheriff Court at Dumbarton would have finally resolved all financial questions between the parties. I am not blaming the husband for the course that he took; after all, he came within one vote of victory in the Supreme Court. With the benefit of 20/20 hindsight I can, however, lament his decision. [145]

CONCLUSION

It remains to be seen whether the judgment of Mr Justice Mostyn dealing with the section 27 application will be appealed. However, it is clear that the jurisdictional issue which was decided by the majority in the Supreme Court will have limited application going forward due to the revocation of the Maintenance Regulation. That said, the law as discussed by Mostyn J in relation to how section 27 applications are advanced is of interest. This may form a subject matter of continued debate, but in any event this mechanism is very rarely utilised in this jurisdiction. The moral of this tale is perhaps found in the fact that the jurisdictional dispute in relation to a maintenance case lasted six years with all the consequent costs and associated stress. No doubt, family lawyers will reflect upon that.



Okpabi and Others v Royal Dutch Shell plc and Another [2021] UKSC 3

Samantha Hopkins,* Ciarán O’Kelly, Ciara Hackett
and Clare Patton†

Queen’s University Belfast
Correspondence email: shopkins04@qub.ac.uk

ABSTRACT

The Supreme Court’s recent decision in *Okpabi and Others v Royal Dutch Shell plc and Another* [2021] UKSC 3 follows a similar trajectory to its predecessors, *Chandler v Cape plc* [2012] EWCA Civ 525 and *Vedanta Resources plc and Another v Lungowe and Others* [2019] UKSC. In this short note, we explore the judgment in *Okpabi* and the implications of increased parent liability for subsidiaries’ actions. This decision removes procedural barriers for claimants particularly around jurisdiction and civil procedure. Specifically, we reflect on the potential that this judgment has for greater access to remedy for those who have suffered a negative human rights impact because of business activities.

Keywords: *Okpabi*; company law; corporate groups; parent/subsidiary liability; business and human rights; access to remedy.

INTRODUCTION

Discussion of parent liability recognises the vast power and influence that parent companies wield both inside and outside their home jurisdictions, on the employees and host communities of subsidiaries and supply chains alike.¹ The ability of such power to manifest in negative impacts on these stakeholders has been a key concern of business and human rights legal scholarship. The increased number of high-profile judgments recognises both the importance of promoting enhanced accountability as well as ensuring redress for victims of corporate human rights impacts. Recently, judgments have

* Samantha Hopkins is a Department of Education-funded PhD student at the School of Law, Queen’s University Belfast.

† Ciarán O’Kelly, Ciara Hackett and Clare Patton are all academic staff at the School of Law, Queen’s University Belfast. The authors are indebted to the comprehensive and thorough feedback received from the Commentaries and Notes Editor. His contribution greatly enhanced the finished product and illustrated the benefits of the review process. All errors that remain are our own.

1 John Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton 2013) 96.

begun to fall in favour of the victims rather than corporate defendants, marking what may represent the emergence of a more victim-centred approach to corporate liability. The issue of parental liability has been considered lately in the UK in the ‘Holy Trinity’ of cases:² *Chandler v Cape plc*;³ *Vedanta Resources plc and Another v Lungowe and Others*;⁴ and *Okpabi*. *Okpabi* is the most recent decision in this area and, in reaffirming and extending the decision in *Vedanta*, offers a potential new step in developing pathways towards holding parents liable for their subsidiaries’ actions.

Vedanta and *Okpabi* are closely linked. In both cases, the direct actions of a subsidiary company of a UK parent were alleged to have caused environmental harms – namely, oil spills, which negatively affected communities in Zambia and Nigeria respectively. Given the existence of both subsidiary and (high-profile) parent companies in the two cases, a key issue was whether a duty of care was owed by the parent company to victims on behalf of its subsidiary.⁵ It was found in both instances that there was an arguable case that a duty of care was owed by the parent company to the victims. In both *Vedanta* and *Okpabi*,⁶ the issue of duty of care was merely a preliminary procedural issue (discussed within the jurisdictional hearing) prior to later consideration of the facts.

On this note, *Vedanta* was never heard on the facts, as it was settled in January 2021, settlement being a less risky option for defendant firms.⁷ However, the procedural issues discussed in that case, given that *Okpabi* was stayed until the former had been heard in the UK Supreme Court, were of significance in the later judgment and so form a discussion point in both the *Okpabi* decision and this comment. Indeed, Lord Hamblen, who gave the unanimous judgment in *Okpabi*, stated that ‘it might reasonably have been expected that the guidance provided by [*Vedanta*] would resolve this appeal without the need for a hearing [, although that] proved not to be the case’.⁸ Many of the issues

2 Tara Van Ho, ‘On emissaries and control: corporate accountability in the aftermath of the Shell litigation in the UK and the Netherlands’, Rapid Response Event (19 February 2021).

3 *Chandler v Cape plc* [2012] EWCA Civ 525.

4 *Vedanta Resources plc and Another v Lungowe and Others* [2019] UKSC 20.

5 In the Dutch courts, a similar decision was reached in *Four Nigerian Farmers and Milieudefensie v Shell*, albeit this was decided on the merits of the case, not at the procedural stage, and as such can be distinguished from the *Okpabi* decision. Case/C/09/337050/HA ZA 09-1580 (ECLI:NL:GHDHA:2021:134): translation available.

6 *Okpabi and Others v Royal Dutch Shell plc and Another* [2021] UKSC 3.

7 ‘Vedanta & Konkola Copper Mines settle UK lawsuit brought by Zambian villagers for alleged pollution from mining activities’ (*Leigh Day*, 19 January 2021).

8 *Okpabi* (n 6 above) para 2.

covered here are, due to the timing of the two UKSC appeals, similar to ones raised in *Vedanta*, however, there are some novel points of interest which we consider below.

There are also two general procedural points to note. First, this case was able to proceed in the UK courts even though the alleged impact took place in Nigeria. This was because article 4(1) of the Recast Brussels Regulation was held by the Court of Justice in *Osuwu v Jackson* to allow any claimant to sue an English domiciled defendant in England free from jurisdictional challenge on *forum non conveniens* grounds.⁹ Second, the unanimous judgment was delivered on behalf of four judges even though five had heard the appeal in June 2020. This was due to the subsequent illness of Lord Kitchin. Lord Hodge gave a direction under section 43(3) of the Constitutional Reform Act 2005 that the court was still constituted by the remaining four Justices.¹⁰

FACTS AND PROCEDURAL HISTORY

Okpabi was, like *Vedanta*, a jurisdiction appeal, rather than a discussion of the merits of the case itself. The facts of the cases were also similar. In *Vedanta*, 1826 Zambian villagers brought a claim against *Vedanta* and Konkola Copper Mines plc (KCM), its Zambian subsidiary, related to toxic emissions from KCM's Nchanga Copper mine into water used for drinking and irrigation. In *Okpabi*, 42,335 Nigerian citizens 'allege that numerous oil spills ... have caused widespread ... water and ground contamination' affecting safe water usage in their communities for 'drinking, fishing, agricultural, washing or recreational purposes'.¹¹ The first defendant was the Shell Petroleum Development Company of Nigeria Ltd (SPDC), a Nigerian-registered company, engaged in a joint venture with the state-owned Nigerian National Petroleum Corporation (NNPC) and two other companies (where SPDC owns 30 per cent, and NNPC owns 55 per cent of the issued share capital).¹² The second defendant was Royal Dutch Shell (RDS), the parent company of SPDC domiciled in the UK.

It was argued that RDS owed a common law duty of care to the claimants as it 'exercised significant control over [or assumed responsibility for] material aspects of SPDC's operations [through] the promulgation and imposition of mandatory health, safety and

9 Case C-281/02 [2005] QB 801 as cited in James Beeton, 'Supreme Court rules in *Okpabi v Royal Dutch Shell plc and SPDC*' (*International and Travel Law Blog*, 12 February 2021). It will be interesting to see whether the UK's departure from the EU will lead to any changes in this area going forward.

10 *Okpabi* (n 6 above) para 161.

11 *Ibid* para 4.

12 *Ibid* para 5.

environmental policies, standards and manuals’ which were insufficient to protect the claimants from ‘harm arising from SPDC’s operations’.¹³ It was also claimed that SPDC was liable on an individual basis.¹⁴ Evidently, given the Nigerian registration of SPDC, the latter would be impossible unless certain facts could be proved in the parent/subsidiary relationship.

The key question, in this case, concerned the jurisdictional ‘gateway’ test in paragraph 3.1(3) of Practice Direction 6B.¹⁵ This requires that ‘appellants must establish that their claims against the anchor defendant [RDS] raise a real issue to be tried, which means that they have a real prospect of success’. The question was twofold: first, it was asked whether there is an *arguable case* for a duty of care being owed by RDS. This grounded the second issue, which was whether SPDC is a ‘necessary or proper party’ to the claim that RDS owed a duty of care, which would confer UK jurisdiction over the foreign subsidiary.¹⁶

Such jurisdiction was accepted by HHJ Raeside QC in 2016, before being challenged by RDS and SPDC. It was held, in the Technology and Construction Court in 2017, that it was ‘not reasonably arguable that there is any duty of care upon RDS’.¹⁷ As such, SPDC was held not to be a ‘necessary or proper party’ to the claim, and jurisdiction was denied. This was again appealed and heard at the Court of Appeal in 2018.¹⁸ The Court of Appeal considered that the approach to the evidence was in error in certain respects and therefore re-examined it (which was raised in this case as itself in error, discussed below). It was held (with Sales LJ dissenting)¹⁹ based on the evidence that there was ‘no arguable case’ that RDS owed a duty of care in these circumstances.²⁰ Permission to appeal was once again granted after the final judgment in *Vedanta*, given the impacts which it promised on this case.

ISSUES OF LAW

The core question, in this case, was whether the Court of Appeal had materially erred in law in several aspects – especially in light of the *Vedanta* decision. These concerned the procedure used in determining

13 Ibid para 7.

14 Ibid para 8.

15 Ibid para 10.

16 Ibid para 1.

17 *HRH Emere Godwin Bebe Okpabi & Others v Royal Dutch Shell plc and Another* [2017] Bus LR 1335 para 122.

18 *HRH Emere Godwin Bebe Okpabi & Others v Royal Dutch Shell plc and Another* [2018] EWCA Civ 191.

19 Ibid [171].

20 Ibid [127].

the existence of an ‘arguable claim’ against RDS, the interpretation of the principle of duty of care relating to parent company liability, and how such duty of care was (or rather was not) found. If the Court of Appeal *were* found to have erred, the question then became ‘whether the majority was wrong to decide that there was no real issue to be tried’.²¹

Prior to these, however, the issue of proportionality was briefly considered – essentially reiterating the decision in *Vedanta*, where it had been a more prominent issue.²² The importance of avoiding mini-trials at the procedural stage²³ was emphasised in both cases: as in *Vedanta*, with 8000 pages of documents, there were 2000 pages and eight files of exhibits submitted here,²⁴ which was considered excessive in both instances. Instead, it was argued, the focus should remain on whether, based on the particulars of claim, there is a ‘real prospect of success’²⁵ for the cause of action.

The first element in a ‘real prospect for success’ was whether the procedure used in determining the existence of an ‘arguable claim’ against RDS was appropriate. It was found, for a variety of reasons, that it was not so. The Court of Appeal was ‘drawn into conducting a mini-trial’ contrary to *Three Rivers* and the later affirmation in *Vedanta*.²⁶ Given the aforementioned plethora of documentation submitted, the Court of Appeal was ‘drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence’ instead of focusing on whether an arguable claim exists.²⁷ This led to ‘the court making inappropriate determinations’²⁸ concerning both the factual and documentary evidence which were ‘not appropriate on an interlocutory application’.²⁹ Specifically, the Court of Appeal misinterpreted the Civil Procedure Rules. The gateway test outlined

21 *Okpabi* (n 6 above) para 74.

22 *Ibid* paras 20–21.

23 *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, 95 (Lord Hope of Craighead).

24 *Okpabi* (n 6 above) paras 23, 105–106.

25 *Ibid* para 22.

26 *Ibid* para 102, 111.

27 *Ibid* para 107.

28 *Ibid* para 126.

29 *Ibid* para 120.

in paragraph 3.1.3 Practice Direction 6B is one of reasonableness.³⁰ However, the defendants in both *Okpabi* and *Vedanta*, distracting the court with the volume of documents, seemed to direct the argument to one of a ‘good’ arguable case – and therefore, a higher threshold to meet (without discovery) than ‘reasonableness’.

In contrast, Sales LJ in the Court of Appeal dissent had stated that certain factual evidence of a witness ‘goes some way to show that there is a very real prospect that highly relevant documents, which may well be supportive of the claimants’ case, will be forthcoming on disclosure if the action proceeds’,³¹ which was the intended purpose of that factual evidence. Essentially, the procedural evidence was to be used (and was not used) as a mere *demonstration* that further evidence could be forthcoming after disclosure was required and thus in keeping with paragraph 3.1.3 Practice Direction 6B. This was supported by Lord Briggs in *Vedanta*: ‘the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue’.³² ‘In other words’, as Lord Hamblen put it in *Okpabi*, ‘are there *reasonable grounds* for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success?’³³ All such determinations recognise the importance of internal corporate documentation (such documentation being the minimal of necessity in the present instance).³⁴

30 Practice Direction 6B, para 3.1.3 (emphasis added): ‘a claim is made against a person (“the defendant”) on whom the claim form has been or will be served ... and – There is between the claimant and the defendant a real issue which it is *reasonable* for the court to try.’

31 *Okpabi* (n 18 above) para 169.

32 *Vedanta* (n 4 above) 45.

33 *Okpabi* (n 6 above) para 128 (emphasis added). Note here that Lord Hamblen uses the language of reasonableness (see para 3.1.3. Practice Direction 6B) rather than questioning the validity of the evidence as had been the case in the Court of Appeal proceedings. In so doing, Lord Hamblen seems to align the test with one of ‘striking out’ which is more ‘claimant’ friendly and in keeping with the apparent shift towards easing procedural hurdles for victims of alleged corporate human rights impacts.

34 This has been found previously in *Lubbe v Cape plc* [2000] 1 WLR 1545 para 1555; in *Hardie Industries plc v White* [2018] NZCA 580; in *Vedanta* (n 4 above) citing *Tesco Stores Ltd v Mastercard Inc* [2015] EWHC 1145 (Ch) para 73; and in *Vedanta* (n 4 above) at para 44. For critique of the Court of Appeal judgment on this point, see *Okpabi* (n 6 above) at paras 133–134. In criticising the Court of Appeal on this, the Supreme Court is aligning itself with international and comparative jurisprudence such as in *Hardie Industries*. For more see Ekaterina Aristova and Carlos Lopez, ‘UK *Okpabi* et al v Shell: UK Supreme Court reaffirms parent companies may owe a duty of care towards communities impacted by their subsidiaries in third countries’ (*Opinio Juris*, 16 February 21).

Second, it was considered that the principles of duty of care as related to parent liability were incorrectly interpreted for three key reasons. Firstly, there was an ‘inappropriate focus’ on the issue of control (by RDS over the subsidiary SPDC).³⁵ While this was a significant aspect of the Court of Appeal decision, here it was held that ‘control is just a starting point’³⁶ for any such decision. Instead, what is important is the extent to which the parent company *actually* took over or shared the specific disputed activity.³⁷ Essentially, it was clarified that ‘control’ and ‘de facto management’ of an activity are ‘two different things. A subsidiary may maintain *de jure* control of its activities, but nonetheless, delegate de facto management of part of them to emissaries of its parent.’³⁸ For example, control is less relevant than the parent’s public statements *holding itself out as* exercising a ‘degree of supervision and control’³⁹ of its subsidiary’s operations. Secondly, the Court of Appeal indicated that groupwide policies or standards can never give rise to a duty of care on the part of the parent,⁴⁰ which was a submission rejected in *Vedanta*. In that case, Lord Briggs stated that he did not consider there to be ‘any such reliable limiting principle’, since group guidelines if possessed of ‘systemic errors’⁴¹ may in implementation ‘cause harm to third parties’.⁴² Thirdly, and overall, it was recognised, as per *Vedanta* and *AAA v Unilever plc*,⁴³ that ‘there is nothing special or conclusive about the bare parent/subsidiary relationship’.⁴⁴ Essentially, the mere existence of a parent/subsidiary relationship is insufficient either to demonstrate the existence *or* the absence of a duty of care. Instead, a company must either take ‘active steps’ in implementing group-wide policies, or else ‘hold ... itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so’.⁴⁵

Third, the means of determining duty of care in parent liability cases, including reliance on the *Caparo* test,⁴⁶ was questioned.⁴⁷ Since, as per *Vedanta*, parent liability is not a novel category of duty,

35 *Okpabi* (n 6 above) para 146.

36 *Ibid* para 147.

37 *Ibid*.

38 *Ibid* para 147 – the use of ‘emissaries’ here is of interest.

39 Lord Briggs in *Vedanta* (n 4 above) para 53, cited in *Okpabi* (n 6 above) para 148.

40 *Okpabi* (n 6 above) para 143.

41 Although these were not pleaded in the present case: para 153.

42 *Vedanta* (n 4 above) para 52.

43 *AAA v Unilever plc* [2018] BCC 959 para 36.

44 *Vedanta* (n 4 above) para 54.

45 *Ibid* para 53.

46 *Caparo Industries plc v Dickman* [1990] 2 AC 605.

47 *Okpabi* (n 6 above) paras 101, 151.

there was no need to apply the *Caparo* test in either case.⁴⁸ As such, the examination of proximity and whether a duty was ‘fair, just and reasonable’ was unnecessary.⁴⁹ Instead, any contested duty of care should consider ‘management/joint management of the relevant activity’, provision of advice or policies, ‘promulgati[on of] groupwide policies and ... active steps to ensure their implementation’, and the parent ‘holding out that it exercises a particular degree of supervision and control’ over the subsidiary.⁵⁰ In this instance, it was also argued that RDS possessed detailed knowledge of past and potential spills, as well as superior expertise in health and safety issues.⁵¹ It was agreed that these are the appropriate means of determining the existence of a duty of care where the parent/subsidiary relationship is concerned.

Having clarified the above areas of error at the Court of Appeal, the question then became whether there was any real issue to be tried, as per paragraph 3.1(3) Practice Direction 6B (‘appellants must establish that their claims against the anchor defendant [RDS] raise a real issue to be tried, which means that they have a real prospect of success’). This was found to be so, in light of ‘the case set out in the pleadings, fortified by the points made in reliance upon the RDS Control Framework and the RDS HSSE Control Framework’,⁵² as well as the prospect of future disclosure.⁵³ In light of the disputes regarding the working of Shell’s organisational structure in practice, the extent of RDS’s delegated authority and the weight to be attached to various types of disclosure, Lord Hamblen stated that a real issue to be tried had been shown.⁵⁴

ANALYSIS

There are several points of interest arising from this case, despite its considerable reliance upon the prior *Vedanta* decision. First, the conclusive rejection of mini-trials for jurisdictional issues limits the ability of companies to utilise preliminary challenges to avoid liability for their human rights abuses. The conclusive emphasis on procedural issues to the exclusion of such fact-based determinations means that submission, and consideration, of large quantities of documents is less effective as an approach to either delay hearings or avoid legal liability wholesale.

48 *Vedanta* (n 4 above) para 49.

49 *Okpabi* (n 6 above) para 24.

50 *Ibid* para 26.

51 *Ibid* paras 32–35.

52 RDS documentation attained by the claimants through a third-party source: para 153.

53 *Okpabi* (n 6 above) para 154.

54 *Ibid* para 158.

Relatedly, the importance of documentation was again emphasised in this case – while there was no disclosure of such documentation in this case, the court recognised that the acquisition of a variety of organisational documents would be vital to any concrete determination of duty of care. Therefore, where documentation is *relevant* to the issue under consideration (ie not a jurisdictional, procedural issue), it will play a significant role in the decision to allow a case to proceed at trial.

Second, the recognition that ‘control is just a starting point’⁵⁵ has considerable implications for the ability of such procedural cases, in the absence of excessive documentation, to fall in the claimants’ favour. It prevents the application of a strict reading to the decision, considering issues such as the extent to which management of an activity is shared. This will place a much lower evidentiary burden on claimants at the preliminary stage, allowing more cases to be considered on their merits than has been the case in the past. This, therefore, is likely to increase the potential for access to justice for those victims affected by actions of multinationals operating through a subsidiary. Such a move has been described as creating ‘some degree of equality of arms’ for victims,⁵⁶ by ‘lowering the bar (in a good way)’ for accessing the courts.⁵⁷ Further, we can now assume that this summary trial-style procedure will hitherto be very limited in cases surrounding parent/subsidiary liability.⁵⁸

Beyond, *Okpabi* can be distinguished from *Vedanta* in its discussion of corporate group structures. For example, at paragraph 51 Lord Hamblen notes:

[i]t is the appellants’ case that the Shell group’s vertical organisational structure means that it is comparable to Lord Briggs’ example of group businesses which ‘are, in management terms, carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant’.⁵⁹

Further, the weight placed on ‘emissaries’ and the relationship between control and management in many ways seemed to point to potential problems with corporate group structures as flagged previously by Hadden.⁶⁰ As Hadden argues concerning taxation management and group structures, the complex corporate structures that have emerged

55 Ibid para 147.

56 Aristova and Lopez (n 34 above).

57 Lucas Roorda, ‘Lowering the bar (in a good way): the Supreme Court decision in *Okpabi v Shell*’ (*Rights as Usual Blog*, 17 February 2021).

58 Note, however, that the case management judge could order the trial of a preliminary issue on the parent company’s control of the subsidiary.

59 *Okpabi* (n 6 above) para 157.

60 Tom Hadden, ‘Accountable governance in corporate groups: the interrelationship of law and accounting’ (2012) 22 *Australian Accounting Review* 117, 119.

are designed around management of financial and tort liabilities, but do not map cleanly onto management pathways. ‘Within most large multinationals’, Hadden writes, ‘the structures for managerial decision making are based on functional or product divisions that are typically superimposed upon, and often cut across, the formal legal structures.’⁶¹ Managerial structures are often ‘more rational’ and ‘centralised’ than would be possible if management was assigned by discrete corporate entity. That this is the case provides an answer of sorts to Chancellor Sir Geoffrey Vos’s remark in the Court of Appeal that ‘it would be surprising if a parent company were to go to the trouble of establishing a network of overseas subsidiaries with their own management structures if it intended itself to assume responsibility for the operations of each of those subsidiaries’.⁶² Corporate groups aim at limiting the liabilities of parent companies, not necessarily to act independently of them.⁶³

A further problem may manifest in the corporation accepting responsibility for subsidiary management. Notably, from both *Okpabi* and *Vedanta*, if a company ‘holds itself out’ as managing a subsidiary, it is likely to be considered so responsible; if it omits to reference any such management, it is likely to be considered otherwise.⁶⁴ This, therefore, has implications for voluntary reporting by corporations; reinforcing the point taken from *Vedanta* to the effect that this could prompt a *withdrawal* of responsibility by parent companies, rather than committing to either perspective.⁶⁵ The corporate reporting landscape may be too multifaceted for parent companies to simply withdraw from or withhold on commitments. Reporting has long since been a useful tool for corporations in managing reputational risk through, for example, the UN Global Compact.⁶⁶ Beyond, the trend within the corporate reporting space is *more* reporting, not less, with requirements from the UN Guiding Principles on Business and Human Rights,⁶⁷ disclosure requirements (eg Modern Slavery Act

61 Ibid 118.

62 *Okpabi* (n 18 above) para 196.

63 See J Dine, *The Governance of Corporate Groups* (Cambridge University Press 2000); P Muchlinski, ‘The changing face of transnational business governance: private corporate law liability and accountability of transnational groups in a post-financial crisis world’ (2011) 18 *Indiana Journal of Global Legal Studies* 665; P Muchlinski, ‘Limited liability and multinational enterprises: a case for reform?’ (2010) 34 *Cambridge Journal of Economics* 915.

64 *Okpabi* (n 6 above) para 148; *Vedanta* (n 4 above) 53.

65 Samantha Hopkins, ‘*Vedanta Resources plc and Another v Lungowe and Others* [2019] UKSC 20’ (2019) 70(3) *Northern Ireland Legal Quarterly* 371, 375.

66 [Communications on Progress](#), UN Global Compact.

67 Principle 15(b) and Principle 17, United Nations, *Guiding Principles on Business and Human Rights* (OHCHR 2011).

2015 (UK), California Transparency in Supply Chains Act 2010)⁶⁸ and due diligence obligations (eg *Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (France), The Netherlands' Child Labour Due Diligence Law,⁶⁹ and the European Union (EU) Conflict Minerals Regulation).⁷⁰ With recent proposals, such as the European Parliament mandatory human rights due diligence⁷¹ and the German (draft) Supply Chain Due Diligence Act,⁷² withdrawing from responsibilities as a result of the *Okpabi* decision would raise questions about corporations' aspirations to respecting human rights.

Finally, and perhaps less optimistically, although this procedural issue was ruled in favour of the claimants, there were other jurisdictional issues not addressed by the trial judge which will likely be remitted by RDS and SPDC.⁷³ In *Vedanta*, the claimants succeeded based largely on the lack of 'substantial justice' which would be attained were the case heard in Zambia (one of the poorest countries in the world).⁷⁴ In *Okpabi*, the issues of the appropriate forum for the case and access to justice were not addressed in this procedural application. If these issues were to be raised going forward, it could preclude the case from being heard in this jurisdiction. The competing arguments of Shell that a fair trial is possible in Nigeria, whilst on the other filing ISDS claims arguing that Nigerian courts have been unfair to them suggests that jurisdictional issues (after their defeat in the Dutch Courts on the merits of a similar case) will continue to shape this type of case in the

68 Modern Slavery Act 2015. For discussion see: Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 three years on' (2018) 81(6) *Modern Law Review* 1017–1045; Genevieve LeBaron and Andreas Rühmkorf, 'The domestic politics of corporate accountability legislation: struggles over the 2015 UK Modern Slavery Act' (2019) 17(3) *Socio-Economic Review* 709–743. For the reporting requirements see, Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015, reg 2. These reporting mechanisms are in addition to those set out in relevant Company Law legislation (eg s 415 and s 172, Company Act 2007, California Transparency in Supply Chains Act 2010). Also of relevance here is, s 1502, Wall Street Reform and Consumer Protection Act (2010).

69 Dutch Child Labour Due Diligence Bill.

70 EU Regulation 2017/821.

71 Lara Wolters (Rapporteur), *Draft Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability*, Committee on Legal Affairs (2020/2129(INL)). Report adopted by the European Parliament Legal Committee on the 27 January 2021.

72 Robert Grabosch, 'The German supply chain due diligence act in the making – what to expect' (*NOVABHRE Blog*, 15 February 2021).

73 *Okpabi* (n 6 above) para 160.

74 *Vedanta* (n 4 above) 90.

future.⁷⁵ Indeed, there is the possibility, given the settling of *Vedanta* before it reached a full hearing, that this case will be similarly dealt with. However, this is yet to be seen.

Overall, this is a clear affirmation and extension of the precedent set out in *Vedanta*. This, along with the recent *Milieudefensie* decision in the Netherlands,⁷⁶ is a clear step away from previous parent liability decisions such as *Jesner et al v Arab Bank plc*⁷⁷ and *AAA v Unilever plc*. These cases had been decided in favour of the defendant companies, but this trend would appear to be going into reverse in certain circumstances. It is to be hoped that case law continues in the present trajectory.

75 Eg 'Shell files arbitration claim against Nigeria over spill dispute' (*The Star*, 14 February 2021); *Four Nigerian Farmers and Milieudefensie* (n 5 above).

76 *Four Nigerian Farmers and Milieudefensie* (n 5 above).

77 *Jesner et al v Arab Bank plc* No 16-499, 584 US ____ (2018).

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