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NORTHERN IRELAND

# LEGAL QUARTERLY

# NORTHERN IRELAND LEGAL QUARTERLY

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# A legal approach to the protection of customers of banks and other financial institutions from identity theft in Nigeria<sup>†</sup>

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## ABSTRACT

Although identity theft is not a new phenomenon in the banking industry, the internet, the use of databases in storing customers' personal information as well as the ubiquitous nature of online transactions have heightened the issues of security and privacy concerns of bank customers. Of significant note is the increase in the risk of customers' exposure to identity theft and the opening of the floodgates for unscrupulous and criminally minded persons to harvest customers' personal information for fraudulent purposes with its attendant financial loss and reputational damages. This article examines identity theft within the banking and financial sector and the adequacy of the regulatory measures that have been deployed to combat it in Nigeria and the United Kingdom. It is contended that, despite the available legislation on identity theft in Nigeria with copious provisions to prosecute identity theft and the constitutional guarantee given to the privacy of citizens, the right to privacy of the citizens is still being constantly violated by identity thieves through unauthorised access to and damaging use of personal and financial data of unsuspecting victims. The article concludes that though, like any other crime, identity theft cannot be completely eradicated, it requires the concerted efforts of all relevant stakeholders to reduce its incidence to the barest minimum within Nigerian society.

**Keywords:** identity theft; personal information; internet banking; data protection; regulation; banks and financial institutions; Nigeria; United Kingdom.

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<sup>†</sup> First published in *NILQ* 75.AD1 1–28 on 21 March 2024.

## INTRODUCTION

The relationship between a banker and the customer is primarily contractual with corresponding rights and duties.<sup>1</sup> At common law, one of the duties owed by the banker to the customer is the duty of care and secrecy.<sup>2</sup> It implies the duty to exercise reasonable care and skill in executing a customer's instruction in its banking business.<sup>3</sup> A banker also has the implied duty to the customer not to pay out the customer's money without authority.<sup>4</sup> On the other hand, the customer undertakes to, *inter alia*, exercise reasonable care in executing written orders so as not to mislead the bank or facilitate forgery.<sup>5</sup> Whilst these duties are still sacrosanct and applicable to the legal relation between the banker and the customer, the advent of information communication technology and its deployment in payment service delivery in the banking business has greatly revolutionised and impacted the operations of banking business across nations, including Nigeria.<sup>6</sup> The process of paying out money from accounts is no longer limited to *inter praesentes* transactions between the banker and the customer, but has been extended to online withdrawals through the use of debit cards and online payments. The cashless policy of the Central Bank of Nigeria (CBN), which is the apex regulatory body for banks and other financial institutions in Nigeria, to facilitate quick access to customers' funds and decongest the banks in respect of minor transactions, has also engendered greater use of technology in the banking service.<sup>7</sup> Nevertheless, the digitalisation of bank operations, the ease with which banking and other financial transactions are

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- 1 *Joackimson v Swiss Bank Corporation* (1921) All ER Rep 92, 100, Lord Atkin. The rationale for the duty of care on a banker is that a banker's customer falls within the ambit of the banker's neighbour, that is, a person who is so closely and directly affected by the act of the banker that the banker ought reasonably to have the customer in contemplation as being likely to be affected when the banker is considering the acts or omissions which are called in question: *Agi v Access Bank plc* (2014) 9 NWLR (Pt 1411) 121. In a breach of the duty by the banker, such as where a victim's identity theft losses have been facilitated by the negligence of the banker, the banker is liable in damages to the customer.
  - 2 *Habib Nigeria Bank Ltd v Fathudeen Syed M Koya* (1990–1993) NBLR 368, 387.
  - 3 *Nigerian Advertising Service Ltd v United Bank for Africa Ltd* (1965) LLR 84.
  - 4 *Slingsby v District Bank Ltd* (1931) 2 KB 588.
  - 5 *London Joint Stock Bank Ltd v Macmillan & Arthur* (1919) A C 777.
  - 6 *Mudiaga-Odje v Younes Power System Nig Ltd* (2014) 5 NWLR (Pt 1400) 412, 433–434, Buje, JCA.
  - 7 In the third quarter of 2020, for example, the value of online payments in the Nigerian banking and financial sector increased to USD116 billion from USD68.3 billion recorded for the same period in 2019: A Onukwe, 'Nigeria's central bank is tightening control of its identity database to check fraud better' (Quartz 14 October 2021).

carried out through the internet, and the rate at which personal information of customers, including biometric information, is stored in databases to enhance operations are not without their attendant challenges, including potential incidences of cyber attacks in the form of identity theft and identity fraud.<sup>8</sup> It is noteworthy in this respect that both the living and the dead could be victims of identity theft and it cuts across different age groups.<sup>9</sup>

Identity theft, though not a new crime, has become one of the fastest-growing crimes and, as such, a source of concern, not only in Nigeria, but also across other developing and developed communities. Documents most often targeted for identity-related information include social security cards, drivers' licences, birth certificates, address books, passports and voters' registration cards and records.<sup>10</sup>

Identity theft, otherwise known as impersonation fraud, occurs when there is a theft, for fraudulent purposes, of personal information, such as account numbers, social security numbers and

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8 Most government entities and businesses are now generating identity-related information and storing it in databases. For instance, in 2014, the Central Bank of Nigeria introduced the BVN policy which mandates every bank customer to get one by providing relevant personal bio data and biometrics at any branch of the customer's bank. The BVN database is being managed by the CBN, banks and the Nigeria Inter-Bank Settlement Scheme. Similarly, the National Identity Database created under the National Identity Management Commission Act 2007 contains biometric information of registered Nigerian citizens and non-Nigerian citizens who are lawfully and permanently resident in Nigeria. The multi-purpose identity card issued to registered persons is a requirement for opening bank accounts in Nigeria. Also, it is mandatory for all subscribers to GSM (global system for mobile communications) phone services to register their SIM (subscribers identity module) cards with the mobile operators, which is done through the collection of biometric information of subscribers: see eg Africa–China Reporting Project Data for Fraud, 'How the biometric system exposes Nigerians to cyber thieves' (7 April 2022); United Nations Office on Drugs and Crime, *Handbook on Identity-related Crime* (United Nations 2011) 12.

9 For example, in the United States of America (USA), there have been over 800,000 incidents of criminals exploiting the identities of the deceased to open credit cards or get a cell phone plan, while twice as many used a fake social security number belonging to the dead: A Julija, '20 worrying identity theft statistics for 2022' (*Fortunly* 14 August 2023). Similarly, child identity fraud in the USA affects one out of every 50 children annually and costs US families USD1 billion annually and takes a tremendous amount of time to resolve, more than identity fraud affecting adults: G DiNardi, 'Identity theft reaches shocking new heights in 2021' (*Nasdaq* 31 January 2022). In the same vein, older adults are reported to be significantly more likely than millennials to be victims of identity theft: M DeLiema, D Burnes and L Langton, 'The financial and psychological impact of identity theft among older adults' (2021) 5(4) *Innovation in Aging*; D U Ebem, J C Onyeagba and G E Ugwuonah, 'Internet banking: identity theft and solutions – the Nigeria perspective' (2017) 22(2) *Journal of Internet Banking and Commerce*.

10 United Nations Office on Drugs and Crime (n 8 above) 16.

other personal identifiers, such as a mother's maiden name.<sup>11</sup> It is the misappropriation of the identity, such as the name, date of birth, current address or previous addresses of another person, without their knowledge or consent and using same to obtain goods and services in that person's name.<sup>12</sup> It has also been statutorily defined as when someone 'knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law'.<sup>13</sup>

Identity, in this context, is the initial legal identity of an individual such as the full name, social security number, date and place of birth, maiden name (both of the victim and the victim's mother) and address, nationality and so on.<sup>14</sup> This is distinguishable from personal identity, otherwise called biometric identity, which is composed of attributes that are peculiar or unique to an individual such as fingerprints, retina, voice, facial structure, DNA profile, hand geometry and the like.<sup>15</sup> The initial legal identity, backed by a document, such as a birth certificate, is usually taken in turn to personalise an authentication method such as bank accounts, debit/credit cards, tokens among others.<sup>16</sup> Identity thieves could thus appropriate and subsequently misuse these identity details for illegal activities, such as to steal from the victim's bank account, obtain loans, make purchases or to commit crime.<sup>17</sup> The

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- 11 J Lynch, 'Identity theft in cyberspace: crime control methods and their effectiveness in combating phishing attacks' (2005) 26 Berkeley Technology Law Journal 259, 260. It has, however, been noted in some quarters that there is as yet no commonly accepted definition of identity theft or identity fraud as different definitions are used for statistical purposes in different countries. The most important feature, however, is the appropriation and use of identity data for conducting other illegal activity, especially economic fraud: Fraud Prevention Expert Group (FPEG), *Report on Identity Theft/Fraud* (Brussels 2007) 7; UK Action Fraud, *Identity Fraud and Identity Theft*.
- 12 R Binder and M Gill, 'Identity theft and fraud: learning from the USA' (PRCI Ltd 2005) 8; UK Action Fraud (n 11 above).
- 13 Identity Theft and Assumption Deterrence Act 1998, s 3(a)(7), as amended by the Public Law 105-318, 112 Stat 3007 (30 October 1998). Means of identification is defined in s 3(d)(3) of the Act to include an individual's name, social security number, date of birth, driver's licence or government-issued identification number, biometric data, electronic identification number, address or routing code, or telecommunication identifying information. The available federal laws on identity theft include the Identity Theft and Assumption Deterrence Act 1998; Identity Theft Enhancement Penalty Act 2004; the Gramm-Leach-Bliley Act 1999; and the Fair and Accurate Credit Transactions Act 2003.
- 14 FPEG (n 11 above) 11.
- 15 Ibid.
- 16 Ibid.
- 17 See, for example, *Rogan v Los Angeles* 668 F Supp 1384 (CD Cal 1987).

majority of cases of identity theft, however, relate to white collar and financial fraud crimes.<sup>18</sup>

In Nigeria, for example, between January and September 2020, fraudsters reportedly stole NGN5 billion (USD12 million) from customers' accounts.<sup>19</sup> In 2017, internet/online banking and automated teller machine (ATM)/card-related fraud types reported constituted 24,266 or 92.68 per cent of the 26,182 reported cases of fraud and forgeries in the banking industry resulting in NGN1.51 billion or 63.66 per cent of losses.<sup>20</sup> Similarly, in the UK, unauthorised financial fraud losses across payment cards, remote banking and cheques amounted to GBP783.8 million in 2020, while fraud losses on UK-issued cards totalled GBP574.2 million.<sup>21</sup> Identity fraud also reportedly accounted for 61 per cent of all cases of fraud reported to the Credit Industry Fraud Avoidance System (CIFAS) in 2019, with 22 per cent of the reported identity theft cases being for the purpose of gaining access to bank accounts.<sup>22</sup>

The article examines financial identity theft in banks and other financial institutions and the legislative measures that have been deployed to curtail the menace in Nigeria. Regulatory measures in the UK are also examined with a view to drawing some lessons therefrom for further reform of the extant law in Nigeria. The identified gaps in the law are highlighted and suggestions for addressing them proffered. The choice of the UK has been informed by the legislative history which Nigeria has with the UK as one of the latter's colonies.

The article is divided into five sections. The analysis of the nature of identity theft is followed in the subsequent section by examination of the techniques identity thieves usually use to steal the personal information of their victims and the impact of the identity theft on victims, the financial institutions and the society. The third section is devoted to the examination of the regulatory framework in Nigeria and the UK to combat identity theft, as well as personal data protective regulatory measures aimed at protecting consumers of banks and

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18 T P Vartanian and T P Nelson, *Identity Theft and Financial Institutions* (nd) 3.

19 Onukwe (n 7 above).

20 Nigeria Deposit Insurance Corporation (NDIC), 'NDIC to investigate banks for failure to make returns on fraud cases' (12 March 2018).

21 UK Finance, *Fraud – the Facts* (2021) 10 and 19.

22 A Aashind, 'ID theft statistics UK edition 2022' (2022). Also, in the USA, about 15 million people experience identity theft every single year resulting in about USD50 billion of financial losses. In 2020, the cost of identity theft to people totalled USD56 billion, while over 49 million people fell victims in that year. The majority of the losses, about USD43 billion, stemmed from direct interaction scams, such as phishing emails, while the 'traditional' identity theft, that is, people losing their information through data breaches and similar attacks accounted for USD13 billion: Julija (n 9 above).

other financial institutions' services. The fourth section explores ways of improving on the current regulatory framework in Nigeria, and the fifth part is the conclusion.

## **MODES OF IDENTITY THEFT AND ITS IMPACT**

### **Modes of identity theft**

Identity theft can come in various forms, either physically, such as by the theft of debit/credit cards, or through the internet, such as by the use of computers, to steal personal and sometimes confidential information of other persons.

The most notable of the techniques used in gaining access to the necessary information, therefore, include offline identity theft which could occur by pick-pocketing, dumpster-diving or bin-raiding, which involves rummaging through trash bins, recycling containers and dumpsters to find discarded and unshredded financial records, credit card slips, ATM receipts, bank statements, loan or credit card applications and the like.<sup>23</sup> It also includes stealing pre-approved credit card applications from mail-boxes, completing 'change of address' forms through the post office in order to divert a victim's mail, and securing low-level employment with an organisation to gain access to and steal customers' credit reports and financial records.<sup>24</sup> Another potential source in this respect is insider attack through the careless handling of confidential customer information or through intentional misconduct of bank staff. Also, in some cases, dishonest bank staff, as insiders, use their access to customer confidential information to commit identity theft or aid or abet others in committing same.<sup>25</sup> Account takeover by third parties could also be facilitated easily by staff fraud without being challenged.<sup>26</sup>

Identity theft through the use of the internet, on the other hand, includes phishing/pharming. This involves the use of social-engineering techniques, especially email, to make victims disclose personal information. In this case, identity thieves purchase a domain name and set up a spoofing site, which is similar to that of a genuine financial institution and then send out indiscriminate mass

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23 Vartanian and Nelson (n 18 above) 3.

24 Lynch (n 11 above) 262.

25 Vartanian and Nelson (n 18 above) 4; Agency Report, 'Bank customers lament illegal withdrawals, demand urgent action' *The Punch* (Nigeria 7 November 2022). In Nigeria, the NDIC has revealed that the number of fraud cases attributed to internal abuse by staff of banks increased from 231 in 2016 to 320 in 2017 or 38.53% above the figure recorded for 2016: NDIC (n 20 above).

26 FPEG (n 11 above) 27.

emails purporting to be from the victims' banks or other e-commerce sites.<sup>27</sup> Another technique to direct the user to the spoofed website is manipulation of the domain name system, known as 'pharming'. The emails typically require victims to update or supply their account details to avoid fraud or for security reasons.<sup>28</sup> It could also be used to acquire information, such as user names, passwords and credit card details. These personal and financial details disclosed by the victims are, thereafter, used to log on to the victims' accounts to perpetrate the fraud under the guise of legitimate banking business and to commit offences, such as the transfer of funds, applications for new accounts or passports and so on.<sup>29</sup>

Another technique is through internet banking, telephone banking and mobile banking which occurs when the identity thief gains access to an individual's bank account through one of these remote banking channels and makes an unauthorised transfer of money from the account.<sup>30</sup> It could also be carried out through pretext calling/scam-related text messages purporting to be from legitimate bank officials where the victim's account is domiciled and requesting for the customer's ATM personal identification number (PIN) or bank verification number (BVN).<sup>31</sup> This can also occur through debit/credit card alerts whereby a purported 'employee' of a credit card issuer would call an unsuspecting customer to confirm unusual spending activity and ask for the security code on the back of the credit card.<sup>32</sup>

Also, identity theft could occur through malware, that is, the use of malicious software. This is done through the installation of small software tools on the victim's computer to intercept communications,

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27 Lynch (n 11 above) 259.

28 Ibid. In the UK, over 25,000 bank-branded phishing websites were reportedly identified and taken down in 2020: UK Finance (n 21 above) 45; see also CBN, 'Advance fees fraud (419) CBN Disclaimer'.

29 United Nations Office on Drugs and Crime (n 8 above) 17; CBN (n 28 above).

30 UK Finance (n 21 above) 43. Almost all cases of identity fraud reported in 2019 to the CIFAS took place on line and 42 % of them were committed with the intention of obtaining debit card or credit card details: Aashind (n 22 above); T Owoyele, 'Access bank wants customer to repay loan taken by a thief' (Foundation for Investigative Journalism 19 November 2022); E Utì, 'Banker trusted UBA with her ₦146,000. She lost it all' (Foundation for Investigative Journalism 20 November 2022).

31 K S Provenza, 'Identity theft, prevention and liability' (1999) 3 North Carolina Banking Institute 319, 324; Africa-China Reporting Project Data for Fraud (n 8 above); Ebem et al (n 9 above) 13.

32 Vartanian and Nelson (n 18 above) 3. In the USA, for example, credit card fraud has become the most common kind of identity theft with about 18,000 reports received by the Federal Trade Commission in 2020 and 2021 from various individuals that their information has been used to gain access to their credit card accounts illegally: Julija (n 9 above).

log keyboard strokes and search for information on the victim's computer.<sup>33</sup> Indeed, at the rebirth of the quick response (QR) codes following the resurgence of e-commerce spurred by the Covid-19 pandemic, it was discovered through available threat intelligence advisories that hackers have developed fraudulent QR codes with embedded malware that allows them to access a person's smartphone to steal personal information, without having the person enter any login credentials.<sup>34</sup>

Other techniques through the internet include hacking, which is the unlawful access to a computer system including computer systems that have large databases with identity-related information.<sup>35</sup> Once the identity thief has access to the computer system, the criminal can obtain identity-related information. There is also skimming, which involves the manipulation of ATMs to obtain the victim's credit card information and access codes.<sup>36</sup>

### **Impact of identity theft**

The impact of identity theft on the victim is multidimensional in nature. First, identity thieves could use the stolen identities of their victims to obtain goods or services by deception, such as to open new financial accounts or take over victims' existing financial accounts;<sup>37</sup> obtain credit cards, loans or state benefits; order goods in the victims' names; establish credit or run up debt; and obtain genuine documents,

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33 United Nations Office on Drugs and Crime (n 8 above) 17.

34 First Bank (Nig) plc email on 'Update on quick response (QR) code scam' of 28 March 2022 sent to all customers of the bank.

35 United Nations Office on Drugs and Crime (n 8 above) 17; N C Wilmington, 'Data company settles for \$1 million after failing to warn customers of identity thief' (*WECT News* 8 November 2022).

36 United Nations Office on Drugs and Crime (n 8 above) 17.

37 UK Finance (n 21 above) 28. In the first, which is application fraud, the identity thief uses stolen or fake documents to open an account in some other person's name and for identification purposes – the identity thief may try to steal documents, such as utility bills and bank statements, to build up useful personal information or, alternatively, use counterfeit documents. The other, which is account takeover, is the impersonation of, or attempt to assume the identity of, an existing account holder that has been previously properly identified. It involves the identity thief fraudulently gathering information on financial institutions' clients and thereafter contacting the card issuer pretending to be the genuine cardholder to get further financial services. In some other circumstances, an identity thief could create a counterfeit card by using information obtained from the magnetic stripe: FPEG (n 11 above) 26; UK Finance (n 21 above) 19–29; S Byers, 'The internet: privacy lost, identities stolen' (2001) 40 *Brandeis Law Journal* 141. In 2018, in the UK, for example, the financial cost of application identity theft in which criminals used stolen identities to open new bank accounts was GBP 29.4 million, while that of account takeover fraud was GBP 17.9 million: Aashind (n 22 above).

such as passports and driving licences in the victims' names.<sup>38</sup> Identity theft thus has significant impact on not only the customer whose identity has been stolen to perpetrate the crime, but also on the financial institutions, the government, private companies detaining large amounts of data and the economy as a whole.<sup>39</sup> The individual customer suffers the immediate financial loss from the money directly taken from their account although the financial loss might be covered by the financial institution in the end if it is found that the customer has not been negligent in any manner in the course of events. In addition to ruined credit, individual customers could suffer the associated indirect cost of having to clean up their names and reputation as well as the emotional and psychological damage in terms of the impact on stress and health levels.<sup>40</sup> There are also indirect costs for businesses which may have to upgrade their prevention systems.

The effect on the financial institutions is linked to both the direct and indirect costs, which are likely to be passed on as costs to the final clients of financial institutions in the form of higher interest rates and larger annual card fees, thereby contributing to diminution of the performance of the financial system.<sup>41</sup> Government could also bear direct financial losses in cases where the identity theft is directed against public bodies, as well as the indirect costs associated with prevention and law enforcement systems.<sup>42</sup> In all, there are also the reputational risks for all stakeholders, including the government whose identification documents made for the citizenry could suffer discredit; the financial system as customers may lose confidence in non-cash means of payment;<sup>43</sup> and the reputational problem for data storage service providers and financial sector providers, which affects the entire market environment and the business model itself.<sup>44</sup>

The spate of identity theft and its devastating effects on individual customers, banks and other financial institutions, other corporate organisations and e-commerce have necessitated the enactment of laws in several countries, including Nigeria and the UK, not only to criminalise the act as a control measure, but also to offer protection for the citizenry, especially bank customers. It is to this we now turn.

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38 Provenza (n 31 above) 320-321; UK Action Fraud (n 11 above).

39 FPEG (n 11 above) 9.

40 Ibid 10.

41 Ibid 9; B F Caminer, 'Credit card fraud: the neglected crime' (1986) 76 *Journal of Criminal Law and Criminology* 747.

42 FPEG (n 11 above) 9.

43 Lynch (n 11 above) 260.

44 FPEG (n 11 above) 10.

## **THE REGULATORY FRAMEWORK AGAINST IDENTITY THEFT IN NIGERIA AND THE UK**

This section is devoted to an examination of the laws that have been enacted in Nigeria and the UK to prosecute identity theft and offer protection to customers of bank and other financial institutions. Our discussion starts with an examination of the relevant laws in Nigeria.

### **Laws against identity theft in Nigeria**

The fulcrum of all the regulatory measures on identity theft in Nigeria is the Constitution of the Federal Republic of Nigeria 1999<sup>45</sup> which, in section 37 thereof, guarantees and protects the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications. Identity theft is, thus, a contravention of the privacy right of an individual. Nigeria is also a signatory to the African Union Convention on Cyber Security and Personal Data Protection 2014 wherein member states are, *inter alia*, enjoined to commit themselves to establishing a legal framework aimed at strengthening fundamental rights and public freedoms, particularly the protection of physical data, and punish any violation of privacy without prejudice to the principle of free flow of personal data.<sup>46</sup>

Other available legislation to prosecute identity theft include the Criminal Code Act 1916, the Advance Fee Fraud and Other Fraud-Related Offences Act 1995 and the Cybercrime (Prohibition, Prevention, etc) Act 2015, which was specifically designed for cyberspace-related offences, including identity theft, the Nigeria Data Protection Regulation 2019 (NDPR) and the Nigeria Data Protection Act 2023 (NDPA). We shall be examining the relevant provisions of these legislation starting with the Criminal Code.

#### *Criminal Code Act 1916*<sup>47</sup>

The Criminal Code has provisions that have tangential bearing on identity theft. These include section 484, which criminalises the act of impersonation of a living or dead person; section 419A, which criminalises the act of obtaining credit by false pretences or other fraud; and section 465, which criminalises the act of forgery or uttering of a document or writing knowing it to be false, and with intent that it

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45 As amended by subsequent legislation thereto.

46 Art 8(1) of the African Union Convention on Cyber Security and Personal Data Protection 2014. Art 8(2) of the Convention further provides that the mechanism so established shall ensure that any form of data processing respects the fundamental freedoms and rights of natural persons, while recognising the prerogatives of the state, the rights of local communities and the purposes for which the businesses were established.

47 Cap C 38 LFN 2004.

may in any way be used or acted upon as genuine, whether in the state or elsewhere, to the prejudice of any person, or with intent that any person may, in the belief that it is genuine, be induced to do or refrain from doing any act, whether in the state or elsewhere.<sup>48</sup>

*Advance Fee Fraud and Other Fraud-Related Offences Act 1995*<sup>49</sup>

The Advance Fee Fraud and Other Fraud-Related Offences Act, in section 1 thereof, similarly criminalises obtaining property by false pretences whether or not the property is obtained or its delivery is induced through the medium of a contract induced by false pretence.<sup>50</sup> Also criminalised is the making of false pretence by any person with the intention of fraudulently inducing any other person in Nigeria, or any other country, to confer a benefit on them or on any other person, by doing or permitting a thing to be done on the understanding that the benefit has been or will be paid for.<sup>51</sup>

The offence of phishing is also captured under the Act as the attempt to commit any of the foregoing offences suffices under section 5 of the Act for conviction once it is successfully proven that the false pretence is contained in a letter or other document and such letter or other document was received by the person to whom the false pretence was directed. Also, notwithstanding anything to the contrary in any other law, every act or thing done or omitted to be done by a person to facilitate the commission of the offence constitutes an attempt. In this regard, 'other document' includes a document transmitted through a fax or telex machine or any other electronic or electrical device, a telegram and a computer printout.

Furthermore, under section 8 of the Act, the conspiracy to commit, or the aiding, abetting or counselling of any other person to commit any of the foregoing offences or the attempt thereof; or being an accessory to the act or offence; or inciting, procuring, or inducing any other person by any means whatsoever to commit the offence, is an

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48 *Mike Amadi v Federal Republic of Nigeria* (2008) 12 SC (Pt III) 55. Under the section, the term 'make a false document or writing' includes altering a genuine document or writing in any material part, either by erasure, obliteration, removal or otherwise, and making any material addition to the body of a genuine document or writing any false date, attestation, seal or other material matter. A person found guilty of the offence of forgery is liable under s 467 to a term of imprisonment for three years.

49 Cap A6 LFN 2004.

50 S 1(1) of the Advance Fee Fraud Act; *Mike Amadi v Federal Republic of Nigeria* (n 50 above); *Odua v Federal Republic of Nigeria* (2002) 5 NWLR (Pt 761) 615.

51 S 1(2) of the Advance Fee Fraud Act. Under s 1(3), the offences listed under s 1(1) and (2) are punishable on conviction with a term of not less than 10 years without the option of a fine.

offence punishable on conviction on the same terms as it is prescribed for the offence under the Act.

*Cybercrimes (Prohibition, Prevention, etc) Act 2015*

A more comprehensive piece of legislation on identity theft is the Cybercrime (Prohibition, Prevention, etc) Act 2015 (the CPPA) which covers most of the cases of identity theft wherein the previous legislation were deficient in view of the advance in technology and the new ways of committing the offence. The objectives of the CPPA are, *inter alia*, to provide an effective and unified legal, regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria, as well as to promote cyber security and the protection of computer systems and networks, electronic communications, data and computer programmes, intellectual property and privacy rights.<sup>52</sup>

Identity theft and impersonation are criminalised specifically by the CPPA in section 22 thereof, which makes it a punishable offence for any person who is engaged in the services of any financial institution, and as a result of their special knowledge and with the intent to defraud, to commit identity theft of its employer, staff, service providers and consultants. Other offences criminalised in this regard include the offence, by any person, of fraudulently or dishonestly making use of the electronic signature, password or any other unique identification feature of any other person;<sup>53</sup> fraudulently impersonating another entity or person, living or dead, with intent to gain advantage for themselves or another person, obtain any property or an interest in any property, cause disadvantage to the entity or person being impersonated or another person, or avoid arrest or prosecution or obstruct, pervert or defeat the course of justice;<sup>54</sup> and making or causing to be made, either directly or indirectly, any false statement as to a material fact in writing, knowing it to be false and with intent that it be relied upon respecting the identity or that of any other person, or their financial condition, or that of any other person, for the purpose of procuring the issuance of a card or other instrument to themselves or another person.<sup>55</sup>

The attempt to commit the offence of identity theft or the aiding, abetting, conspiring, counselling, or procuring another person(s) to commit the offence is also punishable on conviction by the punishment provided for the offence under the Act.<sup>56</sup> Also, insider attack is addressed under section 27(2) of the CPPA such that any employee

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52 S 1 of the CPPA.

53 Ibid s 22(2).

54 Ibid s 22(3).

55 Ibid s 22(4).

56 Ibid s 27(1)(a).

of a financial institution found to have connived with another person, or group of persons to perpetrate fraud using a computer system(s) or network is guilty of an offence.

Furthermore, in furtherance of its stated objectives, the CPPA, in section 28 thereof, *inter alia*, criminalises the importation and fabrication of e-tools for the purpose of committing an offence under the Act and the disclosure, knowingly and without authority, of any password, access code or any other means of gaining access to any program or data held in any computer or network for any unlawful purpose or gain.<sup>57</sup>

Moreover, the act of knowingly or intentionally engaging in computer phishing, engaging in spamming with intent to disrupt the operations of a computer, be it public or private or financial institutions, as well as engaging in the malicious or deliberate spread of viruses or any malware thereby causing damage to critical information in public, private or financial institutions' computers is criminalised under section 32 of the CPPA. Also criminalised under section 30 is the manipulation of ATM machine or point-of-sales (POS) terminals with the intention to defraud.

A wide provision on electronic card-related frauds is available under section 33 of the CPPA. The section, for example, criminalises the use of any access device, including credit, debit, charge, loyalty and other types of financial cards, with intent to defraud, in order to obtain cash, credit, goods or services; the use of a counterfeit access device, an unauthorised access device, or an access device issued to another person resulting in a loss or gain; stealing of an electronic card; the receipt of a card by any person who knows or ought to know it to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder and the retention of the possession of such card with the intent to use, sell, or to traffic it to a person other than the issuer or the cardholder; and the taking of control over a card by any person, with intent to defraud the issuer, a creditor, or any other person as security for a debt. Furthermore, section 34 criminalises dealing in a card of some other person, including the receipt and retaining possession of two or more cards issued in the name or names of different cardholders, which cards the person knows were taken or retained under circumstances which constitute a card theft; section 35 criminalises the purchase or sale of the card of some other person, while section 36 criminalises the use by any person, with intent to defraud, of any device or attachment, emails, or fraudulent website to obtain information or details of a cardholder.

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57 Ibid s 28(3).

A contravention of any of the foregoing offences is punishable on conviction with a fine ranging from NGN500,000 to NGN10 million, or to a term of imprisonment which varies from two years to a maximum of seven years, or to both fine and imprisonment.<sup>58</sup> In deserving cases, the court is empowered to order the restitution of the funds or goods in question as appropriate, or the forfeiture of the assets or goods to which it has been converted to the bank, financial institution, or the customer.<sup>59</sup>

### **Other protective regulatory measures**

#### *Nigeria Data Protection Regulation 2019 and Nigeria Data Protection Act 2023*

In view of the crucial role that data privacy protection plays in the success of e-commerce transactions, the National Information Technology Development Agency (NITDA), established under section 1 of the National Information Technology Development Agency Act 2007 to plan, develop and promote the use of information technology in Nigeria, issued the NDPR in 2019. The Nigeria Data Protection Act 2023 (NDPA) has also been enacted as a substantive law in this regard. The NDPA is generally aimed at, *inter alia*, safeguarding the fundamental rights and freedoms, and the interests of data subjects as guaranteed under the Constitution of the Federal Republic of Nigeria; providing for the regulation of processing of personal data; and promoting data-processing practices that safeguard the security of personal data and privacy of data subjects.<sup>60</sup> The NDPA is applicable to all data controllers or data processors domiciled in, resident in, or operating in Nigeria, or where not so domiciled in, resident in, or

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58 See eg *ibid* ss 13; 22(1) and (4); 27(2); 28(1), (2), (3), (4) and (5); 30(1) and (2); 32(1) and (2); 33(1) and (2); 34; 35 and 35(1).

59 See eg *ibid* ss 27(2), 34 and 35.

60 S 1 of the NDPA. Reg 1.1 of the NDPR. The NDPR was made by the NITDA pursuant to its statutory functions, as contained particularly in s 6(c) of the National Information Technology Development Agency Act 2007, to '[d]evelop guidelines for electronic governance and monitor the use of electronic data interchange and other forms of electronic communication transactions as an alternative to paper-based methods in government, commerce, education, the private and public sectors, labour, and other fields, where the use of electronic communication may improve the exchange of data and information'.

operating in Nigeria, are involved in processing personal data of a data subject in Nigeria, whether by automated means or not.<sup>61</sup>

‘Personal Data’ is defined as any information relating to an individual, who can be identified or is identifiable, directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or one or more factors specific to the physical, physiological, genetic, psychological, cultural, social or economic identity of that individual.<sup>62</sup>

The governing principles of data processing, as spelt out in section 24(1) of the NDPA as well as regulation 2.1 of the NDPR, include the principle of lawfulness, which requires that personal data should generally be collected and processed in accordance with specific, legitimate and lawful purposes consented to by the data subject;<sup>63</sup> the principle of accuracy which requires that personal data be adequate, accurate and without prejudice to the dignity of the human person; the principle of storage limitation, which requires that the personal data be stored only for the period within which it is reasonably needed; and the principle of integrity and confidentiality, which requires that the personal data be secured against all foreseeable hazards and breaches, such as theft, cyber

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61 S 2 of the NDPA. See also reg 1.2 of the NDPR. S 65 of the NDPA defines ‘data controller’ as an individual, private entity, public commission, agency, or any other body who, alone or jointly with others, determines the purposes and means of the processing of personal data. A ‘data processor’, on the other hand, is defined as an individual, private entity, public authority, or any other body, who processes personal data on behalf of or at the direction of a data controller or another data processor.

62 S 65 of the NDPA. Reg 1.3 of the NDPR similarly defines ‘personal data’ as any information relating to an identified or identifiable natural person (‘data subject’). Identifiable natural person, in this context, refers to someone who can be identified, directly or indirectly, in particular by reference to an identifier, such as a name, an identification number, location data, an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. This can be anything from a name, address, a photo, an email address, bank details, posts on social networking websites, medical information, and other unique identifier such as, but not limited to, MAC address, IP address, IMEI number, IMSI number, SIM, personal identifiable information (PII) and others.

63 ‘Data subject’ is defined in s 65 of the NDPA as an individual to whom personal data relates. Similarly in reg 1.3 of the NDPR, ‘data subject’ is defined as any person, who can be identified, directly or indirectly, by reference to an identification number or to one or more factors specific to their physical, physiological, mental, economic, cultural or social identity. ‘Consent’ is defined in s 65 of the NDPA as any freely given, specific, informed and unambiguous indication, whether by a written or oral statement or an affirmative action, of an individual’s agreement to the processing of personal data relating to themselves or to another individual on whose behalf they have the permission to provide such consent.

attack, viral attack, dissemination, manipulations of any kind, damage by rain, fire, or exposure to other natural elements.

The NDPA, as well as the NDPR, imposes a duty of care on every data controller and data processor in respect of data processing, and they are required to demonstrate accountability for any act or omission in respect of the principles contained in the respective legislation.<sup>64</sup> Furthermore, every data controller and data processor is obligated to implement appropriate technical and organisational measures to ensure the security, integrity and confidentiality of personal data in their possession or under their control, including protection against accidental or unlawful destruction, loss, misuse, alteration, unauthorised disclosure, or access.<sup>65</sup>

Under section 48 of the NDPA, any data controller or data processor found to be in breach of the data privacy rights of any data subject may, in addition to any other criminal liability, be ordered, by the Nigeria Data Protection Commission after any necessary investigation, to remedy the violation, pay compensation to a data subject who has suffered injury, loss or harm as a result of a violation, account for the profits realised from the violation, or pay a penalty or remedial fee. Such penalty or remedial fee may be an amount up to the higher maximum amount, which shall be the greater of NGN10 million and 2 per cent of its annual gross revenue in the preceding final year or the standard maximum amount which shall be the greater of NGN2 million and 2 per cent of its annual gross revenue in the preceding final year, taking into consideration, *inter alia*, the nature, gravity and duration of the infringement, the purpose of the processing and types of personal data involved. 'Personal data breach' is defined in section 65 of the NDPA as a breach of security of a data controller or data processor, leading to or likely to lead to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored, or otherwise processed.

*CBN Consumer Protection Framework 2016 and Consumer Protection Regulations 2019*

As part of measures to enhance the confidence of customers of Nigerian banks and other financial institutions in the financial services industry and to promote financial stability, growth and innovation, the CBN, has

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64 S 39(3) of the NDPA; reg 2.1(2) and (3) of the NDPR.

65 S 39(1) of the NDPA. See also reg 2.6 of the NDPR which requires anyone involved in data processing or the control of data to develop security measures to protect data, including protecting systems from hackers, setting up firewalls, storing data securely with access to specific authorised individuals, employing data encryption technologies, developing organisational policy for handling personal data and other sensitive or confidential data; protection of emailing systems; and continuous capacity-building for staff.

issued the Consumer Protection Framework (CPF) and the Consumer Protection Regulation (CPR). A major feature of the CPF as well as the CPR are the provisions relating to protection of consumer/customer assets and privacy.<sup>66</sup>

In this regard, paragraph 2.6 of the CPF requires all banks and financial institutions to establish appropriate measures to guarantee protection of consumer assets and privacy; to, at all times, protect consumers' financial personal information; and to refrain from releasing such information to a third party without the consent of the consumer, except as required by law.<sup>67</sup> Information considered confidential and requiring protection includes contact details, account number and balance, statement of accounts and any other information known to the institution. Furthermore, banks are required to establish guidelines to safeguard consumer assets and privacy against unauthorised access in the area of fraud prevention and data privacy. Specifically, on data protection, all personal information of customers, including those with closed accounts, is to be kept in confidence, and the privacy of customers' data is to be safeguarded as a duty of care. Appropriate data protection measures and staff training programmes are also required to be put in place to prevent unauthorised access, alteration, disclosure, accidental loss or destruction. Consent of the consumers is also required to be obtained in writing before sharing their data with third parties, including a subsidiary or an associated company of the institution.

Similarly, the CBN CPR requires all banks and other financial institutions to ensure the data protection and privacy of consumers.<sup>68</sup> In the first instance, the written consent of consumers is required to be sought and obtained before the collection and processing of personal data of consumers for specific purposes and the option of withdrawal of consent at any time be given.<sup>69</sup> Like the NDPA and the NDPR, these institutions are mandated to abide by certain principles, such as the

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66 'Consumer' is defined in para 1.3 of the CPF as a person or an entity that uses, has used, or is a potential user of financial products or services of a financial institution, while a 'customer' is defined as a person that has a relationship by reason of benefiting from financial products or services offered by a financial institution.

67 Under *ibid* para 2.6.2.2, apart from the express permission of the customer, such information could also be released by the bank or other financial institution as required by the CBN or other regulatory bodies, in compliance with a court order, or in pursuance of public duty/interest. See also *Tournier v National Provincial & Union Bank of England* (1924) 1 KB 461.

68 Consumer is herein defined in reg 10 of the CBN CPR 2019 as a person or an entity that uses, has used, or is a potential user of financial products or services of an institution.

69 *Ibid* reg 5.4.2.

principle of privacy and confidentiality, which requires the protection of the privacy and confidential information of consumer information and assets against unauthorised access, and accountability for acts or omissions in respect thereof;<sup>70</sup> the principle of non-transferability to a third party without express consent of the consumer, except in compliance with a legal obligation and the giving of information whenever the data is exchanged with an authorised third party with details of the exchange;<sup>71</sup> the principle of continued validity, which requires that data processing and privacy procedures are reviewed to ensure that the purpose(s) for which initial consent was granted remain valid;<sup>72</sup> and the principle of accuracy, which requires that data of consumers be kept accurate and updated always.<sup>73</sup>

The CBN CPR has no specific provision for sanctions whenever there is a contravention of the above provisions on data protection and privacy of customers. However, regulation 7.1 of the CPR has a general provision on penalty, which is administrative sanctions on responsible officer(s), including issuance of warning letters and any other statutory sanctions on the officer(s) or institution for persistent breach of regulations.

#### *Know your customer*

The identification of customers by banks and other financial institutions is subject to some legal obligations, including the know your customer (KYC) and the customer due diligence procedure deriving from the anti-money laundering legal obligations. In this regard, the Money Laundering (Prevention and Prohibition) Act 2022, in section 4 thereof, imposes an obligation on financial institutions to verify a customer's identity using reliable, independent source documents, data or information and undertake customer due diligence measures when, *inter alia*, establishing business relationships or carrying out occasional transactions that are wire transfers.

In the same vein, the CPPA imposes similar obligations, with prescribed penalties, on banks and other financial institutions in their dealings with customers. These include the duty to verify the identity of customers carrying out electronic financial transactions by requiring the customers to present documents bearing their names, addresses and other relevant information before issuance of ATM cards, credit cards, debit cards and other related electronic devices.<sup>74</sup>

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70 Ibid reg 5.4.1.

71 Ibid regs 5.4.3 and 5.4.4.

72 Ibid reg 5.4.5.

73 Ibid reg 5.4.6.

74 S 37(1)(a) of the CPPA.

Financial institutions are further required to apply the principle of KYC in the documentation of customers preceding execution of customers' electronic transfer, payment, debit and issuance orders.<sup>75</sup> Furthermore, as a duty to their customers, financial institutions are required to put in place effective counter-fraud measures to safeguard their sensitive information.<sup>76</sup> However, where a security breach occurs, the onus of proof of negligence lies on the customer to prove that the financial institution in question could have done more to safeguard its information integrity.<sup>77</sup>

### *Bank verification number system*

As part of the measures to protect banks and other financial institutions' customers from the menace of identity theft through the promotion of a safe, reliable and efficient payment system, as well as to ensure the effectiveness of the obligation of KYC, the CBN, in collaboration with the Bankers' Committee, deployed and introduced the centralised BVN system in 2014.<sup>78</sup> Under the BVN system, the individual customer is required to enrol by having their biometric and demographic data captured in the BVN central database system and have a unique ID, the BVN, generated for them.<sup>79</sup> This is to ensure a stringent authentication and verification process in the financial system. Thus, as the need arises, banks and other financial institutions would verify the customer by matching the customer's biometric template with what has been captured in the database.<sup>80</sup> Thus, since 2014 for banks and 1 August 2017 for other financial institutions, all customers of these institutions without BVNs linked to their accounts are barred from making any withdrawal therefrom.<sup>81</sup>

Participants in the BVN scheme include the CBN, Nigeria Inter-Bank Settlement System (NIBSS), Deposit Money Banks, other financial institutions as well as bank customers.<sup>82</sup> The NIBSS is specifically mandated to, *inter alia*, ensure seamless operations of the BVN system; maintain the BVN database; ensure adequate security

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75 Ibid s 37(1)(b). Failure of any financial institution to obtain the proper identity of customers before executing customer electronic instructions in whatever way is punishable on conviction with a fine of NGN5 million.

76 Ibid s 19(3).

77 Ibid s 19(3).

78 See para 1.1 of the [CBN Regulatory Framework for BVN Operations and Watch-List for the Nigerian Banking Industry \(2017\)](#) ; [CBN Letter to All Other Financial Institutions, Bank Verification Number \(BVN\) Enrolment for Customers](#), 21 April 2017.

79 Para 1.5(i) of the CBN Regulatory Framework for BVN Operations (n 78 above).

80 Ibid para 1.5(ii).

81 CBN Letter (n 78 above).

82 Para 1.4.1 of the CBN Regulatory Framework for BVN Operations (n 78 above).

of the BVN information; and maintain an online real-time Watch-List Portal.<sup>83</sup> Parties involved in the BVN operations are required to put in place secured hardware, software and encryption of messages transmitted through the BVN network.<sup>84</sup> Also, users of BVN are mandated to establish adequate security procedures to ensure the safety and security of their information and that of their clients, which shall include physical, logical, network and enterprise security.<sup>85</sup>

#### *National identity card scheme*

Again, as a means of curtailing the menace of identity theft in Nigeria, a central identity database is established under section 14 of the National Identity Management Commission Act 2007 (NIMC Act) that could securely and reliably verify and authenticate the identities of individuals registered as prescribed. The National Identity Management Commission (NIMC) established under section 1 of the NIMC Act is charged with the responsibility for creating, managing, maintaining and operating the National Identity Database; carrying out the registration of Nigerian citizens and non-Nigerian citizens who are lawfully and permanently resident in Nigeria; issuing a general multi-purpose identity card to registered persons; and ensuring the preservation, protection, sanctity and security (including cyber security) of any information or data collected, obtained, maintained or stored in respect of the database.<sup>86</sup>

The National Identity Database, generally, contains registered information or data relating to registered persons who have been identified using unique and unambiguous features, such as fingerprints and other biometric information.<sup>87</sup> The information so obtained is thereafter used to issue a multi-purpose identity card with a unique identification number that would provide a medium for the identification and authentication of registered persons including the opening of individual and/or personal bank accounts.<sup>88</sup> In order to ensure the security and integrity of the database, it is a punishable offence, under section 28 of the NIMC Act, for any person to, without lawful authorisation, access data or information contained therein.<sup>89</sup>

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83 Ibid para 1.4.1.2.

84 Ibid para 1.8(i).

85 Ibid para 1.8(iii).

86 S 5 of the NIMC Act 2007.

87 Ibid s 14(1) and (2). 'Biometric information' in relation to a registered individual is defined under *ibid* s 33 as data about such individual's external characteristics, including in particular, the features of an iris or any other part of the eye.

88 Ibid ss 15 and 27(1) of the NIMC Act 2007.

89 Ibid s 28(2) and (3).

## **Laws against identity theft in the UK**

The laws on identity theft in the UK include the Theft Act 1968; Forgery and Counterfeiting Act 1981 (FCA); the Fraud Act 2006; Data Protection Act 2018 (DPA); the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of such Data (UK General Data Protection Regulation (GDPR)); and the Identity Documents Act 2010 (IDA). The relevant provisions on identity theft will now be examined starting with the Theft Act 1968.

### *The Theft Act 1968*

The Theft Act 1968, in section 1 thereof, criminalises all forms of theft whereby a person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.<sup>90</sup> Property, in this context, includes money and all other property, real or personal, including things in action and other intangible property.<sup>91</sup> This, arguably, covers personal/confidential information of victims of identity theft.

### *Forgery and Counterfeiting Act 1981*

The FCA criminalises the act of forgery.<sup>92</sup> This is particularly relevant in relation to debit and credit cards. Under sections 1 and 2 of the FCA, a person is guilty of forgery if they make a false instrument,<sup>93</sup> or a copy thereof, with the intention that they or another person shall use it to induce somebody to accept it as genuine, or as a copy of a genuine instrument, and, by reason of so accepting it, do or not do some act to their own or any other person's prejudice.<sup>94</sup> Also, under sections 3 and

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90 Under s 7 of the Theft Act 1968, a person found guilty of theft is liable on conviction on indictment to imprisonment for a term not exceeding seven years.

91 Ibid s 4.

92 Generally, under s 6 of the FCA, a person that is found guilty is liable on summary conviction to a fine not exceeding the statutory maximum, or to imprisonment for a term not exceeding six months, or to both. A person convicted under ss 1, 2, 3, 4, 5(1) and (3) is liable on conviction on indictment to imprisonment for a term not exceeding 10 years, while an offence under s 5(2) or (4) attracts imprisonment for a term not exceeding two years on conviction on indictment.

93 Under *ibid* s 9, an instrument is false if it, *inter alia*, purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form, or to have been made in the terms in which it is made by a person who did not in fact make it in those terms.

94 Under *ibid* s 8, instrument for the purposes of ss 1–5 includes any document whether of a formal or informal character.

4 respectively of the FCA, it is a punishable offence for any person to use a false instrument, or to use a copy of an instrument which is, and which they know or believe to be, a false instrument, with the intention of inducing somebody to accept it as genuine, or as a copy of a genuine instrument and, by reason of so accepting it, do or not do some act to their own or any other person's prejudice.

Furthermore, section 5 of the FCA *inter alia*, makes it a punishable offence for any person to have in their custody, or under their control, an instrument, including debit cards and credit cards, which is and which they know or believe to be false, with the intention that they or another person shall use it to induce somebody to accept it as genuine and, by reason of so accepting it, do or not do some act to their own or any other person's prejudice.<sup>95</sup>

### *Fraud Act 2006*

The Fraud Act 2006<sup>96</sup> generally makes provision for criminal liability for fraud and obtaining services dishonestly. The Act is significant in the fight against identity theft in the UK because the scope of indictment extends to fraud committed not only by false representation or by abuse of position as it is obtainable under the Nigerian CPPA, but also failure to disclose information.<sup>97</sup> Failure to disclose information amounts to fraud where any person who has the legal duty to disclose fails to do so with the aim of making a gain thereby for themselves or some other person, or causing a loss to another or exposing another to a risk of loss.<sup>98</sup> Fraud by false representation is committed when a person dishonestly makes a false representation whether of fact or law, expressly or impliedly, and intends, by making the representation, to make a gain for themselves or another, or to cause loss to another, or to expose another to a risk of loss.<sup>99</sup> Liability ensues once the

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95 Other instruments to which the section applies, apart from credit cards and debit cards, include money orders, postal orders, UK postage stamps, Inland Revenue stamps, share certificates, cheques and other bills of exchange, travellers' cheques, bankers' drafts, promissory notes, cheque cards, certified copies relating to an entry in a register of births, adoptions, marriages, civil partnerships, conversions or deaths and issued by the Registrar General, a registration officer or a person lawfully authorised to issue certified copies relating to such entries and certificates relating to entries in such register.

96 The Act came into force on 15 January 2007.

97 S 1(1) and (2) of the Fraud Act 2006. Under s 1(3), a person who is guilty of fraud is liable on summary conviction to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory minimum, or to both. A conviction on indictment is imprisonment for a term not exceeding 10 years, or to a fine, or both.

98 *Ibid* 4(1) and (2).

99 *Ibid* s 2(1), (3) and (4).

representation is found to be untrue or misleading and the person making it knows that it is, or might be, untrue or misleading.<sup>100</sup>

Furthermore, the Act criminalised phishing and pharming under section 2(5); possession of articles for use in the course of or in connection with fraud under section 6; and the making or supplying of articles with the knowledge or intention of their being used in the course of or in connection with fraud under section 7 thereof. Article, in this context, includes any program or data held in electronic form.<sup>101</sup>

### *Data Protection Act 2018 and the UK General Data Protection Regulation*

The protection of individuals in relation to the processing of personal data is also a fundamental right in the UK by virtue of article 8 of the Human Rights Act 1998 which guarantees to everyone the right to respect for private and family life, home and correspondence. Similarly, article 16(1) of the Treaty on the Functioning of the European Union (TFEU) guarantees to everyone the right to the protection of personal data concerning themselves. Thus, as a means of enhancing the protection of personal information from the onslaught of identity theft, the DPA and the UK GDPR contain salient provisions geared towards the protection of the fundamental rights of individuals with regard to the processing of personal data.<sup>102</sup> Personal data, in this context, means any information relating to an identified or identifiable living individual.<sup>103</sup> The two pieces of legislation, *inter alia*, require that personal data be processed lawfully and fairly, on the basis of the data subject's consent or another specified basis.<sup>104</sup> The Information Commissioner is particularly vested with the duty of securing an appropriate level of protection for personal data, taking into account

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100 Ibid s 2(2).

101 Ibid s 8.

102 S 2(1) of the DPA; art 1 of the UK GDPR. 'Processing' in relation to information is defined in s 3(1) of the DPA as an operation or set of operations which is performed on information, or on sets of information, such as collection, recording, organisation, structuring or storage; adaptation or alteration; retrieval, consultation or use; disclosure by transmission, dissemination or otherwise making available; alignment or combination; or restriction, erasure or destruction etc.

103 S 3(1) of the DPA 2018. Art 4 of the UK GDPR also has a similar definition except that 'natural person' is used instead of 'living individual'.

104 S 2(1) of the DPA.

the interests of data subjects, controllers and others, as well as matters of general public interest.<sup>105</sup>

Save for cases where the data subject has given explicit consent to the processing of personal data for one or more specified purposes, and except where domestic law prohibits, article 9 of the UK GDPR prohibits the processing of personal data revealing matters such as biometric data for the purpose of uniquely identifying a natural person.<sup>106</sup>

### *Identity Documents Act 2010*

The IDA is another piece of legislation designed to guard against identity theft. The importance of this legislation to identity theft is in relation to the establishment of the identity of an individual, or the verification that a person involved in the transaction is actually the right person. As such, under section 4 of the IDA, it is an offence for any person, with an improper intention, to have in their possession or under their control, an identity document that is false, or that was improperly obtained and which they know, or believe, to have been so improperly obtained, or an identity document that relates to someone else.<sup>107</sup> Improper intention, in this context, includes the intention of using the document for establishing their personal information, or the intention of allowing or inducing another person to use it for establishing, ascertaining or verifying personal information about the person or anyone else.<sup>108</sup> In the same vein, under section 6 of the IDA, it is a punishable offence for any person, without reasonable excuse, to have in their possession, or under their control, an identity document

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105 Ibid s 2(2). The general principles relating to processing of personal data are laid down in art 5(1) of the UK GDPR. These include the principles of lawfulness, fairness and transparency, data minimisation, accuracy, storage limitation, and of integrity and confidentiality.

106 See also ss 10 and 11 of the DPA 2018. The rights of the data subject are spelt out in arts 16, 17, 18, 20, 21 and 22 of the UK GDPR.

107 Under s 4(4) of the IDA, a person found guilty is liable on conviction on indictment to imprisonment for a term not exceeding 10 years or a fine, or both.

108 Under ibid s 8, personal information in relation to an individual includes full name; other names by which the individual is or has previously been known; gender; date and place of birth; external characteristics that are capable of being used for identifying the individual; the address of the principal place of residence in the UK; the address of every other place in the UK or elsewhere where the individual has a place of residence; current residential status; residential statuses previously held, such as nationality or entitlement to remain in the UK; and information about numbers allocated to the individual for identification purposes and about the documents, including stamps or labels to which they relate.

that is false, or that was improperly obtained, or that relates to someone else.<sup>109</sup>

## **TOWARDS ENHANCING THE CURRENT REGULATORY REGIME IN NIGERIA**

Identity theft and financial-related crimes in banks and other financial institutions are, no doubt, a menace that has become widespread across national frontiers and is being addressed from several angles by all relevant stakeholders. In Nigeria and the UK, concerted efforts are being made through legislation as evident in the enactment of purposive laws, including the Nigerian CPPA 2015 and the UK Fraud Act 2006, to regulate evolving cases of identity theft and other related offences that the erstwhile traditional laws, such as the Nigerian Criminal Code did not effectively address.<sup>110</sup> Nevertheless, the following discussion

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109 Under *ibid* s 6(2), a person found guilty is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both, while on summary conviction attracts imprisonment for a term not exceeding the maximum period or a fine not exceeding the statutory maximum or both. Identity documentation for the purposes of ss 4 and 6 includes any document that is or purports to be an immigration document; a UK passport; a passport issued by or on behalf of the authorities of a country or territory outside the UK or by or on behalf of an international organisation; a document that can be used, in some or all circumstances, instead of a passport; a licence to drive a motor vehicle; and a driving licence issued by or on behalf of the authorities of a country or territory outside the UK.

110 The relevant provisions of the Nigerian Criminal Code, s 382, for example, do not cover cases of identity theft as it restricts things capable of being stolen to '[E]very inanimate thing whatever which is the property of any person, and which is movable'. S 383 of the Criminal Code thus defines stealing as the act, by any person, of fraudulently taking anything capable of being stolen, or fraudulently converting to his own use or to the use of any other person anything capable of being stolen. Also, s 419 of the Criminal Code, which makes it an offence for any person to, by false pretence and with intent to defraud, obtain from any other person anything capable of being stolen, or induce any other person to deliver to any person anything capable of being stolen, is deficient in this regard. Given the provisions of ss 1 and 382 of the Criminal Code, although identity theft is a case of false representation, the identity of a person does not come under the category of things capable of being stolen under the Criminal Code. Similarly, under s 2(5) of the Fraud Act 2006, for example, prosecution for the offence of phishing, no longer requires the proof of deception or the obtaining of any property belonging to another hitherto required under s 15 of the Theft Act 1968. The offence is complete once a false representation is submitted in any form to any system or device designed to receive, convey or respond to communications with or without human intervention. Also, in *R v Gold & Schifreen* (1988) 1 AC 1063 (HL), for example, the defendants had hacked a remote computer system, the British Telecom's Prestel Service, by unauthorised use of passwords [*cont on 26*]

highlights possible areas where improvements could be made in the extant law in Nigeria through appropriate amendments thereof.

First, while acknowledging the fact that the Nigerian CPPA has specific provisions to criminalise identity theft, section 382 of the Criminal Code should be amended to cover cases of identity theft by extending property capable of being stolen to things in action and other intangible property as it is available under sections 1 and 4 of the Theft Act of the UK.

Also, section 19(3) of the CPPA, which places the onus of proof of negligence on the customer to prove that the financial institution in question could have done more to safeguard their information integrity, needs to be reviewed. Whenever a security breach occurs, an ordinary customer of a bank or financial institution is not ordinarily expected to know the extent of the security measures that have been put in place by the bank or the financial institution in question to prevent identity theft. The provision of paragraph 2.6.1.5 of the CBN CPF, which mandates financial institutions to promptly refund customers for actual amounts lost due to fraud with interest at the CBN prescribed rate unless it can be proved that loss occurred due to customer's negligence or through fraudulent behaviour, is preferable in this respect.

Nevertheless, it is gratifying to note that, while no provision was hitherto made in the NDPR or the CBN CPR on payment of compensation to victims of personal data breach, the NDPA, in section 48 thereof, has addressed the lacunae. The section has provided for payment of compensation to victims of data privacy breach, as is available under article 82(1) of the UK GDPR wherein the right of any person who has suffered material or non-material damage as a result of an infringement of the Regulation to compensation from the controller or processor for the damage suffered is guaranteed.

Furthermore, although the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is constitutionally guaranteed and protected under

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[n 110 cont] and IDs of other users of the system. The ID and password were immediately cleared by the computer once authorisation for access had been granted. They had been charged under s 1 of the Forgery and Counterfeiting Act 1981 (UK) of uttering a false instrument. The prosecutor had appealed against the decision of the Court of Appeal to quash the conviction. The House of Lords dismissed the appeal and held *inter alia* that it was artificial to treat the creation of a temporary record held by the computer as the making of an instrument as defined in s 8(1) of the Act as the information was held only temporarily and neither recorded nor stored within the Act. According to the court, the language of the Act was not intended to apply to the situation which was shown to exist in the case. The accused persons were thus acquitted because there were no laws to prevent unlawful access to a computer.

section 37 of the Constitution of the Federal Republic of Nigeria 1999,<sup>111</sup> this right is, however, being constantly violated by identity thieves through unauthorised use of personal data of their victims to wreak financial and emotional havoc. There is the need, therefore, to ensure that public and private organisations involved in the collection, processing and storage of data are mandated by law to be continually adequately equipped with advanced security systems for the protection of personal information collected from the citizenry.

Moreover, there is the need for Nigerian policymakers to ensure that, in the implementation of the NDPA, issues relating to protection and processing of personal information of citizens, especially in the banking and financial sector of the economy, are addressed in a balanced manner that does not infringe the right to privacy of the citizens as enshrined in the Constitution. Although the NDPR had hitherto served as a stop-gap regulatory measure for the protection of personal data against identity theft, the enactment of the NDPA to further enhance the protection of personal information and the constitutionally guaranteed right to privacy of the Nigerian citizenry is, indeed, salubrious.<sup>112</sup>

## CONCLUSION

Identity theft has become one of the fastest growing crimes across jurisdictions. The proliferation of online financial transactions, data breaches and malware attacks is continually exposing banks and other financial institutions' customers, as well as consumers of their services, to the risk of identity theft. While the law is, generally, available to prevent identity theft and punish identity thieves, it is important that preventive and deterrent measures are also put in place by all relevant stakeholders to stave off identity theft. In this regard, banks and other financial institutions should be enjoined to continually invest in advanced security systems as well as sophisticated means of authenticating their customers in order to assist customers in securing their identities. There is also the need to raise customers' awareness, especially among the older population who are not that tech-savvy, of the importance of their legal identity documents and the need to protect them from identity thieves. Similarly, the enforcement of the cashless policy of the Federal Government of Nigeria and its adoption by a large majority of the citizenry should be accompanied

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111 See also art 8(1) of the Charter of Fundamental Rights of the European Union and art 16(1) TFEU which respectively provide that everyone has the right to the protection of personal data concerning themselves.

112 See also, Protection of Personal Information Act 2013 (South Africa).

by massive enlightenment campaigns to sensitise bank customers to the importance of their personal and financial information and how to secure them against the onslaught of identity thieves.



# The Identity and Language (Northern Ireland) Act 2022 and compliance with the European Charter on Regional and Minority Languages<sup>†</sup>

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## ABSTRACT

The Identity and Language (Northern Ireland) Act was passed on 6 December 2022. The contents of the resulting Act are based primarily on draft legislation published alongside the 2020 New Decade New Approach Agreement that was introduced before the Northern Ireland Assembly in 2020 as part of an integrated package of legislation. The 2022 Act represents the first provision that has been made to recognise minority languages in Northern Ireland and offers the first opportunity to reflect critically on the commitment to minority language rights in Northern Ireland – and how those commitments reflect the requirements of the European Charter for Regional and Minority Languages. This article argues that the Act fails to satisfy the minimum criteria of the Charter, but nevertheless represents positive progress towards achieving minimum benchmarks in terms of minority language rights and policy which may be supplemented in coming years.

**Keywords:** language rights; Irish language; Ulster Scots; Northern Ireland; minority languages; regional languages.

## INTRODUCTION

There has been a constant demand from minority language speakers in Northern Ireland for recognition, and rights in respect of, their languages. Irish-speaking communities, in particular, have consistently campaigned for recognition of the existence of historically multilingual, and indeed monolingual, Irish-speaking communities in Northern Ireland and have demanded rights to use their language in public spaces and in their interactions with the Northern Irish state.

In this respect, the demands of minority language speakers, and advocates, in Northern Ireland are far from exceptional. Minority language rights legislation has been enacted in other jurisdictions in the United Kingdom (UK) and on the island of Ireland since the

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early 1990s.<sup>1</sup> These laws – notably those in Wales and Scotland – were understood to represent a fulfilment of the minimum content requirements<sup>2</sup> outlined by the Committee of Experts (COMEX) of the European Charter for Regional or Minority Languages (ECRML) to which the UK became a signatory in 2000. In this respect, Northern Ireland’s position on language rights has long been anomalous – representing a noted failure on the part of the UK to implement the requirements of the ECRML.

Indeed, evaluations by the COMEX of the UK’s compliance with the ECRML in Northern Ireland have repeatedly remarked on the failure of the UK as a party to the Charter to implement the ECRML’s requirements in Northern Ireland in respect of Ulster Scots and Irish. In its evaluations of the UK’s implementation of the ECRML, the COMEX has noted the inconsistent approach to minority language protection as between the various jurisdictions within the UK<sup>3</sup> and the failure to provide a comprehensive language policy in Northern Ireland.<sup>4</sup> The COMEX report of 2010 appears to identify a particular turning point in that year when, following the St Andrews Agreement, ‘languages seem to have become hostages to party politics’ and the positive developments which were previously reported in protecting and promoting Irish in Northern Ireland were ‘put on hold’ or even reduced.<sup>5</sup> Indeed, in subsequent reports the COMEX noted that there continued to be a lack of political support for minority rights in Northern Ireland and that there continued to be ‘unjustified restrictions’ on the use of Irish as well as a general failure on the part of the UK to engage with the work of the Committee.<sup>6</sup>

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1 The Welsh Language Act 1993, and the subsequent Welsh Language (Wales) Measure in 2011, as well as Scotland’s Gaelic Language (Scotland) Act 2005 and the Republic of Ireland’s Official Languages Act 2003 as amended in 2021.

2 See the section headed ‘The Requirements of the ECRML’ below.

3 ‘Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts’ evaluation report on the United Kingdom and the Isle of Man’ (24 March 2004) 57.

4 ‘Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts’ second evaluation report on the United Kingdom and the Isle of Man’ (14 March 2007) 62.

5 ‘Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts’ third evaluation report on the United Kingdom and the Isle of Man’ (21 April 2010) 58.

6 ‘Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts’ fourth evaluation report on the United Kingdom and the Isle of Man’ (15 January 2014) 36.

In its 2021 evaluation of the UK's implementation of the ECRML, the COMEX repeated its longstanding concern that laws still in effect in Northern Ireland were discriminatory in respect of linguistic minorities (in this respect the COMEX specifically cited the Administration of Justice (Language) Act (Ireland) 1737) and noted the repeated failure of the UK to give effect to the commitments included in the Charter – and as part of its own domestic law in the form of the New Decade New Approach Agreement (NDNA), the Northern Ireland Act 1998 and, previously, under the St Andrews Agreement.

In its 2021 evaluation, the COMEX particularly noted that the measures proposed by the NDNA (some of which have subsequently been given effect by the 2022 Act) were insufficient – in particular in respect of the Irish language. The COMEX noted that the measures set out in the 2020 NDNA 'while welcome, do not offer the comprehensive approach a law [in the form of an Irish Language Act] and strategy would provide'<sup>7</sup> and made specific recommendations as to the steps necessary to fully fulfil the obligations imposed by the Charter in addition to those proposed under the NDNA.<sup>8</sup> The next ECRML report was undertaken in July of 2023. It was against that background that the Identity and Language (Northern Ireland) Bill was introduced in the House of Lords on 25 May 2022.

The contents of the Identity and Language (Northern Ireland) Act, which has now been passed, are based primarily on draft legislation published alongside the NDNA in 2020<sup>9</sup> and which was to be introduced before the Northern Ireland Assembly in 2020 as part of the fulfilment of the agreement reached in the NDNA. However, the draft legislation which was attached to the NDNA in 2020 took the form of a specific Irish Language Act with further general legislative provisions for minority language rights more broadly. Ultimately, that legislative package was never introduced, and, in June 2021, the UK Government gave a commitment that if the Irish language legislation promised under the NDNA was not introduced before the Northern

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7 'Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Experts' fifth evaluation report on the United Kingdom and the Isle of Man' (22 March 2021) 7.

8 Ibid 6–8 and 13–14.

9 The Act's passage thus proceeded in a 'backwards' fashion – starting in the House of Lords and then moving to the House of Commons. The date for the Second Reading (general debate).

Ireland Assembly by September 2021, then the legislation would be introduced instead in Westminster by October of that year.<sup>10</sup>

After a failure to meet this self-imposed deadline, and under popular pressure from community groups and civil society in Northern Ireland, the UK Government reiterated its commitment to bring Irish language legislation to Parliament in 2022 but declined to set a timetable to do so. When the Northern Ireland Assembly elections in May 2022 resulted in deadlock, the Identity and Language (Northern Ireland) Bill was finally introduced before the House of Lords on 25 May 2022 and was passed on 6 December 2022.

The 2022 Act replicates the main content and broad objectives of the legislation proposed under the NDNA, making provision for Irish language rights, for the creation of an Ulster Scots/Ulster British Commissioner and for the establishment of the Office of Identity and Cultural Expression. In this respect, the Act has been greeted as a long overdue, and welcome, development in terms of language rights – and Irish language rights in particular. Nevertheless, the Act does not meet the thresholds envisioned by the COMEX for compliance with the ECRML.<sup>11</sup> Indeed, what is notable in respect of the 2022 Act, when viewed as a whole, is that it more strongly resembles a language policy than a piece of language rights legislation – affording minority language speakers few specific rights and adopting a light-touch regulatory approach characterised by discretionary action and ambiguously defined standards.

## **THE REQUIREMENTS OF THE ECRML**

The ECRML is the European Convention for the protection and promotion of historical regional or minority languages used by traditional minorities. The Charter provides objectives and principles to be applied by states in providing for and engaging with regional and minority languages within their jurisdiction. These objectives and

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- 10 Pursuant to the Good Friday Agreement, the UK Parliament retains the power to (and is obliged to) legislate in areas devolved to the Northern Ireland Assembly where such intervention is required to meet treaty-based obligations. In this case the obligations imposed by the European Charter of Regional and Minority Languages. In 2021, the COMEX on the Charter urged the adoption of ‘comprehensive law and a strategy on the promotion of Irish in Northern Ireland’ as a recommendation for immediate action.
- 11 Indeed, in its report on the UK’s compliance with the ERCML, the COMEX noted that even in the cases of Wales and Scotland, which make extensive provision for minority language use in interactions between citizens and the state, and in institutional settings, there remained shortcomings: COMEX, ‘Fifth report of the Committee of Experts in Respect of the United Kingdom’ 1380th meeting (1 July 2020).

principles, which are enumerated in article 7, include the need on the part of states to:

- (a) recognise that regional and minority languages are a source of cultural wealth,
- (b) respect the geographic areas associated with particular languages to ensure administrative divisions do not constitute an obstacle to the languages,
- (c) recognise the need for resolute action to promote regional and minority languages,
- (e) facilitate or encourage the use of regional and minority languages in speech and writing and in public and private life,
- (f) maintain and develop links between groups using the same or similar regional and minority languages and establishing cultural relations with other regional and minority language groups,
- (g) provide appropriate forms and means for the teaching and study of regional and minority languages at all appropriate stages,
- (h) provide facilities enabling non-speakers of regional and minority languages living in an area where it is used to learn the relevant language,
- (i) promote study and research on regional and minority languages at universities and equivalent institutions, and
- (j) promote appropriate transnational exchanges for regional and minority languages which are used in other states.

The Charter also commits member states to undertaking to,

- (a) eliminate unjustified distinctions, exclusions, restrictions or preferences respecting the use of regional and minority languages intended to discourage or endanger the maintenance or development of those languages.
- (b) promote, by appropriate measures, mutual understanding between all linguistic groups within the Member State,
- (c) take into consideration the needs and wishes expressed by the groups using regional and minority languages,
- (d) apply, *mutatis mutandis*, the principles outlined in Article 1 to non-territorial languages but with such provision to be determined in a flexible manner and bearing in mind the needs and wishes, and respecting the traditions and characteristics, of the groups which use the languages concerned.

In addition, the Charter provides certain minimum requirements in respect of the provision of education (in article 8), judicial authorities (article 9), administrative and public services (article 10), media

(article 11), cultural activities and facilities (article 12), economic and social life (article 13), and trans-frontier exchanges (article 14) within the territories where regional and minority languages are used, or where the number of residents using the regional and minority languages justifies the provision of that service and according to the situation of each of the languages involved. This framing of the minimum requirements of the Charter is altered under article 10 in respect of administrative and public services which are subject to a reduced obligation that regional and minority languages be facilitated ‘as far as this is reasonably possible’ and in article 11 which acknowledges that the obligations under that article are imposed only to the extent that public authorities are competent and have power or play a role in the field of media, ‘and respecting the principle of the independence and autonomy of the media’.

### **THE RECOGNITION OF MINORITY LANGUAGES AND COMMUNITY IDENTITY**

The most fundamental shift which the 2022 Act has occasioned is in the institutional treatment of the Irish language. The 2022 Act secures official recognition of Irish through section 2 which inserts part 7B into the Northern Ireland Act 1998 and, in section 78J, ‘provide[s] official recognition of the status of the Irish language in Northern Ireland’. Despite this, the Act does not make Irish an official language, rather it is a legally recognised one.

Part 7B also provides for the appointment of an Irish Language Commissioner,<sup>12</sup> the development of standards of best practice relating to the use of Irish by public authorities,<sup>13</sup> and details obligations which will require public authorities to have due regard to such standards.<sup>14</sup> In addition, section 4 of the Act repeals the Administration of Justice (Language) Act (Ireland) 1737 which, until the point of the commencement of the 2022 Act prohibited the use of any language other than English in court proceedings and had been consistently relied upon, including as recently as 2010, in proceedings before the Northern Irish courts.<sup>15</sup>

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12 In 2022 Act, s 78K.

13 In *ibid* s 78M.

14 In *ibid* s 78O.

15 *Re Caoimhín Mac Giolla Catháin’s Application* [2010] NICA24. For a discussion of the associated litigation in Northern Ireland concerning Irish language rights see, Timothy Jacob Owens, ‘Litigating Irish language rights in the United Kingdom’ (2021) Public Law 747.

In addition, the Act provides, in section 3, for the insertion of part 7C into the Northern Ireland Act 1998 and for the appointment of a Commissioner for Ulster Scots and the Ulster British Tradition.<sup>16</sup> The Commissioner is tasked with promoting awareness of Ulster Scots, publishing guidance for public authorities on developing and encouraging Ulster Scots, and requiring public authorities to have due regard to such guidelines.

Two issues are immediately apparent on examining parts 7A and 7B. The first is the conflation of linguistic and community or political identities, and the second is the ambiguous status of both Irish and Ulster Scots under the Act.

### **Conflation of linguistic and community identities**

The immediately apparent issue in examining parts 7A and 7B is the divergence as between the position of Northern Ireland's two minority languages. In particular, provisions relating to Irish in Part 7A are defined by reference to the language writ large, while the provisions relating to Ulster Scots in part 7B specifically link the language to a particular national, and perhaps also political, tradition and culture. As a result, although Irish is not explicitly linked to a distinct political or national tradition in part 7A, it seems (implicitly) to stand in contradistinction to Ulster Scots and the Ulster British Tradition and therefore is implicitly aligned with a nationalist and, presumably, 'Irish' tradition. This framing, while perhaps unintentional, is deeply unhelpful in seeking to depoliticise minority language use – not least in circumstances where Irish has been deliberately politicised in debates concerning language rights in Northern Ireland.<sup>17</sup>

In this respect, the objectives and principles of the ECRML outlined in article 7 specifically note that parties to the Charter undertake to eliminate 'unjustified distinction, exclusion, restriction or preferences relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of it'.<sup>18</sup> Framing Ulster Scots as linked to an Ulster British tradition in an apparently exclusive manner and, by implication, associating Irish with the alternative traditions within Northern Ireland is arguably subversive of this objective.

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16 In s 78R of the 2022 Act.

17 For an overview of the context for this politicisation see, Róisín Á Costello, "To be British, Irish, or both": understanding language rights as a tool for reconciliation in Northern Ireland' (2022) 33 *Irish Studies in International Affairs* 172, 175-179.

18 Art 7(2) ECRML.

To some extent the establishment of the Office of Identity and Cultural Expression,<sup>19</sup> which will create and oversee the implementation of the ‘national and cultural identity principles’, may represent an attempt to avert the kind of identity-based bright-lining otherwise implied by the grouping of Ulster Scots with the Ulster British tradition.<sup>20</sup> The principles, to which public authorities<sup>21</sup> in Northern Ireland are required to have ‘due regard’ pursuant to the Act,<sup>22</sup> establish that everyone in Northern Ireland is free to:

- (i) choose, affirm, maintain and develop their national and cultural identity and<sup>23</sup>
- (ii) express and celebrate that identity in a manner than takes account of the sensitivities of those with different national and cultural identities and respects the rule of law,<sup>24</sup> and
- (iii) that public authorities should encourage and promote reconciliation, tolerance and meaningful dialogue between those with different national and cultural identities with a view to promoting parity of esteem, mutual respect and understanding, and cooperation.<sup>25</sup>

The aims of the Office of Identity and Cultural Expression as outlined in section 78G are the promotion of cultural pluralism and of respect for diversity, the promotion of social cohesion and furthering reconciliation between different national and cultural identities, and increasing the capacity and resilience of Northern Irish citizens to address issues regarding national and cultural identity by supporting and promoting the celebration of the cultural and linguistic heritage of those living in Northern Ireland. In seeking to achieve these aims the Office is required to promote awareness of the national and cultural identity principles, monitor and promote compliance with those principles and report to the Northern Irish Assembly regarding compliance with the duties imposed on public authorities.<sup>26</sup>

However, the potential of these principles to ameliorate the identarian divisions which are implicit in section 7B is questionable

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19 2022 Act, s 78G.

20 *Ibid* s 78F.

21 On the meaning of public authority see sch 3 to the Public Services Ombudsman Act (Northern Ireland) 2016. Strangely, the definition of public authority exempts the Office of Identity and Cultural Expression from the meaning of public authority, thus, apparently, exempting it from the principles which it is obliged to enforce: see s 78F(4)(b) of the 2022 Act.

22 2022 Act, s 78F.

23 *Ibid* s 78F(a)(i).

24 *Ibid* s 78G(a)(ii).

25 *Ibid* s 78F(b).

26 The obligation is imposed by *ibid* s 78I(2).

given the ambiguity surrounding the extent to which the principles are enforceable in contexts where the expression or celebration of a particular identity fails to take ‘account of the sensitivities of those with different national and cultural identities’. It was suggested by the Committee on the Administration of Justice that the language of this section should impose a limitation on the basis of human rights standards, rather than adopting such an ambiguous threshold permitting restrictions of free expression on the basis of the subjective and perhaps prejudicial or intolerant beliefs.<sup>27</sup> The Committee’s recommendation was for the insertion of language which would require that national and cultural identity should be expressed ‘in a manner compatible with the rights of others’, however, this wording was not adopted.<sup>28</sup>

More fundamental, and more concerning, is that section 78F of part 7A defines ‘national and cultural identity’ by reference to ‘a person’s religious belief, political opinion or racial group’. While these indicators are employed in existing equality legislation in Northern Ireland and are not objectionable *per se*, their use in the section, coupled with the failure to note ‘language’ as a marker of national and cultural identity, mean that linguistic identity is apparently excluded from consideration under this portion of the 2022 Act unless it co-exists with a religious or political identity.

The apparent result is that the protection is of Unionist or Catholic Irish speakers separately, but not of Irish speakers irrespective of background – reinforcing rather than minimising the divisions between distinct communities. The differential provision for Irish and Ulster Scots and the manner in which they are linked with particular traditions is thus problematic in terms of article 7 ECRML and its objective of promoting mutual understanding between all linguistic groups.

Perhaps more unusually, the approach would appear to be at odds with that taken in article 14 of the Human Rights Act 1998 which explicitly includes language as a ground of non-discrimination. The issue here is not so much that section 78F of the Act may be fundamentally ineffective – the same formulation of words has (as noted) been used elsewhere in equality-related legislation. Rather, the concern is that, by omitting language as a ground of discrimination the Act effectively reinforces a position which requires a person to identify themselves as a *Protestant* Irish speaker or a *Unionist* user of Ulster Scots, or a *BAME* (black, Asian, and minority ethnic) Irish language

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27 See Committee on the Administration of Justice, ‘Briefing Note on Identity and Language (Northern Ireland) Bill (May 2022)’.

28 Ibid [30].

user in order to be successful under the section. This would seem to run contrary to the objectives of article 7 ECRML because it effectively requires individuals to show they have been subject to discrimination on an additional ground of sensitivity and does not permit a claim that linguistic identity alone might ground a legitimate basis for objection under the section.

### **Ambiguity surrounding the status of Irish and Ulster Scots**

The second issue raised by the text of the 2022 Act is that neither Ulster Scots nor Irish is, in fact, granted a specific status. The repeal of the 1737 Act now ensures that neither Ulster Scots nor Irish are, *de jure*, unrecognised (or unrecognisable) languages, and the 2022 Act recognises both languages as having *de facto* standing as recognised languages through the standards to be enforced by their respective Commissioners. However, neither language is specifically stated to be an official language, but rather is implicitly positioned as such. While this constructive ambiguity perhaps avoids debates about the potential displacement of English as the official, and sole official, language of the jurisdiction, it also leaves both minority languages in a legally undefined position. Moreover, it is unusual given the models for recognition adopted in other jurisdictions in the UK and on the island of Ireland.

The model for recognition in other parts of the UK and on the island of Ireland can be generally characterised as taking one of three broad forms. The first, modelled by the Republic of Ireland, involves the recognition of a minority language (Irish) on a constitutional basis as *de jure* the first and one of the two official languages of the state, with a status practically equal to, but symbolically higher than, English even while the Irish remains *de facto* a minority language. In this model, the constitutional protection of the language is achieved largely through legislation, with a strong but generally supplementary role for constitutional judicial review. This model could be said to be the ‘strongest’ in terms of *de jure* protections – offering constitutional recognition as well as legislative protection (which in the case of the Republic of Ireland are layered on the protections provided by European Union membership). However, in placing the *de facto* minority language on an official footing this approach does have the effect of removing the language from the scope of the protections afforded by the ECRML which applies to languages that are not official languages but are traditionally used within a given territory of a state

by nationals of the state who form a group numerically smaller than the rest of the state's population.<sup>29</sup>

The second model, adopted in Wales, involves the protection of minority language rights through primary legislation. The Welsh Language Act 1993 and the Welsh Language (Wales) Measure 2011 provide that Welsh is recognised as an official language equal in status to English. Significantly, the legislation recognises the right of Welsh speakers to live their lives through Welsh and to be accommodated in that aim.<sup>30</sup> While the Welsh model lacks a constitutional basis as in the Republic of Ireland, the *de facto* operation of the legislation, and the robust nature of the *de jure* standards it imposes – requiring accommodation of a life lived through Welsh (rather than the tolerance of Welsh speakers, or providing such a right only in those areas which are predominantly Welsh speaking) – mean this model is, arguably, the most effective in terms of minority language protection in practice.

Gaelic in Scotland is also afforded official status and is entitled to equal respect under the Gaelic Language (Scotland) Act 2005. However, the legislation in that jurisdiction employs a system based on periodic language plans which provide broad aims in terms of the promotion of Gaelic and the provision of advice to individuals and public bodies on the language's use rather than imposing duties and affording rights to language users – as is the case in Wales or the Republic of Ireland. Similar models based around periodic language plans were previously employed in both Wales and the Republic of Ireland but were found to be less effective than binding, statutory enforcement measures. In this respect, the Scottish model arguably represents the weakest means of minority language rights protection in both the *de jure* and *de facto* terms, tending towards a policy-based rather than a legal framework.

Northern Ireland is not in a position, as a result of reasons of both politics and sovereignty, to adopt a model underpinned by a constitutional guarantee as in the Republic of Ireland. Indeed, the text of the 2022 Act indicates, if not the impossibility, then certainly the political unfeasibility of a model which elevates Irish to an official status co-equal with English in circumstances where the language has been politicised and co-exists with the jurisdiction's other minority language of Ulster Scots.

In the circumstances, the 2022 Act thus grants the Irish language, and to a lesser extent Ulster Scots, a politically feasible level of

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29 Irish remained the language of the majority of the population on the island of Ireland, by some estimates, until the mid-1800s and was definitively the dominant language in use among the population until the late 1700s. See Costello (n 17 above) 175–176.

30 Welsh Language (Wales) Measure 2011, pt 1.

recognition while noting that that recognition does not affect the status of the English language<sup>31</sup> and remaining silent as to the positions of Ulster Scots, Irish and English in relationship with each other in the new order. The presumption in the circumstances is that Ulster Scots and Irish, while recognised, continue to occupy a secondary position and are not to be accommodated to the extent that, for example, Welsh is under the legislation in that jurisdiction. This is certainly the position in practice given the absence of specific rights for individual speakers under the 2022 Act and the focus, instead, on broad policy provisions.

What is particularly interesting in examining these models, and their potential application to Northern Ireland, is the COMEX's recommendation in its 2021 evaluation that the optimal means of protecting the Irish language in particular and fulfilling the UK's obligations under the ECRML would be the adoption of specific Irish language rights legislation (likely similar to the Welsh model) which incorporated public authority obligations but also afforded specific rights to individuals, *and* that such an Act should be introduced alongside an Irish language strategy which would function in a manner similar to the Scottish language plans.<sup>32</sup> The ideal model for minority rights protection in Northern Ireland, certainly as envisioned by the COMEX, is not the model adopted but one which is a mix of the second and third models above as part of a protective infrastructure which encompasses both 'soft' policy-based measures and 'harder' legal standards in the form of individual rights.

## **ADMINISTRATIVE PROVISION FOR THE PROMOTION OF MINORITY LANGUAGES**

One of the primary changes introduced by the 2022 Act is the appointment of an Irish Language Commissioner, who will oversee the development of, and compliance of public authorities with, standards of best practice relating to the use of Irish – in particular by requiring public authorities to have 'due regard' to the standards.<sup>33</sup> Section 78J of the 2022 Act provides that an Irish Language Commissioner will be appointed by the First Minister and deputy First Minister, and will hold office for a maximum of two consecutive five-year terms.<sup>34</sup>

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31 2022 Act, s 78J.

32 Council of Europe 'Evaluation by the Committee of Experts of the Implementation of the Recommendations for Immediate Action contained in the Committee of Expert's fifth evaluation report on the United Kingdom and Isle of Man' (2021) 7–8.

33 2022 Act, s 78J.

34 *Ibid* sch 9B, s 2(2).

Under the legislation, the Commissioner will oversee the development and implementation of ‘best practices’ regarding the use of the Irish language by public authorities. Beyond this, the functions of the Commissioner outlined in section 78L are slightly less clear, not least given that the section itself variously refers to ‘aims’,<sup>35</sup> duties<sup>36</sup> and discretionary functions.

Under section 78L the aim of the Commissioner is to enhance and protect the use of Irish by public authorities in the provision of services to the public or a section of the public. In doing so the section notes that the Commissioner must:

- (a) prepare and public standards of best practice,
- (b) monitor and promote compliance with those standards, and
- (c) investigate complaints.

This would appear to indicate the duties of the Commissioner in service of the aim described. Beyond this, section 78L permits the Commissioner to provide advice, support and guidance to public authorities on the use of Irish and the standards of best practice. This does appear to refer to functions of the Commissioner, though the discretionary nature of the framing leaves open the question of whether it is for the Commissioner to actively advise authorities or whether such advices will be given only where they are sought.

The primary function of the Commissioner then is the preparation and oversight of the implementation of the best practice standards<sup>37</sup> which must be reduced to writing,<sup>38</sup> and submitted to the First Minister and deputy First Minister who may, but are not obliged to, approve them.<sup>39</sup> Significantly, the standards may make different provision for different public authorities such that authorities in predominantly Irish-speaking areas may adopt more strongly bilingual (or trilingual) policies within their own areas.<sup>40</sup> The standards are to be reviewed at five-year intervals<sup>41</sup> or at such other time as the Commissioner considers necessary or desirable.<sup>42</sup> In this respect, the structure of best practice implementation and review under the 2022 Act retains some features of the language strategy or plan system previously in place in the Republic of Ireland and still in place in Scotland. However, it falls short of the precise provision for

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35 See *ibid* s 78L.

36 See *ibid* s 78L(2).

37 See *ibid* s 78L(4).

38 *Ibid* s 78M.

39 *Ibid* s 78M(2).

40 *Ibid* s 78M(5)(B).

41 *Ibid* s 78N.

42 *Ibid*.

a regional, integrated language strategy which the ECRML notes was previously promised under the NDNA.<sup>43</sup>

The position of Ulster Scots under section 78R does not replicate the requirements applied to Irish. Though there is an Ulster Scots and Ulster British Commissioner, they are tasked only with promoting awareness of services provided in Ulster Scots,<sup>44</sup> providing and publishing advices and guidance for public authorities,<sup>45</sup> and handling complaints where a public authority has not had due regard to such guidance.<sup>46</sup> While the compliance threshold for both languages is thus the same, imposing an obligation to have ‘due regard’, the aims and objectives of both Commissioners as regards their specific languages are distinct.

Crucially, the Act does not provide speakers of either minority language a right to interact with the state or its agents through their chosen language nor does it apply a uniform standard for the use of the relevant minority language by all public authorities. While the best practices (in the case of Irish) and guidelines (in the case of Ulster Scots) may provide for an ‘active offer model’ in which individuals are actively offered the opportunity to use their choice of language when interacting with public authorities, it may also be the case that the broadly drawn functions and powers under the legislation result in equally broad standards and guidance documents which, under the auspices of ‘due regard’, effect little change in real terms.

The requirement to have due regard in UK law requires public authorities to consider specific matters, generally provided in legislation or policy. As such, it is not a duty to achieve a specific result but to reflect on, and include in, a consideration of the relevant matters in the authority’s reasoning in the substance of the ultimate decision.<sup>47</sup> There is no indication of the practical mechanisms by which due regard will be measured under the Act, namely, through the use of policy analysis or impact assessments, nor indeed is there specific reference, within the portions of the Act dealing with the Irish language, to the ECRML – though reference is made to the ECRML in respect of Ulster Scots in section 78S(a). In this respect, the extent to which ‘due regard’ will produce practical changes is somewhat questionable.

The absence of a statutory appeals mechanism to challenge the actions of public authorities where they fail to comply with the standards established by the Commissioner is also of concern as it

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43 NDNA, annex E, s 5.21.3 and see Council of Europe (n 32 above) 6.

44 2022 Act, s 78S.

45 Ibid s 78S(2).

46 Ibid s 78T.

47 See the analysis of the concept provided by Colton J in *In re a Decision of the Department of Health* [2022] NIKB 21, [102].

means that any challenge will presumably be based on an application for judicial review – a process which will focus the law’s attention not on the substance of the minority language rights standards themselves but on the procedural processes or steps which are alleged to have been breached. As is discussed further below, the barriers to access in terms of mounting such challenges have been raised as an issue of concern by stakeholders.

The only review mechanism which is provided by the 2022 Act is by way of a complaint to the relevant Commissioner.<sup>48</sup> On receiving a valid complaint the Commissioner must investigate the complaint or provide the complainant with a written statement of the Commissioner’s reasons for not launching an investigation.<sup>49</sup> Where the Commissioner pursues an investigation into a complaint they must notify the public authority in writing of the complaint, afford the authority a reasonable opportunity to comment on the matters raised, and furnish both parties with a report setting out the Commission’s findings.<sup>50</sup>

There is some ambiguity as to whether a failure on the part of a public authority which may be complained of will be occasioned by a failure to make a plan which has due regard to the standards issued by the Commissioner or a failure to fulfil the requirements of the best practices-based operational plan the authority has drafted for itself. If the former is the case, the threshold of due regard is sufficiently ambiguous that the complaints mechanism may be ineffective. If the latter is the case, the risk is that a strategy of minimal provision will develop in order to evade complaints – not least in circumstances where the standards are self-imposed. In particular, it is unclear the extent to which complaints mechanisms under the Act will ensure or bolster compliance with article 10 ECRML which seeks to actively expand the range and offering of public services by administrative authorities in minority languages. The thresholds and objectives outlined in article 10 require staffing and recruitment to ensure users of minority languages can submit oral and written applications and other documents to public authorities and receive replies in those languages,<sup>51</sup> to ensure communications with the public employ minority languages<sup>52</sup> and to allow the use of regional or minority language family names.<sup>53</sup>

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48 In respect of Irish, see s 78P, and, in respect of Ulster Scots, see s 78T of the 2022 Act.

49 See *ibid* s 78P(2) and s 78T(2).

50 See *ibid* s 78P and s 78T.

51 ECRML, art (10)(a)(i) .

52 *Ibid* art 10 and, in respect of areas where the number of minority speakers justify such steps, see the higher requirements imposed by art 10(2).

53 *Ibid* art 10(5).

The penalties imposed under the Act where a public authority fails to fulfil its obligations are also minimal. The primary penalty is the laying of a report before the Assembly detailing the findings of the investigation which concluded there had been a failure, and a discretionary power to make recommendations as to how the failure may be remedied.<sup>54</sup> Unlike in other jurisdictions, no financial penalty, monitoring, or further review of compliance with recommendations is outlined or required by the Act's current text. In some respects, the enforcement structure of the Act is thus the same as the ECRML which is premised on a system of periodic reporting and final reports. However, the enforcement structure does not represent a system which is committed to the kind of resolute action in respect of the promotion of minority languages described by article 7 ECRML as one of the Charter's primary objectives.

This political approval which is inbuilt in the Act also threatens the independence of the Commissioners. Under the 2022 Act both Commissioners are appointed by the First and deputy First Minister for a term of five years which may be renewed once.<sup>55</sup> The Commissioners can be removed prior to the end of this term only with the agreement of the First and deputy First Minister and by means of a notice in writing for one of the stated causes provided in the legislation.<sup>56</sup> While this creates some risk that a lack of political agreement could lead to an ineffective Commissioner remaining in office, this is balanced against the relatively short term of office.

The term of office itself has been repeatedly flagged by language commissioners at an international level as being a crucial component of their independence, with the International Association of Language Commissioners determining a term of 10 years to be the preferable period in office, and other jurisdictions in the UK and on the island of Ireland providing for terms of six, seven and eight years respectively.<sup>57</sup> In the case of Northern Ireland, the term proposed is thus short when compared with neighbouring jurisdictions – and particularly so in circumstances where there is a real possibility that governmental breakdown may coincide with the period of reappointment thus leaving no Commissioner in place. This potential is exacerbated further by the

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54 See 2022 Act, s 78P(4) and s 78T(4).

55 Sch 2 inserting sch 9B into the Northern Ireland Act 1998, s 2(2); sch 3 inserting sch 9C into the Northern Ireland Act 1998, s 2(2).

56 2022 Act, sch 9B, s 2(4); sch 9C, s 2(4).

57 The Irish Coimisinéir Teanga holds office for a term of six years, renewable once (Official Languages Act 2003, sch 2, s 20(1)). In Wales, the Commissioner holds office for a term of seven years (see Welsh Language (Wales) Act 2011, sch 1, s 6).

appointment, in the case of both languages, of only one Commissioner such that no panel of Commissioners is in place and where the term in office of one Commissioner ends no Commissioner will be in office until and unless another is appointed.

While the ECRML does not provide for minimum or indeed recommended terms for language Commissioners, the divergence of the Act from internationally recognised best practice is challenging to justify, not least given the periodic breakdowns of government in Northern Ireland which, if they coincided with the end of a Commissioner's term in office, might leave the offices unstaffed.

## **EDUCATION AND MINORITY LANGUAGES**

Article 8 ECRML provides for a bifurcated process as part of which there are significant obligations for educational provision in areas or territories where the regional or minority language is traditionally used and lesser obligations outside that area.

Within territories where the regional or minority language is traditionally used, parties to the Charter are obliged to make pre-school or a substantial part of pre-school education available in the relevant regional or minority languages, to favour and encourage measures which would provide for such provision, to make the same provisions in respect of primary and secondary education or to provide for the teaching of relevant regional/minority language as an 'integral part' of the curriculum. The Charter further commits parties to provision of technical and vocational education, adult, and continuing education as well as university education in minority or regional languages, and to provide facilities for the study of such languages at university level. The Charter also, specifically, requires the basic and further training of teachers needed to implement these measures and to establish a supervisory body to monitor the measures taken.<sup>58</sup>

In areas where such regional or minority languages are not traditionally used the Charter obliges parties to undertake, where the number of language users justifies it, to allow, encourage or provide teaching in or teaching of the regional or minority language at all appropriate stages of education.<sup>59</sup> On the basis of the provision made in the 2022 Act it must be presumed that this, more minimal, obligation represents the threshold which the UK Government considers itself bound to satisfy in providing for minority language education. And yet, the designation of parts of Northern Ireland as *not* 'traditionally'

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58 ECRML, art 8 .

59 Ibid art 8(2).

Irish-speaking represents at best a fundamental misunderstanding of the historical prevalence of Irish and Irish speakers throughout the jurisdiction and, at worst, a wilful ignorance as to the role and prevalence of Irish in the jurisdiction on a historical basis.

Minimal provision is made in section 78J(2) of the 2022 Act in respect of Irish-medium education. That section provides that the official recognition of Irish permitted by the Act is in addition to any provision made for Irish-medium education.<sup>60</sup> The Education (Northern Ireland) Order 1998 Act imposes a statutory duty on the Department of Education to encourage and facilitate Irish-medium education. In furtherance of this aim, in 2000 the Department of Education established *Comhairle na Gaelscolaíochta* to encourage and facilitate the development of Irish-medium education as required by the 1998 Order. In addition, in 2001 *Iontaobhas na Gaelscolaíochta* was established. *Iontaobhas* operates as a trust for Irish-medium education, with a fund of £1.25 million. Significantly, however, *Iontaobhas* can provide funding only for primary and secondary schooling activities and not for pre-school.

No provision is made in the 2022 Act, or existing legislation, for the teaching of Irish as an ‘integral part’ of the curriculum in Northern Ireland. The additions made by the 2022 Act fail to significantly alter the position in relation to minority language education in Northern Ireland or to more substantively align the position of minority language education in Northern Ireland with the one envisaged under the ECRML.

In respect of Ulster Scots, section 5 of the 2022 Act provides for the amendment of the Education (Northern Ireland) Order 1998<sup>61</sup> by inserting section 89A which provides that:

It shall be the duty of the Department to encourage and facilitate the use and understanding of Ulster Scots in the education system.

This mirrors the existing obligation in respect of Irish under the 1998 Order and, in as much as it represents the adoption of a position of parity, it is a welcome development. What is unclear, however, is the extent to which the provision under the 2022 Act imposes an obligation in respect of teaching Ulster Scots as a language or as part of a tradition. This potential has been raised, in particular, by a statement made by the UK Government, concurrent with the introduction of the Bill, implying it would recognise Ulster Scots speakers as an ethnic minority group.<sup>62</sup>

As the Committee for the Administration of Justice has noted, a recognition of Ulster Scots speakers as an ethnic minority raises a

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60 2022 Act, s 78J(2)(2).

61 Education (Northern Ireland) Order 1998 SI 1998/1759 (NI 13).

62 Ibid [25].

question over whether such recognition would result in the duty to facilitate ‘understanding’ of Ulster Scots under section 5 being re-interpreted as requiring the teaching of political perspectives on Ulster Scots speakers as an ethnic group belonging to a particular community. This reading would certainly appear to be the contextually intended one given the coupling of Ulster Scots and the Ulster British tradition elsewhere in the Act. This is particularly concerning given that it runs contrary to the objectives of eliminating unjustified distinctions regarding minority languages and their maintenance or development as outlined in section 7 ECRML.

As in the case of Irish, there is no detailed provision for the specific or substantive obligations which the statutory duty imposed by the newly inserted section 89A would provide. Fundamentally, this also raises questions about the extent to which the regime which exists, and which is proposed more generally, complies with the ECRML – and in particular the higher threshold which the Charter imposes where a language is ‘traditionally’ used within the territory in question.

### **USE OF MINORITY LANGUAGES IN LEGAL PROCEEDINGS**

One of the most heavily contested aspects of minority language rights in Northern Ireland has long been the continuing force of the Administration of Justice (Language) Act (Ireland) 1737 and its prohibition of Irish and indeed all other languages which are not English in legal proceedings. This position has long been contrary to the obligations imposed by article 9 ECRML which requires states to facilitate and permit the use of minority languages in criminal and civil proceedings generally, and in particular in those judicial districts in which the number of residents using the regional or minority languages justifies it.

In particular, the Charter provides that, where the conditions outlined in article 9 are present, the courts should, at the request of a party to the action, conduct the proceedings through the relevant minority language, allow those appearing before them to use such a language, not consider evidence received in that language inadmissible solely by reason of the language in which it is tendered to court, and to produce relevant documents in such a language and provide, where necessary, for the provision of interpreters and translation.<sup>63</sup>

The 2022 Act does not make any provision in respect of these thresholds or practices – nor does it reproduce the language that was

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63 ECRML, art 9(c) further provides for rules in respect of minority language use in administrative matters.

included in the draft legislation associated with the NDNA and which suggested that languages other than English be permitted in legal proceedings where this was ‘necessary in the interests of justice’.<sup>64</sup> Instead, the 2022 Act provides only for the repeal of the 1737 Act. The effect this will have in practice is unclear absent further changes to the Rules of Court and the provision of resources to enable bilingual proceedings, pleadings and associated matters as envisaged under the ECRML. While the repeal is thus a welcome development, the text of the Act does not require any positive actions or accommodations on the part of the state specific to legal proceedings.<sup>65</sup> The effect of the 2022 Act is thus that Irish and Ulster Scots are, in theory, permitted in judicial settings but there is no indication of to what extent, if any, their use will be facilitated in practice now that they are no longer prohibited.

In addition, the differential framing under the ECRML with provision of greater supports where numbers using a minority language so justify is, in itself, problematic for a jurisdiction such as Northern Ireland where the population of speakers is diffuse and judicial discretion may vary significantly as between areas even in close geographic proximity to each other, and perceptions of the ‘disruptive’ impacts of minority language may be based more on perceived politicisation rather than substantive administrative concerns.

A separate concern relating to judicial proceedings has been raised by other research on the 2022 Act<sup>66</sup> – specifically the absence of an appeals mechanism in respect of a finding by either Commissioner that a public authority has not complied with its obligations in respect of the national and cultural identity principles outlined in section 78F or the standards of best practice. The Act makes no reference either to an internal or statutory appeal against the findings of an investigation undertaken by the Commissioner nor to any other mechanisms of judicial or quasi-judicial review. In circumstances where the enforcement mechanisms provided under the Act are largely light-touch measures and do not attract financial or other penalties, this may be unsurprising.

However, this omission is an issue of concern, first because it implicates an absence of (or hurdle to) access to justice where the Commissioner and/or a public authority is seen as having failed in

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64 See in particular 2022 Act, s 78E(2).

65 This is despite the obligations imposed on the UK Government under ECRML art 9 which requires the most important national statutory texts and those relating particularly to users of these language unless they are otherwise provided.

66 Róisín Á Costello, *Reflections and Recommendations on the Identity and Language (Northern Ireland) Bill 2022* (Irish Research Council/Dublin City University 2022) 18.

respect of their obligations under the Act. The level of knowledge, social and financial capital and time required to avail of judicial review, for example, is significant, and the absence of an explicit process for statutory appeals is likely to reduce the capacity of the public to enforce accountability under the legislation.

The absence of a statutory appeals mechanism is also an issue of concern because, as other research has noted, the absence of such a mechanism may be harmful to the legitimacy of the system of complaints established under the 2022 Act in and of itself – creating a perception that the Act is a paper tiger.<sup>67</sup> It is perhaps here that the impacts of the abandonment of the previous system of a stand-alone Irish Language Act, alongside an Irish Language Strategy, become most apparent. The 2022 Act's potential to facilitate compliance with, and achievement of, the objectives and obligations included in article 9 ECRML is largely a matter delegated to policies which are not yet in place, albeit that the provisions of the legislation do permit such policies to be implemented following the repeal of the 1737 Act.

## **CULTURAL ACTIVITIES AND FACILITIES**

Article 12 ECRML provides that parties to the Charter undertake to foster cultural activities and facilities which encourage and promote access to minority languages and cultural production within those languages, as well as dubbing and other methods which will make cultural materials produced in other languages available in the minority language, to encourage the generation of published works in the minority language, to provide terminological research services.

The 2022 Act makes little mention of cultural activities as a stand-alone matter – though it makes repeated reference to cultural identities. A significant addition to the 2022 Act during the course of its debate and amendment, however, was the inclusion of section 8 which provides for the creation of the Castlereagh Foundation which will have, as its primary objective, the funding and support of academic research into identity, including national and cultural identity in Northern Ireland. It is difficult to say whether the creation of the Foundation contributes to the fulfilment of the provisions of article 12 ECRML or whether the provisions of section 8 should be understood, instead, as representing a contribution towards the objectives of the Charter and the promotion of study and research of minority languages as outlined in article 7(h).

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67 Ibid 18–19.

The creation of the Foundation is certainly welcome. Academic initiatives such as the Northern Irish placenames project<sup>68</sup> have proved both academically rich and publicly popular initiatives both in their own right and as a means of reconnecting communities of all traditions to the languages of their homeplaces and depoliticising minority languages by promoting a sense of ownership. To some extent, existing bodies such as *Forás na Gaeilge* and non-governmental agencies such as *Conradh na Gaeilge* also contribute to the achievement of the goals outlined by article 12 ECRML. What is needed and what these various efforts cannot provide, however, is a state-led and integrated approach to cultural engagement and promotion of minority language cultural efforts as envisaged by article 12.

## CONCLUSION

The 2022 Act represents a ‘first generation’ piece of minority language legislation in that it neither seeks to impose strict, rights-based standards nor punitive deterrent sanctions where the standards it does provide for are breached. The Act also occupies an unusual position in both eschewing the strict requirements of a piece of language rights legislation while also offering little of the detail that would characterise a policy-led language rights approach through a minority language rights ‘language strategy’.

In this respect, the 2022 Act falls short of the provisions for language rights promised under the St Andrews Agreement and the NDNA but, more fundamentally, falls short of the provisions that the COMEX urged should be implemented in order for the UK to comply with its obligations under the ECRML following its most recent review of Northern Ireland’s commitments under the Charter, in 2021. In many respects, the main function of the Act, and its incontrovertible success, is its provision of legal and institutional recognition of both Irish and Ulster Scots in Northern Ireland. This may seem a moderate, or even insufficient, achievement. However, it is significant in as much as it establishes a context in which it may become unremarkable to encounter minority languages in institutional settings in Northern Ireland and an attendant depoliticisation of minority languages in the jurisdiction may be achieved.

Perhaps most significantly, the Act provides a statutory baseline which can be amended and supplemented to comply more fully with the requirements of the ECRML. Certainly, in its present form, the Act does not give full voice to the obligations which the Charter imposes upon parties – whether its lesser thresholds (applicable to areas with

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68 See [Northern Ireland Placenames Project](#).

low densities of minority speakers or which are not traditionally home to minority language communities) or its higher thresholds (in respect of areas ‘traditionally’ home to minority language speakers) are used as a benchmark. Despite this, the establishment of the Castlereagh Foundation and the explicit repeal of the 1737 Act, in particular, indicate the most significant sea change in thinking about and committing to minority languages in Northern Ireland since the state’s foundation.



# Covid-19 as a lens to investigate local approaches to business and human rights: the case of Northern Ireland<sup>†\*</sup>

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## ABSTRACT

The legal and regulatory framework of business and human rights (BHR) tends to prioritise human rights due diligence (HRDD). This has a role to play in protecting and respecting human rights, but we argue that HRDD’s capacity to reflect context showcases BHR’s potential to improve the lived experience of those in the communities where business operates.

Here, we consider two contextual phenomena: Northern Ireland and Covid-19. By focusing on a small regional economy, we investigate the impact of size, location, socio-economic and cultural history on how business integrates (or might integrate) in the social life of a community. By addressing Covid-19 and its recovery, we look at how a global event might be experienced differently depending on location, circumstances and levels of community engagement. We conclude that a more holistic approach might facilitate specific local lived interactions between business and human rights.

**Keywords:** business and human rights; Covid-19; Northern Ireland; recovery; remedy.

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## INTRODUCTION

Pandemics are inherently social. They are health emergencies yet also reflect how ill health is determined and distributed across societies, while public health infrastructures determine differential impacts on people's lives.<sup>1</sup> As one *Financial Times* columnist describes, 'stark inequality, both within nations and between them, is good for pathogens ... inequality is bad for your health'.<sup>2</sup> Further, recoveries after pandemics end or fade away take place in the context of, and exacerbate, economic and social inequalities. The Covid-19 pandemic that struck worldwide from 2019 played out in this way: both as a systemic and global *disruption* to our economic and social lives and as a *product* of our economic and social lives. It exposed the fragility of individual livelihoods and networks of trade and threw into sharp relief the relationship between existing social structures and harms wrought by the pandemic. We argue that that fragility can only be addressed as a matter for both public and private actors.

In this article we explore Northern Ireland as a jurisdiction whose highly networked existence in economic, geographical and regulatory terms interacts with specific local contexts. Drawing on a business and human rights (BHR) framework throughout, we ask how vulnerabilities and disadvantages associated with society-wide ill health manifest and are managed through both public and private regulation. Northern Ireland and the Covid pandemic provide an interesting and unique lens by which to investigate local and small and medium-sized enterprise (SME) approaches to BHR. Context beyond the pandemic also informs: Northern Ireland experiences a post-conflict environment which prompts significant public health impacts and severe economic dislocations, not least as a legacy of conflict. Finally, its political cleavages and conflicts have been exacerbated in recent years in the wake of the decision of the United Kingdom (UK) to exit the European Union (EU). This status prevails with the latest discussions centred round the Windsor Framework and Northern Ireland's place within both the UK and the EU.

The series of BHR instruments and frameworks that have emerged in recent years articulate a set of business responsibilities and seek to build a consensus, including with business, on the economy's place in social life. BHR includes not only those instruments that *explicitly* articulate BHR frameworks, but also the more 'holistic' range of

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- 1 Christopher T Lee et al, 'Association between preparedness and response measures and Covid-19 incidence and mortality' [2021] medRxiv 2021.02.02.21251013.
  - 2 David Pilling, 'What South Africa and Omicron tell us about inequality' *Financial Times* (London 30 November 2021); echoing Richard G Wilkinson and Kate Pickett, *The Spirit Level: Why Equality Is Better for Everyone* (Penguin Books 2010).

instruments that regulate business interactions with rights.<sup>3</sup> We advocate Macchi's 'holistic' BHR approach to understanding how the Covid-19 pandemic interacted with the economy and commerce. She emphasised the interrelation between 'climate, environmental and human rights challenges'.<sup>4</sup> This 'mutually reinforcing' relationship between climate and human rights law, actively lends greater coherence to the overarching BHR principles as articulated by the United Nations Guiding Principles on Business and Human Rights (UNGPs).<sup>5</sup>

We refer to Macchi's approach throughout because, while the pandemic was global, each locality experienced it within its own peculiar context. Examining, first, how (certain) local regulatory environments shape a pandemic and, second, the regulatory context within which recoveries will take place connects emergencies to law, to business and to societal impact. It lends real life interactions to how we talk around BHR narratives. BHR as a field is buttressed by an intricate toolbox of international guidelines and principles, regional and national legislative initiatives, and directives, as well as civil society influences and industry standards. Binding this together is the idea that states protect human rights, businesses have a responsibility to respect human rights and, where a human rights impact has occurred, victims should have access to an effective remedy. Beyond, the importance of an 'holistic approach' lends greater coherence to BHR, its application and workability.<sup>6</sup> Being universally applicable, many case studies and initiatives have focused on large-scale industries in various regions and countries around the world. Less explored are the

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3 Starting with the OECD Guidelines for Multinational Enterprises in 1976. Regularly updated, the 2011 update included a chapter on BHR. The 2023 targeted update renames the Guidelines – now the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct – and offers more guidance on due diligence, continuous learning around remediation and on the need to protect vulnerable groups (Human Rights Defenders etc): Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD 2023). Also, UN, 'Guiding Principles on Business and Human Rights' (UN 2011); the UN Global Compact; the ILO Declaration of Fundamental Principles and Rights at Work; and the Sustainable Development Goals. This list is not exhaustive. It does not include (for reasons of space) multi-stakeholder initiatives such as the Fair Labor Association, the Extractive Industries Transparency Initiatives, the Kimberley Process Certification Scheme, the Sullivan Principles and so on.

4 Chiara Macchi, 'The climate change dimension of business and human rights: the gradual consolidation of a concept of "climate due diligence"' (2021) 6 *Business and Human Rights Journal* 93, 108–109; Chiara Macchi and Josephine van Zeven, 'Business and human rights implications of climate change litigation: *Milieudefensie et al v Royal Dutch Shell*' (2021) 30 *Review of European, Comparative and International Environmental Law* 409.

5 Macchi (n 4 above) 118.

6 See n 3 above.

everyday interactions between BHR within the local context. Here, BHR becomes a tangible *part* of the job, rather than simply someone's role within an organisation.

It is those lesser explored local contexts that motivated this article. We aim to consider the pandemic as a contextual phenomenon within BHR. Bringing one region into focus is crucial, first, because it makes manifest the ways in which health outcomes are determined at regional levels. Second, the kind of holistic perspective that can be offered within BHR helps draw a range of actors – businesses, states, non-governmental organisations (NGOs) etc – into one conceptual frame. Our research questions are twofold. One, what is Northern Ireland's legal BHR framework? And two, how can a single issue (here, the pandemic) demonstrate how myriad actors contribute to BHR protections in a regional outpost (here, Northern Ireland)? These questions are addressed in the following way. The section that follows this introduction frames Northern Ireland as a case study, and the pandemic (and its recovery) as a lens. We then go on to give an account of the legal and regulatory frameworks through which businesses are regulated towards human rights within Northern Ireland. After that, we address specific BHR areas of concern within the Northern Ireland context. We focus on workers' rights, supply chains and the capacity to and of remedy. The penultimate section moves to future-proofing BHR in Northern Ireland by bringing us back to the value of BHR, broadly construed, as both a framework for understanding the pandemic and as a vehicle for building towards a more resilient economy in the face of an uncertain future. The final section concludes.

We make two significant contributions. Focusing on Northern Ireland in this context, is original in and of itself. Research on BHR typically addresses the UK as an homogeneous unit. It does not reflect Northern Ireland's unique political and governance structure, its geographical location, and its business identity. Other countries within the UK may focus on transparency in supply chains. For Northern Ireland, the nature of the local and SME-orientated economy is that they are *parts* of those supply chains. How the Northern Ireland Executive and the business sector engage and interact with these issues will provide insight into the future of the region's engagement with BHR. However, our contribution goes beyond the Northern Irish context. In using Northern Ireland as an example, we are demonstrating how the current 'macro' approach to BHR (both in terms of government/Executive policy and reliance on international broad-brush regulation) risks a failure to consider those local peculiarities that make a particular region attractive to investment in the first place. We urge a turn to context when thinking about BHR both generally and specifically. Our second contribution rests in the proposal for recovery set out in the

penultimate section of this article. Using the context described below and the discussions in the sections that follow provides a starting point for how we should think about BHR both within the region of Northern Ireland particularly, and the 'local' more generally.

## **NORTHERN IRELAND**

Any specific region will have many or even most characteristics in common with others. Northern Ireland is no different. Its health and welfare infrastructures; features of state administration and patterns of social and economic life are unsurprisingly shared with the rest of the UK, the Republic of Ireland and beyond. Northern Ireland is unique just as all regions, localities and states are unique. It is not interesting for our purposes therefore because it is somehow 'uniquely unique'. It is interesting rather as an example of how local dynamics, by both accentuating and attenuating more general characteristics, gave the pandemic form.

The ongoing repercussions of Northern Ireland's conflict, which took 3,720 lives and left 47,541 people with injuries,<sup>7</sup> are at our discussion's heart. The legacy of conflict is inseparable from the 'ordinary' aspects of social and economic life. We take an indirect route to conflict and BHR in these terms: from the everyday economic structures of the economy; to the lacunae opened by the border; to the more direct interplay of legacy and systemic ill-health. These are inseparable from each other and provide a picture of the conflict's less-obvious legacy: that the gaps both revealed and opened by conflict can settle into being an integral part of economic and social life.

This is apparent in the relationship between conflict and health. Physical trauma does not fully capture the conflict's impact on Northern Irish society. Rates of mental ill health have persisted post-conflict, characterised by higher rates of post-traumatic stress disorder

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7 Conflict Archive on the Internet, 'RUC/PSNI Statistics: Table NI-SEC-05: Persons Injured (Number) Due to the Security Situation in Northern Ireland (Only), 1969 to 2003' (CAIN, University of Ulster 2002).

(PTSD),<sup>8</sup> including among older people<sup>9</sup> and even with transmission of trauma experiences across generations.<sup>10</sup> By some survey measures, 39 per cent of people in Northern Ireland had suffered a conflict-related traumatic event, with half of those suffering mental ill-health as a result.<sup>11</sup> The World Mental Health Survey Initiative's Northern Ireland study of health and stress estimated that prevalence of mental illness in Northern Ireland is at the 'upper end' worldwide and is the highest in Western Europe. PTSD rates were at the top.<sup>12</sup> Suicide rates in Northern Ireland are the highest in the UK, are higher than in the Republic of Ireland and seem linked to a combination of post-conflict trauma and deprivation.<sup>13</sup>

All things considered, Northern Ireland has been suffering from a significant public health crisis linked to trauma and mental health since *well before* Covid-19 appeared. This is inseparable from economic and social lives being carried out across contested

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- 8 Finola Ferry et al, 'Traumatic events and their relative PTSD burden in Northern Ireland: a consideration of the impact of the "troubles"' (2014) 49 *Social Psychiatry and Psychiatric Epidemiology* 435; Siobhan O'Neill et al, 'Patterns of suicidal ideation and behavior in Northern Ireland and Associations with conflict related trauma' (2014) 9 *PLOS ONE* e91532; Margaret McLafferty et al, 'Population attributable fractions of psychopathology and suicidal behaviour associated with childhood adversities in Northern Ireland' (2018) 77 *Child Abuse and Neglect* 35.
  - 9 Finola Ferry et al, '[Ageing, health and conflict: an investigation of the experience and health impact of "troubles-related" trauma among older adults in Northern Ireland](#)' (NICCT/University of Ulster 2012).
  - 10 Montserrat Fargas-Malet and Karola Dillenburger, 'Intergenerational transmission of conflict-related trauma in Northern Ireland: a behavior analytic approach' (2016) 25 *Journal of Aggression, Maltreatment and Trauma* 436; E Mark Cummings et al, 'Examining bidirectional pathways between exposure to political violence and adolescent adjustment in Northern Ireland' (2019) 48 *Journal of Clinical Child and Adolescent Psychology* 296.
  - 11 Brendan P Bunting et al, 'Trauma associated with civil conflict and posttraumatic stress disorder: evidence from the Northern Ireland Study of Health and Stress' (2013) 26 *Journal of Traumatic Stress* 134.
  - 12 Brendan P Bunting et al, 'Lifetime prevalence of mental health disorders and delay in treatment following initial onset: evidence from the Northern Ireland Study of Health and Stress' (2012) 42 *Psychological Medicine* 1727, 1735; Healthcare Quality Improvement Partnership, '[National Confidential Inquiry into Suicide and Safety in Mental Health: Annual Report: England, Northern Ireland, Scotland, Wales](#)' (HQIP 2023).
  - 13 Siobhan O'Neill and Rory C O'Connor, 'Suicide in Northern Ireland: epidemiology, risk factors, and prevention' (2020) 7 *The Lancet Psychiatry* 538; Margaret McLafferty et al, 'Suicidality and profiles of childhood adversities, conflict related trauma and psychopathology in the Northern Ireland population' (2016) 200 *Journal of Affective Disorders* 97; Rory C O'Connor and Siobhan M O'Neill, 'Mental health and suicide risk in Northern Ireland: a legacy of the troubles?' (2015) 2 *The Lancet Psychiatry* 582.

spaces and economic structures that are adapted to those spaces: being small-scale, unamenable to regulation and focused on primary production.

Northern Ireland's economy is defined by small and medium-sized businesses to a greater extent than other regions of the UK. This has implications for how the region interacts with global and national supply chains. While, for instance, 45.9 per cent of employment in the UK private sector is with businesses that employ over 250 people, the equivalent figure for Northern Ireland is only 22.1 per cent. Northern Ireland is far more agricultural than the UK generally, which is not atypical for such a region. That said, while only 2.36 per cent of no-employee businesses in the UK are in agriculture, agriculture counts for 17.12 per cent of no-employee businesses in Northern Ireland and 20,506 of 26,089 farms are classed as 'very small'.<sup>14</sup> 'Very small' farms and micro-SMEs shape the economy. Northern Ireland is not only striking for its small number of large capital-intensive employers, but for the fact that enterprises in all sectors tend to be smaller than is the case elsewhere in the UK.<sup>15</sup>

Negative human rights impacts are perhaps most often experienced within the UK as labour-based modern slavery. Unsurprisingly, what evidence there is regarding this form of modern slavery (as opposed, for instance, to sexual exploitation) places victims in agriculture and fisheries, sectors where complex local supply chains are the norm.<sup>16</sup> These sectors share price pressures; dispersed production locations marked by small producers that are traditionally difficult to inspect; and mobile low-skilled workforces.

Northern Ireland's small-scale enterprises are subordinate to the global firms and supply chains upon which the focus of BHR typically lies. They are subjects, not initiators, of BHR policies and are likely to encounter BHR as a form of contractual governance through

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14 Department for Business, Innovation and Skills, 'Business population estimates' (BEIS Statistical release 2022).

15 Ibid.

16 Criminal Justice Inspection Northern Ireland (CJINI), *Modern Slavery and Human Trafficking: An Inspection of How the Criminal Justice System Deals with Modern Slavery and Human Trafficking in Northern Ireland* (CJINI 2020) paras 1.18–1.19. Note: numbers are small and probably under-reported compared to the rest of the UK. It is worth mentioning labour-based exploitation specifically as feeding up into 'legitimate' supply chains.

supplier audit functions and the like.<sup>17</sup> BHR in Northern Ireland being experienced in large part as private governance means moreover that its subjects must navigate it as one part in an overall *private* governance infrastructure including price demands, animal welfare stipulations and so on. Potential for harms and for criminality emerges in such a space.<sup>18</sup> Where modern slavery, for instance, interacts with these sectors, it is inseparable from the legacy of conflict.

This entanglement of economy and conflict involves its interplay with the border between Northern Ireland and the Republic of Ireland. The border is a regulatory barrier certainly, but it is also a regulatory *gap* that emerged from and outlasted the violent conflict. So, while BHR governance is increasingly aligned with the rest of the UK,<sup>19</sup> Northern Ireland's specificity means that it will not play out in the same way. While cross-border policing cooperation on modern slavery is visible and active, the border is, at the same time, a post-conflict conduit for human trafficking with a character all of its own.<sup>20</sup> Organised criminal groups that emerged from paramilitary activities in conflict 'pivoted' away from arms and other smuggling and into people trafficking, using the same networks and routes they had used during the conflict.<sup>21</sup> This is a prime example of specificity, including the difficulties of securitised

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17 See Doreen McBarnet and Marina Kurkchyan, 'Corporate social responsibility through contractual control? Global supply chains and "other-regulation"' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007); also Kateřina Mitkidis, Sonja Perkovic and Panagiotis Mitkidis, 'Tendencies in contractual governance to promote human and labour rights in transnational supply chains' (2019) 23 *Competition and Change* 397.

18 Genevieve LeBaron and Jane Lister, 'The hidden costs of global supply chain solutions' (2021) early access *Review of International Political Economy* 1; also Ekaterina Gladkova, 'Farming intensification in Northern Ireland – a state-corporate environmental harm?' (2023) 4 *Journal of White Collar and Corporate Crime* 110; on other harms and on recent scandals, see Michaela Fox et al, 'Barriers and facilitators to shellfish cultivation' (2020) 12 *Reviews in Aquaculture* 406; Robert Smith and Gerard McElwee, 'The "horse-meat" scandal: illegal activity in the food supply chain' (2021) 26 *Supply Chain Management: An International Journal* 565.

19 CJINI (n 16 above); a consultation was completed in October 2022 with a view to introducing legislation. See Department of Justice, *Consultation on Measures to Strengthen the Response to Modern Slavery and Human Trafficking* (Department of Justice 2022).

20 Paul Ainsworth, 'Three people screened in Armagh as part of human trafficking investigation' *Irish News* (Belfast 15 June 2023).

21 For instance, Henry McDonald and Rory Carroll, 'How IRA and the troubles "industrialised" people smuggling in Ireland' *The Guardian* (London 21 December 2020).

post-conflict policing in Northern Ireland,<sup>22</sup> especially nearer the border, and the challenges of regulation in such a space, coupled with the structures of production that emerged, are not independent from these dynamics, but a part of them.

More general BHR discussions are inevitably rooted in specific locations and situations. BHR will always have a local lens. When it comes to the pandemic, it manifested in Northern Ireland in a context already characterised by conflict-entangled ill-health. The contours of BHR regulation in Northern Ireland will always also be contours of conflict. The economy and the border are not background facts upon which conflict (and life) play out. They *are* conflict and life playing out.

### **THE NORTHERN IRISH BHR LEGAL AND REGULATORY FRAMEWORK**

With context in mind, it is important to situate the BHR regulatory framework within Northern Ireland. As a field, BHR focuses on remedying harm caused by corporate activity.<sup>23</sup> Remedying human rights impacts both characterises BHR and distinguishes it from the parallel, and often interconnected, corporate social responsibility (CSR). Myriad tools have emerged to direct business on how to both respect human rights at all stages of business and when (and how) to remedy when they fail to adequately respect those rights.<sup>24</sup> Thematically, human rights due diligence (HRDD) shapes the space. This requires relevant bodies to exercise reasonable care to ensure that their activity (or that of their subsidiaries/sub-contractors and so on) will not lead to a human rights impact. As far as possible, the ‘regulation’ of the due diligence space involves directing, influencing, or shaping corporate engagement within human rights. Constrained by the limitations of the corporate form, it has been interesting to see how corporations have interpreted their BHR obligations. With HRDD being such an ‘open ended standard’,<sup>25</sup> businesses are reliant on interpretations (both internally and externally) as to how HRDD obligations might be met within specific industries, regions and contexts. Case law (such as there is) has highlighted the newness of the area, rather than offering

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22 Fionnuala Ní Aoláin, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Blackstaff Press 2000).

23 Anita Ramasastry, ‘Corporate social responsibility versus business and human rights: bridging the gap between responsibility and accountability’ (2015) 14 *Journal of Human Rights* 237, 238.

24 Barnali Choudhury, ‘Balancing soft and hard law for business and human rights’ (2018) 67(4) *International and Comparative Law Quarterly* 961.

25 Macchi (n 4 above) 117.

distinct guidance on how to proceed.<sup>26</sup> As an emerging field, it is understandable that case law and corporate responses are limited, but where these do exist, noteworthy trends emerge. Indeed, Macchi considered context via strategic climate change litigation. In these cases, corporations appear to view HRDD as a business process. Their responses to litigation focus on risk mitigation and integration.<sup>27</sup> This is understandable. The nature of business, the extent of supply chains and the distance between parent boardroom and component-part factory floor means that not all impacts can be anticipated and addressed. How they do approach which impacts and when helps us to see whether they value the respecting of human rights or if it is simply another policy to be interpreted and a procedure to be applied.

The reaction to Covid-19 and the post-pandemic response provides an interesting lens by which to view the BHR regulatory framework in Northern Ireland. Whereas the above describes on a 'macro' level how BHR are perceived, consideration of the BHR framework as it applies to Northern Ireland offers a chance to critique the field on two main levels. First, Northern Ireland, uniquely situated within the UK, is often as much a subject of and to domestic regulation as a drafting party. A place apart on the regulatory level, this also extends into how business is characterised within the region with a proliferation of micro, small and medium enterprises particularly beyond the city zones.<sup>28</sup> For an active BHR regime to protect, *business* must mainstream human rights obligations on a day-to-day level, rather than in churning paperwork outlining how obligations were met over the past financial year. In sum, the distance between potential impact within a business transaction and the boardroom of said business is shorter than sweeping international obligations would have us believe. Covid-19

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26 *NGOs v La Société Total Energies SE* (2023) Jugement Rendu en Etat de Référé N°RG 22/53942- N°352 J – W- B7G- CXB4M N°: 2/MC. Here, the court argues that it is not its role to refine what is meant by the 'duty of vigilance' law, or indeed what it is to be a vigilant corporate actor. The argument is that the concept is too new for the courts to direct on it, but beyond that they seem to be implying it is for the stakeholders involved to reach consensus on what it means.

27 Macchi (n 4 above) 98. We would argue that in company responses made to National Contact Points (NCP) under the OECD similar themes emerge. We have looked at the complaints made to the UK NCP. We remark that the NCP process reinforces a broader shift whereby human rights are assimilated into business governance discourses of procedure, or due diligence and of risk. This can be evidenced for example in *IAC & WDM v GCM Resources plc* (2012).

28 For this, we addressed the Invest Northern Ireland Council Briefing Reports (2020). Our observations would suggest that support and business is concentrated within urban areas, and there is less support for border council regions (ie those councils that touch the border with the Republic of Ireland). See Alan McKeown, 'Supporting local business across Northern Ireland' (*Invest Northern Ireland* 18 February 2021).

presents a unique opportunity to assess what currently exists and how this is (un)fit for purpose. As an important aside, it is useful to note that specific responsive legislation was enacted to cope with the Covid-19 pandemic,<sup>29</sup> covering a wide range of areas. Both the Coronavirus Act 2020, and the Health Protection (Coronavirus Restrictions) (Northern Ireland) Regulations 2020 were pieces of emergency legislation that postponed, limited, or suspended human rights.

### **Domestic legislation**

Although less encompassing than the international legal framework (outlined below), regional and national protections within the UK recognise the state's role in protecting human rights.<sup>30</sup> Domestic protections concerning BHR rest primarily in the Modern Slavery Act 2015.<sup>31</sup> Of particular and pivotal interest is the requirement that eligible businesses (those with a £36 million turnover) produce an annual Transparency in Supply Chains Statement (TISC).<sup>32</sup> In this statement, a company documents, or *discloses*, the steps that it has taken to ensure that slavery and/or trafficking has not taken place within the supply chain.<sup>33</sup> The key theme is reporting, one which

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29 Coronavirus Act 2020.

30 Due to limitations of space, we have not discussed general human rights protections such as the Human Rights Act 1998, Equality Act 2010 and, for Northern Ireland, the Northern Ireland Act 1998. Regional disparities persist with equality a devolved matter. Protection from discrimination within Northern Ireland is found in s 75 Northern Ireland Act 1998 and the Disability Discrimination Act (as amended) 1995. The Equality Act 2010 does not extend to Northern Ireland.

31 For posterity, see also s 7 Bribery Act 2010 (failure of commercial organisations to prevent bribery). Also, Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 three years on' (2018) 81(6) *Modern Law Review* 1017; 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.

32 Modern Slavery Act 2015, s 54 (also known as a slavery and human trafficking statement).

33 *Ibid.* In force by Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015, reg 2.

persists in the national (and regional) outlook on BHR.<sup>34</sup> Notably, and in comparison, the regulatory environment within the EU (see below) has shifted towards HRDD. HRDD places a more onerous duty on business organisations. The TISC requirement also applies to Northern Ireland, but aside from this, regional requirements on modern slavery rest within regional legislation.<sup>35</sup>

There are a few points of note. First (as discussed in the section on 'Northern Ireland' above), business in Northern Ireland is characterised by mostly micro businesses and SMEs. They often sit outside the TISC requirement. Second, there is a lack of focus on *businesses'* role in preventing and protecting against modern slavery within both the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 and the most recent modern slavery strategy.<sup>36</sup> Whereas this may be attributed to the potentially small numbers involved, and more notably as businesses in Northern Ireland are more likely to be participants in the supply chain, it is still a gap in the regulatory framework for those that might need to rely on it. There is also a tendency by the strategy and regional regulation to characterise modern slavery as sex trafficking. This narrow approach does not capture the extensive spectrum of exploitation that exists within a business context generally or the specific Northern Ireland environment as noted in the section above. Third, as the implications of Brexit are realised, alongside the unique role that Northern Ireland will play in the Common Market Area, the region's response to and understanding of modern slavery (and the role of business) will need

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34 This is also evident within case law. Domestic case law focuses on the reach of parent company responsibility for the actions of its subsidiaries. Grounded in the *Chandler v Cape* [2012] EWCA (Civ) 525 precedent, more recent case law has looked at the *level of knowledge and control* the parent has over the subsidiary (*Vedanta*) and the relationship between parent and subsidiary responsibilities (*Okpabi*). For *Vedanta* see, *Lungowe v Vedanta Resources plc* [2019] UKSC 20. For *Okpabi*, see *Okpabi and Others v Royal Dutch Shell plc and Another* [2021] UKSC. These due diligence reports in *Vedanta* and *Okpabi* might also be part of a corporation's legal duty as set out in s 414c UK Companies Act 2006 (the Strategic Report) and the anti-slavery and trafficking report from the Modern Slavery Act (Transparency in Supply Chains) (2015) Regulations, reg 2. For more see Samantha Hopkins, 'Vedanta Resources plc and another v Lungowe and others' (2019) 70(3) Northern Ireland Legal Quarterly 371–375; also, Hogan Lovells, 'The implications of the UK Supreme Court's decision in *Vedanta* for the management of human rights risk in overseas operations and supply chains' (*Oxford Business Law Blog* 30 May 2019); S Hopkins, C O'Kelly, C Hackett and C Patton, 'Case Comment: *Okpabi and Others v Royal Dutch Shell plc and Another* [2021] UKSC 3' (2021) 72(1) Northern Ireland Legal Quarterly 148–159.

35 Modern Slavery Strategy 2021 (Department of Justice). Also, submission by Queen's University Belfast, School of Law and Human Rights Centre, 'Draft Modern Slavery Strategy 2021/22' (Consultation Report).

36 Ibid.

reinvigorating. There is a role here also for the Northern Ireland Human Rights Commission (NIHRC). The NIHRC has been a leading and active national human rights institution for BHR – with an extensive National Action Plan for Business and Human Rights and an innovative Business and Human Rights Forum.<sup>37</sup>

### **European guidelines**

Remaining within the EU Single Market and in the UK's customs territory, Northern Ireland is unique in terms of economic regulation. Although some EU regulation is not applicable in the Northern Irish context, the situation remains in flux, and so scope remains for applicability of EU concepts in Northern Ireland. In general, BHR initiatives at EU level are limited, with focus being on trade, product composition and broader company regulation.

Perhaps the most notable EU Regulation is the Non-Financial Reporting Directive (NFRD) (2014/95/EU, amending Directive 2013/34/EU (on financial statements)), requiring a non-financial statement from all companies with over 500 employees, including 'as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters', their policies (including diversity policies), business model, risks and key performance indicators.<sup>38</sup> This was retained in the UK after Brexit, and therefore is applicable in Northern Ireland. However, the nature of Northern Ireland as comprised largely of SMEs means that such requirements are not particularly useful in this specific context – other than where SMEs follow the practices and language of multinational enterprises,<sup>39</sup> a piecemeal method of attaining transparency which does not allow for reliability, comparability<sup>40</sup> or clarity. Indeed, the 'uncertainty and complexity when [companies are] deciding what, where and how to report non-financial information'<sup>41</sup> were issues

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37 See 'Northern Ireland Human Rights Commission submission to the Working Group on Business and Human Rights on the role of national human rights institutions in facilitating access to effective remedy for business-related human rights abuses' (Northern Ireland Human Rights Commission October 2019).

38 Art 19a.

39 Norman Fairclough, *Language and Power* 3rd edn (Routledge 2015) 245.

40 Nora Hahnkamper-Vandenbulcke, 'Implementation Appraisal: Non-financial Reporting Directive' (European Parliament, January 2021).

41 Ibid.

recognised in a 2021 briefing from the European Parliament, reporting on the Directive's effectiveness.<sup>42</sup>

The outworkings of Brexit and the Northern Ireland Protocol nonetheless accentuate Northern Ireland's unique position in very specific ways. These speak at times from the UK's industrial priorities directly to BHR regulation. The EU's Conflict Minerals Regulation 2017/82, for instance, came into force in January 2021.<sup>43</sup> The regulation, similar to the Dodd Frank Act in the United States (US),<sup>44</sup> addresses trade in so-called conflict minerals: tin, tungsten, tantalum and gold (known as 3TG). The regulation requires EU-based importers of these minerals to ensure their minerals are sourced responsibly, with special attention paid to risks associated with the Democratic Republic of Congo or adjoining countries.

EU importers must identify risks, design supply chain strategies, establish strong management systems, carry out third-party audits for supply chain due diligence, and report annually. The regulation applies the five principles of the Organisation for Economic Co-operation and Development (OECD) 'Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas', namely: establishing a management system; identifying and assessing supply chain risk; designing and implementing a strategy for

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42 This report led to Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, art 1(4). It expanded on the NFRD to include SMEs. It does not currently apply to the UK, although given the necessary relationship between Northern Ireland and the Republic of Ireland it may be in the interests of businesses in Northern Ireland to map their obligations alongside these provisions. Other retained EU Directives exist. These include Regulation 2019/2088 (disclosure on environmental, social, and corporate governance (ESG) issues in the financial sector only); Regulation 2019/2089 regarding sustainability-related disclosures for benchmarks relating to climate. Regulation 2020/852 establishes a framework to facilitate sustainable investment. Its future in the UK is uncertain as it is currently awaiting potential repeal through the Financial Services and Markets Bill. There is a suggestion to replace the 2020/852 with a 'UK Green Taxonomy' but this remains in flux. HM Treasury recently (June 2023) held a consultation in relation to ESG matters which touch on the Green Taxonomy.

43 Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas 2017 (OJ L2017/130).

44 Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (PubL 111-203, HR 4173) s 1502; see Galit Sarfaty, 'Shining light on global supply chains' (2015) 56 *Harvard International Law Journal* 419.

responding to the identified risks; third-party independent auditing of supply chain due diligence; and reporting on due diligence.<sup>45</sup>

The EU regulation came into force *after* Brexit, so is not in force in Great Britain (GB). Because Northern Ireland remains in the EU Single Market, the regulation applies,<sup>46</sup> with the Foreign Office acting as the ‘competent authority’ for the purposes of the regulation. At the time of writing, GB firms are encouraged to perform due diligence audits for conflict minerals in their own supply chains with regulation envisaged in future. How this sits with the UK’s broader ‘critical minerals’-intensive post-Brexit industrial strategy remains to be seen.<sup>47</sup>

### **International guidelines**

The international legal framework is shaped by broader policy trends within the field; they are aspirational, forward looking and centred on the idea that a state/region and the business operating within has the capacity to meet those aspirations. In sum, these are focused on large multinationals operating in large, developed, open economies.<sup>48</sup> The BHR ecosystem draws on the interrelationship between public, corporate and civil governance.<sup>49</sup> It is polycentric and captures the coexistence of hard and soft laws.<sup>50</sup> These are used by a spectrum of actors not limited to business, states and civil society.

The BHR ecosystem is grounded by the UNGPs.<sup>51</sup> They represent the first (broadly accepted) attempt to embed corporate responsibilities for human rights into an international legal instrument. In so doing,

45 [OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas](#).

46 Under the Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020; Chiara Macchi, ‘A glass half full: critical assessment of EU Regulation 2017/821 on conflict minerals’ (2021) 13 *Journal of Human Rights Practice* 270, 283.

47 Department for Business and Trade and Department for Business, Energy and Industrial Strategy, ‘[Resilience for the future: the UK’s critical minerals strategy](#)’ (2022); Department for Business and Trade and Department for Business, Energy and Industrial Strategy, ‘[Critical minerals refresh: delivering resilience in a changing global environment](#)’ (2023).

48 This is a broader criticism of BHR and stems from the UNGPs (n 3 above). We would argue that Pillar II, particularly principles 13–15, was written towards the Anglo and/or American profit-orientated corporation. The due diligence requirements closely mirror those reporting requirements that have persisted within the UK and US corporate governance landscape.

49 Cesar Rodriguez-Garavito, ‘Business and human rights: beyond the end of the beginning’ in C Rodriguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge 2017) 12.

50 Choudhury (n 24 above). Also, Enrico Partiti, ‘Polycentricity and polyphony in international law: interpreting the corporate responsibility to respect human rights’ (2021) 70 (1) *International and Comparative Law Quarterly* 133.

51 See n 3 above.

they create a situation whereby complying with the UNGPs is seen as the ‘core and central means for corporate human rights protections at the expense of state based human rights protections’.<sup>52</sup> They remain at the forefront of the international framework due in part to their ability to achieve both a broad stakeholder consensus and ‘an authoritative UN imprimatur on implementing minimum standards’.<sup>53</sup>

The UNGPs are valued for their recognition of victims’ right to access a remedy where there has been a corporate human rights impact. Demonstrating the corporate responsibility to respect human rights is grounded in the practical pragmatism of the UNGPs. This is achieved through the HRDD requirements of Pillar II generally and principles 15 and 17–24 in particular. Due diligence has filtered into domestic requirements with an ‘epidemic’ of global developments.<sup>54</sup> Notably these developments are not yet grounded in domestic law in the UK with the requirements under the Modern Slavery Act 2015 (mentioned above) focused on disclosure rather than the more onerous (and topical) due diligence obligations.

Covid-19 put pressure on both states and businesses to maintain compliance with the UNGPs and other international initiatives. Policymakers responded with guidance to states and business on

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52 Anna Beckers, ‘From corporate personality to corporate governance: the transformation of international human rights protection in corporate governance structures’ in Nehal Bhuta and Rodrigo Vallejo (eds), *Human Rights and Global Governance* (Oxford University Press 2020)

53 Chip Pitts, ‘The United Nations “Protect, Respect, Remedy” Framework and Guiding Principles’ in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016). Other relevant initiatives are outlined above (n 3). Specific sectoral guidance also informs, including: OECD Due Diligence Guidance for Responsible Supply Chains of Miners from Conflict Affected and High Risk Areas; OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector; OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Industry; OECD–FAO (Food and Agriculture Organisation) Guidance for Responsible Agricultural Supply Chains; Responsible Business Conduct for Institutional Investors; Practical Actions for Companies to Identify and Address the Worst Forms of Child Labour in Mineral Supply Chains. The OECD on Covid: [Covid-19 and Responsible Business Conduct](#). The ILO on Covid: ILO Policy Brief (May 2020) ‘[A policy framework for tackling the economic and cultural impact of the Covid 19 crisis](#)’ 2. The Sustainable Development Goals (SDGs), particularly goal 17, para 65, where there is a call on ‘all businesses to apply their creativity and innovation to solving sustainable development challenges’ and commits states to ‘foster a dynamic and well-functioning business sector whilst protecting labour rights and environmental and health standards in accordance with international standards and agreements and other ongoing related initiatives such as the Guiding Principles on Business and Human Rights’.

54 Ciarán O’Kelly and Ciara Hackett, ‘[Ten years of the United Nations Guiding Principles on Business and Human Rights: much done, much more to do](#)’ (2021) (QPOL 23 June 2021).

the key considerations for action.<sup>55</sup> Guidance was very general. For business, considerations included continuing to meet due diligence reporting requirements and that international laws would continue to be respected.<sup>56</sup> Guidance to states (and to a lesser extent business) focused on the requirement to ensure access to remedy for victims of corporate human rights impacts. The overarching message was that it is ‘critical that [the UNGPs] are not put aside now’.<sup>57</sup> This is, and was, problematic. Emergency Covid-19 legislation (both within UK and Northern Ireland) restricted (and in some instances suspended) human rights. This meant that states failed in their duty to protect human rights. Further, the temporary closing of courts and the shift to online tribunals have meant that, for some, the pathway to remedy has been made even less accessible than before. This has been compounded with huge case lists and waiting times before the courts. With the state failing to meet its obligations (for whatever reason(s)), its role as an encourager/enforcer of business responsibilities is compromised. It is, and was, a challenge to require business to continue to respect, within their operations and supply chains, those rights that the state has suspended.

Emergency Covid-19 legislation suspended certain rights within Northern Ireland. Notably, in many cases it was local businesses that assisted local communities in the distribution of food and medications during the lockdown periods. Business interaction with human rights became less about disclosing specific interactions with human rights and more about being community leaders in a time of crisis. Whereas disclosure and, latterly, due diligence are central components of any BHR framework, the Northern Ireland experience shows how businesses (and particularly, micro ones and SMEs) can move *beyond* disclosure, and *even* due diligence (and the multinational-orientated guidance of the UNGPs, for instance) and become full participants of the social life of (in this case) Northern Irish society. This is an important example of business-led engagement with human rights, filling a lacuna within the current legal and regulatory framework. The structure of the Northern Irish business landscape, in its social context, means that this type of activity is perhaps not easily recognisable or identifiable as CSR either, rather it is in supporting the local community from which these businesses draw employees, suppliers and customers. Whereas this ‘gap filling’ by business is an important opportunity for BHR generally,

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55 UN OHCHR, ‘Business and human rights in times of Covid’ (October 2020).

56 Principle 12, UNGPs (n 3 above).

57 Statement by the UN Working Group on Business and Human Rights (2020), ‘Ensuring that business respects human rights during the Covid-19 crisis and beyond: the relevance of the UN Guiding Principles on Business and Human Rights’ (29 April 2020).

challenges persist. The gaps in the local, domestic, and international infrastructure create and sustain an environment for impacts to occur. We identify two specific areas in the next section.

### **BHR: AREAS OF CONCERN**

We have above considered the case of Northern Ireland as a contextual underpinning for the broader themes that emerge in this article. Exploitations and human rights impacts do occur within Northern Ireland. These might mirror the exploitations that occur elsewhere, but in a way unique to the region's geography and socio-economic context. The character of Northern Irish business has meant that certain areas are more prone to impacts than others. When Covid-19 struck, BHR as a field focused on key areas of concern. Northern Ireland is and was no different. However, where divergences occur lies, we believe, in *how* these areas are areas of concern in Northern Ireland, and how the Northern Irish Executive (and private governance) might reasonably respond to these concerns going forward. Specifically, we are keen to reference workers' (and supply-chain workers') rights in the context of the Covid-19 pandemic and recovery.<sup>58</sup> By doing so, we are able to identify the prospect of an holistic BHR framework (explored in the penultimate section). If business respect for human rights and state human rights protections are to advance, a comprehensive approach to providing access to remedy is required. 'Actually lived' BHR narratives, at least in the narrow sense, approach remedy, not in the compensatory frames understood by lawyers, but in terms of 'community engagement'. It is this latter perspective of 'remedy as engagement' which we take below, considering employees/contractors, supply chains and, finally, proposed routes to remedy.

#### **Workers' rights**

Covid-19 impacted all forms of work. How, where and when we work has changed considerably and permanently. After the pandemic in the UK (and further afield), a secondary economic crisis has been compounded by a 'cost of living' emergency. In Northern Ireland, seasonal workers, tourism, childcare and hospitality sectors have been most notably

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58 Other areas such as Human Rights and Environmental Defenders may be of more interest in the broader business and human rights field, but these issues are more salient in examining the interplay of business, government and civil society in Northern Ireland.

affected.<sup>59</sup> Conversations that initiated with Covid-19 need to continue to ensure that post-pandemic recovery enhances existing protections within the workforce: '[a]s governments are scrambling to extend a financial lifeline to struggling businesses, they should also remember the need to build and protect resilience for workers and to ensure that they put human rights at the centre of responses'.<sup>60</sup>

Globally, Covid-19 highlighted several secondary impacts such as discrimination. Groups declared to be most at risk are women, those from ethnically diverse backgrounds, persons with a disability and those from the LGBTQIA+ community. As stated above, Northern Ireland is not uniquely unique; and, thus, these groups are vulnerable within Northern Ireland also. Beyond, the legacy of conflict also creates other 'at risk' groups (both within and in addition to the 'at risk' groups identified) – victims *of* conflict and those impacted by intergenerational trauma *from* conflict. Women and those with caring responsibilities emerged as key actors who experienced trauma which impacted on their caring responsibilities.<sup>61</sup> This parallels the Covid-19 experience. The International Labour Organization (ILO) warned that women would continue to be particularly vulnerable post-pandemic.<sup>62</sup> They assumed the burden of caring and schooling responsibilities during the pandemic and tend to work in those sectors

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59 62 per cent of the global workforce are working in the informal economy. See 'Impact of the coronavirus disease pandemic on contemporary forms of slavery and slavery-like practices: report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences' A/HRC/45/8.

60 Statement by the UN Working Group on Business and Human Rights (n 57 above).

61 Maggie Long, 'Derry Girls and containment: conflict-related and trans-generational trauma in Northern Ireland' (2021) 14(1) *Journal of Psychosocial Studies* 3–17; Jessie Austin, 'The "ceasefire babies": intergenerational trauma and mental health in post-conflict Northern Ireland' (2019) 2(1) *Public Health Review* 1–5).

62 ILO Director General Guy Ryder's remarks at the Global Deal Conference on Social Dialogue and the SDGs in the times of the Covid-19 pandemic: 'Social dialogue essential to any effective response to the pandemic says ILO Director-General' (ILO 26 June 2020).

most adversely impacted.<sup>63</sup> This may lead to an *equality regression*. The parliamentary Women and Equalities Committee launched an enquiry about the different and disproportionate impact that Covid-19 had on those with protected characteristics under the Equality Act 2010.<sup>64</sup> One recommendation made in oral evidence was that there must be ‘a framework ... using the law ... to think it through. What are [the] issues, where are the groups and how do we design that in from the start?’<sup>65</sup> For Northern Ireland (and indeed all localities), it is imperative that identifying the issues and the relevant stakeholders adequately captures the context in which these issues might emerge.

Law’s playing a reflexive role in managing the disproportionate impacts of Covid-19 and of emergencies more generally is key to BHR. That is, focus on due diligence, audit and other processes of discovery highlight BHR’s turn to business knowledge frames in speaking into human rights in the corporate economy. Whether such frames can be turned towards the pandemic’s impacts will require nuanced dialogue between business and states. We argue this must start with both businesses and states coming to an understanding regarding how the interaction of work with vulnerabilities and precarities is itself an agent

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63 Soraya Seedat and Marta Rondon, ‘Women’s well-being and the burden of unpaid work’ (2021) *British Medical Journal* 374; Kate Bahn, Jennifer Cohen and Yana van der Meulen Rodgers, ‘A feminist perspective on Covid-19 and the value of care work globally’ (2020) 27(5) *Gender, Work and Organization* 695–699; Esuna Dugarova, ‘Unpaid care work in times of the Covid-19 crisis: gendered impacts, emerging evidence and promising policy responses’ paper prepared for UN Expert Group Meeting, ‘Families in development: assessing progress, challenges and emerging issues, focus on modalities for IYF+30’. More generally, Lourdes Beneria, ‘The enduring debate over unpaid labour’ (1999) 138 *International Labour Review* 287; Judy Fudge, ‘Feminist reflections on the scope of labour law: domestic work, social reproduction, and jurisdiction’ (2014) 22(1) *Feminist Legal Studies* 1; Silvia Federici, ‘The reproduction of labour power in the global economy and the unfinished feminist revolution’ in Maurizico Atzeri (ed), *Workers and Labour in a Globalised Capitalism: Contemporary Themes and Theoretical Issues* (Palgrave Macmillan 2014) 85–110. For ethnic minority groups, concerns centre round the economic effects of the crisis. For those with a disability, the accessibility of government/executive messaging is questioned. For the LGBTQIA+ community, much of the focus of the literature was on their pandemic experience rather than in the recovery stages. This centred on mental health concerns, lack of access to safe spaces and supports, and domestic abuse. See Chaka L Bachmann and Becca Gooch, *LGBT in Britain. Health Report* (Stonewall & YouGov 2018); LGBT Foundation, *Hidden Figures: The Impact of the Covid-19 Pandemic on LGBT Communities in the UK* 3rd edn (LGBT Foundation May 2020).

64 Ethnic minority groups, gendered economic impact and disability and access to services.

65 Ali Harris, ‘Oral evidence: unequal impact: coronavirus (Covid-19) and the impact on people with protected characteristics’ (Women and Equalities Committee 10 June 2020) HC 276.

of public health, and how a more sustainable economy will require that such inequalities be better addressed. For Northern Ireland, grappling with a public health crisis prior to the pandemic, the added pressures (both direct and indirect) on public services are profound. It is essential that this nuanced dialogue takes place to ensure the existing inequalities in the region (tied to conflict) are not perpetuated and further embedded into the local social, business and public health structures.

### **Workers in supply chains**

Migrant workers, representing 4.7 per cent of the global labour pool, 'have been especially vulnerable to the socio-economic impacts of Covid-19'.<sup>66</sup> The roles that migrant workers typically find themselves in are characterised by low wages and a lack of social protections. For Northern Ireland, this can take two main forms. First, there are those who are employed in the local economy and, second, there are Northern Irish companies who may avail of migrant labour somewhere in their supply chain. Some sectors of the Northern Irish economy rely heavily on migrant labour, for example, seasonal agriculture, the agri-food industry, factories, tourism and hospitality. Whereas these migrant workers do not necessarily experience the extremes of issues of migrant workers in other regions, as discussed above, exploitations can still exist.

During Covid-19, the impact on migrant workers was profound.<sup>67</sup> The casualisation of labour in the most impacted sectors meant that many spent long periods of time without employment. They were trapped. Travel restrictions meant they could not return to their home countries, they may not have been able to access benefits (which in turn impacted housing and access to housing) and the expiry of visas and work permits may have caused a rise in undocumented workers in Northern Ireland. These workers are most at risk of falling within cycles of modern slavery where protections under existing legislation and strategies in Northern Ireland are limited. Meeting the complex needs of these groups becomes even more urgent in the context of economic entrenchment and recession. Increasing economic pressures see risks to already marginalised communities, and opportunities for unscrupulous or struggling employers grow in tandem. Again,

66 David Koh, 'Migrant workers and Covid-19' (2020) 77(9) *Occupational and Environmental Medicine* 634–636; Andrian Liem, Cheng Wang, Yosa Wariyanti, Carl A Latkin and Brian J Hall, 'The neglected health of international migrant workers in the Covid-19 epidemic' (2020) 7(4) *The Lancet Psychiatry* e20.

67 European Commission, '[Overcrowded reception centres and informal settlements make migrants vulnerable to Covid-19](#)' (17 March 2020); Sali Tripathi, 'Companies, Covid-19 and respect for human rights' (2020) 5(2) *Business and Human Rights Journal* 252–260.

beyond questions of inherent dignity, economic resilience favours less exploitative working and living conditions.

### **Remedy**

The unique selling point of BHR is the right to access an effective remedy in the case of a corporate human rights impact. This is emphasised most vigorously in Pillar III of the UNGPs. Progress in achieving this pillar is paramount: '[e]nabling access to effective remedy for rights holders when abuse has occurred through judicial and non-judicial grievance mechanisms, is an integral part of the State's legal duty to protect human rights'.<sup>68</sup> Thus, where a worker's rights have been impacted, they must have access to a remedy (judicial or non-judicial). Where a business has contributed to any negative impact, it must mitigate and seek to remedy it.<sup>69</sup> Conversations on the UNGPs' development, and any future treaty on BHR, have emphasised the importance of strengthening this pillar, clarifying '*effective* remedy' (emphasis added) and widening 'access'.<sup>70</sup>

Remedy need not take place in specifically 'human rights' venues, but in far more micro-level arenas, for example, employment tribunals, lower courts and arbitration proceedings. Covid-19 exacerbated the difficulties in accessing such remedies, not least because NGOs soliciting advice for those who had been wronged were disrupted and, beyond that, tribunals and courtrooms closed their doors, slowing access to justice even as institutions moved online.

From the corporate perspective, community-business engagement became more difficult. For example, typical routes to stakeholder engagement, including with those impacted within supply chains (town hall meetings etc), were either limited or suspended. Whereas other online methods of engagement are available, these suppose levels of digital literacy and access to relevant materials (eg smart phones/tablets and being in rural or remote communities).<sup>71</sup> There

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68 See n 57 above.

69 Eg Principles 11, 13, 15 and 24, UNGPs (n 3 above).

70 Office of the UN High Commissioner for Human Rights, '[Improving Accountability and Access to Remedy for Business and Human Rights Abuses: A submission from the Office of the United Nations High Commissioner for Human Rights \(OHCHR\) on the Third Revised Draft of the legally binding instrument \(LBI\) to regulate in international human rights law, the activities of transnational corporations and other business enterprises](#)' (2021).

71 Faith E Fletcher et al, 'Covid-19's impact on the African American community: a stakeholder engagement approach to increase public awareness through virtual town halls' (2020) 4(1) *Health Equity* 320–325; Shauntice Allen et al, 'Covid 19's impact on women: a stakeholder-engagement approach to increased public awareness through virtual town halls' (2020) 26 (6) *Journal of Public Health Management and Practice* 534–538.

were knock-on implications of closure of services such as libraries and community organisations. The switch to online provision saw some disenfranchised, including the elderly (lack of digital literacy), those in lower socio-economic areas and those with no access to the internet (particularly supply chains and less developed nations). Losing voices is detrimental to communities and businesses, so it is imperative that they and civil society organisations work to ensure that messages are being heard.<sup>72</sup>

Post-pandemic, an opportunity exists for business to rethink its public presence, not least in the interplay of dialogue and consultation with remedy and other less advantageous (to firms) interactions with stakeholders. There is a risk that the post-pandemic world will see less inclusive forms of corporate engagement combine with reduced access to remedy. Conversely, the pandemic highlighted more constructive approaches. The crisis saw a move beyond the business–state dichotomy within the BHR movement. It saw potential for BHR to be more than the types of arbitrary HRDD it has come to be characterised as. In Northern Ireland this was evidenced in the shared response to delivering aid. Local businesses and local government worked with community organisations to distribute groceries, medication and so on. This opened new lines of communication and engagement.<sup>73</sup> Communication and engagement will be, and are, key to facilitating access to remedy where, for example, due diligence has failed. With courts closed (or limited) or facing huge backlogs, justice may seem further removed from harms. Those impacted by business failure to respect human rights including (and beyond) workers and those in the supply chain need to feel supported.

## **A FRAMEWORK FOR FUTURE-PROOFING BUSINESS AND HUMAN RIGHTS IN NORTHERN IRELAND**

Macchi advocates the reading of law through a contextualised lens, considering the interrelated nature of social phenomena. Similarly, we advocate thinking both through and beyond the UNGPs, approaching the interrelation of health and economy within the conceptual frames

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72 Generally, Kee-Hong et al, ‘Does CSR matter in times of crisis? Evidence from the Covid-19 pandemic’ (2021) 67 *Journal of Corporate Finance* 101876; on social distancing, see: Catherine Tobin, Georgia Mavrommati and Juanita Urban-Rich, ‘Responding to social distancing in conducting stakeholder workshops in Covid-19 era’ (2020) 10(4) *Societies* 98.

73 For an overview of collective community responses to Covid-19 including volunteer community groups, GAA Orange Order, Soccer Clubs, Rugby Clubs, Women’s Institute and other organisations, see Northern Ireland Council for Voluntary Action ([Covid 19 Response](#)).

provided by BHR in its broadest regulatory sense. This will help us understand how the complex mix of economic vulnerability, systemic resilience and health equity interact. The approach Macchi advocates is key to understanding law's role in addressing this mix and has characterised our approach in the sections above.

As Northern Ireland and other jurisdictions loosened pandemic restrictions, talk of 'return to normality' gave way to a realisation that no return to an 'old normal' was possible. While immediate concerns took over, the deeper question remains regarding how a post-pandemic phase ought to be assembled. In Northern Ireland this is especially urgent given broader political and economic uncertainties associated with Brexit, the climate emergency, energy supply-chain vulnerabilities and so on. This is compounded by the legacy of conflict on health and development, and the ongoing failures of government including, at the time of writing, the ongoing dysfunction in the Northern Ireland Executive.

It is impossible to predict which path recovery might take. As with all shocks, immediate responses – or absence thereof – only constitute part of the overall picture. Taking a parallel policy track to the *status quo* in the immediate term cannot address changes, for instance, to individuals, to work, or to the economy wrought by the pandemic. Nor does it address any lacunae the pandemic exposed.

Our discussion of Northern Ireland's BHR landscape above underlines the provisions that already exist in sustaining an economy free of exploitation. A question arises now regarding, first, how patterns of vulnerability might evolve in a context of medium-term recovery from the pandemic and, second, how those patterns might be reflected in economic life over a longer term. How law reflects and encodes the recovery will be a key challenge.

In this context, and for several reasons, the *status quo* is insufficient. We name three such reasons here.

### **Engagement between business, community and state**

The Northern Ireland Executive reacted to the unfolding economic crises post-pandemic with initiatives to stimulate the economy and protect business. However, a long recovery beckons, especially in the context of the differential impacts of the pandemic period itself on, for instance, those suffering long-term health impacts from the virus, or on young people who suffered delayed skills and social development. Absent additional support, economic and social recovery will remain fragile. This fragility might not be apparent in headline economic figures, but instead in withdrawal from labour markets, lower productivity, and higher absences from work, all of which would

reflect a greater disconnect between some groups and economic life. In Northern Ireland, this takes on an additional gloss given the post-conflict dispensation: economic displacement has had a long history of exacerbating the conflict because of direct frustration with a lack of opportunity and because of perceived differential impacts from poverty across communities. Beyond, this has been compounded by the collapse of the Northern Ireland Assembly, continued uncertainty regarding Northern Ireland's place in the EU post-Brexit, a UK-wide 'cost of living' crisis, a draconian budget and a series of cuts sanctioned by the Secretary of State for Northern Ireland, Chris Heaton Harris.

BHR frameworks seek to mobilise business into mainstreaming human rights perspectives. At the same time, they assert a perspective on the role that the corporate economy plays in people's lives. The external focus on due diligence for harms arising from the impact of business operations on people's lives has been matched by business discourses focusing on relationships between workers and their employers.<sup>74</sup> While this might be motivated by internal processes providing an easy route to demonstrating human rights credentials, it also reflects a sense that BHR is concerned with people's participation in economic life. The BHR focus on global supply chains ought not to distract from the fact that legitimisation and other questions arise at the local level as well. Conditions for engagement with economic life are a matter both for business *and* for regulators. This suggests that new kinds of regulatory design are required, something for which BHR frameworks are well suited.

They are well suited for such design conversations because they propose human rights, not solely as a constraint on corporate capitalism, *but as a common framework within which business, state and stakeholder interests can play out*. The focus on due diligence and corporate engagement within BHR, while weaker than direct state intervention, allows for greater sensitivity to contingent conditions. Corporations and their regulators can negotiate context-specific BHR frameworks and, where regulatory scrutiny is sufficiently robust, a more ground-level approach can ideally be defined and devised.<sup>75</sup>

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74 See, for instance, Ken McPhail and Carol A Adams, 'Corporate respect for human rights: meaning, scope, and the shifting order of discourse' (2016) 29 *Accounting, Auditing and Accountability Journal* 650.

75 Marianna Leite, 'Beyond buzzwords: mandatory human rights due diligence and a rights-based approach to business models' (2023) 8(2) *Business and Human Rights Journal* (First View) 197–212.

## **Exploitation**

For many of those who remain engaged with economic life, a rebalancing of employer demand and employee need make it likely that patterns of work will not return to pre-pandemic norms. People may work remotely more often. The existing turn to platform or ‘gig’ work (in hospitality, for example) may accelerate and even displace previous working patterns and employers.<sup>76</sup> Beyond that, those who are struggling may be driven to accept lower conditions or join the informal sector to a greater degree than would have been the case absent the Covid-19 economic shock. Across the north Atlantic economies, including in Northern Ireland, the balance of power may shift not only towards employers but also *towards exploitation*.

While it might be the case that labour market dynamics will see employers and employees striking a balance over working from home, the overall environment will require a regulatory response that goes beyond the *status quo*. In addition to scrutiny of platform worker conditions, regulators will have to be cognisant of new vulnerabilities that will arise with distance work: wage theft, tax failings and outright fraud. In these circumstances labour market enforcement can be accompanied by private supply-chain due diligence regulations, something that many Northern Ireland firms are likely to be familiar with if not already actioning. The question as always with BHR relates to the level of regulatory oversight and scrutiny required to ensure that private due diligence processes are in fact set up to support public ends.

Northern Ireland’s failure to implement the Equality Act 2010 means that the state has more to do to maintain the core values of dignity and respect in the world of work post-lockdown. Bailouts or financial incentives to businesses must ensure protections for those vulnerable groups. Further, we recommend that an assessment be carried out on the response by businesses to Covid-19 and their employees, to ensure marginalised groups are being adequately protected.

The specific conditions that prevail in Northern Ireland suggest that particular care would be required on some aspects of these general challenges. A combination of the legacy of conflict, the vulnerability of migrant labour and Northern Ireland’s complex border combined with a small-scale agricultural economy suggests that the region is particularly exposed to and ripe for labour exploitation. First, reform

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76 See Anthony Larsson and Robin Teigland (eds), *The Digital Transformation of Labor: Automation, the Gig Economy and Welfare* (Routledge 2020); Mark Graham, Isis Hjorth and Vili Lehdonvirta, ‘Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods’ (2017) 23 *Transfer: European Review of Labour and Research* 135.

in labour and modern slavery regulation and enforcement may take on additional urgency. Given the difficulties of regulatory scrutiny, however, a due diligence framework soliciting accounts from SMEs might help mediate between the conduct of relatively ‘illegible’<sup>77</sup> small-scale contributors to supply chains and state enforcement mechanisms.

### **Environment**

Finally, any investment and business activities have their own environmental effects, contributing to the social risks from the pandemic. Such effects can be direct or indirect (emissions) and create impact on both a global and local scale, on environments and workplaces.

Northern Ireland is the last part of the UK to legislate for climate change, after a long period of delay,<sup>78</sup> the most recent legislation being enacted in June 2022 as part of a short-lived chain of often-competing Bills.<sup>79</sup> Understanding global climate and its mitigation through narrow legislative frames fails to recognise the diversity of impacts that climate change may have, including on human health. Aspects of the climate emergency have intersected with and hampered pandemic relief.<sup>80</sup> Moreover, climate change is likely to exacerbate and intensify health risks from pandemics and other disease outbreaks. Links have long been drawn between pandemic risks and climate change, for instance, habitat loss, human–animal interactions, and broader health impacts of climate stresses.<sup>81</sup> This concern has been heightened in

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77 James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1998).

78 Committee on Climate Change, ‘[The appropriateness of a Northern Ireland Climate Change Act – Northern Ireland report](#)’ (Committee on Climate Change 2011); Department of Agriculture, Environment and Rural Affairs, [Discussion Document on a Northern Ireland Climate Change Bill](#) (DAERA Consultation Paper 2020).

79 Climate Change Act (Northern Ireland) 2022.

80 Carly A Phillips et al, ‘Compound climate risks in the Covid-19 pandemic’ (2020) 10 *Nature Climate Change* 586.

81 See Diarmid Campbell-Lendrum, A Pruss-Ustun and C Corvalan, ‘How much disease could climate change cause?’ in A J McMichael et al (eds), *Climate Change and Health: Risks and Responses* (World Health Organization 2003); Katrin Kuhn et al, ‘Using climate to predict infectious disease epidemics’ (World Health Organization 2005).

the context of the pandemic,<sup>82</sup> directly linking abstracted global risk to concrete local impacts. While Northern Ireland may not be a large emitter, it is one, especially in commercial activities such as agriculture. The global and the local are as such tied and can be understood in the context of BHR.

While global pandemic risks expose people in Northern Ireland, other environmental issues present themselves at a local level: emissions from transport and industry; and workplace patterns that produce stress, or other health impacts, produce pandemic risks of individual vulnerabilities. Workplace impacts, in addition to traffic and the like, again suggest the need to understand BHR in the round – in Macchi’s holistic sense.

## CONCLUSION

BHR is experienced at the local level but regulated at a macro level. Regional and national approaches to BHR in Northern Ireland and the UK have been driven by market demands rather than centring human rights. This has led to a ‘light touch’ engagement with basic BHR requirements, prioritising disclosure over due diligence, with due diligence limited to private-sector governance rather than mandated by legislation. Further, the failure to engage with the local interactions of business and human rights does a disservice to the potential of an holistic HRDD to achieve a true community-level partnership. Northern Ireland is a case in point. It is characterised by its history, the legacy of conflict and its positioning as the land border between the UK and the EU (Republic of Ireland). Its economic character is also worth noting – far from the lofty heights of the London Stock Exchange, Northern Ireland’s business is built around micro and

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82 Kathryn J Bowen and Kirstie L Ebi, ‘Governing the health risks of climate change: opportunities for regeneration in an age of planetary health’ (2020) 46 *Current Opinion in Environmental Sustainability* 1; updating Kathryn J Bowen and Kirstie L Ebi, ‘Governing the health risks of climate change: towards multi-sector responses’ (2015) 12 *Current Opinion in Environmental Sustainability* 80. See also Colin D Butler, ‘Pandemics: the limits to growth and environmental health research’ (2020) 46 *Current Opinion in Environmental Sustainability* 3; Julien Terraube and Álvaro Fernández-Llamazares, ‘Strengthening protected areas to halt biodiversity loss and mitigate pandemic risks’ (2020) 46 *Current Opinion in Environmental Sustainability* 35; see also the 2022 report from the Intergovernmental Panel on Climate Change, citing the ‘diverse adverse impacts’ of climate change on ‘water security and food production, health and well-being, and cities, settlements and infrastructure’: Hans-O Pörtner et al, *Climate Change 2022: Impacts, Adaptation and Vulnerability: Summary for Policymakers* (Intergovernmental Panel on Climate Change Sixth Assessment Report 2022) 35.

SMEs in predominantly the agricultural sector. Covid, and recovery post-Covid, throws the character of Northern Ireland and its business into sharp relief. Recovery and 'building back better' cannot be a one-size-fits-all approach. Recovery presents an opportunity to build on the successes of the pandemic (in terms of business engagement) and to look for the potential evolution of BHR to develop beyond disclosing impacts towards a more rights-centred holistic approach. This means integrating the respect of human rights into all aspects of business engagement – driving towards private governance as much as towards state regulation. In suggesting a framework for future-proofing BHR in light of Covid and considering the peculiarities that make Northern Ireland Northern Ireland, we focused on engagement, exploitation and environment.

We make four main concluding points. First, context is crucial if BHR is to develop. It is not enough to have sweeping principles and guidelines if there is no sense of how BHR is lived on the ground. Related, second, local experiences and interpretations of BHR are as important as international guidelines. It is the local environment that attracts the investment; therefore, it must be the local environment that helps shape the BHR agenda and practice within a particular region. Third, Covid demonstrated how local areas experienced a global event in different (but the same) ways. For Northern Ireland, Covid demonstrated how conflict had already impacted on public health and how this post-conflict legacy must be considered in all aspects of Northern Irish life. Last, holistic, rights-based BHR provides an opportunity to take context and locality into consideration. An holistic approach to crisis recovery can help future-proof the economy and ensure that recovery champions a better society. Recovery from Covid-19 presents an opportunity to perceive the interrelated vulnerabilities to pandemics and the human rights impacts those vulnerabilities have. A recovery promising a more equitable distribution of benefits and enhanced social as well as economic development would also have the merit of driving Northern Ireland towards greater public health resilience.



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

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## ABSTRACT

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

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

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

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## INTRODUCTION

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

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

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

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

## THE STORMONT EXECUTIVE: EINSTEIN, KEN AND OPPENHEIMER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 NIA, s 4(5).

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

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

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

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

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

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19 Ibid s 18(2)–(6).

20 McCormick (n 2 above) 232.

21 NIA, s 20(3).

22 Ibid s 20(4)(a).

23 Ibid s 20(4)(aa).

24 Ibid s 20(4)(b).

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

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

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

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

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

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

29 McCormick (n 2 above) 235.

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

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

32 NIA, s 28A(10).

33 *Ibid* s 20(1).

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

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

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

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

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

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

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

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

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

39 NIA, s 20(4).

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

41 McCormick (n 2 above) 232.

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

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

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

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

44 McCormick (n 2 above) 236-237.

45 NIA, s 28A(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56 *Ibid* [82]–[83].

57 *Ibid* [83].

58 *Ibid* [77] and [83].

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

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

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

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

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

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

63 *Ibid* s 28B(3)–(4).

64 *Ibid* s 28B(3).

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

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

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

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

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

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66 NIA, s 30(1)(b).

67 Ibid s 30(6).

68 Ibid s 30(2).

69 See Jo Murkens, 'Democracy as the legitimating condition in the UK constitution' (2018) 38 *Legal Studies* 42–58.

70 See *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, [102] per Lord Steyn.

instead often concentrate inter-party rivalries (and occasionally outright hostilities)<sup>71</sup> while simultaneously working alongside these other parties.

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

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

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

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

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

73 See the [Address by the Leader of the DUP to the DUP Party Conference](#), 8 October 2022.

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

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

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

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

75 NIA, s 32(1).

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

77 Ibid 5–10.

78 Ibid 11–13.

79 Ibid 14–16.

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

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

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80 Ibid Declaration of Support, para 5.

81 Ibid Declaration of Support, para 4.

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

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

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

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

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

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

to the GFA concerning, in particular, functions of the Stormont Executive.<sup>88</sup>

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

### **THE EXECUTIVE FACES THE COURT, AGAIN AND AGAIN**

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

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

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

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

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

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

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

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

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92 *McNern* (n 90 above) [20]–[21].

93 *Ibid* [21].

94 *Ibid* [22].

95 *Ibid* [25].

96 *Ibid* [26].

97 *Ibid* [30].

98 *Ibid* [32].

99 *Re Turley’s application for judicial review* [2021] NICA 10, [31], per Sir Declan Morgan LCJ.

100 *Ibid* [31].

out plans to ‘withdraw from the structures of Strand Two of the Belfast Agreement relating to north south arrangements’ in protest at the continued application of the Protocol to Northern Ireland.<sup>101</sup>

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

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

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

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

104 *Ibid* [6].

105 *Napier* [2021] NIQB 120.

106 *Ibid* [22].

107 *Ibid* [48].

108 *Ibid* [70]–[71].

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

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

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

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

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

proceedings arise, the primary accountability mechanisms are likely to be in the political arena'.<sup>114</sup> No mandatory relief followed.

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

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114 Ibid.

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

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

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

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

119 Ibid s 52(6) (superseded).

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

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

122 Ibid 23–24.

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

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

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123 Ibid 20 and 26.

124 Ibid 20.

125 *Re Williamson’s application for judicial review* [2000] NI 281 (NIQBD), 293d, per Kerr J.

126 *Education and Science Secretary v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL), 1047D, per Lord Wilberforce.

127 *de Brun* (n 115 above) 26–27.

128 *de Brun* [2001] NI 442 (NICA), 451h.

129 Respectively, *McNern* (n 90 above), [27] and *Napier* (n 105 above) [48]–[49].

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

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

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

### A REALIST APPROACH TO RELIEF

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

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

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

131 *de Brun* (n 115 above) 26–27.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

142 *McNern* (n 90 above) [20]–[21].

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

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

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

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

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

144 *Ibid* [64].

145 *Ibid* [65].

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

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

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

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

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

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

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

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

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

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

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

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

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

155 Ibid.

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

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

158 Ibid 277.

159 Holmes (n 132 above) 474.

160 See eg O’Leary (n 26 above) 178.

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

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

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

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

163 *Ibid* para 1.4(cb).

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

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

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

167 *Holmes* (n 132 above) 468.

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

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

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

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

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

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

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

171 *Ibid* 1.4(ca).

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

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

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

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

174 *Napier* (n 105 above) [81]–[82].

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

## **CONCLUSION**

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



# Fettering scrutiny on executive discretionary powers? Developments in the judicial reviewability of ministerial non-statutory guidance

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## ABSTRACT

This article examines the Supreme Court’s clarification of the law relating to the judicial review of soft law. In doing so, it offers a fresh perspective on how soft law sits within the legal framework. While much literature to date has attempted to theorise the nature of soft law, or focus on judicial review strategy, this article examines the role that soft law plays in the modern regulatory state. It then examines the treatment of these instruments by the courts, with particular attention paid to the 2021 joined decisions of *R(A)* and *BF*. The Supreme Court reversed a more expansive trend evident in preceding Court of Appeal case law and reinforced the primacy of the narrower approach to review seen in the *Gillick* judgment. Unlike other research on these judgments, this article problematises these decisions by showing how this limits the ability of particularly vulnerable applicants like children to challenge decisions due more to systemically flawed policies than to *ad hoc* misapplications of soft law by end users. How the Supreme Court could in future occupy a role as a mechanism for legal accountability of discretionary executive powers is also discussed; should the judicial branch of the state avail of the opportunity to make declaratory orders or endorse practice directions that might better regularise the making of soft laws in the future. The article then discusses the wider constitutional problems raised by use of a *Gillick*-inspired approach, including issues relating to lack of judicial scrutiny of soft law.

**Keywords:** soft law; policies; *Gillick*; ministerial powers; non-statutory guidance; accountability; scrutiny.

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† The laws, guidelines, policies, etc referenced in this article refer to the versions which were in place as of November 2023 unless otherwise stated.

## INTRODUCTION

The nature of non-statutory ministerial guidance, and the reach of soft law instruments generally, have undergone profound change in the United Kingdom (UK) since the Second World War. The term ‘soft law’ for our purposes is used as a convenient shorthand for a variety of instruments issued by ministers, without a statutory empowerment or obligation. These include instruments variously labelled as ‘guidance’, ‘guidelines’, ‘circulars’ and ‘policies’, among others.<sup>1</sup> They are typically used by ministers to implement government policies via binding rules without using the more traditional methods of primary or secondary legislation. From humble beginnings, and in many guises, this discretionary form of rule-making now pervades every level of central and local government. Though often a quick, flexible and effective method of administration, it can also lack many features that we have come to expect of a parliamentary democracy such as certainty, accountability and transparency. It also lacks standardised regulation and adequate oversight centrally. This article seeks to investigate this modern phenomenon through the prism of a pivotal Supreme Court pronouncement on the subject, in the joined cases of *R(A)* and *BF*.<sup>2</sup> Though very different in terms of the facts that led them there, *R(A)* and *BF* provided the Supreme Court with a long-awaited opportunity to focus on the extent of review of such soft law instruments. Though the *R(A)* outcome was not particularly surprising, the *BF* judgment was not without its controversy, as the Supreme Court significantly shifted from the expansive rights-based claims embraced by the Court of Appeal, to a far narrower focus limited to the unlawfulness of the policy. The Supreme Court also significantly departed from many prominent post-*Gillick* developments by the Court of Appeal in this area, and reinstated the *Gillick* test as the standard by which to assess the lawfulness of soft law in future challenges. Though there were other avenues open to it, the Supreme Court plainly conceived its role here as being to reorient judicial review rather than to engage in a review of soft law *per se*. An alternative and more purposive approach, as employed by a different panel of Supreme Court judges in *G v G*,<sup>3</sup> was open to the Supreme Court, but ultimately not taken. Through mechanisms such as declaratory orders or endorsing practice directions, the court

1 Other terms for soft law encountered by the author in literature cited in this article also include quasi-legislation, third-source powers, sub-delegation, hidden law-making, tacit legislation, etc.

2 *R (A) v SSHD* [2021] UKSC 37 (*R(A)*, SCt); *BF (Eritrea) & Equality & Human Rights Commissioner v SSHD* [2021] UKSC 38 (*BF*, SCt).

3 *G v G* [2021] UKSC 9; see also Kieran Walsh and Sarah Atkins, ‘When our paths cross again: the Supreme Court’s management of related asylum and child abduction claims in *G v G*’ (2022) 85(5) *Modern Law Review* 1245.

could have encouraged and promoted good governance by ministers and prevented future difficulties in similar soft law proceedings, and as such play an important role in ‘opening channels of deliberation and participation’ with government.<sup>4</sup>

The cases of *R(A)* and *BF* were not joined until they reached Supreme Court level. As the ministers had issued the policies at their own discretion in both matters, they were considered suitable vehicles by which to jointly examine (and clarify) ‘the correct approach to judicial review of policies’.<sup>5</sup> The facts of *R(A)* involved a convicted child sex offender challenging the Child Sex Offender Disclosure (CSOD) Scheme on the basis that he felt it did not go far enough in its wording and was unlawful because, *inter alia*, it created an unacceptable risk of unfairness.<sup>6</sup> It was a successful challenge to guidance by the same applicant in 2012 that led to amended wording which was the subject matter of the present proceedings.<sup>7</sup> However, for the applicant, the new wording did not go far enough, giving rise to ‘an unacceptable risk of unfairness and breach of A’s “right to respect for private life” under Article 8’ of the European Convention on Human Rights (ECHR).<sup>8</sup>

The facts of *BF* involved a 16-year-old Eritrean who arrived in the UK and claimed asylum as an unaccompanied minor. Statute requires the Home Office to carry out its functions in a way that takes account of the need to safeguard and promote the welfare of children in the UK, including asylum-seeking children.<sup>9</sup> In *BF*’s case the immigration officers did not believe the adolescent’s assertions that he was under 18 years of age and, based on the criteria in the policy guidance at the time,<sup>10</sup> duly detained him in an adult facility. The UK

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4 Margit Cohn, *A Theory of the Executive Branch: Tension and Legality* (Oxford University Press 2021) 16–17.

5 *R(A)*, SCt (n 2 above) [6].

6 Para 5.5.4 of CSOD Scheme Guidance provides that: ‘If the application raises “concerns”, the police must consider if representations should be sought from the subject to ensure that the police have all necessary information to make a decision in relation to disclosure.’

7 *R (X) v Secretary of State for the Home Department* [2012] EWHC 2954 (Admin).

8 *R (A) v SSHD* [2016] EWCA Civ 597 [23], (*R(A)*, CoA); art 8 ECHR guarantees a person the ‘right to respect for his private and family life, his home and his correspondence’. The applicant’s argument before the Supreme Court was that the Disclosure Guidance in question was not sufficiently certain or predictable in application and accessibility under art 8(2) and therefore not ‘in accordance with the law’.

9 Borders, Citizenship and Immigration Act 2009, s 55.

10 Criterion C under para 55.9.3.1 of the general operational guidance issued by the Home Office to immigration officers entitled the *Enforcement Instructions and Guidance* (EIG), both as it appears and as it is reproduced in other Home Office guidance called *Assessing Age*.

method of assessing age, in the absence of evidence of age, is based on an assessment of the ‘physical appearance and demeanour’ of the individual. Criteria for assessment by immigration officers are provided by Home Office guidance.<sup>11</sup> This guidance stated that immigration officers should apply the benefit of doubt in favour of determining that an individual is a child,<sup>12</sup> pending a Local Authority age assessment. Two age assessments conducted by the Local Authority determining BF to be an adult were later discredited by an independent age assessment that concluded he was under 18 when he entered the UK.<sup>13</sup> The third assessment was ultimately accepted by the Home Office during proceedings,<sup>14</sup> though by then it was too late for BF to avail of his rights as a child. The claim before the court was the lawfulness of the policy.<sup>15</sup>

The combined judgments of *R(A)* and *BF* are important because they represented a rare opportunity for the Supreme Court to evaluate judicial interpretations by the lower courts of the lawfulness of soft law instruments. The Supreme Court chose to recalibrate judicial interpretation of soft law instruments to be more in line with *Gillick* going forward and thus limit the scope of unfair government policies being subject to judicial review in the future. However, by finding unanimously in favour of the Secretary of State for the Home Department (SSHD) and focusing their judgments so narrowly, the Supreme Court judgment is open to some criticism. First, it did not sufficiently distinguish whether the courts might approach statutory and non-statutory guidance differently, and if so how. Secondly, and regardless of finding in favour of the SSHD here, they could have nonetheless encouraged the minister to systematically review the appropriate means of producing, using, interpreting and remedying these non-statutory executive policies and guidance. Given that use of soft law has become a burgeoning practice by ministers in the years since *Gillick*, it is now in urgent need of scrutiny and regulation. In not doing so, the Supreme Court overlooked an opportunity which had been 35 years in the making.

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11 Both the *EIG* and *Assessing Age*, *ibid*, underwent many changes since first published in 2011, including four times during the *BF* matter alone; ch 55.9.3.1 of *EIG* covers ‘individuals claiming to be under 18’. For comparison of different versions of *EIG* and *Assessing Age* see *BF*, SCT (n 2 above) [24]–[31].

12 Version 2.0 of *Assessing Age* (n 10 above) para 2.2.

13 *BF (Eritrea) & Equality & Human Rights Commissioner v SSHD* [2019] EWCA Civ 872 [3] and [85], (*BF*, CoA).

14 *BF (Eritrea) v SSHD*, JR/8610/2014 [12]–[13], (*BF*, UT). However, by then the Home Office had unlawfully detained BF in adult facilities for a cumulative total of nearly nine months, contrary to the Immigration Act 1971, sch 2, 18B (as amended by the Immigration Act 2014).

15 See *BF*, CoA (n 13 above) [11].

Though this may seem controversial to some, what such judicial deference towards non-statutory guidelines indicates is that some of the UK judiciary do not see the courts as a legitimate scrutiniser of this form of soft law. The *BF* judgment also serves as a conspicuous reminder of how too many vulnerable minors in the UK asylum process can fall foul of flawed drafting of soft law instruments. News coverage has highlighted that ‘867 out of 1,386 [individuals] deemed to be adults by the Home Office were later confirmed to be children’,<sup>16</sup> but only after those children had been put at risk over protracted periods when placed in inappropriate adult settings. The current non-statutory guidance on age assessment arguably goes to the heart of this problem.

More recent developments, since these Supreme Court judgments, do not detract from arguments raised here about soft law. In fact, even the nascent National Age Assessment Board (NAAB),<sup>17</sup> a new government body established by the Home Office on foot of the Nationality and Borders Act 2022, sets out the policy and procedures for the operation of the NAAB and on the wider processes by way of non-statutory ministerial guidance. Therefore, the discussion on soft law below is more relevant than ever. In light of the above, it remains fair to say that ‘judicial regulation of administrative rule-making is still patchy and incomplete, and its conceptual basis is often unclear’<sup>18</sup> and requires continued academic attention.<sup>19</sup>

Literature on soft law has a long and varied history.<sup>20</sup> While scholars like McHarg or Williams take a more doctrinal, judicial review emphasis,<sup>21</sup> others like Hewart or Daly have engaged in analysis of

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16 See Refugee Council, *Identity Crisis: How the Age Dispute Process Puts Refugee Children at Risk* (Refugee Council Report October 2022); David Neal, *An Inspection of the Initial Processing of Migrants Arriving Via Small Boats at Tug Haven and Western Jet Foil, Dec 2021 – Jan 2022* (Independent Chief Inspector of Borders and Immigration July 2022); see also Samir Jeraj and Michael Goodier, ‘Child asylum seekers are caught between the Home Office and cash-strapped councils’ (*The New Statesman* 31 October 2022); Diane Taylor, ‘Hundreds of UK asylum seeker children wrongly treated as adults, report shows’ *The Guardian* (London 24 April 2023).

17 See Home Office, *National Age Assessment Board: The Operation of the National Age Assessment Board and Sections 50 and 51 of the Nationality and Borders Act 2022*, version 1.0 (Home Office March 2023); see also Association of Directors of Children’s Services Ltd and the Home Office, *Age Assessment Joint Working Guidance* (Home Office March 2023).

18 See Aileen McHarg, ‘Administrative discretion, administrative rule-making, and judicial review’ (2017) 70(1) *Current Legal Problems* 267.

19 Recent commentary includes Kenny Chng, ‘Reconsidering the legal regulation of the usage of administrative policies’ [2022] *Public Law* 76.

20 Including comparable terms (see n 1 above).

21 See also Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Bloomsbury 2016) writing largely from an Australian perspective.

constitutional questions. These include questions of what such practices, if abused by the executive, say about democratic legitimacy, the rule of law,<sup>22</sup> potential tensions with other constitutional principles and the necessary role of the judiciary in holding the executive accountable.<sup>23</sup> This article adds to the normative scholarship by critically analysing these Supreme Court judgments as symptomatic of how this prevalent form of rule-making undermines established separation-of-power paradigms in a number of concerning ways. Another cause of concern arises when one considers the formal effects of soft law on the people to whom official decision-makers apply these informal rules. As Weeks rightly states, ‘people [are] subjected to real and legally effective consequences as a result of the operation of soft law’.<sup>24</sup> As such, potential ramifications for more vulnerable rights holders that fall foul of this form of rule-making can have life-altering effects. In light of this concern, and in the absence of a regulatory or legislative framework for soft law, the author joins the call for a more enhanced role to be taken by the judiciary to review soft law.<sup>25</sup>

The first part of this article will introduce soft law instruments, with particular focus on non-statutory rule-making. After acknowledging some of the potential benefits of soft law in principle, the section then progresses to interrogate the courts’ position on such guidance to date. There the landmark case of *Gillick* will be examined,<sup>26</sup> as well as how subsequent case law interpreted and applied those principles to soft law instruments. The second part addresses the joined judgments of *R(A)* and *BF*, giving brief attention to their earlier proceedings before presenting the Supreme Court judgments. Finally, part three provides analysis of the linked judgments and raises some criticism that may be levelled against aspects of the joined cases. Discussion of wider constitutional problems with the court’s approach also occurs here. Perhaps controversially, this article argues that in the absence of Parliament reforming the regulation of soft law instruments, it is left to the courts to scrutinise discretionary ministerial power whenever the opportunity arises. Unfortunately, we may infer from these judgments that the Supreme Court does not readily accept this role.

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22 See Stephen Daly, ‘The rule of (soft) law’ (2021) 32(1) *Kings Law Journal* 3.

23 See Lord Hewart in *The New Despotism* (Ernest Benn 1929) arguing that quasi-legislation, at its worst, should be feared.

24 Weeks (n 21 above) 2.

25 See also Cohn (n 4 above) ch 10 generally.

26 Harlow at the time felt *Gillick* was not a helpful judgment following on from *O’Reilly v Mackman* [1983] UKHL 1, [1983] 2 AC 237. See Carol Harlow, ‘*Gillick*: a comedy of errors?’ (1986) 49(6) *Modern Law Review* 768.

## SOFT LAW INSTRUMENTS: OVERVIEW

It is worth noting that, although there is a plethora of terminology used in academic circles to discuss this form of rule-making,<sup>27</sup> I will predominantly use the term ‘soft law’ below. Though emergence of the term ‘soft law’ had its origins in the international/transnational law context,<sup>28</sup> with the passage of time the term has also been adapted for use in domestic law, and in the specific context of domestic UK law that the term ‘soft law’ is used here.

Though some discard the term ‘soft law’,<sup>29</sup> in my view it readily indicates both the power and nature of such instruments in this jurisdiction, whilst at the same time distinguishing them from ‘hard law’ rule-making like primary and secondary legislation. The term ‘soft’ also depicts the malleable and fluctuating character of these instruments from the drafter’s perspective, whilst also being considered as binding the affected end-user or public. In the words of Rawlings, soft law is ‘not directly legally enforceable but ... may be treated as binding in particular legal or institutional contexts’.<sup>30</sup> As such informal devices are considered legally binding by creating powers or duties, the exercise of these powers should in turn be judicially reviewable in the same way as any other exercise of executive functions.

Soft laws are used by ministers to roll out government policies as an alternative to primary or secondary legislation.<sup>31</sup> They may set out policies, principles, practices and procedures assigned by the minister to end-users, such as public bodies/officials, agencies and, in some instances, the public.<sup>32</sup> Though government ministers may produce statutory guidance because they are obligated to do so on foot of primary

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27 For examples, see further Robert E Megarry, ‘Administrative quasi-legislation’ (1944) 60 *Law Quarterly Review* 125; Robert Baldwin and John K Houghton, *Circular Arguments: The Status and Legitimacy of Administrative Rules* (Sweet & Maxwell 1986); Alexander Williams, ‘Judicial review and monopoly power: some sceptical thoughts’ (2017) 133 *Law Quarterly Review* 656.

28 Referring to rules that are not formally binding but still considered to be the accepted ‘rules of the game’; for the international law origins and development of this term see further Dinah Shelton, ‘Soft law’ in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009); Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016).

29 See Cohn (n 4 above).

30 Richard Rawlings, ‘Soft law never dies’ in Mark Elliot and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press 2015) 215.

31 Mark Elliott and Jason N E Varuhas, *Administrative Law: Text and Materials* 5th edn (Oxford University Press 2017) 128.

32 Some academics differ on how best to classify ‘soft law’: eg Weeks (n 21 above); cf Cohn (n 4 above).

legislation,<sup>33</sup> they can produce non-statutory guidance – a form of soft law – at their own discretion without statutory empowerment; it is the latter on which we shall focus. The practice of issuing executive circulars/guidance, and the courts' interpretation of them, became established in the aftermath of the Second World War.<sup>34</sup> The secretive and club-like attitudes that prevailed in government on matters of policy are evidenced by the unearthing of the 'Ram Doctrine'. This was a 1945 legal memorandum that permits ministerial action as long as it is not restricted by statute,<sup>35</sup> but was not a matter of public knowledge until 2003.<sup>36</sup> The exposure of the 'Ram Doctrine' illustrates longstanding government attitudes symptomatic of 'club government',<sup>37</sup> with lack of transparency or accountability being tell-tale characteristics of this mindset.<sup>38</sup>

Subsequent decades saw a gradual increase in transparency; executive practice evolved to 'publish circulars which were of any importance to the public'.<sup>39</sup> However, a public perception of partial opacity remained.<sup>40</sup> Though soft law is now findable on any given departmental website, these remain quite difficult to navigate and to trace previous iterations of a document, particularly for lay people. Because there is still no centralised record of non-statutory ministerial rules, unlike statute, the government webpages in this regard are hardly a model of accessibility or transparency.

With the proliferation of scandals and the shift towards a 'risk society' it has become necessary to move away from oligarchic forms of power and rule-making towards a more transparent and accountable modern regulatory state. Building on Moran's understanding of this,<sup>41</sup>

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33 If a statute requires a minister to publish guidance then the status of that guidance should be likened to other statutory instruments; this obligation should be formalistically distinguished from circumstances where the courts impose a 'duty' on ministers to produce guidance, as an outcome of a specific review of ministerial discretion.

34 *Blackpool Corporation v Locker* [1948] 1 KB 349 and *Patchett v Leathem* [1949] 65 TLR 69.

35 See further Margit Cohn, 'Medieval chains, invisible inks: on the non-statutory powers of the executive' (2005) 25(1) *Oxford Journal of Legal Studies* 97.

36 Anthony Lester and Matthew Weait, 'The use of ministerial powers without parliamentary authority: the ram doctrine' [2005] *Public Law* 415.

37 See Michael Moran, 'The rise of the regulatory state in Britain' (2001) 54(1) *Parliamentary Affairs* 19 and Michael Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (Oxford University Press 2003).

38 Rawlings (n 30 above) 234 includes these characteristics, along with participation, as amongst the 'trio of good governance'.

39 See William R Wade and Christopher F Forsyth, *Administrative Law* 11th edn (Oxford University Press 2014) 736.

40 See Cohn (n 35 above).

41 Moran (n 37 above).

I argue that an essential component of the regulatory state is regulation of government itself. Channelling the work of both Giddens and Beck who argue that risk can no longer be thought of as an objective artefact capable of being eliminated, but as an intrinsic part of late modern society which is constantly constructed and remodelled in light of ever-changing knowledge and attitudes,<sup>42</sup> Moran highlights how objective risks no longer drive regulation, and that the aim of eliminating risk has been replaced by a desire to manage perceptions of risk.<sup>43</sup> While political science was attuned to this more sophisticated understanding of risk and regulation for some time,<sup>44</sup> it will become apparent that some in the current Supreme Court have yet to appreciate these changing modes of governance, or the role they can play.

Until the high-profile *Gillick* judgment there was ‘a paucity of literature’ on the subject,<sup>45</sup> though some early literature concerned itself with the various typologies of soft law, while other work focused on its true source, nature or function.<sup>46</sup> The sources of soft law, and the grounding of their legitimacy, has been thoroughly debated in scholarship. Whilst some argue that it derives from common law (in the form of the Crown’s legal personality) or prerogative, few endorse the view that the power derives from legal personality of the executive. To interpret broad and far-reaching ministerial discretion within the limited range of ministerial prerogative powers would in effect amount to broadening the prerogative, an exploit which would be ‘350 years and one civil war too late’.<sup>47</sup> The drafting and interpretation of discretionary ministerial rules could equally be considered as ‘unsanctioned’ executive action, as distinct from prerogative powers and statutory authority.<sup>48</sup>

The term ‘third source’ powers was coined by Harris to refer to that residuary freedom of executive powers, different in kind from positive authorisation found in statute and common law, but which

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42 See generally Anthony Giddens, *The Consequences of Modernity* (Polity Press 1991) and Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992).

43 See Moran (n 37 above).

44 For a more global and interdisciplinary perspective on forms of regulatory state, see David Levi-Faur, ‘The odyssey of the regulatory state: from a “thin” monomorphic concept to a “thick” and polymorphic concept’ (2013) 35(1–2) *Law and Policy* 29.

45 Gabriele Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (Sweet & Maxwell 1987).

46 See Megarry (n 27 above); Baldwin and Houghton (n 27 above).

47 *BBC v Johns* [1965] Ch 32 [79].

48 See Elliott and Varuhas (n 31 above) 128, quoting *R (New London College Ltd) v SSHD* [2013] UKSC 51 [28] (Lord Sumption); see also Cohn (n 35 above).

are not prohibited under positive law.<sup>49</sup> This residuary ‘third source’ theory is more persuasive because, like Cohn, I find the argument that it is a form of ministerial prerogative derived from royal prerogative unconvincing. Neither is the legal personality argument entirely convincing.<sup>50</sup> However, though the ‘third source’ model persuades in terms of satisfactorily situating the powers and identifying the functional role by which it was initially designed to operate, it fails to adequately portray the true scope of this increasingly utilised and unencumbered ministerial power. Therefore, regardless of which source one finds convincing,<sup>51</sup> none seem to be without their potential flaws.

There are admittedly some attractive features of soft law as a regulatory instrument for the executive branch.<sup>52</sup> One strength of soft law is that it can be brought into force rapidly without the necessity of passage through the Houses of Parliament. As Rawlings acknowledges, ‘flexibility and responsiveness, institutional efficiency, and accommodation of difference’ may be attributed to soft law.<sup>53</sup> The attractiveness of informal rules to the executive also lies in the ability of these devices to ‘inexpensively and swiftly routinise the exercise of discretion’.<sup>54</sup> However, motivation for their creation aside, the realities of their creation and regulation by ministers as well as their extent of scrutiny and review by the courts are more questionable.

It is small wonder, therefore, that these devices were once deemed by the UK courts to be ‘an example of the very worst kind of bureaucracy’ because ‘whereas ordinary legislation, by passing through both Houses of Parliament ... are twice blessed, this type of so-called legislation is at least four times cursed’.<sup>55</sup> The above comment is no less valid today as it was then, because soft law still lacks political and public scrutiny and accessibility, is often both difficult to disentangle and lacks sufficient certainty in language, which can inevitably lead to legal challenges.

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49 See Bruce V Harris, ‘The “third source” of authority for government action’ (1992) 108 *Law Quarterly Review* 626; Bruce V Harris, ‘The “third source” of authority for government action revisited’ (2007) 123 *Law Quarterly Review* 225; Bruce V Harris, ‘Government “third source” action and common law constitutionalism’ (2010) 126 *Law Quarterly Review* 373.

50 See Cohn (n 35 above).

51 See eg Adam Perry, ‘The Crown’s administrative powers’ (2015) 131 *Law Quarterly Review* 652.

52 See further Weeks (n 21 above).

53 Rawlings (n 30 above) 234; see also Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford University Press 2021); see also *BF*, SCT (n 2 above) [2].

54 See Baldwin and Houghton (n 27 above) 239.

55 *Blackpool* (n 34 above) [375] (Scott LJ); *Patchett* (n 34 above) [70] (Streatfield J).

Though ‘for a long time there [was] no judicial criticism of the use made of them’,<sup>56</sup> the publication of circulars and similar ‘state-subject’ instruments impacted on their justiciability as it led to occasional judicial reviews brought by the public of problematic issues with such quasi-legislation.<sup>57</sup> Since the 1940s it was established that circulars could be judicially reviewed because they were legal restrictions which limited delegated power;<sup>58</sup> were they not to be judicially reviewed they would not only avoid parliamentary scrutiny but judicial scrutiny as well. This is especially the case for non-statutory guidelines – a form of soft law. In that sense the courts have proven to be a useful, though often reluctant,<sup>59</sup> mechanism to scrutinise executive rule-making.<sup>60</sup> Nonetheless, the increased use by government ministers of soft law has necessitated that the courts have increasingly addressed questions of the extent to which it can be judicially reviewed.

The court’s ability to review administrative rules has potentially four aspects: first, deciding on its amenability to judicial review; secondly, interpreting meaning from its evidentiary or substantive force within proceedings; thirdly, ensuring consistency of its application by agencies unless good reasons dictate not doing so; and, lastly, by testing if it is being exercised within the scope of any empowering legislation (if applicable) or if any preference between circulars is being shown.<sup>61</sup> Even though not all official executive action is, or needs to be, underpinned by legal powers,<sup>62</sup> it has proved to be a somewhat complicated endeavour to successfully judicially review soft law instruments.<sup>63</sup>

The difference between statutory and non-statutory ministerial guidance was previously a more crucial distinction in terms of being allowed to bring a judicial review than it is today. For statutory guidance, the courts often interpreted the legislation on foot of which the guidance was issued to determine whether the rules were

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56 See Wade and Forsyth (n 39 above) 736.

57 As opposed to ‘subject-subject’ quasi-legislation, see further Megarry (n 27 above).

58 See the judgments of *Blackpool* (n 34 above) and *Patchett* (n 34 above).

59 Even by 2010 it was common for ‘the domestic courts [to] routinely decline ... to intervene in active administration’: see Carol Harlow and Richard Rawlings, *Law and Administration* 3rd edn (Cambridge University Press 2009) 723; though see also Carol Harlow and Richard Rawlings, *Law and Administration* 4th edn (Cambridge University Press 2021) ch 17.5 for analysis of judicial developing of approaches to soft law prior to the *BF*, S Ct judgment (n 2 above).

60 Alternative forms of legal accountability include consultation, legislative supervision and publication.

61 See Paul P Craig, *Administrative Law* 8th edn (Sweet & Maxwell 2016) 469.

62 See Harris (1992) and (2007) (n 49 above).

63 Case in point: *R(A)*, S Ct (n 2 above) and *BF*, S Ct (n 2 above).

reviewable. However, for non-statutory guidance no such legislative authorisation existed, with the result that it was more difficult to argue that these instruments were amenable to review. This hurdle was even more difficult to overcome where the guidance was deemed not to have legal effect. More recently, as the instant Supreme Court judgments illustrate, the distinction between statutory and non-statutory ministerial guidelines is now less about denial of review *per se* but rather more about judicial narrowing of scope in determining the legality of non-statutory instruments.

A further factor which historically persuaded the courts to deny judicial review of non-statutory instruments was because, traditionally, non-statutory executive rules did not tend to have legal effect in the sense of creating justiciable rights or obligations; rather they would be addressed to semi-state, devolved, or professional bodies.<sup>64</sup> I argue that this is now more often the exception rather than the rule; these same instruments are used much more extensively and in a way which gives rise to a variety of justiciable issues. An illustration of this is found in the immigration rules relevant to *BF*; those circulars do have legal effect regardless of their nomenclature or whether or not they are legislatively empowered. More recently it was recognised that the rapid and disorderly evolution of soft law (in all its shapes and labels) has led to more and more types of rules in fact having legal effect.<sup>65</sup> Yet the decisions examined in this article have failed, I argue, to take account of this change. They approach forms of soft law as they were used, not necessarily as they are used.

It is sometimes argued that courts and Parliament should not restrain the discretion of ministers out of respect for the non-fettering principle.<sup>66</sup> McHarg, writing in 2017, observed that the courts, since *British Oxygen*,<sup>67</sup> had moved from a permissive approach towards discretionary executive power to increased judicial scrutiny of administrative law-making. Touching on the interaction between ministerial discretion and the courts, she rightly argued that '[w]hile an essentially permissive approach may be appropriate in relation to the decision whether to adopt administrative rules, judicial restraint seems much less justified in relation to the regulation of administrative rules, if an agency has chosen to adopt them'.<sup>68</sup> It must also be borne

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64 See Baldwin and Haughton (n 27 above) and McHarg (n 18 above).

65 See McHarg (n 18 above).

66 See S Daly (n 22 above); Timothy Endicott, *Vagueness in Law* (Oxford University Press 2000); cf McHarg (n 18 above); Kenneth C Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1971).

67 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610.

68 McHarg (n 18 above) 297.

in mind that non-fettering of discretion arguments are often bound up with matters concerning procedural propriety in decision-making.<sup>69</sup>

The absence of a regulatory or legislative framework for soft law to date has arguably necessitated that courts by default take on a role of scrutinising this power.<sup>70</sup> The ever-changing nature and utilisation of soft law makes arguments that the court should approach these powers differently from policy derived from positive law all the more compelling. Rather than taking a ‘one size fits’ all approach of judicially reviewing policies using a positive law paradigm, Simpson convincingly argues that the judiciary should adjust to the context of non-statutory forms of policy by developing a ‘third source reasoning’ tailored to third source powers.<sup>71</sup> Unfortunately, such a third source reasoning has yet to be embraced by the courts. It is with that in mind that we now turn to how the courts have approached soft law, both in the *Gillick* judgment and since.

### **How has soft law been interpreted in judicial review? *Gillick to R(A) and BF***

*Gillick* was a key judgment in the context of both amenability of ministerial guidance to judicial review and ‘the legality of action recommended in circulars issued by government departments’.<sup>72</sup> What follows will initially set out the *Gillick* principle as it applied to soft law and then examine post-*Gillick* case law that applied, interpreted and proceeded to take a more generous approach in subsequent years.

The matter before the court in *Gillick* was whether,<sup>73</sup> on foot of ministerial guidance, doctors were ‘entitled to give contraceptive advice to girls aged under 16 without the consent of their parents’.<sup>74</sup> The ministerial guidance was provided on foot of statutory duty and was directed to general practitioners.<sup>75</sup> Whilst some of the Law Lords felt that the guidance was issued under specific statutory authority; others did not. Nonetheless, the Lords held the guidance to be judicially

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69 Eg legitimate expectation: *ibid*.

70 A framework of the sort suggested by Lester and Weait (n 36 above).

71 See Jeff Simpson, ‘The third source of authority for government action misconceived’ (2012) 18 *Auckland University Law Review* 86.

72 See Wade and Forsyth (n 39 above) 485.

73 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 (HL) (*Gillick*).

74 See Wade and Forsyth (n 39 above) 386.

75 National Health Service Act 1977, s 5(1), which superseded the National Health Service (Family Planning) Act 1967.

reviewable and proceeded on that basis.<sup>76</sup> On the facts, the official advice in *Gillick* was upheld.

The test on this point, provided by Scarman LJ, was '[i]t is only if the guidance *permits or encourages unlawful conduct* ... that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way'.<sup>77</sup> Put another way, a policy which – if followed – would lead to unlawful acts or decisions or which permitted or encouraged such acts would itself be unlawful, and the court could correct the guidance by way of declaratory order.<sup>78</sup>

The court's power to correct erroneous legal advice in soft law, according to Lord Bridge, was an exception to the general rule that 'the reasonableness of advice contained in non-statutory guidance could not be subject to judicial review'.<sup>79</sup> Therefore, *Gillick* served to demonstrate that declaratory orders are a useful and flexible remedy in such challenges because they clarify the position of the court without necessarily creating the impression of judicial overreach,<sup>80</sup> regardless of whether or not the circular purported to be pursuant to any legal authority.

The lower courts would later rely on *Gillick* and as precedent for expanding the scope of soft law devices of which the court could take notice.<sup>81</sup> By the mid-2000s executive guidance was widely accepted by the courts as a form of 'third source power' at the disposal of government ministers, along with statutory and prerogative powers.<sup>82</sup> As soft law was increasingly being used to undertake the ordinary business of government, despite concerns over its extent and juridical basis,<sup>83</sup> it was in turn deemed more amenable to judicial review by the

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76 Fraser LJ and Scarman LJ held that they had legal effect; Bridge LJ and Templeman LJ held that they had no legal effect but were judicially reviewable; Brandon LJ held no opinion; see further Wade and Forsyth (n 39 above) 736.

77 *Gillick* (n 73 above) para 181F in *R(A)*, SCt (n 2 above) [33] (emphasis added).

78 See Craig (n 61 above) 468.

79 See *ibid*, referencing *Gillick* (n 73 above) (Bridge LJ).

80 See further Elliott and Varuhas (n 31 above) 456.

81 See Wade and Forsyth (n 39 above) 486 and 735.

82 See Elliott and Varuhas (n 31 above) 128; this was in line with Dicey's view that all of the Crown's non-statutory powers are prerogative powers: Albert V Dicey, *Introduction to the Study of the Law of the Constitution* 8th edn (Macmillan 1915) 282; cf Blackstone's approach; see further J Howell, 'What the Crown may do' (2010) *Judicial Review* 36.

83 See Elliott and Varuhas (n 31 above), quoting Lord Sumption in *New London College Ltd* [2013] UKSC 51, [28].

courts.<sup>84</sup> The extent of review of soft law was considered by the Court of Appeal in several post-*Gillick* decisions including *RLC*,<sup>85</sup> *Tabbakh* and *Bayer*.<sup>86</sup>

The Court of Appeal in *RLC* took a more expansive approach than *Gillick*. Sedley LJ in *RLC* confirmed that the relevant question was whether there was something so ‘wrong with a system which places asylum-seekers ... at *unacceptable risk of being processed unfairly*’.<sup>87</sup> *RLC* was later treated by subsequent judgments, such as *Tabbakh*, as authority for interpreting a wider principle of review than was initially set out in *Gillick*.

In considering that the issue of procedural unfairness that arose in *Tabbakh* was materially different from the extent of review of guidance as erroneous in law (*Gillick*), Richards LJ said the question to be asked was therefore ‘whether the system established by the guidance in the policy documentation is *inherently unfair*’.<sup>88</sup> In preferring to draw on *RLC* than on *Gillick*, Richards LJ stated that this wider interpretation ‘does not *reject* the test of “unacceptable risk” of unfairness but effectively equates an unacceptable risk of unfairness with a risk of *unfairness inherent within the system itself*’.<sup>89</sup> Therefore, if the flawed wording or gaps in the guidance – or the resulting flaws in the system – amounted to an unacceptable risk of individuals being processed unfairly then the policy would be deemed unlawful.<sup>90</sup> *Tabbakh* joined *RLC* in being treated by a subsequent line of cases as authority for interpreting a wider principle of reviewing policies than had been set out in *Gillick*.

By way of contrast, in *Bayer*, the Court of Appeal interpreted the scope of Scarman LJ’s use of the term ‘permits’ in *Gillick*. While previous case law had read the term ‘permits’ as meaning ‘does not forbid’ a certain course of unlawful action, the court did not deem this

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84 ‘Third source powers’, as a form of residual non-statutory government power, were generally deemed amenable to judicial review in *R (Shrewsbury and Atcham BC) v SSCLG* [2008] EWCA Civ 148 [48]. However, challenges where policies were empowered by statute ‘against which its *vires* and reasonableness can be judged’ arguably found the courts more willing to consider procedural propriety and consistency issues: see Craig (n 61 above) 469.

85 *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481 (*RLC*).

86 *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 287 (*Tabbakh*); *R (Bayer plc) & Another v NHS Darlington CCG & Others* [2020] EWCA Civ 449 (*Bayer*).

87 *RLC* (n 85 above) [6] (emphasis added).

88 *Tabbakh* (n 86 above) [35], [38] and [48] (emphasis in original). Other members of the court agreed.

89 *Ibid* [48] (Richards LJ) (emphasis in original).

90 The *Tabbakh* judgment came to this conclusion based on the *RLC* judgment.

policy as unlawful when the Clinical Commissioning Group (CCG) neither prescribed lawful action nor proscribed unlawful action.<sup>91</sup> The reasoning of Underhill LJ here was that NHS Trusts are independent entities, with access to their own legal advice, so the CCG was not under a duty to advise NHS Trusts as to what routes were lawful. Clearly, *Bayer's* interpretation of 'permits and encourages' is readily contrastable to those earlier interpretations in *RLC* and *Tabbakh*.

Ultimately, *Gillick* was a significant declaratory judgment and in some ways caused controversy at the time.<sup>92</sup> Subsequent Court of Appeal judgments took expansive approaches to the extent of review of circulars and other forms of official departmental guidance.<sup>93</sup> The Court of Appeal gradually extended the approach in *Gillick* by examining the question of inherent unfairness. However, the Supreme Court evidently became concerned at the gloss which some cases had put on the test post-*Gillick* and took the opportunity to express its concern in these joined judgments.

### THE CASES OF *R(A)* AND *BF*

Though these two cases contain different facts and proceeded through the lower courts quite separately, they were nonetheless linked at Supreme Court level. In both matters the minister had issued the policies at their own discretion rather than being under a legal obligation to do so. Therefore, both cases were considered by the Supreme Court to be suitable vehicles by which to jointly examine (and clarify) 'the correct approach to judicial review of policies'.<sup>94</sup>

#### Earlier proceedings

In *R(A)* the applicant argued that there should be a presumption that the CSOD scheme subject be consulted and have the opportunity to make representations prior to the police making the disclosure to the enquiring member of the public. The Court of Appeal held that the scheme was not unfair, as there was no need for a presumption in favour of seeking representations in every case.

The Court of Appeal in *BF* had overturned the Upper Tribunal decision because, in its view, the 'policy as expressed ... left open an unacceptable risk' that child asylum seekers would be detained as adults,<sup>95</sup> and so it found that the relevant sections of the guidance were

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91 *Bayer* (n 86 above) [200].

92 See *Harlow* (n 26 above); *Simpson* (n 71 above); *Williams* (n 27 above).

93 See *Wade and Forsyth* (n 39 above) 486.

94 *R (A)*, CoA (n 8 above) [6].

95 *BF*, CoA (n 13 above) [78] (Underhill LJ).

unlawful.<sup>96</sup> The Court of Appeal, in the course of granting *BF*'s appeal, acknowledged that the 'appearance and demeanour' method in the guidance was 'based on a subjective and therefore fallible ... means of assessing age'.<sup>97</sup> Whilst acknowledging that a finding of unlawfulness would not apply if the application of a proper policy brought the possibility of mere individual misapplication in the carrying out of the policy, the unlawfulness here arose where the 'terms of the policy themselves create[d] a risk which could be avoided if better formulated'.<sup>98</sup> Even Simon LJ, though dissenting, acknowledged when summarising the criticisms of the policy, that '[it] fail[ed] to convey the inherent doubtfulness of any assessment which is based solely on appearance and demeanour, and that the width of the potential margin for error is drawn too narrowly'.<sup>99</sup> The SSHD appealed this decision to the Supreme Court, but not before changing the wording of the relevant guidance in advance of the appeal being heard.<sup>100</sup> At this point the two cases were joined in the court lists and heard sequentially.

### **The Supreme Court's findings**

From the very outset of the joined judgments, the views of the Supreme Court did not auger well for either individual. Sales LJ stated at paragraph 2 that:

[i]t is a familiar feature of public law that Ministers and other public authorities often have wide discretionary powers to exercise. ... Where public authorities have wide discretionary powers, they may find it helpful to promulgate policy documents to give guidance about how they may use those powers in practice. Policies may promote a number of objectives. In particular, where a number of officials all have to exercise the same discretionary powers in a stream of individual cases which come before them, a policy may provide them with guidance so that they apply the powers in similar ways and the risk of arbitrary or capricious differences of outcomes is reduced. If placed in the public domain, policies can help individuals to understand how discretionary powers are likely to be exercised in their situations and can provide standards against which public authorities can be held to account. In

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96 Ibid [82] (Underhill LJ), referring to Criterion C under para 55.9.3.1 of EIG both as it appeared then and as it was reproduced in *Assessing Age* (nn 10–11 above).

97 *BF*, CoA (n 13 above) [85] (Simon LJ) (dissenting).

98 Ibid [63] (Underhill LJ).

99 Ibid [86] (Simon LJ) (dissenting).

100 For a summary of these changes, see *ibid* [16]–[28]. For further changes up to the Supreme Court hearing see *ibid* [43]; however, on foot of the Supreme Court judgment the minister promptly reverted to wording from older versions: see the latest version of *Assessing Age* (version 6.0 at the time of writing) published in March 2023 on foot of the Nationality and Borders Act 2022; see further nn 10–11 above.

all these ways, policies can be an important tool in promoting good administration.<sup>101</sup>

Therefore, if one takes this statement, made so early in these judgments, as the point of departure then it is apparent that the court feels that soft law is a good thing on the whole and that there is no need to over-regulate its use by the state. The Supreme Court, therefore, unanimously found in favour of the SSHD in both judgments.<sup>102</sup>

For the avoidance of doubt, the Supreme Court made it clear in *BF* that many of the principles relied on in that case had been set out and could be found in *R(A)*,<sup>103</sup> rather than repeating itself in the *BF* judgment. This section will take a similar approach and examine the two judgments in concert. What follows is a precis of the court's views on the extent of review of soft law; *Gillick's* role in the instant cases; and whether the policy in each of the respective cases was lawful.

#### *The extent of review of soft law*

Declining to be drawn on the source of discretionary powers,<sup>104</sup> the Supreme Court nonetheless considered that policies made using these powers were reviewable. Although others have argued for alternative grounds by which discretionary ministerial powers could be successfully challenged, such as legitimate expectation,<sup>105</sup> the Supreme Court here did not entertain the possibility of alternative potential grounds in the *ratio* and focused solely on illegality.<sup>106</sup> Recalling the reasoning of Rose LJ in *Bayer*,<sup>107</sup> the Supreme Court in *R(A)* reiterated that there were a limited number of ways a policy was capable of being deemed unlawful based on the statement of the law it includes or omits when giving guidance.<sup>108</sup> However, the Supreme Court ultimately held that none of these applied to *R(A)*,<sup>109</sup> and in *BF* remained silent on whether

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101 *R(A)*, SCT (n 2 above) [2] per Sales LJ.

102 For contemporaneous case notes, see further Alison L Young, 'Judicial review of policies: or judicial retreat?' (*UK Constitutional Law Association* 5 August 2021) or Paul Daly, 'Firming up judicial review of soft law?' (2022) 81(1) *Cambridge Law Journal* 8–11.

103 *BF*, SCT (n 2 above) [1].

104 *R(A)*, SCT (n 2 above) [2].

105 See McHarg (n 18 above) and Chng (n 19 above); however, arguably, 'the courts are more willing to consider this where the rule is made in the context of a relatively clear statutory framework, against which its *vires* and reasonableness can be judged': Craig (n 61 above) 469.

106 Lord Sales did raise, *obiter* at [54], considerations of certainty and 'in accordance with the law' though only as it pertained to art 8 ECHR arguments and *Gillick* (n 73 above).

107 *Bayer* (n 86 above) [214].

108 *R(A)*, SCT (n 2 above) [45]–[46].

109 *Ibid* [46].

they were applicable to that case. To broaden this would require, they said, ‘the courts to intervene to an unprecedented degree in the area of legislative choice and ... executive decision-making in terms of control of the administrative apparatus’.<sup>110</sup>

The Supreme Court also took a firm position on the level of ministerial obligation depending on whether guidance was statutory or not:

Since there is no [statutory] obligation [to produce a statement of the law here], there is no basis on which a court can strike down a policy which fails to meet that standard. The principled basis for intervention by a court is much narrower ...<sup>111</sup>

This statement by the Supreme Court may well have a significant impact on the future of non-statutory guidance cases in terms of their amenability (or lack thereof) to scrutiny by the courts. In *BF* it was held that the SSHD was under no obligation, at statute or common law,<sup>112</sup> to produce further guidance on foot of safeguarding duties towards children set out in section 55 of the Borders, Citizenship and Immigration Act 2009, but had nonetheless issued guidance using her discretion. The Supreme Court in *BF* also confirmed that there was no general duty at common law ‘to promulgate a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty’,<sup>113</sup> though reducing risk was not addressed by the court. The court felt that to oblige the Secretary of State to provide guidance that satisfied such speculation would place too onerous a burden on the Secretary of State. The court emphasised the point by adding ‘[a]ny such obligation would be extremely far-reaching and difficult (if not impossible in many cases) to comply with. It would also conflict with fundamental features of the separation of powers.’<sup>114</sup> The Supreme Court thus took a narrower view on the extent of review of policy both in terms of the extent of review of this category of informal rules and also on the appropriate amount of judicial scrutiny as to mitigation against risk of misapplication or unfairness in policies’ content.

#### *Gillick’s role in R(A) and BF*

The Supreme Court took the opportunity in *R(A)* to set aside more expansive approaches since *Gillick* by revisiting the Court of Appeal cases of *RLC* and *Tabbakh*.<sup>115</sup> Despite the fact that *RLC* had made

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110 *BF*, SCt (n 2 above) [52]; see also *R(A)*, SCt (n 2 above) [40].

111 *R(A)*, SCt (n 2 above) [39].

112 See *BF*, SCt (n 2 above) [62]–[63].

113 *Ibid* [51].

114 *Ibid* [52].

115 *R(A)*, SCt (n 2 above) [55]–[65].

no mention of *Gillick* in its determinations, the Supreme Court in *R(A)* took the view that *RLC* could be ‘readily assimilated with the approach derived from *Gillick*’.<sup>116</sup> The Supreme Court felt such a misunderstanding had also occurred in *Tabbakh*, observing that the comments made equating an ‘unacceptable risk of unfairness with a risk of *unfairness inherent within the system itself*’ were *obiter dicta* because the challenge in *Tabbakh* was ultimately dismissed.<sup>117</sup>

Whilst endorsing the restrictive *Gillick* approach taken by some subsequent judgments,<sup>118</sup> the Supreme Court in *R(A)* noted that certain other Court of Appeal judgments had ‘treated [*RLC* and *Tabbakh*] as authority for ... wider principles of review ([by asking] is there a real risk or unjustified risk of unfairness or illegality?) without examination of its consistency with the principles articulated in *Gillick*’.<sup>119</sup> The Supreme Court’s position was that this tendency by the lower courts needed to be corrected, and so it ‘put to one side a series of other principles which ... have been relied upon [by the lower courts] to challenge the lawfulness of policies’.<sup>120</sup> The court then proceeded to itemise several cases that had fallen foul of this tendency,<sup>121</sup> including *BF*.<sup>122</sup> In particular, the Supreme Court highlighted that these cases had failed to place sufficient, or indeed any, emphasis on *Gillick* in their reasoning.<sup>123</sup> In doing so, the Supreme Court reiterated that the decisions in *RLC* and *Tabbakh* were merely applications of the *Gillick* principle rather than decisions establishing new free-standing principles.<sup>124</sup> Therefore, the Supreme Court held that the relevant test was to be found in *Gillick*, without the gloss which it had been given in some subsequent cases.

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116 Ibid [62]; at [65] the court proceeded to provide five reasons why *RLC* should be subsequently viewed ‘in line with *Gillick*’.

117 *R(A)*, SCt (n 2 above) [56] (emphasis added).

118 *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin) and *Bayer* (n 86 above) – see *R(A)*, SCt (n 2 above) [44]–[48].

119 *R(A)*, SCt (n 2 above) [66].

120 Ibid [54].

121 *R (Detention Action) v First Tribunal (Immigration Chamber)* [2015 ] EWCA Civ 840; *R (S) v Director of Legal Aid Casework* [2016 ] EWCA Civ 464; *BF*, CoA (n 13 above); *R (Woolcock) v Secretary of State for Communities and Local Government* [2018] EWHC 17 (Admin); *R (W) v Secretary of State for the Home Department* [2020] EWHC 1299 (Admin); see *R(A)*, SCt (n 2 above) [67]–[74].

122 *R(A)*, SCt (n 2 above) [73].

123 Of these itemised cases, those that made no express mention of *Gillick* (n 73 above) included *Detention Action*, *R(S)*, *R(Woolcock)* and *R(W)* (see n 121 above); see also *R(A)*, SCt (n 2 above) [67]–[74].

124 *R(A)*, SCt (n 2 above) [48].

*Whether the policy in question was unlawful?*

On the subject of *Gillick* ‘unlawfulness’, the Supreme Court in *BF* rejected submissions that the relevant policy document<sup>125</sup> ‘permits’ or ‘encourages’ unlawful conduct ‘because it does not sufficiently remove the risk that the immigration officers might make a mistake when they assess the age’.<sup>126</sup> Likewise in *R(A)*, the Supreme Court reinforced that the test for judicial review of a policy at common law was to be found in *Gillick*. When assessed thus, the guidance in both *R(A)* and *BF* was deemed lawful. In its view it was in accordance with, and did not contradict, the SSHD’s legal obligations; nor did it give a misleading direction to the end-user. The court held that the guidance was not defective or unlawful just because it did not spell out ‘in fine detail how decision-makers should assess ... in a particular case’.<sup>127</sup> It further held that ‘it was not incumbent on the Secretary ... to eliminate every legal uncertainty which might arise in relation to decisions falling within its scope’.<sup>128</sup> This position was echoed in *BF* where the court felt that to oblige the SSHD to provide guidance that satisfied such speculation would place too onerous a burden on them as policy drafter.<sup>129</sup> This, the court felt, would create too far-reaching an obligation and could potentially conflict with the doctrine of separation of powers.<sup>130</sup> Therefore, the Supreme Court’s view was that the guidance did enough because it specifically reminded decision-makers that they should satisfy themselves that a decision should conform to the common law requirements of fairness,<sup>131</sup> and in doing so the Secretary of State had discharged their duty accordingly. According to the Supreme Court in *R(A)*, if the test were any more demanding, then (a) there would be a practical disincentive for public authorities to issue policy statements, which would be contrary to the public interest, and (b) the courts would be drawn into reviewing and criticising the drafting of policies to an excessive degree.<sup>132</sup>

In *BF* the court considered that there were sufficient safeguards for the asylum-seeking child in the age assessment process because of both the ‘benefit of the doubt’ wording of the guidance and the

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125 Criterion C under para 55.9.3.1 of EIG both as it appeared and as it was reproduced in *Assessing Age* (n 11 above).

126 *BF*, SCt (n 2 above) [51].

127 *R(A)*, SCt (n 2 above) [42].

128 *Ibid.*

129 See *BF*, SCt (n 2 above) [51].

130 *Ibid* [52].

131 Expressly so in the guidance at issue in *R(A)*, SCt (n 2 above) [42]; however, in *BF*, SCt (n 2 above), the Supreme Court was silent on this point.

132 *R(A)*, SCt (n 2 above) [40].

process used by immigration officers.<sup>133</sup> The ‘benefit of doubt’ was, in its view, sufficiently provided for in the policy guidance because those seeking asylum should be assessed to be an adult only if their physical appearance and demeanour ‘very strongly suggests that they are *significantly* over the age of 18’.<sup>134</sup> The court also found that the fact that two immigration officers should reach the same conclusion that the ‘borderline’ child was an adult was an important safeguard.<sup>135</sup> Thus the Supreme Court observed that the minister had ‘properly complied with her duty under section 55 of the 2009 Act’.<sup>136</sup> Though acknowledging that aberrant application by immigration officers was always a possibility,<sup>137</sup> and that uncertainty could never be eliminated,<sup>138</sup> the court failed to acknowledge that the risk to a child could be reduced through more precise wording in the policy. The court did not elaborate on how many individuals should have the policy misapplied towards them before a threshold was met which might draw attention to potential problems in the instructions.

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133 In *BF*, SCt (n 2 above) [35]. The Supreme Court quoted the Upper Tribunal judge, that ‘[g]iven the evidential and methodological difficulties identified in both [sides’] data sets, I do not consider I have a sufficient evidential basis on which to draw any definite conclusions as regards whether there is a significant risk of error, let alone a risk that is systematic’: *BF*, UT (n 14 above) [77]; see also [41]; however, cf [80] where (in the context of UNISON and the real risk of prevention of access to justice) the Supreme Court seemed to appreciate the part that statistics might play in an evaluative assessment of evidence regarding its likely impact and thereby test the lawfulness of a measure.

134 *BF*, SCt (n 2 above) [30] (original emphasis) referring to ‘version 2’ of Criterion C; note that by the time of the Supreme Court hearing this the wording had changed to ‘their physical appearance and demeanour very strongly suggests that they are 25 years of age or over’ (ibid [43]) but was since changed back as of January 2022.

135 *BF*, CoA (n 13 above) [58]; no evidence as to how often these two immigration officers disagreed with each other’s assessment (if ever) was sought nor submitted.

136 Ibid [59]; the relevant provision that the Supreme Court was referring to was s 55(1)(a), namely ‘having regard to the need to safeguard and promote the welfare of the children who are in the United Kingdom’.

137 In the event of the policy guidance being misunderstood or breached by an official, the Supreme Court viewed that the appropriate remedy is to have access to the courts. However, a logical consequence of unnecessarily vague guidance that the Supreme Court failed to recognise is that there would be an avoidable increased demand on the courts as a result.

138 *BF*, SCt (n 2 above) [58].

## ANALYSIS

The political landscape that served as a backdrop to these proceedings may be worth acknowledging at this point. At the time when these matters were going through the courts the passage of new legislation affecting judicial review was being debated. The Independent Review of Administrative Law had just published its concluding report.<sup>139</sup> It would be speculative to ask whether this report, the Government's response to this report and, the introduction of the Judicial Review and Courts Act 2022 were in the minds of the Supreme Court during *R(A)* and *BF*.<sup>140</sup> Nonetheless, *R(A)* and *BF* do represent a retreat from the more expansive approach to review seen in the Court of Appeal up to that point.

The Supreme Court's judgments in *R(A)* and *BF* have certainly recalibrated the legal framework in this area, but in doing so they failed to appreciate some of the wider constitutional and human rights implications of their judgment. One might be forgiven for assuming that the Supreme Court's and my own views on soft law are diametrically opposed; that is not necessarily so. As was alluded to in *R(A)*,<sup>141</sup> there is much to commend soft law in terms of its expediency and capacity to provide detailed practical guidance of a policy to end-users. Therefore, in principle I agree that – if drafted clearly and if account is taken of the typical end-user's expertise – soft law can indeed 'be an important tool in promoting good administration'.<sup>142</sup> However, in practice those conditions are often not met, as was seen in the case of *BF*.<sup>143</sup>

By thinking about all soft law's scope of review, through the lens of *Gillick*, the Supreme Court created a number of problems which arise from that decision, as well as wider problems related to the use of illegality as the main basis for review. Other considerations only add to the shortcomings in the way soft law is currently made in the UK, namely the lack of any regulatory framework on the drafting, registration or monitoring of soft law instruments by the UK Government. Without such a framework it becomes all the more vital that the courts see it as their role to hold the executive accountable, in the absence of more rigorous standards from either the Government itself or Parliament. Before examining those wider considerations, however, it is necessary

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139 See [The Independent Review of Administrative Law](#) (Crown Copyright March 2021).

140 Now the Judicial Review and Courts Act 2022, c 35; see further Paul Craig, '[IRAL: the Panel Report and the Government's response](#)' (*UK Constitutional Law Association* 22 March 2021).

141 See Sales LJ's quote (text attached to n 101 above).

142 *R(A)*, SCt (n 2 above) [2].

143 See further the text under the heading 'Problems with foregrounding *Gillick*' below.

to first consider the ramifications for judgments' approach to the extent to which non-statutory policies may be judicially reviewed from now on.

### Scope of review of soft law

What seems to have been missing from the Supreme Court's rationale for using the narrow *Gillick* test in *BF* is an acknowledgment that judicial review is often the recourse of last resort available to vulnerable applicants, such as children seeking asylum, to challenge non-statutory guidance.<sup>144</sup> This is made clear in cases like *BF* where an asylum-seeking child, like many others, was wrongly majoritised and had few options to challenge the process or policy other than via judicial review. As a result of this judgment, the scope of legal recourse for vulnerable rights holders has now narrowed significantly.<sup>145</sup> Though *Weeks* provided useful insights into what remedies for breach of soft law might be available at judicial review,<sup>146</sup> since these joint Supreme Court decisions such commentary has almost become moot in the UK in terms of 'unacceptable risk of unfairness'.

This stance by the Supreme Court also failed to acknowledge that the expanding range of non-statutory executive actions often do have practical and/or legal effect even if not statutorily empowered, and this decision could give rights holders less, or even no, opportunity to challenge a poorly worded policy which seriously risks breaching their rights. In *GCHQ*,<sup>147</sup> Lord Roskill made it clear that what opened a decision to review was its impact on an individual's rights rather than the source of the power used to make that decision. While *GCHQ* related to the use of prerogative powers, there is no compelling reason why a decision made on foot of a soft law instrument by a minister should be any more insulated from review than a decision made using prerogative power, if the impact on an applicant's rights is just as significant. The unsavoury alternative would be, as Elliott correctly points out, to limit judicial review to uses of legal power, which would result in under-inclusiveness by 'preclud[ing] review in circumstances in which this might be warranted by reference to the other normative factors which ... animate judicial review'.<sup>148</sup> It is the constitutional imperative of effective legal control of government, he convincingly

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144 As opposed to judicially reviewing, for example, a public authority's decision on foot of primary or secondary legislation.

145 See n 151 below for examples of other potential rights holders with vulnerabilities.

146 See *Weeks* (n 21 above), pt II generally.

147 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

148 See Mark Elliott, 'Judicial review's scope, foundations and purposes: joining the dots' (2012) 2012(1) *New Zealand Law Review* 75–111, 82, echoing the sentiments of Harris (n 49 above).

argues, that ‘furnishes a justification for judicial review of the exercise by government of *de facto*, or “third source” powers’.<sup>149</sup> Harris has previously argued convincingly for the reviewability of government action on the grounds of breach of common law fundamental rights.<sup>150</sup>

The proliferation of soft law over the decades and the extent to which it impacts on the rights of people subject to it has only strengthened the need for these instruments to be judicially reviewed to their full extent. Whilst many of the UK population subject to forms of soft law may not be considered vulnerable individuals, where a particular soft law does apply to vulnerable individuals there should be an onus on the executive to mitigate against compounding their vulnerabilities in their drafting of the soft law instrument. In the case of certain categories of vulnerable applicant,<sup>151</sup> such as asylum-seeking children wrongly classified as adults, they are denied child-specific rights (such as rights to education and child protection rights during their minority) and procedural safeguards which are essential in order to guarantee to them all the rights deriving from their status as a minor. Therefore, if a minor is wrongly identified as an adult, serious and irreversible measures in breach of their rights might be taken by the state.

The Supreme Court commented on potential advantages of soft law in contrast to the formalities of ‘hard law’, and its potential for good governance.<sup>152</sup> One strength of soft law acknowledged by the Court was that it can be brought into force rapidly without the necessity of passage through the Houses of Parliament. Though not acknowledged by the Court here, this characteristic of soft law has the potential to serve good governance well and could have created a constructive dynamic between the executive and the judiciary in this respect. What the court praised as an advantage of soft law could arguably, in that constructive spirit, be seen as an effective tool for rectifying flawed drafting in guidance.<sup>153</sup> In the absence of an executive-led monitoring system to ensure that a new policy is being applied as envisaged, the courts could perform a valuable role in highlighting ‘teething problems’. For example, interpretation of a guidance document could be clarified

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149 See Elliott (n 148 above) 79.

150 See Harris (2010) (n 49 above).

151 Other groups whose vulnerabilities the Government should be live to when drafting their policies and instructions to end-users include those considering assisted suicide, young people (18–25) with special educational needs and disabilities at risk of exploitation, looked after children in the care system, unaccompanied minors seeking asylum placed in hotel accommodation and therefore at an increased risk of human trafficking/modern slavery.

152 See, for example, *BF* S Ct (n 2 above) [2]; see also text between nn 56–58 above.

153 Something not dissimilar to this constructive dynamic (though on a more *ad hoc* basis) arguably occurred at times in the *BF*, UT (n 14 above) [95] and *BF*, CoA (n 13 above) [58].

by the court if doing so reduces both the risk of rights breaches and of further cases of a similar type coming before the courts. This need not be with a view to eliminating risk but rather managing identifiable and avoidable risks perhaps not foreseen by the drafters. Unlike Young, who sees it as fitting that fault be laid at the door of the decision maker,<sup>154</sup> it should be recognised that there is plenty of blame to go around, including some at the door of the drafter.

The SSHD in *BF* demonstrated the ease by which they could adapt and tighten guidance when they amended the relevant guidance on four occasions in the course of proceedings.<sup>155</sup> It is a shame, however, that the Supreme Court did not see that the judiciary could play a constructive role in such a reflexive process by way of issuing declaratory orders, at least until such time as a regulatory framework of soft law is designed, ideally by Parliament. This need no longer be regarded as a major innovation in the judicial role, given that the Supreme Court did something similar in 2020 when it endorsed standard directions for how the state should handle certain categories of asylum-seeking child cases.<sup>156</sup>

Furthermore, this cautious and hands-off position by the Supreme Court in *R(A)* and *BF* is extremely unlikely to discourage ministers from availing of this form of rule-making in the future. In fact, these judgments could actually encourage ministers to increasingly avail of this method, given that the scope of successful judicial review of soft law is slimmer than ever thanks to this now re-affirmed *Gillick* standard, and regardless of whether or not the wording of the guidance allows for an avoidable level of risk of unfairness when applied.

Lastly, it is unfortunate that the court neglected to include what the threshold might be before the court should intervene in the prolonged misapplication of policy. Surely, though the odd abhorrent decision is possible, even likely, there must be a point at which a court should have its attention drawn to the problem, be it poorly drafted instructions or systemic misapplication of policies with legal effect. Whether that threshold is 50 or 5000 such challenges is a matter that the Supreme Court should consider further.

### **Problems with foregrounding *Gillick***

The variability of end-users of policy documents is also important to consider. The Supreme Court in *R(A)* did not seem to appreciate the substantial range of different end-users' training or experience when it comes to interpreting and applying ministerial guidance. There is no connection made in the judgment between the 'inherent risk of

154 See Young (n 102 above).

155 See *Assessing Age* (n 10 above).

156 See *G v G* (n 3 above) Appendix 2; see also Walsh and Atkins (n 3 above).

unfairness' and the relevant end-user of the guidance. The inference here is that all end-users are created equally, in that they will all equally appreciate the subtleties of discretionary or mandatory aspects of relevant guidance, and of the ramifications. It is possible that, with appropriate training, this may be the case, but in the absence of that this is a flawed assumption. In *R(A)*,<sup>157</sup> the Supreme Court read Scarman LJ's oft-quoted *Gillick* test to mean that it 'was to be read objectively, having regard to the intended audience'.<sup>158</sup> In *Gillick*, the intended audience was general practitioners, who undergo on average 10 years of training to gain their qualifications and expertise before they apply their professional judgement; in *R(A)* the intended audience was police officers who undergo a minimum of three years' training before operating that policy. However, in *BF* the intended audience of immigration officers obtain no training on age assessment.<sup>159</sup> There is clearly a higher probability that policies may well be misconstrued and misapplied when operated in the absence of training. Training alone is only a partial solution, however, as the courts are still needed as recourse of last resort to hold public authorities' decisions based on soft law to account.

### **Unlawful on the basis of illegality**

The restoration of the *Gillick* principle and the move away from its more expansive interpretations will have come as a blow to applicants and human rights advocates alike. What seems apparent from these judgments is that the Supreme Court has sent a signal to the lower courts that a more restrictive approach is expected in the future. The judgments also rely on the false assumption that what the claimants sought within the respective guidance was a 'detailed and comprehensive statement of the law'. This is not apparent nor applicable in either *R(A)* or *BF*, where the guidance primarily set out procedures to be followed. In *BF*, for instance, the applicant

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157 *R(A)*, SCt (n 2 above) [33]–[34].

158 *Ibid.*

159 *BF* (UT) (n 13 above) [100] which states: 'The [SSHD]'s own evidence (given by Mr Gallagher) confirmed that none of the officers who implement this policy have any training on how they are to go about visual assessment or on how to apply the "very strong" and "significant" thresholds.' According to a recent immigration officer job description, 'training' means the following: 'Once you gain acceptance for a role as an immigration officer, you enrol in a training course. You learn topics like conflict management, communication and diversity awareness while also training on personal safety methods and arrest and restraint techniques.' The on-the-job skills that an immigration officer may acquire, eg through shadowing colleagues, may or may not sufficiently develop their professional judgment in respect to assessing age. See 'How to become an immigration officer: complete the training process'.

sought that the guidance acknowledge the uncertainty attached to appearance/demeanour age assessments by specifying the width of the potential margin of error, rather than remaining silent, thereby giving the end-user the impression that decision-making procedures were more certain than was actually the case.

While all three Court of Appeal judges in *BF* appreciated the uncertainty that comes with ‘appearance and demeanour’ age assessment,<sup>160</sup> the Supreme Court did not appreciate the importance of acknowledging uncertainty in the policy wording. This is a critical point for this policy, which some commentators fail to appreciate,<sup>161</sup> because by failing to acknowledge uncertainty and the margin of error in the age assessment procedure, the policy did in fact mislead the end-user decision-maker in terms of the latent flaws in the adopted age assessment method. The SSHD thereby omitted relevant considerations from the guidance that may, if included, have led to fewer misapplications by end-users of that guidance to date, more children to have their safeguarding rights ensured on arrival, and in turn fewer legal challenges.

Further concerns that these judgments highlighted include the government-wide lack of consistency towards policy scrutiny, implementation and end-user training. Consistency, accessibility and transparency would seem to be constructive steps towards good administration, for the executive, end-users and public alike. As with many forms of soft law currently in circulation, the Immigration Rules are a maze of guidance and policies. They are drafted inconsistently and on an *ad hoc* basis. They are not subjected to any regulation in terms of neither drafting, organisation nor registration. Young’s argument highlighting ‘the need to reinforce other forms of accountability over the growing use of policies’ and her suggestion for ‘codes and internal review procedures to facilitate effective systems of administration’, while retaining recourse to the law as a last resort, has significant merit.<sup>162</sup> That would certainly be one means of achieving accountability through better monitoring of the roll-out of policies.

In his judgment in *BF* at the Upper Tribunal, Storey J drew on *R (European Roma Rights) v Prague Immigration Officer* to advance

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160 At *BF*, CoA (n 13 above) [54], Underhill LJ referred to the immigration officers’ age assessment as ‘far less substantial’ and ‘more unreliable’ than a *Merton*-compliant age assessment and Simon LJ at [85] acknowledged that the ‘evidence shows that all age assessments are “an inexact science” and that the margin of error ‘can be as much as 5 years either side’; Baker LJ at [98] used the phrase ‘inherently subjective’; local authorities carry out *Merton*-compliant age assessments, *ibid*, citing *R(B) v Merton LBC* [2003] EWHC 1689 (Admin).

161 Young (n 102 above).

162 *Ibid*.

the view that ‘failure to monitor a policy can constitute unlawfulness’,<sup>163</sup> which is a position this author, for one, finds persuasive. There is currently no such system of monitoring the roll-out of soft law policies in the UK, neither by individual government departments nor centrally. In terms of data-gathering in age assessment, Storey J in the Upper Tribunal also noted that reliable data was not available from the SSHD on how many immigration officer decisions as to age were ultimately overturned once challenged.<sup>164</sup> More consistent data-gathering for monitoring purposes across government departments is needed as well as a centralised monitoring system. This lack of standardised departmental oversight in turn hinders the possibility that ‘public bodies ... bear a greater responsibility for ensuring that [agencies acting for the state] do not act unlawfully when they adhere to guidelines’.<sup>165</sup>

Pertaining specifically to asylum-seeking children, the SSHD would also be urged to provide training for immigration officers on the subtleties of applying the age assessment guidance as well as to acknowledge where the adopted methods lack certainty by inserting a ‘+/- 5 years margin of error’ in the guidance.<sup>166</sup> In terms of training of decision-makers, the Court of Appeal in *BF* observed, with some concern, the acknowledgment by counsel for the SSHD that migration officers at first instance are provided with no specific training in age assessment beyond access to the guidance that was the subject of this case.<sup>167</sup> The Court of Appeal certainly felt this was a matter that the SSHD ‘may wish to consider further’.<sup>168</sup> Despite the Court of Appeal judgment being overturned, it is clear that the SSHD should implement the above recommendations without delay, to both strive for best practice in the application of the policy and hopefully to mitigate against as many legal challenges in the future, or else risk falling foul of a *R (European Roma Rights)* type challenge in due course.

The Supreme Court judgments were also arguably lacking when they did not expressly take into account the larger human rights, constitutional and political implications of their decision. This decision

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163 *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 62 [91]; Storey J acknowledged that ‘whilst the [SSHD] has taken some steps to monitor this policy, she had done so belatedly and largely as a result of directions from the Court of Appeal and this Tribunal’ [95].

164 As per the recommendations of Storey J, *ibid*.

165 See Young (n 102 above).

166 As recommended in *BF*, CoA (n 13 above) [75].

167 *Ibid* [58]; here Simon J (though dissenting) echoed the concerns of the Upper Tribunal judge who had found there to be a failure in regard to adequacy of training though not sufficient to render the policy unlawful as ‘the challenge before [the Court was] confined to the policy rather than its application’ – see *BF*, UT (n 14 above) [43].

168 *BF*, CoA (n 13 above) [58].

has clear human rights implications. Soft law, as was the case in *BF*, can lead to decisions that do affect people's rights,<sup>169</sup> and sometimes even determine whether a person has specific rights acknowledged or granted at all. Misidentifying an asylum-seeking child as an adult leads to their children's rights being denied them and them being placed in inappropriate adult settings for months or even years, where they are vulnerable to neglect, trauma, abuse, exploitation or trafficking. Furthermore, with ministers potentially making rules with legal effect without legislative sanction, the traditional lines separating the executive and legislative arms of the state have already begun to blur.

### Constitutional considerations

The UK's fused separation of powers seeks to strike a delicate balance between roles of the respective arms of the state. Yet this decision does little to promote Parliament as the designated maker of UK law. The political implications of the Supreme Court's decision will likely be the encouragement of government ministers in a number of ways. Ministers will be encouraged to continue making rules through their discretionary power, and as such soft law created by the executive side-steps parliamentary oversight. Ministers may also be encouraged to continue drafting these instruments in non-legal and often vague terms. Furthermore, now that the Supreme Court has made its position clear, it is doubtful that ministers will now heed the constructive suggestions by the lower courts in the past urging reform of soft law, such as regulation.<sup>170</sup>

Whilst there are very few scholars who are full-throated supporters of soft law,<sup>171</sup> even those that see the merits of it nonetheless see the flaws in the existing *ad hoc* state of affairs.<sup>172</sup> Even if soft law was used appropriately, for example in times of emergency,<sup>173</sup> many scholars argue nonetheless that there is a need for caution in the increased use of these powers.<sup>174</sup> Contention amongst commentators often lies in how the *status quo* can be reformed for the better. Reform is urged

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169 See also Weeks (n 21 above); Simpson (n 71 above).

170 Eg *BF*, UT (n 14 above) [95]; *BF*, CoA (n 13 above) [75].

171 P Daly (n 53 above) and S Daly (n 22 above) see some of their advantages; Simpson (n 71 above) does not see the third source powers as the problem *per se*, rather the lack of positive rules to control such action.

172 See Young (n 102 above); see also Rawlings (n 30 above); see also McHarg (n 18 above).

173 Eg Jonathan Montgomery, Caroline Jones and Hazel Biggs, 'Hidden law-making in the province of medical jurisprudence' (2014) 77(3) *Modern Law Review* 343 or S Daly (n 22 above) advocating in favour of ministers invoking soft law under certain circumstances.

174 See Ganz (n 45 above); see also Lester and Weait (n 36 above); Cohn (n 35 above); Simpson (n 71 above); McHarg (n 18 above).

both in terms of ministerial accountability and for a more consistent normatively informed system by which the courts should examine soft law in judicial review proceedings.<sup>175</sup> Regulation is a common plea by many supporters of reform, ‘to ensure an effective system of administration and that sound policy choices are made’,<sup>176</sup> though they often differ as to who ought to do the work of regulating.<sup>177</sup> Whilst some, including myself, argue for parliamentary intervention in the form of ‘legislation setting out clear legal requirements of consultation in the formulation of policies, which could help ensure better policies are adopted in the first place’,<sup>178</sup> others prefer to leave responsibility to the Government.<sup>179</sup>

The principle of parliamentary sovereignty is almost sacred in the UK constitution. As a result, executive rule-making, though at times useful and advantageous for the better administration of the state, when unchecked also carries with it the constitutional ‘health warning’ of side-stepping parliamentary scrutiny in the process. This caution should most be heeded when it comes to non-statutory executive rule-making of the kind challenged in *R(A)* and *BF*. However, these Supreme Court judgments would seem to signal to ministers that they may now have far more impunity when it comes to soft law, in stark contrast to the pre-*R(A)* and *BF* case law. One further implication of *R(A)* and *BF* is to discourage as much judicial scrutiny of soft law as had occurred to date.<sup>180</sup> The lower courts are now on notice that more restraint is expected of them in the future than was seen previously when it comes to adjudicating on soft law.

In the absence of a regulated system as described by Young, the only remaining port of call is the court’s scrutiny, and this Supreme Court has just made the route to this port even narrower for applicants at a time when the scope of this soft law form of rule-making is more widespread than ever. Whilst I would join calls for Parliament to regularise the making of, appropriate use for, recording of and monitoring of non-statutory guidance, short of scrutiny by Parliament, it seems remiss for the judiciary to restrain itself as legitimate scrutiniser of executive power as exercised in this way.

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175 See eg Megarry (n 27 above); Cohn (n 35 above) – note that Cohn calls for theorisation of public law in order to develop a distinct approach to third source powers.

176 See Young (n 102 above); see also Rawlings (n 30 above) 216.

177 Simpson (n 71 above) sees the courts as the default regulator; cf S Daly (n 22 above).

178 See Young (n 102 above).

179 Eg S Daly (n 22 above) who echoes Endicott (n 66 above) in taking a more ‘pro-executive’ view on soft law.

180 See further Elliott and Varuhas (n 31 above) 181.

Though some may argue that it is necessary to ensure that courts do not stray from their proper role,<sup>181</sup> I would argue that the courts should not be limited in the policies they review. After all, legal accountability dictates that decisions and actions of the executive are scrutinised though the courts. Whether the rule derives from statute or otherwise is surely immaterial. The courts are both well placed and constitutionally justified in performing this much-needed role in proactively scrutinising this discretionary aspect of executive rule-making.

## CONCLUSION

These judgments are very telling as to how some of the judiciary at the highest level view their role in relation to scrutinising soft law. This is in some contrast to the pattern of judgments that emerged out of the Court of Appeal in the years subsequent to *Gillick*. Though the position taken by this particular panel may not be indicative of an overall Supreme Court consensus, it certainly indicates that a strong judicial deference exists amongst some Supreme Court judges towards non-statutory guidelines as a form of soft law.

These judgments have effectively reset the course of judicially reviewing soft law instruments and undone years of what it clearly views as the lower courts having ‘drifted off course’. We are all now on notice that arguments of real/inherent risk of unfairness alone will get short shrift from the courts, as the *Gillick* principle was strongly endorsed by the Supreme Court as the benchmark when judicially reviewing government policies. However, this renewed high threshold may also serve to embolden the executive and deter potential legitimate challengers of unlawful policies, particularly non-statutory ones.

These judgments served to highlight serious systemic flaws in good governance of soft law instruments. Lack of self-regulation or any monitoring system, either at departmental level or centrally, has led to an *ad hoc* and unpredictable government approach to this ever-expanding body of rules. Likewise, once applied, there is no guarantee of end-user training nor that consistent data-gathering will occur, leading to failure to monitor a policy and whether it is achieving its objectives. Though it would not be possible to eradicate risk, such constructive reforms would mitigate the real and inherent risk of further unfairness in how the guidance is applied by end-users. One suspects, however, that the political will for reform on this scale is absent.

Specific to *BF*, it is regrettable that the Supreme Court did not encourage better governance of soft law by the Government, perhaps by way of declaratory judgment or by endorsing draft standard directions

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181 See Young (n 102 above).

specifying best practice and procedures surrounding asylum-seeking children (or both) to better impede this appreciable and avoidable risk. Though this could be said of many policies, while the policy at the centre of *BF* remains as is, more children will have their rights breached and be put at risk. Furthermore, by mistakenly treating too many children as adults, the UK asylum system has already deprived too many of what is left of their childhoods.

Viewed more broadly, these joined judgments came before the Supreme Court ripe for acknowledgment both of (a) the ways in which non-statutory 'guidance' is utilised by the executive today, having grown exponentially in recent decades, and (b) the constructive role the judiciary may occupy until such time as a much-needed soft law regulatory framework is created. Soft law instruments no longer function as mere supplements to legal provisions or as clarifying 'guidance' for industry and qualified professional bodies, but can now contain detailed practice and procedure documents for agents of the state. However, the Supreme Court's approach on this occasion did not see such acknowledgments as worth making, even though judicial review of discretionary ministerial powers with human rights ramifications fits squarely within the court's supervisory jurisdiction.



# Inheriting the royals: royal chartered bodies in Ireland after 1922

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## ABSTRACT

The establishment of the Irish Free State (Saorstát Éireann) in 1922 did not occur on a blank canvas. A slew of administrative bodies and agencies with pre-1922 origins now found themselves under a new jurisdiction, still familiar in some respects but alien in others. The Irish State Administration Database indicates that the functions performed by these pre-1922 bodies included the delivery of public services and regulatory oversight. The resilience of pre-1922 bodies arguably ensured a greater degree of day-to-day administrative continuity and stability after 1922 than may otherwise have been the case.

This article focuses on a particular subset of these pre-1922 entities – royal chartered bodies – carried into Saorstát Éireann and beyond. Of special interest are the peculiar legal mechanisms through which these bodies were sustained in an altered constitutional landscape. The discontinuation of a pre-1922 royal prerogative to grant and amend royal charters presented legal conundrums for royal chartered bodies and the state. This was mitigated through a mixture of tailored public and private legislation of the Oireachtas. These dynamics are interrogated through the lenses of temporality and legal pluralism.

**Keywords:** public administration; royal charters; legal pluralism; private legislation.

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## INTRODUCTION

The persistence of royal symbolism in the Irish constitutional order post-1922 was a thorny political issue. This was evident during negotiations on the Articles of Agreement for a Treaty between Great Britain and Ireland (the Anglo-Irish Treaty 1921) and, subsequently, in discussions on the draft Constitution of the Irish Free State (Saorstát Éireann).<sup>1</sup> A requirement for members of the Irish Parliament (Oireachtas) to swear an oath of allegiance to the crown was especially problematic. Even the British Prime Minister, David Lloyd George, acknowledged that the Irish were ‘fed up with the Crown this, and the Crown that, and no wonder’.<sup>2</sup> Grievances were also aired on the Irish side about the broader legal infrastructure the new state was to inherit. Michael Collins, revolutionary leader and Chairman of the Provisional Government of Ireland, reportedly accused the British Government of trying to force the English common law upon Ireland.<sup>3</sup>

A number of bodies with an explicit royal heritage firmly rooted in the pre-1922 common law have continued in existence to this day. Typically discernible by the prefix ‘Royal’, they trace their origin to ‘royal charters’ or ‘letters patent’ granted by the British sovereign (the crown) under royal prerogative powers. In symbolic terms, the survival of these royal chartered bodies (RCBs) could be seen as a form of legal greening,<sup>4</sup> akin to the physical re-painting of red letterboxes in green after 1922 – the simultaneous adoption and adaptation of still useful structures.<sup>5</sup> But just below the surface, RCBs (as with those letterboxes) remained adorned in the regalia of a monarchical past. The royal prefix still used by most RCBs clearly harks to their pre-1922 pedigree. Today, although ostensibly private entities in nature, a number of RCBs remain integral to the delivery of services with clearly public dimensions, such as education, the arts and professional accreditation. Many of them have benefited from public funding over the years.<sup>6</sup> RCBs are, therefore, exemplars of administrative resilience.

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1 See, eg, Gretchen Friemann, *The Treaty* (Merrion Press 2021) 186–194; Laura Cahillane, *Drafting the Irish Free State Constitution* (Manchester University Press 2016) 52–55.

2 Cahillane (n 1 above) 54, fn 54.

3 Ibid.

4 For a broader discussion of legal and administrative greening, see, eg, John Biggins, Muiris MacCarthaigh and Colin Scott, ‘Greening the Irish state: early legislative and administrative dynamics’ (2024) *Irish Political Studies* (forthcoming).

5 Thanks to Professor Colin Scott for this analogy.

6 In particular, the Royal Irish Academy, the Royal Irish Academy of Music and, for a time, the Royal College of Surgeons in Ireland. See Office of the Comptroller and Auditor General, *Appropriation Accounts* (various years).

As the sands of political and constitutional authority shifted in 1922, RCBs initially faced an uncertain future. Organs of the British administration formerly assigned governance or approval roles under royal charters (the constitutional documents of RCBs) ceased to exist or operate in 1922.<sup>7</sup> This initially presented operational difficulties for RCBs. As a result, in 1926 the executive authority of the new state was empowered to adapt the original charters of many RCBs to ensure they could continue to perform socially important functions, for example in the education of certain professions. Legislating for these new executive powers threw up peculiar legal, administrative and temporal conundrums. The fledgling Irish Parliament had to grapple with rights anchored in a type of royal sovereignty pre-dating Saorstát Éireann itself, but which demanded recognition in the altered legal order of the present. This exercise also tested the parameters of a transitional provision in the Constitution of Saorstát Eireann. Navigating this challenge was complicated by the fact that the Executive Council (Government) did not, initially at least, have a clear sense of how many royal charters lurked in the wilderness. The fuller administrative implications of the state's policy decision to preserve the rights of RCBs therefore only became clear over subsequent years, as it responded to individual requests for charter adaptations. Later on, certain RCBs also exploited an outmoded form of parliamentary legislation imported from the Westminster tradition, known as the Private Act. While not presenting significant difficulties for the Oireachtas from a normative standpoint, these private legislative patterns nonetheless accentuated the *sui generis* nature of the RCB inheritance.

The RCB heritage was politically awkward. A parliamentary debate in December 1949 exemplified how the visible trappings of a historical monarchy could be weaponised when the Taoiseach (Prime Minister) was asked whether:

before the Estimates for the coming financial year are completed, he will communicate with organisations which use the word "Royal" in their names or descriptions, and particularly with those which are in receipt of grants from the Exchequer ... with a view to securing their consent to eliminating the word "Royal" from their names or their descriptions.<sup>8</sup>

It is notable that the Taoiseach's response was loaded with temporal language, simultaneously characterising RCBs as being symbolic of history but also of more recent progress:

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7 Such as the Lord Lieutenant of Ireland. See Irish Free State (Consequential Provisions) Act 1922, 13 Geo 5 Sess 2, c 2.

8 Dáil Éireann Debate, *Ceisteanna—Questions. Oral Answers – Use of title 'Royal'* (7 December 1949, vol 118, no 14).

The view I take of this word 'Royal' is that it marks merely the historic evolution of our own country and that the fact of its being there emphasises and underlines the progress which has been made ... It is in that sense that I regard the use of this word 'Royal' by these people. It is a matter of no consequence so far as I am concerned; it is of no importance and not worth wasting time over ... In many instances the word 'Royal' derives from a patent and is implicit in the patent and might be difficult to change ...<sup>9</sup>

It is intriguing that RCBs with roots in an earlier legal order have so successfully endured. An attempt is made here to unpick this phenomenon. The article opens with a general outline of some key themes from the law and time<sup>10</sup> and temporal legal pluralism literature.<sup>11</sup> Those themes are taken up in the RCB context at various points later in the article. There then follows a brief primer on the post-colonial administrative legacy, the nature of royal prerogative and charters. The peculiar executive and legislative devices used to fasten RCBs to the post-1922 Irish state, to the legal time zone of the new constitutional order, are then examined.

Subsequently, a case study of one particular RCB, the Institute of Chartered Accountants in Ireland (the Institute), further illuminates these dynamics. It will be demonstrated how that body's attempts to reconcile its pre-1922 philosophy and internal rules (or its original legal time zone) with post-1922 exigencies played into political anxieties around sovereignty and oversight in both the present and future. Light is shone on the Institute's experience of reconciling to the new legal time of the post-1922 Irish state. Precisely because of its RCB status straddling different legal time zones, it is shown how the Institute has been well positioned to harmonise the professional regulatory regimes for accountancy on the island of Ireland notwithstanding territorial partition. Finally, an attempt is made to draw some general conclusions.

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9 Ibid. Incidentally, the Taoiseach (John A Costello) making this statement had, in his earlier guise as Attorney General in 1926, provided advice on complex legal issues relating to royal charters. Politics aside, he must have been keenly aware of the archaic administrative and legal challenges these entities presented for the new state. See, eg, Letter, dated 1 December 1926, from Attorney General to Assistant Secretary of the Executive Council of Saorstát Éireann regarding the definition of 'charter', found in NAI, TSCH/3/S4998.

10 Eg Emily Grabham and Sian M Beynon-Jones, 'Introduction' in Sian M Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2019).

11 Eg Natasha Wheatley, 'Legal pluralism as temporal pluralism: historical rights, legal vitalism and non-synchronous sovereignty' in D Edelstein et al (eds), *Power and Time: Temporalities in the Making of History* (University of Chicago Press 2020).

## ROYAL CHARTERED BODIES: TEMPORAL LEGAL PLURALISM AND TIMELINES

In order to frame the remainder of this article, this section exhibits concepts of ‘legal pluralism’, particularly ‘temporal’ legal pluralism in a common law context, as a means to perceive the relationship between RCBs and the Irish state. It is suggested that these concepts can assist in better understanding the nature of the legal zone RCBs have occupied since 1922.

At its core, legal pluralism sees that:

law and legal institutions are not all subsumable within one ‘system’ but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another so that the ‘law’ which is actually effective on the ground floor of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like.<sup>12</sup>

Legal pluralism has frequently been deployed in analyses of systems shaped by colonialism,<sup>13</sup> for example where customary or indigenous rights have competed with, or been facilitated by, (imposed) official or state law during or after a colonial experience.<sup>14</sup> This article engages the opposite scenario – husbandry, by the Irish state, of overtly colonial-era institutions in a post-colonial context. RCBs are, in their own way, artefacts of colonialism insofar as they draw upon vestigial rights rooted in a time prior to 1922.

Legal pluralist challenges associated with RCBs are, though, less acute than those presented by distinct systems of native customary rights.<sup>15</sup> After all, RCBs are creatures of a common law heritage which was, with variations, retained and replicated by the Irish state post-1922. While RCBs were originally founded in a different constitutional and administrative landscape, in many respects the common law did not *radically* change in post-1922 Ireland.

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12 John Griffiths, ‘What is legal pluralism?’ (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1, 39.

13 See, eg, Keebet von Benda-Beckmann and Bertram Turner, ‘Legal pluralism, social theory and the state’ (2018) 50 *Journal of Legal Pluralism and Unofficial Law* 255.

14 See, eg, Christian R Bursset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press 2023). Taken further in Gunther Teubner, ‘“Global Bukowina”: legal pluralism in the world society’ in Gunther Teubner (ed), *Global Law without a State* (Aldershot 1997).

15 See, eg, Shaunnagh Dorsett, ‘Since time immemorial: a story of common law jurisdiction, native title and the case of tanistry’ (2002) 26 *Melbourne University Law Review* 32.

The Irish state's indulgence of RCBs could, therefore, be perceived as legal pluralism in a 'weak' sense, as articulated by Griffiths.<sup>16</sup> In this concept of legal pluralism, the state is prepared to recognise pockets of pre-existing, or customary law, but always subject to an overarching or controlling 'state' legal system. RCBs could be categorised as pockets of variant common law within an ultimately common law-based system adopted by the Irish state post-1922. As such, we are dealing here with two common law value systems (pre and post-1922) which were, fundamentally, sisters of one another. Reliance on this concept of weak legal pluralism is not, then, entirely satisfactory in understanding the peculiar challenges posed by RCBs for the fledgling state.

More significant, perhaps, was that RCBs were rooted in a lapsed form of royal common law sovereignty. After 1922, RCBs required not just recognition of their pre-existing common law rights, but also demanded actively tailored legislative solutions so that they could be transitioned to the new sovereign legal order of the present. Accordingly, the concept of 'temporal legal pluralism', particularly as elaborated by Natasha Wheatley, offers a further useful prism through which to view the post-1922 conundrums presented by RCBs. The framework of temporal legal pluralism is more focused on dynamics of time, rather than space, in the shaping of legal orders. From this standpoint, pre-existing rights claims carried into a new sovereign order:

can linger as deep-set sovereign qualifications – as legal remainders that the establishment of the state was not a totalizing phenomenon ... These are rights 'from' the past that refuse to be simply 'of' the past ... even if they are politically or philosophically at odds with the current sovereign order.<sup>17</sup>

Temporal legal pluralism thus conceives the state being forced to 'wrestle with bodies of law and bundles of rights that stemmed from a time before the advent of [the state's] own sovereignty'.<sup>18</sup> Perceived from this angle, legal pluralism:

turns less on the (uneven) dispersal of rights throughout space than on their (imperfect) survival through time – on the patchy, friction-filled transference of law along temporal vectors toward the present (or, conversely, into the siloed dead ends of historical oblivion).<sup>19</sup>

Temporal legal pluralism may be considered within a broader theoretical framework of 'law and time' or the 'times of law'.<sup>20</sup> In this framework, time itself is a legitimate object of study. This contrasts

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16 Griffiths (n 12 above) 5.

17 Wheatley (n 11 above) 53.

18 Ibid.

19 Ibid 55.

20 Eg Grabham and Beynon-Jones (n 10 above).

with some traditional assumptions of time as merely an implicit prop, or something taken for granted in a linear, plodding evolution of law. Instead, it is possible to think of time itself as ‘an ontological, requisite, or constitutive feature of law’.<sup>21</sup> Conversely, law may also be capable of shaping or reshaping notions of time. In this way, time, or different legal timelines, can be perceived as non-linear, or a collection of ‘polytemporalities’.<sup>22</sup>

Common law systems (such as that in Ireland) are especially suitable to this type of interrogation. In certain ways, common law draws its potent authority from a kind of ‘non-historical’ ancient precedent, extending back behind the mists of time immemorial.<sup>23</sup> But this ostensibly non-historical common law precedent can (and often does) flexibly adapt or shapeshift as evolving contexts may demand.<sup>24</sup> What Hale branded as the ‘insensible’ variation of common law over time underplays this inherent flexibility.<sup>25</sup> Indeed, it has been suggested by Mawani that ‘common law has its own internal temporal rhythms ... Oriented to the past while reaching to the unforeseeable future, the common law is always becoming.’<sup>26</sup>

The intersection between the ‘non-historical’ time of the common law and a ‘foundational and teleological’<sup>27</sup> time of political history can be instructive. Parker has examined this in relation to the American Revolution. There the persistence of English common law after independence might seem puzzling, given American political aspirations to break with England.<sup>28</sup> One reason proffered is that the common law carried considerable ‘ideological freight’<sup>29</sup> in the specific context of the American Revolution. That struggle was often shrouded in the language of vindicating *common law* rights and freedoms against the British administration.<sup>30</sup> Another potential reason is the prominent role of nineteenth-century American common law lawyers in articulating law to societal constituencies for whom the administrative state was not yet present in the way it would later

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21 Renisa Mawani, ‘The times of law’ (2015) 40 *Law and Social Inquiry* 253, 255.

22 Grabham and Beynon-Jones (n 10 above) 2.

23 Kunal M Parker, ‘Law “in” and “as” history: the common law in the American polity, 1790–1900’ (2011) 1 *UC Irvine Law Review* 587, 600.

24 Mawani (n 21 above) 257.

25 Matthew Hale, *History of the Common Law*, Charles M Gray (ed) (University of Chicago Press 1971) 39–40.

26 Mawani (n 21 above) 255.

27 Parker (n 23 above) 606.

28 *Ibid* 594.

29 *Ibid* 595.

30 *Ibid*. Although, of course, law reform was also broached in the revolutionary American context. See, eg, Gordon S Wood, *The Creation of the American Republic 1776–1787* (University of North Carolina Press) 299–305.

become.<sup>31</sup> Added to that, concepts of political democracy were initially novel, underdeveloped and viewed with some suspicion. In that milieu, there was acceptance of some pre-existing, familiar legal constraints on political action.<sup>32</sup>

Some of the above chimes with the Irish revolutionary and state-building experience, not least the role of lawyers steeped in the common law tradition perpetuating it in a new political context.<sup>33</sup> It is, though, otherwise difficult to discern a substantial 'ideological freight'<sup>34</sup> conceded to the common law in the Irish revolutionary fervour of the twentieth century. Even so, the subsequent political and legal architects of the fledgling post-1922 state were careful to distinguish between the substance of common law itself and the manner in which it had been administered in Ireland. This circumspect stance on law reform is well illustrated in a backhanded compliment paid to the common law in a letter from the President of the Irish Executive Council (Prime Minister) to a Judiciary Committee tasked with devising proposals for a new court system, when he stated:

The body of laws and the system of judicature so imposed upon this Nation were English (not even British) ... A remarkable and characteristic product of the genius of that people, the manner of their administration prevented them from striking root in the fertile soil of this Nation.<sup>35</sup>

Enthusiasm for the common law was less overt in the post-1922 Irish context than it may have been in the nineteenth-century American order. Still, Parker's observation pertaining to the American experience could, as will be illustrated later in this article, just as easily have been written about some Irish constitutional and legislative exercises post-1922, not least in the handling of RCBs:

The times of the common law and the times of history brushed up against each other, informed each other, constituted each other, without destroying each other. History was a method of acting upon the common law; the common law was a method of realizing history. History produced an external perspective on the nonhistorical common law, but at the same time, the nonhistorical common law produced an external perspective on history.<sup>36</sup>

Within this overarching framework, it is also possible to isolate particular moments when a previously unified or linear (legal) narrative can be shattered by an act of speech or language. Such language might

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31 Ibid 596.

32 Ibid 596–597.

33 Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts 1920–24* (Irish Academic Press 1994) 98.

34 Parker (n 23 above) 595.

35 Kotsonouris (n 33 above) 99.

36 Parker (n 23 above) 606.

either affirm or reshape the legitimacy of pre-existing law or reorder legal timelines in fundamental respects. Through this lens, Painter observes how social actors can ‘speak the law into existence and bring the law’s authority into the present and the future through their speech acts’.<sup>37</sup> In the Irish case (further addressed below), contributions made during parliamentary debates may have fulfilled this function. Whatever their legal import, these parliamentary interventions sorted through, and actively contributed to, a (re)legitimation of pre-1922 common law norms underpinning RCBs.

### THE POST-COLONIAL ADMINISTRATIVE LEGACY

The 7 January 1922 saw approval of the Anglo-Irish Treaty 1921 in the Second Dáil Éireann (Assembly of Ireland). On Friday 7 April 1922 a notice appeared in *Iris Oifigiúil* and the *Belfast Gazette* confirming an ‘Order in Council’ made at Windsor Castle on 1 April 1922.<sup>38</sup> This order, *inter alia*, transferred key administrative functions from the British Government to the Provisional Government of Ireland, albeit some of this was ultimately done in a piecemeal and ambiguous fashion.<sup>39</sup> The Irish State Administration Database (ISAD)<sup>40</sup> indicates there were at least 65 active public administrative bodies (units) in Saorstát Éireann as at 1 January 1923, excluding government ministries and related executive offices.<sup>41</sup> The functions of a large number of these pre-1922 bodies transferred to the Provisional Government of Ireland were then inherited by Saorstát Éireann and, in some cases, continued well beyond that. Of these administrative bodies, 16 were originally established by royal charter prior to 1922. These are coded as ‘chartered corporations’ in ISAD and are the focus of this article.<sup>42</sup>

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37 Genevieve R Painter, “Give us his name”: time, law and language in a settler colony’ in Sian M Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2019) 109.

38 Order in Council, *The Belfast Gazette* (7 April 1922) 379–384 issued under the Irish Free State (Agreement) Act 1922 (13 Geo 5 Sess 2, c 1).

39 For discussion of ambiguities regarding the formal emergence of the Irish State, see, eg, Thomas Mohr, ‘Law and the foundation of the Irish Free State on 6 December 1922’ (2018) 59 *Irish Jurist* 31, particularly 50–51.

40 On ISAD generally, see the ISAD [website](#). See also, eg, Niamh Hardiman and Colin Scott, ‘Ordering things: the Irish State Administration Database’ (2012) 27 *Irish Political Studies* 1; Muiris MacCarthaigh, ‘Agency termination in Ireland: culls and bonfires, or life after death?’ (2014) 92 *Public Administration* 1017; Biggins et al, *The Irish State Administration Database* ([publicpolicy.ie](#) 18 October 2021):

41 Niamh Hardiman et al, *The Irish State Administration Database*.

42 It should be noted that some chartered corporations are not currently captured in ISAD due to the fact that they do not have a sufficiently explicit, formal nexus with the state, eg in terms of legislative control, governance or funding.

Of further relevance here is that legal provisions enacted post-1922 did not trigger an immediate, fundamental overhaul of the legislative and administrative order inherited from Westminster. The Constitution of the Irish Free State (Saorstát Éireann) Act 1922<sup>43</sup> contained transitory provisions preserving the legislative, administrative and judicial *status quo* pending future action by the new Irish Parliament (Oireachtas). This was buttressed by legislation such as the Adaptation of Enactments Act 1922 (the 1922 Act)<sup>44</sup> and the Expiring Laws Acts which facilitated the adaptation and extension of pre-1922 legislation in Saorstát Éireann. However, the status of RCBs originally established pursuant to royal prerogative posed a special challenge.

In the case of *Re Irish Employers Mutual Insurance Association Limited*,<sup>45</sup> Kingsmill Moore J usefully synthesised the origin of ‘royal prerogative’ in the English common law:

[t]he prerogative originated in a period when modern conceptions of the nature of sovereignty and government had not yet arisen. The structure of society was still feudal; property law was built on a feudal skeleton; loyalty was an essentially personal matter; the king was looked on more as a feudal overlord than as the embodiment of national power and aspiration; and the royal revenues, feudal by nature, were regarded as the king’s personal possession, which could be spent by him according to his personal desires and without restriction by ministerial or parliamentary interference.<sup>46</sup>

Royal prerogative was initially a loose discretion, exercisable by the English (later British) crown without significant checks or constraints. It has been described as ‘[t]he residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown’.<sup>47</sup> A variant description brands it a power ‘the [crown] enjoys alone, in contradistinction to others, and not to those [it] enjoys in common with any of [its] subjects’.<sup>48</sup> This power was gradually restricted as authority shifted from the crown to Parliament.

In the *Case of Proclamations*<sup>49</sup> it was confirmed that an Act of Parliament would trump any conflicting prerogative as ‘the King hath no prerogative, but that which the law of the land allows him’.<sup>50</sup>

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43 No 1 of 1922.

44 No 2 of 1922.

45 [1955] IR 176.

46 Ibid 215.

47 A V Dicey, *Introduction to the Study of the Law of the Constitution* 10th edn (Macmillan 1959) 424.

48 William Blackstone, *Commentaries on the Laws of England, a Facsimile of the First Edition of 1765-1769* (University of Chicago Press 1979) 111.

49 *Case of Proclamations* (1611) 12 Co Rep 74.

50 Ibid 76 (Sir Edward Coke).

Similarly, in the more recent case of *R (Miller) v The Prime Minister*,<sup>51</sup> prerogative was described as the ‘residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation’.<sup>52</sup>

The survival (or not) of royal prerogatives in the Irish legal order beyond 1922 has historically been a matter of considerable judicial and academic debate.<sup>53</sup> Full treatment of that debate is outside the scope of this article. But it is notable that the status of royal prerogatives was left somewhat ambiguous following the litigation in *Geoghegan v Institute of Chartered Accountants in Ireland*<sup>54</sup> (to which this article will return), albeit the royal prerogative question was *obiter* in those proceedings. In the High Court, Murphy J adopted the earlier position of Finlay CJ in *Webb v Ireland*<sup>55</sup> that, *inter alia*:

no royal prerogative in existence prior to the enactment of the Constitution of Saorstát Éireann, 1922, was by virtue of the provisions of that Constitution vested in the Irish Free State ...<sup>56</sup>

However, in the Supreme Court in *Geoghegan*, O’Flaherty J seemed not to entirely shut the door on royal prerogatives when he observed:

[a]s regards the decisions in *Byrne v. Ireland* [1972] I.R. 241 and *Webb v. Ireland* [1988] I.R. 353, since each was concerned with a single question in respect of the royal prerogative (whether the State was immune from civil suit in the one case and the State’s entitlement to treasure trove in the other), it may be that if in a future case a wider question is raised concerning the royal prerogative, the parameters of the judgments in these cases may need to be delineated.<sup>57</sup>

In any event, regardless of the survival of royal prerogatives, RCBs’ continued existence, as well as their entitlement to petition the Executive and Parliament of Ireland, were not ultimately jeopardised. While no longer shrouded in royal prerogative, it will be demonstrated here how equivalent forms of executive and legislative initiatives sustained RCBs after 1922.

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51 [2018] AC 61.

52 Ibid 139.

53 Well treated in Laura Cahillane, ‘The prerogative and its survival in Ireland: dusty antique or positively useful’ (2010) 1 Irish Journal of Legal Studies 1. See also John M Kelly, ‘Hidden treasure and the Constitution’ (1988) 10 Dublin University Law Journal 5; Niall Lenihan, ‘Royal prerogatives and the Constitution’ (1989) 24 Irish Jurist 1; Kevin Costello, ‘The expulsion of prerogative doctrine from Irish law: quantifying and remedying the loss of the royal prerogatives’ (1997) 32 Irish Jurist 145.

54 [1995] 3 IR 86.

55 [1988] IR 353.

56 Ibid 382.

57 [1995] 3 IR 86, at 118.

Royal charters, the constitutional documents of RCBs, were historically granted upon a petition under the crown prerogative of ‘letters patent’.<sup>58</sup> These are proclamatory orders confirming or establishing a particular legal right, title, body or jurisdiction. Costello describes the pre-1922 procedure:

a memorial was addressed to the Lord Lieutenant; where the Attorney General advised that the petition be granted, the papers would be sent to London, where a Crown letter would be prepared, and issued under the Royal Sign Manual directing that letters patent be prepared and issued under the Great Seal of Ireland for incorporating the institution described in the memorial. By the nineteenth century incorporation by charter had ceased to be sought by commercial organisations, and was attractive only to public corporations, usually of a vocational or educational nature, seeking such approval as would be conveyed by the grant of a royal licence.<sup>59</sup>

As such, RCBs were incorporated under royal charters and usually adopted detailed byelaws to govern their activities. However, in contrast to other types of corporate entities, RCBs as ‘chartered corporations’ have traditionally enjoyed a wide latitude not limited by internal articles of association etc. At common law, chartered corporations can exercise rights analogous to natural persons. The broad scope of chartered corporations was confirmed in *Gray and Cathart v Trinity College Dublin*:<sup>60</sup>

A corporation created by charter is one indivisible entity. It has impliedly all the powers of a natural person, save such as are expressly reserved in the charter. It has an inherent right to use a seal ... It can use the seal for all lawful purposes ... within the scope of its powers. It is not now disputed that it can do so without the consent of every individual member of the corporation ... This is settled by a long series of authorities, extending over four centuries of time ... When the majority authorize the seal to be affixed, the act of the corporation is complete.<sup>61</sup>

Of course, RCBs today may (depending on their activities) now also be captured by public legislative provisions applicable to incorporated and charitable bodies.<sup>62</sup> The RCBs of specific interest in this paper are those originally established prior to 1922, surviving into Saorstát Éireann and beyond – a broad category encompassing educational, health, professional and sporting bodies.

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58 UK National Archives, *Royal Grants in Letters Patent and Charters from 1199*.

59 Costello (n 53 above) 150.

60 [1910] 1 IR 370.

61 Ibid 383–384.

62 For example, s 1312 of the Companies Act 2014 (No 38 of 2014); s 2 of the Charities Act 2009 (No 6 of 2009).

## **RCBs and the adaptation of charters**

The path forward for RCBs was foggy after 1922. They had originally been conceived in a system where the crown embodied sovereign authority. Sovereignty, though contested, had a more popular hue in the Constitution of Saorstát Éireann.<sup>63</sup> At the same time, the new state retained some trappings of regal authority and symbolism. The British monarch had a nominal role in the executive function of the new state<sup>64</sup> and Irish parliamentarians were required to swear an oath of allegiance to the crown.<sup>65</sup> The emergent state in 1922 also remained within the orbit of the British empire as a dominion.<sup>66</sup> While these qualifications to sovereignty diminished as time went on, they undoubtedly influenced the new state's formative years.

After the transfer of political authority in 1922, the crown no longer exercised a role in founding or sustaining<sup>67</sup> administrative bodies in Ireland. Indeed, there was reportedly an 'absolute refusal' by the crown to alter or update the royal charters of RCBs based in Ireland or the other dominions. Apparently, the crown's view was that this was 'now the business of the legislature'.<sup>68</sup> As will be demonstrated below, a mixture of public and private legislation, as well as executive orders, was deployed to fasten RCBs to the post-1922 Irish state. In this way, RCBs not only survived 1922 but were actively sustained by species of legislation and executive orders tailored to their needs.

The most immediate administrative challenge for many RCBs post-1922 was the fact that their charters referred to pre-1922 offices or authorities that had originally been allocated governance functions or exercised important powers to approve new or amended byelaws. For example, charters contained references to the 'Lord Chancellor of Ireland' or 'Our Privy Council in Ireland'. These had ceased to exist or operate in Saorstát Éireann. So, with the legal scaffolding of royal

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63 See the discussion in Cahillane (n 1 above) 100–103.

64 Eg Art 51 of the Constitution of the Irish Free State (Saorstát Eireann) Act 1922 (No 1 of 1922). On the limited executive role of the crown see, eg, Costello (n 53 above) 171–179.

65 Constitution of the Irish Free State (Saorstát Eireann) Act 1922, art 14.

66 Art 1 of the Treaty between Great Britain and Ireland signed at London 6 December 1921.

67 With at least one peculiar exception – the Office of Arms. Due to an administrative quirk, it was not transferred until 1943. See Susan Hood, *Royal Roots Republican Inheritance: The Survival of the Office of Arms* (Woodfield Press & National Library of Ireland 2002). Some other bodies were also temporarily reserved by the British until 1923, including the Land Commission, Registry of Deeds, Commissioners of Irish Lights and the Post Office Savings Bank.

68 Houses of the Oireachtas, [Select Committee Adaptation of Charters Bill, 1925 debate – Thursday, 18 February 1926](#).

charters ‘cleaved apart’<sup>69</sup> in 1922, it became necessary to ensure officers of Saorstát Éireann were instead conferred with the requisite authority and, more generally, that the new state’s law became the reference point in royal charters.

These issues came to a head soon after the foundation of the state and, initially at least, there was considerable confusion over how to proceed. Correspondence from the Royal College of Physicians in Ireland (RCPI) to the Attorney General in early 1925 typified the temporal purgatory in which RCBs found themselves.<sup>70</sup> In July 1924 the RCPI had modified its byelaws governing examinations for candidates seeking to become members of that body. The RCPI’s 1878 royal charter required that such byelaws be submitted ‘to the Lord Lieutenant or other General Governor or Governors of Ireland for the time being’. Under a non-objection procedure, the Lord Lieutenant or Governor (as the case may be) had discretion to partly or fully disapprove of such byelaws within three months, subject to the advice and consent of the Privy Council of Ireland (a defunct body).

After adopting new byelaws in July 1924, the RCPI duly submitted them to the new representative of the crown in Ireland, the Governor General for Saorstát Éireann.<sup>71</sup> However, in August 1924 the office of the Governor General indicated to the RCPI that ‘as a result of inquiries which the Governor General has caused to be made, he is informed that he has no power to approve of them’.<sup>72</sup> As it transpired, the Governor General had consulted the Attorney General (AG) on the matter.<sup>73</sup> The RCPI then engaged a senator, Sam Browne KC, who advised the RCPI that the charter did not come within the ambit of the 1922 Act.<sup>74</sup>

The 1922 Act had adapted certain pre-1922 legislation, contracts and offices to ensure they could continue to function in Saorstát Éireann but did not clearly address the status of royal charters. This prompted the RCPI to alert the Government that there was ‘no authority which can approve or disapprove of the proposed new Membership Bye-Laws’. The RCPI noted that this state of affairs prevented it from making modifications to its membership examinations ‘which have become necessary owing to the advance in Medical Science’.<sup>75</sup> The RCPI submission to the AG went on:

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69 Wheatley (n 11 above) 55.

70 Letter from Royal College of Physicians of Ireland to the Attorney General of Saorstát Éireann, found in NAI, TAOIS/S4966 (RCPI letter).

71 Ibid.

72 Ibid.

73 Letter, dated 20 January 1925, from Attorney General to Secretary to the Executive Council of Saorstát Éireann, found in NAI, TAOIS/S4966.

74 RCPI letter (n 70 above).

75 Ibid.

Under these circumstances the President and Fellows [of the RCPI] humbly urge the Government to grant them assistance, either by bringing the Charter within the scope of the Adaptation of Enactments Act 1922, or by constituting some authority which may legally fulfil the terms of the charter.<sup>76</sup>

So here was a possible existential risk for the RCPI. If it could not ensure its incoming members kept pace with medical developments, that may well have called into serious question the RCPI's *raison d'être*. The AG contacted the Secretary to the Executive Council (Government) in January 1925, attaching the RCPI's correspondence. The AG's perspective was consistent with that of the RCPI, accepting that the charter had not been adapted by the 1922 Act, nor did the Executive Council have power under the 1922 Act to effect an adaptation. The AG thus recommended that 'it would be reasonable that the Government should undertake such legislation as would be necessary to meet that difficulty', which 'could be general in form'.<sup>77</sup>

From a legal pluralist standpoint, it could be said that the RCPI's charter (and indeed those of other RCBs) was, at that point, '[i]nassimilable to the state-backed law of the present, yet evading clear consignment to the past'.<sup>78</sup> Another way of looking at the impasse is that the legal timeline of RCBs on the one hand, and that of the new state they inhabited on the other, were temporally mismatched or out of sync. This was a 'clash of temporal orders'.<sup>79</sup>

Temporal salvation for the RCPI and other RCBs came via the Adaptation of Charters Act 1926 (the 1926 Act),<sup>80</sup> a public Act of the Oireachtas. The 1926 Act authorised the Executive Council to issue orders (statutory instruments) adapting or modifying royal charters in limited ways. Section 1(1) of the 1926 Act stipulates:

The Executive Council may from time to time by order make all such adaptations of and modifications in any Charter which by virtue of Article 73 of the Constitution has the force of law in Saorstát Éireann as are in the opinion of the Executive Council necessary in order to enable such Charter to have full force and effect in Saorstát Éireann.

Section 1 of the 1926 Act was backdropped by article 73 of the Saorstát Éireann Constitution. Article 73 embedded a (rebuttable) presumption of constitutionality for 'laws in force' prior to the foundation of the state. It stipulated:

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76 Ibid.

77 Ibid.

78 Wheatley (n 11 above) 55.

79 Grabham and Beynon-Jones (n 10 above) 21.

80 No 6 of 1926.

Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

Certain RCBs owed their existence to charters granted solely under royal prerogative *simpliciter*. Others had also been subject to, or were underpinned by, pre-1922 parliamentary legislation.<sup>81</sup> Ambiguity around the intended scope of article 73 prompted some (at times confused) debate during passage of the 1926 Act as to whether the reference to ‘laws in force’ in article 73 was wide enough to encompass RCBs solely founded by the administrative grant of a royal charter, without any other underpinning legislation. One such contribution typified the concern:

there are a good many statutory bodies which were established not by any Act of Parliament at all, but by the direct act of the King, and therefore have no, what I believe in technical language is called legal signification ... they would not come in if this whole thing is based on Article 73 ... .<sup>82</sup>

This concern foreshadowed a judicial interpretation which emerged in July 1926, shortly after the 1926 Act was enacted. In *British Thomson-Houston Co Ltd v Litton & Co.*<sup>83</sup> Meredith J in the High Court rejected the notion that letters patent issued under the Seal of the British Patent Office had automatically survived the establishment of Saorstát Éireann. Meredith J took the view that, if this had been the constitutional framers’ intention, they would have designed a specific provision confirming it, as they had for other types of rights.<sup>84</sup>

However, the perspective of the President of the Executive Council (Prime Minister) during an Oireachtas debate on the 1926 Act was telling. He dismissed the notion that some royal charters somehow escaped the gravitational force of state law and also alluded to a legal reset for RCBs under the 1922 Constitution:

We would not bring a charter into existence or give it the force of law if it has not got that already. It must get that character and it can only get it through the Constitution. There is an idea amongst certain people, I believe, that a charter is above the law, and that it cannot be altered. That is all wrong ... .<sup>85</sup>

In this interpretation of the constitutional position, RCBs were confronted by a version of what Chalmers coined as ‘law with two faces,

81 For example, Bank of Ireland Act 1781.

82 Mr Jameson, in *Select Committee* (n 68 above).

83 HC, 16 July 1926.

84 Costello (n 53 above) at 151, fn 22.

85 President of the Executive Council, in *Select Committee* (n 68 above).

contorted in varying expressions of recognition and denial'.<sup>86</sup> RCBs were legally repapered under the Constitution of the new state. Any idea that RCBs could have somehow continued to independently exist outside the temporal parameters of that Constitution was not politically entertained, despite ambiguity in the actual scope of article 73. At the same time, it was not explicitly clarified how RCBs would 'get' the force of law under the Constitution, particularly whether the article 73 protection operated automatically or relied on manual activation, namely through legislation such as the 1926 Act.

This statement of the President of the Executive Council is also intriguing as an influential speech act shrouded in a temporality of the present. The fact it was the President making this statement in the parliamentary chamber is significant. It has been suggested elsewhere that performative speech acts 'work' only if they comply with 'a condition of validity, related to the person making the utterance and to the circumstances of the utterance'.<sup>87</sup> The way in which article 73 was politically interpreted here, and pressed into service under the 1926 Act, ensured that RCB charters and past common law rights were revitalised in the present and would be protected into the future.

This presumption of constitutionality in the 1926 Act was later buttressed by the courts. In *Geoghegan v Institute of Chartered Accountants in Ireland*<sup>88</sup> it was argued that the royal charter establishing the Institute of Chartered Accountants in Ireland (to which this article will return) did not survive the Constitution of Saorstát Éireann 1922 and Bunreacht na hÉireann 1937. But, in the High Court, Murphy J was satisfied that:

It seems to me that the laws carried forward by Article 73 of the Constitution of Saorstát Éireann, 1922, and Article 50 of the Constitution of Ireland, 1937, comprise the full range of laws whether customary or statutory and however they have been made or evolved, subject only to their not being inconsistent with either Constitution. I see no reason in principle why a law enacted in Great Britain in medieval times by the Monarch himself in pursuance of the legislative powers which (as well as judicial and executive powers) vested in him not merely as a theoretical concept but as a practical reality could not have passed into the laws of the Irish Free State. The filtering process provided by Article 73 ... related to the content of the law and not its source. I see no reason why the Institute and all comparable bodies, whether formed under public or private legislation or incorporated by Royal Charter as part of the royal prerogative or residual regal legislative power, should not continue to have a valid and effective existence on the formation of the

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86 Shane Chalmers, 'Terra nullius? Temporal legal pluralism in an Australian colony' (2020) 29 *Social and Legal Studies* 463, 480.

87 Painter (n 37 above) 123.

88 [1995] 3 IR 86.

independent Irish State. Certainly any other result would be chaotic in the extreme.<sup>89</sup>

Once it had been settled that royal charters could benefit from the protection of article 73, there was no obvious agitation in 1925–1926 for particular charters to be cancelled or withdrawn, though the use of ‘royal’ monikers was occasionally challenged in later years.<sup>90</sup> If anything, the locus of discomfort during early parliamentary debates was that the Executive might be tempted to interfere with royal charters in ways other than simply ensuring they could continue to operate in the new state.

This was apparent in a parliamentary contribution which noted: ‘if the Government took power to themselves to alter charters, which alterations were not required by the bodies holding the charters, it might become a rather serious matter’.<sup>91</sup> It is also notable that an official stocktake of RCBs was not undertaken in the early years of the state. Indeed, the Oireachtas seems to have been flying blind on the number and nature of RCBs in 1925, as confirmed in the complaint of a parliamentarian who noted:

We are in the great difficulty that we have not any conception of how many charters are in operation, how many institutions are working under charters, and what is contained in those charters.<sup>92</sup>

In response to a question as to whether it would have been ‘well to have prepared a list of all the chartered bodies?’, the President of the Executive Council responded: ‘I do not think you could possibly do that. These charters are within the personal custody of the bodies affected by them.’<sup>93</sup> An indication here that, while the Government was intent on providing a legislative ramp for pre-1922 RCBs to enter the state’s legal timeline, it was disinclined to enquire too deeply about precisely what it was teleporting from the past. The state initially kept a respectful distance from the private legal sphere of RCBs, even as it transitioned them. The President of the Executive Council did, though, hint at a general organising principle when he confirmed: ‘It is only where there is a body exercising a particular function which affects a particular number of people that we come in to enable things to be done.’<sup>94</sup> This intimates a political intention that the 1926 Act

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89 Ibid 95.

90 Costello (n 53 above) 150.

91 Sir James Craig, *Dáil in Committee – Adaptation of Charters Bill, 1925* (11 November 1925, vol 13, no 2).

92 Ibid Mr Johnson.

93 Exchange between Mr Wyse Power and the President of the Executive Council, in *Select Committee* (n 68 above).

94 President of the Executive Council, in *Select Committee* (n 68 above).

should primarily be seen to deal with RCBs whose activities affected a sufficient number of people – RCBs with a degree of public import.

At its core, the 1926 Act was principally concerned with ensuring that pre-existing RCBs could operate smoothly in the new state. There was a sense of urgency to ensure amended byelaws passed by these bodies (such as the RCPI, above) could be given full effect. This was achieved by explicitly anchoring RCBs in the new legal present and by assigning roles, hitherto performed by officers of the British administration, to the Irish Government, ministers, the Taoiseach or specified Irish judicial officers. By way of example, article 4 of the Royal College of Physicians of Ireland (Adaptation of Charters) Order 1926<sup>95</sup> provides:

The reference in the Charter to “the laws, statutes, rights and customs of this our kingdom of Ireland” shall be construed as referring to the laws and statutes of Saorstát Eireann, and the Charter shall have effect accordingly.

Article 5 of the Royal Hibernian Academy (Adaptation of Charter) Order 1940<sup>96</sup> provides:

That portion of the Charter which provides that statutes, bye-laws, and ordinances made thereunder shall not be binding on the academicians until approved of by the Lord Lieutenant of Ireland or other Chief Governor or Governors of Ireland is hereby adapted by the substitution of the expression “the Government” for the expression “the Lord Lieutenant of Ireland or other Chief Governor or Governors of Ireland” and it is hereby ordered that the said portion of the Charter shall be construed and have effect accordingly.

Beyond that, sections 2 and 3 of the 1926 Act subject RCBs to section 7 of the 1922 Act and section 9 of the Ministers and Secretaries Act 1924 (the 1924 Act).<sup>97</sup> The net effect is:

- a) Under section 7 of the 1922 Act the Government can install ‘boards of commissioners’ to exercise the functions of RCBs engaged in ‘any function of government or discharg[ing] any public duties in relation to public administration’; and
- b) Under section 9 of the 1924 Act the Government can dissolve RCBs (except universities and professional regulatory bodies) performing ‘public service’ functions and, if necessary, arrange for their jurisdictions, powers, duties, and functions etc., to be subsumed into Ministerial Departments. This power was exercised in 1955 to dissolve the governors and revoke the charter of the Royal Hospital, Kilmainham.<sup>98</sup>

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95 SI No 38/1926.

96 SI No 331/1940.

97 No 16 of 1924.

98 Royal Hospital, Kilmainham (Dissolution of Governors and Revocation of Charters) Order 1955 (SI No 260/1955).

Concerns were raised during parliamentary debates about whether section 7 of the 1922 Act could apply to universities and professional bodies. A question was also posed as to whether both section 7 of the 1922 Act and section 9 of the 1924 Act could apply to banks established by royal charter, particularly the Bank of Ireland (BOI), insofar as BOI might incidentally perform ‘government functions’ as a custodian of public monies. It was urged by the President of the Executive Council that the respective sections should not be construed as applying to these entities, though legislative amendments were not favoured by the President either.<sup>99</sup> So these perhaps remain open issues of legislative interpretation.

A temporal concern was also ventilated about the original wording of section 2 of the 1926 Act (applying section 7 of the 1922 Act to RCBs). Initially, this had stipulated that RCBs would be deemed ‘always to have been’ within scope of section 7 of the 1922 Act, that is from December 1922. But it was contended in debate that this retrospective application could ‘take away’ RCB-related rights existing prior to enactment of the 1926 Act. While the precise nature of such rights was not made particularly clear,<sup>100</sup> the phrase ‘always to have been’ was duly deleted from the final legislation. Through the prism of temporal legal pluralism, these parliamentary exchanges around the 1926 Act could be seen as a manifestation of ‘rights vitalism’<sup>101</sup> in which there was a contest (here within Parliament) about the ‘vitality and health’ of pre-1926 RCB-related rights. On this reading, ‘rights, like organisms, can live and die and must struggle to survive in unnatural environments’.<sup>102</sup>

From an RCB standpoint, the ‘unnatural environment’ was the new constitutional and sovereign dynamic of Saorstát Éireann. In one sense, the 1926 Act was simply a technical fix to meet a demand from within the RCB movement. But, in another sense, the 1926 Act was highly significant in confirming the emergent state’s broad sovereign authority over RCBs and the assertion of a new legal timeline of the state’s making. RCBs’ pre-existing rights could now only be vindicated inasmuch as they did not conflict with the exigencies of the post-1922 sovereign order. The state also took the opportunity to confer itself with reserve powers, via section 7 of the 1922 Act and section 9 of the 1924 Act, to steer the affairs of (at least some) RCBs. A sovereign authority that had been implicit in the past since 1922 was made explicit in the

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99 See, Dáil in Committee (n 91 above); *Response of President of the Executive Council to motion moved by Mr Brown, Seanad Eireann Debate* (24 February 1926, vol 6, no 10).

100 Mr T J O’Connell, in Dáil in Committee (n 91 above).

101 Wheatley (n 11 above) 55.

102 *Ibid.*

present of 1926 and in the future beyond. RCBs were brought firmly into the legal time zone of the new state. Nevertheless, the political attitude towards this peculiar royal inheritance was grudging at best. This was evident in a contribution by the President of the Executive Council during parliamentary debate:

I do not want to have the Executive Council deluged with a number of these things. The Executive Council has no particular appetite for dealing with these things at all. It means that a lot of onerous work will be put upon us as well as detailed examination on the part of our legal advisers to know what the effect of these charters is, and whether a particular case comes within the scope of our jurisdiction in regard to these matters ... .<sup>103</sup>

Compounding this official reticence, there were also limits to what could be achieved under the 1926 Act. While executive orders could adapt royal charters, they could not substantively amend them – although, perhaps, a fine conceptual line. So it would become necessary for the state to go even further in order to facilitate substantive changes to RCBs' charters, thereby ensuring continued alignment between RCB and state legal time-zones. Enter the Private Act.

#### *RCBs and the Private Act*

Royal charters provide RCBs with their fundamental legal underpinnings. But the ways and means of achieving, and governing, particular objectives or mandates can or must evolve over time, sometimes in response to supervening public legislation or public policy considerations. With that comes the need to substantively update the constitutional documents of RCBs, namely their royal charters. Both before and after 1922, RCBs could petition the sovereign for charter amendments as a corollary to their inherent common law property rights. Prior to 1922, such amendments to charters were implemented by the crown under royal prerogative or otherwise by amending legislation underpinning chartered corporations.

The crown ceased to have a role in the chartering of RCBs in Ireland post-1922 (per above). However, an inherent entitlement of RCBs to *petition* for charter amendments formed part of the bundle of common law rights carried over by article 73 of the Saorstát Éireann Constitution.<sup>104</sup> And while the 1926 Act (discussed above) facilitates charter *adaptation*, it does not enable the Government, by way of executive action, to substantively *amend* the contents of charters. The Irish Parliament (Oireachtas) thus became the only other authority through which charter amendments could be realised post-1922.

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<sup>103</sup> President of the Executive Council, in *Select Committee* (n 68 above).

<sup>104</sup> Houses of the Oireachtas, *Report on the Revision of Standing Orders Relative to Private Business 1939* (7 November 2012) (on file with author).

Private legislation (also referred to as the ‘Private Act’) was the vehicle to that end. Therefore, while the resilience of royal prerogatives in the post-1922 constitutional order has been hotly debated, it has been suggested:

[T]he prerogative, to the extent that it has survived the coming into effect of the Constitution, is arguably given expression in a Private Act of Parliament which is the exercise of the legislative power of the State specifically for the benefit of a private person or undertaking.<sup>105</sup>

Private Acts of Parliament should not be confused with ‘private members’ (public) Bills, that is Bills for a public general Act of Parliament proposed by individual parliamentarians rather than the Government. In contrast, private legislation has been defined as:

[L]egislation of a special kind for conferring particular powers or benefits on any person or body of person – including individuals, local authorities, companies, or corporations – in addition to or in conflict with the general law.<sup>106</sup>

Private legislation has its origins ‘in the medieval practice of petitioning the King for some special privilege or dispensation which he granted in the form of a statute’.<sup>107</sup> Private legislation historically generated a substantial amount of parliamentary business in England, subsequently Great Britain and then the United Kingdom (UK), particularly from the mid-seventeenth to nineteenth century. For example, in the period 1689–1714 Private Acts represented over 60 per cent of legislation.<sup>108</sup> By the nineteenth century the majority of parliamentary business was still taken up with private legislation.<sup>109</sup> Bogart and Richardson illustrate how private legislation played a major role in reorganising rights to land and resources, especially during the industrial revolution in Britain.<sup>110</sup> Private legislation also featured, albeit less prominently, in the pre-Act of Union Irish Parliament. Between 1692 and 1800, Private Acts comprised 13.8 per cent of the total legislation approved there.<sup>111</sup>

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105 Ibid 17.

106 Erskine May, *Parliamentary Practice* 24th edn (Lexis 2011) para 42.1.

107 Raymond Byrne et al, *The Irish Legal System* 7th edn (Bloomsbury Professional 2020) para 13.47.

108 Julian Hoppit, ‘Patterns of parliamentary legislation’ (1996) 39 *The Historical Journal* 109, 116.

109 House of Commons Library, [Private Bills in Parliament: House of Commons Background Paper](#) (SN/PC/06508) (7 January 2014).

110 Dan Bogart and Gary Richardson, ‘Property rights and Parliament in industrialising Britain’ (2011) 54 *Journal of Law and Economics* 241.

111 James Kelly, ‘The Private Bill legislation of the Irish Parliament 1692–1800’ (2014) *Parliamentary History* 73, 74.

The dividing line between Private and Public Acts, and the precise factors determining choices of instrument, have not always been clear. As Hoppit points out in relation to patterns of English parliamentary legislation between 1660 and 1800, the '[private/public] distinction inconsistently reflected the purposes of legislation'.<sup>112</sup> 'Hybrid' legislation, that is legislation processed under both public and private parliamentary standing orders, has also been known to the Westminster parliamentary tradition. At least one such hybrid Act is understood to have been enacted by the Oireachtas after 1922.<sup>113</sup>

In Ireland, continuation of the Westminster private legislative tradition was signalled early on via a 1924 statute adapting pre-1922 legislation regulating the costs of promoting Private Bills. Private Bills were originally defined under the Private Bill Costs Act 1924<sup>114</sup> as:

any bill promoted for the particular interest or benefit of any person, or which interferes with the private property of any person otherwise than in the interest of the public generally and as a measure of public policy, and includes any bill for the confirmation of any provisional or other order and any public bill which has been referred to the Examiner by the Ceann Comhairle or the Cathaoirleach of the Seanad under standing orders made jointly by Dáil Eireann and Seanad Eireann relative to private business.

Under parliamentary standing orders, applications to the Oireachtas for private legislation are governed by strict procedures.<sup>115</sup> A Joint Committee on a Private Bill, drawing its membership from both Houses of the Oireachtas, would typically convene to consider a private legislative proposal before issuing a report to the Seanad (Upper House) and the Dáil (Lower House). The promoter of the legislation and, if any, a petitioner (opposer) may be represented at such Joint Committee hearings by a registered parliamentary agent (solicitor) and legal counsel. A Joint Committee would also be competent to determine the *locus standi* of any petitioners. Accordingly, parliamentary proceedings on private legislation are, to some extent, of a judicial character.<sup>116</sup>

The relevance of private legislation waned over time and it has only occasionally been availed of in Ireland since 1922. It has, though, remained prominent in other former British colonies, particularly New Zealand.<sup>117</sup> And it is still *the* legislative vehicle for substantively

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112 Hoppit (n 108 above) 116.

113 Houses of the Oireachtas, *Report* (n 104 above) 21; assumed to be the Limerick Harbour Tramways Act 1931 (No 1 Private) of 1931.

114 No 52 of 1924. Section 42 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 (No 33 of 2013) later recast this definition.

115 Houses of the Oireachtas, *Report* (n 104 above) appendix 2.

116 *Ibid.* See also, eg, Byrne et al (n 107 above) paras 13.47–13.52.

117 Ivor Richardson, 'Private Acts of Parliament' (2010) 41 *Victoria University of Wellington Law Review* 653.

amending the charters of most RCBs in Ireland. As such, private legislation has been highly relevant for RCBs but almost irrelevant in other sectors. RCBs availing of private legislation to effect substantive alterations to their charters have included:

- the Governor and Company of the Bank of Ireland;
- the National Maternity Hospital, Dublin;
- the Royal Hospital for Incurables, Dublin;
- the Convalescent Home, Stillorgan;
- the Institution of Civil Engineers of Ireland;
- the Royal College of Surgeons in Ireland;
- the Institute of Chartered Accountants in Ireland;
- the Royal College of Physicians of Ireland;
- Trinity College Dublin;
- the Royal Hibernian Academy.

An interesting aspect of these private legislative initiatives from a temporal standpoint is they have often included a specific provision in the following (or similar) terms: ‘Save as hereby amended, the said Charters or Letters Patent shall be and remain in full force and effect.’<sup>118</sup> These avoidance of doubt clauses betray a lingering insecurity about the legal resilience of RCBs with pre-1922 roots. RCBs may have been transitioned to the state’s legal time zone but any moment of legislative intervention in their affairs is fraught with possible temporal danger – that a charter of the past might become lost to the past when trying to cater for the present and future. This underscores that private legislative initiatives pertaining to RCBs have, in a legal pluralist sense, ‘different temporal properties from regular state law, with its smooth, unselfconscious reliance on the present tense’.<sup>119</sup>

Exploiting this theme further, strictly speaking RCB private legislation is notionally consistent with Irish parliamentary tradition, insofar as the private legislative mechanism itself was inherited from Westminster (as was much else). But this legislative mechanism is anachronistic and now *primarily or only* caters to RCBs. So, a temporal friction permeates not just RCBs’ legislative interactions with the state, but also in the necessity for the state itself to retain a facet of pre-1922 legislative machinery which is, RCBs aside, otherwise largely superfluous in the present and future.

Private legislative initiatives concerning RCBs have, though, seemingly presented relatively few problems over time and this may

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118 Eg s 9 of the Royal College of Surgeons in Ireland (Charter Amendment) Act 1965 (No 1 Private of 1965); s 13 of the Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969 (No 1 Private of 1969); s 14 of the Royal College of Physicians of Ireland (Charter and Letters Patent Amendment) Act 1979 (No 1 Private of 1979).

119 Wheatley (n 11 above) 55.

be key to understanding the resilience of the mechanism itself. For example, it has been unusual for a private legislative proposal to meet with opposition by way of a petition or indeed to provoke any particular controversy. There have, however, been notable exceptions.<sup>120</sup> An RCB-related example was the Trinity College Dublin (Charters and Letters Patent Amendment) Bill 1997 (hereinafter referred to as the TCD Bill), eventually enacted as the Trinity College, Dublin (Charters and Letters Patent Amendment) Act 2000.<sup>121</sup> This was a ‘contested’ Private Bill, in that it was opposed by ‘petition’.

The backdrop here was the Universities Act 1997 (the 1997 Act),<sup>122</sup> a Public Act of the Oireachtas, which carried important implications for universities, especially in terms of their governance structures. However, section 4(2)–(3) of the 1997 Act contained a time-limited derogation clause for Trinity College Dublin (TCD), the sole constituent college of the University of Dublin, with respect to certain internal governance and rule-making matters governed by the TCD royal charter documents.<sup>123</sup> Section 4(2)–(3) facilitated passage of a Private Act of the Oireachtas amending TCD’s charters and letters patent ‘in a manner consistent with the purpose and substance’ of the 1997 Act. In some respects, the 1997 Act was heavily imbued with temporal objectives. For example, section 31 specifies that:

A University may have a charter, not in conflict with this Act, setting out all or any of the following ... the arrangements it has for the promotion and use of the Irish language and the promotion of Irish cultures.

The promotion of the Irish language and culture has been very much a post-1922 official public policy objective, unlikely to have historically featured in the charters of RCBs. So here again was a concerted effort by the state to align the legal timelines of a set of pre-1922 institutions with its own evolving public policy objectives.

In the final stages of parliamentary committee scrutiny, Desmond O’Malley Teachta Dála (TD)<sup>124</sup> argued that, coupled with drafting issues in the Private Bill itself, a number of procedural irregularities had arisen. TCD (as promoter) had allegedly not followed the correct procedures, relying on an allegedly flawed internal ballot. It was also claimed that internal consultation and approval within the University of Dublin had not been secured. The Oireachtas Private Bills Office had

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120 An instance outside the RCB context was *Cane v Dublin Corporation* [1927] IR 582 involving an attempt by a landowner to recover costs incurred in opposing private legislation, which was subsequently withdrawn by its promoters.

121 No 1 Private of 2000.

122 No 24 of 1997.

123 Specific provisions for Trinity College have also been included in the more recent Higher Education Authority Act 2022 (No 31 of 2022).

124 The Irish designation for a Member of Parliament.

seemingly not been made aware of these irregularities and they only came to light during parliamentary hearings on the legislation.<sup>125</sup> In the wake of Deputy O'Malley's revelations, contributions from other parliamentarians were shrouded in temporal language. For example, Dick Roche TD observed:

The complexities he [Deputy O'Malley] has outlined arise from the impenetrable nature of an extraordinary Elizabethan statute – I am speaking about Elizabeth I – which is the basis on which Trinity College, Dublin and Dublin university, the twin universities, are built. It is extraordinary that this arcane legislation should have taken up so much time of the Houses and a joint committee ... .<sup>126</sup>

Committee members were evidently fatigued by the affair and keen to bring it to a close. Enda Kenny TD suggested:

There will always be a small number of cases in which Private Bills will be required, but if their objectives have to be achieved by such a torturous process, perhaps the method by which legislation is introduced should be looked at seriously with a view to reform ... .<sup>127</sup>

This episode is loaded with temporal significance. Here was a scenario whereby TCD, an RCB, availed of a derogation, or reprieve, from the public or state law of the present. It did so by exploiting an alternative legislative mechanism, the Private Act, itself a creature of the past. The fundamental rationales for doing so also had their roots in the past. The ultimate objective was to facilitate a gradual reconciliation between the present legal time of the 1997 Act and the past legal time of TCD's royal charter. Somewhere along the way, things got messy. The frustrations of parliamentarians during debates on the matter were palpable and not without justification.

More recently, in relation to a less controversial Private Bill amending the charter of the Royal Hibernian Academy, some pertinent questions were posed, albeit from a distinctly republican viewpoint. In a December 2023 Dáil debate, Aengus Ó Snodaigh TD queried as to why state power was being harnessed at all:

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125 Desmond O'Malley TD, *Private Business – Trinity College, Dublin (Charters and Letters Patent Amendment) Bill 1997 – Report and Final Stages*, Dáil Éireann Debate (26 October 2000, vol 525, no 1).

126 Ibid Dick Roche TD.

127 Ibid Enda Kenny TD. In fact, such reform was hiding in plain sight. S 76 of the Health Act 1970 (No 1 of 1970) empowers the Minister for Health to make a draft order amending (as opposed to merely 'adapting') a charter or private Act relating to a hospital. A draft order made by the minister under s 76 is subject to adoption by the Houses of the Oireachtas. As such, it is no longer necessary for hospitals constituted by royal charter to undergo a private legislative procedure in order to secure charter amendments.

My first question is why certain private bodies are required to have such changes made by way of legislation and why, therefore, they have the right to have a Bill initiated in the Oireachtas. It is an anachronism and something we must deal with in some way ...<sup>128</sup>

In calling for the Oireachtas or Law Reform Commission to examine this through the prism of statute law revision, he went on:

We should look at charter bodies that fulfil a vital policy role. If it is important that they be left completely as private entities, then so be it. However, we should change the law in order that they do not have to come back to the House and go through the same process we are going through today. If it is a charter body, then it should be allowed to do its own thing. It should be uncoupled from the State. We run the House, and our laws are based on what is decided in the House rather than an outside body. We should not be concerned with the private business of a private institution in any way unless it is contrary to public policy or if that institution is dependent on the State for funding ...<sup>129</sup>

These parliamentary episodes illustrate the tensions between modern principle and outmoded legislative procedures in efforts to facilitate RCBs, themselves purveyors of historical rights and rhythms in their charters. These episodes also beg wider questions as to where, and on what basis, the boundaries between public and private spheres or interests should be drawn. Such challenges are perhaps well captured in Wheatley's observation that historical rights:

come saturated in temporal language and infect the state with their particular historical grammar, injecting a (sharper) multiplicity of times into the legal order. In resisting alignment with the worlds and times of state law, historical rights and other residual entitlements engender a precarious legal-political chronocenos in which state institutions strain to conceptualize, accommodate and tame laws not of their making.<sup>130</sup>

## **INTERACTIONS BETWEEN A ROYAL CHARTERED BODY AND THE PUBLIC AUTHORITIES**

Records from the early years of the state exemplify the precarious legal and political landscape in which RCBs found themselves, as they strove to identify the correct legal authority to effect charter adaptation and have their byelaws approved. Drawing on archival materials, here follows a summary of select interactions between an RCB, the Institute of Chartered Accountants in Ireland, and the Irish

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128 Dáil Éireann Debate, *The Royal Hibernian Academy (Amendment of Charter) Bill 2023: Second Stage* (13 December 2023, vol 1047, no 5)

129 Ibid.

130 Wheatley (n 11 above) 55.

public authorities in the course of amending the Institute's byelaws and royal charter over time. This body has been selected because the surviving archival records tracking its interactions with the Irish state are particularly expansive. It also happens to be an all-island RCB in circumstances where the island of Ireland is otherwise politically and legally partitioned. Some of the touchpoints between the Institute and the state are striking insofar as broader temporal anxieties around sovereignty and authority were played out in microcosm.

### **Institute of Chartered Accountants in Ireland**

The Institute of Chartered Accountants in Ireland (the Institute – now known as Chartered Accountants Ireland) was incorporated by royal charter in 1888. The original petitioners were public accountants based in Dublin, Belfast and Cork and their rationales for seeking a royal charter of incorporation included:

THAT it is obvious that due to the performance of a profession such as this, a liberal education is essential, and the objects of the Petitioners are to secure that education, and to maintain the efficiency as well as the respectability of the professional body in Ireland to which they belong ... THAT in the judgment of the Petitioners, it would greatly promote these objects, and would also be for the public benefit, if the Petitioners were incorporated by Charter, as, besides other advantages, such incorporation would be a public recognition of the importance of the profession, and would tend to gradually raise its character, and thus to secure for the community the existence of a class of persons well qualified to be employed in the responsible and difficult duties often devolving on Public Accountants.<sup>131</sup>

The Institute was a relative latecomer to charter adaptation. This was done by way of the Institute of Chartered Accountants in Ireland (Adaptation of Charter) Order 1941,<sup>132</sup> which provided that:

That portion of the ... Charter which provides that bye-laws, rules, and regulations made by The Institute of Chartered Accountants in Ireland shall not have effect until they have been submitted to and allowed by 'Our Privy Council in Ireland' is hereby adapted by the substitution of the expression 'the Government' for the expression 'Our Privy Council in Ireland,' and it is hereby ordered that the said portion of the said Charter shall be construed and have effect accordingly.

The Institute ultimately evolved into a well-developed educational, representative and self-regulatory body for the accountancy profession with members drawn from across the island of Ireland. The Institute has not enjoyed a formal monopoly in the practice of the profession of accountancy, although by the 1990s it was one of a limited number

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131 Chartered Accountants Ireland, *Charter of Incorporation*.

132 SI No 479/1941.

of private bodies whose members were approved to act as auditors of companies incorporated under the Irish Companies Acts.

### *Byelaws and sovereign dynamics*

In the decades following charter adaptation, the Institute periodically approached the Government requesting byelaw amendments to enable specific changes, such as increasing members' fees, altering internal governance frameworks, enhancing its regulatory functions, revising its disciplinary procedures etc. This inconvenient necessity for governmental approval stems from provisions embedded within the Institute's royal charter, as adapted under the 1926 Act.

Approvals for byelaw amendments are granted in the form of governmental orders 'allowing' same (an example is transcribed in Annex X). These governmental approval orders have not historically been published, seemingly on the basis that they are not themselves statutory instruments.<sup>133</sup> In any case, broad themes have been engaged in the course of these interactions. Issues regarding the nomenclature used by the Institute to define the different territories in which it operates have been especially sensitive. Next follows a snapshot of these interactions, following which there is an attempt to connect these to broader temporal themes brought out earlier in this article.

### ***War and peace***

While consideration was being given to adapting the charter of the Institute, an altogether more controversial parallel proposal emerged in May 1941. At that time, solicitors for the Institute indicated that they would, following adaptation of the charter, also be seeking certain amendments to the Institute's byelaws. Those amendments would, if approved by the Government, have facilitated the granting of certain concessions or exemptions from the Institute's rules for members who opted to serve in the British armed forces in the context of the Second World War.<sup>134</sup> However, according to the minute of a meeting held on 8 May 1941, a clear signal was sent by the Secretary of the Department of An Taoiseach to the Institute in the following terms:

For the Government to approve of such byelaws would be contrary to the policy of neutrality which had been adopted in the present conflict. The Government could not be a party to the granting of concessions to persons who wish to take part in a war in which this country [Ireland] was not engaged ... there would, of course, be no objection if the rules in

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133 Internal Minute of Department of the Taoiseach, dated 26 July 1955, found in NAI, TAOIS/S12305B.

134 Internal Minute of the Office of the Attorney General, dated 8 May 1941, found in NAI, TAOIS/S12305A.

question confined the concessions to persons who join the armed forces of this country [Ireland].<sup>135</sup>

Here the Institute's preferences risked falling foul of the state's sovereign concerns, though an official at the Office of the Attorney General offered a deft solution contiguous with the state's broader policy of friendly (if sometimes muddled) military neutrality.<sup>136</sup> He suggested that:

perhaps, it would be possible for the Institute to devise some sort of a formula which would give them general discretion to grant concessions of the nature sought to their members in circumstances which need not be specifically stated in the rules.<sup>137</sup>

This pragmatic formula was later reflected in the subsequent civil service memorandum to Government on the subject.<sup>138</sup>

### ***What's in a name?***

Article 4 of Bunreacht Na hÉireann 1937 confirms that, in the English language, the name of the state is 'Ireland'. Section 2 of the Republic of Ireland Act 1948<sup>139</sup> stipulates that the description of the state is the 'Republic of Ireland'. Under the Bunreacht as it stood prior to 1999 the state claimed sovereignty over the whole island of Ireland, that is including the six counties comprising Northern Ireland. A general practice had, however, emerged of 'Republic of Ireland' being used in a geographical sense, limited to those 26 counties under the administrative authority of the Irish state '[p]ending the reintegration of the national territory', notwithstanding the wider constitutional claim. In 1953 the Government Information Bureau released a statement on the correct manner of referring to the Irish state, clarifying:

With respect to the statutory description of the State appearing in The Republic of Ireland Act 1948, namely, 'The Republic of Ireland', care is taken, using that expression to avoid any suggestion that it is a geographical term applicable to the area of the Twenty Six Counties.<sup>140</sup>

In 1955 the Institute sought approval for certain byelaw amendments, including an increase in membership fees, amendment of the

135 Ibid.

136 See, eg, Robert Fisk, *In Time of War: Ireland, Ulster and the Price of Neutrality* (Gill & Macmillan 1985).

137 See n 134 above.

138 Memorandum for the Government – Approval to Proposed Amendment of the By-laws of The Institute of Chartered Accountants in Ireland, dated 22 October 1941, found in NAI, TAOIS/S12305A.

139 No 22 of 1948.

140 Government Information Bureau, *Statement on Modes of Referring to the State in English*, dated 17 June 1953, found in NAI, 2013/100/67.

composition of its Council members and in its disciplinary procedures. In an internal memo prepared for the Government by the Office of the Taoiseach, it was noted that the Institute's byelaws used the phrase 'Republic of Ireland' to delimit the area of the 26 counties and also referred to 'Northern Ireland' as a distinct entity, grating with southern political sensitivities at that time.

It was recommended in the memo that it would be 'preferable, if practicable' that 'Republic of' be deleted. But it was also acknowledged that the 'Six County' (Northern Ireland) authorities would not agree to any alteration to the title of 'Northern Ireland'. The memo's conclusion on these points was that '[w]hile the incorporation of the amendments referred to would be desirable, it seems doubtful whether it would prove practicable to secure their acceptance'.<sup>141</sup> Similar issues would recur again on numerous occasions.

In 1957, when considering byelaw amendments sought by the Institute to facilitate a scheme of integration between it and the Society of Incorporated Accountants, attention was drawn by the Department of External Affairs to a provision in the altered byelaws which defined 'Ireland' as the 'Territory comprising both the Republic of Ireland and Northern Ireland'.<sup>142</sup> This was a functional internal definition to suit the Institute's all-island mandate. While the Department highlighted this characterisation was inconsistent with article 2 of the Bunreacht, a pragmatic view ultimately prevailed over principled misgivings regarding terminology:

the Minister for External Affairs would be reluctant to advise any change, since the proposed alteration of the by-laws must also obtain the approval of the Six-County authorities as well as of the Six-County members of the Institute and any interference could endanger the adoption of the proposed scheme of integration – which, envisaging, as it does in effect, a thirty-two county body for the members concerned of the accountancy profession, the Minister for External Affairs considers to be most desirable.<sup>143</sup>

The matter surfaced again in 1983 when high-level reservations were expressed about references to 'Government of the Republic of Ireland' in the Institute's byelaws. The Taoiseach at the time queried whether this should be recast as 'Government of Ireland'.<sup>144</sup> Consideration was

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141 Memorandum for the Government – Institute of Chartered Accountants in Ireland: Proposed Amended Bye-Laws, from Office of the Taoiseach to the Government, dated 18 February 1955, found in NAI 2013/16/1244.

142 Memorandum for the Government – Institute of Chartered Accountants in Ireland: Proposed Alteration of Bye-Laws, from Office of the Taoiseach to the Government, dated 8 May 1957, found in NAI 2013/16/1244.

143 Ibid.

144 Letter from Department of the Taoiseach to Department of Foreign Affairs, dated 21 January 1983, found in NAI 2013/100/67.

given within the Department of An Taoiseach to informally broaching the matter with the Institute (though it is unclear whether this actually occurred). It was acknowledged that any amending proposal would require three-way support, that is agreement by the Government, the Secretary of State for Northern Ireland and the Institute, and requesting the change would be sufficient to set ‘alarm bells ringing’.<sup>145</sup>

The AG’s view was, reportedly, that the Institute ‘faced a dilemma when defining the meaning of “Ireland”, thus its use of the expressions “Republic of Ireland” and “Northern Ireland” was a diplomatic way of reaching a compromise’.<sup>146</sup> Meanwhile, the Department of Foreign Affairs advised that:

While this Department would, of course, welcome a change in the references to ‘Government of Ireland’, we consider that such a change would be unlikely to be acceptable to either the British or Northern Ireland authorities. Moreover, and perhaps more importantly, such changes could well prove divisive within the Institute itself.<sup>147</sup>

Handwritten notes in the margins of an internal memo indicate that the civil service was inclined to let matters lie. It was commented that the Institute was not ‘under our control’<sup>148</sup> and attempting to change the reference ‘would probably give rise to substantial dissention within that body [the Institute] and might put its All-Ireland status in danger’.<sup>149</sup> The issue does not appear to have arisen on the face of the final memo to Government in 1983 attaching a draft governmental order approving these particular byelaws.<sup>150</sup>

Similar wrangling occurred in relation to the descriptions of universities in the Institute’s byelaws. In 1955 requests were made that the Institute consider referencing universities by their geographical locations, namely by referring to ‘universities in Ireland, England, Scotland or Wales’, rather than by ‘political descriptions’ such as ‘Republic of Ireland’ and ‘United Kingdom of Great Britain and

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145 Internal Memorandum of Department of the Taoiseach, dated 2 March 1983, found in NAI 2013/100/67.

146 Internal Memorandum of Department of the Taoiseach, dated 20 January 1983, found in NAI 2013/100/67.

147 Letter from Department of Foreign Affairs to Department of the Taoiseach, dated 16 February 1983, found in NAI 2013/100/67.

148 An arguable point, given that amendments to the Institute’s bye-laws required governmental approval.

149 20 January letter (n 146 above).

150 Memorandum for the Government – The Institute of Chartered Accountants in Ireland: Instrument Allowing Alteration of Bye-Laws, from the Office of the Taoiseach to the Government, dated 16 March 1983, found in NAI 2013/100/67.

Northern Ireland'.<sup>151</sup> This was not ultimately followed, likely because it would be unacceptable to the Northern authorities.

### ***Coordinating the island***

Although executive action is required in both Ireland and Northern Ireland for the adoption of byelaws made by the Institute (given its all-Ireland scope), historically there seems to have been little or no formal direct coordination between authorities in the two jurisdictions on these initiatives. For example, archived correspondence between the Institute and the respective authorities frequently requested confirmation that proposed byelaws were acceptable to, or were already approved in, the other jurisdiction.<sup>152</sup> A copy of an executive order made at Hillsborough enabling byelaw amendments is recorded in the Irish departmental files (transcribed in Annex Y). However, the Institute itself did the running to coordinate both authorities working separately. This was apparent in a departmental note in 1941 which observed that:

There is a complication ... in that parallel action will also presumably be necessary by the Government of Northern Ireland. This is not a matter which need concern us as presumably the Solicitors acting for the Institute will make whatever contacts are necessary to ensure that action on similar lines and on the same date is taken both here and in the North.<sup>153</sup>

During the processing of byelaw amendments in 1957 a technical issue arose over the precise date of the Institute's byelaw amendments entering into force. An indirect query was conveyed from Belfast to Dublin, via the Institute's solicitors, as to whether 'the same problem has been exercising the minds of the Government of the Republic of Ireland'.<sup>154</sup> These suboptimal communication dynamics did not make for speedy governmental approvals of byelaws on which the island-wide profession depended. In spite of that, the Institute has been successful in maintaining all-Ireland regulatory and policy consistency within its own professional constituency.

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151 Minute of Meeting between Solicitors for Institute of Chartered Accountants in Ireland and Department of the Taoiseach, dated 1 March 1955, found in NAI TAOIS/S12305B.

152 Eg Letter from Northern Ireland Office to Institute of Chartered Accountants, dated 5 September 1973, found in NAI 2004/21/91.

153 Internal Minute of Department of the Taoiseach, dated 10 March 1941, found in NAI TAOIS/S/12305A.

154 Letter from Solicitors for Institute of Chartered Accountants in Ireland to Department of the Taoiseach, dated 12 September 1957, found in NAI TAOIS/S12305C/1+2.

### **Charter amendments and public administrative sensitivities**

In April 1964 the Institute's solicitors wrote to the AG indicating that the Institute required amendments to its underlying constitutional document, the royal charter itself. The purpose of the legislation was to:

alter the provisions of the Charter in relation to admission to fellowship, the annual general meeting and the appointment of the council and secretary of the Institute and to confer power on the Institute to grant or join with similar bodies in granting diplomas, certificates and awards and for other purposes relating to the Institute.

Notably, section 6 confirmed that: '[a]ny byelaws made by the Institute or any alteration or amendment thereof shall not have effect until they have been submitted to and allowed by the Government'. That legislation seems to have transited through the Oireachtas without controversy.

In 1972 the Institute initiated a second piece of private legislation<sup>155</sup> to further amend its charter but this proved less palatable to the public administration. In particular, concerns were raised by the Department of Industry and Commerce regarding a section of the proposed legislation which would have dispensed with the need for ministerial approval of byelaws made by the Institute. The compromise reached between the Institute and the Department was for future byelaws to be submitted, instead, under a non-objection procedure, whereby they would be deemed approved within a certain timeframe unless the minister indicated otherwise. The Institute's solicitors wrote '[t]his would give a control to the Minister in a manner which would facilitate our clients'.<sup>156</sup> As matters transpired, while the Private Bill was submitted to the Oireachtas by the Institute, it was ultimately abandoned due to a proroguing of the Northern Parliament and failure of an amalgamation scheme with another accountancy body.<sup>157</sup>

This episode demonstrated sensitivities within the public administration at a potential loss of public authority over an influential professional and regulatory body, albeit an essentially private one. By this stage, the state had evidently become much more interested in retaining a formal influence at the Institute. It may be found, on further research, that a similar tendency manifested at other RCBs. This

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155 Institute of Chartered Accountants in Ireland (Charter Second Amendment) Bill 1972.

156 Letter from Solicitors for Institute of Chartered Accountants in Ireland to Office of the Attorney General, dated 10 March 1972, found in NAI 2013/16/1244.

157 Letter of Institute of Chartered Accountants to Department of the Taoiseach, 26 August 1973, found in NAI 2004/21/91.

dynamic, as it evolved over time, sharply contrasted with the starting point (at least outwardly) in 1926 when '[t]he Executive Council [had] no particular appetite for dealing with these things at all'.<sup>158</sup>

### ***Characterising the state–institute relationship***

The projection of public authority over certain RCBs, such as the Institute, throws up puzzles, including from transparency and accountability standpoints. Here we have an independent, privately governed and funded self-regulatory body which must, due to a quirk of history, marshal executive or legislative power in order to organisationally evolve in the present and future. This is not unique to the Institute. But, in important ways, the Institute's status as an all-island RCB puts it into a different category to many other RCBs from a temporal standpoint. This may also help in understanding the degree of public administrative interest in retaining an approval role in the Institute's affairs, evidenced at precisely the moment the Institute attempted to dispense with it.

The fact that the Institute is an influential regulatory body for an economically (and perhaps politically) sensitive professional cohort is likely of relevance. Of course, the Institute also carries the complicated RCB baggage of past legal time and historical rights, inherent in its charter, as explored earlier in this article. Still, public administrative anxieties around the use of nomenclature for the state and broader sovereign policy on neutrality betray a wider theme.

The state successfully diverted the Institute's proposal to embed explicit concessions in its rules for members serving in the British armed forces. Indeed, the state's policy of neutrality was itself a temporal symptom of past unresolved issues of national sovereignty. Interestingly, though, a pragmatic middle way was found here. On the surface, the Institute was reined in and compelled to align with the state's policy of neutrality (such as it was). But, in a more subtle way, the state also left the Institute sufficient room to internally navigate its own heritage and temporal rhythms. In fact, the state itself offered a solution to enable the Institute to grant concessions, in practice, to members serving in the British armed forces.

With respect to sovereign nomenclature, the public administration actively pondered, though resiled from, mandating the Institute to align its internal concept of sovereign legal time with the state's external aspirational concept. The state wanted its name, as defined in the state's own constitutional norms, to be styled as such within the Institute's internal private legal regime. This could be seen as an (abortive) effort by the state both to tie a domestic body more firmly to its own concept of sovereign legal time and also to project the state's

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158 See above in this paper.

norms outwards to other political constituencies interacting with the Institute in a sort of legal Venn diagram. It was clear to all sides that this would be incompatible with the objective of uniting and regulating a single profession on a partitioned island riven with inherently conflicting perspectives on sovereignty, history and the future.

The problem here was that the state's preferred nomenclature spoke both to a lost time in the past and unrealised future time of national unity. In reference to the Grenada revolution of 1979, Scott writes that, after a moment of revolution has been and gone, generations become stranded in 'the present'.<sup>159</sup> He goes on:

in the aftermath of a longed-for event – a revolution, which also, in anticipation, played its own strong role in configuring temporal horizons – the present equates to ruined time and brings with it the task of responding to a loss of political hope.

One of the ways in which the state attempted to remedy the 'ruined time' of partition was to constitutionally define the national territory in a manner of its own liking. But given that the definition embodied a claim not recognised by the territory concerned (Northern Ireland), the definition itself could only aspire to a future legal time. The state then attempted to project this definition to other political constituencies in the present. The Institute, as an all-island body, entered the frame as a conduit for this preferred definition.

The state ultimately stopped short on pragmatic grounds and, in that moment, the state was forced to reconcile itself to a legal present different from its preference. The Institute, meanwhile, was left to navigate multiple non-harmonised legal times – the past, present and future times of itself (as embodied in its charter and byelaw amendments), as well as the non-harmonised legal times of both jurisdictions on the island. Nonetheless, in coordinating authorities on both sides of the island of Ireland, and in successfully keeping its professional constituency together, the Institute *de facto* performed a unifying role across multiple legal time zones. This, perhaps, underscores the promise and potential of certain RCBs.

## CONCLUSIONS

In this article, there has been an attempt to survey and conceptualise the inheritance of RCBs in Ireland after 1922. In one sense, RCBs were a potentially subversive legal pockmark on the new state's sovereign authority. Through lenses of legal temporality, it has been demonstrated how the Irish state transitioned RCBs from a past legal time of the royal

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<sup>159</sup> Grabham and Beynon-Jones (n 10 above) 5, citing David Scott, *Omens of Adversity: Tragedy, Time, Memory, Justice* (Duke University Press 2014) 71.

common law to the legal timeline of a new constitutional order. In so doing, the state and RCBs grappled with peculiar legal and political challenges, invoking tailored and archaic legislative mechanisms to navigate conflicting legal time-zones. Having survived this, RCBs could be said to ‘wear time’ in a manner described by Wheatley:

they are everywhere marked by it – moth eaten with periods of lapse, redoubled with cycles of renewal, scarred by the work of resisting destruction, defiant in the face of predicted extinction. They have time texture.<sup>160</sup>

It has also been outlined how an all-island RCB (the Institute of Chartered Accountants in Ireland) could bridge and harmonise various legal timelines for their stakeholders, operating as a unifying force in an otherwise fragmented political and legal landscape. In some ways, this exemplifies the potential of RCBs. Precisely due to their unique heritage in the legal past, at least some of them may have a role to play in ameliorating various temporal conflicts and inconsistencies on the island of Ireland both in the present and future.

## ANNEX X<sup>161</sup>

### Instrument

#### allowing alterations of Bye-Laws of

#### The Institute of Chartered Accountants in Ireland

WHEREAS by a Charter granted on the 14th day of May, 1888, the Institute of Chartered Accountants in Ireland (hereinafter called “the Institute”) was incorporated by that name and, amongst other matters, provision was made for the making and alteration of bye-laws by the Institute:

AND WHEREAS in accordance with section 6 of the Institute of Chartered Accountants in Ireland (Charter Amendment) Act 1966 (No. 2 Private of 1966), bye-laws made by the Institute or any alteration or amendment thereof shall not have effect until they have been submitted to and allowed by the Government:

AND WHEREAS bye-laws altering the bye-laws of the Institute have been duly made by the Institute and submitted to the Government:

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160 Wheatley (n 11 above) 55.

161 Annex to Memorandum for the Government: The Institute of Chartered Accountants in Ireland – Instrument allowing Alteration of Bye-laws from Office of the Taoiseach to the Government, dated 16 March 1983, found in NAI 2003/100/67.

NOW, the Government, in exercise of the powers conferred on them by the said section 6, hereby allow the bye-laws (a copy of which is annexed hereto) altering the bye-laws of the Institute.

GIVEN under the Official Seal  
of the Government, this  
\_\_\_\_\_ day of  
\_\_\_\_\_ 1983

## ANNEX Y<sup>162</sup>

### INSTITUTE OF CHARTERED ACCOUNTANTS IN IRELAND

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#### Approval of Amendments to Bye-Laws

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By the Governor of the Privy Council of Northern Ireland

WHEREAS by Royal Charter bearing date the 14th of May, 1888, the Institute of Chartered Accountants in Ireland (hereinafter called “the Institute”) are empowered to make Bye-Laws for the purposes therein mentioned subject, however, as provided by the said Charter, to the approval of the Privy Council in Ireland.

AND WHEREAS the Institute in exercise of the authority vested in them by the said Charter have from time to time made Bye-Laws for the regulation of the affairs of the Institute.

AND WHEREAS by an Order in Council dated the 8th day of April, 1921, certain Bye-Laws so made (therein and hereinafter referred to as “the Bye-Laws of 1921”) were approved by the Privy Council in Ireland.

AND WHEREAS by virtue of Article 2(1) of the First Schedule to the Irish Free State (Consequential Provisions) Act, 1922, the powers of the Privy Council in Ireland are in Northern Ireland exercisable by the Privy Council of Northern Ireland.

AND WHEREAS by an Order in Council dated the 6th day of November, 1942, certain additions and alterations in the Bye-Laws of 1921 were approved of by the Privy Council of Northern Ireland and the Bye-Laws of 1921 as so added to and altered are hereinafter referred to as the Bye-Laws of 1942.

AND WHEREAS it is provided by No. 121 of the Bye-Laws of 1942 that the same may be added to or any of them may be altered or amended

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162 Letter, dated 9 July 1955, from solicitors for the Institute of Chartered Accountants in Ireland to the Secretary, Department of the Taoiseach, found in NAI 2013/16/1244.

provided that the proposed additions, alterations or amendments are first approved by the Council of the Institute and afterwards adopted at two successive general meetings of the Institute.

AND WHEREAS at two successive general meetings of the Institute held respectively on the 6th day of November, 1954, and an adjournment thereof on the 24th day of November, 1954, and on the 17th day of December, 1954, certain additions to and alterations and amendments in the Bye-Laws of 1942 which had been first approved of by the Council of the Institute were approved and adopted and it was resolved that the same as respects Northern Ireland come into operation and take effect as soon as the same should be allowed by the Privy Council of Northern Ireland.

AND WHEREAS it is considered by the said Privy Council that such proposed additions to and alterations and amendments in the Bye-Laws of 1942 should be allowed.

NOW, THEREFORE, I, JOHN DE VERE, BARON WAKEHURST, KNIGHT COMMANDER OF THE MOST DISTINGUISHED ORDER OF ST. MICHAEL AND ST. GEORGE, GOVERNOR OF NORTHERN IRELAND, by and with the consent of the Privy Council, in exercise of the powers conferred upon me by the said Charter and of all other powers enabling me in this behalf, do hereby approve of the additions to and alterations and amendments in the Bye-Laws of 1942, which have been proposed, adopted and approved by the Institute under the said Charter, and do accordingly order, declare and direct that after the expiration of one month from the date of this Order the Bye-Laws of the Institute shall have effect in the form hereto annexed and in that form may be styled the Bye-Laws of 1955.

GIVEN, at Government House, Hillsborough

this \_\_\_ day of \_\_\_ 1955



# Cracking a nut with a sledgehammer: the *Lord Advocate's Reference* on a second Scottish independence referendum in constitutional context<sup>†</sup>

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## ABSTRACT

The UK Supreme Court's judgment in the *Reference by the Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31 not only confirms that holding a second referendum on Scottish independence is outside the Scottish Parliament's legislative competence but raises a series of important constitutional issues. These include the constitutional status of referendums, the importance of sub-state democracy and the sovereignty of the United Kingdom (UK) Parliament. Whilst the Court gives referendums more significance than they were previously thought to have, its reasoning invoking democracy and on parliamentary sovereignty suggests it has adopted a vision of the UK constitution in which UK-level authority is privileged over sub-state authority, to the detriment of subsidiarity and devolved autonomy.

**Keywords:** referendums; devolution; parliamentary sovereignty; democracy; Scottish independence; constituent power.

## BACKGROUND

On 28 June 2022, the then First Minister of Scotland, Nicola Sturgeon, announced that a reference was to be made to the United Kingdom (UK) Supreme Court by the Lord Advocate under paragraph 34 of schedule 6 to the Scotland Act 1998.<sup>1</sup> Paragraph 34 allows the Lord Advocate to refer to the UK Supreme Court 'any devolution issue which is not the subject of proceedings'. Under paragraph 1(f) of schedule 6, a 'devolution issue' includes questions about whether a particular function is 'exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters'.

<sup>†</sup> First published in [NILQ 75.AD1 1–14](#) on 21 March 2024.

<sup>1</sup> *Reference by the Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31, hereafter '*Scottish Independence Referendum Reference*'.

The reference concerned a provision of a draft Scottish Independence Referendum Bill that had not yet been introduced into the Scottish Parliament. The Bill would provide for a 'consultative' referendum on Scottish independence, with the question 'Should Scotland be an independent country?'. The reference arose because the Lord Advocate felt she (the Lord Advocate) did not have sufficient confidence that the Bill did not relate to reserved matters under the Scotland Act 1998 for the minister introducing the Bill to certify this.<sup>2</sup> The reference therefore aimed to establish whether a consultative referendum would be within the Scottish Parliament's legislative competence.

The prospective referendum in question amounted to Plan B in the Scottish Government's pathway to independence. Under Plan A, the Scottish Government asked the UK Government to request His Majesty the King to make an Order in Council under section 30 of the Scotland Act 1998 to temporarily grant the Scottish Parliament the legislative competence to hold an independence referendum, as had happened in the lead-up to the 2014 independence referendum. The former UK Prime Minister, Boris Johnson, had rejected the Scottish Government's request. Plan B was this prospective consultative referendum, whilst Plan C is to treat the next UK General Election as a *de facto* referendum on independence.<sup>3</sup> The political context of the reference is the growing call for a second independence referendum in the wake of the UK's withdrawal from the European Union (EU) in early 2020. In particular, the Scottish National Party, which now forms the Scottish Government in a confidence-and-supply arrangement with the Green Party, stood for the Scottish Parliament elections in May 2021 on a manifesto that committed to holding a second independence referendum.<sup>4</sup>

Three principal questions were put before the UK Supreme Court in argument:

- 1 Is the Lord Advocate's question a 'devolution issue' under paragraph 1(f) of schedule 6 to the Scotland Act 1998?
- 2 Should the Court decline to exercise its discretion to decide the question referred?
- 3 Does the provision of the Bill providing that the question to be asked in a referendum is 'Should Scotland be an independent country?' relate to the reserved matters<sup>5</sup> of the Union of

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2 Ibid [10]. See Scotland Act 1998, s 31(1).

3 Andrew Learmonth, 'Nicola Sturgeon to push ahead with plans for "de facto" referendum' *The Herald* (Glasgow 23 November 2022).

4 Scottish National Party, 'SNP 2021 manifesto: Scotland's Future, Scotland's Choice'.

5 See Scotland Act 1998, ss 29(2)(c) and 29(3).

the Kingdoms of Scotland and England (the Union) and the Parliament of the UK (the UK Parliament)?<sup>6</sup>

The Scottish National Party also intervened in the reference in support of an argument in favour of the Scottish Parliament's competence to enact the provisions in the draft Bill.

## THE UK SUPREME COURT'S DECISION

### Question 1: is the question referred a 'devolution issue'?

The Court determined that it was. It gave four reasons, each of which responds to one of the Advocate General for Scotland's arguments. First, the Advocate General had argued the question did not arise 'by virtue of this Act' because the need for the Lord Advocate to certify the competence of the Bill before its introduction was contained within the Scottish Ministerial Code and not the Scotland Act 1998. The Court held that whether a question so arises 'does not depend on whether the Lord Advocate is required *by the Scotland Act* to answer it'.<sup>7</sup> The question was found to arise under section 31(1) of the Act, which requires a minister to certify competence.<sup>8</sup> Second, allowing the reference to proceed under paragraphs 1(f) and 34 of schedule 6 did not undermine the system of legislative scrutiny involving ministerial statements, the Presiding Officer and the procedure for references on Bills passed by the Scottish Parliament in sections 31 and 33 of the 1998 Act. The Law Officers' section 33 power to refer questions on legislative competence to the Court did not prevent a reference from being made under paragraph 34 before the introduction of a Bill.<sup>9</sup> Although this would result in references on legislative competence and reserved matters being handled under paragraphs 1(f) and 34 of schedule 6 and those on other issues relating to legislative competence<sup>10</sup> being made under section 33 (the 'bifurcation' point), as well as consecutive references raising different issues about the same Bill, this was not a reason to narrowly construe paragraph 1(f).<sup>11</sup> The Law Officers having a 'parallel power' to choose whether to bring a devolution issue before the UK Supreme Court or the Scottish courts<sup>12</sup> would not be an issue

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6 Scotland Act 1998, sch 5, para 1(b) and (c).

7 *Scottish Independence Referendum Reference* (n 1 above) [16], emphasis added.

8 *Ibid* [16]–[17].

9 *Ibid* [23].

10 These include the other grounds on which a provision might be outside competence under s 29 of the 1998 Act.

11 *Scottish Independence Referendum Reference* (n 1 above) [24].

12 Scotland Act 1998, sch 6, para 4.

in practice as the Law Officers could be expected to exercise that power appropriately.<sup>13</sup> Third, the Court treated paragraph 1(f) as a 'sweeping-up provision' ensuring that every possible question about whether a function can be exercised within devolved competence is justiciable.<sup>14</sup> Fourth, the possibility of the Lord Advocate answering the question referred did not exclude the reference, as the Law Officers could be mistaken on issues of competence, and it would be 'more consistent with the rule of law' and the Scotland Act 1998 for the Scottish Parliament to exercise its competence on the basis of an authoritative judicial decision.<sup>15</sup> The Court added that there was little possibility of abuse of this power, as the UK Parliament could be confident that references 'would be made responsibly in the public interest'.<sup>16</sup>

### **Question 2: should the Court decline to exercise its discretion to determine the question asked?**

The Court advanced six reasons why previous authorities suggesting that it should decline to exercise its discretion ought not to be followed. First, previous authorities were concerned with ordinary litigation, whereas the present case fell under the Court's 'devolution jurisdiction'.<sup>17</sup> Second, the reference was not hypothetical but related to a legal question that had already arisen with practical importance and consequences. Third, the relevant provisions of the Bill would be introduced into the Scottish Parliament in the same form as they were in before the Court and there was little likelihood of amendment. Fourth, the purpose and effect of the Bill was apparent without recourse to other documentation. Fifth, it was unlikely that a further reference on the Bill would be necessary under section 33 of the Scotland Act 1998. Sixth, the Lord Advocate did not appear to be acting 'other than with a proper sense of her responsibilities'.<sup>18</sup> The Court thus regarded itself as capable of determining the question referred.

### **Question 3: does the Bill 'relate' to reserved matters?**

The Court had to determine whether the Bill would be outside the Scottish Parliament's legislative competence by virtue of 'relating' to the reserved matters of the Union and the UK Parliament.<sup>19</sup> Section 29(3) of the Scotland Act 1998 states that whether an Act of the Scottish Parliament 'relates' to reserved matters must be determined

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13 *Scottish Independence Referendum Reference* (n 1 above) [27].

14 *Ibid* [37].

15 *Ibid* [44]–[45].

16 *Ibid* [46].

17 *Ibid* [53].

18 *Ibid*.

19 Scotland Act 1998, sch 5, para 1(b) and (c).

'by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances'. The term 'relates to' means the provision must have 'more than a loose or consequential connection' with the reserved matter.<sup>20</sup> The Court stated that 'effect in all the circumstances' extends to non-legal effects.<sup>21</sup> The scope of the relevant subject-matter encompassed, in the Court's view, whether the Union should end and whether 'Scotland should cease to be subject to the sovereignty of the [UK Parliament]'.<sup>22</sup> In a crucial paragraph, it added that a lawful referendum was 'not merely an exercise in public consultation' but a formal democratic process governed by the referendum's enabling statute.<sup>23</sup> If the conditions in the enabling statute are followed, the authority of this statute 'confer[s] legitimacy upon the result'.<sup>24</sup> Given the public and political importance of referendums,<sup>25</sup> their effects would have the political consequences of shaping the democratic legitimacy of the Union and the independence movement,<sup>26</sup> since referendums are an expression of the view of the Scottish electorate in a constitution committed to democracy. The proposed referendum would therefore have 'more than a loose or consequential connection' with the Union, and with the sovereignty of the UK Parliament and therefore the UK Parliament itself.<sup>27</sup>

### The self-determination issue

The Scottish National Party argued that section 29(2)(b) of the Scotland Act 1998 should be interpreted according to the right of self-determination of the Scottish people. The Court dismissed this. The principle of self-determination was not in play here. The usual context for the right to external self-determination in international law, said the Court, was former colonies, people oppressed by foreign military occupation or a denial of meaningful access to government,<sup>28</sup> none of which applied to Scotland. The limitation of the right to secede was, for the Court, consistent with the UK's submissions to the International Court of Justice in its Advisory Opinion on Kosovo's Unilateral

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20 *Scottish Independence Referendum Reference* (n 1 above) [17], citing *Martin v Most* [2010] UKSC 10 [49] and *Imperial Tobacco v Lord Advocate* [2012] UKSC 61 [16].

21 *Scottish Independence Referendum Reference* (n 1 above) [74], citing *Imperial Tobacco* (n 20 above) [39].

22 *Scottish Independence Referendum Reference* (n 1 above) [77].

23 *Ibid* [78].

24 *Ibid*.

25 *Ibid* [79]–[80].

26 *Ibid* [81].

27 *Ibid* [82].

28 *Ibid* [88]–[89].

Declaration of Independence.<sup>29</sup> Finally, neither a narrow nor a wide reading of section 29(2)(b) of the Scotland Act 1998 could result in a breach of the international law principle of self-determination as the 1998 Act creates a devolution settlement founded on subsidiarity. The Act is to be interpreted just as any other statute.<sup>30</sup>

## COMMENT

### The procedural issues

Although there has been much focus on the Court's determination on the question referred, given its political importance, there are several points of note in its approach to whether the reference could be brought.

First, the Court adopted a wide reading of 'by virtue of this Act' in paragraph 1(f) of schedule 6. Armstrong argued prior to the handing-down of the judgment that the question before the Court did not truly arise under the Act, but by virtue of the Scottish Ministerial Code.<sup>31</sup> This invokes the Lord Advocate's responsibility to ensure that the Scottish ministers act within the bounds of the law and suggests ministers must seek the Law Officers' advice where the constitutional propriety of a proposed Bill is in doubt. The Scottish Ministerial Code here seems to create an additional threshold relating to competence beyond the minister's certification under section 31(1) of the Scotland Act 1998. The Lord Advocate's lack of confidence in certifying the Bill as competent thus appears to strike at the relevant provisions of the Ministerial Code rather than the section 31(1) requirement. The Court, in holding that the paragraph 1(f) condition does not depend on whether the 1998 Act requires the Lord Advocate to address this issue, treats 'by virtue of the Act' as encompassing the broader constitutional scheme of government for Scotland of which the 1998 Act is the centrepiece. Its interpretation suggests that the legal and non-legal aspects of Scotland's constitution work in tandem and that this ought to be recognised by the courts.

Second, the Court's reasoning on its discretion to determine the question demonstrates that it views itself not simply as the apex court in a common law system but, increasingly, as a constitutional court. Its reference to the 'devolution jurisdiction'<sup>32</sup> under which this case fell distinguishes the present reference from ordinary common

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29 Ibid [90].

30 Ibid [91].

31 Kenneth A Armstrong, 'Will the Supreme Court clear the way to a Scottish independence referendum?' (UK Constitutional Law Association 21 November 2022); Scottish Ministerial Code, paras 2.30 and 2.33.

32 *Scottish Independence Referendum Reference* (n 1 above) [53].

law cases that might come before it. That the Court permitted the reference to be brought under paragraph 34 of schedule 6 *prior to the Bill's introduction* reinforces this distinction. In doing so, the Court has identified that it has a limited 'advisory' jurisdiction in respect of matters reserved under the Scotland Act 1998.<sup>33</sup> This sharply contrasts with the common law position, in which a matter must be 'live' before the courts will consider it, as represented by the *Keatings* case.<sup>34</sup> In *Keatings*, a petition for a declarator that the Scottish Parliament had the competence to legislate for a referendum on Scottish independence without the UK Government's consent was rejected by the Lord Ordinary as premature, academic and hypothetical. This was upheld by the Inner House of the Court of Session on the basis that the pursuer would not need the declarator to exercise his right to vote in the 2021 Scottish Parliament elections.<sup>35</sup> On an analogous situation of a draft Bill not introduced into the Scottish Parliament, the Scottish courts focused on the lack of a practical connection between the competence issue and the petitioner's voting rights. By contrast, the UK Supreme Court here regarded the introduction of the Bill as enough of a practical consequence to determine the question referred. The UK Supreme Court therefore appears willing to take a wider view than the lower courts on the necessary practical implications for making a determination and, accordingly, the extent to which it can act in a more 'advisory' capacity.

Third, the Court's finding that the Law Officers have a parallel power 'to choose the appropriate forum' to determine devolution issues exposes a distinction between the reference procedures under paragraph 1(f) and 34 of schedule 6 and under paragraph 4 of schedule 6 to bring proceedings in relation to devolution issues in the Scottish courts. Under the former procedure, the UK Supreme Court in effect sits as a first instance court, whereas under the latter, the question would be considered by both the Outer and Inner House of the Court of Session before reaching the UK Supreme Court. Although the Court in this reference acknowledges the importance of the question before it, the nature of the procedure necessarily limits the extent of judicial consideration the question referred might receive. Furthermore, the distinction between these two procedures has the potential to entrench the distinction between the UK Supreme Court as a constitutional court under paragraphs 1(f) and 34, and as an apex common law court under paragraph 4.

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33 I am grateful to the anonymous reviewer for their comments on this point.

34 *Keatings v Advocate General* [2021] CSIH 25.

35 *Ibid* [54].

## The constitutional status of referendums

Central to the Court's conclusion in this reference is that a second independence referendum would have political effects that must be taken into account in establishing whether the draft Bill 'relates to' reserved matters. The Court's brief discussion about referendums is striking for four reasons.

First, it appears to diverge from Lord Neuberger's orthodox position in *Moohan v Lord Advocate*.<sup>36</sup> Lord Neuberger took the view that the 2014 referendum on Scottish independence was not self-executing, in the sense that the result would have effect without further action by any institution. A 'Yes' vote in favour of independence would have required the UK Parliament to pass legislation to implement the result. In the course of doing so, Members of the UK Parliament would be 'constitutionally bound' to vote in any way they liked.<sup>37</sup> This view casts referendums as purely advisory, with no impact, or normative case for their impact, on democratic decision-making in the UK Parliament. Whilst the Court in the *Scottish Independence Referendum Reference* does not treat a second referendum as self-executing, it does accord it effects beyond those acknowledged by Lord Neuberger. In particular, by holding that the effects of a referendum result impact the democratic legitimacy of the Union,<sup>38</sup> the Court recognises that direct democratic exercises can have some weight within the UK's constitutional order, although it does not go further to specify exactly how they might do so.

Second, however, the Court does not explicitly state that all referendums have constitutional significance. Despite noting the practical consequences of a second independence referendum, it does not recognise a constitutional convention on following referendum results, which Tierney<sup>39</sup> has suggested now exists, nor does it explicitly invoke the language of constituent power.<sup>40</sup> The scope of the Court's reasoning is also unclear. It leaves us with uncertainty as to whether it is only *independence* referendums that produce these practical consequences (as opposed to a referendum on, for example, the time zone for Scotland),<sup>41</sup> or whether it is only referendums in the devolved territories *held under devolved powers* that do so.<sup>42</sup> This, presumably,

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36 *Moohan v HM Lord Advocate* [2014] UKSC 67.

37 *Ibid* [47].

38 *Scottish Independence Referendum Reference* (n 1 above) [81].

39 Stephen Tierney, 'The Lord Advocate's Reference: referendums and constitutional convention' (UK Constitutional Law Association 4 October 2022).

40 Pravara Petkar, 'Consultative referendums and constituent power in the UK' (UK Constitutional Law Association 5 July 2022).

41 Head L5, sch 5, pt II, Scotland Act 1998.

42 The practical effects of a UK-wide referendum given effect by an Act of the UK Parliament would not present the same issue owing to parliamentary sovereignty.

would only pose an issue for Scotland and Wales, since the UK Parliament has already committed itself to a process for a referendum on Irish unification in section 1 of the Northern Ireland Act 1998. It is therefore difficult to draw general conclusions about the constitutional status of referendums from the Court's reasoning here.

Third, the Court does not specify the *source* of the democratic consequences of a second independence referendum. On one hand, it states that referendums are formal electoral processes with an enabling statute that 'confer[s] legitimacy upon the result'.<sup>43</sup> The focus on the enabling statute here as opposed to the referendum as a direct democratic exercise suggests that, in some way, the referendum derives democratic force *from the statute* and not from the views of the people expressed. This position would be more consistent with *Moohan* but also with the principle of parliamentary sovereignty, which places representative democracy at the heart of the UK's constitution<sup>44</sup> and, on the 'manner and form' account, tends to view constitutional change in terms of restrictions on the UK Parliament's legislative powers.<sup>45</sup> On the other hand, the Court also states that the referendum affects the democratic legitimacy of the Union by virtue of its status as an expression of the democratic will of the Scottish electorate in a constitution committed to democracy. This suggests it is the referendum *itself* as a direct democratic exercise that carries weight rather than its enabling statute. As a result, in the first case, a direct democratic exercise has significance only through the legislation of a representative institution, whilst in the second case, it does so on its own terms. This is an important distinction because it goes to the question of the place of direct democracy within the UK's constitutional order.

Fourth, by finding that a second referendum on Scottish independence would be outside the Scottish Parliament's legislative competence, the Court confirms that it is for the UK Government to determine, by means of a section 30 Order under the Scotland Act 1998 or otherwise, when a referendum should take place. The default position in the UK therefore remains that referendums occur at the executive's behest and not otherwise. As Qvortrup has suggested, this is not without its dangers. He notes that a referendum initiated by opposition groups or by the people can be a check on power, whereas a referendum initiated by the executive can become a 'plebiscitary instrument' to give the government a 'blank cheque' to do what it

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43 *Scottish Independence Referendum Reference* (n 1 above) [78].

44 *R (Miller/Cherry) v Prime Minister* [2019] UKSC 41 [55].

45 Michael Gordon, *Parliamentary Sovereignty in the UK Constitution* (Hart 2015) ch 6.

likes.<sup>46</sup> In the present case, the Court's decision preserves the reality that a UK Government may only allow another referendum on Scottish independence when it is politically expedient for it to do so, rather than when a sub-state unit of the UK makes a principled case for such a referendum.

### The paradox of sub-state democracy

In determining the question referred, the Court relies on the democratic authority associated with a second independence referendum. It states that the referendum, 'whichever way the question was answered, would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate'.<sup>47</sup> This extract makes clear that the referendum result would bear democratic authority at the sub-state level. The invocation of the UK's democratic culture, however, cuts two ways. It is simultaneously the reason why a sub-state referendum has authority and practical effects, but because of these practical effects, it is also the reason why the referendum should be deemed outside competence. Democracy is here mobilised by the Court to restrict a potentially alternative form or site of democratic authority, suggesting that the Court has a particular vision of democratic authority in mind when invoking this term. The Court's reasoning here creates a paradox regarding sub-state democratic authority: it is capable of existing, yet at the same time cannot exist, at least through any legal form.<sup>48</sup>

This, it is submitted, creates a broader problem for the relationship between sub-state and UK-level institutions within the UK's constitutional framework. By invoking democracy as a fundamental principle in the manner it does, the Court makes democratic authority exercised at the UK level superior to that at the sub-state level. The latter, however, can only be exercised with the permission of the institutions wielding the former. On the surface, this is perfectly consistent with the devolution framework for Scotland. In *AXA*, Lord Hope pointed out that the Scottish Parliament does not enjoy the 'sovereignty' of the UK Parliament;<sup>49</sup> it is a subordinate legislature in the UK constitution that may only act under the powers conferred upon it. The hierarchical superiority of the UK Parliament is, on this view, a mere statement of legal reality.

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46 Matt Qvortrup, 'The Referendum: *non basta più*', *The Referendum and Other Essays on Constitutional Politics* (Hart 2018) 6–7.

47 *Scottish Independence Referendum Reference* (n 1 above) [81].

48 Pravar Petkar, 'A second Scottish independence referendum and Schrodinger's sub-state constituent power' (*IACL-AIDC Blog* 29 November 2022).

49 *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46 [47] (Lord Hope).

The Court's reasoning nevertheless, in my view, exposes deeper constitutional issues. The hierarchy of democratic authority that it sets up presents a vision of the UK constitution in which it is preferable to exercise democratic authority at the UK level instead of the sub-state level. The Court's invocation of democracy at [81] of its judgment conflicts with Lord Hope's defence of the democratic credentials of the Scottish Parliament in *AXA*, in which the Scottish Parliament's democratic mandate was a reason in favour of finding that its legislation was not subject to review on the ground of irrationality.<sup>50</sup> It also somewhat sits in tension with the Court's own reasoning at [90] in this reference, in which it states that the devolution settlement for Scotland is founded on 'principles of subsidiarity'.<sup>51</sup> The principle of subsidiarity entails that power ought to be exercised at the most local level possible. It creates a trend in favour of devolution and therefore the exercise of sub-state democratic authority, whereas the Court's use of 'democracy' in this reference seems to take us in the other direction, towards a preference for the exercise of democracy at the UK level. This naturally raises questions about the importance given to sub-state democracy within the UK constitution on the view presented here by the Court.

### The developing 'practical effects' doctrine

This reference marks the second time in two years that the UK Supreme Court has considered the 'practical' effects of a legislative provision in a Bill or draft Bill in determining whether that provision is within the Scottish Parliament's legislative competence. The first of these two instances was the *UNCRC Incorporation Reference*.<sup>52</sup> The Court had to determine the legislative competence of several provisions of a Bill attempting to incorporate the UN Convention on the Rights of the Child into Scottish law as regards devolved matters. For present purposes, the key provision is section 21, which authorised courts to make 'incompatibility declarators' in respect of legislation infringing the UNCRC's requirements. This provision, materially equivalent to section 4 of the Human Rights Act 1998, was found by the Court to be outside competence as it modified section 28(7) of the Scotland Act 1998. In particular, the Court cast the section 21 power as a form of 'judicial condemnation' that would put pressure on the UK Parliament to avoid the criticism that would come from infringing an international

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50 Ibid [45]–[46] and [49] (Lord Hope).

51 *Scottish Independence Referendum Reference* (n 1 above) [90].

52 *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) Scotland Bill* [2021] UKSC 42, hereafter '*UNCRC Incorporation Reference*'.

human rights instrument.<sup>53</sup> This would qualify the UK Parliament's sovereignty, protected by section 28(7), though the equivalent qualification in the Human Rights Act 1998 was permissible as it was imposed by *the UK Parliament itself*.<sup>54</sup> As Elliott and Kilford have noted, the Court here fails to distinguish legal and political constraints on the UK Parliament.<sup>55</sup> The Court's reasoning appears to replicate aspects of the 'manner and form' theory of parliamentary sovereignty,<sup>56</sup> making non-legal limitations on the UK Parliament impermissible unless self-imposed. This widens the scope of the UK Parliament's proper sphere of legislative action to include devolved matters that might affect its sovereignty.

The Court seems to take the 'practical effects' doctrine in a different direction in this reference, though in a manner that mirrors the substance of its earlier decision. Here, the potential practical effects of the referendum are relevant effects under section 29(3) of the Scotland Act 1998 and so 'relate to' reserved matters. The Court must necessarily develop a different shape for this doctrine because neither the Lord Advocate nor the Advocate General for Scotland argued before it that the provision for a referendum would modify section 28(7). Although the Court as a result does not quote its reasoning in *UNCRC Incorporation Reference*, it still takes the view that practical effects qualifying parliamentary sovereignty can only be imposed at the UK-level; here, the practical effects of a second independence referendum could end the sovereignty of Parliament over Scotland.<sup>57</sup> Both cases therefore discuss the impact of practical effects on parliamentary sovereignty. Nevertheless, the analogy with the 'manner and form' theory is somewhat weaker in this reference. Whilst UK-level action in the form of a section 30 order would be needed to grant the Scottish Parliament competence to hold a referendum, a section 30 order is made by the Crown on the advice of the executive rather than through the UK Parliament.

This discussion is significant because it suggests that the Court could have come to the same conclusion on the competence of the referendum provision without invoking the UK's democratic constitutional culture. Instead, taking the position it had developed in *Imperial Tobacco* about non-legal effects, it could have drawn an analogy between the effects of a referendum and the effects of the 'incompatibility declarators' at

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53 Ibid [52].

54 Ibid [50].

55 Mark Elliott and Nicholas Kilford, 'The Supreme Court's defence of unqualified lawmaking power: parliamentary sovereignty, devolution and the Scotland Act 1998' (2022) 81 Cambridge Law Journal 4.

56 See generally Gordon (n 45).

57 *Scottish Independence Referendum Reference* (n 1 above) [82].

issue in *UNCRC Incorporation Reference*. Since both section 28(7) and the reservation of the UK Parliament concern parliamentary sovereignty,<sup>58</sup> it could be argued that the 'practical effects' doctrine developed in *UNCRC Incorporation Reference* should be transposed into the present case. This, it is submitted, would avoid the paradoxical and difficult discussion about democracy that is prompted by the way in which the Court actually reached its conclusion here.

### **The territorial scope of parliamentary sovereignty**

Some attention should also be given to the way the Court construes the concept of 'sovereignty' in this case. In the context of the 2016 EU referendum, Douglas-Scott noted that sovereignty has parliamentary, popular and 'external' aspects. Parliamentary sovereignty applies to representative democracy, popular sovereignty to the direct democracy of a referendum and external sovereignty to state sovereignty on the international plane.<sup>59</sup> The Court here stated that a Bill providing for 'ending the sovereignty' of the UK Parliament over Scotland would have 'more than a loose or consequential connection' with that Parliament's sovereignty.<sup>60</sup> This conflates different senses of the term 'sovereignty' without highlighting those differences or detailing the distinctions between them. It is correct that an independent Scotland would not be subject to the UK Parliament's sovereignty, but this is because it would have ceased to be part of the externally sovereign state of the UK. This blends parliamentary sovereignty, which Douglas-Scott describes as 'unlimited legislative power',<sup>61</sup> into external sovereignty. A potential change in the territorial scope over which the UK Parliament's supreme and unlimited legislative powers are to be exercised is thus treated as a challenge to those very legislative powers. Framing the issue of sovereignty in this loose manner paints the question of Scotland's secession as a challenge to the legislative supremacy of a representative democratic institution. In the UK context, this might be regarded as a limit on parliamentary sovereignty of the kind represented by the Parliament Acts 1911–1949, or even the courts' powers to issue declarations of incompatibility under the Human Rights Act 1998.<sup>62</sup>

This line of reasoning creates a further conceptual challenge because of the apparent similarities with the 'manner and form' theory of parliamentary sovereignty. Since the UK Government would have

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58 See *ibid* [76] on the latter point.

59 Sionaidh Douglas-Scott, 'Brexit, article 50 and the contested British constitution' (2016) 79 *Modern Law Review* 1019, 1020.

60 *Scottish Independence Referendum Reference* (n 1 above) [82].

61 Sionaidh Douglas-Scott, 'Brexit, the referendum and the UK Parliament: some questions about sovereignty' (UK Constitutional Law Association 28 June 2016).

62 *UNCRC Incorporation Reference* (n 52 above) [52].

to advise the King to make a section 30 order allowing a referendum, and the UK Parliament would have to enact legislation to facilitate secession in the event of a result favouring independence, it seems that the territorial scope over which the UK Parliament's powers are to be exercised can ultimately only be altered by the UK Parliament itself. However, if Scottish secession is treated as a 'manner and form' limit on parliamentary sovereignty, it follows from the UK Parliament's unlimited legislative competence that it can unmake any self-imposed restrictions, including the restriction it would impose upon itself by permitting Scottish secession. The Court's reasoning, thus extrapolated, leads us to the uncomfortable conclusion that the UK Parliament could somehow bring Scotland back into the Union at any time of its choosing as a matter of domestic law. This would render the idea of a voluntary union between England and Scotland meaningless whilst flying in the face of the doctrine of state sovereignty in international law. As the Court's reasoning on the UK constitution's democratic culture does, its construction of sovereignty tilts the balance of the constitution firmly in favour of the UK-level institutions and away from current sub-state institutions. The availability to the Court of alternative lines of reasoning to reach the same conclusion, as suggested above, puts its actual reasoning into sharp relief. It raises the concern that, if extended, it could do more harm than good in the future for the relationships between different territorial elements of the UK's constitution.

## CONCLUSION

From a political perspective, the Court's judgment is undoubtedly a significant roadblock in the pathway to independence outlined by the Scottish Government in June 2022. In strict legal terms, it confirms that there is no free-standing constitutional pathway to secession for Scotland that does not involve the consent of the UK Government of the day, distinguishing Scotland from the position of Northern Ireland and reinforcing the complex and tailored nature of the UK's devolution settlement. The Court's reasoning, however, threatens to open a series of constitutional Pandora's boxes, with implications that stretch beyond the question of competence. It brings into focus the relationship between sub-state and UK-level institutions within the UK constitution, the voluntary nature of the union and the way in which power is actually distributed under Scotland's contemporary devolution settlement. It remains to be seen whether, in future cases on the Scottish Parliament's legislative competence, the Court will further develop this line of reasoning or indeed step back from it to reorient Scotland's devolution settlement towards the principle of subsidiarity on which it claims that devolution settlement is based.



# (To) intimacy and beyond: rethinking the definition of ‘cohabitant’ in Ireland

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## ABSTRACT

The issue of cohabitants’ rights in Ireland has received limited attention in either public or academic discourse since the enactment of part 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 more than a decade ago. However, questions pertaining to the rights and entitlements of *de facto* families under Irish law are once again coming under the spotlight. This note considers one discrete feature of the Irish cohabitation scheme: namely, the requirement to prove intimacy to demonstrate the existence of a cohabiting relationship for the purposes of the 2010 Act. It investigates the importance of intimacy within the definition of ‘cohabitant’ and drawing on the most up-to-date case law highlights the deeply (in)sensitive investigations which are often undertaken to establish its existence.

**Keywords:** cohabitation; *de facto* couples; intimacy; relationship regulation; Irish family law.

## INTRODUCTION

Since the enactment of part 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, the issue of cohabitants’ rights in Ireland has largely taken a back seat in both public and academic discourse. However, questions pertaining to the rights and entitlements of *de facto* families under Irish law have recently come to the fore. In March 2024, an ultimately unsuccessful referendum seeking to change the constitutional definition of the ‘Family’ carried in article 41 of *Bunreacht na hÉireann*, to encompass, among others, cohabiting *de facto* families, generated considerable media attention.<sup>1</sup> So too did the Supreme Court’s judgment in *O’Meara & Ors v Minister for Social Protection, Ireland and Attorney General* wherein it held that in excluding cohabitants from the Widow’s, Widower’s or

1 The referendum sought to recognise families based on marriage or ‘other durable relationships’. It failed, however, by a significant majority (67.7% ‘No’ vote). Various factors contributed to the rejection of the proposed constitutional amendment, notably the ambiguity of the phrase proposed. See, for example, Michael McDowell, ‘A Yes vote on the family referendum is a vote for a foreseeable and avoidable mess’ *Irish Times* (Dublin 7 February 2024).

Surviving Civil Partner's (Contributory) Pension, the state was failing to give effect to the obligation in article 40.1 to treat all human persons equal before the law.<sup>2</sup> What impact these developments will, or ought to have, is likely to attract further attention in the months and years ahead.

Yet, while it is important to look to the future and the potential it may present, it is equally important to reflect on how the cohabitation scheme is currently operating. Some focus has recently been placed on the low level of litigation generated by the scheme, highlighting in particular the need to reconsider the requirement to establish 'financial dependency' to access relief on relationship breakdown.<sup>3</sup> Many other aspects, however, remain largely ignored.

This note seeks to shine a spotlight on one discrete feature of the Irish cohabitation scheme: namely, the requirement to prove intimacy to demonstrate the presence of a cohabiting relationship for the purposes of the 2010 Act. The note considers the importance of intimacy within the definition of 'cohabitant' and drawing on the most up-to-date case law highlights the deeply (in)sensitive investigations which are often undertaken to establish its existence. Having considered the difficulties this creates, it questions the necessity of adopting an intimacy requirement and reflects on the potential for reform.

### **INTIMACY UNDER PART 15 OF THE 2010 ACT**

Pursuant to section 172(1) of the 2010 Act, a 'cohabitant' is defined as one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.

Section 172(2) further provides that in concluding whether or not two adults are cohabitants, 'the court shall take into account all the circumstances of the relationship'. To guide the court, a non-exhaustive list of factors to which it shall, 'in particular', have regard is set out including the duration of the relationship, the basis on which the couple live together, the degree of financial dependence or nature of financial

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2 *O'Meara & Ors v Minister for Social Protection, Ireland and Attorney General* [2024] IESC 1 at [38] on an appeal from [2022] IEHC 552. See section 124(1) of the Social Welfare Consolidation Act 2005 as inserted by section 17(4) of the Social Welfare and Pensions Act 2010. The couple were in a cohabiting relationship for 20 years and shared three children.

3 Kathryn O'Sullivan, 'Cohabitant protection on relationship breakdown in Ireland: A lesson in illusory justice?' (2023) 37(1) *International Journal of Law Policy and the Family* ebad017.

arrangements between the parties, the presence of dependent children, the degree to which the adults present themselves as a couple et cetera. Although section 172(3) confirms that 'a relationship does not cease to be an intimate relationship ... merely because it is no longer sexual in nature', the need that a sexual relationship existed at one point is implicit.<sup>4</sup> As Baker J observed in *DC v DR*:

The Act offers no assistance as to what is meant by an intimate relationship, but ... it is clear that a relationship *must have been at some point in time a sexual relationship* for intimacy to be found. *The intimacy that is intended is a sexual intimacy and not merely the intimacy of close friendship.*<sup>5</sup>

Highlighting the importance of this qualifying criterion, in 2020, Allen J in *GR v Regan*, described the need for the relationship to be 'intimate and committed' as the 'overarching requirement' of the 2010 Act.<sup>6</sup> Cohabitant status is thus determined on a case-by-case basis having regard, in theory, to objectively verifiable evidence that a couple was in a sexually intimate and committed relationship.

However, securing cohabitant status is, of itself, of limited benefit under the 2010 Act.<sup>7</sup> To be eligible to apply for relief, an applicant must also meet the narrower definition of 'qualified cohabitant'. Section 172(5) defines a 'qualified cohabitant' as

... an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period –

- (a) of 2 years or more, in the case where they are the parents of one or more dependent children, and
- (b) of 5 years or more, in any other case.

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4 In *GR v Regan* [2020] IEHC 89 [36] it was observed that although a relationship does not cease to be intimate simply because it ceases to be sexual, 'the requirement that the relationship be committed remains, as does the requirement that the couple live together'.

5 *DC v DR* [2015] IEHC 309 [86] (emphasis added). Baker J suggested [107] that 'the test requires the court to determine whether a reasonable person who knew the couple would have regarded them as living together in a committed and intimate relationship'.

6 *GR v Regan* (n 4 above) [36].

7 Although the 2010 Act's definition of 'cohabitant' is used under the Social Welfare Acts and other miscellaneous legislative enactments, its main focus of protection arises on the termination of a cohabiting relationship.

## THE SEXUAL INTIMACY REQUIREMENT IN RECENT CASE LAW

Given the centrality of the (sexual) intimacy requirement within the definition of 'cohabitant', it is worthwhile to consider how this aspect of the definition is being applied in recent case law. Despite the limited amount of jurisprudence arising in relation to part 15 claims generally,<sup>8</sup> a number of reported decisions provide an interesting insight.

Available judgments pertaining to claims on relationship breakdown, though few and far between, show a varying level of focus being placed on the intimacy of the relationship shared by the couple. The unreported Circuit Court decision of *MO'S v EC*, concerned a successful application for relief on the breakdown of a 25-year cohabiting relationship which produced one child.<sup>9</sup> The former couple's sexual relationship, its nature and duration, was not investigated. Although counsel for the respondent did question whether the couple were still in an 'intimate and committed' relationship on 1 January 2011 when the 2010 Act was commenced,<sup>10</sup> the court found that the relationship endured until autumn 2011, albeit with little consideration of the intimacy (or commitment) of the parties in the final year(s).<sup>11</sup>

Similarly, in the 2019 judgment of *XY v ZW*, as the respondent 'did not even attempt to argue that the parties had not been cohabitants',<sup>12</sup> an investigation into whether the couple *prima facie* enjoyed a sexually intimate relationship was avoided. However, extensive oral and written evidence of the physical intimacy shared by the couple was nevertheless put before the court with a view to proving the endurance of the relationship and thus the applicant's status as a *qualifying* cohabitant under section 172(5). To support her claim that the seemingly 'on again/off again' relationship continued to be intimate and committed from when it began in January 2007 to when it ultimately ended in April 2016, the applicant submitted detailed diaries including entries 'suggesting intimacy' for 2007, 2011 and 2013.<sup>13</sup> Various specific dates beyond

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8 For example, a search for the term 'qualified cohabitant' within the judgment texts of the Courts Service of Ireland website produces just nine substantive results in August 2023. See the [Courts Service website](#). This number of written judgments is confirmed on Westlaw IE.

9 Unreported, Circuit Court, 12 January 2015.

10 Ibid [30].

11 Ibid [37]. Given section 172(3), the presence or absence of physical intimacy in determining when the relationship ended appears understandably reduced. See also *DC v DR* (n 5 above) discussed below.

12 *XY v ZW* [2019] IEHC 25 [4].

13 Ibid [31].

those in the diary were also given in evidence as to when 'intimacy' took place.<sup>14</sup> However, notwithstanding the applicant's reliance on evidence of sexual intimacy as an apparent proxy for the continuation of the relationship throughout the period, Binchy J refused relief, concluding that the relationship could best be characterised as 'a ten/eleven year relationship with intermittent breaks'.<sup>15</sup> Although he accepted that '[f]or most of the period, the parties were indeed in an intimate and committed relationship, and lived together', he found that the evidence overwhelmingly established that the relationship 'broke down, at least three times, in the five years before it came to its final conclusion'.<sup>16</sup> As cohabiting periods cannot be aggregated,<sup>17</sup> the claim failed.

The intimacy criterion, and the need to establish at a base level whether a couple enjoyed a sexual relationship or not, has played a much more important and contentious role in the context of applications made under section 194 on the death of a purported cohabitant. Reflecting on the 'degree of lack of unanimity in the perception of the relationship' between the parties to the litigation in *DC v DR*,<sup>18</sup> Baker J observed that it was 'remarkable' that it was 'the intimate nature of the relationship, and whether the couple lived together', specifically, that was in dispute.<sup>19</sup> There, the applicant alleged that the relationship between himself and the deceased 'became intimate some months after they met and ... remained close and intimate until she died'.<sup>20</sup> However, as both he and the deceased 'were dutiful children ... neither felt free to fully and openly engage in an intimate relationship until their mothers had died'.<sup>21</sup> Having moved in with the deceased on the day his own mother died, the applicant explained that the couple 'shared a double bed and continued to do so until her illness came to interrupt her sleep to such an extent that both of them preferred to sleep in single beds, albeit ... in the same room'.<sup>22</sup> Despite this, he reiterated that 'the relationship was sexual until close to the end of the life of the deceased'.<sup>23</sup> This suggestion was, however, rejected outright by the deceased's respondent brother. He disputed the suggestion that the couple had ever been sexually intimate,

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14 See, for example, *ibid* [22].

15 *Ibid* [101].

16 *Ibid*.

17 *GR v Regan* (n 4 above) [48].

18 *DC v DR* (n 5 above).

19 *Ibid* [58].

20 *Ibid* [22].

21 *Ibid* [23].

22 *Ibid* [26].

23 *Ibid* [46].

asserting that the relationship was 'one of close friendship'.<sup>24</sup> Various witnesses on behalf of the respondent also noted their surprise that intimacy was being asserted.<sup>25</sup> Nevertheless, Baker J found for the applicant. Although noting that the applicant was not cross-examined as to when the relationship ceased to be sexual, she reflected

that was a sensitive and realistic approach to the question having regard to the fact that the Act *does not require intimacy to continue* through all of the vagrancies of a relationship, provided sexual intimacy *can be said to have been part of the relationship at some time* in the past.<sup>26</sup>

A similarly hostile reaction by surviving family members to an application by a purported surviving cohabitant under section 194 was observed in *D v B*.<sup>27</sup> Although the case did not involve a determination as to the applicant's status as 'cohabitant', the court noted that the children of the deceased rejected the truthfulness of the applicant's assertions that she had an intimate relationship with their father and noted how the children wanted to 'defend, what they regard as, their parent's honour as well as his finances'.<sup>28</sup>

However, while respondents (often family members) representing the estate of deceased persons may dispute the intimate nature of the relationship enjoyed between the deceased and the applicant, where it is not seriously questioned, the courts may be willing to accept the presence of a sexual relationship much more readily. In *GR v Niamh Regan*,<sup>29</sup> although whether the applicant and the deceased had been physically intimate was doubted by the deceased's family, it was not contested.<sup>30</sup> Consequently, the court accepted that the couple had been intimate with little discussion.<sup>31</sup>

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24 Ibid [7].

25 See, for example, *ibid* [76].

26 Ibid [87]. Given that section 172(5) states the parties must have lived '*as a couple*' for the period in question, and mindful of section 172(3), it seems unlikely that sexual intimacy must continue throughout the qualifying period. Note, however, Binchy J's comments in *XY v ZW* (n 12 above) that to be eligible for relief as a 'qualified cohabitant' it was 'an essential requirement that they *must have lived together continuously in such an intimate and committed relationship* for the period of five years prior to the date on which the relationship ended' (emphasis added).

27 *D v B* [2021] IEHC 407.

28 Ibid [58]. The case itself concerned the application of the 'in camera' rule.

29 See n 4 above. The deceased died intestate and his siblings declined to take out a grant of administration resulting in Ms Niamh Regan, solicitor, being appointed administrator.

30 Ibid [40].

31 Ibid [53]. The court moreover clarified that '[n]either the fact that following the deterioration of the deceased's health the relationship ceased to be sexual, nor the deceased's lack of capacity from 2007, meant that the relationship ceased to be intimate.'

Finally, one further related context in which intimacy was previously directly relevant in an application for relief under the 2010 Act arose pursuant to section 172(6). There, a partial exception existed to the definition of 'qualified cohabitant' where 'one or both of the adults is or was, at any time during the relationship concerned, an adult who was married to someone else', and, at the time the relationship concerned ended, had not 'lived apart' from his or her spouse for four of the previous five years – the period of time formerly required to make an application for divorce.<sup>32</sup> Where a married couple live in the same house, section 5(1A) of the Family Law Act 1996 (as amended) provides that they 'shall be considered as living apart from one another if the court is satisfied that, while so living in the same dwelling, the spouses do not live together as a couple *in an intimate and committed relationship*'.<sup>33</sup>

These provisions were of central importance in the 2022 case of *Z v Y*.<sup>34</sup> There, the applicant, Ms Z, sought a declaration that she was a 'qualifying cohabitant' within the meaning of the Act, notwithstanding the deceased's concurrent marriage with his wife, Mrs Y. While evidence was advanced that Ms Z and the deceased had been intimate in an extra-marital relationship,<sup>35</sup> an even greater focus was placed on whether the deceased had 'lived apart' from Mrs Y and whether the latter couple had ceased to be intimate. Although Mrs Y accepted that applicant and the deceased were in a relationship and that it was intimate, she denied that she ceased to cohabit with the deceased as his wife.<sup>36</sup> Conscious of the intrusive nature of the enquiry, Barrett J sought to be 'as sensitive as possible and to avoid any indelicacy' in his judgment.<sup>37</sup>

Despite the applicant's arguments to the contrary, the court did not accept that Mr X and his wife had lived apart from one another for the required period<sup>38</sup> nor that the relationship between Mr X and Mrs Y, was 'to borrow from Mrs Y, "a celibate relationship"'.<sup>39</sup> Although the couple did not share a bedroom throughout their marriage, this,

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32 John Mee, 'Cohabitation law reform in Ireland' (2011) 23(3) CFLQ 323, 332 explained, the rationale of this provision was so that 'if an application for relief [was] made against a cohabitant who [was] married to a third party, it [would] be possible to adjourn the proceedings to allow the cohabitant's spouse to seek a divorce and apply for ancillary relief'.

33 Emphasis added. This was carried into the 2010 Act though section 4(2)(b) of the Family Law Act 2019.

34 *Z v Y* [2022] IEHC 583.

35 *Ibid* [15].

36 *Ibid* [8].

37 *Ibid* [1].

38 *Ibid* [11].

39 *Ibid* .

the wife explained, was attributable to the deceased's shift work over 30 years and his 'totally irregular' sleep patterns, compounded by his problematic drinking.<sup>40</sup> Reflecting on the evidence, Barrett J observed that it was 'entirely convincing that a husband and wife who are living together might occasionally or regularly have intimate relations notwithstanding that their marital relationship on the whole may be floundering'.<sup>41</sup> He thus concluded that although the marriage 'cooled over time', it did not do so to such an 'extent that they never enjoyed intimate relations with each other'.<sup>42</sup> In addition, while the applicant was not capable of being a qualified cohabitant given the continued marital relationship, Barrett J further held that Mr X and Ms Z were in any event not 'living together' in the manner contemplated, 'as opposed to spending time together and enjoying occasional intimate relations with each other'.<sup>43</sup>

The exclusion carried in section 172(6) was removed going forward with the commencement of the Family Law Act 2019 which reduced the wait period for divorce to two years, thereby aligning it with the shorter qualifying period under the cohabitation legislation. However, the potential need for the courts to determine the relationship status of spouses, when faced with an application under part 15 from a purported qualified cohabitant, ensures that where there is a concurrent marriage, the intimacy and commitment of spouses may still need to be investigated in the future.

### **IS AN INTIMACY REQUIREMENT ... REQUIRED?**

Notwithstanding the application of an 'in camera' rule and the broad understanding that cohabitation claims are 'highly sensitive proceedings',<sup>44</sup> the apparent invasion of privacy prompted by the definition of what constitutes a cohabiting relationship under the 2010 Act can be significant. While the requirement to prove that a couple were 'living together' has seen disputes arising as to the number of possessions held in the alleged shared home,<sup>45</sup> nowhere is the intrusiveness of the Irish scheme more pronounced than in relation to the requirement to prove intimacy. As well as having to share deeply private evidence in court as to the sexual relationship enjoyed,

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40 Ibid [8].

41 Ibid [11].

42 Ibid [12].

43 Ibid [15].

44 *D v B* (n 27 above) [52].

45 Considerable evidence has been provided in a number of cases as to the amount of possessions held in the homes in question. See *DC v DR* (n 5 above); *XY v ZW* (n 12 above); *Z v Y* (n 34 above).

applicants have also been required to produce highly personal items to bolster their claims as to the intimacy of the union. This is particularly evident in cases pursued under section 194 with Christmas cards, birthday cards and Valentine day cards, received from the deceased, advanced as physical proof of the genuinely emotional, if not sexual, relationship shared by the couple.<sup>46</sup> That such evidence is demanded of applicants in the Ireland of 2024 arguably seems at odds with modern sensibilities.

The potentially intrusive nature of the enquiries liable to be required under part 15 was well flagged by Alan Shatter TD prior to the introduction of the 2010 Act. Noting the need to establish that there were some 'intimate relations', he reflected on the potential for a court being required to 'examine the minutiae of the intimacy' that a couple engaged in:

Will we have judges being asked to examine the number of occasions per week, month or year in which people engaged in sexual intercourse? Will men and women have to give explicit detail under cross-examination of the nature of their sexual interactions? Will they be put through this sort of degradation? Will we leave it to the subjective assessment of judges to determine what level of sexual interaction amounts to sufficient intimacy ... ?<sup>47</sup>

While in the absence of more reported judgments it is impossible to say whether, or to what extent, such deeply personal enquiries are being undertaken in Irish courts, the potential is tacit. Anecdotal evidence from practitioners suggesting that a desire to avoid such investigations has emerged as an important incentive to settle, further speaks to the impact that the threat of such investigations is having at grassroots level.

Yet, although Ireland is by no means the only jurisdiction applying a definition focusing on the need to establish physical intimacy,<sup>48</sup> not all jurisdictions adopt approaches requiring such (in)sensitive examinations of parties' private lives. Some jurisdictions have chosen to remove the focus on intimacy in their cohabitation regimes, opening up their schemes to include non-intimate relationships where

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46 *DC v DR* (n 5 above) [32].

47 *Dáil Deb* 21 January 2010, vol 699, no 3.

48 Such an approach is adopted in many common law jurisdictions including across Canada and the United States of America. However, its appropriateness is increasingly being questioned. See, for example, Lisa Young, 'Australia' in Jens Scherpe and Andy Hayward (eds), *De Facto Relationships: A Comparative Guide* (Edward Elgar 2024) (forthcoming). See also Michelle Fernando and Olivia Rundle, 'The Family Court's approach to the "circumstances" of a de facto relationship' (2021) 34 *Australian Journal of Family Law* 181.

appropriate.<sup>49</sup> Such an approach is, for example, adopted in Alberta, Canada. There, pursuant to its Adult Interdependent Relationships Act 2002 (as amended), adult interdependent partners are defined as two people who live in a 'relationship of interdependence'. A relationship of interdependence is defined in section 1(1)(f) as

a relationship outside marriage in which any 2 persons

- (i) share one another's lives,
- (ii) are emotionally committed to one another, and
- (iii) function as an economic and domestic unit.

In determining whether two persons function as an economic and domestic unit all the circumstances of the relationship must be taken into account, including, where relevant, 'whether or not the persons have a conjugal relationship'; 'the degree of exclusivity of the relationship'; 'the conduct and habits of the persons in respect of household activities and living arrangements'; 'the degree to which the persons hold themselves out to others as an economic and domestic unit' et cetera.<sup>50</sup> Thus, although it may be a relevant factor to which the court may have regard, 'it does not require partners to have a conjugal relationship to be adult interdependent partners'.<sup>51</sup>

The potential for introducing a scheme not premised on the need for a sexual relationship was considered in *Seanad Éireann* almost 20 years ago.<sup>52</sup> The discussion arose in the context of an ultimately

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49 Note, while requiring couples to register their relationship would *reduce* the need for an investigation into the nature of the union in a court of law, it would not *eliminate* the need for such enquiries unless coupled with an extension of the cohabitation scheme to non-intimate couples. For example, in Belgium the *cohabitation légale*, a form of registered cohabiting partnership, is available to both those in intimate and non-intimate relationships, See Geoffrey Willems, 'Registered partnerships in Belgium' in Jens Scherpe and Andy Hayward (eds), *The Future of Registered Partnerships* (Intersentia 2017). See also Bérénice Delahaye, Fabienne Tainmont and Viviane Lebe-Dessard, *La cohabitation légale* (Larcier 2013). However, a core weakness of such an approach, as the Law Reform Commission *Rights and Duties of Cohabitants* (LRC 82, 2006) para 1.21 highlighted, is that it would be 'unlikely to benefit vulnerable couples since they are the least likely to formalise their relationship'.

50 S 1(2).

51 Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult Interdependent Partners* (Final Report No-112, 2018) para 193. Note also the consideration given to the term 'conjugal relationship' in *Molodowich v Penttinen* (1980), 17 RFL (2d) 376 [16] (Ont Dist Ct) where the court found it was more than a synonym for sexual relationship. The 2018 report noted at para 4 that adult interdependent partners enjoy 'many of the same rights, benefits and obligations as spouses'. Since 2020, this includes in relation to the division of assets on relationship breakdown, see Family Property Act 2000 (as amended).

52 *Seanad* Deb 16 February 2005, vol 179, no 6.

unsuccessful Private Members Bill, the Civil Partnership Bill 2004, introduced by Senator David Norris. The then Minister for Justice, Michael McDowell, reflected on the question of '[e]xtending some State recognition to partnerships between persons who decide to create a relationship of mutual dependence, care and love between themselves, whether the relationship is heterosexual, homosexual or non-sexual'.<sup>53</sup> In particular, he recognised the need to 'consider the position of people whose relationship has no sexual element and who may need legal protection and recognition for what is de facto a relationship based on a community of property or income, which flows from a caring relationship between them'.<sup>54</sup> He suggested his support for recognising the needs of 'non-sexual people in a relationship of caring and dependency',<sup>55</sup> with backing for such recognition also evident soon after in the Law Reform Commission's 2006 *Report on the Rights and Duties of Cohabitants*.<sup>56</sup> However, influenced by the failure of the Law Commission for England and Wales' broad proposals for 'home sharers' in its Discussion Paper, *Sharing Homes*, the Irish Commission concluded that a scheme encompassing all cohabiting relationships had 'the potential to fail to address the underlying vulnerabilities and difficulties faced by those in an intimate relationship' and was thus taken no further.<sup>57</sup> Since then, the issue has fallen off the legislative agenda.

Despite this, while it would potentially be problematic to seek to include *all* cohabiting relationships, the inclusion of a definition akin to that adopted in Alberta could have the dual advantage of addressing the definitional and evidential difficulties associated with the need to establish sexual intimacy to prove the existence of a cohabiting

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53 Ibid.

54 Ibid. Note, a remedy may be available in equity in such cases under the doctrine of proprietary estoppel. However, whether such a claim would succeed would be highly fact-dependent and require proof of detrimental reliance by the applicant on a promise or an assurance made by the deceased.

55 Ibid.

56 See Law Reform Commission (n 49 above) para 1.02. The issue of non-conjugal relationships was also considered in the *Options Paper by the Working Group on Domestic Partnership* (2006). It noted at para 9.01.2 that 'individuals in other nonconjugal cohabiting relationships may also need legal protection and recognition for what is de facto a relationship based on a community of property or income, in other words, an interdependent relationship'. It declined to make recommendations, highlighting the need for further legislative review and reform.

57 Law Reform Commission (n 49 above) para 1.02 referring to the Law Commission for England and Wales, *Sharing Homes: A Discussion Paper* (Law Com No 278-2002). Deputy Charlie Flanagan TD stated that Fine Gael's Civil Partnership Policy Paper had also included reliefs for cohabiting couples in non-intimate relations. See *Dáil Deb* 3 December 2009, vol 697, no 1.

relationship for the purposes of the 2010 Act while simultaneously remedying the vulnerability of non-conjugal couples in situations of interdependency as identified by McDowell and recognised by the Law Reform Commission. As we re-imagine the recognition due to cohabiting *de facto* families under Irish law, the potential inherent in such reform would also seem particularly ripe for further investigation.<sup>58</sup>

## CONCLUSION

Given the shortfall in jurisprudence from the Superior Courts, it is impossible to draw any firm conclusions on how the threshold intimacy requirement is being applied in practice. While it appears that the evidential burden may vary case to case depending on the nature or duration of the relationship, as well as the strategy pursued by the respondent(s),<sup>59</sup> it is difficult to make concrete findings in this regard. What is clear, however, is just how intrusive and voyeuristic the enquiries into the sexual relationship enjoyed by a couple can be, particularly in the context of applications for relief under section 194.

Yet, notwithstanding that the Irish scheme places 'undue weight upon whether or not the parties enjoyed a sexual relationship',<sup>60</sup> reform with a view to redirecting this focus would require a considerable shift in both Irish law and policy. Whether legislation along the lines adopted in Alberta will thus be forthcoming seems somewhat unlikely in the near future. Despite strong arguments within academic discourse since the turn of the millennium on the

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58 While it is outside the scope of this note to fully interrogate the vulnerabilities of those in non-conjugal relationships, given the rise of assisted reproductive technologies and the increasingly heterogeneous nature of families, it is not difficult to imagine a scenario where an unmarried couple who have never shared a sexual relationship enjoy a caring and interdependent family life together with children of the relationship. Why the absence of physical intimacy should exclude a vulnerable party to such a relationship from accessing relief where appropriate under the 2010 Act is hard to explain and raises questions as to the purpose and function of relationship recognition under Irish law.

59 See above. Robert Leckey, 'Cohabitation, law reform, and the litigants' (2017) 31(2) *International Journal of Law Policy and the Family* 131, 139, highlights how litigation strategy has shifted its focus towards increasingly disputing the conjugal nature of relationships in Canada.

60 Brian Sloan, 'The concept of coupledness in succession law' (2011) 70(3) *Cambridge Law Journal* 623, 624.

need to look beyond conjugality in family law,<sup>61</sup> few legislatures have taken the plunge to date. An intermediate step forward could perhaps see the amendment of the Succession Act 1965 to facilitate applications for discretionary financial relief from a broader range of survivors, including, for example, surviving interdependent partners, irrespective of the sexual nature of the relationship.<sup>62</sup> Although such reform would not eliminate the focus on intimacy for all purposes, it would at least reduce its (questionable) role in the context of applications on death<sup>63</sup> and would mirror developments elsewhere.<sup>64</sup>

Ireland has come a long way since its characterisation in Brinsley McNamara's *The Valley of the Squinting Windows*. However, developments in Irish family law, particularly part 15 of the 2010 Act, though welcome in introducing potentially important protections for non-marital families, have the potential to re-introduce the need for intrusive enquiries into the private lives' of cohabiting couples. As this note has highlighted, such investigations are not inevitably required. Let us hope that the potential for the reform of this aspect of Irish family law receives the investigation that *it* deserves.

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- 61 See the Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Adult Relationships* (Public Works and Government Services Canada 2001) and Brenda Cossman and Bruce Ryder, 'Beyond *Beyond Conjugality*' (2017) 30(2) *Canadian Journal of Family Law* 227. Closer to home, see Jonathan Herring, 'Making family law less sexy ... and more careful' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014) 25–41. He argues at 40 that '[t]he way ahead is to focus on care, rather than sex'. See also Nicola Barker, 'Rethinking conjugality as the basis for family recognition: a feminist rewriting of the judgment in *Burden v United Kingdom*' (2016) 6(6) *Oñati Socio-legal Series* 1249–1275; Nausica Palazzo, *Legal Recognition of Non-conjugal Families: New Frontiers in Family Law in the US, Canada and Europe* (Hart 2021).
- 62 It might be appropriate to shift all provisions relating to applications on death from the 2010 Act and resituate them in the 1965 Act. Although it is beyond the scope of this note to tease out all the implications of such reform, amendments on these lines could be taken as part of a broader reform, widening the access to discretionary relief under the 1965 Act as advocated for by Kathryn O'Sullivan, 'Til death do us part': surviving spouses, civil partners and provision on intestacy in Ireland' (2016) 38(2) *Journal of Social Welfare and Family Law* 118–139.
- 63 Insisting on an intimacy requirement on death appears somewhat futile since only the parties to the relationship can usually speak to its sexual nature and thus the only other person, besides the applicant, to know the truth may be deceased.
- 64 Various Australian states and territories have introduced broader reforms facilitating access to discretionary provision for non-conjugal relationships in the context of succession while closer to home, in England and Wales, a 'dependant' may be eligible for provision in limited circumstances pursuant to its Inheritance (Provision for Family and Dependants) Act 1975. See section 1(1) (e). Note also the decision in *Re Watson (deceased)* [1999] 1 FLR 878 discussed in Daniel Monk, 'Sexuality and succession law: beyond formal equality' (2011) 19 *Feminist Legal Studies* 231. However, see further Sloan (n 60 above) 638.



# A continuing nuisance: *Jalla v Shell International Trading and Shipping Company Ltd* [2023] UKSC 16

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## ABSTRACT

In *Jalla* the Supreme Court was required to decide whether the damage, which had been caused to the claimants' land by the continued presence of oil on the land, which in turn had been caused by a spill from the defendants' oil pipeline, constituted a continuing nuisance, the upshot of which was that a continuing cause of action accrued afresh from day to day. The court held that a continuing nuisance was a nuisance which continued day after day, or on another regular basis. In such cases, the cause of action continued afresh on a continuing basis. However, in *Jalla* the court held that there was no continuing nuisance, on the grounds that there was no repeated activity, or continuing state of affairs, which had been caused by the defendants. Rather, the leak was a one-off event, or isolated escape, which had been caused by the defendants. The cause of action was complete once the claimants' land was affected by the oil spill. In short, there was no continuing cause of action for as long as the oil remained on the claimants' land. Whereas the presence of the oil on the claimants' land may have ranked as a 'nuisance' in common parlance, the continuing presence of the oil on the land did not rank as a nuisance in law. The author concludes that *Jalla* illustrates the confusion which stems from the fact that the concept of nuisance is not clearly defined.

**Keywords:** private nuisance; oil; isolated escape; damage to land; commencement cause of action; limitation period.

## BACKGROUND AND DECISION

An oil spill occurred approximately 120 kilometres off the coast of Nigeria when a large quantity of crude oil, which had been extracted from the seabed, leaked into the ocean from the flowline through which it was being transferred into a waiting tanker. Just under six years later, the claimants who owned land in Nigeria, said to be affected by the spill, issued a claim in private nuisance against various defendants for undue interference with the use and enjoyment of their land. In particular, the claimants alleged that, following the initial oil leak, which lasted six hours, oil migrated towards and reached

the Nigerian shoreline, and that the oil was still present on their land and had not been cleaned up. More than six years after the leak, the claimants applied to amend their claim form and particulars of claim, to substitute one of the original defendants for a new defendant. The claimants contended that their applications fell within the limitation period (a period of five years under Nigerian law) because as long as the undue interference of their land (presence of oil) was continuing, there was a continuing nuisance and thus, a continuing cause of action that was accruing afresh, from day to day.

On a preliminary issue as to limitation, the trial judge held that the oil spill was a single escape which could not constitute a continuing nuisance and that the claimants' right of action had accrued when the oil first struck their land. The Court of Appeal upheld that decision. The claimants appealed.

Lord Burrows delivered the judgment of the Supreme Court.

Lord Burrows stated that the oil spill occurred off the coast of Nigeria in December 2011. The substantive question which fell to be answered by the court was whether there was a continuing private nuisance, and hence a continuing cause of action. The relevant limitation period under Nigerian law was five years. The claimants submitted that there was a continuing cause of action because there was a continuing nuisance, so that the limitation period ran afresh, from day to day.

Lord Burrows stated that the tort of private nuisance was committed where the defendant's activity, or the state of affairs for which the defendant was responsible, unduly interfered with the use and enjoyment of the claimant's land.<sup>1</sup> Moreover, the creator of a nuisance could be sued whether or not that person still has, or had, any interest in land from which the nuisance emanates. The parties had agreed for the purposes of the appeal that a private nuisance could be created where a nuisance emanated from the sea. It was also assumed that the tort of private nuisance could be committed by a single one-off event, such as an oil spill.

Lord Burrows stated that the tort of private nuisance was actionable only on proof of damage and was not actionable *per se*.<sup>2</sup> This requirement was satisfied in nuisance by establishing the undue interference with use and enjoyment of land, as by the impact of noise or smell, notwithstanding the fact that there was no physical damage to the land itself. This included physical damage to the land itself, and also damage to buildings or vegetation growing on the land.

Lord Burrows stated that the core principles of the law of nuisance were set out in the recent Supreme Court decision of *Fearn v Tate*

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1 [2023] UKSC 16 [2].

2 *Ibid* [3].

*Galleries*.<sup>3</sup> In that case, it was decided that the defendants were causing a private nuisance by using the top floor of their building as a public viewing gallery, which looked straight across into the living areas of the claimants' flats. First, *Fearn* decided that the private law of nuisance was a tort to land. Secondly, a nuisance could be caused by any means and did not require a physical invasion. The interference could be by something tangible (such as Japanese knotweed) or something intangible such as fumes, noise, vibration or an unpleasant smell. It could include intrusive overlooking. The interference also required to be substantial, and also to be an interference with the ordinary use of the claimant's land. At a general level, what was involved was the balancing of conflicting rights of landowners. In deciding whether there was a private nuisance, one was required to have regard to the character of the locality. Coming to the nuisance was no defence. Nor was it a defence to private nuisance that an activity which was being carried on by the defendant was for the public benefit.

Lord Burrows then referred to three House of Lords' decisions relied upon by the claimants.<sup>4</sup> The first was *Darley Main Colliery Co v Mitchell*.<sup>5</sup> In that case, the defendants had the right to extract coal from under the claimant's land. In doing so, they had caused subsidence to the claimant's land in 1868. Lord Burrows stated that, whilst the expression 'nuisance' was not used by the House, it was clear that it was a nuisance action. The defendants compensated the claimant. They carried out no further excavation work. However, in 1882 a further subsidence had occurred causing damage to the claimant's land. That subsidence would not have occurred if an adjoining owner had not carried out excavation work for coal on and under his land, or if the defendants had left enough support under the claimant's land. The majority of the House decided that the second subsidence constituted a new cause of action, separate from the first.<sup>6</sup> The facts fell outside, and therefore did not infringe, the general rule that damages for a cause of action must be recovered once and for all. The limitation period had not expired.

Lord Burrows then referred to *Sedleigh-Denfield v O'Callaghan*.<sup>7</sup> In that case, a local authority, had trespassed and placed a pipe in a ditch on the defendant's land, to carry away rain water. However, the work had been carried out negligently. The pipe became blocked with leaves and other debris. The defendants knew or should have known of the defective pipe. Three years later, after a heavy rainstorm, the

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3 [2023] UKSC 4; *ibid* [18].

4 *Ibid* [19].

5 (1886) 11 App Cas 127.

6 *Ibid* [20].

7 [1940] AC 880; [2023] UKSC 16 [21].

ditch overflowed. The claimant's land was flooded, causing substantial damage. The House held that the defendants were liable to the claimant in the tort of private nuisance. Although the defendants had not created the nuisance, they had 'continued' the nuisance. In Viscount Maugham's opinion the defendants had also 'adopted' it by making use of the pipe. The defendants had continued the nuisance because, despite actual or presumed knowledge of the unguarded pipe, they did not take reasonable steps to remedy the position. However, Lord Burrows in the instant case, stated that Lord Atkin pointed out in *Sedleigh-Denfield* that it was inaccurate to talk about there being a nuisance on the defendant's land, given that the tort of private nuisance was not committed unless and until damage to the claimant's land was caused.<sup>8</sup>

Finally, Lord Burrows referred to the case of Delaware Mansions.<sup>9</sup> The roots of a plane tree which was situated on the pavement adjoining a block of flats had caused cracks which appeared in 1989 in the structure of the flats. The land on which the block of flats was built was then owned by the Church Commissioners. In 1990 they transferred the freehold to Fleckson Ltd (F) for £1. The defendant highway authority (Westminster City Council) refused to remove the tree. F carried out the necessary underpinning to protect its property. F claimed the cost from the defendant as damages, for the tort of private nuisance. The House held that F was entitled to recover damages. There was a continuing nuisance of which the defendant knew or ought to have known.

Lord Burrows then addressed the issue as to what constituted a continuing nuisance. He stated that part of the difficulty lay in the fact that, as a matter of ordinary language, one could naturally describe the effect of the interference or damage as still being present and not having been cleaned up, or otherwise dealt with, as being a continuing problem.<sup>10</sup> Therefore, in the instant case, one could describe the oil still present on the claimants' land as a continuing nuisance. However, that was wholly misleading when one was trying to clarify the meaning of a continuing nuisance, in a legal sense.

Lord Burrows stated that a continuing nuisance was one where, outside the claimant's land and usually on the defendant's land, there was repeated activity by the defendant, or an ongoing state of affairs, for which the defendant was responsible, which causes continuing undue interference with the use and enjoyment of the claimant's land.<sup>11</sup> He added that, for a continuing nuisance, the interference may be similar on each occasion. However, the important point was that it

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8 Ibid [22].

9 [2002] 1 AC 321.

10 [2023] UKSC 16, [24].

11 Ibid [26].

was continuing day after day, or on another regular basis. In such cases, the cause of action therefore accrued afresh on a continuing basis.

Lord Burrows stated that a case on tree roots, such as *Delaware Mansions*, provided a good example of a continuing nuisance.<sup>12</sup> In that case, there was an ongoing state of affairs outside the claimants' land, constituted by the living tree and its roots, for which the defendant was responsible, and which caused, by extraction of water through its encroaching roots, continuing undue interference with the claimant's land. The cause of action therefore accrued afresh from day to day. It logically followed from the concept of a continuing cause of action that if a limitation period was one of six years from the accrual of the cause of action, damages at common law could not be recovered for causes of action (ie for past occurrences of the continuing nuisance) that occurred more than six years before the claim was commenced.<sup>13</sup>

Lord Burrows then drew attention to the importance of recognising the linguistic confusion concerning the concept of a continuing nuisance.<sup>14</sup> What was meant by that was clearly explained in *Sedleigh-Denfield*. It meant that a defendant who had not created a nuisance would be liable for it (if damage was caused to the claimant) where, with actual or presumed knowledge of the continued state of affairs, the defendant did not take reasonable steps to end it. However, the 'continuing' of the nuisance in that sense was not the same as there being a continuing nuisance, in the sense of there being a continuing cause of action, which the court was concerned with in the instant case. For example, in *Sedleigh-Denfield* the defendants had continued the nuisance created by the trespasser. They were, therefore, liable in the tort of private nuisance for the damage to the claimant's land caused by the flooding. However, that did not mean that there was a continuing cause of action. On the contrary, the cause of action accrued once the claimant's land was flooded.

Lord Burrows then applied the law to the facts of the instant case.<sup>15</sup> He stated that the claimants claimed that there was a continuing nuisance on their land because (on the facts which were to be assumed for the purposes of the appeal) the oil was still present on the claimants' land, and had not been removed or cleaned up. If that submission was correct, it would mean that, if the other ingredients of the tort of nuisance were made out and the claimants' land were to be flooded by an isolated escape on day 1, there would be a continuing nuisance, and a fresh cause of action accruing day by day, so long as the land remained flooded on day 1000. The effect of accepting that submission

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12 Ibid [30].

13 Ibid [32].

14 Ibid [33].

15 Ibid [34].

would be to extend the running of the limitation period indefinitely, until the land was restored.<sup>16</sup> It would also impliedly mean that the tort of private nuisance would be converted into a failure by the defendant to restore the claimant's land. It might also produce difficulties for the assessment of damages, which require to be assessed once and for all. Where land was flooded on day 1, all the losses, past and prospective for that cause of action, could only be assessed on day 1. It was unclear how there could be a different assessment for damages, for a different cause of action, on day 2.

However, Lord Burrows added that there was no continuing nuisance in the instant case because there was no repeated activity by the defendants, or an ongoing state of affairs, for which the defendants were responsible, that was causing continuing undue interference with the use and enjoyment of the claimants' land.<sup>17</sup> The leak was a one-off event, or an isolated escape. The cause of the action accrued and was complete once the claimants' land was affected by the oil. There was no continuing cause of action for as long as the oil remained on the land.

Lord Burrows added that it was not necessary that the defendant had control over the continuing nuisance.<sup>18</sup> This was because the person who created the nuisance could be sued in the tort of private nuisance, even though that person no longer had control over the state of affairs which caused the continuing nuisance. Therefore, the fact that the defendant had no control over the oil on the claimants' land was not an additional reason for holding that there was no continuing nuisance.<sup>19</sup>

The claimants' appeal therefore fell to be dismissed.

## COMMENT

In his seminal article on nuisance,<sup>20</sup> Newark observed that the boundaries of nuisance are blurred. Neither academic nor judge has been able to give a clear and comprehensive definition as to what constitutes a private nuisance. In *Jalla* the Supreme Court was required to address the ostensibly simple question as to whether the oil which remained on the claimants' land, after the oil had leaked from the defendants' oil pipe, constituted a private nuisance. The claimants had argued that the relevant nuisance continued each day the oil remained on the claimants' land, the upshot of which was that the limitation period ran afresh each day.

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16 Ibid [36].

17 Ibid [37].

18 Ibid [44].

19 Ibid [46].

20 F H Newark, 'The boundaries of nuisance' (1949) 65 Law Quarterly Review 480.

Traditionally, for liability to lie in terms of the law of nuisance, there requires to be an adverse state of affairs (eg fumes, smoke, noise) which is present on the defendant's land, which unreasonably affects the enjoyment of the claimant's premises. However, the relevant state of affairs may consist of a latent defect which is present in the defendant's premises. For example, in *Sedleigh-Denfield* the adverse state of affairs consisted of a defective pipe or culvert. That case is also authority for the proposition that the harm or interference with the enjoyment of the claimant's land can be caused by a 'one off' event, such as an escape of water (or oil) from the defendant's land.

In *Sedleigh-Denfield* the escape of water only became an actionable nuisance after the water left the defendants' land and had entered and damaged the claimant's premises. In effect, the defendants had not continued the 'nuisance'. Rather, (as Lord Atkin pointed out) they had continued, or adopted, the relevant adverse *state of affairs*, after they had become aware (or should have become aware) of the existence of the defective culvert. The water only became a *nuisance* in law after it had entered and damaged the claimant's land. Similarly, in *Jalla* the isolated escape of oil from the defendants' oil pipe immediately became an actionable nuisance, after it had entered and damaged the claimants' land. Whereas the oil remained on the claimants' premises for some years after the leak, there was no continuation of a *nuisance* which would, of course, have been the case if the oil had continued to pour on to the claimants' land. Whereas the presence of the oil on the claimants' land may have been a 'nuisance' in common parlance, the presence of the oil did not rank as a nuisance in law. While *Jalla* does not take the law further forward, it is illustrative of the confusion which stems from the fact that the concept of nuisance is not clearly defined.



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

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## INTRODUCTION

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

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

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

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

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

## THE RELEVANT FACTS AND GROUNDS OF APPEAL

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

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

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

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

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

6 See Protocol, arts 5–10.

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

8 Enacted by the Parliament of Great Britain.

9 Enacted by the Parliament of Ireland.

10 NIA, s 1(1).

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

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

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

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

13 [2016] NIQB 85, [153].

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

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

16 EUWA, s 8C(2).

17 NIA, s 56A and sch 6A.

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

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

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

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

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

## THE COURT'S REASONING

### Introduction

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

### The first ground: the 'subjugation' of article VI

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

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

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

24 Deb et al (n 3 above) 797.

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

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

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

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25 *Allister* (n 1 above) [52].

26 *Ibid* [54].

27 See eg Northern Ireland Affairs Committee, *Oral evidence: effect of paramilitary activity and organised crime on society in Northern Ireland*, HC 24, questions 496–557 (17 October 2023), questions 502 and 526 in particular.

28 *Allister* (n 1 above) [68].

29 EUWA, s 7A(1) and (2).

30 *Allister* (n 1 above) [64].

31 Dicey (n 22 above) 64.

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

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

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

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

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

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

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

34 *Ibid* [14].

35 *Ibid* [70].

36 Union with Ireland Act 1800, art VI.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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47 Ibid reg 3(3).

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

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

Ireland] to [Ireland] and the Union can be salami-sliced away up to that point.’<sup>50</sup>

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

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

51 Pursuant to the Northern Ireland Act 2000.

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

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

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

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

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

### **The third ground: the use of Henry VIII powers**

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

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

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

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57 EUWA, s 8C(1)(a).

58 Allister (n 1 above) [109].

59 NIA, s 42(1) (since superseded).

60 Allister [2021] NIQB 64, [166].

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

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

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

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61 Ibid [182]–[190].

62 *Allister* [2022] NICA 15, [240]–[249].

63 Ibid [427] and [431].

64 *Allister* (n 1 above) [107].

65 *Allister* [2022] NICA 15 [427].

66 *Allister* (n 1 above), [107].

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

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

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

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

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

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

68 Ibid art 18(2).

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

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

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

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

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

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

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

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

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

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

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

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

76 *Ibid* [107].

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

78 *Allister* (n 1 above) [87].

79 EUWA, s 8C(5A) (restrictions relating to the modification of the UK Internal Market Act 2020) and s 8C(7) (restrictions relating to the making of regulations pursuant to art 11(1) of the Protocol).

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

## CONCLUSION

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



# Why are we waiting? Judicial scrutiny of delays in access to healthcare in Northern Ireland

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## INTRODUCTION

The waiting list is a familiar and long-standing feature of the delivery of publicly funded healthcare in the UK, but in the wake of the Covid pandemic it has become especially prevalent. A record 7.8 million people were awaiting hospital treatment in England in September 2023,<sup>1</sup> with the 18-week target for treatment established in the National Health Service (NHS) Constitution for England not having been met since 2016.<sup>2</sup>

The problem is especially acute in Northern Ireland, which has the longest waiting times of any nation in the UK. The equivalent of more than one quarter (26.3 per cent) of the population was on a waiting list for treatment and care as of March 2023, as distinct from 12.4 per cent in England and 24 per cent in Wales.<sup>3</sup> Waiting time targets for elective care have not been met since 2013–2014.<sup>4</sup> The Department of Health has estimated that an additional £707.5 million would be required to meet modest waiting time targets set in 2021 of 52 weeks for a first outpatient appointment/inpatient treatment and 26 weeks for a diagnostic test by 2026,<sup>5</sup> but has already conceded that these cannot be achieved.<sup>6</sup>

The waiting list can be a positive experience for the patient, since it offers ‘hope and a plan for treatment’,<sup>7</sup> hence ‘to be on a waiting

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- 1 C Baker, *NHS Key Statistics: England, November 2022*, HC Lib 07281 (17 November 2022) 4.
  - 2 *Ibid.* See Department of Health and Social Care, *Handbook to the NHS Constitution for England* (updated 1 October 2023).
  - 3 Northern Ireland Audit Office, *Tackling Waiting Lists: Report from the Comptroller and Auditor General* (NIAO 2023) 8.
  - 4 *Ibid.* The targets are set out at [1.2].
  - 5 *Ibid* [5.5].
  - 6 *Ibid* [5.12].
  - 7 R Tudor Edwards and J Davies, ‘My planned care, your planned care and our planned care in the NHS’ (Centre for Health Economics and Medicines Evaluation, Bangor University 10 May 2022).

list is to be betwixt and between; to be accepted as a suitable case for treatment, even if the prospect of that treatment being delivered may be distant or absent'.<sup>8</sup> But, of course, lengthy wait times for treatment are not acceptable to all. They can have a negative impact upon the health gain which may be derived from the treatment,<sup>9</sup> a deleterious effect on mental health,<sup>10</sup> and reduce levels of patient satisfaction with health services.<sup>11</sup> Furthermore, they may have an impact on the collective activity of allocating scarce resources efficiently to publicly funded care. As the Northern Ireland Audit Office (NIAO) has observed, long waits mean that 'significantly increasing numbers of patients risk developing serious conditions and illnesses which damage their daily lives, and which ultimately become much more complex and expensive to treat, [and this] represents extremely poor value for money'.<sup>12</sup>

Waiting times thus represent a 'divisive and contentious' issue in the contemporary welfare state<sup>13</sup> and would seem to be an obvious target for challenge by those who are adversely affected by them. Judicial review represents a potential mechanism by means of which controversies of this type may be addressed and might be thought to be of particular value where political avenues for complaint are less accessible, as has recently been the case in Northern Ireland during the suspension of the Stormont Assembly.

This commentary considers a recent legal challenge in the High Court and Court of Appeal in Northern Ireland to lengthy waiting times in the Northern Irish health service. It will analyse the judicial response to this familiar but persistent problem of public policy and will seek to locate this within the broader, but arguably distinct, context of an evolving jurisprudence on denial of access to healthcare treatments and services.

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8 S Frankel and R West, 'What is to be done?' in S Frankel and R West (eds), *Rationing and Rationality in the National Health Service: The Persistence of Waiting Lists* (Macmillan 1993) 115, 125.

9 See S Nikolova, M Harrison and M Sutton, 'The impact of waiting time on health gains from surgery: evidence from a national patient-reported outcome dataset' (2016) 25 *Health Economics* 955–968.

10 See A Gagliardi et al, 'The psychological burden of waiting for procedures and patient-centred strategies that could support the mental health of wait-listed patients and caregivers during the COVID-19 pandemic: a scoping review' (2021) 24 *Health Expectations* 978–990, especially at 981–982.

11 See C Bleustein, 'Wait times, patient satisfaction scores, and the perception of care' (2014) 20 *American Journal of Managed Care* 393–400.

12 NIAO (n 3 above) 18.

13 *Wilson and Kitchen v Department of Health for Northern Ireland and Others* [2023] NICA 54, [79] (McCloskey LJ).

## THE FACTS

The first applicant, Eileen Wilson, was referred to a neurology service in June 2017 by her general practitioner because of suspected multiple sclerosis, her case therefore being classified as urgent. This was later modified to ‘routine’ by the attending consultant. Having been advised that the waiting list for neurology appointments was 163 weeks, an appointment was scheduled for March 2020, but this was cancelled due to the pandemic. A virtual appointment took place in March 2022 and MRI scans were undertaken in May of that year, but these showed nothing out of the ordinary, and her symptoms were managed as those of fibromyalgia. The Court of Appeal noted that ‘no detriment to this appellant’s health in consequence of the timeline under consideration has been established’.<sup>14</sup>

The second applicant, Eileen May Kitchen, had been diagnosed with cataracts, and referred to an ophthalmology service for an operation in July 2019. She was told that this would not take place for three to four years. In the event, she was offered an outpatient appointment within the 42-month waiting period for such appointments, but was informed that there was still a further wait time of between 15 and 17 months for an operation. Concerned that she might lose her sight altogether, she sought private care and was offered an appointment within six weeks.

## THE HIGH COURT DECISION<sup>15</sup>

At first instance, the cases rested upon claims of breach of statutory duty and interference with rights under article 8 of the European Convention on Human Rights. The latter argument was readily dismissed, Colton J noting that the Strasbourg organs regarded matters relating to the allocation of resources as ‘generally not justiciable or reviewable’,<sup>16</sup> hence judicial recognition of a duty triggered by article 8 to provide healthcare within a particular timeframe ‘would be a very substantial departure from established authority’.<sup>17</sup>

The court engaged in much more comprehensive analysis of the claim that there had been a breach of the general duties of the Department of Health in relation to the provision of healthcare imposed by section 2 of the Health and Social Care (Reform) Act (Northern Ireland) 2009, and the predecessor provisions contained in the Health and Personal Social Services (Northern Ireland) Order 1972.<sup>18</sup> These duties are

14 Ibid [57].

15 *Wilson’s and Another’s Application* [2023] NIKB 2.

16 Ibid [94].

17 Ibid [102].

18 Health and Personal Social Services (Northern Ireland) Order 1972 No 1265 (NI 14).

phrased in very broad terms, such as the obligation to ‘promote ... an integrated system of healthcare’,<sup>19</sup> and they admit of significant discretion, as manifested in wording such as ‘to such extent as it considers necessary’,<sup>20</sup> and ‘on such terms and conditions as the ministry may determine’.<sup>21</sup> Nonetheless, it was contended on behalf of the applicants that, once they had been assessed as having a clinical need, a duty to provide them with healthcare within a reasonable time crystallised, and that this was not subject to the availability of resources.

This argument was rejected by the court. Construing the statutory provisions as amounting to ‘target duties’ of a macro-economic or macro-political nature,<sup>22</sup> Colton J endorsed the view of McCloskey J in *JR47* – which was also concerned with section 2 of the 2009 Act – that judicial intervention was ‘inherently improbable’ in a case of this type.<sup>23</sup> Of course, this admitted of the *possibility* that review could succeed, and the applicants pointed to two cases, *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety*<sup>24</sup> and *Re LW’s Application for Judicial Review*,<sup>25</sup> in support of the argument that an enforceable duty existed.

However, these cases were distinguished. In the first, there had been a complete failure to comply with the duty at all, whereas in this instance there had ‘been repeated steps taken in an attempt to fulfil the duty in question’.<sup>26</sup> The second case related to social care provision: in this context it was accepted that availability of resources could be considered in the initial assessment of individual need, but once that need had been established, an enforceable duty of provision arose which was not resource-dependent.<sup>27</sup> By contrast, in the healthcare setting, a body’s decision of when to treat ‘manifestly involve[d] considerations of resources, the demand on its budget, and responsibilities to other members of the population’ which could not be fully assessed when the clinical need was first identified by (for example) a general practitioner.<sup>28</sup>

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19 Health and Social Care (Reform) Act (Northern Ireland) 2009, s 2(1)(a).

20 Health and Personal Social Services (NI) Order 1972 (n 18 above) art 5(1).

21 *Ibid* art 5(3).

22 *Wilson’s and Another’s Application* (n 15 above) [60], [64].

23 *JR47* [2013] NIQB 7, [31].

24 [2015] NI 188.

25 [2010] NIQB 62.

26 *Wilson’s and Another’s Application* (n 15 above) [74].

27 *Cf R v Gloucester CC, ex parte Barry* [1997] AC 584.

28 *Wilson’s and Another’s Application* (n 15 above) [82].

On this basis, there had been no breach of duty by the Department, and a similar argument advanced in relation to the exercise of powers by the respective Trusts was also rejected.

### **THE COURT OF APPEAL DECISION<sup>29</sup>**

The ‘centre piece of the appeals’ was article 5(1)(c) of the 1972 Order,<sup>30</sup> the question being whether government had failed to comply with an enforceable duty to ‘provide throughout Northern Ireland, to such extent as it considers necessary ... medical, nursing and other services’. The argument was quite briskly dismissed. The court held that any obligation which existed by virtue of article 5(1)(c) should be discharged within a reasonable time,<sup>31</sup> but did not consider that the facts in either case established a breach of any such duty. Moreover, McCloskey LJ, on behalf of the court, noted that the article related to ‘the exercise of discretionary powers couched in manifestly elastic terms’.<sup>32</sup> Reiterating the stance of the ‘inherent improbability’ of judicial intervention which he had articulated in *JR47*,<sup>33</sup> the judge sought to ‘highlight ... the limitations on the competence of a court seized of isolated legal challenges of this kind’.<sup>34</sup>

Other arguments advanced by the appellants,<sup>35</sup> relating to the possibility of granting declaratory relief even in situations where duties were of a ‘target’ nature; that (in the case of Mrs Kitchen, who had received private treatment) services were not provided free of charge; and that there was a violation of article 8 of the European Convention on Human Rights due to the impact that the delays had on health, were accorded little weight by the court.

### **WAITING LISTS AS A DIMENSION OF RATIONING HEALTHCARE**

It is important to comprehend that the waiting list fulfils a function as a means of rationing of scarce healthcare resources. In the useful typology adopted by Klein and Maybin, this is ‘rationing by delay: the traditional form of rationing in the NHS, designed to control access to

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29 See *Wilson and Kitchen* (n 13 above).

30 *Ibid* [13].

31 *Ibid* [54].

32 *Ibid* [64].

33 See *JR47* (n 23 above).

34 See *Wilson and Kitchen* (n 13 above) [75].

35 *Ibid* [65]–[74].

the system and match demand to supply by making patients wait'.<sup>36</sup> The mechanism is explained in more detail by Siciliani:

A major difference between a national health service and a more conventional market is that demand is not price rationed: when health care is free of charge and supply is constrained, part of the demand remains untreated and the formation of a waiting list occurs. A different rationing system arises and waiting times deter patients from seeking treatment in the public sector. The longer the waiting time, the more patients will seek treatment in the private sector or will seek no treatment. The value of the treatment may reduce with time because of the foregone expected benefit, temporary discomfort and pain, and, for some pathologies, the higher risk of a permanent reduction in health status.<sup>37</sup>

Yet, while 'the phenomenon of the waiting list is one of the most visible symptoms of scarcity of resources in healthcare',<sup>38</sup> it has not been the primary focus of litigation on allocative questions in the UK. Although there are exceptions,<sup>39</sup> the majority of judicial review cases have concerned 'rationing by denial', that is situations where 'specific forms of intervention are excluded from the NHS services on offer, on the grounds of lack of effectiveness, high cost or a combination of the two'.<sup>40</sup>

However, when wait times are excessive, the distinction between delay and denial of access to care becomes blurred. As ten Have explains, what might otherwise seem ethically acceptable as a rational and equitable instrument for the selection of patients and the distribution of scarce resources basis suffers from 'breakdown' once the wait becomes too lengthy:

Waiting lists have a critical length. If patients have to wait too long, they feel that they can no longer expect to be treated within a reasonable

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36 R Klein and J Maybin, *Thinking About Rationing* (King's Fund 2012) 4. The umbrella term 'NHS' is used here to refer to publicly funded health services in the UK, including those falling under Health and Social Care in Northern Ireland. In the High Court (n 15 above) [1], Colton J observes that the health service in Northern Ireland is 'not technically part of the NHS', but that it nonetheless subscribes to the same three core principles of universality, being free at the point of use, and based on clinical need rather than ability to pay.

37 L Siciliani, 'Does more choice reduce waiting times?' (2005) 14 *Health Economics* 17, 17.

38 H ten Have, 'Choices in health care: waiting list, rationing and priorities' in H ten Have and B Gordijn (eds), *Bioethics in a European Perspective* (Springer 2001) 219.

39 See eg *R v Central Birmingham Health Authority, ex parte Collier* [1988] WLUK 690: repeated delays to cardiac surgery on a child; *R (Watts) v Bedford Primary Care Trust* [2003] EWHC 2228 (Admin): reimbursement for cost of a hip operation carried out in EU because of long waiting lists on the NHS.

40 Klein and Maybin (n 36 above) 4.

period of time. In these circumstances waiting is equivalent to endless postponement of treatment or admission to a healthcare institution. Waiting is without perspective of help. The very harm that is planned to be prevented or eliminated in the foreseeable future because of appropriate treatment or care within an institution, will probably occur during a long waiting period...When the waiting time for a healthcare facility exceeds a critical limit, it cannot be argued any more that the waiting list helps to distribute fairly the scarce resources available. In fact, we have a situation where care and treatment are irresponsibly delayed or not provided at all to particular categories of patients... Waiting for many people has become equivalent to not being treated or cared for; waiting implies that some patients have to live with significant disability and suffering without reasonable prospect of relief. Waiting in fact implies that the healthcare system has become inaccessible.<sup>41</sup>

In circumstances such as this, a 'legitimacy problem' arises which is comparable in nature to the more frequently litigated cases of rationing by denial.<sup>42</sup> This transpires as those who are unable to access the treatment for which they have a clinical need manifest 'suspicion, distrust and even resistance' towards the authority of the allocative decision-maker.<sup>43</sup> As argued elsewhere,<sup>44</sup> the courts are both an obvious vehicle for articulation of such grievances and appear, at least in principle, to possess the capacity to assist in redressing this problem. They can do so by ensuring that allocative decision-makers comply with tenets of procedural justice which can serve to enhance public understanding and acceptance of the inevitably difficult choices inherent in the allocation of scarce healthcare resources, even in situations where the patient ultimately loses out. Much of the English and Welsh jurisprudence subsequent to the *Child B* decision in 1995 can be understood in this light.<sup>45</sup>

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41 ten Have (n 38 above) 225–226.

42 For discussion, see K Syrett, 'NICE work? Rationing, review and the "legitimacy problem" in the new NHS' (2002) 10 *Medical Law Review* 1; K Syrett, *Law, Legitimacy and the Rationing of Healthcare: A Contextual and Comparative Perspective* (Cambridge University Press 2007). The concept is originally drawn from N Daniels and J Sabin, 'Limits to healthcare: fair procedures, democratic deliberation and the legitimacy problem for insurers' (1997) 26 *Philosophy and Public Affairs* 303.

43 N Daniels, 'Accountability for reasonableness in private and public health insurance' in A Coulter and C Ham (eds), *The Global Challenge of Health Care Rationing* (Open University Press 2000) 89, 90.

44 Syrett (2007) (n 42 above).

45 *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898. For discussion, see D Wang, 'From *Wednesbury* unreasonableness to accountability for reasonableness' (2017) 76 *Cambridge Law Journal* 642.

## A RESTRAINED JUDICIAL APPROACH

The *Wilson and Kitchen* case demonstrates a quite different judicial approach to situations in which patients have been unable to access treatments for which they have a clinical need. The focus of both courts was upon the question of whether the delays *per se* were lawful. There was accordingly the potential for the judges to be drawn much closer into an analysis of whether decisions to prioritise certain patients over others were permissible.

Review of this type is inherently more problematic than review of procedure given its potential to second-guess the decision-maker and thus to interfere with the separation of powers. Courts therefore rightly show a degree of reticence in such cases. However, as Newdick has observed,<sup>46</sup> judges in England and Wales have nonetheless shown increasing willingness to undertake ‘hard look’ scrutiny in certain instances of allocative decision-making, for example in cases in which they have identified misunderstandings or mistakes of fact in relation to the interpretation of the evidence of clinical efficacy or cost-effectiveness upon which decisions on access to particular treatments are premised.<sup>47</sup> While acknowledging that such precedent is not binding in Northern Ireland, it is not, therefore, inevitable that there will be a refusal to intervene in cases of this type.

However, this case is characterised by a highly restrained stance on the part of the judiciary that is more reminiscent of the pre-*Child B* period of ‘judicial passivity’ than the subsequent ‘hard look’ mode of scrutiny.<sup>48</sup> Designation of the relevant statutory duties as ‘target duties’ affords justification for judicial reticence to intervene, since such duties are ‘aspirational in nature’ and ‘the standards to be achieved by the public authority and the manner in which it achieves them are essentially matters for each public authority’s discretion’.<sup>49</sup>

This application of legal principle to the facts is reinforced by expression of lack of judicial competence to adjudicate upon delays in offering treatment, a matter which is stated to be subject to ‘less intrusive or “soft edged”’ supervision.<sup>50</sup> In the High Court, Colton J pointed out that, while the delays inevitably had impacts upon particular individuals, their causes, and the means to remedy them, were situated elsewhere:

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46 C Newdick, *Who Should We Treat? Rights, Resources and Rationing in the NHS* 2nd edn (Oxford University Press 2005) 100–107.

47 See eg *R (Ross) v West Sussex Primary Care Trust* [2008] EWHC 2252 (Admin); *Servier Laboratories Ltd v NICE* [2010] EWCA Civ 346; *R(SB) v NHS England* [2017] EWHC 2000 (Admin).

48 See Newdick (n 46 above) 98–100.

49 C Callaghan, ‘What is a “target duty”?’ (2000) 5 *Judicial Review* 184, 184, 185.

50 *Wilson’s and Another’s Application* (n 15 above) [44].

What is involved in resolving the problem [of long waiting lists] is a matter of contention. It clearly involves high level political decisions in relation to resources and also in relation to structural reform of the health service. Manifestly, that is not a matter for the courts ... it seems to me that these are not matters in which the court can productively intervene. Whether the problems that arise in relation to waiting lists in the health service are caused by resource issues or strategic issues, or a combination of both is not something which can be measured by any legal standard. This is not a judgment which the court can make.<sup>51</sup>

How can the court determine whether adequate resources or whether a restructuring or reorganisation of the health service is necessary to deal with the unsatisfactory situation regarding waiting lists? Assuming Professor Heenan<sup>52</sup> is correct that what is required to remedy the admitted problem with waiting lists is urgent structural reform and transformation, by what legal measure can this court determine whether the strategies outlined by the respondents meet that requirement? Any interference in this sphere would plainly be impermissible.<sup>53</sup>

A similar view was taken in the Court of Appeal. McCloskey LJ opined that:

The forum for debate, inquiry, investigation and proposals for improvement and resolution of the issues raised in these proceedings – fundamentally, the single issue of hospital waiting lists in Northern Ireland and its offshoots – belongs to government Ministers, politicians, economists, sociologists, doctors, academics and doubtless other experts and many interested persons and agencies. The subject is one of much controversy and obviously broad and substantial dimensions. It is manifestly inappropriate for judicial intervention.<sup>54</sup>

### **ARE WAITING LISTS DIFFERENT?**

The adoption of a highly deferential judicial stance at both levels in this case raises the question of whether a distinction can be drawn between challenges based upon delays in accessing treatment, and those in which treatment is denied: in which, as indicated previously, judges have shown increasing willingness to intervene, albeit largely on procedural grounds.

The most obvious response to this is to observe that delay and denial are distinctive phenomena: the latter is a definitive decision (albeit, not necessarily irreversible), whereas in the former case, there remains a possibility that discretion will (eventually) be exercised in

51 Ibid [74].

52 Professor of Social Policy, Ulster University and author of a report dated 3 January 2022 which was relied upon in evidence by the applicants.

53 *Wilson's and Another's Application* (n 15 above) [85].

54 *Wilson and Kitchen* (n 13 above) [78].

favour of the aggrieved individual. The differentiation is reflected in the fact that delay is not a free-standing ground on which relief in judicial review proceedings can be awarded, albeit that it may amount to breach of a statutory duty.<sup>55</sup> In these circumstances, a court is likely to be extremely reticent to intrude upon a situation which, ostensibly, remains ongoing. However, this may well not reflect the patient's perception of the situation, As noted by ten Have,<sup>56</sup> delay eventually becomes so excessive that it equates, for practical purposes, to non-accessibility.

Relatedly, it is plausible that the judges in this case did not (or chose not to) construe lengthy waiting times as instances of rationing at all. Instead, they may simply have been viewed as an inevitable concomitant of publicly funded healthcare.<sup>57</sup> As New and LeGrand observe, 'after all, queuing is something we do when we wait for a bus, or when we wait at a supermarket checkout, and so would not suggest that there was any fundamental mismatch between demand and supply'.<sup>58</sup> This connects to a deeper understanding of the nature of the health system and the values that underpin it. As a form of queuing, the waiting list can be seen as an inherently communal phenomenon: 'it is a site where people who are total strangers follow an unspoken script for collective behaviour that respects priority and produces an orderly outcome'.<sup>59</sup> As such, it may be seen as a reflection of the solidaristic nature of publicly funded health services in the UK. Judicial intervention which, in effect, permitted individual patients to 'jump the queue' would therefore strike at the heart of the founding principles of the NHS. Even more broadly, it would represent a challenge to a fundamental aspect of collective identity given the centrality of the NHS to the political psyche, coupled with the fact that 'norms against line jumping are so strongly felt that people frequently regard no cutting as a point of national pride'.<sup>60</sup>

The construction of waiting lists as an innate feature of a publicly funded health system points also towards the inherently political

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55 See S Lambert and A Strugo, 'Delay as a ground of review' (2005) 10 *Judicial Review* 253. For discussion of a possible duty relating to wait times in the NHS in England, see *R (AA and Others) v NHS Commissioning Board* [2023] EWHC 43 (Admin), [2023] EWCA Civ 902.

56 ten Have (n 38 above) and accompanying text.

57 Especially as they have existed since the inception of the NHS: around 460,000 people were on the waiting list as inpatients on 5 July 1948: see A Harrison and J Appleby, *The War on Waiting for Hospital Treatment* (King's Fund 2005) 1.

58 B New and J LeGrand, *Rationing in the NHS: Principles and Pragmatism* (King's Fund 1996) 23.

59 D Fagundes, 'The social norms of waiting in line' (2017) 42 *Law and Social Inquiry* 1179, 1194–1195.

60 *Ibid* 1182.

character of this form of rationing of healthcare, which is stressed by both judges.<sup>61</sup> Further, as they note, there are multiple drivers of lengthy delays in health systems. In the Northern Ireland context these range from patient non-attendance and cancellations, to the redirection of staff and other resources to manage the pressures arising from the pandemic, to reductions in non-recurrent funding to address waiting lists through provision of extra capacity or use of the independent sector.<sup>62</sup> The ‘multifaceted and polycentric nature of the issues at play’<sup>63</sup> in respect of lengthy wait times render these matters which ‘fall within the macro-economic/macro-political field’,<sup>64</sup> and are thus ‘par excellence, unsuitable for assessment in a judicial forum’.<sup>65</sup> This stands in contradistinction to ‘micro-level’ instances of denial of care,<sup>66</sup> which, while impacted by the scarcity of resources, generally turn on considerations of clinical efficacy and cost-effectiveness in relation to the particular circumstances of an individual patient, upon which judges consider themselves more competent to adjudicate.<sup>67</sup>

### **TOWARDS A LIMITED JUDICIAL ROLE IN CASES OF DELAY?**

If, as this case suggests, challenges to delays in treatment afford an exception to the general trend of greater judicial reviewability of allocative decision-making in healthcare which has evolved over the past three decades or so, the matter is of some practical importance to aggrieved patients. Since ‘waiting lists are the predominant rationing mechanism for the allocation of non-urgent health care services under the ... NHS’,<sup>68</sup> and in light of the continuing pressure on services following the pandemic, delays are matters of ongoing and significant public controversy. This is especially the case in Northern Ireland,

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61 See nn 51 and 54 above and accompanying text.

62 See NIAO (n 3 above).

63 See *Wilson and Kitchen* (n 13 above) [77].

64 See *Wilson’s and Another’s Application* (n 15 above) [44].

65 See *Wilson and Kitchen* (n 13 above) [79].

66 For discussion of the various ‘levels’ at which rationing takes place, see K Syrett, ‘Fairness, accountability and legitimacy: law’s role in micro-level rationing’ in M Danis et al (eds), *Fair Resource Allocation and Rationing at the Bedside* (Oxford University Press 2014).

67 Although note that judicial intervention in cases of this type may also be controversial. For discussion, see K Syrett, ‘Into the matrix and beyond: seeking an understanding of problem priority-setting cases in English courts’ (2024) 75 *Northern Ireland Legal Quarterly* (forthcoming).

68 R Tudor Edwards and J Barlow, ‘Rationing health care by waiting list: an extra-welfarist perspective’ (Centre for Health Economics, University of York, Discussion Paper 114 1994) 1.

not only because wait times are lengthier than elsewhere in the UK, but also because the periodical suspension of devolved government renders the prospect of addressing this policy problem through the political process – as the judges here suggest – more remote.<sup>69</sup>

However, it is not simply the length of waits which is problematic. A recent report from the Northern Ireland Public Services Ombudsman (NIPSO) concludes that there is systematic maladministration in relation to the communications provided to patients and/or their carers following placement on a waiting list.<sup>70</sup> The report notes that ‘the focus of waiting list processes has moved away from being patient centred. Instead, patients are too often provided with little to no communication on the progress of a fundamental aspect of their lives, leaving them to feel forgotten.’<sup>71</sup>

Although the recommendations contained in the report may, if implemented, result in improvements in time,<sup>72</sup> pressure through the judicial review process might have provided an additional impetus for definitive action to be taken, and sooner, on this failing within the Northern Irish health system. This need not entail the type of overreach of which the judges in this case appear fearful since, as noted above, procedural review is now an accepted dimension of litigation on healthcare resource allocation in England and Wales. A key element of this form of review (albeit, as previously discussed, not articulated mainly in the context of waiting times) has been judicial enforcement of ‘duties of transparency’ on the part of allocative decision-makers.<sup>73</sup> This would assist in addressing the problem of the lack of openness in waiting list communications identified by the Ombudsman.<sup>74</sup>

*Wilson and Kitchen* was not directly concerned with the issue of communication regarding wait times. Nonetheless, the highly deferential judicial stance adopted here, which echoes the ‘passive’

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69 The solicitor to the two applicants was quoted as saying ‘Even if we had a functioning Executive, the issue of our growing hospital waiting lists has been prevalent for almost two decades. Citizens have no option but to turn to our courts when the other limbs of our government have failed.’ See A Erwin, ‘Two Belfast women appeal verdict in legal challenge over NI’s “catastrophic” hospital waiting lists’ *Belfast Telegraph* (Belfast 12 September 2023).

70 Northern Ireland Public Services Ombudsman, *Forgotten* (NIPSO 2023).

71 *Ibid* 5.

72 These include use of text messages and standard acknowledgment templates, updating after six months’ wait, provision of additional information to general practitioners, updating of websites and provision of information on fundamental issues with services: see *ibid*, *passim*.

73 Wang (n 45 above) 667.

74 NIPSO (n 70 above) 9.

early English case law,<sup>75</sup> gives little cause for optimism that Northern Irish judges might be prepared to engage even in a limited procedural form of scrutiny of delays in access to healthcare. In view of the capacity of courts to enhance understanding and acceptance of decisions to restrict access to healthcare resources through their enforcement of fair process,<sup>76</sup> this is regrettable. Rather, it would appear that the wait for amelioration, let alone resolution, of this thorny policy problem in Northern Ireland is set to continue.

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75 Newdick (n 46 above). An example is *Collier* (n 39 above), in which Ralph Gibson LJ observed that ‘If I were the father of this child, I think that I would want to be given answers about the supply to, and use of, funds by this health authority’, but nonetheless held that ‘The court by this application is being asked to conduct an investigation which it has no power to conduct.’

76 See further Syrett (2007) (n 42 above), Wang (n 45 above).



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